



COMPLAINTS AND COMPLIANCE COMMITTEE

DATE OF HEARING: 7 AUGUST 2024

CASE NO: 478/2024

LICENSING AND COMPLIANCE DIVISION OF ICASA

COMPLAINANT

V

YFM

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 - Haseena Cassim

Philippa Rafferty

JUDGMENT

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.

THE PARTIES

[2] The Complainant is the Licensing and Compliance Division ("LCD"/"Complainant") of the Independent Communications Authority.

[3] The Respondent is YIRED (PTY) LTD ("YFM"), a Commercial Sound Broadcasting Service Licensee.

[4] On 4 June 2019, YFM was granted and issued an Individual Broadcasting Service Licence No.: 013/COMMERCIAL/R/JUN/19 by the Authority.

[5] The licence is due to expire on 16 December 2028.

THE COMPLAINT

The Charge Sheet

[6] The allegations are that the Respondent contravened regulation 6(13) of the Regulations.

[7] The Charge Sheet reads as follows:

7.1 "The Licensee has during the elections period contravened Regulation 6(13) of the National and Provincial Elections Broadcasts and Political Advertisements Amendment Regulations, 2024 as published in the Government Gazette No 50204 dated 26 February 2024 as follows:

1.1.1 Failure to comply with the above mentioned Regulation which provides that:

"A BSL that broadcasts PA must ensure that all PA broadcasts are clearly identified through a standard pre-recorded concluding message ("tail disclaimer".)"

Summary of Complaint

[8] The Complainant set out circumstances that led to the lodging of the present complaint as follows:

"During its compliance monitoring in respect of the 2024 National and Provincial Elections coverage, the Licensing and Compliance Division noted that YFM transmitted Political Adverts (PAs), as follows in contravention of Regulation 6(13) of the Regulations as per the Table below."

[9] The Table referred to is titled **TABLE 1 - Political Adverts broadcast by YFM** and notes the date, times as well as the alleged contravention and the Political Party concerned.

[10] The information extracted from **Table 1** above confirmed that on the 1 April 2024 at 08h48, 10h21, 13h34 and 16h31, YFM flighted PAs for the Democratic Alliance without tail disclaimers.

[11] It is not disputed that the conduct concerned is in contravention of regulation 6(13) of the Regulations. In terms of the regulation, all Broadcasting Service Licensees ("BSLs") which elect to broadcast PAs, are duty bound to flight those PAs with tail disclaimers.

THE RELIEF SOUGHT

[12] The Complainant recommended that the CCC impose appropriate penalties as prescribed by section 17E (2) of the ICASA Act.

THE RESPONDENT'S RESPONSE

[13] In a letter dated 18 July 2024, the YFM Station Manager, Haseena Cassim, admitted the charges as set out and then sought to explain circumstances which led to the alleged contravention.

[14] In part, the letter reads thus:

"2. At the outset we wish to thank the Authority for bringing this matter to our attention. Following receipt of your letter of 12 July we conducted our own internal investigation into the issues raised by the Licensing and Compliance Division of ICASA and found the following:

- 2.1 The booking for the DA Political Advertisement was made on Thursday 28 March at 13.28 and material was received and loaded at 13.50 on the same day. Unfortunately the team working on loading the PA did not pick up that the disclaimer tags were not included with the PA.*
- 2.2 The spots, specified in the letters aforementioned, for 1 April were flighted without the tags.*
- 2.3 It has come to our attention that there was an additional spot flighted on 2 April at 07h35 that did not have a disclaimer as well.*
- 2.4 The internal process at YFM for bookings ahead of weekends and/or public holidays has a deadline of 12pm. However, due to the client request the late booking was processed ahead of the Easter weekend. The material was flighted on Easter Monday which was also a public holiday and again early morning on Tuesday 2 April 2024.*
- 2.5 Unfortunately, due to the late booking and the late receipt of material, the PA was loaded without the requisite checks.*
- 2.6 All other PAs flighted for the election period complied with the requisite regulations.*

In the light of the above, we accept responsibility for the contravention and plead guilty to the charge of breaching regulation 6(13) of the Regulations for Broadcasting of Political Advertisements.”

