



**COMPLAINTS AND COMPLIANCE COMMITTEE**

**DATE OF HEARING: 7 AUGUST 2024**

**CASE NO: 479/2024**

**LICENSING AND COMPLIANCE DIVISION OF ICASA**

**COMPLAINANT**

**V**

**POWER FM**

**RESPONDENT**

**CCC MEMBERS:**

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

**FROM THE OFFICE OF THE CCC:**

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

**LEGAL REPRESENTATION FOR PARTIES**

For the Complainant - Busisiwe Mashigo

For the Respondent - Given Mkhari  
Nomalanga Selenje  
Queen Serobe  
Adolph Letsoalo

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## JUDGMENT

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Judge Thokozile Masipa

### INTRODUCTION

- [1] This is an urgent election matter brought in terms of Regulation 6 of the Regulations Governing Aspects of the Procedures of the CCC of the ICASA as amended.
- [2] On 17 July 2024, the Licensing and Compliance Division of ICASA ("LCD") lodged an urgent election complaint with the CCC against Power FM in terms of section 17B(a) of the Independent Communications Authority of South Africa ("ICASA") Act No. 13 of 2000.
- [3] The complaint in this matter concerns an alleged breach of regulation 6(11) of the National and Provincial Elections Broadcasts and Political Advertisements Amendment Regulations, 2024 ("Regulations").

### THE PARTIES

- [4] The Complainant is the Licensing and Compliance Divisions ("LCD") of the Independent Communications Authority ("ICASA").
- [5] The Respondent is Power 987 (PTY) LTD ("Power FM"/"Respondent"), a Commercial Sound Broadcasting Service. In terms of its licence, it is a full-service adult contemporary talk radio station with up to 70% of airtime devoted to talk and at least 30% to music.

### THE LICENCE

- [6] In April 2023, the Authority granted and issued an INDIVIDUAL BROADCASTING SERVICE LICENCE No.: 019/RE/COMMERCIAL/R/APRIL/2023 to POWER 987(PTY) LTD FOR THE PROVISION OF COMMERCIAL SOUND BROADCASTING SERVICE TO BE KNOWN AS POWER FM.

[7] The licence, which was to be effective from 25 May 2022, was updated on 20 March 2024.

## **THE COMPLAINT**

### ***The Charge Sheet***

[8] The Charge Sheet refers to the Respondent's alleged contravention of regulation 6(11) of the National and Provincial Election Broadcasts and Political Advertisements Amendment Regulations, 2024 ("Regulations").

[9] Power FM is alleged to have failed to comply with the above mentioned regulation which provides that "(11) A BSL must not broadcast a PA immediately before or after another PA or PEB."

### ***Summary of Complaint***

[10] The Complainant sets out circumstances which led to the lodging of the present complaint thus:

*"During its compliance monitoring in respect of the 2024 National and Provincial Elections coverage, the Licensing and Compliance Division noted that Power FM transmitted Political Advertisements (PAs) as follows in contravention of regulation 6(11) of the Regulations as per the table below."*

[11] **Table 1 - Political Adverts broadcast by Power FM** sets out the details of the alleged contravention as shown hereunder:

***Date: 13 May 2024,***

***Time: 15:20:44 and 15:21:20***

***Contravention: Broadcast of PA after another PA***

***Political Party: Democratic Alliance***

[12] On 12 July 2024, the LCD advised Power FM of the allegations against it and the decision to refer the matter to the CCC for adjudication.

## **RELIEF SOUGHT**

[13] The relief that the Complainant sought was that the CCC impose appropriate penalties as prescribed by section 17E (2) of the ICASA Act.

## **THE RESPONDENT'S RESPONSE**

[14] The Respondent admitted the charge set out in the Charge Sheet and then pleaded mitigating circumstances.

