

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 21/58810

In the matters between:

MEDIA MONITORING AFRICA TRUST

First Applicant

SUPPORT PUBLIC BROADCASTING COALITION (SOS)

Second Applicant

and

**THE BROADCASTING COMPLAINTS
COMMISSION OF SOUTH AFRICA**

First Respondent

**CHAIRPERSON OF THE BCCSA APPEAL TRIBUNAL
IN CASE NUMBER: 010/2021**

Second Respondent

**CHAIRPERSON OF THE BCCSA APPEAL TRIBUNAL
IN CASE NUMBER: 012/2021**

Third Respondent

e.tv (PTY) LTD

Fourth Respondent

e.sat (PTY) LTD

Fifth Respondent

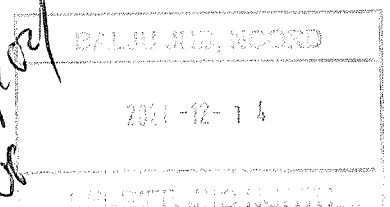
**SOUTH AFRICAN BROADCASTING
CORPORATION SOC LIMITED**

Sixth Respondent

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT the applicants intend to apply to this Court on a date to be determined by the Registrar for an order in the following terms:

*Mary Snyman
Stefan Roubey
14/12/2021
12/12/2021*



1. The decision by the Appeal Tribunal of the first respondent in BCCSA Case Number: 010/2021 is reviewed and set aside.

2. The decision by the Appeal Tribunal of the first respondent in BCCSA Case Number: 010/2021 is substituted with the following decision:
 - “1. The appeal is dismissed.
 2. The fine ordered by the BCCSA Tribunal shall be paid within 15 days of the broadcasters having received this order.
 3. The apology ordered by the BCCSA Tribunal shall be broadcast on the first episode of the programme ‘So What Now?’ to be broadcast after the broadcasters have received this order.”

3. The decision by the Appeal Tribunal of the first respondent in BCCSA Case Number: 012/2021 is reviewed and set aside.

4. The decision by the Appeal Tribunal of the first respondent in BCCSA Case Number: 012/2021 is substituted with the following decision:
 - “1. The appeal is upheld.
 2. It is declared that the South African Broadcasting Corporation Soc Limited contravened clause 3(b) of the Free-to-Air Code; and
 3. The applicants’ obligation to pay costs is waived.”

5. The costs of this application, including the costs of two counsel, are to be paid jointly and severally by any respondents opposing it.

6. Further or alternative relief.

TAKE NOTICE FURTHER that the founding affidavit of **WILLIAM ROBERT BIRD**, together with the annexures thereto and confirmatory affidavit of **JUSTINE LIMPITLAW**, shall be used in support of this application.

TAKE NOTICE FURTHER that the applicants have appointed **POWER SINGH INC.** 1st Floor, 20 Baker Street, Rosebank, Johannesburg, 2196 as the address at which they will accept notice and service of all processes in these proceedings. The applicants will accept electronic service at the following email address: tina@powersingh.africa and tara@powersingh.africa.

TAKE NOTICE FURTHER that if any of the respondents wish to oppose the order sought they are required:

- (a) Within 10 days after receipt of this notice of motion, to deliver notice to the applicants that they intend to oppose and, in such notice, to appoint an address within 15 kilometres of the office of the Registrar at which they will accept notice and service of all process in these proceedings;
- (b) Within 15 days after having given notice of the intention to oppose the application, to file answering affidavits if any.

If no notice of intention to oppose is delivered, the application will be placed on the unopposed roll.

DATED at JOHANNESBURG on 10th DECEMBER 2021



POWER SINGH INC.

Attorneys for the applicants
20 Baker Street
Rosebank
JOHANNESBURG
Tel:+27 11 268 6881
Fax: +27 86 614 5818
Ref:PSIMM-201912

Email: tina@powersingh.africa
tara@powersingh.africa

**TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT
JOHANNESBURG**

**AND TO: THE BROADCASTING COMPLAINTS
COMMISSION OF SOUTH AFRICA**
First Respondent
Block No 8, Burnside Island Office Park,
410 Jan Smuts Avenue,
Craighall
JOHANNESBURG
Tel: +27 11 326 3139

**AND TO: CHAIRPERSON OF THE BCCSA APPEAL TRIBUNAL
IN CASE NUMBER: 010/2021**
Second Respondent
Block No 8, Burnside Island Office Park,
410 Jan Smuts Avenue,
Craighall
JOHANNESBURG
Tel: +27 11 326 3139

**AND TO: CHAIRPERSON OF THE BCCSA APPEAL TRIBUNAL
IN CASE NUMBER: 012/2021**
Third Respondent
Block No 8, Burnside Island Office Park,
410 Jan Smuts Avenue,
Craighall
JOHANNESBURG
Tel: +27 11 326 3139

AND TO: e.tv (PTY) LTD
Fourth Respondent
4 Albury Road
Dunkeld West
JOHANNESBURG
Tel: +27 11 537 9300

AND TO: e.sat (PTY) LTD
Fifth Respondent
4 Albury Road
Dunkeld West
JOHANNESBURG
Tel: +27 11 537 9300

**AND TO: SOUTH AFRICAN BROADCASTING
CORPORATION SOC LIMITED**
Sixth Respondent
Corner of Artillery and Henley Road
Auckland Park
JOHANNESBURG
Tel: +27 11 714 9111

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: _____

In the matters between:

MEDIA MONITORING AFRICA TRUST

First Applicant

SUPPORT PUBLIC BROADCASTING COALITION (SOS)

Second Applicant

and

**THE BROADCASTING COMPLAINTS
COMMISSION OF SOUTH AFRICA**

First Respondent

**CHAIRPERSON OF THE BCCSA APPEAL TRIBUNAL
IN CASE NUMBER: 010/2021**

Second Respondent

**CHAIRPERSON OF THE BCCSA APPEAL TRIBUNAL
IN CASE NUMBER: 012/2021**

Third Respondent

e.tv (PTY) LTD

Fourth Respondent

e.sat (PTY) LIMITED

Fifth Respondent

**SOUTH AFRICAN BROADCASTING
CORPORATION SOC LIMITED**

Sixth Respondent

FOUNDING AFFIDAVIT

imb Bels

TABLE OF CONTENTS

THE ESSENCE OF THIS APPLICATION.....	1
PARTIES.....	4
KEY PRINCIPLES	8
The importance of self-regulation	9
The harm of misinformation	15
Reviewability.....	18
THE e.TV APPEAL TRIBUNAL DECISION	21
The “So What Now?” interview	21
Procedural history.....	24
Grounds of review.....	29
<i>Incorrect interpretation of “facts truly stated”</i>	<i>29</i>
<i>The failures by David Icke.....</i>	<i>33</i>
<i>The failures by the host – Gareth Cliff.....</i>	<i>38</i>
<i>Incorrect application of the test</i>	<i>41</i>
<i>Grounds under PAJA and the principle of legality</i>	<i>49</i>
THE SABC APPEAL TRIBUNAL DECISION	50
The Full View interview.....	50
Procedural history.....	52
<i>The complaint.....</i>	<i>52</i>
<i>BCCSA Tribunal decision.....</i>	<i>58</i>
<i>Leave to appeal.....</i>	<i>60</i>
<i>The Appeal Tribunal decision.....</i>	<i>62</i>
Grounds of review.....	68
<i>Failure to apply the Free-to-Air Code</i>	<i>68</i>
<i>The summary of findings was irrational.....</i>	<i>72</i>
<i>Failure to waive costs.....</i>	<i>76</i>
<i>Grounds under PAJA and the principle of legality</i>	<i>78</i>
REMEDY.....	79
CONCLUSION	81

W/B 2 Bels

I, the undersigned,

WILLIAM ROBERT BIRD

state the following under oath:

- 1 I am the Director of the Media Monitoring Africa Trust, operating as Media Monitoring Africa ("**MMA**"). MMA is a non-profit organisation with its principal place of business at Suit 2, 22 Art Centre, 6th Street, Parkhurst, Johannesburg.
- 2 The facts in this affidavit fall within my personal knowledge unless the contrary is stated or appears from the context. They are, to the best of my knowledge and belief, both true and correct.
- 3 Where I make submissions of law, I do so on the basis of advice received from the applicants' legal representatives.
- 4 I am duly authorised to depose to this affidavit and bring this application on behalf of MMA as well as on behalf of the second applicant. A confirmatory affidavit from the second applicant is filed with this affidavit.

THE ESSENCE OF THIS APPLICATION

- 5 The Broadcasting Complaints Commission of South Africa ("**BCCSA**") is a self-regulatory body of profound public importance. Through two Codes of Conduct – the Subscription Code, which applies to subscription broadcasters such as Multichoice and the Free-to-Air Code, which applies to free-to-air broadcasters such as the SABC – it provides a self-regulatory complaints

WRB
1 *Eds*

mechanism for the broadcast media in South Africa. I attach the Subscription Code as "WRB1" and the Free-to-Air Code as "WRB2".

6 The importance of the BCCSA cannot be overstated.

6.1 Its existence is vital to the protection of media freedom in South Africa. It is only with appropriate self-regulation that the media can operate without substantial regulation by the state, and the threats to media freedom that state regulation necessarily entails. A robust system of self-regulation is thus a critical feature of media freedom.

6.2 Moreover, the BCCSA offers a critical check on the conduct of broadcasters, and protects members of the public from unethical and unprofessional broadcasting, including misinformation and disinformation. It does so by affording members of the public a mechanism in terms of which to make complaints, and to have them fairly and independently adjudicated.

7 This is an application to review and set aside two decisions taken by the Appeal Tribunal of the BCCSA. However, the central purpose of the application is in fact to protect and uphold the integrity and legitimacy of the BCCSA. The applicants contend that the two impugned decisions undermine the BCCSA's core purposes, and threaten its public legitimacy, because they reflect an approach that fails to enforce the BCCSA Codes robustly, and fails protect the public against the risk of misinformation and disinformation.

Zds
WRB²

- 8 The two impugned decisions of the Appeal Tribunal are:
- 8.1 *ENCA & e.TV v Media Monitoring Africa*, Case No: 010/2021 (BCCSA), handed down on 5 July 2021; and
- 8.2 *Support Public Broadcasting Coalition & Media Monitoring Africa v SABC Channel 404*, Case No: 012/2021 (BCCSA), handed down on 20 September 2021.
- 9 The applicants contend that the impugned decisions are unlawful and invalid in various respects, and seek to have them reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) and/or under the principle of legality and/or under the common law.
- 10 As I will explain in this affidavit, the two decisions that form the subject of the reviews before this Court dealt with different provisions of the BCCSA Codes. However, underlying both decisions are critical similarities:
- 10.1 Both matters involved broadcasts based on facts that were effectively accepted by all parties to be false. They thus raise questions as to the approach that the BCCSA ought to adopt – in the e.TV decision on the merits, and in the SABC decision on the question of sanction – where a programme involves the broadcasting of false facts.
- 10.2 Yet in both matters, the Appeal Tribunal fundamentally altered the scope of the Codes in a manner that denudes them of their bite, affords insufficient protection to the public, and enables unethical and unprofessional broadcast journalism.

