

# COMPLAINTS AND COMPLIANCE COMMITTEE<sup>1</sup>

Date heard: 12 December

CASE NR: 364/2019

In the matter between:

**Moloi**

Complainant

and

**QWAQWA RADIO**

Respondent

TRIBUNAL

Prof JCW van Rooyen SC (Chairperson)  
Councillor Dimakatso Qocha  
Mr Peter Hlapolosa  
Mr Mzimkulu Malunga  
Dr Jacob Medupe  
Mr Jack Tlokana

The Complainant: Veli Moloi

From the Respondent: Tebello Mosala, Makutlwano Mahamuza and Thabo Mokoena

From the Office of the Coordinator: Mr T Mtolo and with him Mr S Plaatyi  
Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

JCW VAN ROOYEN and Q QOCHA

### COMPLAINT

[1] This is a complaint lodged by Mr Veli Moloi against Qwaqwa Community Radio Station. The Complainant avers, in essence, that he had been defamed by

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<sup>1</sup> The Complaints and Compliance Committee ("CCC") is an Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000. Its constitutionality as an independent Administrative Tribunal in terms of section 33 of the Constitution has been confirmed by the Constitutional Court. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such judgments: are referred to Council for noting and are, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the Compliance and Consumer Affairs Division at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and only subject to review by a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order against the licensee. Council then considers a sanction in the light of the recommendation by the CCC. Once Council has decided, the final judgment is issued by the Complaints and Compliance Committee's Coordinator.

the Respondent Radio Station on 18 October 2019 between 12:00 and 13:00, 21 October 2019 between 12 and 13:00 and 23 October between 12:00 and 13:00. The core of the allegation was that the radio station spread an untruth in having stated that he had been appointed by the Municipality as Youth Development Officer without his having attained a matriculation certificate. Furthermore, it was averred that the radio station was in contravention of Regulation 3(1)(a) of the Code of Conduct in that a guest in one of the programs broadcast by the station stated that they would march in protest against his appointment whilst he was not even in possession of a matriculation certificate. The latter, it was alleged, amounting to “propaganda for war.”

[2] A certified copy that the Complainant had indeed attained a matriculation qualification (National Senior Certificate) was handed in as evidence as part of the documentation before the CCC. In fact, the certificate also stated that he had met the minimum requirements for admission to diploma or higher certificate study at a Higher Education Institute.

[3] The applicable Regulations are to be found in the 2009 ICASA Code of Conduct for Broadcasting Service Licensees. Although the broadcasts complained about could very well resort under the News clause 10(1)(a), (b) and (c) as well tabulated by the Coordinator’s Office, the core of two complaints, although broadcast during the News, pertains to the dignity and reputation of the Complainant. It would thus be in the interests of justice – given the fact that the Complainant is a layperson as to the Law - to adjudicate these two complaints under the dignity clause. In fact, dignity and reputation lie at the core of the complaint. It should be said that nothing in the broadcast would even come close to propaganda for war, as alleged by the Complainant. However, the news clause 10 would be applicable to the instances where the statements were made on the News. It provides as follows:

#### **10. News**

(1) Broadcasting service licensees must report news truthfully, accurately and fairly.

There is no doubt that the two items on the News were not truthful.

[4] The Dignity Regulation 14 provides as follows:

#### **14. Privacy, Dignity and Reputation**

(1) Broadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of

individuals, bearing in mind that the said rights may be overridden by a legitimate public interest.

(2)...

(3)...

[5] Section 10 of the Constitution of the Republic of South Africa protects the dignity of all persons. It states as follows:

#### **10. Human dignity**

Everyone has inherent dignity and the right to have their dignity respected and protected.

