



P.O.Box 412365 • Craighall • Tel (011) 326 3130 • Fax (011) 326 3198 • email: bccsa@nbsa.co.za
Block No 8 • Burnside Island Office Park • 410 Jan Smuts Avenue • Craighall Park • 2196 • www.bccsa.co.za

CASE NUMBER: 09/2020

DATE OF HEARING: 23 SEPTEMBER 2020

JUDGMENT RELEASE DATE: 30 OCTOBER 2020

MEDIA MONITORING AFRICA

COMPLAINANT

vs

eNCA CHANNEL 403

RESPONDENT

**TRIBUNAL: PROF HP VILJOEN (CHAIRPERSON)
MS NOKUBONGA FAKUDE (COMMISSIONER)
MR EDWIN NAIDU (COMMISSIONER)**

For the Complainant: ADV STEPHEN BUDLENDER SC, INSTRUCTED BY AVANI SINGH OF POWER SINGH INC. AND TARA DAVIS OF POWER SINGH INC.

For the Broadcaster: ADV INGRID CLOETE, INSTRUCTED BY MR DAN ROSENGARTEN OF ROSENGARTEN & FEINBERG AND MR OSCAR MACHABA AND MS PHILLIPPA RAFFERTY OF eNCA/etv.

Complaint against broadcast of an interview with a certain Mr David Icke whose view is that Covid-19 pandemic is a hoax and “there is no virus”- at issue is limitation of freedom of expression – Tribunal finding that comment was not justifiable because misinformation could cause harm – contravention found of Clause 28.2.2 and Clause 13 of the Codes respectively and complaint upheld – interview not a discussion of controversial issues of public importance – Clause 28.3.1 and Clause 13(1) of the Codes respectively not applicable and thus not contravened – Clause 13 of Subscription Broadcasting Code pertaining to material unsuitable for children not contravened because broadcast on eNCA was after watershed – BCCSA has no jurisdiction to order removal of programme from website – Media Monitoring Africa vs e.tv and eNCA Channel 403, Case No: 09/2020 (BCCSA).

SUMMARY

A complaint was lodged against the Broadcasters eNCA and etv for broadcasting an interview with a certain Mr David Icke, also known as a conspiracy theorist, whose view is that the Covid-19 pandemic is a hoax and that “there is no virus.” At issue here is the limitation of freedom of expression. The Tribunal found that comments made during the interview were not justifiable nor reasonable because the misinformation spread by the interviewee could cause harm to the people of South Africa. The Tribunal found a contravention of Clause 28.2.2 of the Subscription Broadcasting Code and Clause 13 of the Free-to-Air Broadcasting Code respectively and the complaint was upheld. The Tribunal found that the interview did not constitute a discussion of controversial issues of public importance and therefore Clause 28.3.1 and Clause 13(1) of the Codes, respectively, were not applicable and thus not contravened. Clause 13 of the Subscription Broadcasting Code pertaining to material unsuitable for children was not contravened because the broadcast on eNCA, although broadcast at 20:30, was after the watershed. Finally, the BCCSA has no jurisdiction to order the removal of a programme from a website of the Broadcaster.

JUDGMENT

HP VILJOEN

[1] The Registrar of the BCCSA received a complaint against e.tv and eNCA regarding the programme “So what now?”, during which an interview was broadcast with a certain David Icke, known as a conspiracy theorist. The programme was broadcast on eNCA on 22 July 2020 at 20:30, which has to comply with the Code for Subscription Broadcasting Licensees, and on etv on 23 July 2020 at 23:00, which has to comply with the Free-to-Air Code for Broadcasting Licensees.

[2] **The complaint reads as follows:**

“COMPLAINT SUBMITTED BY MEDIA MONITORING AFRICA

1. We act for Media Monitoring Africa (“MMA”).
2. Please find enclosed a complaint submitted to the Broadcasting Complaints Commission of South Africa (“BCCSA”), on behalf of MMA, regarding an interview with David Icke that was broadcast on eNCA and eTV on a show titled “So what now?”. To MMA’s knowledge, the details of the broadcast are as follows:
 - a. The interview was first broadcast on eNCA on Wednesday, 22 July 2020 at 20h30.
 - b. The interview was re-broadcast on eTV on Thursday, 23 July 2020 at 23h00.
 - c. The interview remains accessible on ENCA’s website, and is accessible here: <https://www.enca.com/shows/so-what-now-22-july-2020>.

3. Please feel free to contact us if we can provide any further information.

COMPLAINT TO THE BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA SUBMITTED BY MEDIA MONITORING AFRICA

INTRODUCTION

1. This complaint is submitted by Media Monitoring Africa ("MMA") to the Broadcasting Complaints Commission of South Africa ("BCCSA"). The complaint relates to an interview with David Icke on a show titled "So what now?", which was first broadcast on eNCA on Wednesday, 22 July 2020 at 20h30, and subsequently re-broadcast on eTV on Thursday, 23 July 2020 at 23h00. The broadcast also remains accessible on ENCA's website, and is accessible here: <https://www.enca.com/shows/so-what-now-22-july-2020>.
2. MMA submits that the contents of the broadcast were unlawful, harmful, and in breach of the provisions of both the Subscription Broadcast Code of Conduct (applicable to eNCA) and the Free to Air Code of Conduct (applicable to eTV). In the current context, as South Africa and the world grapple with the devastating effects of the COVID-19 pandemic, broadcasts of this nature that patently seek to spread disinformation should be carefully scrutinised, as they do not serve the public interest or further any meaningful engagement on the subject. In particular, MMA submits that eNCA, as a news broadcaster, has a heightened responsibility to ensure the credibility and truthfulness of the content that it disseminates.
3. This submission is structured as follows: (i) first, an overview of MMA; (ii) second, the harmful nature of the broadcast; (iii) third, the specific grounds of complaint; and (iv) fourth, the appropriate sanction. This is dealt with in turn below.

OVERVIEW OF MEDIA MONITORING AFRICA

4. MMA is a not-for-profit organisation that has been monitoring the media since 1993. MMA's objectives are to promote the development of a free, fair, ethical, and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom.
5. MMA has over 25 years of experience in media monitoring and direct engagement with media, civil society organisations, state institutions and citizens. MMA is the only independent organisation that analyses and engages with media according to this framework. In all of our projects, we seek to demonstrate leadership, creativity and progressive approaches to meet the changing needs of the media environment.
6. MMA also works directly on issues to combat the spread of disinformation. This includes overseeing the Real411 portal, which is an online platform through which members of the public can submit complaints of disinformation, hate speech, incitement to violence and the harassment of journalists. MMA has also conducted research, training workshops and public discussions on the need to strike an appropriate balance between the right to freedom of expression and measures to address disinformation.

7. For more information about MMA, please visit: www.mediamonitoringafrica.org.

HARMFUL NATURE OF THE BROADCAST

8. MMA submits that the broadcast is a clear example of disinformation pertaining to the COVID- 19 pandemic. In this regard, it should be noted that disinformation relates to verifiably false or misleading information created, presented and disseminated for economic gain or to intentionally deceive the public.¹ The Merriam-Webster Dictionary defines disinformation as “false information deliberately and often covertly spread (as by the planting of rumours) in order to influence public opinion or obscure the truth”. Similarly, the Cambridge Dictionary defines it as “false information spread in order to deceive people”, and the Oxford Learner’s Dictionary defines it as “false information that is given deliberately”.
9. A more nuanced definition is provided by the European Commission High-Level Expert Group on Fake News and Online Disinformation, which defines disinformation as “all forms of false, inaccurate or misleading information designed, presented and promoted to intentionally cause public harm or profit”.²
10. Disinformation may have far-reaching consequences, cause public harm, be a threat to democratic political and policy-making processes, and may even put the protection of the public’s health, security and environment at risk. Disinformation erodes trust in institutions, as well as in the media, and harms democracy by hampering the ability of the public to take informed decisions. It can polarise debates, create or deepen tensions in society, undermine electoral processes, and impair freedom of opinion and expression. As explained in the Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda:³

“[D]isinformation and propaganda are often designed and implemented so as to mislead a population, as well as to interfere with the public’s right to know and the right of individuals to seek and receive, as well as to impart, information and ideas of all kinds, regardless of frontiers, protected under international legal guarantees of the rights to freedom of expression and to hold opinions.”

11. According to the World Health Organisation (“WHO”), disinformation about the COVID-19 pandemic is of particular concern, as it affects whether people will do the right thing to control the disease or to mitigate its impact.⁴ Disinformation relating to the COVID-19 pandemic is of such significant concern that it has been criminalised in terms of the regulations issued under section 27(2) of the Disaster Management Act 57 of 2002, as published on 18 March 2020. Notably, regulation 11(5) provides that:

¹ European Commission, ‘Tackling online disinformation’, accessible at <https://ec.europa.eu/digital-single-market/en/tackling-online-disinformation>.

² European Commission, ‘A multi-dimensional approach to disinformation: Report of the independent High-level Group on fake news and online disinformation’ (2018) at p 3.

³ (2017). This is published by the Special Rapporteur on Freedom of Opinion and Expression of the United Nations, the Representative on Freedom of the Media of the Organisation for Security and Co-operation in Europe, the Special Rapporteur on Freedom of Expression of the Organisation of American States, and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples’ Rights

⁴ World Economic Forum, ‘How experts are fighting the Coronavirus ‘infodemic’’ (5 March 2020), accessible at <https://www.weforum.org/agenda/2020/03/how-experts-are-fighting-the-coronavirus-infodemic/>.

“Any person who publishes any statement, through any medium, including social media, with the intention to deceive another person about –

(a) COVID-19

(b) COVID-19 infection status of any person; or

(c) any measure taken by the Government to address COVID-19,

commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding six months, or both such fine and imprisonment.”