Bds

MB³

- 11 The significance of this application thus extends far beyond these two decisions. If the BCCSA were to follow a similar approach in future, it would threaten to undermine the entire system of self-regulation.
- 12 In what follows, I address the following main topics:
- 12.1 Parties;
 - 12.2 Key principles underlying both review applications:
 - 12.2.1 The lack of value in false statements and the risk of misinformation;
 - 12.2.2 The critical importance of proper regulation by the BCCSA;
 - 12.2.3 The reviewability of decisions of the BCCSA Appeal Tribunal;
 - 12.3 The review of the e.TV appeal decision;
 - 12.4 The review of the SABC appeal decision;
 - 12.5 Conclusion and costs.

PARTIES

- 13 The first applicant is **MEDIA MONITORING AFRICA TRUST**.

- 13.1 MMA is a non-profit organisation which promotes ethical and fair journalism that supports democracy and human rights. It advocates for freedom of expression and supports the responsible free flow of

WB ²⁰¹³ 4

information to the public on matters of public interest and which enables an engaged and informed citizenry in Africa and across the world.

13.2 The core of MMA's work is to promote a free, fair and ethical culture, and freedom of expression. MMA also has a long history of promoting these principles in the courts.¹ It has specialised expertise in national, regional and international law standards in relation to freedom of expression and related issues.

13.3 MMA is also a member of the second applicant.

14 The second applicant is **SUPPORT PUBLIC BROADCASTING COALITION** (“SOS”), a non-profit voluntary association with its principal office at Suite 2, Art Centre, 22, 4th Avenue, Parkhurst, Johannesburg.

¹ These include the following matters:

(i) *Media Monitoring Africa and Others v South African Broadcasting Corporation* (case number 195/2016) before the Independent Communications Authority of South Africa Complaints and Compliance Committee, regarding the SABC's decision in 2016 to ban media coverage of violent protests and destruction of public property;

(ii) *Verashni Pillay v Afriforum* (matter number: 3239/04/2017) before the appeals panel of the Press Council of South Africa, which dealt with the correct balance to be struck between hate speech and freedom of expression;

(iii) *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others* (81056/14) [2017] ZAGPJHC 289 (17 October 2017) concerning the constitutionality and lawfulness of the powers that the Minister of Communications exercises in respect of the Directors of the SABC Board and whether these powers undermine the independence of the SABC, which is required under the right to freedom of the media;

(iv) *Media Monitoring Africa and Others v President of the Republic of South Africa and Others* (case no: 02653/19), in which the MMA challenged certain provisions of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State on the basis that these provisions limit media freedom and access to information;

(v) *AmaBhungane Centre for Investigative Journalism NPC and another / Minister of Justice and Correctional Services and others* (CCT 278/19), in the confirmation proceedings before the Constitutional Court of South Africa. The matter concerns the constitutionality of various provisions of the Regulation of Interception of Communications and Provision of Communication Related Information Act, 2002, which authorises state surveillance. This creates a chilling effect on the right to privacy and associated human rights; as well as

The matters of (vi) *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22 (31 July 2021) and (vii) *South African Human Rights Commission (on behalf of the South African Jewish Board of Deputies) v Masuku and Another* (CCT Case Number: 14/2019). Both of these cases concern hate speech as defined under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

- 14.1 SOS is committed to, and campaigns for, broadcasting services that advance the public interest. While the SABC is its primary focus, SOS also engages in the advancement of community broadcast media in South Africa. It is made up of a broad range of civil society organisations, trade unions and their federations, and individuals (including academics, freedom of expression activists, policy and legal consultants, actors, script-writers, film makers, producers and directors).
- 14.2 The SOS Coalition campaigns for an independent and effective public broadcaster. It engages with policymakers, regulators, and lawmakers to secure changes that will promote citizen-friendly policy, legislative and regulatory changes to broadcasting and its associated sectors.
- 15 The applicants approach this Court in their own interest as well as in the public interest.
- 16 The first respondent is the **BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA**, a voluntary association formed by agreement between the broadcasters for the administration of the Code of Conduct and Procedure.
- 16.1 The BCCSA is recognised by ICASA as a formal tribunal in terms of section 54(3) of the Electronic Communications Act 36 of 2005 ("ECA").²

² Section 54 provides, in relevant part:

"(2) Subject to the provisions of subsection (3), all broadcasting service licensees must adhere to the code of conduct for broadcasting service licensees as prescribed.

(3) The provisions of subsection (2) do not apply to a broadcasting service licensee who is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a code of

- 16.2 Broadcasters who are members of the National Association of Broadcasters adhere to the Code of Conduct for Free-to-Air Licensees or the Code of Conduct for Subscription Broadcasting Service Licensees.
- 16.3 The BCCSA is served care of its Registrar at its principal place of business: 410 Jan Smuts Avenue, Craighall Park, Randburg, Johannesburg.
- 17 The second respondent is **ADVOCATE SUNETTE LÖTTER**, cited in her official capacity as the Chairperson of the BCCSA Appeal Tribunal which heard the e.TV appeal (Case number 010/2021).
- 18 The third respondent is **ADVOCATE BOITUMELO TLHAKUNG**, cited in her official capacity as the Chairperson of the BCSA Appeal Tribunal which heard the SABC appeal (Case number 012/2021).
- 19 The fourth respondent is **e.tv (PTY) LTD**.
- 19.1 e.TV is a private company duly registered and incorporated in terms of the company legislation of South Africa, with its registered address at 5 Summit Road, Hyde Park, Johannesburg.
- 19.2 e.tv holds a commercial free-to-air ("FTA") television broadcasting service licence. It broadcasts 24 hours a day, seven days a week.

conduct enforced by that body by means of its own disciplinary mechanisms, provided such code of conduct and disciplinary mechanisms are acceptable to the Authority."

LYB 7
Bols

20 The fifth respondent is **e.sat (PTY) LTD**. e.TV's news channel – eNCA – broadcast the interview that formed the substance of MMA's complaint to the BCCSA on 22 July 2020 at 20h30. eNCA is a division of e.sat TV (Pty) Ltd.

21 I refer to the fourth and fifth respondents collectively as "*the e.TV respondents*" or "*e.TV*". e.TV's interest derives from the first of the two decisions that the applicants seeks to have reviewed and set aside.

22 The sixth respondent is the **SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD** ("**the SABC**").

22.1 The SABC is a statutory public body established by the Broadcasting Act 4 of 1999 and its principle place of business is corner of Artillery and Henley Road, Auckland Park, Johannesburg, South Africa.

22.2 The SABC holds two free-to-air television broadcasting licences: individual broadcast service licence no. 001/PBS/TV/SEPT/08 for the provision of a public television broadcasting service (SABC 1 and 2) and individual broadcast service licence no. 003/PBS/TV/SEPT/08 for a public commercial television broadcasting service (SABC 3).

22.3 The SABC's interest derives from the second of the two decisions that the applicants seeks to have reviewed and set aside.

KEY PRINCIPLES

23 I will address the factual background and merits of the e.TV and SABC appeal decisions separately, in turn, later in this affidavit. Before doing so, however, it

ZMB
Bds
8

is necessary to articulate three fundamental principles that underlie the proper approach to both matters.

23.1 First, the importance of the media and the need for proper self-regulation / co-regulation;

23.2 Second the lack of value in false statements and the risk of misinformation;

23.3 Third, the reviewability of the decisions of the BCCSA Appeal Tribunal.

The importance of self-regulation

24 Section 16 of the Constitution guarantees freedom of the press. I am advised that our courts have acknowledged the importance of the free flow of information, and have held that the media are key agents in ensuring that these aspects of the right to freedom of information are respected. Moreover, the ability of every citizen to be a responsible and effective member of society *depends* on the manner in which the media carry out their constitutional mandate.

25 The media thus relies on and fosters freedom of expression.

26 Regular and invasive involvement by the state in the affairs of the media undermines freedom of the press. That is especially so where such involvement relates to the editorial content of the media. It is anathema to press freedom for government to censor and punish the media for the content of its publications.

MB
9

- 27 Cognisant of this danger, various independent bodies have been established to regulate the media:
- 27.1 The BCCSA for the broadcast media;
 - 27.2 The Press Council of South Africa for print and online media publications;
 - 27.3 The Advertising Regulatory Board (formerly the Advertising Standards Authority of South Africa) in relation to advertising industry and disputes between advertisers and consumers.
- 28 In 2012, the Press Freedom Commission, chaired by former Chief Justice Pius Langa was appointed by the Print Media South Africa and the South African National Editors' Forum. The Langa Commission was tasked with finding the most efficient and effective regulatory system to govern the print media in South Africa.
- 29 In the background, the ruling African National Congress had adopted a resolution in 2007 requesting Parliament to investigate the desirability of a statutory Media Appeals Tribunal for the print media. This was the context within which the Langa Commission was tasked with considering a system of self-regulation.
- 30 I attach the executive summary of the Langa Commission report marked "WRB3". The Langa Commission Report defined two common models of press regulation: self-regulation and independent co-regulation.

30.1 Self-regulation was defined as:

"[A] peer review system operating within a set of self-imposed rules by the media. It consists of representatives from the media profession passing judgement on complicated matters of journalistic reporting using a Journalistic Code of Ethics which is applied in determining the final ruling, and benchmarking the generally accepted norms and standards."³

30.2 Independent co-regulation, by contrast, was defined as:

"[A] system of press regulation that involves public and press participation with a predominant public membership but without State or government participation. It is accountable to the public."⁴

31 Self-regulation and independent co-regulation – as defined by the Langa Commission – are both commonly referred to as forms of “self-regulation”. These methods have received overwhelming support regionally and internationally as being a cornerstone for a free press.

32 The Organisation for Security and Co-operation in Europe (“OSCE”) has identified five separate reasons in favour of the development of a system of self-regulation. These are that it:

32.1 preserves editorial freedom;

32.2 helps to minimise state interference;

32.3 promotes media quality;

32.4 is evidence of media accountability; and

³ The Langa Report at page 107.

⁴ Ibid at page 7.

32.5 helps readers access the media.⁵

33 The OSCE further states that:⁶

“Self-regulatory bodies determine the boundaries between the legitimate rights of a free press and the legitimate rights of people who attract media attention. They generally do this by examining complaints against an agreed code of ethics and judging whether its rules have been broken. Thus they provide guidance for journalists and the public on what practices are acceptable and the standards expected of news outlets. By dealing with complaints professional standards can be raised.

