IN THE APPEAL TRIBUNAL OF THE BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA

Appeal No: A18/2020
Case No: 09/2020

In the matter:

ENCA First Appellant

e.TV Second Appellant

and

MEDIA MONITORING AFRICA Respondent

APPELLANTS' HEADS OF ARGUMENT

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"The idea of reptilians was popularised by David Icke, a conspiracy theorist who claims shapeshifting reptilian aliens control Earth by taking on human form and gaining political power to manipulate human societies."
– Wikipedia 'Reptilian Conspiracy Theory'[1]

"*When you get back into the ancient world, you find this recurring theme of a union between a non-human race and humans – creating a hybrid race. … From 1998, I started coming across people who told me they had seen people change into a non-human form. … The basic form is like a scaly humanoid, with reptilian rather than humanoid eyes.*" – David Icke[2]

INTRODUCTION

1 On 22 July 2020 at 20h30, eNCA broadcast an interview with Mr David Icke, a notorious conspiracy theorist, on a show titled "*So what now?*". The interview was re-broadcast on etv on 23 July 2020 at 23h00.[3]

2 Mr Icke is most famous for his theory that the world is controlled by shapeshifting alien lizards who assume human form. This was frequently referenced in the interview. Mr Icke has repurposed this theory into a bizarre version of Covid-19 denialism. He believes that the pandemic is a hoax concocted, in part, by our lizard overlords.

3 On 21 August 2020, Media Monitoring Africa (**MMA**) submitted a complaint to the BCCSA regarding this interview. The focus of MMA's complaint was Mr Icke's remarks that Covid-19 does not exist. MMA alleged three breaches of the BCCSA's Code of Conduct for Subscription Broadcasting Service Licensees (**the**

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[1] Wikipedia "Reptilian Conspiracy Theory" https://en.wikipedia.org/wiki/Reptilian_conspiracy_theory.
[2] The Royal Family are bloodsucking alien lizards – David Icke", The Scotsman, 30 January 2006, available at https://www.scotsman.com/news/uk-news/royal-family-are-bloodsucking-alien-lizards-david-icke-2478194.
[3] The broadcast is accessible here: https://www.enca.com/shows/so-what-now-22-july-2020.

Subscription Code)[4] and the BCCSA Free-to-Air Code of Conduct for Broadcasting Service Licensees (**the FTA Code**).[5]

4 On 20 October 2020, the Tribunal dismissed two of MMA's three complaints. It upheld a single complaint, holding that the broadcast contravened clause 28.2.2 of the Subscription Code and clause 12.2 of the FTA Code (**the comment clauses**).[6] These clauses provide, in relevant part, that: "*[c]omment must be an honest expression of opinion and must be presented in such a manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.*"

5 Based on this single finding of a breach, the Tribunal imposed a fine of R10,000 and ordered the broadcasting of an apology, in wording prescribed by the Tribunal.[7]

6 The appellants now appeal to the Appeal Tribunal, with the leave of the Acting Chairperson of the BCCSA, granted in terms of clause 4.4 of the Procedure of the Commission.[8] This appeal is confined to the finding of a breach of the comment clauses and the sanction. There has been no cross-appeal against the dismissal of MMA's other complaints.

[4] In respect of eNCA.
[5] In respect of etv.
[6] Tribunal decision p 29 para 26(1).
[7] Tribunal decision p 37 para 32.
[8] Leave to appeal ruling, handed down on 13 January 2021.

7 In what follows, we demonstrate why the Tribunal's decision cannot stand. We address the following points in turn:

7.1 First, we outline the factual background, explaining the context and content of the interview.

7.2 Second, we address the right to freedom of expression and the crucial distinction drawn in ***Jersild v Denmark***[9] between the mere airing of offensive views in the media and media endorsement of such views.

7.3 Third, we set out the relevant principles for the interpretation of the comment clauses.

7.4 Fourth, we demonstrate why the appellants did not breach these comment clauses:

7.4.1 First, these clauses do not apply to the views expressed by Mr Icke, as no reasonable viewer would believe that Mr Cliff or the appellants endorsed these extreme views.

7.4.2 Second, even if the comment clauses do apply, Mr Icke's views, while extreme, were honest expressions of his opinion, clearly indicated to be comment, on facts fairly indicated and referred to.

7.5 Fifth, we address the sanction imposed by the Tribunal.

[9] *Jersild v Denmark* (1994) 19 EHRR 1.

BACKGROUND

8 "*So What Now?*" is hosted by Gareth Cliff once a week at 20h30 on eNCA and repeated at 23h00 on etv the following day.[10] The premise for the show is described as follows:

> *"The Coronavirus pandemic has swept the planet, leading to global lockdowns and extraordinary changes to all of our lives. What is the 'new normal' that everyone is talking about? Virtually everything that defines us has been turned inside-out. Diversity of thought is one of the most valuable things we can expose ourselves to in finding the answers.*
>
> *Gareth Cliff hosts smart and creative guests – both left and right-of centre thinkers, opinion makers, thought leaders and alternate voices to open our minds and prepare for change – the only thing of which you can really be certain. You may not always agree but… great minds don't always think alike."*[11]

9 The show has a two-part structure. The first segment is a panel discussion on a particular topic with a number of guests. The second half of the show profiles an individual who is interviewed one-on-one by Mr Cliff.[12]

10 The interview with Mr Icke came at the end of the show as an approximately 15-minute insert in a 48-minute programme. A rough transcript of this interview is attached as **Annexure A**.

11 From its opening moments, the programme is presented as an irreverent take on current affairs, presenting robust commentary on the pandemic and life under lockdown.

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[10] Response to complaint, para 6.
[11] Response to complaint, para 7.
[12] Response to complaint, para 8.

12 Mr Cliff begins the show with an attempt at lockdown humour, an imitation of a soap-opera announcer ("*Like sands through the hourglass, these are the days of our lives*"), and a clip of cartoon characters as a stand-in for a live studio audience.[13] The opening credits then roll over upbeat music, with words flashing across the screen: "*fresh perspectives*", "*critical thinkers*" and so on.[14]

13 No reasonable viewer could mistake this for the news.

14 The first six minutes of the programme are Mr Cliff's introductory remarks, focusing on the Covid-19-related events of the previous week and personal grievances about his portrayal in the media.