[15] In mitigation, the Respondent set out the following:

1. This is the first contravention of this nature by YFM.
2. As part of its election preparation, eMedia conducted various workshops internally to make employees aware of the Regulations for Broadcasting of Political Advertisements and the requirements for compliance.
3. As soon as YFM became aware of the contravention it took steps to investigate and has since taken measures against the employees responsible for not checking and loading the PAs properly; and
4. The contravention only occurred five (5) times and was connected to a single PA.

[16] Lastly YFM assured the Authority that it had taken steps internally to prevent a repeat of this nature.

DISCUSSION

The Nature and Gravity of the Non Compliance

[17] To understand the nature and gravity of the non compliance in this matter, it is necessary to have regard to the role played by the media (in this case, BSLs), in the public arena.

[18] It is not in dispute that the media, including broadcasting media, play a crucial role in disseminating information to the public. This role is even more crucial during the election period.

[19] In some communities, especially where the rate of illiteracy is high, a BSL may be the only source of information available. In such an environment the important role of a BSL becomes even more crucial.

- [20] To make informed decisions in the election process, the public needs responsible media that can be relied upon. The media can successfully carry such responsibility only if it is apolitical and therefore impartial while carrying out its duties. This is a huge responsibility.
- [21] In addition to disseminating information to the public, BSLs also have a significant influence on public thinking. Moreover, media is the primary means through which public opinion is formed.
- [22] This is one of the reasons the Regulator deemed it fit to put in place different regulatory frameworks to guide the media in this important role.
- [23] The Authority has been consistent in guiding broadcasting service licensees in their broadcasting responsibilities during elections period. The recent election period in 2024 was no different. The Regulations on National and Provincial Party Election Broadcasts and Party Elections Broadcasts and Political Advertisements were published in 2024 specifically to guide broadcasters in their reporting responsibilities during the 2024 election period.
- [24] These regulations prescribe the framework and guidelines under which party election broadcasts and Party Advertisements must be conducted by broadcasting Service Licensees during the National and Provincial elections.
- [25] The Regulations, which are intended only for the duration of the election period, apply to broadcasting service licensees and to political parties.
- [26] While BSLs are expected to provide accurate information at all times, that expectation is heightened during the election periods. In dealing with politically related matters, not only must the information be accurate, but it must also be conveyed to the public in a manner that leaves no doubt that the BSL is merely the messenger and not the mouthpiece of a particular political party. The use of disclaimers to identify the information (in the present case, political advertisements) specifically serves this very purpose. In addition, disclaimers also serve to protect BSLs against accusations that they may be promoting certain political parties during the election period.

[27] In cases where a disclaimer has been omitted, the ordinary listener has no way of knowing that the PA is actually information that is produced by a political party to advance its own interests, and not by the BSL. Consequently, whatever decision is taken as a result of having been exposed to such information, is likely to be an uninformed decision.

[28] Having understood the nature of the non compliance, the next step is to consider the seriousness of what occurred on the 1 April 2024.

[29] In the present case, the broadcast of PAs without a tail disclaimer happened not once but four times. In our view, although this fact was presented as a mitigating factor ("*only five times*", it was argued), on the contrary, it served as an aggravating factor.

[30] I say this because, considering the impact of such an occurrence, as highlighted above, even one error in flighting a PA without identifying it as such, is very serious. The fact that in the present case, the "error" occurred more than once, and that none of the people responsible at the station noticed, is real cause for concern.

The Consequences of the Non Compliance

[31] The Regulations assist, *inter alia*, in protecting the integrity of the elections and to ensure that the rights of the public are protected and respected during the election period.

[32] The consequences of not complying with Regulation 6(13), therefore, are far more serious and far reaching than most people may realise. It is for this reason, among others, that every BSL should strive for professionalism, accuracy and integrity in carrying out its duties.