While courts must have a role in upholding the law, in a democracy the press should be free from excessive political and judicial interference. It is better that the press agrees to regulate itself or delegates regulation to an independent body. Readers have more trust in newspapers that are willing to take responsibility for their actions.”

34 The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) similarly identifies the advantages of self-regulation as being that it:⁷

“[P]reserves independence of the media and protects it from partisan government interference. It could be more efficient as a system of regulation as the media understand their own environment better than government ... As the media environment becomes global (through the development of the internet and digital platforms) and questions of jurisdiction become more complex then self-regulation can fill the resulting gap. It is less costly to government because industry bears the cost and can be more flexible than government regulation. Self-regulation may also encourage greater compliance because of peer

⁵ Organisation for Security and Co-operation in Europe, *The media self-regulation guidebook* (2006) at p 12 (accessible at <http://www.osce.org/fom/31497>).

⁶ *Ibid* at p 34.

⁷ UNESCO, *The importance of self-regulation of the media in upholding freedom of expression* (February 2011) at p 12 (accessible at <http://unesdoc.unesco.org/images/0019/001916/191624e.pdf>).

pressure ... Self-regulation can also drive up professional standards by requiring organisations to think about and even develop their own standards of behaviour⁸.

- 35 Similarly, in the United Kingdom, the Office of Communications (“Ofcom”) identifies the flexibility and the more targeted approach of self-regulation as advantages in the regulatory system, noting that self-regulation generally allows more organisations to take part as it has the potential to provide low entry points for regulation that build over time, and that it is more conducive to innovation and competition. Most importantly, it makes participants answerable for their own actions.⁸
- 36 A commonly identified advantage of self-regulation is the prevention of excessive government intervention, and the ensuing independence from state interference. The Langa Commission’s recommendations sought to preserve this benefit, while at the same time ensuring that the mechanism is independent of media control and allows both public and press participation with a predominantly public membership.
- 37 The South African broadcast media is subject to a form of co-regulation.
- 38 In terms of the ECA, broadcasters are either regulated and subject to the jurisdiction of ICASA or – if they choose – the BCCSA. Section 54 (2) and (3) states:

⁸ Ofcom, *Identifying appropriate regulatory solutions: Principles for analysing self- and co-regulation* (10 December 2008) at p 8 (accessible at <http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/statement/statement.pdf>).

"(2) Subject to the provisions of subsection (3), all broadcasting service licensees must adhere to the code of conduct for broadcasting service licensees as prescribed.

(3) The provisions of subsection (2) do not apply to a broadcasting service licensee who is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a code of conduct enforced by that body by means of its own disciplinary mechanisms, provided such code of conduct and disciplinary mechanisms are acceptable to the Authority." (Emphasis added)

39 MMA and SOS support the existence of the BCCSA and its system of self-regulation emphatically and unequivocally. That is exactly why they have brought this application. They are concerned that the two impugned decisions of the BCCSA Appeal Tribunal threaten to undermine the system of self-regulation, and denude the Codes of their bite. Ultimately, the applicants' concern is that if this approach were to continue into the future, the likely consequence would be further state regulation.

40 Self-regulation is particularly important in the South African broadcast environment. Given high levels of illiteracy in South Africa, television and radio broadcast media is the primary source of information for millions of South Africans. A democracy simply cannot function effectively without an informed citizenry.

40.1 The SABC, as the public broadcaster, is a primary source of news and information for millions of South Africans. It plays a critical public information role. Ensuring that the SABC engages in ethical and professional journalism is therefore crucial to the health of our democracy.

MB
Bds

40.2 e.TV also has extremely high viewership figures. A report from July 2016, conducted by Intellidex entitled: *Who Owns the News Media?* Stated estimated that e.TV had over 41 million viewers. The relevant extracts of this report are attached marked "WRB4". Quite clearly, e.TV is responsible for providing information to a large proportion of the South African population.

The harm of misinformation

41 As I will explain, neither the e.TV broadcast nor the SABC broadcast concerned the dissemination of ideas which are merely controversial or offensive.

42 They both concerned the dissemination of statements that were:

42.1 false;

42.2 known and accepted by the broadcaster to be false;

42.3 broadcast without expressly indicating to viewers that the claims were false or what the true facts were.

43 I am advised that courts – in South Africa and globally – have held that the publication of false statements is not protected in the same way as the publication of merely controversial political opinions. Our courts have made it clear that:

43.1 the constitutional protection of freedom of expression has – at best – attenuated interest in the publication of false statements;

WS
15

- 43.2 the spread of misinformation and disinformation on social media platforms is a notorious and worldwide concern; and
- 43.3 the spread of falsehoods that threaten or infringe the rights of individuals and the public is a legitimate concern.
- 44 Indeed, international experts on freedom of expression explain that disinformation undermines – rather than promotes – the right to freedom of expression. According to a 2017 Joint Declaration of Special Rapporteurs and Representatives on Freedom of Opinion and Expression:⁹
- “[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.”
- 45 The need to limit misleading and false information takes on especial significance in the context of a public health crisis such as the Covid-19 pandemic.
- 45.1 As the WHO Director-General has explained: “We’re not just battling the [Covid-19] virus ... We’re also battling the trolls and conspiracy

⁹ Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda, 2017. This was published by the Special Rapporteur on Freedom of Opinion and Expression of the United Nations, the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe, the Special Rapporteur on Freedom of Expression of the Organization of American States, and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples’ Rights (accessible at <https://www.osce.org/files/f/documents/6/8/302796.pdf>).

theorists that push misinformation and undermine the outbreak response.¹⁰

45.2 Disinformation about Covid-19 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, which makes it an offence to publish any statement with the intention to deceive another person about Covid-19 or any measure taken by the government to address Covid-19.¹¹

45.3 As I will explain, the interview that forms the subject of the e.TV review was broadcast at the height of the Covid-19 pandemic, and plainly fell into the category of deliberate misinformation designed to undermine the response to the Covid-19 pandemic.

46 As I have explained, another important aspect of the need to curb misinformation – which is relevant to the SABC review – is the heightened obligation of the SABC as the public broadcaster.

47 As the public broadcaster, the SABC not only has a significant public service mandate, but it also has a unique role in providing access to news and

¹⁰ The statement is available at: <https://www.who.int/news-room/feature-stories/detail/immunizing-the-public-against-misinformation>

¹¹ Regulation 11(5) of the Regulations issued under section 27(2) of the DMA, as published on 18 March 2020, provides that:

“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.”

MB
Bds

information for the majority of people in South Africa. It is therefore required to provide news and public affairs programming which meets the highest standards of journalism – including fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests.

- 48 Most importantly, when the SABC gets it wrong, and broadcasts misinformation, it must be directed to publicly apologise for doing so, in a way that is aimed at correcting the misinformation.

Reviewability

- 49 I am advised and respectfully submit that the decisions of the BCCSA Appeal Tribunal amount to administrative action under PAJA.

- 50 Section 1 of PAJA provides, in relevant part:

“... any decision taken, or any failure to take a decision, by

...

(b) a natural or juristic person other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...”

- 51 There can be no doubt that the BCCSA exercises public power and performs public functions.

- 51.1 This Court has previously found that the BCCSA, when performing its functions that are recognised in the ECA, exercises public power.

Paragraph 1.2 of the BCCSA Constitution, which I attach marked "WRB5", provides:

"The BCCSA is a self-regulatory body for broadcasters as provided for in the ECA in terms of section 54(3). This section provides that the code of conduct prescribed by ICASA shall not apply to a broadcasting service licensee who is a member of a body which has proved to ICASA's satisfaction its members subscribe and adhere to an acceptable code of conduct enforced by that body by means of its own disciplinary mechanisms, which are also acceptable to ICASA".

51.2 In other words, those broadcasters who choose not to become members of the BCCSA fall under the jurisdiction of the Complaints and Compliance Committee ("the CCC") of ICASA. But for the exercise by the BCCSA of its public function, the activities of these broadcasters would be directly regulated by the state.

51.3 The primary basis for the BCCSA's existence is the rendering of a public service in the public interest. It is the regulator of the broadcasting industry. The BCCSA Constitution and Codes are replete with statements that underline the public function of the BCCSA.

51.4 The public nature of the BCCSA's functions is further evident from the fact that:

51.4.1 Members of the public (ordinary viewers of broadcasts) are invited to interact with the BCCSA and to file complaints relating to broadcasts that fall foul of the principles set out in the BCCSA Codes.

51.4.2 Any complaint is investigated with the interests of the public at large and that of consumers and children (in particular) in mind.

51.4.3 The results of the hearings and appeal are published and readily accessible to the person in the street.

52 The BCCSA and its Tribunals perform their tasks in terms of the BCCSA's empowering provisions: the BCCSA Constitution (which contains its procedural rules) as well as the BCCSA Codes. They are empowered to do so by section 54 of the ECA.

53 Moreover, the decisions of the Appeal Tribunal have direct, external legal effect, which have the potential adversely to affect the rights of broadcasters and complainants, as well as the rights of the public.

54 Clause 3.1 of the BCCSA Constitution provides that the broadcasters "further undertake not only to adhere to the Code of Conduct and Procedure, but to also abide by rulings of the Chairperson, the Tribunal, [and] Appeal Tribunal or an Adjudicator as provided for under this Constitution." In other words, decisions of the BCCSA Appeal Tribunal is binding on broadcasters.

55 By corollary, a *failure* by the BCCSA Appeal Tribunal to uphold a complaint, or to impose an appropriate sanction, plainly affects the rights of the complainant.

56 Accordingly the decisions by the BCCSA's Tribunal and Appeal Tribunal amount to administrative action and reviewable under PAJA.

57 However, even if PAJA were found not to be applicable, the decisions of the BCCSA Appeal Tribunal plainly amount to the exercise of public power and are thus in any event subject to review under the principle of legality. Each of the grounds of review upon which the applicants rely can be accommodated under the principle of legality. Moreover, and in any event, the decisions falls to be reviewed under the common law and the grounds of review upon which the applicants rely can be accommodated under the common law.

THE e.TV APPEAL TRIBUNAL DECISION

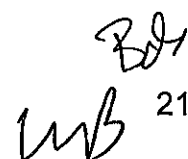
The "So What Now?" interview

58 On 22 July 2020 at 20h30, e.TV broadcast an interview between Gareth Cliff and David Icke on the programme "So What Now?". The interview was re-broadcast on e.TV on 23 July 2020 at 23h00. At the time of deposing to this affidavit, the broadcast remains accessible on eNCA's website at: <https://www.enca.com/shows/so-what-now-22-july-2020>.

59 For nearly two years, the world has grappled with an unprecedented threat from the Covid-19 virus. More than 5 million people worldwide have died from the virus, including almost 90 000 South Africans.

