

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 6 December 2018

Case Number: 293/2018

S A NATIONAL CIVIC ORGANISATION & OTHERS

COMPLAINANTS

V

MORETELE COMMUNITY RADIO

RESPONDENT

COMMITTEE Prof Kobus van Rooyen SC (Chairperson)
Dr Keabetswe Modimoeng (ICASA Councillor)
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Mr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana

For the Complainants: Adv Joshua Lebombo

For the Respondent: Attorney Mike Mokhari from Mokhari INC. Attorneys,
Hammanskraal

From the Coordinator's Office: Ms Xola Mantshintshi
Coordinator: Ms Lindisa Mabulu

JUDGMENT

PROF JCW VAN ROOYEN SC

INTRODUCTION

[1] Moretele Community Radio Ltd is a community broadcaster which is licensed

¹ An Independent Administrative Tribunal at the Independent Communications Authority of South Africa (ICASA) in terms of Act 13 of 2000 and section 192 of the Constitution of the RSA. It, inter alia, decides disputes referred to it by the Authority or filed with it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides on complaints from outside ICASA in terms of the Electronic Communications Act 2005, the Broadcasting Act 1999 or the Postal Services Act 1998 (where registered postal services are included). Where a complaint is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order, if any, against the licensee. Council then considers an order 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. Such a decision is, on application, subject to review by a Court of Law. Where a complaint is not upheld by the CCC, the finding is also referred to Council.

by the Independent Communications Authority of South Africa (“ICASA”). It provides, according to its licence, radio services within a radius of 72 km from Temba in the North West Province of the Republic of South Africa. This is set out in the Licensee’s radio frequency spectrum licence.

[2] The South African National Civic Organisation (“SANCO”) has lodged a complaint against the radio station with the Coordinator of the Complaints and Compliance Committee at ICASA. Four members of the relevant community have joined the Complaint. At the hearing of the matter, the attorney appearing for the Respondent handed up a document from SANCO, denying involvement in this matter as a Complainant. Whatever the position is, there are also four other complainants, who explicitly associated themselves with the Complaint. Thus, even if it is accepted in favour of the Respondent that SANCO is not a Complainant, there are four further Complainants. There is, accordingly, a valid complaint before the CCC by, at least, the four other complainants.² The aim of the complaint is stated as follows:

Our aim is to establish a community task team that will investigate all the alleged matters and implement the public contents for the interest of the community as a whole, that can only be fairly done through your intervention and observation in the monitoring body.

THE COMPLAINT: MORE DETAILS REQUIRED (20 June 2018)

[3] The initial complaint, dated 5 June 2018, was formulated in broad terms, including maladministration in financial matters, the term of office of Board members, the use of languages on air not specified in the license, local music not being broadcast and that the Respondent is biased in religious slots and programmes.

[4] Since the complaint lacked in detail, the Coordinator of the CCC required more details from the Complainants and the following letter was sent to the Complainants on 20 June 2018:

The office of the Complaints and Compliance Committee (“CCC”) confirms that we have noted the contents of your letter dated 5 June 2018 and we advise as follows:

To enable the CCC to investigate your complaint we need more clarity in relation to the following issues you raised in your complaint:

- 1.1 Maladministration - As a Complainant in this matter, you have not provided the CCC with the details of the “maladministration” and the clause and/or provision in the*

² Hammanskraal Progressive Residential Association (Chairperson Mr Sello Mathews Tshilo); Pastors United Movement of South Africa (Reverend Peter Mmatladi); Mmathari Tourism (Contact Mr Mozumbe Maifadi) and AIRASA (Contact Mr Elias Mabuse Kgobudi). Contact numbers were provided in each case.

Licence Conditions of the Constitution of Moretele that correspond with the contravention you are alleging

- 1.2 Violation of licence conditions – Please provide details of how the licence was violated and the relevant clause in the licence conditions that corresponds with this allegation of contravention.*
- 1.3 Financial audit – Please provide us with more information on what it is that you require the CCC to investigate in relation to this allegation.*
- 1.4 Forensic audit – Please elaborate on what is it about forensic audit that needs to be investigated.*

- 1.5 Board term of office – What provision of the Constitution / Founding Documents of the licensee have been violated relating to the Board’s terms.*

