

## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 23582/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
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_____	Signature
Date	

In the matter between:

**HOT 1027 FM (PTY) LTD****APPLICANT**

and

**THE INDEPENDENT COMMUNICATIONS  
AUTHORITY OF SOUTH AFRICA (ICASA)**

**FIRST RESPONDENT****THE ACTING CHAIRPERSON OF ICASA****SECOND RESPONDENT**

**THE COMPLAINTS AND COMPLIANCE  
COMMITTEE OF THE INDEPENDENT  
COMMUNICATIONS AUTHORITY  
OF SOUTH AFRICA**

**THIRD RESPONDENT**

**PRIMEDIA (PTY) LTD**

**FOURTH RESPONDENT**

**KAGISO MEDIA (PTY) LTD**

**FIFTH RESPONDENT**

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**JUDGMENT**

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**KUBUSHI, J**

**INTRODUCTION**

[1] The Applicant, HOT 1027 FM (Pty) Ltd, (“HOT 1027”) approached this Court on an urgent basis seeking an order, in the main, to review and set aside the decision taken by the Council of the Independent Communications Authority of South Africa (“the Council”). The decision in question, emanates from the recommendations of the Complaints and Compliance Committee of the Independent Communications Authority of South Africa (“the CCC”). In the said decision, the Council, confirming the recommendations of the CCC, found against HOT 1027 in two complaints that were lodged against it by the Fourth Respondent, Primedia (Pty) Ltd (“Primedia”) and the Fifth Respondent, Kagiso (Pty) Ltd, (“Kagiso”).

[2] The application was brought in two parts, namely, Part A and Part B. In Part A, HOT 1027 sought urgent interim relief to suspend the operation of the said decision pending the outcome of the Review Application. In Part B, HOT 1027 seeks to review and set aside the decision of the Council confirming the recommendations of the CCC. The interim relief sought in Part A of the Notice of Motion was disposed of by an Order of Court granted by agreement between the parties. Part B of the Notice of Motion is now before this Court.

[3] The application is opposed by the First to the Third Respondents (the Independent Communications Authority of South Africa (“ICASA”) Respondents) and Primedia. Kagiso is not taking part in these proceedings. For the sake of convenience, the ICASA Respondents are referred to in the judgment as ICASA.

## **PARTIES**

[4] ICASA is a juristic person established in terms of section 3(1) of the Independent Communications Authority of South Africa Act (“the ICASA Act”).<sup>1</sup> ICASA is the sector regulatory authority for broadcasting and electronic communications services. It is ICASA’s function, amongst others, to monitor the broadcasting sector to ensure compliance with the Electronic Communications Act (“the ECA”),<sup>2</sup> and the underlying statutes.<sup>3</sup> In these proceedings, it is ICASA’s decision in relation to its role in broadcasting that is at issue.

[5] In particular, ICASA monitors the compliance of licensees with their licence conditions. And through the CCC ICASA investigates and hears all matters, complaints and allegations of non-compliance with the ECA or the underlying statutes referred to it by ICASA or received by it.

[6] HOT 1027, Primedia and Kagiso, on the other hand, are licence holders of individual broadcasting services and are competitors in the broadcasting space.

[7] Before considering HOT 1027’s grounds of review, it is proper that the factual matrix be set out in order to give perspective as to why HOT 1027 launched this application. The factual background is set out hereunder.

## **FACTUAL BACKGROUND**

[8] The application has its genesis in two complaints lodged with the CCC by HOT 1027’s competing broadcasters, Primedia and Kagiso. The complaints are said to have come about as follows.

[9] Until recently, an entity known as Classic FM South Africa (Pty) Ltd (“Classic Ltd”) operated a commercial classical music radio station (“the station”) that identified itself as Classic FM or Classic FM 1027 (“Classic FM”). Classic FM was compelled under its licence, at the time, to play classical music only. It served a very niche market consisting largely of white, middle-aged and

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<sup>1</sup> Act No. 13 of 2000.

<sup>2</sup> Act no. 36 of 2005.

<sup>3</sup> Section 4(3)(b) of the ICASA Act.

older males. As the profile of the radio audience changed over time, the taste of music and the listenership changed. And overtime the audience numbers dwindled. With the shrinking audience Classic FM could not attract advertising revenue, it, thus, went into steady decline. Consequently, Classic Ltd, and by extension Classic FM, was placed in business rescue.

[10] Classic Ltd was taken out of business rescue when the business rescue practitioner accepted an offer by a consortium of investors to purchase more than 80% of the shares in Classic Ltd. The consortium purchased the interest in Classic Ltd with the intention to try and turn Classic FM, around. The commercially viable format for Classic Ltd was to jettison classical music altogether from Classic FM, and introduce other types of music.

[11] Applications were then made to ICASA to transfer control of the licence to the new shareholders and to amend the music format. Most significantly, Classic Ltd applied to amend the format obligation in Clause 5.1 of its licence from "*Classical Music*" to "*Old Skool and R&B amongst other genres,*" and sought consequential amendments.

[12] ICASA is said to have taken more than a year to consider the applications. It, eventually, approved transfer of the control of the licence to the new shareholders unconditionally, and also approved the licence format amendment. However, when it issued the Amended Licence, the licence did not contain the format amendments that Classic Ltd had applied for. Instead, ICASA, clearly mindful that classical music should remain on the airwaves, imposed a formatting obligation in Clause 5.1 of the Schedule of the Amended Licence to provide for Classic FM to play "*50% Classical Music and 50% Old Skool and R&B music*". Fundamentally, the Amended Licence did not specify a period of the day applicable for compliance measurement, which is a bone of contention in these proceedings.

[13] In respect of the General Programming Obligations, it was recorded in the licence that "*[t]he Licensee shall broadcast news on a regular basis for a minimum of thirty (30) minutes each day between 05h00 and 23h00*".

[14] In the meanwhile, Classic Ltd applied to the Companies and Intellectual Property Commission (“CIPC”) to change its name to HOT 1027 FM (Pty) Ltd (“HOT 1027”). CIPC gave confirmation of the name change of the legal entity, Classic Ltd, to HOT 1027. The entity having changed its name as such, it, also, wanted to change its name as stated in the licence from Classic Ltd to HOT 1027 and to change the name of its radio station from Classic FM to HOT FM 1027.

[15] It needs to be mentioned that even though the entity had changed its name as reflected above, when Primedia and Kagiso lodged their respective complaints, the name of the licensee was still recorded in the licence in question as Classic Ltd, and the station name was recorded as Classic FM 1027. The complaints were, as a result, brought against Classic Ltd as the licensee, and not against the new entity. Hence, the judgment of the CCC refers to Classic Ltd and not to HOT 1027.

[16] In an attempt to effect the change to the names of the licensee and that of the station, HOT 1027, invoked the provisions of Regulation 14(A) of the Licensing Processes and Procedures Regulations (“the Processes and Procedures Regulations”),<sup>4</sup> and furnished ICASA with Form O, informing it of the name change of Classic Ltd to HOT 1027, and the concomitant adjustment of the trading name, or station name from Classic FM to HOT FM 1027. There was no response received from ICASA, despite the numerous correspondence sent to it by HOT 1027, as well as the teleconference that was held pursuant to the said correspondence.

[17] HOT 1027 having sent Form O to ICASA, started making preparations to change the station name in the public eye and to adopt the new division of the musical minutes, as *per* the Amended Licence. It planned to launch on 1 July 2021 – almost two months after ICASA was told of the purported changes to the names.

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<sup>4</sup> Licensing Processes and Procedures Regulations, 2010, GG 33293, GN R522, 14 June 2010, as amended.

[18] In preparation for its launch, HOT 1027 went on to announce to the public that it was undergoing a major change: not only would the station previously known as Classic FM or Classic 1027 be known as Hot FM 1027, but the radio station would be switching from playing predominantly classical music to being the home of Old Skool and R&B music. In view of the obligation to split the broadcast between classical music and Old Skool and R&B music, HOT 1027 announced that HOT 1027 FM will play the latter genre from 05h00 to 18h59, and classical music from 19h00 in the evening until 04h59 the next morning. The division, according to HOT 1027, ensured that 50% of the "musical minutes" played in a 24-hour period would be classical music.

[19] Upon learning of these announcements, Primedia lodged a complaint with the CCC, on an urgent basis. It contended that Classic FM had changed the station name without applying for the necessary amendment to its licence; that Classic FM had breached its formatting requirements by changing the format of the station to Old Skool and R&B instead of its licensed "50% Classical Music and 50% Old Skool and R&B Music", and that such conduct by Classic FM was harmful to Primedia's business.

[20] Subsequent to Primedia's complaint, Kagiso, also, filed a complaint against Classic Ltd/Classic FM. Kagiso asserted in its complaint that Classic FM was acting, or had acted, in contravention of various terms of its Individual Broadcasting Service Licence (the Amended Classic FM Licence). The complaint, in essence, slightly different from that of Primedia, was that Classic FM had been rebranded to HOT FM 1027 without the approval of ICASA, and the station did not comply with an asserted obligation to play classical music 50% of the time, measured between the hours of 05h00 and 23h00.

[21] After hearing representations from the parties (HOT 1027, Kagiso and Primedia), the CCC prepared a judgment containing its findings, reasons therefore, and recommendations to the Council. In its judgment, the CCC found that Classic FM failed to comply with:

- 21.1 the ECA and regulations made thereunder, as well as, the terms and conditions of its licence in that, it changed the name of the station from Classic FM to Hot FM 1027, without following the prescribed procedures (the Rebranding Finding); and
- 21.2 its format obligations in terms of Clause 5.1 of its Amended Licence in that it played less than 50% of classical music and more than 50% of Old Skool and R&B music during the performance period (the Format Finding).

[22] The CCC made the following recommendations to the Council, that the Council directs Classic Ltd to:

- 22.1 desist from any further contravention of the ECA, the regulations and its licence terms and conditions relating to the change of the name and the format obligations;
- 22.2 apply for a licence amendment "*in the prescribed form with a view to changing the name of the station*"; and
- 22.3 pay a fine in the amount of R25 000, R10 000 of which would be "*payable immediately*", and the balance "*suspended for 24 months on condition that there is no repeated non-compliance during the period of suspension*".