15 He presents a brief taster of Mr Icke's presentation: "*Later in the show, we'll talk to David Icke, the world's most famous conspiracy theorist [knowing nod], and first a panel of clever people who may not have a point of view you might have heard before*".[15]

16 Mr Cliff explains the premise for the show as follows: "*the point is, you get to make up your own mind. I'm not selling any narrative. Do we have a deal?*"[16]

17 The majority of the programme, from minutes 6 to 33, is taken up by the panel discussion, involving a financial journalist, a political analyst, and a former comedian.

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[13] Timestamp: 00:00 – 00:36.
[14] Timestamp: 00:37 – 1:00.
[15] Timestamp: 05:50 – 05:56.
[16] Timestamp 06:00 – 6:07.

18 The discussion that follows is opinionated, robust, and at times light-hearted. Commentary on serious matters is tempered with humour.[17]

19 Despite the irreverent tone, the entire premise of the introductory remarks and the panel discussion is that Covid-19 is real. Mr Cliff states that "*curbing this pandemic and saving lives is critical*."[18] Among other things, the panellists are asked to comment on government's response to the pandemic, and how the balance between lives and livelihoods should be achieved. At no point is it ever suggested that Covid-19 is anything other than a serious public health threat, despite the divergent views expressed about how to address it.

20 The programme was first aired at 20:30 on 22 July 2020, after the 20:00 evening news on eNCA. This was at the height of South Africa's first wave. The news that night, as with every night, was filled with reports of rising Covid-19 infection rates, deaths, and an overwhelmed and under-resourced healthcare system.[19]

21 The second airing of the programme, at 23h00 on 23 July 2020, followed after President Ramaphosa's address to the nation at 20h00 that night.[20] In that address, the President announced that more than 130,000 new coronavirus cases had been confirmed since mid-July, the total number of confirmed cases stood at 408,052, and South Africa had the fifth highest number of confirmed coronavirus cases in the world at the time.

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[17] See, for example, Timestamp: 20:30 – 22:00, where the discussion cuts away to a viral video of the EFF spokesperson fumbling basic arithmetic.

[18] Timestamp: 4:40.

[19] The news bulletins that night are available here: https://we.tl/t-SrpL6CqMua.

[20] A copy of that address is available here: https://ewn.co.za/2020/07/23/read-president-ramaphosa-s-full-address-to-the-nation.

22 Accordingly, any reasonable viewer watching the show would have been steeped in the grim news of the Covid-19 pandemic and would have been in no doubt about its reality.

23 At minute 33:42 of the programme, Mr Cliff transitions to a one-on-one interview with Mr Icke. Mr Cliff introduces Mr Icke, saying that he has been called "*a madman*", "*crazy*" and a "*lunatic*". He specifically refers to Mr Icke as a "*world-famous conspiracy theorist*".

24 The programme then cuts to a "*coming up next*" insert, showing Mr Cliff challenging Mr Icke and poking fun at his lack of medical expertise:

> *"Mr Cliff: I'm not a doctor.*
> *Mr Icke: That's fair enough. But you've done no research on it.*
> *Mr Cliff: Neither have you!*
> *Mr Icke: I've done thirty years' research!*
> *Mr Cliff: Yes, but, as a doctor?"*[21]

25 After this insert, Mr Cliff introduces the interview with a disclaimer:

> *"<u>My next guest definitely has some controversial opinions</u>, David Icke welcome to the show. You're a former footballer, who had a promising career, then a BBC sports commentator since then you've been warning for 30 years of a global Orwellian state in the making. <u>I need to put a disclaimer upfront, you have been banned from most of the major social media platforms and you've even been banned from being interviewed on TV internationally for putting out what has been reported as harmful information</u>. Now, some of what you say may sound crazy to some people, some of it makes sense to some people. <u>But I'm a proponent of free expression, even if I don't buy it, and everyone gets to decide for themselves</u>."*[22] (Emphasis added)

[21] Timestamp: 33:57 – 34:06.
[22] Timestamp: 34:17 – 34:56.

26 While Mr Cliff presents this disclaimer, the screen is overlaid with a definition of "*conspiracy theory*" and "*conspiracy theorist*", which is displayed for a full ten seconds.

> "*conspiracy theory … a belief that an event or situation is the result of a secret plan made by powerful people*"
>
> *conspiracy theorist … someone who believes in a conspiracy theory (= the idea that an event or situation is the result of a secret plan made by powerful people)*"[23]

27 That clip, together with the introduction, sets the context in which the rest of the interview must be viewed. The viewer is alerted to the fact that Mr Icke will be expressing "*controversial opinions*" and that he is a conspiracy theorist: a person who some would call a lunatic, who has controversial beliefs, is not a doctor, and has done no genuine medical research on the matter. The viewer is primed from the outset that Mr Icke will be expressing opinions, not facts, and that these opinions must be viewed critically and with caution. Mr Cliff also distances himself from the opinions that will follow, making it clear to the viewer that he "*[doesn't] buy it*".

28 Mr Cliff proceeds to ask five questions:

28.1 He asks how Mr Icke became a world-famous conspiracy theorist.

28.2 He asks how one finds the balance between preventing the dissemination of harmful narratives and free expression.

28.3 He asks about whether the current state of the world makes it easier for conspiracy theories take hold.

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[23] Timestamp: 34:42 – 34:56.

28.4 He asks why it is threatening if people obtain their own evidence.

28.5 Mr Cliff then asks Mr Icke about his relationship with South African writer, Credo Mutwa.

29 At no point does Mr Cliff ask Mr Icke to provide his views on COVID-19. In fact, Mr Cliff makes clear that he is not seeking to give airtime to Mr Icke's Covid-denialism, saying "*we won't have time to interrogate this in any detail*".[24] The focus of Mr Cliff's questions is on the existence of conspiracy theories, their prevalence during the pandemic, and who gets to decide on the balance between free expression and the suppression of harmful narratives.[25]

30 When Mr Icke lays out his theories about the pandemic and the WHO, Mr Cliff pushes back and openly mocks him. For instance:

30.1 Mr Cliff repeatedly refers to Mr Icke's belief in "*lizard people*" who control the world,[26] providing context to Mr Icke's sweeping claims.

30.2 There are many points during the interview where Mr Cliff stares in disbelief and laughs at Mr Icke, communicating that his views are plainly ridiculous – in particular, where Mr Icke says there is a "*web of deceit*" surrounding the pandemic.[27]

30.3 When Mr Icke claims there is no virus,[28] Mr Cliff looks incredulous, laughs at him, and later interjects to correct him that people have died from Covid-

[24] Timestamp: 36:30 – 36:40.
[25] Timestamp: 36:40 – 37:03.
[26] Timestamp: 39:20 – 39:25 ; 47:00.
[27] Timestamp: 40:58 – 41:03.
[28] Timestamp 41:15 – 42:00.