- 1.6 Setting aside of the unfair suspension of the station management – We advise that this is a labour related matter which the CCC cannot adjudicate. The entities that will have jurisdiction will be the Labour Department and/or the CCMA.*
- 1.7 Appointment of Board members is not geographic and demographic – We request more clarity and details of the relevant provisions of the Constitution or licence conditions that support this allegation.*
- 1.8 Programme changing is done without consulting the community – We request more clarity and details of the relevant provisions of the Constitution or licence conditions that support this allegation.*
- 1.9 Languages used are not the ones on the licence conditions – Please provide the relevant clause in the licence conditions that supports this allegation and the languages allegedly used.*
- 1.10 Programmes are not serving the interest of the community – Please provide more information and evidence to support this allegation.*
- 1.11 Local music is not played – What are the local music quotas stipulated in the licence conditions to support your allegation? What are the quotas they are playing against the licenced local quotas?*

- 1.12 The station is biased on religious slots and programmes – Please provide more information regarding this allegation.*

COORDINATOR RESRUCTURING THE COMPLAINT (3 JULY 2018)

[5] After more information was provided by the Complainants, the CCC Coordinator’s Office restructured the complaint as follows on the 3rd of July 2018:

1. Clause 11.3 of MCR's Constitution provides that *"The assets of the MCR shall remain the property of the radio station and cannot be shared or otherwise distributed among the Board of Directors, Club Members, Staff and/or the Presenters."* The alleged contravention is that MCR registered one of its cars under Oscar Meselane, who is a staff member of MCR and not registered under the entity's assets.
2. Clause 4.2.1 of MCR's Licence conditions read with Schedule 1, regulation 10A, 8(a) of the Regulations on Standard Terms and Conditions, states that: *"The programming of community radio must meet the needs of community members within its broadcasting coverage area by encouraging the participation of community within its coverage area in the production of content."* The contravention is that MCR's Board failed to provide for the participation of community members in the (planning of) programming of the radio station.
3. It is alleged that Mr. Sona Mathebula, Mr. Lesego Kwakwa and Mr. Khumalo overstayed their term of office and have been serving as Board Members of MCR since 2011 to date. Clause 13.6 of MCR's Constitution states that *"The term of office for the elected Board of Directors shall be thirty six months from the date of their elections."*
4. It is alleged that MCR's Board of Directors were continuously paid their monthly stipends regardless of their failure to meet for a period of five months after the death of the deceased Station Manager.
5. It is alleged that MCR's Board of Directors appointed the current Station Manager without following the proper recruitment procedures, such as advertising the position either internally or externally. In terms of clause 12.1 of the MCR Constitution, the Board has the authority to appoint the station manager.

RESPONSE BY THE RADIO STATION (27 JULY 2018)

[6] The essence of the Response by the Radio Station (through its Attorneys) reads as follows:

- (1) MCR disputes that it has contravened any clause in the Station's Constitution, licence terms and conditions or the Standard Terms and Conditions as amended in 2016.
- (2) It also disputes that it has ever registered in the name of any person nor shared any property belonging to MCR amongst the Board Directors, Club Membership, Staff and/or the presenters at the station.
- (3) MCR Board of Directors disputes that the Station failed to provide a platform for the participation of community members in the programming of the Radio Station. The community has never complained to the Board and/or Station Management previously and the Board is of the view that if MCR has to improve on the current community participation, they are willing to listen and give attention to any suggestions the community might propose.

(4)None of the present Board Members have overstayed their term of office. All the present Board Members were elected at the Annual General Meeting (AGM) held on the 30th JULY 2016 as per the Constitution and their terms in office are still valid until the 29th July 2019.

(5)The Board has met as required by the Constitution and there are minutes to prove same.

(6)The Board is not responsible for appointment of Staff members. One of the requirements as a Registrant is that as the NPO there should be a clear separation of powers between management and the board of directors. The current Station Manager has been in an acting capacity until he was formally appointed to allow continuity.

(7)The “so called SANCO” is masquerading as a local business forum and they are causing problems within the Business community of Tshwane. They hire drug addicts to terrorise the community to achieve their ill intentions. When they protest, they are always about twenty people in a community of over 27000 and they have never supplied the Respondent station with an attendance register of the community meetings where complaints were raised. The City has already obtained various court orders....against them for disrupting community projects. (The Court orders were handed up to the CCC at the hearing)

(8)SANCO does not have offices and it becomes difficult to engage them. During the month of May 2017 our attorneys had to prevent them from disrupting the “Pipe Replacing Project at Babelegi Industrial under case numbers...The City of Tshwane has also issued circular... under Transport and Roads Department....on the 24th May 2018 warning the community of the criminal organisations operating as business forums within the city. The intention of this group is to place their people in every strategic position within the community project so that they can benefit individually. Since the passing of the previous station manager they have been touting their persons for positions at the Station....³

The radio station will soon take legal action to interdict known members and/or persons from harassing the employees of the Station.