[23] The Council met and adopted the recommendations of the CCC as they were. Pursuant to such adoption, the Council issued the decision as *per* the recommendations of the CCC. It, as such, directed Classic Ltd to discontinue its contravention of the licence, the ECA and regulations. It directed further that Classic Ltd apply to amend its licence in order to change the station name. Finally, ICASA directed that Classic Ltd pay a fine of R25,000, R10,000 of which was suspended for 24 months on condition that there is no repeated non-compliance during the period of suspension. It is this decision that is the subject matter of these proceedings. HOT 1027 was made aware of the decision in a letter to it from the Council dated 12 April 2022. Aggrieved by this

decision, HOT 1027 approached this Court for relief as referred to paragraph [2] of this judgment.

[24] HOT 1027's Grounds of Review are dealt with, hereunder.

### **APPLICANT'S GROUNDS OF REVIEW**

[25] The review is brought under the Promotion of Administrative Justice Act ("PAJA"),<sup>5</sup> alternatively, the principle of legality entrenched in section 1(c) of the Constitution. It is HOT 1027's submission that the decision is reviewable at least because it: was materially influenced by an error of law;<sup>6</sup> was taken because irrelevant considerations were taken into account and/or relevant considerations were not considered;<sup>7</sup> and, it is not rationally connected to the information before, and the reasons given for it, by the decision-maker(s).<sup>8</sup>

[26] HOT 1027 admits both the rebranding of its station and the fact that it broadcasts classical music between 19h00 and 04h59. It, however, submits, in its papers, that there was no basis in law for ICASA to conclude that:

- 26.1 it had failed to comply with a prescribed procedure in respect of the station name change, in circumstances where no such procedure is prescribed; and
- 26.2 it had acted in non-compliance of its obligation to effect the 50/50 split between the different musical genres, since the obligation was not linked to a time period covering less than 24 hours, whereas ICASA assessed compliance by reference to the more limited performance period.

[27] The ultimate contention by HOT 1027 is that both the Rebranding Finding and the Format Finding of the Council are, as a result, materially influenced by an error of law, and that the decision was ultimately taken

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<sup>5</sup> Act No. 3 of 2000.

<sup>6</sup> Section 6(2)(d) of PAJA.

<sup>7</sup> Section 6(2)(e)(iii) of PAJA.

<sup>8</sup> Section 6(2)(f)(ii)(cc) and 6(2)(f)(ii)(dd) of PAJA.



because irrelevant considerations were brought into account whilst relevant considerations were left out of account. For these reasons, HOT 1027 concluded that there is no rational connection between the information that served before the decision-maker(s) and the outcome of the complaints.

[28] A further ground of review that does not fall within the purview of the findings of the Council is that the Council, when it came to the decision it did, it did not exercise its duties properly.

[29] It is, as a result, submitted on behalf of HOT 1027 that, when all the above grounds of review are properly considered, they lead to a conclusion that the decision of the Council, falls to be reviewed and set aside.

#### **ISSUES FOR CONSIDERATION BY THIS COURT**

[30] In the joint Practice Note uploaded on Caselines, there were numerous issues agreed to by the parties that they wanted this Court to determine. However, in their oral arguments in Court, it became apparent that only three main issues were required to be determined. The three issues are:

- 30.1 In relation to the Rebranding Finding, is the issue of the requirements and procedures for effecting a station name change under the applicable legislation. Underlying this issue is whether a station name is a condition of a broadcasting licence;
- 30.2 In relation to the Format Finding, is the issue of the requirements and procedures for effecting the 50/50 split between the musical genres. Underlying this issue is whether HOT 1027 complied with its licence conditions in relation to the split between the musical genres; and
- 30.3 In relation to the duties of the Council when considering the recommendations of the CCC, the issue is whether the Council duly adopted the recommendations of the CCC.

[31] Before considering the abovementioned issues, this Court will first, set out the legislative framework, relevant to the issues in this matter.

## LEGISLATIVE FRAMEWORK

[32] ICASA is a creature of statute, endowed with powers and duties under two principal statutes, the ICASA Act and the ECA.

[33] In the first place, the ECA authorises ICASA to grant licences and to prescribe standard terms and conditions for licences it grants. The source of the authority to grant licences, such as that granted to Classic FM in the amended form, derives from the provisions of section 5(1) of the ECA,<sup>9</sup> which empowers ICASA to, amongst others, grant individual licences. Whereas, the authority to prescribe standard terms and conditions to be applied to such individual licences, is sourced from the terms of section 8(1) of the ECA.<sup>10</sup>

[34] Subsection 8(1) of the ECA, even though is prescriptive in nature, it is, however, non-exhaustive. It does not limit the powers of ICASA in determining the standard terms and conditions because under subsection 8(2) of the ECA, ICASA is entitled to determine any other terms and conditions even those not included in the ECA, itself. This, ICASA has determined in terms of regulations, that is, The Standard Terms and Conditions for Individual Broadcasting Services Regulations (“the Standard Terms Regulations”).<sup>11</sup> ICASA may, also, in accordance with the said section 8(1) of the ECA, vary the standard terms and conditions of a licence in keeping with the different types of individual licences, granted.

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<sup>9</sup> **“5 Licensing**

(1) The Authority may, in accordance with this Chapter and the regulations prescribed hereunder, grant individual and class licences.”

<sup>10</sup> **“8 Terms and conditions for licences**

(1) The Authority must prescribe standard terms and conditions to be applied to individual licences and class licences. The terms and conditions may vary according to the different types of individual licences and, according to different types of class licences.”

<sup>11</sup> Standard Terms and Conditions for Individual Broadcasting Services, 2010, GG 33296, GN R523, 14 June 2010, as amended.

[35] Furthermore, the ECA empowers ICASA to make Regulations. The empowering provisions are embodied in sections 4(1)<sup>12</sup> and 5(7)(a)(i)<sup>13</sup> of the ECA. ICASA is in terms of section 4(1) of the ECA empowered to make regulations with regard to any matter which in terms of the ECA or the related legislation,<sup>14</sup> must or may be prescribed, governed or determined by regulation. Whereas section 5(7)(a)(i) of the ECA, authorises ICASA to prescribe regulations setting out processes and procedures for applying for or registering, amending, transferring and renewing, amongst others, licences specified in subsections 5(2)(b) of the ERA.<sup>15</sup>

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<sup>12</sup> **“4 Regulations by Authority**

(1) The Authority may make regulations with regard to any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation. Without derogating from the generality of this subsection, the Authority may make regulations with regard to-

- (a) any technical matter necessary or expedient for the regulation of the services identified in Chapter 3;
- (b) any matter of procedure or form which may be necessary or expedient to prescribe for the purposes of this Act or the related legislation;
- (c) the payment to the Authority of charges and fees in respect of-
  - (i) the supply by the Authority of facilities for the inspection, examination or copying of material under the control of the Authority;
  - (ii) the transcription of material from one medium to another;
  - (iii) the supply of copies, transcripts and reproductions in whatsoever form and the certification of copies;
  - (iv) the granting of licences in terms of this Act or the related legislation;
  - (v) applications for and the grant, amendment, renewal, transfer or disposal of licences or any interest in a licence in terms of this Act or the related legislation;
- (d) generally, the control of the radio frequency spectrum, radio activities and the use of radio apparatus.”

<sup>13</sup> **“5 Licensing**

...

(7) The Authority must prescribe regulations-

- (a) setting out-
  - (i) the process and procedures for applying for or registering, amending, transferring and renewing one or more of the licences specified in subsections (2) and (4);”

<sup>14</sup> In terms of the definition section of the ECA **“related legislation”** means the Broadcasting Act and the Independent Communications Authority of South Africa Act and any regulations, determinations and guidelines made in terms of such legislation and not specifically repealed by this Act.

<sup>15</sup> **“5 Licensing**

(2) The Authority [ICASA] may, upon application and due consideration in the prescribed manner, grant individual licences for the following:

...

- (b) broadcasting services;”

[36] In accordance with sections 4(1) and 5(7)(a)(i) of the ECA, ICASA has, as such, issued numerous regulations, which include amongst others: The ICASA South African Music Content Regulations, 2016 (“the Music Regulations”);<sup>16</sup> and, the Processes and Procedures Regulations.<sup>17</sup>

[37] The relevant provisions of the mentioned acts and regulations will be dealt with, more fully hereunder. What follows, immediately, hereunder is the application of the law to the facts in the matter.

### **THE APPLICATION OF THE LAW TO THE FACTS**

[38] The facts in these proceedings, are largely common cause. The dispute lies in how the terms and conditions of the relevant broadcasting licence, the ECA and the regulations should be interpreted.

[39] It is argued on behalf of HOT 1027 that ICASA and Primedia’s interpretation of the above prescripts, is not correct. Whilst on behalf of ICASA and Primedia it is submitted that HOT 1027’s approach to the law is incorrect, would lead to absurdity and would leave the statutory scheme inoperable. It would, further, undermine the procedural rights of other licensees who are impacted by HOT 1027's conduct.

[40] The controversy lies there in that, as regards, the rebranding issue, HOT 1027 interpret the ECA and regulations thereto, to mean that the name of a station is just objective information stated in the licence, and can simply be changed by notification to ICASA in terms of Regulation 14(A) of the Processes and Procedures Regulations, and Form O, thereof (“Regulation 14(A)”). Whilst, in terms of the format issue, HOT 1027 interpret the provisions of the ECA and the regulations thereto, to mean that the format of the “music minutes” should be divided by taking the 24-hours of the broadcasting period, into consideration, as envisaged in Regulation 6(1) of the Standard Terms Regulations.<sup>18</sup>

<sup>16</sup> GG 39844, Vol. 609, GN 344, 23 March 2016.

<sup>17</sup> *Idem* n 4.

<sup>18</sup> *Idem* n 11, “**6 Hours of Operations**

(1) A Licensee must provide broadcast services for twenty-four (24) hours per day unless the Authority [ICASA] has approved a shorter schedule of daily broadcast operations as specified in the Schedule.”

[41] Conversely, ICASA and Primedia's interpretation is to the effect that, in relation to the rebranding issue, the name of the station is a term and condition of a licence and can only be changed by application as envisaged in the provisions of sections 8, 9 and 10 of the ECA read with Regulation 9 of the Processes and Procedures Regulations.<sup>19</sup> And, in respect of the format issue, the "music minutes" must be measured for compliance by means of the performance period as defined in Regulation 1 of the Music Regulations.<sup>20</sup>

[42] As is trite, it is, therefore, the duty of this Court to determine the correct interpretation of the said prescripts, and in so doing, determine the correct procedure in relation to the name change of a station and the correct formatting of the "music minutes".