19: "*David, there are actual people who are dead*". Mr Icke responds "*Yes of course*."[29]

30.4 When Mr Icke's phone rings midway through the interview, Mr Cliff interjects "*You might want to get that call in case it's the overlords*"[30]

30.5 Mr Cliff specifically says that he only agrees with Mr Icke to the extent that he thinks that pushing views like Mr Icke's underground actually makes them more powerful.[31]

30.6 This leads to the argument prefaced in the initial insert, where Mr Icke accuses Mr Cliff of doing no research, to which Mr Cliff responds, in a mocking tone, pointing out that Mr Icke is not a doctor has not done any genuine medical research.[32]

30.7 Mr Icke ends the interview with a final reference to his reptilian theory. In response to Mr Cliff's question on his connection to Credo Mutwa, Mr Icke refers to the time he spent with Mr Mutwa in South Africa. Mr Mutwa was a supporter of Mr Icke's belief that there is a "*reptilian agenda*" of lizards who control the world. That much is apparent from the briefest Wikipedia search.[33]

30.8 After describing his relationship with Mr Mutwa, Mr Icke concludes by stating:

> *"There is a common theme and that theme is of a force manipulating human society and all I've done is bring that*

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[29] Timestamp: 42:00 – 42:18.
[30] Timestamp: 43:20 – 43:30.
[31] Timestamp: 44:10 – 44:25.
[32] Timestamp: 44:20 – 44:52.
[33] https://en.wikipedia.org/wiki/Vusamazulu_Credo_Mutwa#%22Reptilian_agenda%22.

> *back into the 21st century and show that it is still going on until today big time. <u>And that's the force behind this fake pandemic.</u>"*

30.9 The interview ends with Mr Cliff expressing confusion at this bizarre claim, saying "*I hope you're as confused as I am*", before signing off:

> *"[I]f any of our lizard overlords are watching, please let us know what we can do to get our lives back to normal, because I think we're all gatvol of this lockdown, winter, and all the rest".*[34]

31 The interview is plainly not about endorsing Mr Icke's views. Instead, it is primarily about highlighting the existence of such conspiracy theories in the pandemic and the freedom of expression concerns that arise when deciding whether and to what extent to limit these views, as extreme, offensive, ludicrous and ridiculous as they are. The viewer is primed on the need to consider these views critically and to form their own opinion.

32 During the brief interview, Mr Icke is shown to be what he is: an unqualified peddler of bizarre theories whose views should be treated with scepticism, if not outright derision. No reasonable viewer would be left with the belief that Mr Icke is an authority on the pandemic, or that the pandemic is a hoax, any more than they would have left believing that shapeshifting lizards control the world.

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[34] Timestamp: 47:00

FREEDOM OF EXPRESSION AND THE *JERSILD* DISTINCTION

33 The value of freedom of expression and media freedom needs no elaboration. The section 16(1) constitutional right not only encompasses views that are favourable, but also those that "*offend, shock and disturb*". The Constitutional Court[35] has repeatedly cited the European Court of Human Rights' (ECtHR) judgment in ***Handyside***[36] in emphasising this point:

> *"Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man it is applicable not only to information or ideas that are favourably received but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society."*

34 Truth-finding, the Constitutional Court has held, is best advanced by airing such views, no matter how far-fetched, wrong-headed or offensive they may seem:

> *"[Freedom of expression] helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values."*[37]

35 The Constitutional Court has recognised that limitations on freedom of expression should be permitted only where it is strictly necessary. That has always been so in respect of statutory provisions that interfere with speech.[38] It is especially true in the light of the constitutional right to freedom of expression,

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[35] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at paras 15 – 16; *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC) at para 49.
[36] Handyside v United Kingdom (1976) 1 EHRR 737 at 754.
[37] *Democratic Alliance vAfrican National Congress and Another* 2015 (2) SA 232 (CC) at para
[38] *R v Bunting* 1916 TPD 578 at 583.

in terms of which "*we are obliged to delineate the bounds of expression generously*."[39]

36 The interpretive process should be informed by South Africa's painful history of censorship. As the Constitutional Court explained in ***Mamabolo***,[40] "*[h]aving regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression - the free and open exchange of ideas - is no less important than it is in the United States of America*". The Court cautioned that "*we should be particularly astute to outlaw any form of thought control, however respectably dressed.*"[41]

37 The underlying principle is eloquently captured by Justice Brandeis in *Whitney v California*[42] where he memorably stated:

> "*Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that*

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[39] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) at para 47.
[40] *S v Mamabolo* 2001 (3) SA 409 (CC) at para 37.
[41] Ibid.
[42] *Whitney v California* 274 US 357, 375-376 (1927).

> *the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."*[43]

38 Conspiracy theories can be combatted by bringing them into the open, giving viewers an understanding of their context and the character of the people who peddle them, and priming viewers to treat these as opinions, not facts, that must be viewed with the healthy scepticism (and ridicule) that they deserve. Integral to the notion of autonomy is that reasonable viewers can be trusted to make up their own minds. To hold otherwise, as with censorship under apartheid, is to deny people their dignity and autonomy and to treat them in a condescending and paternalistic manner.

39 There is a world of difference between *airing* such offensive views and *endorsing* them. This vital distinction was addressed in the ECtHR judgment in ***Jersild v Denmark,***[44] a judgment that has been frequently endorsed by the BCCSA Tribunal: [45]

39.1 Mr Jersild, a Danish journalist interviewed a group of extremist youth as part of a television programme. During the interview, the youths made

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[43] Cited with approval in *NM v Smith (Freedom of Expression Institute as amicus curiae)* 2007 (5) SA 250 (CC) at para 144 per O'Regan J; *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) at para 142 per Ngcobo J and Khampepe J; *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 612 per Cameron J.

[44] *Jersild v Denmark* (1995) 19 EHRR 1 (ECtHR Grand Chamber).

[45] See, for example, *Kriel v Morning Live, SABC 2* Case No: 22/A/2014 at para 7; *National Commissioner of the South African Police Service and Others v e.tv (Pty) Ltd* Case No 05/2010 at paras 16 – 20; *Darne v SAFM* Case No: 06/2010 at paras 5 – 8; *Bosman v Multichoice Channel 107* Case No 22/2011 at para 5; *Human Rights Commission vs SABC* 2003 (1) BCLR 92 (BCCSA); [2002] JOL 10185 (BCCSA) at para 40; *Grady v e.tv* Case No. 58/2004.

racist comments, boasted about their hate crimes, and expressed the opinion that Denmark was for Danes and not for immigrants.