[33] Without qualities described above, a broadcaster cannot meaningfully give effect to the right of access to information, which is vital, especially during the election period. Lack of integrity on the part of a BSL, for example, may have a significant negative impact on voters' electoral participation and probably the outcome of the elections.

[34] In many communities, the voting public depends heavily on BSLs not only for information but also for education. As an educational resource, a BSL can be very influential especially during the election period. That is one of the reasons why BSLs are required to be apolitical. So, by not complying with the Regulations, the BSL frustrates the purposes of the Regulations.

[35] Moreover, where individuals are unable to access the correct and accurate information from a broadcaster because such broadcaster has committed an error such as in the present case, the integrity of the election process may be compromised. This is because individuals may also be unable to make informed decisions about voting for the party of their choice. Consequently, public confidence in the democracy may unwittingly be undermined.

[36] It is evident, therefore, from the discussion above, that contravention of election related regulations is no small matter because of the ripple effect such contravention has on the public. So serious is the non compliance of these regulations that the licensee can be liable for a fine up to R1-million rand (one million rand).

What Steps the Licensee Has Taken To Remedy The Problem

[37] According to YFM, as soon as it became aware of the contravention, it took steps to investigate the allegations. This was followed by a disciplinary inquiry against personnel who had failed to ensure that the broadcast of the PAs on the day concerned complied with the regulations. At the time of the hearing, the disciplinary proceedings were still pending.

[38] In addition, to the written and oral argument, YFM took advantage of an opportunity offered to it by the CCC to make supplementary written submissions. Amongst other things, YFM confirmed that the only Political Advertisement ("PA") which was flighted on 1 April 2024 was the Democratic Alliance PA. A reconciliation of all political advertising booked with YFM for the entire election period was attached to the written supplementary submissions.

Procedures, policies in place for election matters.

[39] According to YFM, eMedia’s compliance department conducted internal training for all eMedia staff on 5, 9 and 12 April 2024 in Johannesburg and Cape Town offices. The compliance department also provided guidelines to assist staff responsible for election content.

[40] From the facts before the CCC, it appears that YFM certainly tried to prepare its staff properly for the election period. This counts in its favour and serves to confirm that YFM is taking its broadcasting responsibilities during the election period seriously. The training as described above probably assisted in confining the contravention to only one day.

Steps YFM took to remedy the complaint

[41] Once more YFM confirmed that as soon as it became aware of the non compliance on 12 July 2024, it took action. ***Inter alia***, it made its own internal investigation. As a result it was able to verify the non compliance. In addition, it found another incident of non compliance committed on 2 April 2024 and voluntarily reported it to the CCC.

[42] Through its Human Resources Department, YFM took disciplinary action against the responsible parties. At the time of the submission of the written argument, disciplinary processes were still under way.

Steps taken by YFM to ensure similar complaints would not be lodged in the future

[43] YFM submitted that it was in the process of preparing a “refresher” compliance training for all staff. In addition, it would continue to hold workshops for all election periods. This would also enable it to share any amendments to Regulations as soon as they are published. YFM also re-iterated that it would ensure that all on-air production and sales personnel that engage with election content, attend workshops and understand the Regulations.

MITIGATION AND AGGRAVATING CIRCUMSTANCES

[44] A consideration of mitigating circumstances and aggravating circumstances is essential to ensure that the CCC recommends sanctions which are fair and just.

[45] YFM admitted the allegations against it and then proceeded to set out mitigating circumstances. In response to the charges against it, it was prompt and honest.

[46] I say this because not only did the Respondent conduct its own internal investigation as soon as it received the alleged non compliance notice, but it also found and disclosed an additional contravention that the LCD had missed.

[47] Such conduct, on the part of a Respondent, is highly commendable. The fact that YFM chose to cooperate with the CCC, gave a credible account of what happened and how, conducted its own thorough internal investigation, made full disclosure, and took steps to prevent the recurrence of the incident, certainly must count in its favour.