That dignity includes the reputation of all persons is clear from the judgments of the Constitutional Court.<sup>2</sup>

[6] That balancing of fundamental rights is inherent in the system of fundamental rights was, inter alia, held by the Constitutional Court in *De Reuck v Director of Public Prosecutions*.<sup>3</sup> In the present matter the Respondent Broadcaster has the Constitutional right to freedom of expression and the listeners have the concomitant right to information. On the other hand there is the right to dignity which, according to the Constitutional Court, includes the right to protection of reputation. Thus O'Regan J stated as follows in *Khumalo and Others v Holomisa*:<sup>4</sup>

[27] In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*. *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, *dignitas* and privacy in giving effect to

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<sup>2</sup> See note 3.

<sup>3</sup> 2004(4) SA 402 (CC) at paragraph [55].

<sup>4</sup> 2002 (5) SA 401 (CC) at 404-405.

the value of human dignity in our Constitution. No argument was addressed to this Court on the relevance of the right to privacy to this case and I shall not consider it further. [28] The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other. (*References not included*)

[7] In the present matter there is no doubt that Qwaqwa Radio has the right to freedom of expression and that the community it serves has the right to information. Freedom of expression would thus include the right to criticise the appointment of the Complainant and, where it is in the public interest, the Complainant would have had the right to respond on air. Of course, “public interest” does not mean that which is interesting to the public. In Law it means when there is a higher value at stake.<sup>5</sup> Generally, the “public interest” defence within the sphere of freedom of expression means speech which is legally justified as a result of its exposure of abuse and or evil within our Constitutional democracy.

[8] In the present matter one does not have an instance where mere criticism was expressed against the Complainant’s appointment. In such a case, depending on what was said, the Complainant would probably have had the right to reply on air and the CCC would, on complaint, have advised the Council of ICASA to order the Respondent to grant him the right to respond. The Respondent has, according to the undisputed evidence before the CCC, broadcast a substantially erroneous statement about the matriculation qualification the Complainant. Even in an instance where a person who is interviewed makes this statement the interviewer should immediately have intervened and said that the station could not confirm this itself and that it would seek a reply from the Complainant or, in the absence thereof, do its own independent investigation and broadcast the result thereof. Of course, even

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<sup>5</sup> See *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) Corbett CJ said in delivering the majority judgment (at 464C-D): “(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known . . . (2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest...” Quoted with approval by Hoexter JA in *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A) at 779 and Hefer JA in *National Media Ltd v Bogoshi & Others* 1998(4) SA 1196(SCA) at 1212 where reference is made to Asser *Handleiding tot de Beoefening van het Needelands Burgerlijk Recht* (9th Ed vol III at 224 para 238.

then it might be incorrect; a necessary source would be the person criticised. Although it was said that a Whatsapp was sent to the Complainant to obtain his response, this was denied by the Complainant. The CCC is, however, prepared to accept that a Whatsapp was sent to the Complainant. However, whatever the situation was, the Respondent should have *broadcast* that it was taking steps to verify the claim and should then, within a reasonable time, have broadcast the result thereof.

[9] The position is thus as follows: Where a radio station broadcasts as a fact or even as an opinion that a person does not, for example, have a matriculation certificate, it would have to prove that it had beforehand done a *bona fide* inquiry and also sought the view from the person criticised. Where, in a live interview, such an observation is made by a person interviewed, the interviewer must immediately intervene and state that it would check this fact with due speed and then, on air, correct what was broadcast as soon as possible, alternatively, broadcast that the radio station is taking urgent steps to verify the observation and then, within a reasonable period, broadcast the result. An obvious source would have been the Municipality – but that route was not followed at all.

However, in the present matter it was not only broadcast on three occasions, but the statement by the person interviewed was not queried on air by the interviewer – even if it is accepted that he sent a Whatsapp to the Complainant and it was received. The broadcast and its veracity is the responsibility of the radio station and it cannot and should not in law let the matter, as it were, hang in the air.

[10] Lastly we must return to the interview, where the person interviewed, without criticism by the person doing the interview, stated that they would march against this appointment. Regulation 3 is applicable to this plan of action. It provides as follows:

### **3. Violence and Hate speech**

- (1) Broadcasting service licensees must not broadcast material which, judged within context;
  - (a) contains violence which does not play an integral role in developing the plot, character or theme of the material as a whole;  
or
  - (b) sanctions, promotes or glamorises violence or **unlawful** conduct.