[43] As a point of departure, this Court takes cognizance of the rule of law principles raised by counsel for HOT 1027 and counsel for ICASA, in oral argument in Court. The arguments raise fundamental principles of the rule of law, which are instructive, and find application in the circumstances of this application.

[44] The argument of HOT 1027's counsel is based on the predictability, reliability and certainty of the law that is intrinsic in the rule of law. In this sense, counsel emphasised that the law must be clear, must be publicised and stable, and be applied evenly. The submission of counsel in this regard was to emphasise HOT 1027's argument that the reasons and findings in the CCC judgment and the decision of the Council, are all premised on the imposition of obligations upon HOT 1027, that are not found anywhere in the express

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<sup>19</sup> **"9. Application to amend an individual Licence** (section 10 of the Act)  
An application to amend a licence must be in the format as set out in Form C and it must be accompanied by the applicable fee."

<sup>20</sup> *Idem* n 17. **"1. Definitions**

In these regulations any word to which a meaning has been assigned to it in the Independent Communications Authority of South Africa Act (Act no. 13 of 2000) and the underlying statutes, will have that meaning, unless the context indicates otherwise-

**"Performance Period"** means the period of 126 hours in one week measured between the hours 05h00 and 23h00 each day."

statutory or regulatory provisions or in the licence itself. The contention is that reliance is placed on a variety of outside instruments to import duties that are not expressly provided for in respect of the duties on HOT 1027, as regards, the process to be followed to effect the station name change and in respect of its duties to divide “musical minutes” in accordance with its obligations under the licence.

[45] Counsel for ICASA’s argument is, on the other hand, based on the fact that the rule of law does not allow people to take the law into their own hands and resort to self-help. This is an indication that HOT 1027 took the law into its own hands when implementing the station’s name change and dividing the musical minutes.

[46] Of importance is that the issue that this Court must resolve, in relation to the HOT 1027’s Grounds of Review, is the interpretative understanding of the legislative provisions applicable to the change of name of a station and the division of the “music minutes”.

[47] It is trite that judicial precedent now establishes that a so-called unitary approach to the interpretation of documents, whether they be contracts, statutes or other written instruments, must be followed. Account must, at all times when interpreting the said instruments, be taken of the text, context and purpose. This is the state of law as was made clear in the *Endumeni* judgment<sup>21</sup> by the Supreme Court of Appeal, and restated by the Constitutional Court in cases like *Bato Star*.<sup>22</sup> In *Chisuse*,<sup>23</sup> the Constitutional Court explained that the purposive or contextual interpretation of legislation must still remain faithful to the literal wording of the statute. That Court, in particular, stated that Courts must not lose sight of the fact that the construction given to legislation must still be

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<sup>21</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA); [2012] ZASCA 13.

<sup>22</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687; [2004] ZACC 15.

<sup>23</sup> *Chisuse and Others v Director General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC); [2020] ZACC 20, para [52].

reasonable. And, cautioned that strained reading of texts, no matter how well-intentioned, can lead to dissonance.<sup>24</sup>

[48] The Constitutional Court in that judgment, quoting the judgment in *Abahlali Basemjondolo Movement SA*,<sup>25</sup> stated emphatically so, that:

“[124] The rule of law is a founding value of our constitutional democracy. Its content has been explained in a long line of cases. It requires the law must, on its face, be clear and ascertainable.

...

[125] There can be no doubt that the over-expansive interpretation of section 16 is not only strained, but also offends the rule of law requirement that the law must be clear and ascertainable. In any event, separation of power considerations require that courts should not embark upon an interpretative exercise which would in effect re-write the text under consideration. Such an exercise amounts to usurping the legislative function through interpretation.”

[49] In light of the aforementioned backdrop, the issues sought to be determined in this matter are dealt with hereunder in turn.

### **The Rebranding Finding**

[50] In terms of its Rebranding Finding, as adopted by the Council, the CCC made a finding that Classic Ltd failed to comply with the ECA and regulations made thereunder, as well as the terms and conditions of its licence in that, it changed the name of the station from Classic FM 1027 to HOT FM 1027 without following the prescribed procedures.

[51] HOT 1027 is challenging this finding and submits in its written submissions that the CCC’s reasoning on the Rebranding Finding, adopted by the Council, exhibits two material errors of law in that:

51.1 it asserts that the ECA, the Standard Terms Regulations and the Amended Licence treat the name of the station and the licensee as separate concepts; and

<sup>24</sup> *Idem* n 24, para [54].

<sup>25</sup> *Abahlali Basemjondolo Movement SA v Premier of The Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC); 2009 JDR 1027 (CC); [2009] ZACC 31 (CC), paras 124 -125.

51.2 it bases its decision on the notion that the station name is a condition of the licence that can be changed only through an application to amend the terms and condition of a licence.

[52] The two purported material errors of law are dealt with hereunder, in turn.

**The notion that the ECA, the Standard Terms Regulations and the Amended Licence treat the name of the station and the name of the licensee as separate concepts**

[53] HOT 1027, in its papers, contends that the ECA does not treat the name of the station and the name of the licensee as separate concepts, as such, no reliance can be placed on the Standard Terms Regulations, to argue that the statute envisages such a distinction.

[54] This, however, is a different argument, because HOT 1027's counsel conceded, on a question asked by the Court, that the name of the licensee and that of the station are two separate concepts. This concession by counsel was correct, for in denying that the name of the licensee and that of the station are two different concepts, HOT 1027 conflated the notion of a station and a licensee when they are in fact separate concepts, as can be discerned in the ECA, the Standard Terms Regulations and the licence.

[55] In accepting the distinction, counsel, however, failed to explore the legal consequences of that difference. As argued, correctly so, by ICASA's counsel, the difference is not a mere distinction as a matter of fact or wish. It is a distinction based on a clear regulatory environment in light of the controlling provisions of the ECA and the regulations regulating the industry. And, HOT 1027's counsel having accepted that there is such a distinction, it stands to reason that she must also accept, on behalf of HOT 1027, the consequences of that distinction. These consequences will become clear, later in the judgment.

[56] The second purported material error of law, follows hereunder.



## **The Notion that the Station Name is not a Condition of the Amended Licence**

### **Submission by HOT 1027**

[57] It is HOT 1027's submission that the rebranding finding stands to be reviewed and set aside since, neither the legislature in providing for conditions to be imposed, nor ICASA in issuing regulations regarding terms and conditions, provides for the station name to constitute a condition of the licence. This, HOT 1027 submits is so because, the ECA does not envisage the name of a station as a condition of a licence, nor does the Standard Terms Regulations treat the name of the station as a condition of a licence.

[58] In addition, HOT 1027 submits that even the licence itself, does not set the name of the station as a condition of the licence. This, HOT 1027 argues is so, because the name in the licence, is merely identified at the top of the Schedule with no obligatory language used, the name simply identifies what the name of the station is, in contradistinction to the remainder of the licence where obligatory language is used.

[59] According to HOT 1027, the only obligation regarding the station name is required in terms of the General Obligations of Licensees, Regulation 11(3)<sup>26</sup> thereof, which is that a station must clearly identify itself at intervals of not more than thirty (30) minutes. However, as HOT 1027 argues, the requirement is not that the station identify itself in accordance with a particular name or the name that is in the licence. HOT 1027, argues, further, that, if the name of the station is treated as an obligation of the licence, there can be no name change. That is, if the name of the station is a condition of the licence or is treated as a condition of the licence, or it is read together with the regulations to mean that it is a condition of the licence, then, when the identification announcement is made, the name used must be exactly as in the licence. Thus, HOT 1027 contends that the regulatory scheme interpreted in the context of the practical considerations lead to the conclusion that the station name is not an obligation

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<sup>26</sup> *Idem* n 11.

of the licence and can be changed in accordance with the notice procedure set out in Regulation 14(A) of the Processes and Procedure Regulations.<sup>27</sup>

[60] Besides, so HOT 1027 argues, no other regulatory process could have been followed to change the name of the station, because none is prescribed. Neither the relevant legislation nor the regulations made thereunder, prescribe any formalities for a change of the name by which a licence holder identifies itself on air. What is prescribed, are the formalities for notification of a change of ownership and/or any change of name of a licensee. The change of a station name, accordingly, did not require an application for an amendment to the terms and conditions of the licence. ICASA was properly notified of the name change in accordance with Regulation 14(A) and Form O and it is adequate for purposes of the station name change, so it is argued.

#### **Submission by ICASA**

[61] In opposing the argument by HOT 1027, ICASA's counsel submits that there is a factual creep into HOT 1027's case justifying the grounds of review that are mainly based on material errors of law. The contention by counsel is that HOT 1027's suggestion that the name of a station is not a condition of a licence, but an objective fact recorded in the licence, is fundamentally wrong because, according to counsel, the name of a station recorded in the licence goes beyond a mere matter of objective recording, it is a term and condition of the licence.

[62] In reinforcing his argument, ICASA's counsel referred to the common cause facts between the parties that, firstly, in sending Form O to ICASA, HOT 1027 was requesting ICASA to consent to the name change of the station as given in the notice. This, according to counsel, is so because HOT 1027 later on sent a letter to ICASA seeking ICASA to provide it with a letter of confirmation of the name change. Counsel submits that it would have been odd that HOT 1027 would send such a letter to ICASA, when ICASA was not required to do anything about the name change.

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<sup>27</sup> *Idem* n 4.

[63] Secondly, that the consequences of the application for the amendment of the shift and change of the music genre, as well as, the application of the transfer of the licence to the new proprietor that did not include the change of name of the station, was that the licence continued to identify the station, in Clause 1 of the Schedule, as Classic FM 1027. Thus, on the face of the licence itself, the obligation on the part of Classic FM was to identify itself through the name recorded in the licence.

[64] Thirdly, that, in the context of the highly competitive market under which HOT 1027 operates, there is, as counsel argues, an obligation on HOT 1027, in terms of Regulation 11(3) of the Standard Terms Regulations, which must be fulfilled through the terms and conditions of the licence, and, those terms and conditions include the name of the station as specified in the licence.

[65] Lastly, that, the reference by HOT 1027 in its Annual Report as of March 2020, that the name of the station shall be as in Clause 1 of the Schedule to the licence, is in its own language an indication given by HOT 1027 that the station name is not merely a matter of objective fact, but, is a name as prescribed in the licence, and is, thus, a term and condition of the licence.