39.2 Mr Jersild and the youths were all prosecuted and convicted in Denmark for various offences related to the publication of these statements. On appeal, the ECtHR held that the conviction of Mr Jersild was a violation of the Article 10 right to freedom of expression.

39.3 The ECtHR noted that –

> *"A significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme of Danmarks Radio… In assessing whether his conviction and sentence were "necessary", the Court will therefore have regard to the principles established in its case- law relating to the role of the press…"*[46]

39.4 It concluded that:

> *"The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted."*[47]

39.5 The Court placed particular emphasis on how Mr Jersild had presented these interviews:

> *"[T]he TV presenter's introduction started by a reference to recent public discussion and press comments on racism in Denmark, thus inviting the viewer to see the programme in that context. He went on to announce that the object of the programme was to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background. There is no reason to doubt that the ensuing interviews fulfilled that aim. <u>Taken as a whole,</u>*

[46] *Jersild v Denmark* (1995) 19 EHRR 1 (ECtHR Grand Chamber) at para 31.
[47] Ibid at para 35.

> *<u>the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern</u>."*[48]

39.6 While the Danish authorities criticised Mr Jersild for not doing more to rebut the interview subjects' abhorrent views, the ECtHR rejected these criticisms, emphasising that it is not for the courts to dictate methods of reporting to the media:

> "*[T]he methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. <u>It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists</u>. In this context the Court recalls that <u>Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed</u>.*"[49] (Emphasis added)
>
> …
>
> *Admittedly the item did not explicitly recall the immorality, dangers and unlawfulness of the promotion of racial hatred and ideas of superiority of race. However, in view of the abovementioned counterbalancing elements and the natural limitations in spelling out such elements in a short item within a longer programme as well as the journalist's discretion as to the form of expression used, the Court does not consider the absence of such precautionary reminders to be relevant."*[50]

40 *Jersild* has been applied and repeatedly endorsed by the BCCSA Tribunal in a range of contexts including the publication of alleged hate speech, incitement of violence, and child pornography.[51] So important has this judgment been to the

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[48] Ibid at para 33.
[49] Ibid at para 31.
[50] Ibid at para 34.
[51] See note 45 above.

BCCSA's jurisprudence that it even invited Mr Jersild to present the keynote address at its 2012 AGM.[52]

41 ***National Commissioner of the South African Police Service v e.tv (Pty) Ltd***,[53] is an instructive example of the Tribunal's application of this *Jersild* distinction between airing and endorsing offensive views. There etv broadcast interviews with two individuals who stated that they intended to rob tourists during the FIFA 2010 World Cup and threatened violence if the police tried to apprehend them. The Tribunal found that merely broadcasting these interviews did not constitute glamorising or inciting violence. It could not be reasonably suggested that etv itself endorsed these views.[54] The Tribunal further emphasised the following:

> *"[24] The fact that the interview may be considered to be offensive or even sensational is irrelevant within the ambit of the Code. Questionable styles in journalism are not prohibited as such. The Constitutional Court, the European Court of Human Rights and this Tribunal have recognised that freedom of expression extends to expression that is offensive. In addition, the mere fact that a documentary or news item is sensational does not deprive it of its value as such. On the question whether it was in the public interest to have publicised the views of the criminals – as argued by counsel for the National Commissioner – the counter argument, which this Tribunal adopts, is that the suppression of this information (which might be without any value according to many viewers) would amount to an unjustifiable suppression of information as to the psyche of two criminals – a psyche which is abhorrent to law-abiding society – but, nevertheless, adds to the broad picture of society."*
>
> *…*
>
> *[25] Lastly, e-tv did not ultimately choose sides, but instead left the question open as to whether the policy of the National Commissioner was likely to be effective, given the attitudes of the two interviewees. Although many viewers might, from the point of view of patriotism,*

[52] BCCA 2014 Annual report.
[53] *National Commissioner of the South African Police Service and Others v e.tv (Pty) Ltd* Case No 05/2010.
[54] Ibid at paras 16 to 22.

> *have expected e-tv, as a South African broadcaster, to have sided with the police and not left the question open as to whether the National Commissioner would be successful in his anti-crime efforts, there is nothing in the Code which expects of broadcasters that they show patriotism. The latter would be in conflict with the independence of broadcasters, freedom of expression and the right to be informed. A black-out on offensive information would be typical in a dictatorial state. The right to know is a fundamental right that cannot be compromised in a democratic state."* (Emphasis added)

42 Offensive and even sensational views have their place in a constitutional democracy, even during times of crisis. The airing of such views on matters of public interest, falling short of endorsement by the media, is vital to open debate and the search for truth.

THE COMMENT CLAUSES AND PRINCIPLES OF INTERPRETATION

43 The Tribunal found that the broadcast contravened clause 28.2.2 of the Subscription Code and clause 12.2 of the FTA Code.

43.1 Clause 28.2 of the Subscription Code provides that:

> *"28.2.1 Licensees may broadcast comment on and criticism of any actions or events of public importance.*
>
> *28.2.2 Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to."*

43.2 Clause 12.2 of the FTA Code is framed in materially similar terms, providing, in relevant part, that:

> *"(1) Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance.*
>
> *(2) Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to."*

44 These comment clauses set out three explicit requirements for comment:

44.1 First, it must be an honest expression of opinion.

44.2 Second, it must be presented as comment rather than fact.

44.3 Third, the comment must be made on facts truly stated or fairly indicated and referred to.

45 Section 39(2) of the Constitution compels the Appeal Tribunal to interpret these comment clauses in a manner that both avoids limiting rights and best promotes freedom of expression.[55]

45.1 This Tribunal has repeatedly emphasised that the comment clauses must be implemented in a manner that does not unduly limit freedom of expression. In *Grové*,[56] the Tribunal made the following remarks:

> *"Yet it has constantly been our approach to clause 35 (clause 3 in the previous Code) that only in cases where it is absolutely clear that there was an unfair comment on a matter of public importance would we find against a broadcaster under this clause. Balance and fairness are difficult aims to meet, and so, in order not to stifle freedom of expression, in cases where doubt exists we would rather come to the finding that a programme has not contravened this clause of the code, than stifle debate and free speech, even though such speech may not have been wholly sensitive or balanced. Freedom of expression is too precious an asset in our new democracy to chip away at without very good reason. Usually, the reasons behind imposing a limitation would be based on considerations of harm and misinformation, or on an obvious invasion of privacy without any compelling reason for having done so."*[57] *(my emphasis)*

[55] *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at para 87, referring to *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC).
[56] *Grové v e-tv,* Case No 29/2004 (BCCSA), 22 July 2004.
[57] *Grové* ibid at para 5.