The statement by the person interviewed that they would march against this appointment amounts to a contravention of Regulation 3 in that it promotes unlawful conduct. There was no addition that permission would be sought from the Authorities. There was also no reaction countering this “march” from the presenter. In fact this is a serious contravention and will be taken into consideration in establishing the amount of the fine advised to Council.

## **FINDING**

[11] The broadcasts amounted to a case of serious defamation in contravention of Regulation 10 of the Code for Broadcasters. This is so despite the fact the CCC accepts in favour of the Radio Station that the Complainant was contacted per Whatsapp to respond on the interview and did not react. In fact, he stated at the hearing that he, as an employee of the Municipality, was not the one to respond. The Municipality has its own public relations policy and officials and the radio station should have approached the Municipality.

[12] Ultimately, there should at least have been a broadcast summarising the whole matter: but then the Municipality should have been drawn in to also obtain its comment and, in fact, the truth. Added to that: even if the allegation was made by a guest during a broadcast, the question remains why the radio station repeated the statement on the News and, in any case, did not broadcast the result of the inquiry which it should have undertaken. And this inquiry could not have taken place without having inquired from the Municipality as to the correct facts.

It would be fitting to impose a fine on the Respondent as well as a duty to repeatedly broadcast on air that it had erred and apologize on air to the Complainant.

## **ORDER ADVISED TO COUNCIL**

[13] Insofar as the findings against Radio Qwaqwa are concerned, the Radio Station be ordered to broadcast, as a *first* item of its *News* after 07:00 (thus before 08:00) the first Monday, Tuesday, Wednesday, Thursday and Friday, after release of this judgment by ICASA the following in Sesotho and English directly after each other.

### **SESOTHO version:**

**“Qwaqwa Radio e laetswe ke Lekgotla le Ikemetseng la Dikgokahano la Afrika Borwa (ICASA) ho re e hase kopo ena ya tshwarelo ho Monghadi Veli Moloi: (1) ho re dikagasong tsa sona tsa 2019, seteishene se ile sa tlaleha ho re Monghadi Moloi o hirilwe ke Mmasepala jwalo ka Leqosa la Ntshetso-pele ya**

Batjha (Youth Development Officer) ntle le ho ba le lengolo la Materiki. Nnete ke ho re o na le lona lengolo lena, ebile o fuwe tumello ya ho kenya kopo ya ho kena sekolong sa Thuto e Phahameng.

(2) Hape Qwaqwa Radio e entse phoso ka ho se lokise motho eo e neng e na le puisano le yena, ya tlalehileng ho re ba tla hwanta kgahlanong le kgiro ena. Mohwanto o lekannngwa le tlolo ya molao e bang o sa fuwa tumello ke Lekgotla le tshwanetseng.”

English version:

“ Radio Qwaqwa has been ordered by the Independent Communications Authority of South Africa to broadcast the following apology to Mr Veli Moloji:

(1) that the radio station stated in broadcasts in 2019 that he had been appointed by the Municipality as a Youth Development Officer without his having attained a matriculation certificate. He is indeed in possession of such a certificate and has also been granted the right to apply for admission to a Higher Education Institution.

(2)Further, that Radio Qwaqwa had erred in not correcting a person interviewed who stated that they would march against this appointment. Marching amounts to a criminal act if not authorised by the relevant Authority”.

An electronic copy of each broadcast must be provided to the Manager CCA at ICASA within ten calendar days after the last broadcast.

[14] That the Radio station also be ordered to pay a fine of R10 000, R5000 of which is suspended for five years, subject to the condition that it is not again found by the CCC to have contravened regulation 14(1) or 3 of the Broadcasting Regulations, as quoted above, within five years from when this judgment is published.

The fine must be paid to the Independent Communications Authority of South Africa by 1 April 2020.



JCW VAN ROOYEN SC

20 May 2019

The Members of the CCC agreed