12. In sum, therefore, MMA submits that the broadcast was harmful for at least three key reasons: (i) first, the broadcast intentionally disseminated disinformation based on facts that were untrue; (ii) second, the broadcast promoted unlawful conduct that was in violation of the regulations issued under the Disaster Management Act; and (iii) third, by denying the existence of COVID-19 and claiming it to be a scam, the consequence of the broadcast may result in people not following appropriate precautionary and health measures in line with the advice of the relevant authorities.

GROUNDS OF COMPLAINT

First ground of complaint: Comment must be based on facts that are true

13. Clause 28.2.2 of the Subscription Broadcast Code of Conduct and clause 12.2 of the Free to Air Code of Conduct both require 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**”. (Emphasis added.) Importantly, while licensees are entitled to broadcast comment, such comment must be based on facts that are true and justifiable.
14. In the present matter, the broadcast was rife with falsehoods and untruths. This included the following:
- a. Mr Icke called COVID-19 “a pandemic hoax”, and claimed to have “absolute factual evidence to support that”. However, no such evidence was provided.
 - b. Mr Icke stated that “we have this quite obvious scam going on in terms of communication of information”.
 - c. Mr Icke stated that the WHO “was created by people like the Rockefeller family to control global health policy from a central point”, and that the WHO was “fronted up by a guy called Tedros, the DG, who is just an asset of Bill Gates, who owns the WHO”.
 - d. Mr Icke stated that “I was banned after doing a live interview stream on Youtube which got phenomenal audience because I said one thing, and this is what they are terrified of people realising: there is no virus.”
 - e. Mr Icke stated that “there is not a scientific paper on planet earth that has isolated the virus they call SARS-CoV-2 or COVID-19, they’ve never isolated it to show it exists”.
 - f. Mr Icke stated that “the information has come from doctors, virologists and medical specialists who will never get on a mainstream program because they’ve sussed there is no virus”.

15. At the crux of the interview with Mr Icke was the assertion that COVID-19 does not exist, and that the concerns regarding the pandemic are a scam. This is patently untrue. COVID-19 was declared as a global pandemic on 11 March 2020. Around the world, international organisations, states, leading medical experts and other relevant stakeholders have confirmed the existence of COVID-19. At present, there are more than 20 million people globally who have had confirmed infections of COVID-19, and more than 700 000 people who have died as a result of the disease.⁵ While co-morbidities may present an additional risk to affected persons, this does not negate the existence or direct impact that COVID-19 has had on the health and lifespan of millions of people around the world.
16. Further to this, and contrary to the assertion made by Mr Icke, a collaborative effort between the University of the Western Cape and Stellenbosch University obtained the first-known laboratory isolate of COVID-19 in South Africa on 1 April 2020.⁶ This has also been done in other countries, such as Canada for example, where a Canadian team of researchers from Sunnybrook Research Institute, McMaster University and Toronto University successfully isolated a strain of COVID-19 from two specimens and then cultivated it in a secure containment facility.⁷
17. Furthermore, the broadcast sought to discredit the WHO, which is one of the primary organisations that has been relied upon in the development of strategies to address COVID-19. Again, the facts contained in the broadcast were untrue. The funding of the WHO is made transparently known, and is received from member states paying their assessed contributions, in addition to voluntary contributions from member states and other partners.⁸

As a specialised agency of the United Nations, the WHO is independent from any state or private sector actor, and therefore is not – and cannot – be owned by Bill Gates, as claimed in the broadcast.

18. MMA submits that the denial of the existence of COVID-19 is both harmful and dangerous. There is insurmountable evidence that COVID-19 does indeed exist, and the statements made throughout the broadcast fail to meet the requirement of being based on facts that are true. This may result in viewers who believe the contents of the broadcast deciding not to take the necessary health and safety measures, and thereby endangering themselves and the broader public. In the midst of a public health crisis, it is particularly important that even commentary must be justified on true facts. This is for good reason, as the failure to do so would permit patent lies and falsehoods to be peddled in a manner that skews the public discourse and undermines public safety responses.
19. Accordingly, MMA submits that the broadcast was in breach of clause 28.2.2 of the Subscription Broadcast Code of Conduct and clause 12.2 of the Free to Air Code of Conduct.

⁵ Worldometer, 'COVID-19' (10 August 2020), accessible at <https://www.worldometers.info/coronavirus/>.

⁶ News Medical, 'South Africa obtains first laboratory isolate of SARS-CoV-2' (11 May 2020), accessible at <https://www.news-medical.net/news/20200511/South-Africa-obtains-first-laboratory-isolate-of-SARS-CoV-2>.

⁷ Independent, 'Coronavirus: Scientists isolate virus responsible for deadly COVID-19 outbreak' (13 March 2020), accessible at <https://www.independent.co.uk/news/science/coronavirus-covid-19-virus-isolate-canada-scientists-mutations-strains-a9399226.html>. See, also, The Conversation, 'I study viruses: How our team isolated the new coronavirus to fight the global pandemic' (25 March 2020), accessible at <https://theconversation.com/i-study-viruses-how-our-team-isolated-the-new-coronavirus-to-fight-the-global-pandemic-133675>.

⁸WHO, 'How WHO is funded', accessible at <https://www.who.int/about/planning-finance-and-accountability/how-who-is-funded>.

Second ground of complaint: Duty to present opposing points of view

20. Clause 28.3.1 of the Subscription Broadcast Code of Conduct and clause 13.1 of the Free to Air Code of Conduct provide as follows:

“In presenting a programme in which a controversial issue of public importance is discussed, **a broadcaster must make reasonable efforts to fairly present opposing points of view** either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.” (Emphasis added.)

21. MMA submits that the broadcast was self-styled as one being controversial, but failed to effectively present opposing views. The segment with Mr Icke did not include any other guests, which might have included a medical expert who could meaningfully counter Mr Icke’s denial of the existence of COVID-19. The host also did not effectively counter Mr Icke’s denial, and acknowledged that he was neither a doctor nor a researcher on the subject. Moreover, the host also ended the broadcast by expressing his confusion, stating that “I hope you’re as confused as I am”.
22. As a consequence of this failure, Mr Icke was permitted to make his false claims unchecked, without any countervailing discussion or correction. Accordingly, MMA submits that the broadcast was in breach of clause 28.3.1 of the Subscription Broadcast Code of Conduct and clause 13.1 of the Free to Air Code of Conduct.

Third ground of complaint: Protection of child viewers

23. Clause 13 of the Subscription Broadcast Code of Conduct provides that “[a] television or composite subscription broadcasting service licensee, wherever practicable, must attempt to ensure that **the more the broadcasting of programming material is unsuitable for children, the later that programming material must be broadcast** after the commencement of the watershed period.” (Emphasis added.)
24. In the present matter, the broadcast on eNCA took place a mere 30 minutes into the watershed period. The interview also remains accessible on eNCA’s website to be viewed at any time. This poses a significant risk of children viewing the broadcast to their detriment. Given the evolving maturities of children, and in the midst of the current public health crisis, it is important to ensure that children are appropriately protected against false information about the COVID-19 pandemic that may confuse or disturb their understanding thereof. Accordingly, MMA submits that the broadcast was in breach of clause 13 of the Subscription Broadcast Code of Conduct.

APPROPRIATE SANCTION

25. MMA submits that the broadcast was reckless and irresponsible in its dissemination of disinformation. eNCA and eTV have shown no concern for the harm that the broadcast has the potential to cause, as it has both re-broadcast the interview and maintained a copy on eNCA’s website. MMA submits that it is impermissible for disinformation of this nature to be broadcast – particularly on a news channel – and submits that the BCCSA should issue an appropriate sanction.

26. This may include, for instance, a reprimand; an order to broadcast a correction or summary of the finding; and/or a fine of up to R80 000.

CONCLUDING REMARKS

27. MMA has been deeply concerned by the broadcast, and notes that complaints regarding the broadcast have been received on the Real411 platform. MMA therefore urges the BCCSA to address the key issue of the dissemination of disinformation as a matter of urgency, as such content is deeply detrimental to the public interest.
28. Please do not hesitate to contact us if we can provide any further information.”

[3] **The Broadcaster responded as follows:**

“RE: BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA / SO WHAT NOW / 22 JULY 2020

Introduction

1. This is a response to a complaint submitted by Media Monitoring Africa (“**the complainant**”) in relation to an interview conducted by Gareth Cliff with David Icke that was broadcast on eNCA on 22 July 2020 and e.tv on 23 July 2020.
2. The essence of the complaint is that the content of the broadcast was unlawful, harmful and in breach of the provisions of the BCCSA Code of Conduct (both the Subscription and Free to Air Code).

Alleged breach of the Code

3. The complainant alleges that we have breached the following sections of the BCCSA Code of Conduct (“**the Code**”): 28.2.2 and 28.3.1 (12.2 and 13.1 of the Free to Air Code).
4. **Clause 28.2.2** of the Code provides that:

28.2.1 Comment 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. **Clause 28.3.1** of the Code provides that:

28(3)(1) In presenting a programme in which controversial issues of public importance are discussed, a licensee must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.

28(3)(2) A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given a right to reply to such criticism on the same programme. If this is impracticable, however, an opportunity for response to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.

So What Now?