60 The interview with David Icke was aired at the height of Covid-19 lockdowns in South Africa.

61 eNCA proclaims itself to be "South Africa's most watched TV news channel" and "South Africa's most trusted independent TV and online news brand." e.TV

 21

describes itself as "the most viewed English channel in the country". I attach extracts from the respective websites containing these claims marked "WRB6".

62 Given these lofty claims, one would have expected that it would ensure that its broadcasts contributed to providing useful true/accurate and reliable information regarding the Covid-19 pandemic.

63 However, in this instance e.TV did exactly the opposite.

64 "So What Now?" was hosted by Gareth Cliff once a week and broadcast on both the eNCSA and e.tv platforms. The premise of 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."

65 The structure of the programme was two segments. The first segment comprised a panel discussion on a particular topic (generally with four guests). The second part profiled an individual who was interviewed by Mr Cliff.

- 66 The interview with Mr Icke was part of the second segment. It followed a discussion between three guests and Mr Cliff regarding the overreaching nature of the government's response to Covid-19.
- 67 I attach a copy of the transcript of the broader programme marked "WRB7" and a copy of the transcript of the interview with Mr Icke is marked "WRB8".
- 68 The applicants have no complaint about the first segment: it is entirely appropriate for guests on a programme such as this to criticise government's response to the pandemic. The interview with Mr Icke, however, is a different matter altogether.
- 69 During the interview, Mr Icke (described as a journalist) made various false claims about the Covid-19 pandemic. He said that it was "*a pandemic hoax*", that there was an "*obvious scam going on*" and that "*there is no virus*" at all. At no point did the host, Gareth Cliff, ever make clear to viewers that these claims were false. This was so even though Icke claimed that elsewhere he could discuss "*the absolute factual evidence to support*" his claims.
- 70 However, there is no support for those claims. There never has been. Indeed, e.TV has never attempted to defend the truth of Icke's claims. e.TV accepts that the claims made by Icke are utterly false.

Procedural history

71 MMA filed its complaint on 21 August 2020. I attach a copy marked "**WRB9**". I also attach copies of e.TV's response marked "**WRB10**" and MMA's reply marked "**WRB11**".

72 The matter was heard on 23 September 202 and the BCCSA Tribunal handed down its decision, under Case No: 9/2020, on 30 October 2020. I attach a copy of the decision marked "**WRB12**". The BCCSA Tribunal held that the broadcast breached the provisions of the BCCSA Codes dealing with the broadcast of comment. It emphasised (at para 22) the extraordinarily irresponsible nature of the broadcast:

"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."

73 The BCCSA Tribunal imposed the following sanction:

- 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.”

- 74 The BCCSA Tribunal prescribed the following apology at paragraph 32 of its decision, which e.tv was required to broadcast:

“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 eTV 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 eTV apologise for the fact that it did not protect the people of South Africa from the potential harm and misinformation contained in the interview”.
(Emphasis added)

- 75 e.TV filed an application for leave to appeal against the finding and sanction imposed by the BCCSA Tribunal. Leave to appeal was refused by the Chairperson of the Tribunal on the basis that:

“... the Applicants [e.TV] have not made out a case that the finding of the Tribunal was clearly wrong and I do not think that there is a reasonable possibility that an Appeal Tribunal will find that the finding by the Tribunal was clearly wrong. This applies to the finding of a contravention of the Code and to the sanction imposed. The Applicants are ordered to broadcast the apology at the start of the episode of the

programme 'So what now?' following directly after receiving this ruling. The Applicants are also ordered to pay the fine of R10 000 (ten thousand Rand) to the Registrar not later than 15 December 2020, by the [Applicants] jointly; the one paying, the other to be absolved."

76 e.TV then submitted an application for leave to appeal in terms of clause 4.4 of the Procedure of the Commission.¹² This application was granted on the basis that the Appeal Tribunal may reasonably come to a different decision.

77 The appeal was heard on 3 May 2021. I attach the heads of argument filed on behalf of e.TV and MMA as "WRB13" and "WRB14" respectively. e.TV advanced two main arguments before the Appeal Tribunal.

77.1 First, that the comment clause in the BCCSA Codes did not apply unless the broadcaster endorsed the remarks made. In other words, broadcasters could publish harmful and false views and would only be subject to the requirements of the comment clause if the broadcaster had indicated (either through its host or in some other way) that the broadcaster endorsed those harmful and false views.

77.2 Second, even if the comment clause did apply, e.TV argued that the provision was complied with. The central feature of e.TV's argument was that the "facts" on which a comment must be based need not be true. In other words, it contended that the BCCSA Code allows for comments based on false facts.

¹² Clause 4.4 provides: "Where leave to appeal is refused, a party who is aggrieved by such a refusal may, within 5 days, apply to the Chairperson of the Commission or an alternate Chair-person of the Commission or another Commissioner designated by the Commission for leave to appeal – such Chairperson, Alternate Chairperson or Commissioner not having sat in the first Tribunal. Such application is decided on the papers, unless the Chairperson, Alternate Chairperson or other Commissioner re-requests the parties to address him or her."

- 78 The Appeal Tribunal handed down its decision on 5 July 2021. I attach the decision marked "**WRB15**".
- 79 The Appeal Tribunal correctly found that e.TV's first argument applied only to news broadcasts. It did not apply in the context of the comment clause.
- 80 The Appeal Tribunal then determined whether the comment clause had been breached. The comment clause is set out in clause 28.2.2 of the Subscription Code and clause 12.2 of the Free-to-Air Code. The text is identical and is as follows:

"Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to".

- 81 The Appeal Tribunal went on to find that the comments by Mr Locke were his honest opinion based on facts truly stated. The Appeal Tribunal's reasoning is contained in 5 short paragraphs:

"[15] In terms of Clauses 28(2)(2) and 12(2) the broadcaster is expected to ensure that any comment expressed on a programme is supported by facts truly stated or fairly indicated. This is a further refinement of the general approach set out above. The second leg of the test is required so as to inform the viewer on which facts the comment is based. Once the viewer is aware of these facts, he/she can decide how much weight to attach to the veracity thereof. If this requirement is not complied with, a comment, even if it is an expression of an honest opinion, may easily result in the dissemination of false information.

[16] The requirement does not refer to the veracity of the facts, but to the fact that, the facts must be truly stated or fairly referred to. A comment would for example fall foul of this clause if the facts were

Bds
WRB 27

stated but twisted to support the comment or if the reference does not support the opinion because it is not fairly stated.

[17] If the requirements of these two clauses are applied to the impugned interview it is clear that Mr Icke's outrageous comments were backed up with facts truly stated. He referred the presenter to books that he authored; although no titles were mentioned. He was also not able to advance any scientific research paper in support his opinion.

In his interview he stated that:

'Someone like me comes along, having done 30 years of research and predicted all this stuff that is going on now in my books decades ago by the way, and says they're lying to you'.

The fact of the matter is that Covid-19 had only been identified with the recent (at the time of the broadcast) outbreak of the pandemic which means that he could not have predicted the virus. When confronted with the fact that he had done no research on his statements about the pandemic, he retaliated and stated that he is not a doctor but he has done thirty years of research on information that comes from doctors, virologists and medical practitioners who will never get on any mainstream programme.

[18] The question is what value can be attached to research regarding the existence of Covid-19 when it was done by only one person without any qualifications in the field of virology and related fields of medicine. Mr Icke explains that although he is not a doctor, his research is based on views of doctors, medical practitioners and virologists. These scientists are never identified. According to him they are unknown because they will not be granted opportunities to explain their views on 'mainstream' programmes.

[19] Mr Icke's comments should not only be judged on the facts set out above. The viewer is also guided by the information provided by the presenter. He introduced Mr Icke as a former footballer and a BBC sports commentator, banned from social media and also from being interviewed on TV internationally and lastly as the world's most famous conspiracy theorist. Based on this introduction and the facts Mr Icke

stated to support his claim that the corona pandemic is a hoax, it is clear that the reasonable viewer would have realised that the real hoax was Mr Icke and not the pandemic.

[20] The second leg of the test set out above, only comes into play once it has been established that the comment had been an honest opinion. In this instance it is clear that Mr Icke expressed his honest opinion however unacceptable. To him the pandemic serves as further proof of his general theory and consistent belief over thirty years that governments control citizens by scaring them with false information. Time has proven Mr Icke wrong but then, the facts upon which the comment are based need not be true, only truly stated...”.

Grounds of review

82 I am advised that the Court has the power to review administrative action if it was materially influenced by an error of law in terms of section 6(2)(d) of PAJA, alternatively under the principle of legality. Our courts have held that an error is material where it affects the outcome of a decision.

83 The applicants submit that the Appeal Tribunal’s reasoning and decision were based on various material mistakes of law.

Incorrect interpretation of “facts truly stated”

84 The Appeal Tribunal found that the requirement that comment “must be made on facts truly stated or fairly indicated and referred to” – “does not refer to the veracity of the facts, but to the fact that, the facts must be truly stated or fairly referred to” (paras 17 and 20).

85 e.TV's case in the Appeal Tribunal rested on the premise that under the BCCSA Codes a comment can be made on "*false facts*". It claimed, in particular, that:

"The facts upon which the comment is based may be true, false, far-fetched or entirely made up, as long as some 'fair' reference is made to them." (Emphasis added)

86 I respectfully submit that this approach is utterly untenable and verges on absurd. Clause 28.2.2 of the Subscription Code and clause 12.2 of the Free-to-Air Code recognise that comment may only be broadcast, if the following requirements are met:

86.1 The comment must be an honest expression of opinion.

86.2 The comment must be presented in such a manner that it clearly appears to be comment.

86.3 The comment must be made on facts truly stated or fairly indicated and referred to.

87 The BCCSA Codes bind the *broadcasters* – not the guests who appear on a particular programme. Thus it is up to the *broadcaster* to ensure that the comment programme complies with clause 28.2.2 of the Subscription Code and clause 12.2 of the Free-to-Air Code.

88 e.tv's approach is entirely at odds with a literal, purposive and contextual reading of clause 28.2.2.

89 Textually, the very notion of "*false facts*" is a contradiction in terms.

MB BLS
30

- 89.1 The Oxford Shorter English dictionary defines a “fact” as “a thing known for certain to have occurred or to be true”.¹³
- 89.2 The Cambridge Dictionary defines a “fact” as “something that is known to have happened or to exist, especially something for which proof exists, or about which there is information”.¹⁴
- 89.3 The South African Oxford Dictionary defines a fact as “*a thing that is indisputably the case*”.
- 90 Contextually, the Appeal Tribunal’s interpretation is also at odds with the various other references to the term “*facts*” in the BCCSA Codes. For instance, Clauses 28.1.3, dealing with news, make clear that the word facts means “true facts”:
- “28.1.3 Only that which may reasonably be true, having due regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with due regard to context and importance. If a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate clearly that such is the case.”
- 91 The BCCSA Code thus defines facts as claims “*which may reasonably be true*”. All of the claims made by Mr Icke were false, were known to be false at the time of the broadcast, and e.TV has always accepted that the claims were all false.
- 92 If facts could be “*entirely made up*”, then the journalists and broadcasters who agreed to be bound by the BCCSA Code would not have used the term “*facts*” in

¹³ Shorter Oxford English Dictionary, Oxford University Press (2007 edition).