45.2 Furthermore, because a breach of the comment clauses carries potentially serious consequences, it must be interpreted restrictively. Any uncertainty must be resolved against the risk of being penalised.[58] The Tribunal endorsed this principle in *Philip v Talk Radio 702*:

> *"I have studied the recent judgment of the Constitutional Court on comment, and have come to the conclusion that clause 12 of the Code may in a sense be compared to the statutory crime created by the Election Act that was before the Court in [the Democratic Alliance judgment]. In the latter, the Court clearly stated that the matter before it did not amount to a defamation case, but instead related to a statutory crime. Although the consequences of a finding that the Broadcasting Code has been transgressed are much less severe than a finding that the said Electoral Act had been contravened, the BCCSA is also permitted to impose a fine that could amount to a maximum of R60 000. Clause 12 must, accordingly, be approached with an open mind. In fact, this Tribunal has, in the past, often held that, in so far as clause 12 requires balance, balance must be defined narrowly, so that ample criticism may be lodged on matters of public importance. Clause 12 should, accordingly, not be approached with anxiety by broadcasters. When a genuinely held belief is broadcast, it must be approached with what may be termed a section 16 frame of mind. In my opinion, this result accords with the thinking of the Constitutional Court, cited above, which gave a wide latitude to claims made in an election SMS of the Democratic Alliance, claims which were and are disputed by the ANC."[59](my emphasis)*

45.3 The comment clauses must also be interpreted in a manner that gives effect to its purpose. [60] A sensible meaning of these clauses must be preferred over one that leads to insensible or unbusinesslike results.[61]

45.4 This Tribunal discussed the purpose of clause 28.2 in *Karson*.[62] It explained that, since comment differs from straight news reporting insofar as it entails personal opinion, this clause affords audiences the

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[58] *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at paras 129-131. See further *Hira v Booysen* 1992 (4) SA 69 (A) at 78.
[59] *Philip v Talk Radio 702*, Case No 02/2015 (BCCSA), 4 March 2015 at para 7.
[60] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28.
[61] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (CC) at para 18.
[62] *Karson v Multichoice ANN7 Channel,* Case No 15/2017 (BCCSA), 14 June 2017.

opportunity to decide for themselves how much weight or importance to attach to personal opinions expressed.[63]

THE COMMENT CLAUSES DO NOT APPLY TO MR ICKE'S INTERVIEW

46 The comment clauses must be interpreted in light of the ***Jersild*** distinction and the principles that underpin it. Properly interpreted, the restrictions contained in these clauses can only apply meaningfully to comment made by the broadcaster itself, or comment which could be reasonably perceived to be endorsed by the broadcaster.

47 To hold otherwise would jettison the vital distinction between mere airing of offensive opinions and endorsement. It would threaten to stifle media freedom and the robust exchange of ideas, by forcing the media to censor views expressed by controversial interview subjects, no matter the public interest in the subject matter, and despite all reasonable steps being taken to distance the broadcaster from these views.

48 It would also produce a direct conflict between the provisions of the Codes that deal with hate speech and other harmful forms of speech, on the one hand, and the comment clauses, on the other.

49 Both the Subscription Code[64] and the FTA Code[65] prohibit the publication of hate speech, incitement of violence, propaganda for war and a range of other harmful

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[63] *Karson* ibid at para 4.
[64] Subscription Code, clauses 9 – 11.
[65] FTA Code, clauses 3 – 5.

forms of speech, subject to the qualifications, *inter alia*, that this prohibition does not apply to "*opinion*" on a matter of public interest:

> *"11.1 broadcasts of bona fide scientific, documentary, artistic, dramatic, literary or religious programming material, which, judged within context, is of such nature;*
>
> *11.2 broadcasts which amount to a bona fide discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or*
>
> *11.3 broadcasts which amount to a bona fide discussion, argument or opinion on a matter of public interest."* (Subscription Code)

50 The forms of protected "*opinion*" under this exception do not need to be substantiated by facts, nor do they need to constitute fair comment, as defined under the comment clauses. As the BCCSA Tribunal has repeatedly held, citing *Jersild*, it suffices that these opinions be expressed on matters of public interest, where it is made clear that the broadcaster does not endorse these views.

51 On general principles, the provisions of the Codes must be read and interpreted holistically and in a manner that reconciles all its provisions in a sensible manner.[66]

52 If the *Jersild* distinction is not applied in the same way to the comment clauses, this would create startling anomalies. For example:

52.1 A broadcaster would be permitted to air an interview in which a pastor expresses his personal belief that "*homosexuality is a sin*" as part of an interview on religious attitudes to sexuality, but if the pastor commented, in passing, that he believes that the moon landing was a hoax orchestrated

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[66] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at para 89.

by the CIA, without any reference to facts, then the broadcaster would be held liable for breaching the comment clauses.

52.2 A broadcaster could screen an interview with an ex-AWB member who expresses hateful, racist opinions as part of an exposé on white supremacist groups, but would be sanctioned if the subject mentioned his unsubstantiated opinion that the Illuminati control global finance.

52.3 It would be permissible to air a radio interview with a politician who espouses anti-immigrant opinions as part of a segment exploring his party's policies, but it would be prohibited from including a clip in which the the politician expressed the opinion that the world is flat, without any supporting facts.

53 All of this demonstrates that the *Jersild* distinction must apply equally to the comment clauses: in the absence of endorsement by the broadcaster, actual or reasonably perceived, the comment clauses do not apply to an interview subject's comments and opinions.

54 The interview with Mr Icke must be approached from the perspective of the reasonable viewer, who is "*broadminded, balanced and not overly sensitive*".[67]

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[67] *Boshoff v SABC 3* Case No: 51/A /2012 at para 8; *Russell v 567 Cape Talk* Case No: 48/2006 at para 6. The same standard is applied in defamation law, where it is held that a reasonable viewer is a *"right thinking person*" who is of "*average education and normal intelligence*" and is "*not abnormally sensitive*". See *Basner v Trigger* 1945 AD 22 at pp. 35 – 6; *Channing v South African Financial Gazette Ltd* 1996 (3) SA 470 (W) at 474.