6. The show, “So *What Now?*” is hosted by Garth Cliff once a week at 20h30 on eNCA and repeated at 23h00 on etv the following day.
7. 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.
8. The structure of the show is follows: The first segment of the Show comprises of a panel discussion on a particular topic with a number of guests (usually four). The second half of the show profiles an individual who is interviewed one-on-one by Gareth Cliff.
9. Gareth selects all guests on the show carefully and regularly includes contentious individuals who have viewpoints that may be perceived as controversial. As part of the second segment, Gareth has interviewed the following people: Gad Saad, Lord Peter Hain, David Icke, Thuli Madonsela, Douglas Murray, Patrick Gaspard and Larry Elder.
10. At the outset we deny that the broadcast-
 - a. intentionally disseminated disinformation;
 - b. promoted conduct that was in violation of the regulations issued under the Disaster Management Act; and
 - c. resulted in people not following appropriate health measures.
11. We submit that the interview with Mr Icke was not about giving Mr Icke a platform to spread false information about COVID-19, but rather was an interview about freedom of expression, conspiracy theories and their place in a democratic world.
12. If viewed as a whole, the interview was framed around freedom of expression; the control of information; and who gets to express their views when such views may be unpopular or challenge the official narrative.
13. Mr Icke was able to express his views on these topics as he is a well-known conspiracy theorist who believes that his views are being repressed, and consequently his right to free speech.

First complaint: Comment must be based on facts that are true

14. The complainant states that the broadcast was rife with falsehoods and untruths and that, while they accept a licensee is entitled to broadcast comment, they state that such comment “*must be based on facts that are true and justifiable.*”
15. We respectfully submit that the complainant has misunderstood clause 28.2.2 of the Code (12.2 of the Free to Air Code). The clause in question requires comment to 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.*” (our emphasis) The requirement is not on facts that are true and justifiable, but rather on facts

truly stated or fairly indicated and referred to.

16. We submit that it is clear from the interview that Mr Icke was expressing his views and his comments were based on his own honest opinion. We further ensured that viewers were made aware that the interview was founded on opinion. Mr Cliff introduced David Icke by saying, "*My next guest definitely has some controversial opinions.*"
17. Mr Cliff sets out a disclaimer at the start of the interview and even went as far as to define "conspiracy theory" and "conspiracy theorist" for the viewer. It was therefore apparent from the outset of the interview that Mr Icke was a conspiracy theorist who held controversial opinions.
18. Mr Cliff further stated that he is a proponent of free expression even if he does not agree with Mr Icke's views, but that everyone gets to decide for themselves.
19. We submit that the necessary context was provided to viewers and as such, viewers would have expected that the opinions and comments expressed during the interview were not widely held beliefs and were based on facts which Mr Icke honestly believed to be true and genuine.
20. It was also clear from the interview that Mr Cliff held a different view to Mr Icke. This is in fact the nub of the interview- that people may have differing viewpoints but that does not mean that those views or their expression should be curtailed or repressed.
21. In our law, fair comment is protected even if it is unreasonable. In this respect, our courts have found that "fair" does not mean "just", "balanced" or even "reasonable". Rather it requires that the statement of opinion is honestly-held and genuine, relevant to the facts upon which it was based, and does not disclose malice. Thus, our courts have held that even views that are extreme, unjust, unbalanced, exaggerated and prejudiced will be protected. This is crucial for encouraging open and robust debate. As was stated in the case of ***The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others as Amici Curiae) 2011 (4) SA 191 (CC)***:

"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.

22. We respectfully submit that the statements made by Mr Icke in the interview comprise comment or opinion that is honestly-held and genuine and are not in contravention of the Code.

Second complaint: Duty to present opposing points of view

23. We deny that clause 28.3.1 of the Code (13.1 of the Free to Air Code) is applicable to the broadcast in question. The aim of the broadcast was a one-on-one interview with Mr Icke to profile his views on freedom of expression. 28.3. 1 applies to "a programme in which controversial issues of public importance are discussed" (emphasis added). A one-on-one interview with a person is not a programme in which issues are "discussed".
24. The BCCSA has previously held that there is a distinction between a programme that is merely an interview with a person who holds controversial views on matters of public interest, on the one hand, and a programme in which controversial issues of public importance are

discussed. In ***P Rautenbach vs Electronic Media Network (Case number: 02/2007)*** the BCCSA stated the following:

“Although there might be some discussion on matters of public interest during an interview with a person, this does not bring the programme within the ambit of clause 36. A programme like the one in the De Vos case is specially designed to elicit commentary and discussion. Should only one viewpoint be highlighted and all other viewpoints be ignored or shot down, that would be a contravention of clause 36. In the present case, the objective with the programme was clearly not to elicit discussion but only to profile an author. As the programme was not a discussion programme, it fell outside the scope of clause 36.1 of the Code. Therefore, the broadcaster was not obliged to present opposing views or a debate on Mr Freke’s views.”

25. In light of the above, we submit that the broadcast in question was not a discussion programme and did not fall within the ambit of clause 28.3.1. Consequently, we were not required to include any other guests into the segment.
26. Nevertheless, even if the BCCSA finds that the broadcast in question does fall within the ambit of clause 28.3.1, we deny that the interview failed to present opposing views. Mr Cliff challenged his guest on a number of issues, in particular on Mr Icke’s belief that there is no virus

Third complaint: protection of child viewers

27. We deny that the programme was harmful to children.
28. In any event, it is broadcast at 20h30 on eNCA, within the watershed period. Furthermore, parents have access to parental controls mechanisms on DStv should they feel like the content is not appropriate for younger children.
29. The broadcast on e.tv is at 23h00 which is well within the watershed period for Free to Air licensees.

Real411 Platform

30. It is not clear what the relevance of the 411 platform is to this complaint. The complainant has not attached any of the alleged complaints and we have not had sight of them.
31. In any event, the BCCSA is only able to adjudicate matters which form part of the broadcast. As such, alleged complaints to another platform and which took place outside the broadcast are not relevant to the complaint.

Conclusion

32. We submit that the interview with David Icke was correctly identified as an interview in which controversial views would be presented to the viewers. Mr Icke was expressing his own views and his comments were based on his own honest opinion.
33. Accordingly, we submit that eNCA has not contravened clauses 28.2.and 28.3.1 of the Code and request that the complaint is dismissed.”

[4] **The Complainant replied as follows:**

“INTRODUCTION

1. On 21 August 2020, Media Monitoring Africa (“MMA”) submitted a complaint to the Broadcasting Complaints Commission of South Africa (“BCCSA”) regarding an interview with David Icke on a show titled “So what now?” (“the complaint”). As set out in the complaint, MMA submits that the contents of the broadcasts were unlawful, harmful, and in breach of the provisions of both the Subscription Broadcast Code of Conduct (applicable to eNCA) and the Free to Air Code of Conduct (applicable to eTV).
2. Specifically, MMA submits that the broadcasts spread disinformation about the COVID-19 pandemic, which is both unlawful in terms of the regulations to the Disaster Management Act 57 of 2002, as well as being deleterious to the public health efforts that are currently being taken to curb the spread of the pandemic. MMA is firmly of the view that broadcasters – and particularly news broadcasters, such as eNCA – have a responsibility to ensure the credibility and factual underpinning of the content that is being disseminated.
3. At the crux of its answer (“eNCA answer”), eNCA contends that the purpose of the interview was to air the controversial views of Mr Icke. However, the interview goes well beyond simply being controversial, and seeks to spread patent falsehoods about a health crisis in the country. This is not a matter of insignificance or triviality, but rather one in which false information of this nature can result in real-world harm to those who believe the disinformation being spread.
4. This reply is structured as follows: (i) the requirement that comment must be based on facts that are true or fairly indicated; (ii) the duty to present opposing views; and (iii) the protection of child viewers. This is dealt with in turn below.

COMMENT MUST BE BASED ON FACTS THAT ARE TRUE OR FAIRLY INDICATED

5. It is not in contention that Mr Icke was expressing his opinion. However, it is clear from clause 28.2.2 of the Subscription Broadcast Code of Conduct and clause 12.2 of the Free to Air Code of Conduct that such opinion must be based on facts that are truly stated or fairly indicated and referred to. This therefore creates a dual requirement:
 - a. The opinion must be honestly held; **and**
 - b. The opinion must be made on facts that are true.
6. MMA has no knowledge of whether the opinions expressed are honestly held by Mr Icke, but this is nevertheless irrelevant to the complaint. It is trite, as contended in the eNCA answer with reference to *The Citizen 1978 (Pty) Ltd and Others v McBride*, that comment may be “extreme, unjust, unbalanced, exaggerated and prejudiced”.⁹ However, this entitlement is qualified by the requirement that such comment, however extreme it may be, must be based on facts that are true. As explained in the same judgment quoted by eNCA, “**the defendant must ‘justify the facts; but he need not justify the comment’**”.¹⁰
7. It is central to the complaint that Mr Icke’s comments were not based on facts that were true or fairly indicated and referred to in the broadcasts. MMA has already set out certain statements of concern at paragraph 14 of the complaint, and dealt with the falsity of these statements at paragraphs 15-17 of the complaint. For ease of reference, this may be summarised as follows:

⁹ [2011] ZACC 11 at para 81.

¹⁰ Id at para 83. (Emphasis added.)