[15] In a letter, dated 19 July 2024, Power FM responded in detail to the allegations against it. The letter, addressed to the CCC and signed by James Shikwambana, the Managing Director, stated the following, among others:

- "3. We have gone through the log records of 13 May 2024 and hereby confirm that we erroneously flighted two PAs of a political party, one after the other.*
- 4. The log Editor who has been in the role for over 10 years in the company has fully acknowledged the error which occurred on the day.*
- 5. In over 11 years of providing broadcasting services during periods of local, provincial and national elections we have ensured that we adhere to all the provisions of the regulations.*
- 6. We regret that on 13 May 2024, through human error, we fell short.*
- 7. We affirm our commitment to compliance and will apply improved checks and balances measures to avoid future contraventions.*
- 8. We unreservedly apologise to the Authority and plead for the Authority's leniency when considering the matter."*

## **THE DISCUSSION**

### ***The Nature and Gravity of the Non Compliance***

[15] The Respondent is alleged to have contravened regulation 6(11) of the Regulations in that it flighted one Political Advertisement immediately after the other with no break in between. This is a serious non compliance.

[16] Public interest and fairness demand that BSLs treat political parties and independent candidates participating in the elections, equitably. By contravening regulation 6(11), in the manner that Power FM did, scales were effectively tipped in favour of one party as listeners heard the PA for the same party twice within a few seconds.

[17] Transmitting one Political Advertisement immediately after another has the effect of inordinately drawing the attention of the listeners to one Political Advertisement. This means that the political party concerned received extra publicity.

[18] This is exactly the kind of unfair advantage that the Regulations seek to avoid.

### ***Chances of the Re-occurrence of a Similar Contravention in the Future***

[19] In its response, it is clear that the Respondent did not know about the alleged transgression until two months later, when the Complainant alerted it to this fact. This delay in detecting the contravention may be an indication that checks and balances and monitoring mechanisms at Power FM are nonexistent. If they do exist, chances are that they are non functional. This is worrisome as in such cases the likelihood of a re occurrence of a similar incident is high.

### ***The Log Editor's Role***

[20] Further probing by the CCC revealed an additional weakness in Power FM's system. And it is this: The log Editor seems to be the one and only person that Power FM relies on to ensure that tasks related to PAs and/or PEBs are executed correctly.

[21] There is often a mistaken belief that once someone has been doing a particular job for a number of years he/she cannot make a mistake. However, that is a fallacy.

[22] Human beings are not infallible. This is something that stands out especially when employees become overextended. They are prone to get tired or lose focus and as a result may commit errors. This is inevitable, no matter how capable or competent an employee may be. In a case where a task is performed by only one person, there's a likelihood that the person may not even take a break, thereby making himself/herself more prone to making mistakes. Hence the need for effective checks and balances on every level.

## ***The Role of Effective Checks and Balances and Monitoring Measures***

[23] In the present case, at the time the “error” took place, effective checks and balances were obviously not in place. The effect of this oversight was brought to light when, on the 23 May 2024, the log Editor, in the words of the Respondent, “*missed it*” as one PA was transmitted immediately after another, in contravention of Regulation 6(11) of the Regulation.

[24] Not only did the log Editor miss the error before it could occur, but she, thereafter, failed to notice, for two months, that anything untoward had happened, until the Authority brought the error to the Respondent’s attention.

[25] Power FM stated that it has been providing broadcasting services to the public for 11 years without a single contravention.

[26] A clean record for more than a decade is, undoubtedly commendable. But what would greatly assist the CCC is if it were informed what it is that the Respondent did during those 11 years that ensured compliance, and which the station failed to do on the 23 May 2024.

[27] Unfortunately, the Respondent was not forthcoming about how exactly the error occurred, and how it intended to prevent likely re-occurrences in future. The statement that the Respondent “*fell short*” is not an explanation of how the error occurred let alone how it could be avoided in the future.

## ***Re-Commitment to Compliance***

[28] The Respondent stated that it affirmed its commitment to compliance and “*will apply improved checks and balances measures to avoid future contraventions.*”

[29] The challenge with the statement above is that the CCC has not been informed if currently, checks and balances exist in the first place. And if they do exist, their nature, strengths, weaknesses and/or limitations.