¹⁴ Cambridge Dictionary, (accessible at <https://dictionary.cambridge.org/dictionary/english/fact>).

the Codes at all. At the very least, there would have been some form of explanation in the provisions of the Code.

- 93 Purposively, e.TV's construction would undermine the very objective of the comment clause. If all that broadcasters are required to do to satisfy the BCCSA Codes is refer to false facts, then the bar has been set so low that it will always be satisfied by broadcasters. That would completely undermine the purpose of the BCCSA system, and would do nothing to protect viewers.
- 94 In short, broadcasters and journalists are required to present the facts, not invent them. The notion of facts being "far-fetched" or entirely "made-up" is equally misguided when the common law legal position is considered, which has been frequently cited by the BCCSA Tribunal. This will be demonstrated in legal argument.
- 95 In legal argument, the applicants will also show that the Appeal Tribunal's finding is also entirely at odds with the manner in which the Tribunal has applied the comment clause before. Importantly, investigative journalism programmes such as *3rd Degree* and *Carte Blanche* have never been permitted to base their comments on facts that they have made up. Quite the opposite: the Tribunal interrogates the truth value and veracity of the factual claims made.
- 96 This error formed the basis for the Appeal Tribunal's decision. Critically, if the Appeal Tribunal had applied the correct test then the result would have been

different and would (like the first Tribunal) have found that e.TV breached the BCCSA Codes.

The failures by David Icke

97 During the broadcast, no effort whatsoever was made to provide a factual basis for the impugned statements. For instance, in describing COVID-19 as “a pandemic hoax”, Mr Icke stated that he had “*absolute factual evidence*” to support the statement. However, he did not indicate or refer to any facts in support of this. This is similarly so in respect of the other impugned statements identified in MMA complaint and reply.¹⁵ Before the BCCSA Appeal Tribunal e.TV made no attempt whatsoever to show that the facts relied upon were true or had any veracity whatsoever. Quite the opposite: e.TV accepts that the facts were false, and suggests that false facts were good enough for the BCCSA Codes.

98 The table below demonstrates this:

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	No. There is no evidence to support the claim that there is a scam in respect of the	No. Mr Icke does not indicate or refer to <u>any</u> facts to support his claim of there being a scam

¹⁵ MMA complaint, 21 August 2020 at paras 14-17; MMA reply, 7 September 2020 at para 7.

<p>in terms of communication of information”</p>	<p>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 COVID-19 “have been widely described as a sign of what dedicated leaders can achieve”.¹⁶ 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.”¹⁷</p>	<p>in terms of the communication of information, still less true facts</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</p>	<p>No. The funding of the World Health Organization is made transparently known, and is received from member states</p>	<p>No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts</p>

¹⁶ Brightness Mangolothi & Malesela Maubane, ‘Effective communication from leadership is essential during a crisis’, *Mail & Guardian*, 15 April 2020.

¹⁷ Charles Shey Wiysonge, ‘South Africa’s war on COVID-19’, *Think Global Health*, 20 April 2020.

<p>by a guy called Tedros, the DG, who is just an asset of Bill Gates, who owns the WHO”</p>	<p>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>“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. Again, that is false and was known to be false at the time of the interview. In fact, various studies in fact were able to isolate the pathogen in patients from as early as February 2020.¹⁸ 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 2020.¹⁹ This has also</p>	<p>No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts.</p>

¹⁸ J Kim, Y Chung et al, “*Identification of Coronavirus Isolated from a Patient in Korea with COVID-19*”, Osong Public Health Research Perspective, republished in the US National Library of Medicine, National Institutes of Health available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7045880/>

¹⁹ Stellenbosch University, ‘South Africa obtains first laboratory isolate of SARS-CoV-2’, *News Medical*, 11 May 2020.

	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. ²⁰	
“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”	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 of South Africa.	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

99 The Appeal Tribunal found that it was sufficient for Icke to refer to unspecified “doctors, virologists and medical specialists” who backed up his version. If that is all that is required for broadcasters to satisfy the BCCSA Codes then the bar has been set so low that it will always be satisfied by broadcasters. That – with respect – completely undermines the purpose of the BCCSA system.

100 Contrary to the position espoused by the broadcasters, the applicants submit that blithe references made by Mr Icke exacerbated the harmful nature of the broadcasts. Mr Icke created the false impression that he had credible information to verify the claims he was making, without pointing the viewer to

²⁰ Harry Cockburn, ‘Coronavirus: Scientists isolate virus responsible for deadly COVID-19 outbreak’, *Independent*, 13 March 2020.

any such evidence to be able to test the credibility of his claims. In this regard, as correctly noted by the first Tribunal:

"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 COVID-19 because this virus was only identified towards the end of 2019 ... If Mr Icke's statement was intended to create the impression that he had done 30 years' research on COVID-19, this comment was not justified – plainly put, it was a lie."²¹ (Emphasis added)

101 It also does not assist e.TV's case that the earlier segments in the show contained more credible guests discussing the COVID-19 pandemic. The likely result of this was that ordinary viewers treated Mr Icke with the same level of credibility as the other guests. In any event, the Codes require each expression of comment to be justifiable by facts that are true or fairly indicated and referred to. Mr Icke was given a platform to disseminate patent falsehoods regarding the global pandemic, without any substantiation, and in circumstances where the host himself made little to no credible effort to counter these views.

102 This is a patent breach under Clause 28.2.2 of the Subscription Broadcasting Code and clause 12.2 of the Free to Air Broadcasting Code.

²¹ Ruling of the Tribunal at para 20.

MB *Bde*
37

The failures by the host – Gareth Cliff

103 Importantly, when the interview was broadcast on 22 and 23 July 2020 there was nothing “*controversial*” about David Icke’s opinions or the facts upon which they were based. Mr Icke’s views were demonstrably false.

104 Despite this, Mr Cliff had the following to say during the course of the interview:

104.1 He described David Icke as “*having some controversial opinions*”;

104.2 “*Now some of what you say may sound crazy to some people, some of it makes sense to some people, but I’m a proponent of free expression, even if I don’t buy it, and everyone gets to decide for themselves”;*

104.3 “*We won’t have time to interrogate this in any detail*”;

104.4 “*With you being banned from so many platforms ... how can we find the balance, in your opinion, between blocking perceived harmful narrative and allowing actual freedom of expression? And who gets to decide, David?*”

105 Mr Cliff explained that he was giving Mr Icke a platform to explain his position:

“Well I’m pleased to have given you a place to tell your story and to explain your position because so many people would rather shut you down... ”. (Emphasis added)

106 Mr Cliff then said he planned to get Mr Icke “*on the radio show as well, give you some room*” – to give further airtime for Mr Icke to explain his views.

MB Bds
38

- 107 What Mr Cliffe did not do, was explain to viewers that Mr Icke's views were false, or that they lacked any factual foundation.
- 108 Portraying something that is obviously false as "*debatable*" or "*controversial*" is a technique that has been used throughout history to counter actual evidence that: (a) there is a link between smoking and lung cancer; (b) there is a link between HIV and AIDS; (c) that the holocaust, in which approximately 6 million Jewish people were murdered by the Nazi party, took place.
- 109 The reasonable viewer would assume that a trusted source like e.TV would not host someone actively spreading disinformation, which was known to be false, without, at a very minimum, clearly demarcating this for the view. But Mr Cliff never did so. Instead, Mr Cliff said that Mr Icke's views were merely "*perceived*" by some as harmful, while "*some of it makes sense to some people*". Which parts? The viewer was never told.
- 110 In response to the extraordinary statements by Icke regarding "*a pandemic hoax*" and his claim that "*The WHO was created by people like the rockefeller family to control global health policy from a central point*", Mr Cliff's immediate response was not to disagree, but instead to say:

"Part of the reason I was curious to have you on is because this almost feels like a perfect storm for this kind of suppression of information, conspiracy theory stuff – it looks like the world is ripe for all of this to take root at the moment because people just don't know who to believe, right?"

111 Throughout the interview, Mr Cliff was either silent, or expressed affirmation or agreement with such views, including by stating that *"I'm pleased to have given you a place to tell your story and to explain your position"*.

112 Indeed, at times Mr Cliff repeated the views expressed by Mr Icke without in any way gainsaying or challenging them, for example:

"You've been very vocal about this coronavirus pandemic being a planned conspiracy theory, a conspiracy rather for global governance. We won't have time to interrogate this in any detail".

113 The word *"interrogate"* implies that there was a view that could still be interrogated, i.e. that there might possible be some degree of merit in Icke's view.

114 Chris Roper, a former editor of the Mail & Guardian, summed up Mr Cliff's various failures as a host in an opinion piece, attached marked **"WRB16"**.²²

"Is it OK to hate Jews, and to blame them for the creation of the coronavirus? Is it OK to decide that the coronavirus doesn't exist, and that if it does it's spread by 5G technology, so it's OK to beat up mobile technicians and set fire to mobile infrastructure? I don't know! Can we ever know? You decide for yourself. That's freedom, buddy. I didn't invent it.

Some people on social media proffered a defence of Cliff's decision to host Icke [before the programme aired], by claiming that he would use his Superior Intellect™ to demolish Icke's arguments. That never happened, of course, and in fact Cliff very openly laid out his own rationale for his decision. 'I need to put a disclaimer upfront. You have been banned from social media platforms, and even from appearing on

²² C Roper, "How conspiracist David Icke 'confused' Gareth Cliff", published in *Financial Mail*, dated 6 August 2020 available at: <https://www.businesslive.co.za/fm/features/2020-08-06-how-conspiracist-david-icke-confused-gareth-cliff/>

television internationally, for putting out what has been reported as harmful information,' he said."

115 Ironically, as Mr Roper notes, a "*controversy*" is defined as a discussion marked by the expression of opposing views.²³ There was nothing of the sort in Mr Cliff's broadcast. For these reasons, too, the programme failed to comply with the comment clause in the BCCSA Codes.

116 The Appeal Tribunal failed to appreciate that the "comment" that e.TV made by virtue of its broadcast was that the views expressed by Mr Icke could be considered by members of the public, that the public may "buy them". That comment is directly contrary to the facts – facts which e.tv and Mr Cliff elected not to state.

117 Mr Cliffe was required, at a minimum, to indicate that Mr Icke's views were false – that is, that Mr Icke's comments were not based on any facts, and that he had failed to refer to any facts.

Incorrect application of the test

118 I have explained above that the Appeal Tribunal misunderstood the meaning of the phrase "facts truly stated" and applied the incorrect test. For that reason alone, its decision falls to be reviewed and set aside.

