



## **COMPLAINTS AND COMPLIANCE COMMITTEE**

**DATE OF HEARING: 19 OCTOBER 2023**

**CASE NO: 457/2023**

**ICASA REGIONS AND CONSUMER AFFAIRS**

**COMPLAINANT**

**V**

**DIHLABENG FM**

**RESPONDENT**

### **CCC MEMBERS:**

Judge Thokozile Masipa – Chairperson  
Councillor Catherine Mushi - Member  
Mr Monde Mbanga - Member  
Mr Peter Hlapolosa - Member  
Mr Thato Mahapa - Member  
Mr Paris Mashile – Member  
Ms Ngwako Molewa - Member

### **FROM THE OFFICE OF THE CCC:**

Lindisa Mabulu - CCC Coordinator  
Meera Lalla - CCC Assessor  
Thamsanqa Mtolo - CCC Assessor  
Amukelani Vukeya – CCC Administrator

### **LEGAL REPRESENTATION FOR PARTIES**

For the Complainant – Mr Gumani Malebusha and Ms Magdeline Mogashoa

For the Respondent – Mr Basi Mokhothu the Station Manager  
Mr Tshepo Mofokeng Board Chairperson  
Mr Lucky Maseko Programs Manager

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## JUDGMENT

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Judge Thokozile Masipa

### INTRODUCTION

- [1] There are two Complainants in this matter. The first Complainant is Mr. JJ Tsotetsi (“the 1st Complainant”). He is the Major General in the South African Police Service and a District Commissioner of Thabo-Mofutsanyana in the Free State.
- [2] The second Complainant is the ICASA Regions and Consumer Affairs.
- [3] The Respondent is Dihlabeng FM 100.5, a Community Radio station in Bohlokong, Bethlehem in the Free State.

### HISTORICAL BACKGROUND

- [4] Mr. JJ Tsotetsi, alleged that Dihlabeng FM had broadcast South African Police Service (SAPS) internal and confidential matters between himself and some of the police officers with intent to incite community members to engage in violence against him. He alleged further that the allegations broadcast about him were untrue.
- [5] On 20 April 2023, Dihlabeng FM responded in writing to the complaint. In its response the Respondent explained, *inter alia*, that on 29 February 2023, (later changed to 28 February 2023), at 12h00 to 15h00, the presenter of Dihlabeng FM’s show on current affairs, Mr Byl Moloi, had a guest in the studio, Mr Motloun, a former policeman. Mr Motloun complained about his senior, by the name of General Tsotetsi.
- [6] The gist of the discussion was that he and his fellow colleagues were mistreated by General Tsotetsi. The Respondent sought to distance itself from the allegations against it by stating that the presenter at the station, was not guilty and the guilty person was Mr Motloun, the guest who told the story. In support of the denial,

the Respondent relied on a disclaimer which, allegedly, was to the effect that the views expressed were not those of Dihlabeng but of the guest.

[7] On 24 April 2023, Consumer Affairs sent Dihlabeng's response to the Mr Tsotetsi who, understandably, still felt aggrieved.

[8] Before that, on 21 April 2023, Consumer Affairs requested Dihlabeng FM to submit the recordings of the programme broadcast for purposes of verifying the allegations made by Mr Tsotetsi.

[9] On 29 May 2023, Consumer Affairs sent a Right of Reply to Dihlabeng FM. The latter was given until 5 June 2023 to make written representations stating why it should not be taken to the Complaints and Compliance Committee (CCC) for contravening Section 53(1)(a) of the ECA.

[10] Dihlabeng FM failed to respond to the Right of Reply.

## **COMPLAINT**

[11] As stated above, there are two Complainants with three distinct charges. The first two charges were brought by Mr Tsotetsi. The third charge was brought by the ICASA Regions and Consumer Affairs.

### ***Charge 1***

[12] That the Respondent contravened Regulation 3(2) of the Code of Conduct for Broadcasters ("Code").