[30] Furthermore, there is no indication of what the “*improved checks and balances*” will entail, and what impact they will have on the Respondent’s ability to avoid future incidents of a similar nature. More importantly, nothing is said about when exactly these “*improved checks and balances*” will be implemented.

[31] Without this vital information, it was impossible to determine whether the statement of intention by the Respondent had a basis or was even doable.

[32] To deal with the shortcomings in the submissions of the Respondent, it became necessary, for the CCC, to give Power FM an opportunity to submit further written submissions to provide a clearer picture of how the alleged contravention occurred and how it intended to prevent future similar incidents.

### **Further Written Submissions**

[33] Power FM submitted its further written submissions as requested. In the submissions, Power FM explained the events of the 13 May 2024, as follows:

*"During the 2024 National and Provincial Elections, POWER 987 flighted Political Advertisements of the National African Congress, the Democratic Alliance and Action SA. The Democratic Alliance booked a total of 163 spots for their 2024 election campaign. Seven of the spots were booked for 13 May. Two of the seven spots were booked to flight on POWER Drive between 3 – 6pm on two separate ad breaks. The first DA ad on POWER Drive was supposed to flight in the first hour of the show (that is between 15h00 and 16h00). It was supposed to be followed by a Live Read for another client, We Buy Cars. The next DA ad was supposed to have aired in the next hour, that is between 16h00 and 17h00.*

*In exporting the log to the playout system, our Log editor omitted to separate the two DA add on POWER Drive. She does not have a recollection of the circumstances under which she made the omission. To our knowledge, this is the first time that an error like this has occurred in the eleven years that she has been in the role. To the best of our knowledge this error has not occurred in the eleven years that the station has been on air".*

[34] Power FM re-iterated its regret that the non compliance had occurred and restated its commitment to ensuring that non compliance with the Regulations would not re-occur.

### **Measures Introduced Following the Noncompliance**

[35] Power FM submitted that it implemented software updates *"to improve the functionality of the booking and scheduling system to avoid future contravention of*

*election regulations”.*

[36] In addition, the station worked on additional features to its booking and playout systems, developed in consultation with its service provider, Envision Software Solutions. The implementation of the measures would be effective from 12 August 2024.

[37] According to Power FM the updates would ensure that the log would not be generated without confirmation that there were no conflicts of client category spots. The Spot Sequence step ensures that there are no repeat spots within an advertising break.

### ***Aggravating Factors and Mitigating Factors***

[38] To determine what a fair and just sanction would be for a specific case, it is important to consider all the relevant facts as well as the mitigating factors and aggravating factors.

[39] In the present case, the Respondent explained the occurrence of the error as follows:

*“In exporting the logs to the playout system, our log Editor omitted to separate the two DA ads on POWER Drive.”*

[40] Though the Respondent had been afforded an opportunity to make further supplementary written submissions, to give more clarity, granting the opportunity seemed like a fruitless exercise. I say this because the next sentence reads:

*“She (log Editor) does not have a recollection of the circumstances under which she made the omission.”*

[41] A statement such as the one above, is of no assistance at all, as it cannot help place the error in perspective. In our view, apart from the fact the Respondent is a first offender, there are no other mitigating circumstances.

[42] On the other hand, the CCC finds the following to be aggravating:

42.1 The contravention is a serious non compliance that may cause the public to lose confidence in the electoral process, among other things.



42.2 The Respondent's response to the charge was disappointing, to say the least. It readily admitted the non compliance and sounded shocked that it should have made such an error. However, the shock that the station expressed in words was not supported by any action on its part. One would have expected Power FM to conduct an internal investigation so as to find the cause of the problem and then put in place plans to avoid similar incidents in future. It failed to do so.

42.3 Power FM failed to notice that an error had occurred. This is an indication that the station does not believe in the importance of monitoring its performance. In my view, no serious BSL can function properly without an effective monitoring system. The fact that Power FM has been in existence for more than a decade, without such a system, is an aggravating factor.

## **ANALYSIS**

[43] Non compliance with Regulations in this matter is not a trivial matter. The failure by Power FM to even notice the error until it was brought to its attention, by the Authority, two months later, is reason for even more concern.