119 However, even on the Appeal Tribunal's watered down test, it should have found that Mr Icke's comments breached the comment clause. The Appeal

²³ Ibid.

Tribunal accordingly (even on its own test) committed a material error of law in the manner it applied the legal principles to the facts.

120 The Appeal Tribunal acknowledged (correctly) that a comment would “*fall foul of [the comment clause] if the facts were stated but twisted to support the comment or if the reference does not support the opinion because it is not fairly stated”.* (Emphasis added)

121 That is precisely what Mr Icke did, and was allowed to do by the broadcaster. The Appeal Tribunal even accepted this (at para 12) finding that it was “*indeed correct that Mr Icke’s statements contained misinformation, disinformation and even a false statement*”.

122 The Appeal Tribunal then reached the astonishing conclusion (at para 20) that “Time has proven Mr Icke wrong but then, the facts upon which the comment are based need not be true, only truly stated”. This seems to suggest that it may at one stage have been thought that Mr Icke’s views were factual, but that with the benefit of hindsight we know them not to be.

123 Again, that is incorrect. It was known at the time of the interview that Mr Icke’s views were demonstrably false. e.TV and Mr Cliff knew (but the South African public did not know) that Mr Icke is someone who generally ignores and entirely manipulates facts.

124 Mr Icke described himself as a journalist during the interview. That claim was never challenged by Mr Cliff. Yet Mr Icke is neither a respected journalist nor a

researcher of any kind. Quite the opposite, He makes a habit of distorting facts and misleading the public.

125 Indeed, Mr Icke has made a multi-million dollar business out of pedalling his “theories”. In 2012, *VICE* media created a two-part segment on Mr Icke which reports that he had sold, at that stage, approximately 20 million copies of his books. Mr Icke has written 20 different books. Each copy is sold for approximately \$10 (approximately R150 at the current rate of exchange). Part 1 of the *VICE* segment has been viewed approximately 5.5 million times.²⁴ Part 2 has been viewed 2.3 million times.²⁵

126 Indeed, in the discredited *London Real* interview with Mr Icke that was the subject of the Ofcom complaint – he referred to one of the ‘factual’ sources: a YouTube video of a New York doctor who Mr Icke alleges “*broke ranks*” and confessed that there was no such thing as Covid-19. But when one views the interview with the doctor, nothing could be further than the truth.²⁶

127 The viewer was not told anything about Mr Icke’s penchant for falsehoods, or about the falsity of the claims he made during the interview. All that e.TV’s broadcast contained were a few extremely vague references (unexplained) made to “lizard overlords”. The viewer was not provided with any real context on Icke or that the references to “lizards” were not metaphorical – nor figurative

²⁴Available at: <https://www.youtube.com/watch?v=1w2dMeklJLw&list=PLA8098C06012E9B51&index=2> (accessed 22 November 2021).

²⁵ Available at: https://www.youtube.com/watch?v=qjbTBpc8-dU&list=PL7oJJSTr2NijX0H1_fJ-1EKg2CqmtaMsb&index=69 (accessed 22 November 2021).

²⁶ Dr Cameron Kyle-Sidell was not saying (as Mr Icke suggests) that Covid-19 did not exist. Rather his discussion was questioning the use of ventilators and the new nature of Covid-19 and how it could better be treated: https://www.youtube.com/watch?v=UmS4AL_jUeE.

or hyperbole – but that Mr Icke actually claims to believe that the world is run by lizards.

128 Before the Appeal Tribunal, e.TV – for the first time on appeal – sought to suggest that Mr Icke was obviously and notoriously unhinged, and that it was therefore not necessary for Mr Cliff need not refer to the fact that Icke’s views were false. But this was entirely absent in Mr Cliff’s broadcast.

128.1 The viewer was not told, for example, that Mr Icke claims to believe that an elite group of people, including Queen Elizabeth, George W. Bush, and Bill and Hillary Clinton are not human beings but are instead shape-shifting reptilian humanoids.

128.2 This is Mr Icke’s “factual” account of how the world actually works. He sets out his “theory” purportedly based on “facts” in his book: *The Biggest Secret: The book that will change the world* – first published in 1998 where he says the following:

“[A] reptilian race from another dimension has been controlling the planet for thousands of years. I know other people who have seen [George] Bush shape-shift into a reptilian.”²⁷

“Shape-shifting is the ability to use your mind to project another physical image for people to see. Everything is energy vibrating at different speeds, so if you use your mind to re-vibrate that energy to a different resonance, you can appear in any form you choose.”²⁸

“These reptile full-bloods and reptile-possessed people hold the major positions of power in the world or work in the background controlling those in the positions of apparent power like prime ministers and

²⁷ The Biggest Secret at p 64

²⁸ Ibid at p 65

WB Bds
44

presidents. Having a reptilian or reptilian-controlled human as president might sound fantastic if you have allowed yourself to have your vision of possibility suppressed to the size of a pea, but when you see the evidence put together over thousands of years, it makes perfect sense of the 'mysteries' of history".²⁹

"[There is an] obsession with interbreeding among the Elite bloodline families. They are seeking to maintain a genetic structure which allows them to move between dimensions and shape-shift between a human and reptilian appearance."³⁰

129 An extract of these passages is attached marked "**WRB17**".

130 While Mr Icke might well be "*notorious*" in other countries, his falsehoods are not generally known to the reasonable South African viewer. Indeed the members of the first Tribunal made it clear that they had no idea who Icke was – they thought he was possibly a medical doctor.³¹

131 Following the *London Real* interview in April 2020 – months before the e.TV interview – Mr Icke's views were discredited, pulled from various reputable sites and Mr Icke was banned from YouTube³² and Facebook.³³ Moreover, as set out above, the UK Regulator, Ofcom, found on 20 April 2020 that the London Real interview with Mr Icke violated the applicable UK Code.

²⁹ Ibid at p 423.

³⁰ Ibid at p 65.

³¹ Ruling of the Tribunal at para 20.

³² "YouTube terminates David Icke's account over Covid-19 conspiracy theories", dated 2 May 2020 – available at: <https://www.itv.com/news/2020-05-02/youtube-terminates-david-ickes-account>.

³³ "Coronavirus: David Icke kicked off Facebook", dated 1 May 2020 – available at: <https://www.bbc.com/news/technology-52501453>.

132 In this context, there was surely a duty on e.TV to inform its viewers of the falsity of Mr Icke's views and to challenge those views during the course of any interview with him.

133 This was not a high burden. Various other media outlets have described Mr Icke's views as false without any difficulty.

133.1 For example, on 1 May 2020 the BBC reported that "Facebook has taken down the official page of conspiracy theorist David Icke for publishing 'health misinformation that could cause physical harm'." I attach a copy of the article marked "**WRB18**".

133.2 Significantly, the BBC article explained that "*Mr Icke has made several false claims about coronavirus, such as suggesting 5G mobile phone networks are linked to the spread of the virus. In one video, [Icke] suggested a Jewish group was behind the virus*".

133.3 The BBC did not feel it necessary or appropriate to describe Mr Icke's comments as 'controversial views' that make sense to some people. It described them, without any equivocation, as false.

134 Mr Cliff not only failed in his duty to challenge Mr Icke's claims, but suggested that a viewer might not "*buy*" the "*lizard stuff*" but might buy some of Mr Icke's other ideas. This carried the clear implication that some of Mr Icke's other views – such as his Covid-19 denialism – may be more credible.

135 Indeed, this has been recognised by other regulators in respect of the broadcast of very similar statements by Mr Icke himself.

WRB Sds
46

135.1 In April 2020, Ofcom – the communications regulatory authority of the United Kingdom – sanctioned a broadcaster for the broadcast of an interview with Mr Icke.³⁴ A copy of Ofcom’s decision is attached marked “**WRB19**”.

135.2 In a ruling that closely aligns with the reasoning of the BCCSA Tribunal – but is at odds with the approach of the Appeals Tribunal – Ofcom expressed the view that Mr Icke’s statements –

“had the potential to cause significant harm at a time when health care systems around the world are fighting to contain the deadly impact of the Coronavirus and the scientific consensus is that distancing, and the public’s compliance with it, is a key step to restricting the spread of the disease.”³⁵

135.3 Notably, in Ofcom’s summary of its ruling, it stated as follows:

“Our investigation found David Icke expressed views which had the potential to cause significant harm to viewers in London during the [Covid-19] pandemic. We were particularly concerned by his comments casting doubt on the motives behind official health advice to protect the public from the virus. ... These claims went largely unchallenged during the 80-minute interview and were made without the support of any scientific or other evidence.”³⁶ (Emphasis added)

135.4 Importantly, and contrary to e.TV’s approach, Ofcom did not hold that David Icke’s views about Covid-19 were so far-fetched that they could be aired. Nor did Ofcom accept that it was so notorious that David

³⁴ Ofcom, ‘Ofcom decisions on recent programmes featuring David Icke and Eamonn Holmes’, 20 April 2020, accessible at <https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/david-icke-and-eamonn-holmes-decision>.

³⁵ Ibid.

³⁶ Ibid.

MB
Reds
47

Icke should not be believed that there was no harm in the airing of his false views.

135.5 Indeed, Ofcom made clear in its decision that it was “prioritising cases related to the Coronavirus which could cause harm to audiences”.³⁷

135.6 Ofcom explained that this would include:

135.6.1 Health claims related to the virus which may be harmful;

135.6.2 Medical advice which may be harmful; and

135.6.3 Accuracy or materially misleading programmes in relation to the virus or public policy regarding it.³⁸

136 The Appeal Tribunal found that the e.TV interview and the *London Real* interview concerned different codes, and the *London Real* interview, at 80 minutes, was far longer than the Icke segment. But that is irrelevant. What is critical is that, like the *London Real* interview, Mr Cliff offered no meaningful challenge to Icke’s views. Importantly, the premise underlying the UK Ofcom decision in respect of the *London Real* interview was that – even though Icke’s information was patently false and far-fetched – there was still risk that UK reasonable viewers may believe Mr Icke.

137 Thus, even if the Appeal Tribunal’s interpretation of the Codes was correct, it plainly misapplied the comment clause. For this reason too, the Appeal Tribunal’s decision falls to be reviewed and set aside.

³⁷ Ibid at p 1.

³⁸ Ibid.