The said Regulation states:

*"Broadcast Service Licensees must not broadcast material which, judged within context, sanctions, promotes or glamorises violence or unlawful conduct based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age or mental or physical disability.*

## **Charge 2**

[13] that the Respondent has contravened *Regulation 3(3)(c) of the Code which states that:*

*" broadcast service licensees must not broadcast material which, judged within context, amounts to advocacy of hatred that is based on race, ethnicity, religion or gender and that constitutes incitement to cause harm."*

[14] Mr Tsotetsi alleged that the Respondent broadcast South African Police Services (SAPS) internal and confidential matters between Mr Tsotetsi and some police officers with the intent to incite violence among members of the community over allegations which were not true.

## **Charge 3**

[15] That the Respondent contravened Section 53(1)(a) of the Electronic Communications Act 36 of 2005. The section provides:

*"A broadcast service licensee must (a) on demand by the Authority, produce to the Authority any recording of every programme broadcast in the course of his/her broadcasting for examination or reproduction, within 60 days from the date of the broadcast."*

[16] The Complainant alleged that on 21 April 2023, the Respondent was requested to submit recordings of the current affairs programme broadcast on 29 February 2023 (later corrected to read the 28 February 2023) and that the Respondent failed to do so.

## **DIHLABENG FM'S DEFENCE**

[17] On 5 September 2023, Dihlabeng FM addressed an email to the offices of the CCC explaining the events of the 28 February 2023.

[18] The third paragraph reads:

*" ... we would like to apologise sincerely to the Complainant about the harm that may have been caused by that interview, our intentions are never to cause harm or put lives of any commercial member in danger, we are always neutral, impartial and we broadcast within the rules and policies of ICASA."*

[19] In the next paragraph, the Respondent states that the programme concerned was not recorded "*due to a corrupted recording software*" which was managed by Netdynamix and which was used at the time.

[20] According to the Respondent, it was not aware of this malfunctioning of the software, until five days later when it came to its attention that the shows of that week, including the one which is the subject of the present complaint, were not recorded.

[21] Then the Respondent undertook

*"to do anything that ICASA or CCC want us to do in order to end this case."*

[22] On 14 September 2023, Mr Tsotetsi addressed an email to the office of the CCC refuting the statement that the station took no part in attacking him. Also refuted was the statement by Dihlabeng that the programme concerned was not recorded due to a malfunction in the software.

[23] According to Mr Tsotetsi, both the station manager, Mr Mokgothu, and the presenter of the show, Mr Moloji, took an active role in attacking his character in a public broadcast without affording him the opportunity to hear his side of the story. In addition, Mr Tsotetsi alleged that Dihlabeng was lying about the unavailability of recordings especially because the programme, in which he was the subject of the discussions, went on for months. His submission is stated hereunder:

*"The Radio Station is misleading ICASA or CCC by saying that the recordings of a week cannot be found. They ran a program for many months which was focused at tarnishing my name, instil hatred on the community against me."*

## **THE EVIDENCE**

[24] Mr Tsotetsi submitted video and audio clips to support his case. The recordings showed clearly that Mr Mokhothu, the station manager, played a significant role in attacking the character of Mr Tsotetsi on air without affording him a hearing. Furthermore, the video recording supported the conclusion that the radio interviews during which Mr Tsotetsi was discussed and the prior protest marches in the streets of Bethlehem allegedly against the police, were inextricably linked.

[25] During one of the radio interviews, Mr Mokhothu is heard encouraging junior police officers under Mr Tsotetsi to "down tools" until Mr Tsotetsi is removed from his position as head.

[26] In the video clip Mr Mokhothu's figure looms large as he is seen among "community members" in a protest march that apparently took place sometime before the interviews. Mr Mokhothu is heard expressing himself thus: "Lenna ke a chesa" in the Sotho language, which means "I also set fire" or "burn".

[27] Mr Mokhothu could not and did not dispute the evidence above. He, however, sought to attach an innocuous meaning to his statement, by saying that when he said: "Lena ke a chesa," he meant "I am also hot."