Statement	Is the comment based on true facts?	Are the facts fairly indicated or referred to?
"a pandemic hoax"	No. COVID-19 was declared a global health pandemic on 11 March 2020, and its existence has been confirmed by international organisations, leading medical experts and other relevant stakeholders around the world.	No. Although Mr Icke states that he has "absolute factual evidence" to support the statement, he does not indicate or refer to <u>any</u> facts in support of this, still less true facts
"we have this quite obvious scam going on in terms of communication of information"	No. There is no evidence to support the claim that there is a scam in respect of the communication of information. The information communicated by the National Institute for Communicable Diseases and the Department of Health, as well as from other stakeholders, has been seen to be reliable and credible. South Africa's communication efforts in relation to	No. Mr Icke does not indicate or refer to <u>any</u> facts to support his claim of there being a scam in terms of the communication of information, still less true facts

	<p>COVID-19 “have been widely described as a sign of what dedicated leaders can achieve”.¹¹ According to Think Global Health, “[t]he performance of the South African government in the COVID-19 response has granted it a reprieve. Praise for the government emanating from all sectors of South African society are at a level that I have never seen before. Political party leaders, the business sector, civil society and the public have all commended the government’s efforts against COVID-19.”¹²</p>	
<p>“[The World Health Organization] was created by people like the Rockefeller family to control global health policy from a central point”</p>	<p>No. The World Health Organization is a specialised agency of the United Nations, and was created by member states to the United Nations.</p>	<p>No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts</p>
<p>“[The World Health Organization] was fronted up by a guy called Tedros, the DG, who is just an asset of Bill Gates, who owns the WHO”</p>	<p>No. The funding of the World Health Organization is made transparently known, and is received from member states paying their assessed contributions, in addition to voluntary contributions from member states and other partners. As a specialised agency of the United Nations, the World Health Organization is independent from any state or private sector actor, and is not owned by any single individual.</p>	<p>No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts</p>

¹¹Brightness Mangolothi & Malesela Maubane, ‘Effective communication from leadership is essential during a crisis’, *Mail & Guardian*, 15 April 2020.

¹² Charles Shey Wiysonge, ‘South Africa’s war on COVID-19’, *Think Global Health*, 20 April 2020.

<p>“this is what they are terrified of people realising: there is no virus”</p>	<p>No. At the time of submitting the complaint, there were more than 20 million people globally who had confirmed infections of COVID-19, and more than 700 000 people who had died as a result of the disease. While co-morbidities may present an additional risk to affected persons, this does not negate the existence or direct impact that COVID-19 has had on the health and lifespan of millions of people around the world.</p>	<p>No. While Mr Icke appears to base this statement on his claim of there being no evidence of anyone having died of COVID-19, this is a circular argument and is not sufficient to comply with the Code. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts</p>
<p>“there is not a scientific paper on planet earth that has isolated the virus they call SARS-CoV-2 or COVID-19, they’ve never isolated it to show it exists”</p>	<p>No. A collaborative effort between the University of the Western Cape and Stellenbosch University obtained the first-known laboratory isolate of COVID-19 in South Africa on 1 April 2020.¹³ This has also been done in other countries, such as Canada for example, where a Canadian team of researchers from Sunnybrook Research Institute, McMaster University and Toronto University successfully isolated a strain of COVID-19 from two specimens and then cultivated it in a secure containment facility.¹⁴</p>	<p>No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts.</p>
<p>“the information has come from doctors, virologists and medical specialists who will never get on a mainstream program because they’ve sussed there is no virus”</p>	<p>No. The existence of COVID-19 has been confirmed by, among others, the World Health Organization, the National Department of Health, the National Institute of Communicable Diseases, the South African Medical Association, the Association of Surgeons of South Africa and the Health Professions Council</p>	<p>No. While Mr Icke refers broadly to “doctors, virologists and medical specialists”, he does not indicate or refer to <u>any</u> facts to support his statement, still less true facts</p>

¹³ Stellenbosch University, ‘South Africa obtains first laboratory isolate of SARS-CoV-2’, *News Medical*, 11 May 2020.

¹⁴ Harry Cockburn, ‘Coronavirus: Scientists isolate virus responsible for deadly COVID-19 outbreak’, *Independent*, 13 March 2020.

8. In addition to being false, inaccurate and misleading, the broadcasts were also harmful in seeking to cast doubt on the existence of COVID-19, the truthfulness of the information being conveyed by the government and the World Health Organization, and the legitimacy of the measures that the public is being asked to take in response to the public health crisis.

Mr Icke's comments are melded with purported statements of fact, but as set out above, these are patently untrue. In the current context, broadcasts of this nature are particularly dangerous, as they may result in people becoming infected with COVID-19 or spreading the virus to others if Mr Icke is to be believed

9. As the BCCSA has previously explained, reasons for which the BCCSA may impose a limitation of the right to freedom of expression "would be based on **considerations of harm and misinformation**, or on an obvious invasion of privacy without any compelling reason for having done so."¹⁵ MMA submits that the reference to misinformation has been included with good reason: to ensure that the public is reliably and credibly informed, so that they may in turn make informed decisions and choices. No person can – or should – be entitled to air views on any channel (and especially a news broadcasting channel) that wilfully misinform the public, which is why both codes of conduct require even comment to be based on facts that are true or fairly indicated and referred to. The broadcasts fall foul of this requirement, and are deserving of being appropriately sanctioned.

DUTY TO PRESENT OPPOSING VIEWS

10. In sum, eNCA has two tenets to its argument: either the broadcasts did not "discuss" controversial issues; or, if they did, the host presented opposing views. However, these arguments are mutually destructive of each other. It is central to the second tenet of eNCA's argument that there must have been some form of discussion in the broadcasts, which brings the present matter within the ambit of clause 28.3.1 of the Subscription Broadcast Code of Conduct and clause 13.1 of the Free to Air Code of Conduct.
11. Furthermore, the present matter is distinguishable from *Rautenbach v Electronic Media Network*¹⁶ for several reasons:
- a. The broadcast in *Rautenbach* was an interview with an **author**.
 - b. The objective of the broadcast was solely to **profile** the author.
 - c. As explained by the BCCSA, "**the objective with the programme was clearly not to illicit discussion but only to profile an author**".
 - d. The BCCSA explained further that "**[s]hould only one viewpoint be highlighted and all other viewpoints be ignored or shot down**, that would be a contravention of clause 36."¹⁷
12. MMA submits that, in the present matter, the purpose of the broadcasts was not merely to profile Mr Icke. Rather, in distinction to *Rautenbach*, the purpose was indeed to illicit discussion – but in doing so, the broadcasts ignored the countervailing viewpoints that should have been brought to the attention of the audience. The broadcasts also failed in the duty to fairly present opposing points of view.
13. MMA submits further that, on eNCA's own version, this duty could easily have been met. As explained in the eNCA answer, the first segment of the broadcasts consisted of a panel

¹⁵ *Grove v eTV*, BCCSA Case No. 29/2004, 22 July 2004 at para 6.

¹⁶ BCCSA Case No. 02/2007, 31 January 2007.

¹⁷ Clause 36.1 of the Code of Conduct, as it then was, mirrors the requirement in 28.3.1 of the Subscription Broadcast Code of Conduct and clause 13.1 of the Free to Air Code of Conduct to present opposing views.

discussion, followed by one-on-one discussions with the selected guests. There is no reason why Mr Icke could not have either been included as part of a panel discussion, or why the broadcasts could not have included a health expert (or other relevant person) to explain the falsehoods that were contained in Mr Icke's interview. MMA submits that this was a flagrant disregard of clause 28.3.1 of the Subscription Broadcast Code of Conduct and clause 13.1 of the Free to Air Code of Conduct.

14. Furthermore, while the host did engage in discussion with Mr Icke, he failed to meaningfully present any opposing viewpoints. As set out in the complaint, the host did not effectively counter the statements made by Mr Icke, and acknowledged that he was neither a doctor nor a researcher on the subject. The host further commented to Mr Icke that "I'm pleased to have given you a place to tell your story and to explain your position". Moreover, the host ended the broadcast by expressing his confusion, stating that "I hope you're as confused as I am".
15. As such, MMA submits that the broadcasts contained discussions within the ambit of clause 28.3.1 of the Subscription Broadcast Code of Conduct and clause 13.1 of the Free to Air Code of Conduct, and that the broadcasters failed to comply with the duty to present opposing points of view as required.

PROTECTION OF CHILD VIEWERS

16. The eNCA answer baldly denies that the broadcasts were harmful to children, without any substantiation. As explained in the complaint, the broadcast on eNCA took place a mere 30 minutes into the watershed period. This tribunal has previously made clear that the more damaging the material is to children, the further into the watershed period it should be broadcast. This was not done here.
17. To MMA's knowledge, there was no appropriate warning accompanying the broadcast to indicate that the content may be harmful or misleading to children. This was despite the fact that the broadcasters and the host were well aware of the viewpoints that Mr Icke was likely to convey, and could reasonably have foreseen that this would be viewed by children.
18. The falsehoods and disinformation contained in the broadcasts were clearly contrary to the principle of the best interests of the child. As set out in the complaint, given the evolving maturities of children, and in the midst of a public health crisis, it is important to ensure that children are appropriately protected against false information about the COVID-19 pandemic that may confuse or disturb their understanding thereof.
19. As a responsible broadcaster – and particularly as a news broadcaster – MMA submits that eNCA should have taken appropriate measures to protect child viewers from the broadcast. As such, MMA submits that the broadcast was in breach of clause 13 of the Subscription Broadcasting Code of Conduct.

CONCLUDING REMARKS

20. In *Khumalo and Others v Holomisa*, the Constitutional Court emphasised the duty of the media to be "scrupulous and reliable", stating as follows:¹⁸

"If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled."
21. MMA submits that the broadcast of disinformation – particularly in the current context of a

¹⁸ [2002] ZACC 12 at para 24.

global pandemic and a public health crisis – is inimical to the duties owed by broadcasters to their audience.

22. Accordingly, MMA submits that eNCA and eTV are in breach of the Subscription Broadcast Code of Conduct and the Free to Air Code of Conduct, respectively, for having disseminated disinformation. In addition to the proposed sanctions set out in the complaint, MMA submits that the BCCSA may also consider directing eNCA and eTV to include a future segment on the show in question that includes the perspectives of a credible public health expert, in order to correct the false perceptions that the interview with Mr Icke may have created.
23. Please do not hesitate to contact us if we can provide any further information.”

