

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of hearing: 17 October 2008

Case number: 23 / 2007

**Monitoring and Complaints Unit (MCU)
of the Independent Communications
Authority of South Africa**

Complainant

vs.

Imbokodo Community Radio

Respondent

Complaints and Compliance Committee

| | |
|-------------------|---------------|
| R Mokgoatheng J | (Chairperson) |
| N Ntanjana | (CCC Member) |
| S Thakur | (CCC Member) |
| JCW van Rooyen SC | (Councillor) |

For the Complainant

Ms Fikile Hlongwane (Manager): Monitoring and Complaints Unit, assisted by

Thato Mahapa (Manager): Compliance (Telecoms)

Kgomotso Mokitle: Compliance Officer

For the Respondent

Sandile Ngema: Station Manager

Sandile Dlamini: Marketing Manager

Xolani Khuzwayo: Programmes Manager

Gladys Ngema: Board Member

¹ Established in terms of s 17C of the ICASA Act 13 of 2000 as amended

JUDGMENT

JCW van Rooyen

[1] Imbokodo Community Radio (“Imbokodo”) is a licensed community broadcaster. The Monitoring and Complaints Unit of ICASA (“MCU”) has lodged several charges against Imbokodo. The complaints pertain to alleged breaches of its licence conditions.

[2] The charges read as follows:

1. The licensee has failed to submit audited financial statements for the period 2006/2007 and 2007/2008 in accordance with Generally Accepted Accounting Practices (GAAP). This is a contravention of clause 9.4 and 18.4 of the radio station’s licence conditions which states that *“the licensee shall furnish to the Authority, for every completed one (1) year of this licence or upon written demand by the Authority, audited financial statements of income and expenditure compiled in accordance with GAAP, and any further supporting vouchers and documentation as may be required by the Authority after receipt of the annual audited statement.”*

2. On request by the Compliance Unit, Imbokodo Community Radio failed to submit recordings for the period 17 March until 29 April 2008. This is a contravention of section 53 of the Electronic Communications Act (ECA) No. 36 of 2005 which states that, *“A broadcasting service licensee must on demand by the Authority produce to the Authority any recordings of every programme broadcast in the course of his or her broadcasting service for examination or reproduction within 60 days from the date of broadcast;*

3. Imbokodo FM has failed to submit outstanding log of programmes when requested by the Compliance Unit for the period May 2007 until January 2008. This is a contravention of Clause 18.7 of its licence conditions which states that, *“the licensee shall to the satisfaction of the Authority, in addition to records prescribed by any law, keep a log of programmes broadcast in the form acceptable to the Authority, relating to its broadcasting activities.”*

4. The licensee failed to comply with clause 2 of Schedule C of its licence, which states that, *“The licensee shall have a programming format of 50% talk and 50% music.”* The programmes logsheets submitted by the radio station, which also do not have correct dates (February – April), reflects that the radio station plays an average of 31.6% talk and 68.4% music;

5. The licensee failed to inform the Compliance Unit about the resignation of Board of Directors who resigned before the AGM. This is a contravention of Clause 14.1.1 – which states that, *“the licensee shall inform the Authority of the name, nationality and physical residential and business addresses, or any changes thereto, of any person appointed as director, trustee or board member of the licensee, and of any director, trustee or board member of the licensee who resigns.”*

6. Imbokodo FM failed to submit founding documents of the radio station outlining its legal status.

7. The newly elected Board of Directors has failed to hold a meeting since they assumed office after the elections of 06 April 2008. This is a contravention of Clause 10.9.1 of the licensees’ Constitution which states that, *“the meeting of the board of directors shall be held once in every two (2) months”.*

8. Nepotism - Clause 13 of Imbokodo Community radio's licence requires the radio station to ensure equal employment opportunity practices and to also ensure that the composition of its management and staff reflects the racial and gender demographics of the community it serves. Due to lack of Human Resources Policies to foster compliance with the fair labour practises the previous chairperson of the licensee employed her own son as the station manager and her daughter as one of the presenters of the radio station.

[3] Imbokodo admitted that it had contravened charges 1, 2, 4 and 7. Although Imbokodo initially denied that it had contravened charge 3, they, eventually, after some explanation to them by the Chairperson, also admitted to have contravened charge 3.

[4] As to charge 5, it also emerged that Imbokodo had failed to inform the Authority of changes to the names etc of the directors of Imbokodo.