REPLY BY THE COMPLAINANTS (3 August 2018)

[7]The Complainants replied as follows:

We hereby reply to the Respondent’s response, disputing the allegations we have levelled against it in terms of regulation 4(2) of the Regulations Governing Aspects of the Procedures of the CCC of ICASA.As the stakeholders, we feel that our matter has not been responded to, to our satisfaction.

(1) With regard to the Respondent’s reply for the car’s registration documents, we are still looking into verifying as to the truth of the Respondent’s enclosed vehicle registration papers and whether they are legit or not. To our knowledge MCR has more than five vehicles including a mobile studio truck which is currently registered under a certain board member, Mr. Kekana....

(2) MCR Board of directors disputes that the station failed to provide a platform for the participation of the community members in the programming of the radio station. We are

³ Irrelevant detail has been left out in this judgment.

reiterating that, since 2011, there has never been any AGM's. No announcements were ever made on the radio (MCR) to that effect, informing the people living within the geographic coverage area of MCR about the intended meeting and how the community should prepare to participate in the meeting. The Licence conditions for Community Broadcasters provides for community participation through at least an AGM and two meetings that will address programming and programme related matters. MCR failed to conduct such AGM's since 2011, with the effect that there has been no community participation for the period since 2011. Without these AGM's it means MCR does not report back on operational and financial issues. We are of the view, therefore, that lack of financial reporting systems by MCR is a result of intentional concealment of corrupt activities.

(3) In terms of clause 12.1 of the MCR Constitution, the Board has the authority to appoint the station manager. However, the current so-called "MCR Board" appointed the Station Manager knowing full well that their term of office had lapsed since there has never been any AGM since 2011. The position of a station manager must be formally appointed by constitutionally elected board members after following proper recruitment procedures, such as advertising the position internally and externally. However, the current position of MCR station manager was not advertised, either internally or externally. No interviews were conducted regarding the position of MCR station manager.

(4) In response to what the Respondent calls "background to the dispute" that "*SANCO is masquerading as a local business forum and causing trouble,*" is unfounded. The respondent's dispute about SANCO holds no ground as it is neither a matter at issue nor a matter at dispute. They are failing to provide why they are currently in contempt of two Court orders. The current board as we speak is in contempt of court orders in that they failed and they continue to fail to honour a CCMA award ruling that they unfairly dismissed employees. Mr. Ken Mabuza, Mr. Trevor Sephua and others we re-instated and remunerated for their service. To this end since the CCMA Award ruling, these employees concerned who were unfairly dismissed and ultimately won their case through CCMA, are still prevented from resuming their duties at the station despite the CCMA Award ruling. Their continuing disregard of the CCMA Award will be in contempt of court if the concerned employees decide to approach the Labour Court. The status of the Labour Court is equivalent to that of the High Court of South Africa. And if the dismissed employees decide to approach the Labour Court, the implication may therefore be detrimental to the daily running of the station. The other court order is that of the stand on which MCR built their offices and the station on. The owner of the stand is currently in possession of a High Court ruling ordering MCR to vacate the stand in six months' time and pay the owner what is due to her with interest.

(5) Also SANCO, in terms of the principles underlying community broadcasting licence conditions, should be seen as an active participant with regard to community participation. In this instance, SANCO, as any other community based organisation, is expected to encourage its community, or persons associated with its community, or promoting the interest of such a community served by it, to participate in the selection and provision of programmes to be broadcast by MCR in the course of such broadcasting service. This is what

the current so-called MCR board is failing to do (Section 1 of the Broadcasting Act 4 of 1999).⁴ SANCO is an organisation that represents all community stakeholders, in this regard; it is not SANCO alone that raised these matters, but different community stakeholders. It is with disappointment that the Board would go and hide behind attorneys, and instead of responding to the tabled allegations levelled against them, they divert from the matter and try to taint SANCO's good name.

FURTHER INQUIRY BY THE COORDINATOR FROM THE RESPONDENT BROADCASTER (14 August 2018)

[8]We have assessed your reply dated 27 July 2018 and we advise that the matter is still under investigation. Please briefly advise, accordingly, regarding the following to enable the CCC Office to thoroughly assess and investigate the matter:

MCR disputes that it failed to provide a platform for the participation of community members in the programming of the radio station. Please provide us with more information and supporting evidence on the participation of the community members in the programming of the Radio Station as required in terms of Clause 4.2 (4.2.1) of MCR's Licence conditions read with regulation 10A, 8(a) of the Regulations on Standard Terms and Conditions as amended in 2016.

MCR referred to an AGM held on 30 July 2016. Please provide us with more information and supporting evidence on how the community was notified about the AGM prior the date of the scheduled AGM being, 30 July 2016.