EVALUATION

- [5] The Broadcaster eNCA on 22 July at 20:30 broadcast an interview with a certain David Icke. This broadcast was repeated on 23 July at 23:00 by etv, therefore the complaint was lodged against two Broadcasters for broadcasting the same programme. This is also the reason that we have to apply both our Broadcasting Codes, the Free-to-Air Code and the Subscription Broadcasting Code. The host of the programme “So what now?” was Mr Gareth Cliff. It is the case for the Broadcasters that the object of the broadcast was to discuss freedom of expression and not, in the first instance, to discuss the Covid19 pandemic. However, the programme “So what now?” consisted of two parts: first a discussion with three experts on Covid-19 and then the interview with Mr Icke which turned mainly around the pandemic. It is also significant that at the very beginning of the programme Mr Cliff said: “Yes, curbing this pandemic and saving lives is critical.” It is therefore clear that the focus of the whole programme was on the Covid-19 pandemic.
- [6] Mr Icke is described as a conspiracy theorist. A quick search on the Internet reveals that he has recently published a book called “The Answer” which apparently provides the answer for all the “...world’s ills, conflicts, prejudices and injustice”. In the interview with Mr Cliff he states, *inter alia*, that Covid-19 is a “pandemic hoax”, “there is no virus” and that the virus has not been isolated.
- [7] The complaint is that the two broadcasts were unlawful, harmful and in contravention of the two Codes. The detail of the complaint and the arguments for and against will be discussed below. The first question is whether the Broadcasters have the right to give an

opportunity to even a so-called conspiracy theorist to use the airwaves to vent his opinion. In a country like ours with freedom of expression being protected in the Constitution, the simple answer to this question will be “of course they have the right”. But we all know that this is not a simple matter. The important matter to be decided is the limits of freedom of expression. Freedom of expression and freedom of speech are regarded as pillars of democracy. For example, to emphasise the importance of freedom of expression in a democracy, this Tribunal has often quoted from the Constitutional Court case of *South African Defence Union v Minister of Defence and Another*¹⁹ where O’Regan J said:

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

This quote is in support of the view that broadcasters, as part of freedom of expression, should give vent to the ideas of, *inter alia*, conspiracy theorists, holocaust deniers, members of the flat earth society and other similar types. However, when there is a clash of fundamental rights like that between freedom of expression and the right not to be offended by a broadcast, which includes the rights mentioned in the Codes of conduct, one has to weigh the rights against each other. An example of the weighing of such rights occurred in the Supreme Court of Appeal case of *Independent Newspapers Holdings Ltd and Others v Suliman*²⁰ where the following warning was given:

None of these rights should be regarded as permanently trumping the others in the sense that there is a preordained and never shifting order of priority to be assigned to each of them. The weight to be assigned to each of them in a given situation will vary according to the circumstances attending the situation.

- [8] It is a well-known fact and need not be substantiated by reference to legal authority that no basic right is absolute. That is the reason why the Constitution provides in section 36 thereof that limitations may be imposed on basic rights, provided that the requirements mentioned in that section are applicable. These limitations must be reasonable and

¹⁹ [1999] ZACC 7;1999(4) SA 469 (CC) para [7]; 1999(6) BCLR 615.

²⁰ 2005 (7) BCLR 641(SCA) at para. 44.

justifiable in an open and democratic society based on human dignity, equality and freedom. Applied to the situation in the present case, the Broadcasters' right to freedom of expression may be limited by other rights of the viewing public, like the right to dignity, the right to receive information or ideas, etcetera.

ARGUMENTS FOR THE COMPLAINANT

- [9] The case for the Complainant is that the interview with Mr Icke was irresponsible action by the Broadcasters and was harmful and unlawful. It was allegedly irresponsible of the Broadcasters because it amounted to disinformation on a subject as serious as a worldwide pandemic. Such disinformation or misinformation was condemned by the World Health Organisation's director-general who stated, and I quote from the complainant's heads of argument:

We're not just battling the [Covid-19] virus ... We're also battling the trolls and conspiracy theorists that push misinformation and undermine the outbreak response.

This broadcast reminds one of the classic fable of the child who blurts out that the emperor is naked. We all know that it cannot be true that all the subservient people around the globe dutifully agree that there is a pandemic because the authorities say so, when there is actually no pandemic, and Mr Icke takes it upon himself to inform the world of this "truth". At the time of the broadcast some 700 000 people world-wide had died as a result of the pandemic and at the time of writing this, more than one million people in the world have succumbed to the corona virus and many millions have been infected by the virus. Mr Icke is clearly swimming against the tide. The broadcast, it is alleged, was causing harm because people were being misinformed and could doubt the seriousness of the pandemic or could disobey the regulations which were made to protect them.

- [10] The Complainant alleges that the broadcast was also unlawful because of the provisions of Regulation 11(5) issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 which provides that any person who publishes any statement through any

medium with the intention to deceive another person about Covid-19, is guilty of an offense. We do not know with what intention Mr Icke broadcast his ideas, but it is for the criminal courts to decide because the BCCSA has no jurisdiction over this aspect of the complaint. However, we take note of the fact that this broadcast might have constituted a criminal offence.

- [11] The first ground for the complaint is based on Clause 28.2.2 of the Subscription Code and Clause 12.2 of the Free-to-Air Code which determine 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.

The Complainant alleges that comment to be valid in terms of this clause, must be made on facts which are true or on facts fairly indicated and referred to. The Complainant refers to comments about Covid-19 by Mr Icke like “pandemic hoax”, “obvious scam in terms of communication of information”, “there is no virus” and other comments. It then tabulates instances to prove that these comments are not true and were not fairly indicated.

- [12] The second ground refers to Clause 28.3 of the Subscription Code and Clause 13 of the Free-to-Air Code, respectively, which read:

In presenting a programme in which controversial issues of public importance are discussed, a licensee must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.

The Complainant’s case is that the interview with Mr Icke was in the nature of a discussion programme and that the Covid-19 pandemic which was discussed was a controversial issue of public importance. Only the host (Mr Gareth Cliff) and Mr Icke

were in the studio, thus no opposing points of view were presented to the viewers and neither did Mr Cliff challenge the ideas of Mr Icke sufficiently so as to bring balance to the programme, according to the Complainant.

- [13] As far as the eNCA broadcast is concerned, the programme was broadcast at 20:30, which according the Complainant, is a mere 30 minutes into the watershed period. This, the third ground of the complaint, is in contravention of Clause 13 of the Subscription Code which determines that:

A television or composite subscription broadcasting service licensee, wherever practicable, must attempt to ensure that the more the broadcasting of programming material is unsuitable for children, the later that programming material must be broadcast after the commencement of the watershed period.

The argument is that the programme was unsuitable for children and neither were there any advisories regarding age restrictions. The effect of the programme on children, according to the Complainant, is that it could confuse them and put their health in danger.

This ground of complaint is not applicable to the broadcast of the same programme by e-tv because the latter was broadcast at 23:00 on the following evening, well into the watershed period.

ARGUMENTS FOR THE BROADCASTERS

- [14] In response to these grounds for complaint, the Broadcasters precede their detailed arguments with the following general statement:

The interview, viewed in context, was clearly an interview about freedom of expression: Mr Icke was asked his views on the control of information, and who gets to express their views when such views may be unpopular or challenge the official narrative. The broadcast was not geared at providing Mr Icke with an opportunity to spread false information about COVID-19.

We will deal with this general statement later in this judgment.

- [15] Referring to the first ground of complaint, the Broadcasters' response is that Mr Icke's views are honest expressions of opinion, based on the facts as he perceived them to be, and the Broadcasters aver that the Complainant does not dispute this. They further argue that the facts on which the opinions are based, need not be true. Because the opinions were honest, there was no intention to deceive the public. It is also argued that comment need not be based on facts that are true.
- [16] The Broadcasters argue that Clause 28.3.1 of the Subscription Code is not applicable in this case because what was broadcast was a one-on-one interview with Mr Icke and not a discussion of a controversial issue of public importance. Even if we were to find that the broadcast was one in which controversial issues of public importance were discussed, it was submitted that the Broadcasters complied with the requirement that opposing points of view were presented in the way that Mr Cliff voiced contrary points of view.
- [17] As for the complaint based on Clause 13, dealing with the protection of children, the Broadcasters' response is that the programme was broadcast in both instances into the watershed period. Furthermore, the Broadcasters relied on the views expressed by the BCCSA that parents and care givers have a co-responsibility with broadcasters to protect children against harmful material. To this the Broadcasters added that the material was in any case not harmful to children and that children were not part of the target market.

ANALYSIS AND FINDINGS

- [18] We start first with the last ground mentioned, the protection of children. The most compelling argument by the Broadcasters is that the target market of the programme "So what now?" is not children. Although "child" is defined in both Codes as persons under the age of 18 years, even most 17-year olds or younger people will probably not have formed part of the audience. According to statistics supplied by the Broadcaster, few children below the age of 18 would have been part of the audience. It is also clear to us that this programme is not a "children's programme". The argument by the Complainant is that because the broadcast on eNCA was only 30 minutes into the watershed period, it

was in contravention of Clause 13 of the Code. Apart from the fact that the target audience of this programme was not children, we find that the programme was not so unsuitable for children that it should have been broadcasted later in the evening. Taking all factors into consideration, we do not find a contravention of Clause 13 of the Subscription Broadcasting Code. As the repeat broadcast on etv was at 23:00, Clauses 6 and 7 of the Free-to-Air Code are not applicable to this complaint.