Grounds under PAJA and the principle of legality

138 In the circumstances, the Appeal Tribunal decision falls to be reviewed and set aside on the following grounds:

- 138.1 Section 6(2)(a) of PAJA and the principle of legality, as the Appeal Tribunal was not authorised to make the decision by the empowering provisions in the Codes;
- 138.2 Section 6(2)(d) of PAJA and the principle of legality, as the Appeal Tribunal's decision was materially influenced by errors of law;
- 138.3 Section 6(2)(e)(iii) of PAJA and the principle of legality, as irrelevant considerations were taken into account and relevant considerations were not considered;
- 138.4 Section 6(2)(e)(vi) of PAJA and the principle of legality, as the Appeal Tribunal's decision was made arbitrarily or capriciously;
- 138.5 Section 6(2)(f)(i) of PAJA and the principle of legality, as the Appeal Tribunal decision contravened the Codes and were not authorised by the empowering provision in the Codes;
- 138.6 Section 6(2)(f)(ii) of PAJA and the principle of legality, as the Appeal Tribunal decision was irrational;
- 138.7 Section 6(2)(i) of PAJA and the principle of legality as the Appeal Tribunal decision was otherwise unconstitutional or unlawful.

W/B *Sds*
49

THE SABC APPEAL TRIBUNAL DECISION

The Full View interview

139 On 18 November 2020, the SABC broadcast an interview with the Secretary-General of the African National Congress, Mr Ace Magashule. The interview formed part of the *Full View* programme, which describes itself as focusing “on the general news of the day”.

140 Much of the interview focused on the retrenchment process that was then underway at the SABC at the time.

141 During the course of the interview, the two SABC interviewers, Mr Samkele Maseko and Mr Ntebo Mokobo, made false and unsubstantiated remarks about the retrenchment process, and actively goaded Mr Magashule – and through him, the Minister of Communications, and the President – to intervene in the affairs of the SABC board. The interviewers made no attempt to hide their own views or present a balanced view: the ANC, the Minister and the President must intervene, they said, including by removing members of the SABC board.

142 The interview remains available online, as at the date of deposing to this affidavit, at: <https://www.youtube.com/watch?v=lq6YQRZ9ufc>.

143 The interviewers said, for example:

2MB Bds
50

- 143.1 that SABC directors earn “*millions of Rands*” while the staff were “*earning peanuts*”, that the retrenchments were a “*jobs bloodbath*”, and that “*atrocities are being done to peoples’ lives*”;
- 143.2 “*the Governing Party is yet to call this Board and address them. What is the ANC doing to save jobs at the public broadcaster?*”;
- 143.3 “*Mr Magashule you are seemingly a tenant that is absent in his own party. The governing party is governing this country – the ANC – it is your deployees who are running and who are in charge of the portfolio committee, it is your Minister who is there, Stella Ndabeni-Abrahams, it’s your Deputy Minister Pinky Kekane who is there, but the ANC is seemingly afloat and aloof when it comes to the issues of the workers in the public broadcaster. What have you done to proactively and actively engage with halting the process of section 189?*”
- 143.4 “*Mr Magashule are you saying that the SABC Board is renegade and is not listening to those who employed them to do their job and they’ve just gone amok?*”
- 143.5 “*This board, when it was brought in, together with the executive, was meant to save the SABC. But it seems the SABC has been leaping from one problem to the other. Do you think, as the ANC and the governing party, that this board and its executive, have reached its sell by date and maybe they must just pack and go?*”

143.6 *“What has the President of the Republic of South Africa and the President of the ANC done to instruct the Minister to halt the job retrenchments at the SABC? Has he engaged the Minister, Stella Ndabeni-Abrahams, on halting the process of retrenchments at the public broadcaster?”*

143.7 *“Mr Magashule, let me put it to you bluntly, the SABC is forging ahead with retrenchments, whether we like it or not. You are sitting there right now as the Secretary-General of the governing party. What is stopping you from extending a call right now, to President Ramaphosa...to say President, please make sure that those poor employees of the SABC do not lose their jobs”.*

Procedural history

The complaint

144 On 30 November 2021, MMA and SOS lodged a complaint with the BCCSA against the SABC and Multichoice regarding *the Full View* interview. I attach the complaint marked **WRB20**.

145 The complaint emphasised the fact that the SABC is the public broadcaster, and the unique role that it plays in providing access to news and information for the majority of people in South Africa.

146 The complaint drew particular attention to the *“one-sided, self-interested interview style and inflammatory language used by the interviewers”*. It

MB
Bals
52

demonstrated that the interviewers had failed to refer to the true facts during the interview, including that:

- 146.1 far from earning peanuts, the salary of the lowest level of SABC staffer was double the average salary of a non-agricultural worker in the formal sector, according to the latest Quarterly Employment Survey;
- 146.2 there had been job losses across all sectors of the economy as a result of the Covid-19 pandemic, and in the context of the SABC, retrenchments had been required or recommended by parliament, by the National Treasury (as a precondition for two bailouts) by the Auditor-General and by the Special Investigative Unit.
- 146.3 far from constituting an atrocity, the process had been conducted in accordance with the law (particularly section 189 of the Labour Relations Act) pursuant to a decision by a majority of the SABC Board;
- 146.4 statements suggesting that Mr Magashule, or the ANC or its deployees, should intervene in the affairs of the SABC Board were contrary to section 13(11) of the Broadcasting Act, which empowers the Board independently to control the affairs of the SABC, and amounted to the promotion of unlawful conduct. The complaint referred specifically to the decision of *SOS Coalition and Others v the SABC and Others* [2017] ZAGPJHC 289 (17 October 2017), in which this Court explained that the Board is responsible for controlling the

affairs of the SABC without outside interference and held unequivocally that such interference, including through the removal of board members by the Minister, is unlawful.

147 Because the *Full View* was aired on both the SABC news channel 404 (on the DStv subscription bouquet) and subsequently on one of the SABC's digital terrestrial free-to-air channels, both the Subscription and Free-to-Air Codes applied. The complaint alleged that the SABC had breached the following provisions of the Codes:

147.1 The provisions of the Subscription Code relating to news and commentary on matters of public importance, namely:

147.1.1 Clause 28.1.1, which requires broadcasting services licensees to report news truthfully, accurately and fairly.

147.1.2 Clause 28.1.2, which requires news to be presented in the correct context and in a fair manner without intentional or negligent departure from the facts, whether by:

- (a) Distortion, exaggeration or misrepresentation;
- (b) Material omissions; or
- (c) Summarisation.

147.1.3 Clause 28.1.3, which provides that "[o]nly that which may reasonably be true, having due regard to the source of the

news, may be presented as fact, and such fact must be broadcast fairly with due regard to context and importance”;

147.1.4 Clause 28.2.1, which provides that licensees may broadcast comment on and criticism of any actions or events of public importance.

147.1.5 Clause 28.2.2, which provides that comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.

147.1.6 Clause 28.3.1, which requires a licensee, when presenting a programme in which controversial issues of public importance are discussed, to *“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”*.

147.2 The provisions of the Free-to-Air Code relating to news and commentary on matters of public importance, namely:

147.2.1 Clause 3(b), which prohibits a broadcaster from broadcasting materials which, judged within context, *“sanctions, promotes or glamorises violence or unlawful conduct.”*

Eds
WFB 55

147.2.2 Clause 11(1), which requires broadcasting services licensees to report news truthfully, accurately and fairly.

147.2.3 Clause 11(2), which requires news to be presented in the correct context and in a fair manner without intentional or negligent departure from the facts, whether by:

- (a) Distortion, exaggeration or misrepresentation;
- (b) Material omissions; or
- (c) Summarisation.

147.2.4 Clause 11(3), which provides that only that which may reasonably be true, having reasonable regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with reasonable regard to context and importance.

147.2.5 Clause 11(4), which provides that where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate, clearly that such is the case.

147.2.6 Clause 12, which provides that:

- (a) Licensees may broadcast comment on and criticism of any actions or events of public importance;

- (b) Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.

147.2.7 Clause 13(1), which provides that *"in presenting a programme in which a controversial issue of public importance as discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same program or in a subsequent program 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."*

148 The SABC responded formally to the complaint on 10 December 2020. I attach its response marked **"WRB21"**.

148.1 Importantly, the SABC admitted that it had breached the Codes, and accepted that the interview amounted to a failure of editorial and journalistic professionalism and ethics.

148.2 It appreciated that the breaches had *"broader implications not only for the journalists themselves or editorial staff broadly, but the integrity of the institution itself"* and explained that the concerns about editorial quality and journalistic posture were *"noted and fully accepted"*. It also acknowledged that SABC matters predominated the interviews, and that *"there is no question that the issues raised in relation to this*

mb
Bols
57

aspect could have been treated differently and dealt with without compromising editorial independence and impartiality.”

148.3 While the SABC referred to various factors in mitigation – such as that the “*editorial drifts*” were not preconceived or intentional and occurred in a highly emotive context – it described its own breaches as “*egregious and unacceptable*”.

149 MMA and SOS replied on 17 December 2020. I attach the reply marked “**WRB22**”. MMA and SOS welcomed the SABC’s acknowledgement of its failures, but noted that they pointed to systemic failures in the newsroom and that the SABC’s response had failed to engage meaningfully with the specific breaches alleged in the complaint.

BCCSA Tribunal decision

150 The matter was argued before the BCCSA Tribunal on 29 January 2021.

151 On 1 February 2021, MMA and SOS addressed correspondence to the SABC, which I attach marked “**WRB23**”, expressing their disappointment at certain oral submissions made on the SABC’s behalf at the hearing, which were defamatory towards MMA and SOS, and which suggested that the SABC did not agree with various judgments to which it was a party, including the High Court decision in *SOS Coalition and Others v the SABC and Others*.

152 On 3 February 2021, the General Manager of Policy and Regulatory Affairs at the SABC, Mr Philly Moilwa, indicated that he would respond after viewing the recordings of the oral hearing. On 17 February 2021, Mr Moilwa took the

WB Bds
58

extraordinary step of distancing the SABC from the submissions made on its behalf at the hearing before the Tribunal, explaining that it agreed with and accepted the judgments to which it had been a party, and that *"the position presented at the hearing was not in line with the SABC's position"*. I attach the letters of 3 February 2021 and 17 February 2021, as **"WRB24"** and **"WRB25"** respectively.

153 The BCCSA Tribunal handed down its decision on 24 February 2021. I attach the decision marked **"WRB26"**. It held, in short, that:

- 153.1 the SABC had breached both the Free-to-Air and Subscription Codes;
- 153.2 the *Full View* constitutes news content, and both Codes thus require the SABC to report news truthfully, accurately and fairly;
- 153.3 the interviewers had made numerous statements regarding the retrenchments at the SABC that were unexplained and unsubstantiated;
- 153.4 while it was understandable that the interviewers were passionate, *"they failed to observe the cardinal journalistic rule of objectivity and left the reasonable readers with half-truths"* and failed to make reasonable efforts fairly to present opposing points of view.
- 153.5 however, on the specific question as to whether the interviewers had promoted unlawfulness in breach of the Free-to-Air Code:

"We do not agree with the Complainant that it was unlawful for the interviewer to ask Mr. Magashule to intervene in their plight at the SABC. This would have been curtailing freedom of expression, which is

the cornerstone of our democracy. As quoted in paragraph 16 above, this Tribunal has often emphasised, especially in matters pertaining to balance, that too rigorous an interpretation of the Code would chill broadcasters in their reporting on matters of public interest, which is anathema to a free and open democracy such as ours.”