MCR states that the current Board Members were elected as per the Constitution at the AGM held on 30 July 2016 and that their term of office is still valid. Please advise regarding the following:

NOMINATIONS: Clause 18.1 of MCR's Constitution provides that *"The Nomination of contesting candidates shall be called for and submitted to the appointed electoral officer via the Station Manager or Manageress in a sealed envelope two weeks before the Elective AGM."*

Please provide us with more information and supporting evidence on how the process of the nomination of contesting candidates was conducted.

ELECTIONS in terms of Clause 19 of MCR's Constitution. Please provide us with detailed information and supporting evidence on how the election process was conducted until the results of the election outcome were announced.

⁴ Compare section 1 of the Broadcasting Act 1999: "community broadcasting service" means a broadcasting service which -(a) is fully controlled by a non-profit entity and carried on for non-profitable purposes; (b) serves a particular community; (c) encourages members of the community served by it or persons associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and (d) may be funded by donations, grants, sponsorships or advertising or membership fees, or by any combination of the aforementioned;

We hereby request that you respond to the above in writing by delivering a response to our offices within seven days of receipt hereof, being Thursday, 23 August 2018 @ 17:00.

**REPLY BY RESPONDENT TO THE 14 AUGUST 2018 INQUIRY BY COORDINATOR
(22 AUGUST 2018)**

[9]Your letter dated the 14th August 2018 has reference and our instructions (as attorneys) are to respond as follows to same.

(1)Moretele Radio Station has one representative from the villages [to which] we are broadcasting and all these representatives form what is known as Listeners' Forum. The objective of this forum is to influence and to direct the programming of the radio station and to give feedback of their respective constituencies regarding the programming and to also inform the communities of any changes thereto.

Attached is a roll call of the last meeting of the listeners' forum held on the 10th March 2018.

(2)The Community was informed via broadcasting and advertising which lasted for twenty one days. Supporting recordings are available at the station and with proper arrangements same can be downloaded in DVD or USB for ease of reference.

NB: YOU CAN ARRANGE FOR COLLECTION OF SAME WITH THE STATION MANAGER.

NOMINATIONS & ELECTIONS

There were no envelopes received by the Station for the nomination of any new potential board members. Therefore, on the election day the previous board members were elected without any objections because there were no nominations from the floor either. At the opening of the meeting the presiding officer called for nominations from the floor and none was received.

There were no election agencies on that particular day. A neutral person was appointed (Mr Levae Msiza) to conduct the election process.

Hoping that the above covers all the issues raised on your letter.

MOKHARI INC. ATTORNEYS

ULTIMATE ALLEGATIONS: 28 August 2018

[10]The Coordinator of the CCC ultimately put the following allegations to the Respondent

1.Clause 11.3 of MCR's Constitution provides that *"The assets of the MCR shall remain the property of the radio station and can't be shared or otherwise distributed among the Board of Directors, Club Members, Staff and/or the Presenters."* The contravention is that MCR registered one of its cars under Oscar Maselane who is a staff member of MCR and not registered under the entity's assets.

2.Clause 4.2 (4.2.1) of MCR's Licence conditions read with Schedule 1, regulation 10A, 8(a) of the Regulations on Standard Terms and Conditions, states that: *"The programming of community radio must meet the needs of community members within its broadcasting*

coverage area by encouraging the participation of community within its coverage area in the production of content.” The contravention is that MCR’s Board of Directors failed to provide for the participation of community members in the programming of the radio station.

3. It is alleged that Mr. Sona Mathebula, Mr. Lesego Kwakwa and Mr Khumalo overstayed their term of office and have been serving as Board Members of MCR since 2011 to date. Clause 13.6 of MCR’s Constitution states that *“The term of Office for the elected Board of Directors shall be thirty six (36) months from the date of their elections.”*

4. It is alleged that MCR’s Board of Directors appointed the current Station Manager without following the proper recruitment procedures, such as advertising the position either internally or externally. Reference is made to clause 12.1 of MCR’s second Constitution which provides as follows: The Board has the authority to appoint the Station Manager and in turn the Station Manager has the authority to appoint the departmental heads.

FINDING BY THE CCC ON THE COMPLAINTS

[11] SANCO AND OTHER MATTERS

(1) Firstly, as to the status of SANCO in regard to the complaint. Four associations (with contact persons) associated themselves with the complaint by SANCO. At the hearing the Respondent filed a resolution by SANCO which stated that it had not resolved to file the complaint. The CCC, accordingly, has two conflicting statements under the name of SANCO before it. Both statements are claimed to be valid. Since four other associations also supported the complaint it is irrelevant whether SANCO is a Complainant or not. The CCC is clearly seized with the matter. The Complaint remains the same, whether SANCO is part of the matter or not. Thus: for purposes of resolving the dispute SANCO is removed as a Complainant. For administrative reasons, we will, however, refer to the matter as *SANCO and Others v Moretele Radio Station*.