55 There could be no suggestion that the appellants or Mr Cliff actually endorsed or supported Mr Icke's views, nor could any reasonable viewer have been left with that impression:

55.1 The irreverent nature of the programme made it clear that this was a show about robust commentary on current affairs, not factual news broadcasting.

55.2 Viewers were expressly warned to be sceptical and critical of what they saw on the show.

55.3 Mr Cliff's introduction of Mr Icke made it clear that he held strong opinions and that Mr Cliff did not agree with them, but that he believed that it was important that views like this be aired, rather than repressed, to encourage debate.

55.4 The definitions of "*conspiracy theory*" and "*conspiracy theorist*" that flashed across the screen left it in no doubt that Mr Icke would be expressing his personal beliefs and that these were to be treated with caution.

55.5 Mr Cliff's challenging of Mr Icke and his mocking, incredulous tone would have left the reasonable viewer in no doubt that Mr Cliff and the appellants did not support Mr Icke's views.

55.6 The overwhelming flood of news on the Covid-19 pandemic broadcast before and after this show, at the height of the first wave, would also have left the reasonable viewer with no uncertainty as to the appellants' views on the seriousness of the pandemic.

56 Could Mr Cliff have been more robust in challenging Mr Icke and debunking his claims? Perhaps. But as the Tribunal has held, with reference to *Jersild*, "*[q]uestionable styles in journalism are not prohibited as such*",[68] nor should courts or tribunals seek unduly to second-guess the methods employed by media professionals.[69] Freedom of expression and media freedom not only protect the content of expression, but also the media's chosen means of expression.[70]

57 In cases such as this, where the views expressed by an interview subject are so implausible and so extreme, mockery, laughter and ridicule are perfectly justified responses. Belief in lizard men and Covid-19 denialism is deserving of nothing less. Poe-faced, earnest rebuttal of such outlandish claims will often merely serve to lend them credibility. As Sachs J noted in ***Laugh it Off***, albeit in a different context:[71]

> *"A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. It enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an elixir of constitutional health."*

58 As a consequence, there was no breach of the comment provisions, because they did not apply to Mr Icke's opinions. No reasonable viewer could have been left with the impression that the appellants endorsed such comments.

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[68] *National Commissioner of the South African Police Service and Others v e.tv (Pty) Ltd* Case No 05/2010 at para 24.
[69] *Jersild v Denmark* (1995) 19 EHRR 1 (ECtHR Grand Chamber) at para 31
[70] Ibid.
[71] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) at para 110.

MR ICKE'S VIEWS WERE PROTECTED COMMENT

59 Even if it is found that the comment clauses applied to Mr Icke's statements, the requirements for protected comment were satisfied.

The first and second requirements: Honest expression of opinion, that clearly appears to be comment

60 It was not disputed by MMA that the first two requirements of the comment clauses were met. Mr Icke's was an honest expression of opinion, albeit extreme, which was clearly presented as opinion rather than a fact.[72] Mr Cliff's introductory remarks further emphasised that everything that followed was comment and stressed that it was up to viewers to form their own opinions.

61 Yet the Tribunal disagreed. It rejected the appellants' argument that the test for comment is whether it is honestly held, holding that "*irrational*" or "*far-fetched*" comments contravene the comment clause.[73] Respectfully, this betrays a fundamental misunderstanding of free expression and the nature of fair comment.

62 Far-fetched and irrational comments are broadcast every day – on radio talk shows, in interviews with politicians, and in numerous other settings. And the broadcast of these irrational comments is protected. This is the very distinction between news and comment: while only "*that which may reasonably be true*"[74]

[72] MMA Reply at para 5, reproduced in Tribunal decision p 12 para 4.
[73] Tribunal decision at pp 25 – 26 para 21.
[74] Clause 28.1.3 of the Subscription Code.

may be broadcast as news, the Codes impose no such requirement in relation to comment.

63 If comment is to be disallowed purely because it is considered by some to be "*irrational*", the distinction between news coverage and comment is impermissibly eroded.

The third requirement: Comments made on facts fairly indicated and referred to

64 The only question remaining is whether Mr Icke's comments satisfied the third requirement for protected comment.

65 The disjunctive phrasing of this requirement is significant. Unlike fair comment in defamation law, there is no requirement that the facts upon which the comment is based should be true. It suffices if the comments are either "*made on facts truly stated*" or "*fairly indicated and referred to*".

66 A "*fact*" is not necessarily a true statement.[75] The facts upon which the comment is based may be true, false, far-fetched, or entirely made up, as long as some "*fair*" reference is made to them.

67 "*Fairness*", when applied to comment, is a misleading term of art. A "*fair comment*" need not be fair, just, reasonable or sensible at all, on the ordinary

[75] *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at para 148.

meaning of these terms. The Constitutional Court explained this in detail in ***McBride***:[76]

> *"[81] Nearly a century ago, in the judgment that firmly authenticated the defence in South African law, Innes CJ remarked that the use of the term 'fair' to describe the defence is 'not very fortunate'. He was right. As he explained, the criticism sought to be protected need not 'commend itself' to the court. Nor need it be 'impartial or well-balanced'. In fact, 'fair' in the defence means merely that the opinion must be one that a fair person, however extreme, might honestly hold, even if the views are 'extravagant, exaggerated, or even prejudiced'. The comment need be fair only in the sense that objectively speaking it qualifies 'as an honest, genuine (though possibly exaggerated or prejudiced) expression of opinion relevant to the facts upon which it was based, and not disclosing malice'.*
>
> *[82] So to dub the defence 'fair comment' is misleading. If, to be protected, comment has to be 'fair', the law would require expressions of opinion on matters of fact to be just, equitable, reasonable, level-headed and balanced. That is not so. An important rationale for the defence of protected or 'fair' comment is to ensure that divergent views are aired in public and subjected to scrutiny and debate. Through open contest, these views may be challenged in argument. By contrast, if views we consider wrong-headed and unacceptable are repressed, they may never be exposed as unpersuasive. Untrammelled debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.*
>
> *[83] Protected comment need thus not be 'fair or just at all' in any sense in which these terms are commonly understood. Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true. In the succinct words of Innes CJ, the defendant must 'justify the facts; but he need not justify the comment'.*
>
> *[84] Perhaps it would be clearer, and helpful in the understanding of the law, if the defence were known rather as 'protected comment'. …"*
> (Emphasis added)

68 This is a common sense reflection of how people come to hold opinions. It was explained by Lord Diplock in ***Horrocks v Lowe***:[77]

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[76] *The Citizen 1978 (Pty) Ltd and Others v McBride* at paras 81 – 84, citing *Roos v Stent & Pretoria Printing Works Ltd* 1909 TS 988 at 998, per Innes CJ.