[28] Having regard to the context, this contrived explanation is nonsensical and is rejected as such. The context in which the statement was spoken shows the clear meaning: *"I also set fire."*

[I pause to state that in the same sentence, in which Mr Tsotetsi's name is mentioned, something to this effect is also said:

*"after all they live among us or in our midst."]*

[29] In my view, the statement above is dangerous and irresponsible. I say this because it was addressed to a group of people who could be described as “a mob”, where emotions were running high. The mob could have easily taken the threats further by putting them into action.

[30] It appears that the same hostile atmosphere, that was apparent in the protest marches, prevailed in the Dihlabeng FM programme where various people were allowed air time to convey their displeasure against Mr Tsotetsi. This was done without affording him an opportunity to tell his side of the story.

[31] According to Mr Tsotetsi there was a deliberate attempt by Mr Mokhothu and others to turn the community against him because, he dared to discipline irresponsible police who worked under him. The same people would like to see him leave as they regard him as an outsider.

*“They say I am also an outsider ... not born and bred in Bethlehem.”*

[32] Neither Mr Mokhothu nor anyone in his team could come up with a valid defence. More importantly neither had the sense to apologise.

[33] Instead they exacerbated the problem by making statements they could not support. They, for example, said they did try to get hold of Mr Tsotetsi to invite him to the station to hear his side of the story. Further probing showed that the attempt by Dihlabeng to get hold of Mr Tsotetsi was a month and 15 days after the interview. So, they could not even explain what purpose the invitation would have served.

[34] More worrisome is the fact that in their attempt to save their skins, Mr Mokhothu and his team deliberately misled ICASA and the CCC. In their bid to conceal evidence (which conduct is an aggravating factor), they gave two different versions as to why they could not produce recordings related to the incident that brought them before the CCC. None of them could explain this discrepancy.

[35] It is not surprising, therefore, that they could not utter a word in their defence when Mr Tsotetsi produced the incriminating video and audio clips. An adverse inference can reasonably be drawn that, despite their repeated claims that they had no intention to harm Mr Tsotetsi, Mr Mokhothu and team in fact had such an intention.

[36] Such intention can be seen from the disdain with which they treated Mr Tsotetsi. They tried to hide behind the disclaimer and shamelessly proceeded with an interview or interviews that had the potential to promote hatred against Mr Tsotetsi and instigate violence against him. They also had little regard for him as a person and for his family.

[37] [I pause to mention that although intention is not a requirement and, therefore, not relevant for purposes of our finding, it is extremely important as an aggravating factor].

[38] From the evidence before the CCC, it can safely be concluded that Mr Tsotetsi's claims that Mr Mokhothu and his team used Dihlabeng to fight their personal battles against him are true. This is consistent with the fact that Mr Mokhothu, as station manager, had an interest in the community forum that was responsible for picketing against Mr. Tsotetsi. More importantly, there was evidence that Mr Tsotetsi had previously successfully applied for a restraining order against one of them.

[39] The CCC particularly takes a dim view of the dishonest manner in which the representatives of Dihlabeng conducted this case. Over and above the dishonesty, they consistently showed ignorance and a lack of insight into likely consequences of their actions.

[40] Mr Tsotetsi submitted that because of the one-sided interview, one community member who had been listening to Dihlabeng FM, to Mr. Motloun's interview in particular, stated on Facebook that:

*"I should be assassinated the same way the late rapper A.K.A (Kiernan Forbes) got assassinated."*



[41] No wonder Mr Tsotetsi made an impassioned plea to the CCC to recommend a heavy sanction against Dihlabeng. Of the Station Manager, the Programmes' Manager, and the Chairperson of the Board, he had this to say:

*"The team is like pilots in the cockpit of a flying machine without any flying skills carrying a full load of passengers. My humble plea is that they be stopped before they put more people's lives in danger as they did to me and my family."*

[42] The view of the CCC is that the above description of the Station Manager, the Programme's Manager and the Chairperson of the Board is on point. Not only did they use a Community Radio Station for their own selfish reasons, but they also remained unrepentant throughout the proceedings even after being granted an opportunity to remedy the situation.