[19] We now come to the first ground for the complaint, namely the expression of an opinion and the requirements therefor. The Complainant refers to the requirement in Clause 28.2.2 of the Subscription Broadcasting Code (similar to Clause 12(2) of the Free-to-Air Code) that the comment must be an honest expression of opinion and that it must appear clearly to be comment and must be made on facts truly stated or fairly indicated and referred to. In interpreting this clause, the Complainant errs in stating that the facts on which the comments are made must be true. As the Broadcasters point out, in various decisions of this Tribunal it was stated that the facts on which a comment is based, need not be proven to be true. However, the requirement is that the comment must be made on facts truly stated or fairly indicated and referred to. What is the correct interpretation of this requirement? We can get our cue for this from a previous decision of this Tribunal, namely *Madibeng Local Municipality v M-Net*²¹ where the following was said:

The effect of this Clause (Clause 28.2.2) is that signatories to the Code do not have an unfettered right to broadcast anything and everything, including comment on matters of public importance.

In applying the limitations to the fundamental right to freedom of expression as determined by Clause [35](now Clause 28.2.2), we are guided by the judgments of our courts. A good example of judicial interpretation of this freedom, as it relates to the printed media, is to be found in the case of Mthembi-Mahanyele v Mail & Guardian²². In this decision by our Supreme Court of Appeal, we read the following which is particularly relevant to this case:

“Freedom of expression in political discourse is necessary to hold members of government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed

²¹ Case 15/2015.

²² 2004 (6) SA 329 (SCA).

about what government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably; that is with the reasonable belief that the statements made are true. Accountability is of the essence of a democratic state: It is one of the founding values expressed in section 1(d) of our Constitution.” (Our emphasis).

In the present case the statements made by Mr Icke imply that the South African government and all other governments in the world are misleading all their citizens because of the restrictions they put on their freedom of movement and other freedoms, like economic activity, while they have no reason to do so because “there is no virus” according to Mr Icke. If the purpose of the comments was in the spirit of democracy to hold the South African government accountable for the lockdown regulations, then we have a serious problem with the broadcast.

[20] The first problem is that facts must be truly stated or fairly indicated and referred to. In terms of the decision in *Mthembi-Mahanyele v Mail & Guardian*²³ the statements (comments) must be published (broadcast) justifiably and reasonably. In the light of the Covid-19 pandemic which killed about a million people world-wide so far and affected, directly or indirectly, billions of people on earth, we find it irresponsible if not reckless to talk of the “pandemic hoax” and to state “there is no virus”. Such comment is not justified, and neither is it reasonable. When the interview started, we were uncertain whether Mr Icke was perhaps a medical doctor, but later in the interview he stated that he was a journalist. He added that he had done 30 years research. He does not mention what the subject of his research was. It could not have been on Covid-19 because this virus was only identified towards the end of 2019 – therefore the “19” in the name of the virus. If Mr Icke’s statement was intended to create the impression that he had done 30 years research on Covid19, this comment was not justified – plainly put, it was a lie.

[21] Secondly, in the Broadcasters’ heads of argument we read:

31.4 This Tribunal also has repeatedly held that it is sufficient, for the purposes of the comment clause, if the facts on which the view is based are the facts as genuinely perceived by the person who made them. A person is entitled to express a view on

23 Referred to above.

what he sincerely seemed to perceive the facts to be. A broadcaster is entitled to broadcast such a view.

This does not hold good for all broadcasts. This cannot mean that any comment, how far-fetched, how irrational it might be, will be protected if the commentator expresses a view on what he *sincerely seemed to perceive the facts to be*. An example is if someone would seriously believe that the moon is made of cheese or that the earth is flat. If there is no justification for a comment or if it is not reasonable, the Tribunal can find, on authority of the *Mthembi-Mahanyele*-case, that the broadcast was in contravention of the Code.

[22] Thirdly, this broadcast must be distinguished from those relied upon by the Broadcaster. We mention a few:

*Levin v SABC2*²⁴ was about a debate on the medicine Ritalin as a remedy for ADHD. The complainant was concerned about the effect one of the doctor's view would have on the health of children. The Tribunal found that a balanced debate was broadcast because various pediatricians, psychiatrists, teachers and parents, took part and no contravention was found.

In *Gaye Derby-Lewis v Talk Radio 702*²⁵ the complaint concerned a comment by then minister Sexwale about a conspiracy surrounding the assassination of Chris Hani, but the Tribunal did not find a contravention of the Code.

*Philip v Talk Radio 702*²⁶. This concerned a comment by Mr John Robbie that he thought Mr Dewani was “... as guilty as hell ...” for the murder of his wife. No contravention of the Code was found.

In *Karson v Multichoice ANN7 Chanel*²⁷ the comment by a political commentator on Minister Pravin Gordhan was found to comply with the requirements for protected comment.

²⁴ Case 52/2005.

²⁵ Case 19/2013.

²⁶ Case 02/2015.

In *Churr v eNCA*²⁸ an interview with the director of Gun Free South Africa was broadcast. The complainant objected to a statement by the director that the USA has some of the highest suicide rates in the world. The Tribunal found that this comment was an honest expression of opinion made on facts truly stated or fairly indicated and referred to.

The ground for distinction between these decisions and the present one is that in all the mentioned cases issues of public importance were discussed and debated on which people had different views. The comments in all these cases would not have life-and-death consequences on society at large. Not so with the broadcast under discussion. In the case of *Fair Trade Independent Tobacco Association v President of the Republic of South Africa*²⁹ the court had to decide on the legality or not of the restrictions on the sale of tobacco products during the lock down imposed as a result of the Covid-19 pandemic. In the very first sentence of the Full Bench decision it was stated that “*South Africa, like the rest of the world, faces an unprecedented crisis following the invasion of the COVID-19 virus, which poses a clear and present danger to human life.*”

When this programme was broadcast on 22 and 23 July 2020, South Africa was already 4 months into the various phases of lockdown and people were becoming restless on account of their freedoms being curtailed. If someone could convince them that there was “no virus” and that the whole thing was a “pandemic hoax”, people would probably disobey all the regulations. That in turn would have caused a new outbreak of the pandemic and many more people could have died.

In *Grovè v e-tv*³⁰ this Tribunal, in considering limitations on freedom of expression, said: *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.* This has convinced the Tribunal that a limitation should be put on comments in this broadcast, not because we want to chip away at the basic freedom of expression but because we see it as our duty to protect the people of South Africa from harm being caused

²⁷ Case 15/2017.

²⁸ Case 10/2018.

²⁹ [2020] ZAGPPHC 246.

³⁰ Case 29/2004.

by the obvious misinformation contained in the broadcast under consideration. Although the harm has already been done, this judgment should show the way for future decisions whether to broadcast or not to broadcast similar types of programme. The Broadcasters clearly exceeded the limits of freedom of expression by broadcasting comment that was not protected by either Clause 28.2.2 (Subscription Broadcasting Code) or Clause 12(2) (Free-to-Air Broadcasting Code).

- [23] This leaves the second ground upon which the Complainant relies, namely that this was a broadcast in which controversial issues of public importance were discussed. Clause 28.3.1 (Subscription Broadcasting Code) and Clause 13(1) (Free-to-Air Broadcasting Code) both lay down the requirements for such a broadcast which in the main imposes a duty on the broadcaster to make reasonable efforts to fairly present opposing points of view. The purpose of this is to obtain balance in the programme so that the viewers/listeners can objectively decide for themselves what viewpoint to support. The Complainant regards this broadcast as falling into the category of a discussion on controversial issues of public importance.
- [24] The Broadcasters, on the other hand deny that this was a broadcast to which the mentioned clauses of the Codes apply. Quoting the decision in the case of *P Rautenbach vs Electronic Media Network*³¹, the Broadcasters argue that the purpose of the interview with Mr Icke was to profile him. The meaning of the verb (to “profile” someone), according to the Oxford Dictionary of Current English is to write a short article about someone. We assume the meaning has found its way into the broadcasting media to obtain basically the same result, but through words and pictures. According to the Broadcasters the intention with the interview was to obtain the views of Mr Icke on freedom of expression. That was not our impression of the interview. Although freedom of expression was mentioned, the bulk of the interview turned around the Covid-19 pandemic and Mr Icke’s irrational ideas about the virus.

31 Case No 02/2007.

- [25] As mentioned in paragraph [5] above, the programme consisted of two parts: the first being a discussion on Covid-19 and which part would be subject to Clauses 28.3.1 and 13(1). The second part was just the interview with Mr Icke. The Broadcasters argued in the alternative that even if it was found that the two clauses applied to the interview with Mr Icke, that the broadcast complied with the requirement that opposing points of view be fairly presented. In this regard they argue that the comments by Mr Cliff constituted such opposing points of view. We do not think it is necessary to decide on this argument in the alternative because we decide now that the interview with Mr Icke was an interview and not in the nature of a discussion programme. Clauses 28.3.1 and 13 of the two Codes respectively are not applicable and could therefore not have been contravened.
- [26] Finally, we were asked to order the removal of this programme from the website of the Broadcaster. The BCCSA has no jurisdiction over anything published or broadcast over the Internet. For this reason we cannot make such an order.