[48] Another mitigating factor is that YFM took steps to ensure that personnel responsible for the error were held accountable. The pending disciplinary action is a strong indication that YFM is taking the non compliance in the present case, with the seriousness that it deserves.

[49] YFM also apologised for having contravened the regulation concerned.

[50] Determining whether an expression of an apology is sincere, or whether the wrongdoer is merely paying lip service, is often a challenge.

[51] In the present case, the sincerity of YFM cannot be doubted, in my view. I say this because the expression of regret was supported by concrete action on the part of the Respondent.

51.1 Once YFM was informed of the non compliance, it responded promptly. What is significant is that YFM conducted a thorough internal investigation which unearthed an additional contravention that the Complainant had missed.

51.2 Subsequently it brought the missed contravention to the attention of the CCC. The prompt and meaningful response as well as decisive action on the part of

YFM, all show that the apology was not mere lip service, but that it arose from genuine remorse.

[52] Lastly, YFM is a first offender.

Traditionally, first offenders are often treated less severely than repeat offenders when it comes to meting out a penalty.

[53] The one aggravating factor is that the omission of the inclusion of the tail disclaimer happened not only once or twice but four times in one day.

[54] In balancing all the factors above, the CCC is of the view that the mitigating factors in the present case outweigh the aggravating factors by far. This then calls for a sanction tempered with mercy.

CONCLUSION

[55] In disseminating information to the public during the election period, the BSLs play an important role. The importance of this role was recognised by the Regulator. Hence the introduction of the regulations to assist and guide the BSLs in providing their services.

[56] The Regulations concerned also serve to protect and maintain the integrity of the election process. Any non compliance of or disregard for the regulations, is, therefore, seen in a serious light as the non compliance may endanger the credibility of the country's electoral processes.

FINDING

[57] Accordingly, the CCC makes the following finding:

57.1 YFM is found to have contravened Regulation 6(13) of the Regulations in that on the 1 April 2024 at 8h48, 10h21, 13h34 and 16.31, it broadcast PAs for the Democratic Alliance without tail disclaimers.

57.2 The CCC has taken note of the fifth contravention that took place on 2nd April 2024. However, nothing more needs to be said about it, since this contravention was not part of the Charge Sheet. The existence of the contravention concerned came to light during the course of the proceedings,

and even then, there was no attempt by the Complainant to amend the Charge Sheet.

RECOMMENDATIONS

[58] In terms of section 17E(2) of the CCC makes the following recommendations to the Authority to:

58.1 direct the Licensee to desist from any further contraventions in respect of Regulation 6(13) of the Regulations.

58.2 direct YFM to issue and publish an apology during the first week after this order is issued.

58.2.1 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.

58.2.2 The times of the broadcast must be notified by email to the LCD of ICASA at the latest 48 hours before the broadcast.

58.2.3 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

58.3 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 without adding a statement which clearly identifies Political Advertisements as such.

This is in conflict with the ICASA Election Regulations which require such statements to be made before and after the advertisement. This station further extends its apology to ICASA and to its listeners for having committed

these contraventions”.

58.4 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.

58.5 direct the Licensee to pay a fine in the following amount:

58.5.1 R10000.00 (ten thousand Rands) in respect of the contravention committed on 1 April 2024 at 8h48;

58.5.2 R10000.00 (ten thousand Rands) in respect of the contravention committed on 1 April 2024 at 10h21;

58.5.3 R10000.00 (ten thousand Rands) in respect of the contravention committed on 1 April 2024 at 13h34;

58.5.4 R10000.00 (ten thousand Rands) in respect of the contravention committed on 1 April 2024 at 16:31.

The total amount is R40000.00 (forty thousand Rands)

58.5.5 The amount of R20000 (twenty thousand Rands) of the total fine is suspended for 4 (four) years on condition that there is no similar contravention during the period of suspension.

58.5.6 The remaining R20000 (twenty thousand Rands) must be paid to ICASA within 90 calendar days from when this judgment is issued.

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

TMMasipa

Judge Thokozile Masipa
Chairperson of the CCC

Date: 22 November 2024