#### **CONTRAVENTION OF SECTION 53 (1)(a) OF THE ECA**

[43] It is common cause that Dihlabeng failed to submit to the Authority, on demand, recordings of the programme which is the subject of this hearing.

[44] From the submissions on behalf of the Regions and Consumer Affairs, it transpired that prior to the present complaint, the Complaints Officer had warned Dihlabeng FM about the consequences of not recording the programmes.

[45] In view of the above Dihlabeng cannot be heard to say that it did not know that, as a station, it had a responsibility to keep and submit recordings or the consequences of the failure to do so.

[46] With regard to the present case (charge 3), on 21 April 2023, Regions and Consumer Affairs requested Dihlabeng FM to submit the recordings of the programme broadcast for the purposes of verifying the allegations made by Mr Tsotetsi. The station did not submit the recordings requested.

[47] On 27 April 2023, Mr. Mokhothu addressed an email to the Consumer Affairs explaining that the station was unable to submit recordings as requested. The recordings could not be found as they were "*revamping their station premises and had changed their website domain.*"

[48] It must be noted that on a different occasion the explanation given was that the software they used for recordings had been corrupted.

[49] In its written submissions, the Regions and Consumer Affairs argued the Dihlabeng gave contradictory statements regarding the unavailability of the recordings. This was clearly to protect "*their unlawful actions as alleged by the Complainant.*"

For that reason, Dihlabeng should be given a hefty sanction.

#### **MITIGATING CIRCUMSTANCES AND AGGRAVATING FACTORS**

[50] In mitigation, on behalf of Dihlabeng, it was submitted that Dihlabeng has a clean record. It is so, that Dihlabeng has been in existence for a number of years and that during that period it has never been hauled before the CCC for a contravention. That this must count for something is clear. However, a clean record *per se* is not a guarantee that the Respondent will get a light sanction. There are other equally important considerations that have to be taken into account to come to a fair and just decision.

[51] In the present case, as impressive as Dihlabeng's clean record is, it cannot be viewed in isolation. It has to be viewed against the seriousness of the transgression, the attitude of the Respondent as well as a number of aggravating factors.

[52] The attitude of the three representatives of Dihlabeng was, among others, one of arrogance coupled with ignorance - a worrisome combination, to say the least. During the course of the proceedings, the team from Dihlabeng was compelled to admit that they were not aware of the Code of Conduct for Broadcasters. Among other things, the CCC found it extremely reprehensible that Mr. Mokhothu would

abuse his position as station manager and use the station to promote his own personal agenda knowing that his actions had a potential to harm others.

[53] Furthermore, the fact that Mr. Mokhothu and his team also showed no remorse throughout the course of the hearing, makes it difficult to believe that they have learned a lesson from their actions and that the mistakes (for lack of a better word) will not be repeated. The only time they expressed an apology to Mr Tsotetsi was after they realised that they were in trouble. And, having regard to the dishonest manner in which they conducted their case, one wonders whether the apology is not mere lip service.

[54] I say this because even the tone of their letter from their attorneys, NIEMANNGLOBELAAR, is not convincing. In part the letter, dated 2 November 2023, reads:

*"Our client, ... deeply regrets the events that transpired on the specific day and is keen to manifest their profound understanding on the gravity of the situation."*

[55] In the next paragraph the letter lists measures that Dihlabeng intends to take to avoid a recurrence of a similar incident. *"These measures encompass comprehensive training initiatives, the revision and enhancement of our editorial guidelines, as well as active cooperation with SAPS and Mr Tsotetsi."*

[56] As can be seen, the "deep regret" expressed in paragraph [55] above sounds hollow as an apology. I say this because the "events that transpired on the day" are not even specified. Secondly, such events are not connected in any way to any of the individuals who triggered them. This gives the impression that those responsible do not accept that they were the cause of those events.