In the result we find the following:

- (1) that both Broadcasters (eNCA and etv) contravened Clause 28.2.2 and Clause 12 respectively of the relevant Broadcasting Codes in that the comments made in the interview with Mr Icke were not protected in terms of the Codes and the complaints are upheld;**
 - (2) that the complaint that Clause 28.3.1 and clause 13 respectively were contravened, is not upheld;**
 - (3) that the broadcast by eNCA did not contravene Clause 13 of the Subscription Broadcasting Code and the complaint is not upheld; and**
 - (4) that the BCCSA does not have the jurisdiction to order the removal of the programme complained about from the websites of the Broadcasters.**
- [27] **Regarding the finding in (1) above, the Complainant and the Broadcasters were requested to submit written arguments in aggravation and in mitigation, respectively regarding sanction to be imposed.**

Broadcaster: “RE: MEDIA MONITORING AFRICA V E.NCA CHANNEL 403/ CASE NO: 09/2020

1. Further to the draft judgment in the above matter sent to our client on 16 October 2020, we set out below our client's submissions on the following sanction.
2. In terms of the BCCSA's Constitution, this Tribunal has the following powers of sanction:

"14. Powers of an Adjudicator or a Tribunal

Following any investigation of an alleged infringement of the Code by a signatory, a Commissioners acting as Adjudicator or, as the case may be, a Tribunal may

 - 14.1 *dismiss the complaint;*
 - 14.2 *reprimand any respondent adjudged to have been guilty of an infringement of the Code;*
 - 14.3 *direct that a correction and/or a summary of the findings of an Adjudicator or Tribunal be broadcast by the respondent in such manner as may be determined by the Adjudicator or Tribunal;*
 - 14.4 *direct that a respondent grant reasonable access in its broadcasts on an equal opportunity basis to a political party, organisation or movement or candidate in a case where the Code was not complied with and the BCCSA has jurisdiction to hear the matter in terms of its recognition in terms of section 54(3) of the Electronic Communications Act 2005 or where any applicable legislation does not provide for jurisdiction of the CCC of the ICASA. The same rule shall apply with the necessary changes in the case where the sanction of the Tribunal or an Adjudicator is that a broadcaster must afford a complainant a right to reply.*
 - 14.5 *impose a fine not exceeding R80,000 on any respondent adjudged to have infringed the Code, whereupon the fine so imposed shall be a debt due to the BCCSA and recoverable as such. The maximum amount of the fine may be increased by resolution taken at an AGM or SGM.*
 - 14.6 *in its reasons for its findings, record criticism of the conduct of the complainant in relation to the complaint, where such criticism is in its view warranted;*
 - 14.7 *make any supplementary or ancillary orders or directions that it may consider necessary for carrying into effect orders or directives made in terms of this clause and, more particularly, give directives as to the broadcasting of its findings."*
3. MMA seeks severe sanctions against our client, on the basis that, in its view, the broadcast was "reckless and irresponsible in its dissemination of disinformation." There has been no finding that the conduct of our client was reckless and irresponsible, nor should there be as there are no facts to substantiate such a conclusion.
4. We submit that a severe sanction would be manifestly inappropriate in the circumstances, for the following reasons:
 - 4.1 MMA has no basis for its claim that the broadcast was a deliberate attempt by the respondents to disseminate disinformation or deceive the public.
 - 4.2 In fact, the contrary is true: the broadcast made every effort to make it clear to viewers that all that was being presented was Mr Icke's own opinion.

- 4.3 Any sanction should bear in mind the broadcaster's broad discretion and freedom of expression; the context of the broadcast; the fact that it was clearly presented as opinion and not fact; the fact that the interview took place in the context of a programme in which the first part of the programme acknowledged the existence and serious impact of Covid 19 in South Africa and that the broadcast, seen in context, has no real potential to cause harm to the public.
- 5 Given the nature of the of the programme, and as the complaint was aimed at the programme generally rather than at one particular individual, our client submits that it would be inappropriate to direct that a correction be broadcast.
- 6 The provisions of Section 14 of the BCCSA Constitution, which applies to political broadcasts, does not apply.
- 7 Moreover, for the reason set out above and as this is the first finding in respect of the programme, and given what is set out in paragraph 4 above, our client submits that the imposition of a fine is inappropriate.
- 8 In all the circumstances, eNCA submits that a reprimand would be the only appropriate sanction.
- 9 However, to the extent that the Tribunal is disinclined to agree with this position, eNCA would suggest that the Tribunal go no further than requiring Gareth Cliff to broadcast the following in the same programme in which the initial interview appeared:
- “On 22 and 23 July 2020, during my programme which was broadcast on eNCA and e.tv, I conducted an interview with David Icke, a known conspiracy theorist. The matter was referred by Media Monitoring Africa to the BCCSA on the basis that it was in breach of the relevant Codes of Conduct. In the interview Mr Icke denied the existence of Covid. The BCCSA found that his views exceeded the limits of freedom of expression. Both eNCA and e.tv do not agree with or support the views expressed by Mr Icke relating to the existence of Covid which continues to be a pandemic affecting the citizens of South Africa. Both eNCA and e.tv apologise for the fact that it did not protect the people of South Africa from the potential harm and misinformation contained in the interview.”*
- 10 It goes without saying that, by making these submissions, all of the rights of our clients to appeal the decision are reserved.”

The Complainant: “Media Monitoring Africa // eNCA and Another (Case No. 09/2020): Submissions on sanction

1. We refer to the draft judgment of the Tribunal and the Broadcasting Complaints Commission of South Africa (“BCCSA”), in which the Tribunal held that eNCA and eTV contravened clause 28.2.2 of the Subscription Broadcast Code of Conduct and clause 12 of the Free to Air Code of Conduct, respectively (together, “the Codes”).
2. As requested, Media Monitoring Africa (“MMA”) hereby provides its submissions regarding the appropriate sanction to be imposed. In sum, and in line with clause 14 of the Constitution of the BCCSA, MMA submits that the following would be an appropriate sanction:
 - a. A reprimand to the broadcasters (clause 14.2 of the Constitution of the BCCSA);

- b. A direction to the broadcasters that an apology and summary of the findings be broadcast on the same programme in terms to be agreed by the Tribunal and MMA (clause 14.3 of the Constitution of the BCCSA);
 - c. A direction to the broadcasters that an appropriate and acknowledged expert on public health and COVID-19 be invited to participate in the programme, to be provided equal prominence to that offered to Mr Lcke, in order to offer the true and correct position regarding the seriousness with which the COVID-19 pandemic ought be treated (clause 14.4 of the Constitution of the BCCSA); and
 - d. An appropriate fine, to be suspended on condition that the broadcasters (i) do not again act in contravention of the Codes; and (ii) provide an undertaking not to further publish any mis- or disinformation regarding the COVID-19 pandemic (clause 14.5, read with clause 14.7, of the Constitution of the BCCSA).
3. Set out below, MMA addresses the factors in aggravation of the sanction, as well as justification for the terms of the proposed sanction itself.

Factors in aggravation of the proposed sanction

4. In determining the sanction to be imposed in this matter, MMA submits that the following factors should be considered in aggravation of the proposed sanction:
- a. The broadcasts were harmful in nature in the context of a global health crisis;
 - b. The broadcasts were unlawful in terms of the regulations issued under section 27(2) of the Disaster Management Act 57 of 2002;
 - c. The harmful and unlawful content was intentionally broadcast in circumstances where the broadcasters were aware thereof;
 - d. The broadcasters have shown no remorse or contrition for their conduct or the violation of the Codes; and
 - e. The broadcasters have elected to continue to perpetuate the harm of the broadcasts through the ongoing publication on their website.
5. These are dealt with in turn below.

(a) Harmful nature of the broadcasts

6. As set out in the complaint, MMA submits that the broadcasts were a clear example of disinformation pertaining to the COVID-19 pandemic. Rather than promoting the right to freedom of expression, the broadcasts were instead intended to undermine trust in public institutions and the media, as well as to polarise debate.
7. Of particular concern, the broadcasts risked putting the public health efforts in response to the COVID-19 pandemic in jeopardy. As correctly noted in the draft judgment:³²

“When this programme was broadcast on 22 and 23 July 2020, South Africa was already 4 months into the various phases of lockdown and people were becoming

³² Draft judgment at para 22. Emphasis added

restless on account of their freedoms being curtailed. If someone could convince them that there was “no virus” and that the whole thing was a “pandemic hoax”, people would probably disobey all the regulations. That in turn would have caused a new outbreak of the pandemic and many more people could have died.”

8. As such, in disseminating disinformation about the COVID-19 pandemic – including by denying the existence of the pandemic, and describing it as a “hoax” and a “scam” – MMA submits that the broadcasts could readily have resulted in members of the public not following appropriate precautionary and health measures in line with the advice of the appropriate authorities.

(b) Unlawful nature of the broadcasts

9. Regulation 11(5) of the Regulations issued under section 27(2) of the Disaster Management Act 57 of 2002 renders it an offence to deceive any other person about inter alia COVID-19 or any measure taken by the government to address COVID-19. On the face of it, it is apparent that the broadcasts were in contravention of this provision providing Mr Icke with an opportunity to deny the existence of COVID-19, to call it a hoax and a scam, and to seek to undermine the credibility of the local and global public health authorities.
10. While it is clear that the Tribunal does not have jurisdiction over the Regulations, this is nevertheless relevant for two key reasons. First, it highlights the seriousness with which disinformation about the COVID-19 pandemic is treated, and underscores the harmful nature of the broadcasts. Furthermore, it is apparent that the broadcasts sought to promote and glamourise unlawful conduct, in circumstances where such conduct could have real-world consequences to the health of the broader public.
11. This is deeply problematic, particularly for a news broadcaster on whom the public should be entitled to rely to act in a credible and responsible manner.