[44] With no monitoring processes in place, within the station, there is no likelihood that the station will improve on its performance. There is even less likelihood that Power FM might be able to prevent similar contravention in the future. I say this because where a station has no means to monitor its performance, it is immediately at a disadvantage as it is unable to detect an error once it has occurred. The error might, therefore, occur repeatedly before it is detected and acted on.

### ***How Busy Was POWER FM During the Election Period?***

[45] There is nothing in the papers or in oral submissions to support a conclusion that Power FM was inundated with a lot of work during the election period. Instead, there is evidence that on the 13 May 2024, out of 163 spots that Power FM had to deal with, there were only seven booked for the day. It was not argued that seven was too much to handle. Nor was there any claim by the Respondent that fighting a Political Advertisement was a highly complex task. In the absence of any submission in that regard, an inference is irresistible that the person fighting the PAs that day was negligent.

[46] A broadcaster knows in advance whether it is going to be broadcasting PAs or not and is, therefore, expected to get ready to flight them without problems.

***Additional Assistance to BSLs by the Authority in Preparation for Elections***

[47] BSLs who are charged with failure to comply with the election regulations usually have no one to blame but themselves. I say this because there is no scarcity of resources to assist stations which are willing to learn and improve their services.

[48] Significantly, ICASA is always willing and able to assist broadcasters to operate smoothly and efficiently during the election period by running various workshops related to broadcasters' regulatory obligations and other election matters. Sadly a number of BSLs fail to take advantage of this opportunity.

[49] In the present case, Power FM had an opportunity and an obligation to provide its personnel with training through ICASA's workshops. There was no evidence that Power FM sent any of its employees to any workshop in preparation for the elections.

[50] In my view, Power FM did not give an impression that it was serious about training its staff as nothing was submitted about the nature of its preparation for the elections, if any.

[51] Moreover, the Respondent's Achilles heel seems to have been the inclination to rely on only one person, the logs Editor. But human beings are fallible. This is exactly where checks and balances come in handy.

[52] Hopefully, Power FM has learnt a lesson from this case that a BSL cannot afford to be lukewarm in its approach to its regulatory obligations.

[53] The Regulations for National and Provincial Elections Broadcasts and Political Advertisements Amendment Regulations were promulgated for a good reason. It was to assist Broadcasters to ensure that they conducted their businesses, during the election period, efficiently, and within the confines of the applicable law.

[54] In the present case, Power FM was obviously not conducting its business efficiently despite that it had been in operation for more than 10 years. It seems to have laboured under the impression that the log Editor knew everything there was to

know about her functions, and that training was only for new comers.

[55] This is an unfortunate and myopic way of thinking as there is always room for improvement. In the present case, had the log Editor attended a workshop to refresh her knowledge, or had she worked with someone else to check on her work, Power FM would probably not have been in the position it found itself as a transgressor.

### ***The Circumstances under which the Non Compliance Occurred***

[56] Circumstances under which something happened are always important to place facts in perspective and to find solutions where possible.

[57] In the present case, circumstances under which the non compliance took place remain a mystery. It, therefore, becomes difficult to determine how similar transgressions may be avoided in the future.

### ***Consequences of the Non Compliance***

[58] It cannot be disputed that non compliance with Election Regulations might have a ripple effect and consequences that might affect the public adversely.

[59] It is in the public interest that BSLs should treat all political parties and independent candidates equitably. In fact, equitable treatment is a hallmark of free and fair elections. Anything that thwarts the principle of equitable treatment should be frowned upon.

[60] Regulation 6(11) prohibits the transmission of a PA one after the other with no break in between. Where the two PAs are from the same political party, the result of non compliance is that one party is given more exposure than others.

[61] This might have an adverse effect on free and fair elections.

[62] Ultimately there may be loss of confidence in the electoral system.

### ***Steps Taken By the Licensee to Remedy the Non-compliance***

[63] In the present case there was no indication of what the Log Editor did or did not do which might have led to the non compliance. Her role on the 13 May was not

clear. It was also not clear whether there were other people involved and what role they played, if any.