### **Submission by Primedia**

[66] Primedia, on the other hand, supports ICASA's decision which is based on the notion that the station name is a condition of the licence that can be changed only through an application to amend the terms and conditions of a licence.

[67] It argues, further, that it is a rational and necessary incident of the legislative scheme that when ICASA licenses a licensee to broadcast a sound broadcasting service, it authorises the licensee to broadcast a named station. ICASA's licensing powers must, therefore, be interpreted to include those powers that are reasonably necessary or incidental to the powers it is expressly granted in the ECA. According to Primedia, it follows that the name of a sound

broadcasting service/station is an express term of an individual sound broadcasting licence, and HOT 1027's licence demonstrates this, in that:

67.1 the title of the licence says that the licensee (Classic Ltd) is licensed by ICASA "*for the provision of a commercial sound broadcasting service to be known as Classic FM 1027.*"

67.2 the name of the station is, again, explicitly named in Clause 1 of the Schedule to the licence.

[68] Primedia submits that HOT 1027's interpretation that the only requirement that rests on a licensee when changing a station name is to notify ICASA of the change of name of the licensee in accordance with Regulation 14(A)(2)(a) of the Processes and Procedures Regulations, is misconceived. It illustrates this by referring to licensees that operate multiple stations, where each of the multiple stations operated by a single licensee has a separate obligation to identify itself by the licensed station name every thirty (30) minutes. Primedia contends that Regulation 14(A)(2)(a) refers specifically to the licensee.

[69] It argues further that HOT 1027's interpretation if accepted, will result in absurdity as nothing in the statutory scheme would prevent another station changing its name and referring to itself every thirty (30) minutes in that changed name. There would as such, be no opportunity for interested and affected parties to make representation, and no power on the part of ICASA to approve or reject the proposed change.

[70] The ECA and the regulations do not expressly require the amendment of specific terms and conditions found in licences but impose a general obligation to comply with the terms and conditions of the licence, and to follow the prescribed procedure to amend those terms and conditions, so the argument goes.

## **Discussion**

[71] Whether the station name is a term and condition of a licence turns on the interpretation of the applicable law and the licence. Having said so, it is this

Court's view that if it is found that the station name is a term and condition of the licence, the process to be followed would be that of an application procedure, as contended for by ICASA and Primedia; and if it is found that the station name is merely objective information, then, the procedure to follow is that of notification as argued for by HOT 1027.

[72] For the reasons that follow hereunder, it is this Court's view that the station name is, as argued by ICASA and Primedia, a term of the licence and can never have been intended to be objective information stated in the licence.

[73] It is the view of this Court that the name clause in the licence, as correctly submitted by Primedia, is tied to specific legal obligations set out in the ECA and its regulations. And, as pointed out, correctly so as well, by Primedia in argument, section 5(12) of the ECA and Regulation 11(3) of the Standard Terms Regulations, when read together with Clause 1 of the licence, provides the relevant legal obligations of a licensee.

[74] Section 5(12) of the ECA provides that “[a] licence confers on the holder the privileges and subjects him or her to the obligations provided for in this Act and specified in the licence.” That is to say, the conditions stipulated in a broadcasting licence create privileges, as well as, statutory obligations for licensees. On the other hand, the provisions of Regulation 11(3) of the Standard Terms Regulations, which stipulate that “[a] station must clearly identify itself at intervals of not more than thirty (30) minutes”, are a standard term of the licence, which the licensee is obliged to comply with.

[75] Therefore, section 5(12) of the ECA and Regulation 11(3) of the Standard Terms Regulations when read together with Clause 1 of the licence, enjoined Classic FM 1027 - the sound broadcasting service/station licensed then to Classic Ltd – to identify itself as Classic FM 1027, at regular intervals of thirty (30) minutes. As such, until the station name is changed, the station has to continue identifying itself as Classic FM at intervals of thirty (30) minutes.

[76] Moreover, the effect of failing to amend the station name when the application for the amendment of the music genre or the application of the transfer of licence to the new proprietor, was made, meant that, on the face of the licence, the licence continued to identify the name of the station, in Clause 1 of the Schedule, as Classic FM 1027. The legal consequences of which was that Classic FM remained obligated to identify itself through the name recorded in the licence. As *per* the analogy used by ICASA's counsel during argument, it would, indeed, be odd that a member of the public would go to the records of ICASA, and find that the name of the station is recorded as Classic FM 1027, and yet, the station operates publicly under a different name. It is, therefore quite apparent that on the face of the licence itself, the obligation on the part of Classic FM was to identify itself through the name recorded in the licence.

[77] Additionally, the argument by HOT 1027 that the licence does not set the name of the station as a condition of the licence, is not sustainable. By the mere reading of the licence itself, it is apparent that the title of the licence says that the licensee (Classic Ltd) is licensed by ICASA "*for the provision of a commercial sound broadcasting service to be known as Classic FM 1027*", and the name of the station is, again, explicitly named in Clause 1 of the Schedule to the licence. It is in that sense that this Court is of the view that if the station name were simply a trading name of the licensee, as HOT 1027 contends, there would be no need for the licence to describe - as it does - the licensee distinctly from the station name. This, to this Court, is a clear indication that the name of the station is an express term of the licence conditions.

[78] This Court is not in agreement with the argument by HOT 1027 that the ECA did not envisage the name of a radio station as a term and condition of a licence. This, HOT 1027 contends is so because the non-exhaustive list of conditions envisaged in section 8(2) of the ECA, expressed in general terms, makes no reference to "station name", and that none of the classes of conditions envisaged in section 8(2) include conditions that appear to have any bearing on a station name. It is, this Court's view that the non-exhaustive list of conditions envisaged in section 8(2) of the ECA, entitles ICASA to determine

any other term and condition of the licence even those not included in the ECA. The fact that the station name is not referred to therein does not mean that it has been excluded.

[79] Furthermore, it is of importance to note that Regulation 14(A) cannot be used to change a station name. There is, actually, nothing in the provisions of Regulation 14(A) and the content or format of Form O, which indicates that once Form O is given, it entitles the licensee to proceed with the name change.

[80] Regulation 14(A), which HOT 1027 used in an attempt to effect the name change, is titled notice of change of information in respect of an individual licence. Sub-regulation (1) thereof provides that a notice of change of information in a licence must be submitted in Form O. Sub-regulation (2) thereof gives the content of the information that may be changed in terms of regulation 14(A), namely, the name or contact details of the licensee changes; or the nature of the service/s provided in terms of the licence change; or shareholding.<sup>28</sup> Form O, also, titled notice of change of information in respect of an individual licence, states the information required to be changed as that of a licensee and not the name of a station. From the aforesaid, it can be seen that the licence terms and conditions, which include the name station, fall outside Regulation 14(A) and must, therefore, be amended in accordance with the procedure prescribed in section 10(2) read with section 9(2) to (6) of the ECA.

[81] Therefore, the submission by HOT 1027 that the regulatory scheme interpreted in the context of the practical considerations lead to the conclusion that the station name is not an obligation of the licence and can be changed in accordance with the notice procedure set out in Regulation 14(A), falls to be dismissed.

[82] Furthermore, HOT 1027's interpretation that the only requirement that rests on a licensee when changing a station name is to notify ICASA of the change of name of the licensee in accordance with Regulation 14(A)(2)(a) of the Processes and Procedures Regulations, is misconceived. This is so

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<sup>28</sup> Regulation 14(A)(2).

because in the context of the highly competitive market under which HOT 1027 operates, there ought to be an obligation on HOT 1027, to inform any interested or affected party of any intended change of the name of the station, to provide them with the opportunity to either make representations and/or where necessary object to the name change. ICASA must also be given the opportunity to exercise its powers in terms of the ECA to approve or reject the proposed name change.

[83] The interpretation given by HOT 1027 in its argument that the requirement in Regulation 11(3) of the General Obligations of Licensees,<sup>29</sup> calling upon a station to identify itself at intervals of not more than thirty (30) minutes, does not oblige the station to identify itself in accordance with a particular name or the name that is in the licence, is without substance. Primedia, in response to this contention, gave a useful illustration in referring to licensees that operate multiple stations, like SABC, Primedia, Kagiso and others. Each of these multiple stations operated by a single licensee has a separate obligation to identify itself, as a station, at intervals of not more than thirty (30) minutes, by reference to the station name recorded in its licence. It is indeed so that if HOT 1027's interpretation is to be accepted, it will result in absurdity, as nothing in the statutory scheme would prevent another station changing its name and referring to itself every thirty (30) minutes in that changed name.

[84] Fundamentally, it is trite that subordinate legislation, as is the case in this matter, cannot be used to interpret primary legislation. This has been made quite clear by the Constitutional Court in more than one of its judgments. It is quite obvious that reliance cannot be placed on Regulation 14(A) and Form O in order to interpret the provisions of sections 8 to 10 of the ECA, since Regulation 14(A) and Form O are the products of the controlling provisions of section 8 to 10 of the ECA. As such, an attempt by HOT 1027 to rely on Form O in order to unilaterally change its station name does not survive the clear jurisprudential starting point that regulations cannot be used to interpret primary legislation.

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<sup>29</sup> *Idem* n 11.



Hence, HOT 1027 could not rely on having furnished ICASA with Form O to unilaterally change the name of its station.

[85] HOT 1027's proposition that the ECA and the regulations do not expressly provide for an application to amend a station name, and that no other regulatory process could have been followed to change the name of the station, because none is prescribed, cannot be sustained in the face of the general obligation of a licensee to comply with the terms and conditions of the licence (the station name is part of that) and to follow the prescribed procedure to amend those terms and conditions.

[86] It cannot be correct, as HOT 1027 wants to suggest, that the licence does not set the name of the station as a condition of the licence. That the name of the station is set out as a condition of the licence is plainly demonstrated by the fact that, the name of the station is explicitly stated together with other terms in the licence. The title of the licence mentions that the licensee (in this case Classic Ltd) is licensed by ICASA "*for the provision of a commercial sound broadcasting service to be known as Classic FM 1027*". The name of the station is, again, named in Clause 1 of the Schedule to the licence. The station name as such forms part and parcel of the terms and conditions of the licence.

[87] This Court having made a finding that the name of a station is a term of the licence, it stands to reason that the procedure that must be followed in changing the station name is that contained in sections 8, 9 and 10 of the ECA read with Regulation 9 of the Processes and Procedures Regulations, that is, the application procedure.