(2) Secondly, it is irrelevant for purposes of a matter before the CCC whether SANCO or persons associated with SANCO, were interdicted in a different matter or matters. That is a matter for the Courts and not for the CCC.

(3) Thirdly, whether the fifth vehicle is registered in the name of the radio station or not, is irrelevant. There is no evidence that the said vehicle is the property of the radio station. The last we heard from the Complainants on this point is that they were investigating the matter further. In any case, the matter of ownership is a matter for the Courts.

(4) Fourth, the question whether the radio station is situated on property which belongs to a third party or that a debt would have to be paid by the radio station

by a certain date, is also a matter for the Courts and not the CCC. The task of the CCC is limited to what is to be found in the Broadcasting Act 1999, the Electronic Communications Act 2005, the ICASA Act 2000, the relevant regulations and the licence conditions of the radio station.

[12] **This leaves the CCC with three complaints:**

(1) The first remaining charge reads as follows: The programming of a community radio must meet the needs of community members within its broadcasting coverage area by encouraging the participation of the community within its coverage area in the production of content. In fact, the charge accords with what is provided in the Broadcasting Act 1999, where the following definition of a community broadcasting service is stated:

“community broadcasting service” means a broadcasting service which -

- (a) is fully controlled by a non-profit entity and carried on for non-profitable purposes;
- (b) serves a particular community;
- (c) *encourages members of the community served by it or persons associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and*
- (d) may be funded by donations, grants, sponsorships or advertising or membership fees, or by any combination of the aforementioned;
(accent added in (c))

Section 10A(7)(b) of the Electronic Communications Act 2005 repeats the essence of what the Broadcasting Act provides:

- (b) *A Licensee must encourage the community within its coverage area to participate in ownership, management of television station or radio station.*

The Respondent denied that it had not complied with the said requirement and stated as follows:

Moretele Radio has one representative from the villages (where) we are broadcasting and all these representatives form what is known as *The Listener's Forum*. The objective of this forum is to influence and to direct the programming of the radio station and to give feedback of their respective constituencies regarding the programming; and also to inform the communities of any changes thereto. Attached is a roll call of the last meeting of the listener's forum held on 10 March 2018.

The Roll call was indeed attached and 18 persons from fourteen different areas within the broadcasting range of Moretele were present at a meeting on 10 March 2018. It is of interest that when Radio Moretele was before the CCC in 2008, it was ordered to establish such a Committee. See *Monitoring and Complaints Unit of ICASA v Moretele Community Radio (Case 22/2008)*. There is no evidence before us that the order, as then issued by Council, was not complied with.

This complaint is, accordingly, not upheld.

(2) The second remaining complaint is that the Board was not properly constituted when it appointed the Acting Station Manager as the Manager. The response was that the terms of the three members of the Board, whose three year terms were said to have expired, had been elected on 30 July 2016. Their terms would, accordingly, only expire in 2019. Attached was the Minutes of the 30 July 2016 Annual General Meeting at which they were elected as Board Members.

This complaint is, accordingly, not upheld.

(3) The third remaining complaint is that the Station Manager had not been appointed in a procedurally correct manner. The Constitution of Moretele (referred to as the second Constitution in the charge sheet of 28 August 2018) provides as follows:

The Board has the authority to appoint the Station Manager and in turn the Station Manager has the authority to appoint the departmental heads.

The charge was that the Board had appointed the current station manager without following the proper recruitment procedures, such as advertising the position either internally or externally.

The CCC does not have jurisdiction in labour disputes. This is a matter for the Commission for Conciliation, Mediation and Arbitration (“CCMA”) and the Labour Court.⁵

This complaint is, accordingly, not upheld.

REFERRAL TO THE COUNCIL OF ICASA

[13]The finding by the Complaints and Compliance Committee is that, insofar as it has jurisdiction, the complaints against Moretele Community Radio Station are not justified in terms of the applicable legislation and its licence.

Section 17D(3) of the ICASA Act 2000, as amended, provides that the Complaints and Compliance Committee must submit its *finding* and recommendations as to an order to the Council of ICASA.

Since the *finding* is that there has been no contravention within the applicable legislation and licence, no order is advised to the Council of ICASA.



JCW van Rooyen SC

The Members Concurred

⁵ Compare Van Jaarsveld and Others *Butterworths: Labour Law* (2018).