[64] The dearth of information in this regard is an indication, in my view, that the Respondent does not view the non compliance with the seriousness that it deserves.

[65] On the facts, no steps were taken by Power FM to remedy the non compliance. This was not surprising since the very first time that the Respondent became aware of the non compliance was when the Authority brought it to its attention, two months later.

[66] There was, however, an attempt by Power FM, in its further written submissions, to re-assure the CCC that it had done something. It stated that it *"worked on additional features to our booking and playout systems, developed in consultation with the service provider, Envision Software Solutions. These measures have been implemented with effect from Monday 12 August 2024."*

### **Steps Taken By the Licensee To Ensure That Similar Complaints Are Not Filed in The Future**

[67] Submissions made in this regard on behalf of Power FM were noted by the CCC. These are measures referred to in the previous paragraph. Notably, the nature of these measures were not explained.

[68] The fact that these "measures" were described in very vague terms is not the only problem. What needs to be borne in mind is that a system is as good as the people who operate it. For that reason, the CCC strongly recommends to the Respondent that in future, it prepares properly before the next election period by *inter alia*, training its personnel and apprising it of the BSL's regulatory obligations especially during the election period.

[69] This will ensure that whatever measures or systems are introduced, they can be handed over into the capable hands of people who will be able to operate them properly.

## **FINDING**

[70] On the totality of the evidence before it, the CCC makes the following finding:

70.1 Power FM contravened Regulation 6(11) of the Regulations and was grossly negligent in that on the 23 May at **15:20:44 and 15:21:20** it flighted a DA Political Advertisement one after the other.

## **ORDER**

[71] In terms of section 17E(2) of the ICASA Act, the CCC recommends the following orders to be issued by the Authority, namely:—

71.1 Direct the Licensee to desist from any further contravention of the said regulation;

71.2 Direct the Licensee to take the following remedial actions;

71.2.1 Within 90 Calendar days from the date of the issue of this order, Power FM is to submit to the LCD a report, setting out, among others, a brief technology readiness report, articulating the technology operations plans, systems preventative maintenance and how they would be implemented during the next election period.

71.2.2 That the radio station upgrades its hardware and software. This must be followed by a dry run on the system's operation to ensure that it is foolproof.

71.2.3 Direct the Licensee to deploy a team of five (5) people who would individually check the PAs before they are broadcast.

71.3 In addition the CCC recommends to the Authority to direct that Power FM broadcasts a public apology during the first week after this order is issued.

71.3.1 The apology is to be broadcast in English once per day for five consecutive days as its first item on its news service between 7h00 and 20:10. On the first two days the broadcast must take place in the first newscast after 7h00. The times of the broadcast must be notified by email to the LCD of ICASA at the latest 48 hours before

the broadcast.

71.3.2 The broadcast may not be accompanied by any background music or sounds and the item must be read formally by the Station Manager or his/her representative, who must declare that he/she is the Station Manager or acting on behalf of the Station Manager.

71.3.3 The apology must be phrased thus:

*"The Independent Communications Authority of South Africa has found that this station was negligent in not having abided by the National and Provincial Elections Regulations 2024. This station broadcast Political Advertisements (PAs) one after the other.*

*This is in conflict with the ICASA Election Regulations which require that a Political Advertisement should not be flighted immediately after the other. This station further extends its apology to ICASA and to its listeners for having committed the contravention".*

[72] An electronic copy of each broadcast stating the date and the time of the broadcast, must be sent to the LCD at ICASA by email within 48 hours from the last broadcast in the said five days.

[73] A fine of fifty thousand rands (R50 000.00) of which twenty thousand rands (R20 000.00) is suspended for four (4) years on condition that there is no non compliance of Election Regulations during the period of suspension. The remaining amount of thirty thousand rands (R30 000.00) must be paid to ICASA within 90 calendar days from when this judgment is issued.

[74] The CEO of ICASA or his nominee must be copied with proof of payment within 24 hours from when the payment was made.

  

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

**Date:** 22 November 2024