[88] This Court, therefore, holds that the CCC by extension the Council's determination, on this point, was not influenced by any material error of law.

### **The Format Finding**

[89] In accordance with its format finding, the Council found that Classic Ltd failed to comply with its format obligations in terms of Clause 5.1 of its Amended

Licence in that it played less than 50% of Classical Music and more than 50% of Old Skool and R&B Music during the performance period" (the Format Finding).

### **Submission by HOT 1027**

[90] The submission by HOT 1027 on this issue is that the CCC's judgment ignores the entirety of the legal argument presented at the hearing in relation to the interpretation of the clause in the station's licence that relates to format, namely Clause 5.1, having regard to the typical licence conditions imposed by ICASA on the licensee, and having regard to the argument presented on the only use of the term "performance period" in the regulations. The argument is that instead, the CCC states in the judgement, that "*[w]hether or not Classic breached its obligations would depend on what measurement the CCC decided to adopt*", which according to HOT 1027, is plainly wrong.

[91] HOT 1027 argues that the CCC adopted the performance period as it pleased, as is obvious from the statement it made in paragraph 50.2 of its judgment, which says:

"The performance period in terms of which ICASA measures the compliance of licensees with their programme obligations is during the period of 05h00 to 23h00 and not on a 24-hour period as suggested by Classic. It follows, therefore, that where the amended licence requires Classic FM to play 50% Classical Music and 50% Old Skool and R&B Music this is measured over the 18-hour period of 05h00 to 23h00. These are the hours when most listeners would be awake."

[92] It is submitted further that the material error in the Format Finding lies therein that the CCC, and ultimately ICASA, read in an obligation not found in the Amended Licence. That "reading in" is, according to HOT 1027, motivated by reference to a "practice" of limiting measurement of compliance to specific hours, as found in the Music Regulations and by placing reliance on a measurement limitation in an unrelated term of the Amended Licence. No reliance could be placed on these irrelevant considerations, and to have done so constitutes a material error of law, so it is argued.

[93] HOT 1027's further submission is that on the plain reading of the licence obligation in question, there is no time period or "performance period" obligation linked to the division of the music genres; and, the licence does not provide for a "shorter schedule of daily broadcast operations" as contemplated in Regulation 6(1) of the Standard Terms Regulations, which states:

"(1) A Licensee must provide broadcast services for twenty-four (24) hours per day unless the Authority has approved a shorter schedule of daily broadcast operations as specified in the Schedule".

The contention is that, in fact, the condition in the licence does not specify how the division of the musical genres ought to be measured and ICASA, as well, did not indicate in the decision how the division should have been allocated.

[94] The argument is that the absence of reference to a specific time period must be compared to the conditions of the Amended Licence in respect of the obligation to broadcast news, which is expressed specifically by reference to the hours between 05h00 and 23h00. In other words, in the same licence, where ICASA required compliance by reference to a specific time period, it expressly regulated the hours of measurement in the Amended Licence.

[95] HOT 1027 argues, consequently, that based on a reasonable interpretation of the condition, the station divided the total percentage of "musical minutes" (excluding weather, news, interviews, advertisements and entertainment by DJs) over the 24-hour period that it is required to broadcast, and it, thus, plays classical music from 19h00 to 04h59 and Old Skool and R&B music from 05h00 to 18h59. In the result, HOT 1027, contends that the station provides 50% classical music and 50% Old Skool and R&B music. The selected time division, according to HOT 1027, is consistent with the rationale for the "format change" provided to ICASA and accepted in its reasoning.

[96] Furthermore, although HOT 1027 admits that the station is not broadcasting classical music between 05h00 and 23h00, it, however, contends that this fact did not provide the basis for a complaint or an adverse finding against the station. According to HOT 1027, the Amended Licence issued to the

station does not link the 50/50 requirement to the performance period because the performance period cannot apply by operation of law in the absence of such a requirement in the licence, since such performance period is prescribed only in the Music Regulations, and concerns the calculation of local content (South African Music).<sup>30</sup>

[97] There is, accordingly, no basis in law or fact for any submission that the licensing obligation in respect of the 50/50 split is linked to any particular time of the day and the CCC's attempt to create one is irrational. The Format Finding must, therefore, be set aside, so it is argued.

### **Submission by ICASA**

[98] It is conceded on behalf of ICASA that the licence is silent on the period over which the obligation should be calculated. ICASA in its submission confirms that the licence does not state whether the 50% split is per day, per week, per month, per year, or some portion of the day. So, the argument is that, on its face, the licence is ambiguous, because read literally, Classic 1027 FM could comply with its conditions in Clause 5.1 of the licence by only playing classical music either on Saturdays to Tuesdays, and then play Old Skool and R&B music over the weekends, or on any other day, or it could play it from July to December, but not from January to June. The licence as it stands simply does not make any sense. A proper period over which to calculate is required. The difficulty is that the clause does not exactly state what the period is, so texturally it is ambiguous.

[99] ICASA's further submission is that HOT 1027's argument that the "music minutes" should be divided by using the 24-hour period would have something in it if the text of the licence said the licensee shall provide 50% classical music and 50% Old Skool and R&B music over every 24-hour period. If that was what the licence said, then it would be acceptable that context cannot be used to undermine those words. But, the licence does not say so. It also does not state

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<sup>30</sup> *Idem* n 17.

that the performance period should be used. It is effectively silent. It creates ambiguity. So the text does not resolve the question, so ICASA argues.

[100] So, in ICASA's argument, context and purpose will then have to be looked at. As regards context, ICASA contends that *Endumeni*<sup>31</sup> refers to the material known to those responsible for the production of the license. ICASA contends that in this matter, the material known is: that the licence expressly uses certain hours regarding the broadcast of news – which is 05h00 to 23h00; in ICASA's reasons when approving the format amendment there is a specific reference that the listenership has to be catered for on the traditional platform; the music regulations provides that the performance period is between 05h00 and 23h00, which is the same as the news period; and the COVID-19 National Disaster Regulations speak about a shortened performance period of between 07h00 and 21h00. Thus, according to ICASA the whole thrust is that the focus is always on daylight hours, either between 05h00 in the morning and 23h00 at night when most people are awake, or between 07h00 and 21h00, that is, the shortened performance period. This is the material that was known to ICASA, so it is argued.

[101] According to ICASA, when there is a provision which does not specify whether compliance should be measured by the performance period or per day, per week, per month per year, the natural understanding is that the context, which is provided by what is known by the material known to everyone in the industry, will resolve the problem. In this case that is during the performance period.

[102] In addition, ICASA submits that the above is the contextual approach that the CCC followed which cannot be faulted because Classic Ltd, when it applied for the format amendment, it undertook to comply with the local content obligations imposed on licensees in terms of the Music Regulations and it was on that basis that ICASA issued the Amended Licence.

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<sup>31</sup> *Idem* n 22.

[103] The second point that ICASA raises in its argument, is the purpose. It is ICASA's contention that the purpose of the format obligation is to protect and retain the format. In other words, to protect and retain classical music. Not all of the time, but enough of the time that people who want to listen to it can listen to it. This, ICASA submits, is clear from the reasons provided by ICASA when it approved the format amendment. However, HOT 1027 (Classic FM) intends to broadcast classical music only in the middle of the night and intends to broadcast Old Skool and R&B music during the day when people are awake. This, according to ICASA's counsel, will undermine the very purpose of imposing format obligations.

[104] Counsel in oral argument, gave an example which he contends is not speculative, that if format obligations can be adhered to whenever, what it means is that if a licensee has an obligation to play 50% of its programming in English and 50% in Zulu, then it would be fine for the licensee to broadcast Zulu at night when most people are asleep and broadcast in English during the day. It would then be fine for licensees to only broadcast marginalized languages in the middle of the night because it is more profitable to broadcast in English during the day, so counsel submits.

[105] Furthermore, as ICASA argues, the performance period referred to in the Music Regulations reflects a prevailing practice which ICASA utilises in the monitoring of compliance by licensees of their local content obligations. A proposition was made on behalf of ICASA that ICASA operates in terms of the performance period when it measures things like local content, COVID-19 risks and a variety of other things. It measures across the performance period because that is most of the time when the stations are broadcasting to their listeners.

[106] Moreover, as ICASA argues, the 24-hour period which Hot 1027 relies on for the division of the "music minutes" provides for the service during the night when most listeners are already asleep. This time period, so ICASA argues, does not provide access to classical music and is patently not giving effect to the format obligation.

[107] So, it is on all the aforementioned reasons that ICASA argues that the format finding cannot be assailed.

### **Submission by Primedia**

[108] The submission by Primedia on this issue is that Classic Ltd has done everything in its power to sidestep its obligation to continue playing classical music, in that it has relegated the playing of classical music to the dead of night where listenership is at its very lowest, which is impermissible.

[109] Primedia concedes that the text in Clause 5.1 of the licence, in isolation, does not provide a clear answer whether the obligation to play 50% classical music and 50% Old Skool and R&B music is calculated over a day, a part thereof or a week, month or year. It, however, submits that when the context within which the licence was issued is considered, including ICASA's prevailing practice, and the purpose of the format obligation in the licence, it is clear that the format obligation must be measured in accordance with the performance period.

[110] According to Primedia, the context in which Classic Ltd's licence was issued and the material known to those responsible for its production is that:

110.1 the licence expressly uses the performance period of 5h00 to 23h00 for measuring the licensee's obligation to broadcast news for a minimum of thirty (30) minutes each day.

110.2 in its reasons for the decision to amend the format requirements of the licence, ICASA stated that it was of the view that the regular and classical music listener despite the decline, must not be isolated but still catered for on the traditional platform. The contention is that it is, thus, absurd to suggest that the Amended Licence allows Classic Ltd to relegate classical music to the dead of night.

[111] It is Primedia's contention that the obligation to broadcast news on a regular basis for a minimum of thirty (30) minutes each day, the compliance of which is measured using the performance period as *per* Classic FM's 2020 compliance report, is contextually instructive as the period over which the format obligations fall to be measured.

[112] Primedia accepts, also, that the Music Regulations are concerned with local content obligations. It submits, however, that it is not its argument that these regulations impose a direct obligation on Classic Ltd to comply with the format requirements within the performance period. It, instead, argues that the Music Regulations are instructive for purposes of the interpretive exercise in identifying the context with reference to the performance period. And, ICASA's prevailing practice is to measure format obligations with reference to the performance period.