(c) Intentional nature of the broadcasts

12. On their own version, the broadcasters were aware prior to the broadcasts that Mr Icke is a conspiracy theorist who espouses falsehoods about the COVID-19 pandemic. It is by now well-known that this has exacerbated the challenges experienced in responding to the pandemic; for instance, in this regard, the Director-General of the World Health Organization has explained that: “We’re not just battling the [COVID-19] virus ... We’re also battling the trolls and conspiracy theorists that push misinformation and undermine the outbreak response”.
13. This is not an instance of mere negligence on the part of the broadcasters. Rather, the broadcasters intentionally and deliberately broadcast disinformation about the COVID-19 pandemic in the midst of a public health crisis, with full knowledge of the falsehoods that Mr Icke intended to convey.

(d) Lack of contrition shown by the broadcasters

14. The broadcasters have, at no stage, shown any contrition for their conduct. Rather, the broadcasters appear to have taken the view that the broadcast of disinformation is permissible and defensible, despite this being below the standard required of responsible broadcasters by the Codes. Not only was the programme broadcast twice – once on eNCA and thereafter on eTV – it is further relevant that the programme remains accessible on the eNCA website to be viewed by anyone at any time.

15. MMA is further concerned that the broadcasters appeared to have continued to act in disregard of the Codes. In this regard, MMA draws the Tribunal's attention to the most recent episode of 'So what now?' of 21 and 22 October 2020, which included guests discouraging the public from wearing masks in response to the COVID-19 pandemic.³³ In a similar vein to the present matter, this appears to be harmful, unlawful and irresponsible.

(e) Ongoing perpetuation of harm

16. In addition to the broadcasts on eNCA and eTV, the interview with Mr Icke remains accessible on the eNCA website. This is a blatant disregard for the harmful nature of the broadcasts and the consequences that may arise for persons who view the interview. While the Tribunal may not be in a position to order the removal of the content from the eNCA website, this nevertheless attests to the attitude of the broadcasters and an unwillingness to treat this matter with the seriousness that it deserves.

Justification for the proposed sanction

17. There are several tenets to the sanction that MMA proposes:
- a. Reprimand: In terms of clause 14.2 of the Constitution of the BCCSA, MMA submits that the broadcasters should be reprimanded. However, as the Tribunal has previously noted, a reprimand is the lightest sanction that can be imposed for an infringement of the Codes.³⁴ In *Mniki v YFM*, the Tribunal took into consideration all "extenuating circumstances" of the matter in determining that a reprimand alone would not suffice.³⁵ In the present matter, MMA submits that such extenuating circumstances include the harm that could result from the broadcasts in the context of a global pandemic; the unlawful nature of the broadcasts; and the wilful disregard that the broadcasters have shown for the standards of reasonable and responsible broadcasting. As such, MMA submits that a reprimand alone would not suffice.
 - b. Apology and summary of findings: In terms of clause 14.3 of the Constitution of the BCCSA, MMA submits that the broadcasters should be directed to publish an apology and a summary of the findings on the same programme and in the same timeslot. In *Prince v Heart 104.9 FM*, the Tribunal noted that an apology should be heartfelt, seek to rectify the matter, be in the usual language style of the broadcasters, and be done with the necessary gravity.³⁶ MMA submits that the broadcast of an apology and a summary of the findings would serve the interests of transparency, accountability and the remediation of the harm caused by the broadcasts. In this regard, and subject to the views of the Tribunal, MMA submits that the apology and summary of findings may read as follows:

"On 22 and 23 July 2020, eNCA and eTV broadcast an interview with Mr David Icke on a show titled "So what now?". In that interview, Mr Icke set forth his theories about the Covid-19 pandemic, which included false information claiming the pandemic to be a hoax and a scam.

³³ Accessible at <https://www.enca.com/shows/so-what-now-21-october-2020>.

³⁴ *Churr v eNCA*, BCCSA Case No. 11/2015 (4 August 2015) at para 13.

³⁵ BCCSA Case No. 15/2010 (9 July 2010) at para 11.

³⁶ BCCSA Case No. 43/2013 (14 January 2014) at para 4.

Media Monitoring Africa complained that the show breached the relevant broadcasting codes in a series of respects. Its complaint has now been upheld by the Broadcasting Complaints Commission of South Africa, which has held that the show breached the codes. This was because the show contained views expressed which were not based on any facts truly stated or fairly indicated and referred to.

We apologise unreservedly for this contravention, and re-commit ourselves to broadcasting accurate information regarding the COVID-19 pandemic.”

- c. *Interview with an appropriate expert:* In terms of clause 14.4 of the Constitution of the BCCSA, MMA submits that the broadcasters should be directed to invite an appropriate and acknowledged expert on public health and COVID-19 to participate in the programme, to be provided equal prominence to that offered to Mr Icke. In MMA’s view, this would serve to correct the falsehoods perpetuated by Mr Icke, and provide viewers with the true and correct position regarding the seriousness with which the COVID-19 pandemic ought to be treated.
- d. *Appropriate fine:* In terms of clause 14.5, read with clause 14.7, of the Constitution of the BCCSA, MMA submits that the serious and egregious nature of the contraventions of the Codes warrant an appropriate fine to be issued. In *Hubbard and Another v Multichoice*, the Tribunal took into account the harmful nature of the broadcast and the “aggravated negligence” on the part of the broadcaster in deciding in favour of imposing a fine.³⁷ However, the present matter goes beyond negligence: here, the broadcasters acted knowingly and intentionally when broadcasting disinformation about the COVID-19 pandemic, and disregarded the warnings provided to them. As such, MMA submits that, in the light of the harmful, unlawful and reckless nature of the broadcasts, a fine would be an appropriate sanction. MMA does, however, propose that such fine be suspended on condition that the broadcasters (i) do not again act in contravention of the Codes; and (ii) provide an undertaking not to further publish any mis- or disinformation regarding the COVID-19 pandemic.

Concluding remarks

18. MMA appreciates the opportunity to provide these submissions on the proposed sanction. In particular, MMA emphasises that the sanction imposed should meet the criteria of impact, transparency, objectivity and remediation of harm. MMA submits that the proposed sanction set out above will serve to meet these criteria and allay some of the harm that may have been caused by the broadcasts in the context of the ongoing public health crisis.
19. Please do not hesitate to contact us if we can provide any further information.”

SANCTION

[28] The Broadcasters and the Complainant have submitted arguments in mitigation and aggravation, respectively, of sanction. The arguments of both are published above and need not be repeated. In summary the Broadcasters are of the view that

³⁷ BCCSA Case No. 21/2011 (14 June 2011) at para 11.

at most they should be reprimanded, alternatively ordered to broadcast an apology. The Complainant argues for comprehensive sanctions against the Broadcasters, including a reprimand, the broadcast of a summary of the findings and an apology, an interview with an appropriate expert in a follow-up programme, and an appropriate fine.

[29] The Complainant refers to the fact that the interview complained about is still published on the eNCA website. Although there is consensus that this Tribunal cannot order the removal of material from a broadcaster's website, it does raise a question regarding the Broadcasters' sincerity in proposing to broadcast an apology for the fact that they did not protect the people of South Africa from the potential harm and misinformation contained in the interview.

[30] We have been referred to the case of *Hubbard & Another v MultiChoice*³⁸ in which a fine was imposed because of the harmful effect of the broadcast and the aggravated negligence on the part of the broadcaster. We find that the potential harm to the population with this broadcast, and the host of the programme falling short by far to counter the misinformation divulged by Mr Icke, justify the imposition of a fine of R10 000 (ten thousand Rands). The Complainant graciously suggests a suspension of the fine under certain conditions, but the BCCSA cannot police the compliance of conditions imposed – we only act on complaints lodged with the BCCSA according to our Procedure.

[31] The Broadcasters quote section 14 of the BCCSA Constitution, providing for sanctions. We are not certain what the Broadcasters are referring to with the following:

The provisions of Section 14 of the BCCSA Constitution, which applies to political broadcasts, does not apply.

³⁸ Case 21/2011.

Nowhere is mention made in section 14 of political broadcasts.

- [32] The Broadcasters propose the broadcasting of an apology, should we not agree to the appropriateness of a reprimand. Considering the seriousness of the contravention and the potential harm it could have caused, we think that the broadcasting of such apology at the start of the first broadcast of the programme “So what now?” after publication of this judgment, would be appropriate. The wording of the broadcast must be as follows:

“On 22 and 23 July 2020, eNCA and eTV broadcast an interview with Mr David Icke, known as a conspiracy theorist, on the show titled “So what now?”. In that interview, Mr Icke set forth his theories about the Covid-19 pandemic, which included false information claiming the pandemic to be a hoax and a scam and that there was no virus.

Media Monitoring Africa complained that the show breached the relevant broadcasting codes in a series of respects. Its complaint has now been upheld by the Broadcasting Complaints Commission of South Africa, which has held that the show breached the codes. This was because the show contained views expressed which were not based on any facts truly stated or fairly indicated and referred to and thus exceeded the limits of freedom of expression.

Both eNCA and e.tv do not agree with or support the views expressed by Mr Icke relating to the existence of Covid-19 which continues to be a pandemic affecting the citizens of South Africa. Both eNCA and e.tv apologise for the fact that it did not protect the people of South Africa from the potential harm and misinformation contained in the interview.”

In the result, the following sanction is imposed on the Broadcasters:

- a) a fine of R10 000 (ten thousand Rands) to be paid to the Registrar of the BCCSA on or before 15 November 2020 by the Broadcasters jointly; the one paying, the other to be absolved; and**
- b) the broadcasting of an apology by both Broadcasters at the start of the programme “So what now?” the first episode after publication of this judgment. The wording of the apology must be the same as that contained in paragraph [32] above. Both Broadcasters must inform the Registrar and the Complainant two days in advance of the date and time of the programme on which the apology is to be broadcast.**



PROF HENNING VILJOEN

CHAIRPERSON: BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA

Commissioners Fakude and Naidu concurred in the above judgment.