[77] *Horrocks v Lowe* 1975 AC 135 (HL) at 150, cited with approval in *Vincent v Long* 1988 (3) SA 45 (C) at 50 and *Yazbek v Seymour* 2001 (3) SA 695 (E) at 704.

> "*Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". If he published untrue defamatory matter recklessly without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more.*"

69 However, the Tribunal ignored all of these principles and invented an entirely new test of its own for protected comment:

69.1 According to the Tribunal, comments must be broadcast "*justifiably and reasonably*".[78]

69.2 It found that the comments Mr Icke made in relation to Covid-19 being a hoax and to the effect that there is no virus, were not justified or reasonable.[79] The reason these comments were not justified was, according to the Tribunal, because they were not true.[80]

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[78] Tribunal decision p 25 para 20.
[79] Tribunal decision p 25 para 20.
[80] Tribunal decision p 25 paras 20-21.

69.3 The Tribunal considered Mr Icke's comments to be potentially harmful to the public, and that they had "*life-and-death consequences on society at large*".[81] This was because, if people were convinced by the broadcast that there was no virus, "*people would probably disobey all the regulations*", leading to a new outbreak and many more deaths.[82] The Tribunal's role, it held, was "*to protect the people of South Africa from harm being caused by the obvious misinformation contained in the broadcast under consideration*."[83]

70 None of these requirements are to be found in the comment clauses, nor are they consistent with a constitutionally compatible, restrictive interpretation of those provisions. They evince a paternalistic approach which denies that reasonable people are capable of making up their own minds. It is a reversion to the kind of "*thought contro*l" that characterised censorship under apartheid.[84]

71 The only requirement that ought to have been applied was whether the comments were made based on facts fairly stated and referred to.

72 The requirement that facts be fairly indicated and referred to does not require the person voicing their opinion to provide an exhaustive reference list to each factual assertion underpinning their opinion. Nor is it clear what "facts" the Tribunal had

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[81] Tribunal decision pp 26 - 28 para 22.
[82] Tribunal decision pp 26 – 28 para 22.
[83] Tribunal decision pp 26 - 28 para 22.
[84] See Gilbert Marcus "Reasonable Censorship?" in H Corder (ed) *Essays on Law and Social Practice in South Africa* (Juta & Co Ltd) 1988 at pp 349 – 360; JCW Van Rooyen *Censorship in South Africa* (Juta & Co Ltd) 1987.

in mind and how they would apply to the views of a conspiracy theorist like Mr Icke.

73 In ***DA v ANC***, the election SMS case, the court specifically held that "*it does not matter that the facts justifying the comment were not listed at length in the SMS. It is enough that it referred to the facts it relied upon*."[85] There the comment consisted of a single line: "*The Nkandla report shows how Zuma stole your money to build his R246 m home*."

74 In ***McBride***,[86] the Constitutional Court further explained that the facts that form the basis of a comment do not need to be set out in full, or at all, particularly where those facts are notorious:

> *"This is because 'there may be cases where the facts are so notorious that they may be incorporated by reference'. And indeed, in the decision that authoritatively incorporated the defence of protected or 'fair' comment into South African law, the court took account of notorious facts about the labour disturbances on the Witwatersrand during 1913 and 1914, from which the disputed publication arose, even though the comment did not expressly set them out. It was enough that the facts were 'in the common knowledge of the person speaking, and those to whom the words are addressed'."*

75 In the context of an interview with a controversial figure, to require detailed or exhaustive reference to each fact would be overly cumbersome and onerous. But more importantly, the finding by the Tribunal that people would be convinced that the there was no virus and that this would lead to disobedience of the regulations is, with respect, absurd. This is for the following reasons:

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[85] *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at para 151.

[86] *The Citizen 1978 (Pty) Ltd and Others v McBride* at para 89, citing *Roos v Stent & Pretoria Printing Works Ltd* 1909 TS 988.

75.1 There can be no event in the past 75 years that has more dominated the news cycle and the media generally, than the Covid-19 pandemic.

75.2 The public generally is informed virtually on an hourly basis of the lethal effect of the pandemic with updates on the number of infections and the number of deaths.

75.3 The public is repeatedly reminded of the need for stringent precautions. These are broadcast on all media and by way of daily SMS.

75.4 The fact of the pandemic is constantly visible with the wearing of masks being compulsory and the need for social distancing and sanitising.

75.5 No reasonable person can be unaware of this, including reasonable viewers of the programme.

75.6 The very premise of the programme is the factual existence of the pandemic. As already noted, Mr Cliff states, *inter alia*, that "*curbing this pandemic and saving lives is critical*."[87] The question is posed "*how do you balance saving lives with saving livelihoods?*". In his exchange with Mr Icke, Mr Cliff puts it bluntly: "*There are people who are dead.*"[88]

75.7 All of this, together with the incredulity and challenges to Mr Icke, are more than sufficient to allow viewers to make up their own minds.

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[87] Timestamp: 4:40.
[88] Timestamp: 42:00 – 42:18.

76 The BCCSA Tribunal has upheld as protected comment opinions that were expressed with scant reference to any facts. This was on the basis that the reasonable viewer has enough to assess the value of the opinion for himself.

76.1 In *Churr*, the complainant took issue with an interview conducted with the Director of Gun Free South Africa.[89] The complainant's main concern was a statement Ms Kirsten made that the US has "*some of the highest suicide rates*" in the world.[90] Ms Kirsten did not refer to any facts in support of this view. However, the Tribunal held that the broadcast did not contravene the Code:

> *"Having listened carefully to the interview, it appears that Ms Kirsten said that the USA has some (own emphasis) of the highest suicide rates in the world. The value that a viewer would have attached to this statement will be determined by the fact that she is pro-gun-control (as stated at the beginning of the interview) and secondly by the fact that she does not attempt to validate her statement by any authority. It was her opinion and neither she nor the interviewer attempted to present it as anything else. The generality of Ms Kirsten's reference to statistics in two of her other statements confirms the fact that this interview was comment based on honest opinion made on facts fairly stated as required in Clause 28.2.2."*[91] *(my emphasis)*

76.2 Even if it is clear from the interview that the opinion is based on speculation, that may be sufficient for the purposes of the comment clause.