[113] It is argued on behalf of Primedia that the purpose of the licence is the clearest indication that the format obligations under licences could never be understood to apply over a 24-hour period. In the present matter, the purpose of the format obligation, as set out in ICASA's reasons for the decision to amend the format, is to protect and retain the format in question, and to ensure a diversity of formats on the airwaves. In Classic FM's case it is to ensure that classical music remains on the airwaves and available and accessible to listeners. Thus, HOT 1027's interpretation of its format obligations would undermine the purpose of the obligation, so the argument goes.

[114] Therefore, having regard to the text, context and purpose of Clause 5.1 of the licence, it is clear that the format obligation in Classic Ltd's licence, like in all licences, is not measured on the basis of a 24-hour day. But, falls to be assessed over what is known as the performance period - that is the period between 05h00 and 23h00 daily, so Primedia submits.

[115] Primedia asserts, in the final analysis, that having regard to the text, context and purpose of Clause 5.1 of Classic Ltd's licence, the licence condition plainly falls to be assessed over the performance period. Primedia concludes,



consequently that ICASA's decision in respect of the format contravention was reasonable and lawful and that there is no basis to set it aside on review.

### **Discussion**

[116] It is common cause that the station's Amended Licence states that "*the Licensee shall provide 50% Classical Music and 50% Old Skool and R&B Music*". It is, also, not in dispute that there is no time period obligation linked to the division of the music genres, that is, the condition does not specify how the division of the music should be allocated. ICASA, in the reasons issued, did not, also, indicate how the division should be allocated.

[117] It is common cause that Classic Ltd wanted to do away, altogether, with classical music, but, ICASA in its wisdom, wanted to ensure that classical music still remained on the airwaves in one form or another. Most probably this was so that listeners of classical music should continue to enjoy a station that provides that type of music. It is in that sense that ICASA made it a condition of the licence that Classic FM continue to play classical music.

[118] Indeed, it may be irrelevant to HOT 1027's commercial needs and quests to make money, for it to play classical music. That type of music may also, no longer be popular with a number of listeners in different genres of music. But, that, 50% of classical music must be played in its radio station, is a regulatory obligation. The obligation is in the licence, and it must be fulfilled. As a result, Classic FM must continue to broadcast classical music. What is at issue is how to apply the 50/50 split to the music it should broadcast; or rather when to broadcast classical music.

[119] This, as HOT 1027 argues, is an unusual situation in that there is a split between Old Skool and R&B music genre on the one side and classical music on the other. Old Skool and R&B types of music are more or less in the same broad genre. It might even be difficult to draw precise lines between these particular genres. To the contrary, classical music falls totally outside these two genres, and, is something quite different from the Old Skool and R&B type of music.

[120] HOT 1027 relies on the 24hour period in which a station is expected to broadcast its programmes as specified in Regulation 6(1) of the Standard Terms Regulations, for the division of the music minutes. Whereas, ICASA and Primedia, aligns themselves with the terms of the "performance period", that is the hours between 05h00 and 23h00, as defined in the Music Regulations, for the split in the music minutes. On the face of the licence, there is, however, no "performance period" obligation linked to the division of the music genres. Nor does the licence provide for a "shorter schedule of daily broadcast operations" as contemplated in Regulation 6(1) of the Standard Terms Regulations.

[121] The fundamental question that requires determination is whether the 50/50 split is to be measured on the basis of 24 hours as contended for by HOT 1027 or whether the correct measurement is in accordance with the performance period, that is, the hours between 05h00 and 23h00 as argued by ICASA and Primedia.

[122] As earlier stated in this judgment, the text, context and purpose of the relevant document are of importance when interpreting a document. In this matter they will assist this Court in the interpretation of Clause 5.1 of the Amended Licence.

[123] It is common cause that the text in this matter, does not resolve the interpretation issue. This is so because the clause in question does not exactly state what the period is, so texturally it is ambiguous. Therefore, context and purpose will then have to be looked at.

[124] There is no dispute in regard to the purpose of Clause 5.1 of the licence. All the parties are agreed that the purpose of the clause, as specifically stated in the reasons for the decision of ICASA when it approved the format amendment, is to protect and retain the format. In other words, to protect and retain classical music on the airwaves. However, ICASA and Primedia are of the opinion that Classic's interpretation of its format obligations undermines the very purpose of the obligation. As ICASA argues, Classic undermines the purpose of imposing the format obligation because it wants to play classical

music only in the middle of the night when most listeners of classical music are asleep and to play Old Skool and R&B music during the day when people are awake.

[125] It is common cause that when there is a provision which does not specify whether compliance should be measured by the performance period or in terms of the 24hour period, the natural understanding is that the context, which is provided by what is known by the material known to everyone in the industry, will provide an answer.

[126] It is not this Court's understanding that there is a dispute in respect of the material that is known in the industry in relation to the context of the format obligation. As ICASA contends, correctly so, in this matter, the material known is: that the licence expressly uses certain hours regarding the broadcast of news – which is 05h00 to 23h00; in ICASA's reasons when approving the format amendment there is a specific reference that the listenership has to be catered for on the traditional platform; the music regulations provides that the performance period is between 05h00 and 23h00, which is the same as the news period; and the COVID disaster regulations speak about a shortened performance period of between 07h00 and 21h00. Primedia submits that the material known to the industry is the licensee's obligation to broadcast news for a minimum of thirty (30) minutes each day, and ICASA's reasons for the decision to amend the format requirements of the licence,

[127] This Court is, however, of the view that ICASA and Primedia, when providing the material that is known to the industry, left out the 24hour period stipulated in Regulation 6(1) of the Standard Terms Regulations. This is another material that is known in the industry that provides that a station is expected to broadcast its programmes over a period of 24hours, and it should also be considered.

[128] The CCC, in its judgment, held that ICASA was entitled to apply the performance period yardstick in order to evaluate and ensure compliance with HOT 1027's obligations referred to in Clause 5.1 of the amended licence. HOT 1027 is challenging this finding and contends that based on its reasonable

interpretation of the condition, the 24hour period is applicable. Whilst on the other hand, ICASA and Primedia do not agree to the use of the 24hour period for the split of the music genres, they argue that HOT 1027's challenge of the CCC's finding is mistaken for the following reasons:

128.1 HOT 1027 has not contended that it is free from the application of the Regulations on Local Content and that it is not obliged to comply with obligations imposed upon it in clause 3(2) of the Regulations on Local Content which require it to play at least 35% of South African music spread across the performance period, which is measured between the hours 05h00 and 23h00. What that indicates is that the time from 23h01 to 04h49 is excluded from the performance period. The submission is supported by reference to the logs of musical recordings submitted by HOT 1027 in response to the complaint of Kagiso, which make it clear that HOT 1027 did play South African music in its broadcasting cycle in terms of the Regulations on Local Content, and in that sense, have accepted the application of those Regulations in the presentation of its music format.

128.2 Further, that ICASA has always applied the practice of measuring compliance by licensees with their music format obligations by means of the yardstick of the performance period. ICASA supports its argument by indicating that the deponent to the founding affidavit of HOT 1027 is aware of that practice and has in fact invoked it when he submitted the logs of another community broadcasting station in which he is the contact person.

[129] Based on those reasons, it is submitted that the interpretation of Clause 5.1 of the station's Amended Licence by the CCC is not open to challenge, and that HOT 1027 has not shown any reviewable irregularities arising from the conclusions expressed by the CCC in that regard.

[130] In its conclusion that the format obligation must be measured in accordance with the performance period, the CCC in its judgment relied, amongst others, on ICASA's reasons for the decision to amend Classic's licence to require it to broadcast 50% Classical Music and 50% Old Skool and R&B Music. For instance, at paragraph 13.2.5 of ICASA's reasons for the decision, the following is stated -

"In considering the amendment the Authority was of the view that... allowing for Classical Music to be provided on an online platform will prejudice its loyal listeners across the racial and cultural spectrum who may not necessarily have means to tune in on the online platform but are depended on the traditional platform".

ICASA was further of the view that "the regular and Classical Music listener despite the decline, must not be isolated but still be catered for on the traditional platform".

The CCC concluded based on the above passages that

"It appears that ICASA was specifically concerned that listeners of Classical Music should not be "isolated", marginalized or left in the cold, as it were. It seems to me that by relegating Classical Music to the hours when most people have gone to bed, Classic is doing the very thing that ICASA wanted to avoid."

[131] On this point, this Court is in alignment with HOT 1027's submission that the reasons for the decision of ICASA when it considered the application for an amendment of its licence, do not permeate into the licence condition, as set out in Clause 5.1 of the licence. On the face of the licence, it is impossible to draw the inference that the plain wording of Clause 5.1 of the station licence holds such a meaning or that ICASA intended that classical music be played at any particular time of day (or night). The licence certainly does not specify it.

[132] Importantly, the passages which the CCC relied on are clear that ICASA was debating the proper platform, whether the traditional platform or the online platform, on which classical music should be provided. It was more concerned that if classical music were to be provided on the online platform, its loyal listeners across the racial and cultural spectrum who may not necessarily have means to tune in on the online platform but are depended on the traditional platform, would be prejudiced. ICASA was, also concerned that if the music

was provided on the online platform, the regular and classical music listeners would be isolated. It, thus, opted to retain the provision of classical music on the traditional platform. What is patently clear is that if it was ICASA's intention that HOT 1027 should not play classical music at any time between 19h00 and 04h59, same is not distinct from the reading of Clause 5.1 of the licence.

[133] Another reason provided by the CCC, by implication the Council, in its judgment why it relied on the performance period as a yardstick to divide the music genres is mainly because, in terms of the Music Regulations, ICASA measures the compliance of licensees with their programme obligations during the performance period of 5h00 and 23h00. It is in that sense that it concluded that where the Amended Licence requires Classic Ltd to play 50% classical music and 50% Old Skool and R&B Music this should be measured over the 18-hour period of 5h00 to 23h00, which, according to the CCC, are the hours when most listeners would be awake.

[134] The challenge, however, is that Music Regulations, as correctly argued by HOT 1027, were prepared and published with the specific purpose to regulate local content, as both the name and the source of authority to issue the regulations as relied on makes clear. The context in which the reference to "performance period" appears is in a regulation that is solely concerned with local content in programming, and not directed to any other purpose. The compliance by the licensees which is required to be measured in terms of those regulations, is nothing else but the local content.

