

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of hearing: 4 February 2010

Case number: 28 / 2010

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

Complainant

vs

The Voice of Tembisa

Respondent

Complaints and Compliance Committee

IWB de Villiers Judge (Acting Chairperson)
N. Ntanjana
T. Matshoba
J.C.W. Van Rooyen SC (Councillor)

For the Complainant

Monitoring Complaints Unit:

Ms. Fikile Hlongwane

Assisted by: Compliance Officer:

Ms. Susan Mashinini

For the Respondent

Chairperson of the Board

Ms. Phindile Dlodlu

The Station Manager:

Mr. Sonnyboy Masingi

Board Member

Ms. Elisa Moerane

The Matter

Community radio station – non-compliance with order to pay fine imposed by Council. CCC striking charge as defective in law. Since respondent did not plead to the charge, the charge having been found to be defective by the CCC, mero motu, before a plea was called upon, the Monitoring Unit may file a new charge.

¹ In terms of section 17C of the ICASA Act 13 of 2000 as amended

Judgment

JCW van Rooyen SC

[1] The Voice of Tembisa, a Community Radio Station was charged for not having submitted its audited financial statements for 2006-7, not reacting to a request from the Complainant that it must submit a programme schedule of the station, failing to submit monthly programme log sheets, failing to submit a list of management personnel, failing to submit a complaints report and, lastly, that it failed to submit proof of community participation by way of formal structures which would facilitate community participation in the control, management, operational and programming aspects of the broadcasting service.

[2] The following finding was made on the merits and a recommendation was made to Council on the sanction. Council adopted the recommendation:

“The Voice of Tembisa” is ordered to file with the coordinator of the CCC and the Monitoring Unit of ICASA;

- (1) its audited financial statements for the period 2006-7 within ninety calendar days from this Council resolution;
- (2) its programming schedule before the end of August 2008 for the months of June and July 2008 combined with a log that these programmes were broadcast and, if not, the reason for such amendment or omission;
- (3) a list of its management personnel (stating their positions) as at 1 June 2008;
- (4) a written report of complaints, if any, received for the period 1 July 2008 – 31 December 2008;
- (5) the minutes and members of at least one committee of at least 10 persons, which it has formed from the community of listeners for participation in the choice of programmes before 1 December 2008.
- (6) To pay a fine of R10 000 if paragraph (1) of this order is not complied with and a fine of R2000 each for the omission to give effect to any one of paragraphs (2), (3), (4) and (5) and the CCC has found this to have been the case after due inquiry and on complaint by the Monitoring Unit of ICASA.”

[3] The date on which the fine of R18000 had to be paid was 1 November 2009. Shortly after the 1st of November the Coordinator of the CCC sent a letter to the Respondent indicating that the fine had not yet been paid. The fine was then paid by the middle of November 2009.

[4] The Complainant then lodged a complaint with the CCC as a result of the Respondent's not having timeously paid the fine. The charge sheet set out the non-compliance as having amounted to a contravention of section 17H of the ICASA Act in that:

“a person is guilty of an offence if that person – fails to comply with any order made by the Authority in terms of this Act or the underlying statutes and is liable on conviction to a fine not exceeding R100 000”

[5] At the beginning of the hearing the Chairperson informed the parties that the charge sheet was defective and invalid. The CCC is not a Court of Law and section 17H of the ICASA Act creates criminal offences which must be heard by a Court of Law with appropriate jurisdiction. Of course, the ICASA Act also provides for the adjudication of transgressions of the relevant legislation, the regulations and licence conditions. An interesting feature of the Electronic Communications Act 2005 (“ECA”) is that, except for section 74, it does not create any criminal offences. It does, however, impose a multitude of duties on licensees, which must be brought before the CCC either by a member of the public directly or by the Monitoring Unit of ICASA. The Council may also refer complaints to the CCC for investigation. Nowhere in the ECA or the ICASA Act can a provision be found which directly creates the duty by a licensee to comply with an order of Council, which is imposed in terms of section 17E of the ICASA Act. Of course, such an order creates a civil right for ICASA which it may enforce in a Court of Law. But this is not before the CCC, which obviously does not have jurisdiction to enforce claims. It could be argued that it is implicit in the Act that an order of Council in terms of section 17E must be abided by and if not so abided by, it amounts to a contravention of a duty in terms of the Act. This inference is, however, dispelled by section 17H which explicitly makes non-compliance with a Council order an offence. This means that the common law right of a Court of Law to hold a non-complying respondent in contempt if it is proved beyond a reasonable doubt that it has intentionally not complied with a civil court order, has not been granted to the ICASA Council.² Accordingly, the charge in the present matter is intrinsically defective and accordingly null and void.

[6] Since the CCC quashed the charge on its own initiative, there was no charge to plead on. This means that the Complainant has the right to re-charge the

² *H v M* 2009 (1) SA 329 (W); *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

Respondent of non-compliance of the order if it succeeds in convincing the CCC that non-compliance with an order of Council is indeed a matter which may be adjudicated by the CCC. This charge must reach the respondent on or before 1 March 2010 and must be placed for a hearing by the CCC before the end of March. If the Complainant does not comply with these time frames, the matter is hereby struck from the Roll of the CCC. The Complainant has indicated that it might wish to lay further charges against the Respondent. This is, obviously, not a matter for the CCC to decide on. However, if it deems it necessary to do so, the further matters may be placed on the Roll for the same day as the matter previously mentioned.

The Chairperson, Mr Justice IWB de Villiers and Committee Members N. Ntanjana and T. Matshoba concurred in the above judgment.



Councillor on the CCC

9 February 2010