76.3 For instance, in *Gaye Derby-Lewis*,[92] the Tribunal considered whether statements made by then Minister Tokyo Sexwale, to the effect that there was a conspiracy surrounding the assassination of Chris Hani, contravened the comment clause. The Tribunal held that Minister

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[89] *Churr v eNCA*, Case No 10/2018 (BCCSA), 20 June 2018.
[90] Ibid at para 7.
[91] Ibid at para 14.
[92] *Gaye Derby-Lewis v Talk Radio 702*, case 19/2013 (BCCSA), 2 July 2013.

Sexwale's views about there being a "conspiracy", were clearly presented as his opinion, based on a long-held belief. It affirmed that Minister Sexwale "*is both entitled to this opinion, as well as to express this opinion, as afforded by section 16 of the Constitution*".[93] This was so even though "*evidence of such a conspiracy has never been put forward*".[94] The Tribunal held that "*it is obvious from the interview that the opinions expressed as to any conspiracy are as speculative as any view in this regard has ever been*."[95] The comment accordingly did not contravene the Code. The key was that the views expressed amounted to honest expressions of opinion, and were presented as such.

77 Turning to this case, the underlying factual basis for Mr Icke's comments is referenced throughout: he believes that the world is controlled by shadowy lizard overlords, and the Covid-19 pandemic is their latest plot. Mr Cliff's repeated interjections on this point and his closing remarks constantly remind the viewer of this. Any viewer looking to explore Mr Icke's theories about lizard overlords in greater detail would find this through a simple Wikipedia search.

78 These, of course, are not the only relevant "facts". All the facts referred to above about the existence of the pandemic and its lethal nature, are equally facts which hare directly relevant to any sensible assessment of the programme.

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[93] Ibid at para 7.
[94] Ibid at para 8.
[95] Ibid at para 10.

79 When dealing with a self-confessed conspiracy theorist of an extreme sort like Mr Icke, it is difficult to insist on requirements of "*facts*" from him in any evidential understanding of the term. Mr Icke refers to "*factual evidence*" to support his claim of a "*pandemic hoax*"; he refers to his own books and "*research*"; and he refers to his information having come from "*doctors, virologists and medical specialists*". Throughout the interview, a screen behind Mr Icke directs viewers to his personal website, "*Ickonic.com*", where viewers looking to interrogate his comments could access his books, podcasts and films.

80 The factual basis for Mr Icke's opinions is not exhaustively spelled out in the 15 minutes interview, but that is not what is required. The key point is that the viewer is provided with enough information about the factual basis (or lack thereof) for Mr Icke's opinions and where to find more, should they wish to examine his claims in greater detail. The reasonable viewer, on seeing the interview, would recognise that the opinions expressed are largely speculative conspiracy theories. The purpose of the comment clauses is accordingly met. Moreover, the reasonable viewer will make up his or her own mind, not simply on what Mr Icke says but also on the basis of common sense and the daily inundation of countervailing facts on the pandemic.

81 To hold that the broadcast does not meet the requirements of the comment clauses would lead to absurdity. It would mean that a broadcaster is required, in an interview situation, where a person's personal views are sought on a particular issue, to refrain from broadcasting the interview where the opinion of the interviewee is not exhaustively referenced to detailed facts, or where the interview subject can produce no facts to support their opinions. One can imagine

any number of interviews that might fall under this category – from interviews with ill-prepared politicians, to call-in radio shows, to interviews with religious leaders. This is a serious and far-reaching limitation of expression, effectively gagging viewpoints and opinions that some consider to be "*wrong*" or poorly informed, and limiting discussion on matters of public importance.

SANCTION

82 For the reasons set out above, the sanction imposed on the appellants cannot stand. Even if the Appeal Tribunal finds that there was a breach of the Codes, the sanction imposed by the Tribunal was manifestly disproportionate and clearly incorrect.

83 No reasonable viewer would take the broadcast of the interview as providing them with a reason to stop obeying Covid-19 protocols, any more than they would see it as a good reason to believe in lizard people, or a global governance conspiracy.

84 In addition, the Tribunal failed to give appropriate weight to the following factors:

84.1 the broadcaster's broad discretion over the means of expression;

84.2 the context of the broadcast;

84.3 the fact that the statements complained of were clearly presented as opinion and not fact; and

84.4 The daily reporting on all media of the lethal nature of the pandemic.

85 At the very most, the Tribunal ought simply to have ordered the appellants to broadcast an apology, in the terms they initially proposed.[96] The imposition of a financial penalty was entirely unwarranted.

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[96] As recorded in the Tribunal decision p 31, at para 9 of the appellants' submissions.

86 The gross disproportionality of this penalty is best illustrated by comparing the facts of this case with a recent decision of the UK Regulator, Ofcom, in a matter involving Mr Icke.[97]

86.1 There Ofcom considered a complaint of "*harmful and / or offensive material*" under the relevant UK codes, which is a far broader category of prohibited material than the comment clauses under the BCCSA Codes.

86.2 This complaint was directed at a television channel, *London Live*, which broadcast a full 80-minute interview with Mr Icke. In that interview, Mr Icke was given free rein to espouse his view that Covid-19 is a hoax.

86.3 The interviewer offered no meaningful challenge and ended the interview by shaking Mr Icke's hand and thanking him profusely, suggesting a strong endorsement of his views:

> *"[Y]ou blew me away, most of the things you said made total sense to me … I'll be honest David, a lot of people told me not to have you on today…and I thought every time I have David on he always shows me that he's got some amazing knowledge and amazing perspective about what's going on here, and I'm so glad I had you on to talk about this stuff"* (Emphasis added)

87 Even in those extreme circumstances, which are plainly distinguishable from the present case, Ofcom held that an apology was sufficient and that a financial penalty was an unwarranted imposition on freedom of expression.[98]

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[97] Ofcom decision on merits (20 April 2020) available at https://www.ofcom.org.uk/about-ofcom/latest/bulletins/content-sanctions-adjudications/decision-estv-limited.

[98] Ofcom decision on sanction (8 June 2020) available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0020/194402/sanction-decision-estv.pdf.

CONCLUSION

88 For all of these reasons, we submit that the appeal should be upheld and the finding of a breach of the comment clauses should be overturned.

GILBERT MARCUS SC

CHRIS MCCONNACHIE

10 March 2021

Chambers, Sandton