[135] This Court, is of the view that HOT 1027 is correct in its suggestion that there is no basis to rely on the performance period outside the applicability of the Music Regulations. The reliance by the CCC on the Music Regulations to find a contravention by the station, in circumstances where the Music Regulations find no application in the assessment of the duty to split playing time between classical music and Old Skool and R&B music as contained in the licence, is indeed misplaced.

[136] Even if ICASA were to persist in its argument that the performance period is applicable, the challenge that it will face is that the Music Regulations do not stipulate the type of local music that should be played during the performance period and the exact time within the performance period it should be played. What appears to be of importance is that a station plays 35% of South African music during the performance period. That period stretches from 5h00 until 23h00, and it is not disputed that Classic FM plays classical music within that time period, that is, from 19h00 until 4h59. There is no evidence on record that the classical music played by Classic FM is not South African music.

[137] Besides, the 35% South African music that must be played by Classic FM is not only specific to classical music but is inclusive of the other music genres that are provided for in the Amended Licence. When calculating 35% of the local content ICASA must consider all three music genres across the performance period. It should not only look at classical music. Therefore, the argument that the performance period should be applied to the format obligation because Classic Ltd agreed, when it applied for the format amendment, to comply with the provisions of the Music Regulations, is misplaced.

[138] Moreover, this Court does not understand HOT 1027 to be saying that it is free from the application of the Music Regulations on local content and that it is not obliged to comply with obligations imposed upon it in Regulation 3(2) of the Music Regulations on local content which require it to play at least 35% of South African music spread across the performance period which is described as a period of 126 hours in a week measured between the hours 05h00 and 23h00.

[139] HOT 1027's contention, which in this Court's view is correct, is only that the performance period does not find application to the format conditions, and applies only to the calculation of local content (the total amount of music played by a licensee that must be composed and/or performed by South Africans) - not to a particular genre of music, like classical music and not to Old Skool and R&B Music. In this Court's view, it is an inconceivable error of law, as correctly argued, that the performance period, which applies only to a specific set of

regulations on local music content, would apply to a format related licence obligation.

[140] Primedia's submission that because HOT 1027 in its argument acknowledges that as of now it broadcasts classical music between 19h00 and 04h59 which translates into only 22,2% of the musical minutes played, instead of 50%, misses the point of HOT 1027's argument. HOT 1027's proposition is that during the day, the lengthier period of time during which Old Skool and R&B music is played includes advertising time, news, interviews, and listener interaction including competitions, which reduces the "musical minutes" played to an equivalent 50%, that is, the total music played within the 24-hour period translates into 50% classical music, and 50% Old Skool and R&B music.

[141] It is clear that the Music Regulations apply only to the calculation of local content not a particular genre of music, like classical music and not Old Skool and R&B music. It is, thus, this Court's view, that the performance period is not a yardstick in terms of which ICASA should measure the compliance of licensees with their programme obligations but it should measure compliance with local content.

[142] In the circumstances, HOT 1027 is correct, no reliance can be placed on the performance period as set out in the Music Regulations to impose an obligation on the licensee in regard to a format obligation. In any event, there is no provision in the statutes and the regulations that makes the performance period applicable to the split in formats envisioned in the licence, in circumstances where the Music Regulations find no application in the assessment of the duty to split playing time between classical music and Old Skool and R&B music as contained in the licence. Section 5(12) of the ECA provides that "[a] licence confers on the holder the privileges and subjects him or her to the obligations provided for in this Act and specified in the licence". The provisions make clear that the obligations of the station must be sourced either in the statute or in the licence conditions.



[143] Furthermore, the reliance by ICASA in its decision on what it refers to as its "prevailing practice" to found a contravention by Hot 1027 of Clause 5.1 of its licence, is to this Court farfetched and of no consequence, as these proceedings are concerned with alleged non-compliance with statutory and regulatory obligations, not alleged non-compliance with a practice.

[144] As it is, HOT 1027 did not at any time suggest that it would offer two different formats in its broadcast period. In fact, it specifically requested a complete format change to Old Skool and R&B music in its amendment application. It was ICASA, in its wisdom, which imposed a 50/50 format and which sat and considered this split. It is thus within its knowledge how it foresaw how the split would operate. It must therefore have determined in what manner the split was to be made, it should as such, have indicated same in the licence.

[145] ICASA, in its wisdom, specifically endorsed another condition in HOT 1027's Amended Licence, that obliged Classic FM to broadcast news on a regular basis for a minimum of thirty (30) minutes each day between the hours of 5h00 and 23h00. When the two conditions are compared, it shows that the format clause is indeed ambiguous. It is this Court's view that if ICASA was concerned that a specific obligation must be complied with by reference to a specific time period, it should have expressly stated so in the licence. In this way, it would have avoided the ambiguity that currently exist.

[146] Moreover, the news broadcast obligation is an indication that where ICASA is particularly concerned that a specific obligation must be complied with by reference to a specific period, that is, when it wants to impose an obligation by reference to a time period, as it did with the time of the news broadcast, it does so, and, it does so expressly. For example, in the ICT COVID-19 National Disaster Regulations,<sup>32</sup> ICASA established minimum standards for the National State of Disaster, including a shortened performance period and it specifically set the period of 07h00 to 21h00.

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<sup>32</sup> GG 43207, Vol. 658, GN 238, 6 April 2020.

[147] Without any guidance provided by ICASA as to when it expected the classical music to be played, it left it to HOT 1027 to decide the best way it would deal with the split. HOT 1027, as a result, divided the total percentage of "musical minutes" (excluding weather, news, interviews, advertisements and entertainment by DJs) over the 24-hour period that it is required to broadcast, and it broadcasts - classical music from 19h00 to 04h59, and Old Skool and R&B music from 05h00 to 18h59. In the result, it is providing 50% classical music and 50% Old Skool and R&B music. The selected time division, as correctly argued by HOT 1027, is consistent with the rationale for the format change provided to ICASA and accepted in its reasoning.

[148] It is, therefore, this Court's view that the CCC's decision constitutes a reviewable irregularity.

**The duties of the Council when considering the recommendations of the CCC**

[149] The supposition by HOT 1027, in this regard, is that the Council appears to have rubber-stamped the decision of the CCC, without critically engaging in the basis for the decision and the correctness of the reasoning that underpins the findings. Moreover, the decision appears to have been made without any consideration or appreciation of its practical effect.

[150] In its further submission, HOT 1027 argues that the Council is by no means bound by the recommendations of the CCC, and when considering the recommendations of the CCC, it must take all relevant matters into account, one of which is the recommendations of the CCC. Others are the nature and gravity of the non-compliance, the consequences of the non-compliance, the circumstances in which the non-compliance occurred and steps taken by the licensee. And, it must, ultimately, make a decision that is permitted by the ICASA Act or the underlying statutes, and provide reasons for the decision to affected persons.

[151] According to HOT 1027, the Minutes of the Council reveals that the prescripts of the statute were not met, in that, the CCC simply presented its

recommendations, Management raised one question concerning a licensee's name change, which was answered with the assertion that *"a change for a licensee requires a notification, ...a change of the name of station requires an amendment of the license as it involves members of the public"*.

[152] The submission is that nothing other than the recommendations of the CCC was considered by the Council. And, this, as HOT 1027 argues, means that the Council merely rubber-stamped the recommendations of the CCC without engaging with the issues and relevant materials, including the record, that served before it. This, therefore in HOT 1027's opinion, renders the decision reviewable, independently from the considerations already addressed above.

[153] Counsel for HOT 1027, in her submission before Court, argued that there seems to be a mistaken suggestion that the recommendations of the CCC come before the Council for the Council to look at what consequences attaches to the finding, and not for the Council to consider them. The contention is that the obligations that the statute places on the Council is to take all relevant matters into consideration. The Council is not just there to take the recommendations of the CCC and agree with them without having considered them. The Council should not just rubber stamp the recommendations of the CCC, so counsel argues.

[154] Counsel further suggests that what happened during the Council meeting was a brief discussion and except for only one question that was raised by a member of Council, little else was interrogated of what the CCC had said in its judgment. This, according to counsel, is in stark contradistinction to the exercise this Court was engaged with at the hearing of these proceedings, like for instance, questioning the content of the licence, the meaning of the licence and the difference between a licence, a licensee's name and the radio station name. The Council seemed to have just accepted that the CCC was correct in its conclusions, so counsel argues. That, according to counsel, was non-compliance with its duties.

[155] The very reason why the decision of the CCC is not final and binding is because the legislature thought it good to impose another level of consideration by the Council and what it asks of the Council is to interrogate the legal conclusions that are drawn by the CCC. The legislature asks the Council, if it is necessary, to have regard to the record that must be placed before it, in order to inform itself of the correctness or otherwise of the CCC's decision. None of that exercise was, according to counsel, done.

[156] In support of the argument that the Council should not just rubber stamp the recommendations of the CCC, counsel for HOT 1027, referred this Court to the Constitutional Court's finding in *Walele*,<sup>33</sup> as authority that the rubber stamping of this nature is not in order, and is, thus, not acceptable. In *Walele*, the City of Cape Town ("the City") made certain assertions that were not borne out by the objective facts provided. When asked to furnish the list of documents placed before the decision-maker, the City mentioned certain documents and confirmed that those were the only documents that served before that decision-maker at the time. The Constitutional Court found that "*there could be no doubt that these documents could not reasonably have satisfied the decision-maker*" or that, if indeed the decision-maker was so satisfied, "*his satisfaction was not based on reasonable grounds*".<sup>34</sup>

[157] Support for the argument was, also, based, in a different context, in *New Clicks*,<sup>35</sup> a judgment of the Constitutional Court where it was stated that a Minister, who was required to make regulations based on a recommendation, was not allowed merely to "*rubber stamp the recommendation*", but rather had to apply her mind to it and "*make a decision whether to accept such recommendation*".<sup>36</sup> It was held in that context that the Minister could only do this if furnished with the information that formed the basis of the recommendation, so the argument goes.

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<sup>33</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC); [2008] ZACC 11.

<sup>34</sup> *Idem* n 34, para [60].

<sup>35</sup> *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC); [2005] ZACC 14.

<sup>36</sup> *Idem* n 36, para [542].

[158] What is of importance in these judgments, so counsel suggests, is that the judgments establish the principle that when a decision-maker is confronted with a recommendation, that is, something is put, like in this instance, before the Council for approval, the Council must ask for the underlying documents. The Council must interrogate whether that recommendation is consistent with the record, and whether it is consistent with the underlying documents.