[57] Equally inadequate are the remedial steps proposed in the next paragraph on behalf of the Respondent. The nature of the training is not clear. Also, not clear is who is going to do the training, for how long and for what purpose. And, most importantly, when these measures are to be implemented. This oversight further

serves to confirm the lack of insight on the part of Dihlabeng as to the seriousness of the allegations against it.

[58] After careful consideration of the facts of this matter, the CCC finds that all three charges against the Respondent have been proven. We have also considered the mitigating circumstances and aggravating factors and have come to the conclusion that the mitigating circumstances in the present matter are far outweighed by the aggravating factors. This means the only suitable sanction is a very heavy one, that will act as a deterrent not only to Dihlabeng but also to other Licensees who may be tempted to disregard the law and regulations with impunity.

[59] The CCC is aware that imposing a heavy sentence against Dihlabeng might have an adverse impact on the community served by the station. However, having given this issue careful consideration, it seems to the CCC that this is one instance where a heavy sanction cannot be avoided.

## **FINDING**

[60] In the result, the CCC finds that Dihlabeng contravened the following:

60.1 Regulation 3(2) of the Code of Conduct for Broadcasters

60.1 Regulation 3(3) of the Code of Conduct for Broadcasters

60.3 Section 53 (1)(a) of the Electronic Communications Act No 36 of 2005.

## **RECOMMENDED ORDER**

[61] Accordingly, the CCC recommends the following orders to be issued by the Authority, namely:—

- (a) direct the Licensee to desist from any further contravention;
- (b) direct the Licensee to pay as a fine the amount of R50 000 (fifty thousand rand) with

- (1) R25 000 (twenty-five thousand rand) thereof payable to the Authority within 7 days of the order; and
  - (2) the balance suspended for a period of 3 years, provided the Licensee is not found guilty of a similar contravention and further subject to the Licensee providing written confirmation that it is complying with obligations arising in terms of section 53 for a period of 6 months within 7 days of the commencement of each month, including the submission of additional documentation and copies of samples of recordings as may be required by the Authority.
- (c) direct the Licensee, through the Board, to issue a detailed written apology to Mr. Tsotetsi, for the violation of his human rights and disregard for the Authority's procedures, within 7 days of the publication of the decision of the Authority.
- (d) direct the Licensee to broadcast an apology every hour on the hour (11h00, 12h00 and 13h00) during the programme in question, immediately after the news bulletin, for a period of 30 days. Such broadcast should commence within 7 days of the publication of the decision of the Authority. Recordings of the broadcasts must be furnished to the Authority within 7 calendar days of the expiry of the 30-day period.

(e)(i) **The apology must be phrased thus:**

*"The Independent Communications Authority of South Africa (ICASA) has found that this station, Dihlabeng FM, contravened Regulation 3(2) and 3(3) of the Code of Conduct for Broadcasters in that it conducted several interviews on air during which individuals were given an opportunity to express their displeasure with Mr JJ Tsotetsi, the Major General, without giving Mr Tsotetsi an opportunity to state his side of the story.*

*This station has also been found to have contravened Section 53 of the Electronic Communications Act No 36 of 2003 (ECA)" in that it failed to*

*submit recordings of the discussions concerned when it was called upon to do so by ICASA.*

*Dihlabeng extends its apology to Mr Tsotetsi for violating his human rights and for any harm that the broadcast may have caused Mr Tsotetsi and his family;*

*Dihlabeng further extends its apology to the SAPS where Mr Tsotetsi holds the position of Major General and District Commissioner of Thabo Mofutsanyana in the Free State.*

*Dihlabeng also extends its apology to ICASA, the Community of Bethlehem and to the listeners for having committed these contraventions.”*

*TMMasipa*

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**Judge Thokozile Masipa**  
**Chairperson of the CCC**

**Date:** 29/1/2024