[5] As to charge 6, it was argued by Imbokodo that they had sent in their founding documents. This was denied by the MCU. However, the CCC is of the view that the Constitution of Imbokodo, as attached to the MCU documentation before it, satisfies the requirement of a common law legal persona and that it suffices as a document which has been filed. It is legally possible for a voluntary association to be a corporate entity. Whether this is so, will depend on its Constitution and, only if the Constitution is not clear, will evidence of extraneous facts be permitted. See *Ahmadiyya Anjuman Ishaati-Islamlahore (South Africa) and Another v Muslim Judicial Council (Cape) and Others* 1983(4) SA 855(C) at 860-863; and also *Morrison v Standard Building Society* 1932 AD 229. From a perusal of the Constitution of Imbokodo it is clear that it is a common law legal persona. It has permanence in spite of its members' possible withdrawal or alteration and has the authority to own property and other rights. It also does not pursue gain for its members and need not, accordingly, be registered as a company in terms of section 30(1) of the Companies Act 1973. See *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) (1999 (8) BCLR 845): where Olivier JA states as follows:

"The prohibition contained in s 30(1) should be kept within its proper bounds. The underlying purpose of the prohibition in our country, as in England, is to prevent mischief arising from trading

undertakings being carried out by large fluctuating bodies so that persons dealing with them do not know with whom they are contracting (see *Smith v Anderson* (1880) 15 ChD 247 (CA) at 273; *Mitchell's Plain Town Centre Merchants Association v McLeod and Another* 1996 (4) SA 159 (A) at 169I - 170B). On the facts before us it cannot be said that Save was trading or carrying on a business with the object of the acquisition of gain. Consequently, the objection cannot be upheld.”

[6] As to the charge of nepotism, the MCU led the evidence of the Complaints Officer. It emerged that he had received calls from members of the community that positions had been given to family members of the said Chairperson. It was put to the Complaints Officer by the Chairperson of the CCC that such evidence is hearsay and not admissible. The response was that members of the community were reluctant to come forward and provide such evidence, fearing reprisal. Evidence by way of affidavit or orally, under oath, should be provided. The Complaints Officer could also give evidence under oath if she or he has personally investigated the matter. Hearsay would, however, only be permitted in exceptional circumstances and where it is in the interests of justice to do so (see the Law of Evidence Act 45 of 1988 and *S v Molimi* 2008(3) SA 608(CC) at paras [35]-38], where strict compliance with the factors set out in section 3(1)(c) are emphasised). It would, in any case, be procedurally unfair to simply state the charge and then expect Imbokodo to provide an answer. Although the onus is not, as in a criminal trial, that the MCU must prove its case beyond a reasonable doubt, the onus does rest on the MCU to prove its case on a balance of probabilities (see *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485 (AA) at 495 in fin - 496H; *Rheeder v Ingelyfde Wetsgenootskap van die Oranje-Vrystaat*, 1972 (3) SA 502 (AA) at 507B); *Die Prokureursorde va die Oranje-Vrystaat v Schoeman* 1977(4) SA 588(O) at 601H). No admissible evidence has been led and the hearsay evidence is so vague that it cannot be admitted. Charge 8 is, accordingly, dismissed.

[7] In the result Imbokodo is found to have contravened charges 1, 2, 3, 4, 5 and 7. No contravention is found in the case of charges 6 and 8.

[8] As to sanction the MCU argued that the CCC should recommend to Council that Imbokodo be closed down for three months so that it could get its affairs in order. Imbokodo’s representatives argued that such an order would be far too harsh. The CCC is of the view that it would be comparable to a “death sentence” to close down

the station for three months. It would lose all its advertising and the community would be deprived of its services. However, the contraventions are serious and sufficient measures should be taken to ensure compliance. The contraventions found above are remedied by way of sanctions and should not, in the CCC's view, be regarded as relevant in denying the renewal of the licence.

[9] The following sanction is recommended to Council:

1. Audited financial statements must be submitted by Imbokodo for the periods 2006-2007 and 2007-2008 before 31 January 2009. Failing to carry out this order, a maximum fine of R10 000 will be imposed by Council on the recommendation of the CCC. Any omission to provide such financial statements in future shall be brought before the CCC to consider a relevant sanction.
2. If recordings are, at any time in future, not provided by Imbokodo to the Authority within 60 days of the broadcast, when so demanded, a maximum fine of R10 000 shall be imposed by Council on the recommendation of the CCC.
3. If a log of broadcast programmes is not kept by Imbokodo, at any time in future, a maximum fine of R10 000 shall be imposed by Council on the recommendation of the CCC.
4. If Imbokodo does not comply with the condition that 50% talk and 50% music is broadcast by 1 February 2009, a maximum fine of R10 000 shall be imposed by Council on the recommendation of the CCC. A 5% deviation will be permissible and be regarded as substantial compliance.
5. Imbokodo shall furnish the names and addresses of Directors of the Board to the Authority by 30 November 2008. Any omission to inform the Authority of the names of new Directors and their addresses, shall lead to

a maximum fine of R5000 being imposed by Council on the recommendation of the CCC.

6. If Imbokodo fails to hold meetings of its Directors once every two months, a maximum fine of R5000 shall be imposed by Council for each omission to hold such a meeting, on the recommendation of the CCC.



JCW Van Rooyen SC

Date: 20-10-2008

R Mokgoatheng J, N Ntanjana and S Thakur concurred with the above judgment.