[159] This exercise, as counsel contends, was not done, or at the very least, it was not done properly. On the basis of this argument, she made a proposition that, in the instance of this matter, the reasoning of the CCC, which effectively stands as the reasoning of the Council, is based on an incorrect interpretation of the law. There are errors of law that underpin the decision, and for that reason alone, the decision must be set aside. It must, also, be set aside because the Council did not perform its duties in the manner it was required to perform them when it evaluated the recommendations of the CCC.

[160] The above case precedents, according to counsel for HOT 1027, underscore that it is not sufficient to merely rubber-stamp the recommendations of the CCC. And, in doing so, the Council erred and failed to comply with its statutorily imposed obligations.

[161] It is trite that in terms of section 17D(1) of the ICASA Act the CCC must make a finding on all complaints received by it or referred to it by ICASA. It must, also recommend to ICASA the action ICASA must take against the licensee. Then, in accordance with section 17D(3) of that Act, the CCC must submit its finding and recommendations contemplated in subsections 17D(1) and (2) of that Act, and a record of such proceedings to the Council for a decision contemplated in section 17E of the ICASA Act regarding the action to be taken by ICASA.

[162] When making a decision contemplated in section 17D, the Council is enjoined in terms of section 17E(1) of the ICASA Act, to take all relevant matters into account, including – (a) the recommendations of the CCC; (b) the nature and gravity of the non-compliance; (c) the consequences of the non-

compliance; (d) the circumstances under which the non-compliance occurred; (e) the steps taken by the licensee to remedy the complaint; and (f) the steps taken by the licensee to ensure that similar complaints will not be lodged in the future.

[163] It is not in dispute that for purposes of the hearings before the CCC, the CCC prepared hearing bundles. These hearing bundles, together with the heads of argument submitted by the parties, the transcripts of the proceedings before the CCC, the CCC recommendation (including the reasons therefore), served before the Council meeting at which the recommendations of the CCC were adopted.

[164] It is not HOT 1027's complaint that the Minutes of the Council are incomplete. Rather, the position that HOT 1027 adopts is that the Minutes are wholly inadequate to establish a fair and reasonable endorsement of the CCC's recommendations, particularly having regard to the obligations on ICASA under section 17E(1)(a) to (f) of the ICASA Act. The main issues being that at the Council meeting that sat to consider the CCC recommendations only one question was asked by management and answered.

[165] The argument in opposition to HOT 1027's proposition that the Council rubber stamped the CCC's recommendations, is well taken. It is the view of this Court that HOT 1027's argument on this issue is unsustainable because the principles it relies on, as enunciated in *Walele* and *New Clicks*, have no application to the facts of this case. These principles, as correctly argued by Primedia, have not been breached in these proceedings.

[166] In *Walele*, the Building Control Officer had not placed the relevant information that substantiated his "recommendation" before the decision-maker.<sup>37</sup> That Court, therefore, considered that the Building Officer's signature on a document was not a "recommendation" in terms of the relevant statute on which the decision maker could decide.<sup>38</sup> Whereas, in *New Clicks*, the Court criticised the Minister for rubber stamping the recommendations of a committee

<sup>37</sup> *Idem* n 34, para [70].

<sup>38</sup> *Idem* n 34, para [71].

on the basis that the Minister accepted the fees recommended by a Pricing Committee without being furnished with an explanation of how the fees were arrived at.<sup>39</sup>

[167] This Court, as a result, agrees with the argument that the facts in these proceedings are completely distinguishable from those in *Walele* and *New Clicks*, in that this matter is not the same as in *Walele* where the persons charged with making the recommendation placed no supporting information before the decision-maker. It is, also, not the case as in *New Clicks* where the decision maker was given no explanation for the recommendation.

[168] It is common cause that in these proceedings, the Council was provided with detailed reasons for the CCC's recommendations which appears in the written judgment of the CCC. The Minutes of the meeting of the Council at which the impugned decision was taken indicates that a CCC member presented the CCC's submission and recommendations to the Council. The Minutes reflects, further, that the CCC's written reasons for its decision served before the Council, and that the Council deliberated on the recommendations and the judgment during that meeting. Following the Council's considerations of the CCC's written reasons, the oral submission and the deliberation, the Minutes records that the Council approved the submission and made its decision. HOT 1027 was made aware of the CCC's reasons for its recommendations to the Council in the letter which informed it of the outcome of the complaints, to which the CCC judgment was attached.

[169] There is no evidence on record, none was proffered in oral argument before this Court, that when the Council members were provided with the documents that served before the Council, they did not read them or that having read them, they were not satisfied with the contents thereof. The fact that no questions, except the one asked by Management, were asked, does not mean that the Council members did not interrogate the documents and satisfied themselves that the recommendations are consistent with the record and the underlying documents. To the contrary, that no questions were asked at the

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<sup>39</sup> *Idem* n 36, para [542].

meeting, is in this Court's view, an indication that the Council members were indeed satisfied with the recommendations of the CCC. They were also content that the recommendations are consistent with the record and the documentation that served before Council in that meeting.

[170] It is on the basis of all these reasons that this Court comes to a conclusion that the procedure followed by the Council when it made the decision, cannot be assailed.

### **REMEDY**

[171] As earlier indicated in this judgment, the interim relief sought in Part A of the Notice of Motion was disposed of by agreement between the parties. The agreement was made an Order of Court on 10 May 2022. In terms of the said Court Order, the operation of the decision issued by ICASA to confirm the recommendations of the CCC was suspended pending the outcome of the review application in Part B, which is before this Court for determination.

[172] Pursuant to the said Court Order, Classic Ltd was allowed the use of the station name Hot 1027 FM pending the outcome of the application before this Court. This Court having found in favour of ICASA and Primedia in regard to the name change, it follows that after more than a year of broadcasting under the new station name, the station has to change back to being referred to as Classic FM.

[173] This will be so even though, in accordance with its licence provisions, Classic FM is now obliged to play music that is not 100% classical music, as it used to do. This, as HOT 1027 argues, has potential disastrous consequences for its fundamental strategy aimed at making the station attractive to a broader audience and, therefore, a broader spectrum of advertisers. And, also, on the backdrop of the station having just been saved from business rescue and possible liquidation.

[174] Importantly, if HOT 1027 later opts to revert to the station name of HOT 1027 FM, it will then have to make a formal application for the name change,



pay a fee of R70 000 to ICASA and then await ICASA's decision on the amendment process, a process that previously had taken more than a year to complete. This is the process that it will follow in the event the proposed new regulations for changing the station name are not yet promulgated by the time HOT 1027 starts the process of the name change.

[175] All this process of changing names, will lead to confusion amongst the current listeners and any other potential listener of the station, and/or classical music who might end up losing interest in the station, and with consequences in respect of any number of reporting and monitoring obligations for the station. It is this Court's view that such a situation should it be allowed to persist would certainly be untenable for the station.

[176] In terms of section 172(1)(b) of the Constitution this Court has a wide discretion to consider an appropriate relief which is just and equitable. In *Hoërskool Ermelo*,<sup>40</sup> the Constitutional Court when granting a remedy based on section 172(1)(b) of the Constitution, expressed itself as follows:

“[96] Section 172(1)(b) of the Constitution provides that when this Court decides a constitutional matter within its power it ‘may make any order that is just and equitable’. The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words, the order must be fair and just within the context of a particular dispute.

[97] It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional

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<sup>40</sup> *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC); [2009] ZACC 32 at para [96]-[97].

requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties.” (Footnotes omitted).

[177] This Court has earlier on made a finding to uphold the decision of ICASA in relation to the rebranding finding. It has, also, found that the decision will have a disastrous outcome for HOT 1027, if it is upheld. It this Court’s view that in order to avoid the disastrous outcome, the decision should not be confirmed. Such an order, if granted, would be just and equitable in the circumstances of this matter.

[178] This Court, is however, of the view that HOT 1027 should still be held liable to pay a fine for its transgression in respect of the rebranding finding. In its finding that HOT 1027 contravened the provisions of the ECA and its regulations in relation to the rebranding and format findings, ICASA directed HOT 1027 to pay a fine of R25 000. Nonetheless, this Court found in favour of ICASA in regard to the rebranding decision and for HOT 1027 in relation to the format decision.

[179] Due to the fact that in its judgment, the CCC does not indicate how the amount of R25 000 is split between the two contraventions, it is this Court’s view that the issue be referred back to ICASA to determine the amount which HOT 1027 should pay as a fine for the rebranding decision.

## **COSTS**

[180] Three issues were before this Court for determination. Of those three issues, HOT 1027 was successful in only one. ICASA and Primedia are each successful in respect of the two other issues, and are, therefore, substantially successful. ICASA and Primedia are, in that regard, entitled to be granted the costs of the application.

[181] Both ICASA and Primedia applied to be granted costs including costs of two counsel, one senior and one junior, in the event of their success. It is this

Court's view that the complexity and intricacy of this matter required the attendance of two counsel, and that such costs should be granted.

[182] ICASA and Primedia being the successful parties, an order for costs inclusive of the costs of two counsel should be granted in their favour. HOT 1027 should, as a result, be ordered to pay the costs of the application, which costs must be inclusive of costs consequent upon the employment of two counsel, one senior and one junior.

### **ORDER**

[183] In the circumstances, the following order is made:

1. The decision issued by the First Respondent to confirm the recommendations of the Third Respondent in respect of its internal case numbers 427/2021 and 423/2021, issued on 12 April 2022 (the decision), is hereby reviewed and set aside.
2. The Applicant is ordered to pay a fine in respect of the Rebranding Decision.
3. The calculation of the *quantum* of the fine is remitted to the First Respondent for determination.
4. The Applicant is ordered to pay the costs of the application for the First, Second, Third, and Fourth Respondents, such costs to include costs consequent upon the employment of two (2) counsel for each of the Respondents, one senior and one junior.

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**E. M. KUBUSHI J**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

#### **Appearances:**

Applicant's Counsel:

M J Engelbrecht SC

Applicant's Attorneys:

Bowman Gilfillan inc.

First to Third Respondents' Counsel:	Vincent Maleka SC K Manyage
First to Third Respondents' Attorneys:	Mashiane, Moodley & Monama Attorneys
Fourth Respondent's Counsel:	Steven Budlender SC Annabel Raw
Fourth Respondent's Attorneys:	Edward Nathan Sonnenbergs Inc
Date Heard:	07 September 2022
Date of Judgment:	13 January 2023