154 The BCCSA Tribunal accordingly upheld the complaint in part. It found that the SABC had committed multiple breaches of the BCCSA Codes, including of:

154.1 Clauses 28.1.1, 28.2.2 and 28.3.1 of the Subscription Code and Clauses 11(1), 11(3) and 13(1) of the Free-to-Air Code, in that the news report/interview was not truthfully, accurately and fairly presented and it was not presented in the correct context.

154.2 Clause 28.1.6 of the Subscription Code and clause 13(1) of the Free-to-Air Code, in that a right of reply in the same programme and in the same timeslot was not given.

Leave to appeal

155 MMA and SOS applied for leave to appeal to the BCCSA Appeal Tribunal on 1 March 2021. I attach the application for leave to appeal marked “WRB27”. MMA and SOS welcomed the ruling by the BCCSA Tribunal that the SABC had contravened numerous clauses of the Subscription and Free-to-Air Codes. However, two aspects of the decision were, in their view, quite incorrect.

155.1 First, MMA and SOS sought leave to appeal in respect of sanction. In particular, while the Tribunal had directed the SABC to pay a fine, it failed to order any form of correction or apology. This meant that, unless the Appeal Tribunal intervened on appeal, no steps would be

WB
60

taken to correct the admittedly untruthful and inaccurate information which was broadcast to the public.

155.2 Second, MMA and SOS contended that the BCCSA Tribunal erred in failing to find that the SABC breached clause 3(b) of the Free-to-Air Code, in that the journalists sanctioned, promoted and/or glamorised unlawful conduct.

156 The SABC did not oppose leave to appeal. While it regarded the decision of the Tribunal as "*well thought-out and fair*", it essentially abided the BCCSA's decision on leave to appeal. I attach the SABC's response to the application for leave to appeal, dated 5 March 2021, marked "**WRB28**".

157 The application for leave to appeal was heard on 28 April 2021, and the judgment granting leave to appeal, which I attach marked "**WRB29**", was delivered on 11 May 2021. In granting leave to appeal, the Chairperson of the Tribunal held that:

157.1 the SABC's resistance to an apology as a sanction was "*based on political reasons*" rather than the upholding of journalistic principles, and that it was possible that another Tribunal would find that "*the only way in which the general public's (possible) incorrect perceptions and views as a result of this broadcast can be addressed is through a public apology*";

157.2 the conduct of the interviewers in asking Mr Magashule to "*meddle in the internal affairs of the public broadcaster is tantamount to the*

WB 61

glamorisation of unlawful conduct which is against the Code of Conduct."

158 The Chairperson granted leave to appeal, and held that MMA and SOS would be invoiced for a security fee, payable before the date of the hearing before the Appeal Tribunal.

159 On 12 May 2021, MMA and SOS wrote to the BCCSA, asking it to reconsider the discretionary order directing them to pay a R25 000 security for costs order. They emphasised the public importance of the issues they had raised, and the fact that both organisations are non-profit entities operating on shoe-string budgets.

160 On 20 May 2021, the Acting Chairperson of the BCCSA wrote to MMA and SOS, and explained that while she was not inclined to waive the security fee, she would reduce the amount to R10 000.

The Appeal Tribunal decision

161 The appeal was heard on 22 June 2021. MMA and SOS filed heads of argument in advance of the hearing, which I attach marked "WRB30". The SABC sought leave at the hearing to file heads of argument and did so on 25 June 2021, which I attach marked "WRB31". MMA and SOS filed replying heads of argument on 2 July 2021, which I attach marked "WRB32".

162 On 12 August 2021, the Appeal Tribunal circulated a "draft judgment" to the parties, which I attach marked "WRB33".

WRB
62

163 The draft judgment described the grounds of appeal as follows:

163.1 That the Appeal Tribunal should direct the SABC to broadcast a correction and/or summary of the first Tribunal's findings at the beginning of each broadcast of The Full View on three consecutive weekdays.

163.2 That MMA and SOS should be exempted from the payment of administrative fees for the appeal.

163.3 That the SABC had breached clause 3(b) of the Free-to-Air Code. The draft judgment said it would address this issue “[e]ven though this is not mentioned at the conclusion of the Appellants’ HOA”. This was a surprising remark: the breach of clause 3(b) of the Free-to-Air Code was a primary ground of appeal in the application for leave to appeal, and was argued extensively in both the main and replying heads of argument (including in the concluding section setting out the relief sought, where MMA and SOS sought “a finding that the SABC breached clause 3(b) of the Free-to-Air Code, by promoting unlawful political interference in the affairs of the SABC”).

164 On the question of the need to publish an apology and summary of findings, the draft judgment “took cognisance and applauds” the SABC for having implemented corrective measures to curtail a repeat of “opportunistic journalism” in the future. It did so despite there being no evidence on the record of any such measures having been implemented.

WNB Bds
63

165 However, the draft judgment held, it was necessary to consider how the public would be made aware of this, which was important given that *“the interview was opportunistic and publicly advanced political interference into the internal affairs of the [SABC] of the Respondent by asking the former Secretary General of the ANC, Mr Ace Magashule to intervene on behalf of the Respondent’s employees, which he agreed to do as the persuasion escalated”*.

166 The draft judgment held that while MMA and SOS had asked for the summary of findings to be broadcast over three days, given that the impugned programme was broadcast seven months prior, the Appeal Tribunal would instead exercise its discretion to compel the SABC to air a summary of the findings on one episode of the Full View, and would confirm the fine imposed by the first Tribunal.

167 On the issue of the breach of clause 3(b) of the Free-to-Air Code, the draft judgment held that the Full View is broadcast on SABC News Channel 404, a subscription channel, and that while it was *“trite”* that the Full View was repeated on a Free-to-Air channel, that was the *“secondary channel of broadcast”*, which *“precludes the BCCSA from applying the provisions of clause 3(b) of the Free-to-Air”*.

168 On the costs of the appeal, the draft judgment held that *“the Appeal Tribunal cannot waive the administrative costs payable when an appeal is lodged”*.

169 The draft judgment set out the following wording for the summary of findings, in respect of which it invited the parties’ comments:

MB Eds
64

“On the 30th of November 2020 the BCCSA received a complaint from MMA/SOS against the SABC News programme, Full View which plays on Channel 404 in which they raised their concerns regarding the manner in which SABC’s journalists conducted an interview with the former ANC Secretary General, Mr. Ace Magashule. regarding the ongoing retrenchment of SABC’s employees. The complaint specifically focused on the issue that the journalists’ conduct at the time had the potential of inciting political violence or rather of creating tension between the Executive Management of the SABC and the ruling party.

The matter was heard by a Tribunal of the BCCSA on the 29th of January 2021 where the Tribunal ruled in favour of the MMA/SOS:

‘that the provisions of clause 28 of the subscription code of conduct was contravened and accordingly issued a R10 000 fine against the SABC’.

In mitigation, the SABC undertook to take internal disciplinary steps against the two journalists, as a risk mitigation step to curb against any future misconduct.

The MMA/SOS lodged an appeal against the sanction imposed by the First Tribunal. They were of the opinion that there was a need for the SABC to apologize to the SABC Executive Management and the general South African public for making false statements during the interview.

The BCCSA Appeal Tribunal took all factors into consideration and ruled that:

1. It is satisfied that steps have been taken against the journalists who conducted the interview and that the SABC is to continue with applicable internal processes in order to rectify any elements of misconduct.
2. The BCCSA cannot compel the SABC to issue an apology to the SABC Executive Management or the South African public as the BCCSA never received a complaint from either the SABC Executive management or the broader South African public. The Appellants are the only complainants before the Appeal Tribunal and as

MB
Bds
65

such cannot request an apology on behalf of these two parties.

3. The Appeal Tribunal confirmed the fine of R10 000 against the SABC which was imposed by the First Tribunal and which is payable within 14 days of the release of the judgment.”

170 On 31 August 2021, Power Singh Inc. wrote to the Chairperson of the Appeal Tribunal on behalf of MMA and SOS, submitting comments on the draft judgment. I attach the submission marked “**WRB34**”. The submission noted that:

170.1 while the draft judgment applauded the SABC for having implemented corrective measures, there was no evidence of such measures in the record that served before the Appeal Tribunal;

170.2 the Appeal Tribunal’s distinction between the primary and secondary channel of broadcast was without basis, as the only inquiry is whether the broadcast took place on a Free-to-Air channel, and the SABC had in any event abandoned the contention (adopted for the first time in oral argument in the appeal) that the Free-to-Air Code did not apply;

170.3 the draft judgment had erred in making a finding that the Appeal Tribunal was unable to waive the administrative costs payable when an appeal is lodged;

170.4 regarding the summary of findings in particular:

WB Bds
66

- 170.4.1 the summary of findings did not explain the essence of the Tribunal's findings regarding the SABC's conduct and the import of the contravention of the Subscription Code
- 170.4.2 the summary of findings referred to steps taken in mitigation that were not apparent from the record.
- 170.4.3 the summary of findings erred in stating that a public apology could not be issued in the absence of the public being complainants, in circumstances where MMA and SOS acted in the public interest.

171 MMA and SOS therefore proposed alternative wording for the summary of findings – which had been contained in their heads of argument – as follows:

On 18 November 2020, an interview with the ANC's Secretary-General, Mr Ace Magashule was broadcast on The Full View.

The Broadcasting Complaints Commission of South Africa has ruled that in that interview, the SABC contravened clause 28 of the Subscription Code in that the interview was not truthfully, accurately and fairly presented, was not presented in the correct context and the right of reply was contravened.

The Broadcasting Complaints Commission of South Africa also ruled that in that interview, the SABC contravened clause 3(b) of the Free-to-Air Code in that the interviewees promoted unlawful conduct by urging Ms Magashule to secure political interference in the affairs of the SABC.

The SABC was fined R10 000.00 and was ordered to broadcast this statement for three consecutive days on The Full View. The SABC apologises to the public for these breaches and the News Team assures the public that it has taken steps to avoid similar occurrences in future.

W/B Bds
67

172 The Appeal Tribunal gave its final decision on 20 September 2021, which I attach marked “WRB35”. Save for minor typographical changes, it was identical to the draft judgment described above – including the summary of findings that the SABC was directed to broadcast.

Grounds of review

Failure to apply the Free-to-Air Code

173 It was beyond dispute in the appeal proceedings that the SABC had breached clause 3(b) of the Free-to-Air Code by promoting and glamourising unlawful conduct in the form of political interference in the affairs of the SABC.

173.1 MMA and SOS explained in detail, with references to the content of the interview, that the journalists sanctioned, promoted and glamourised political interference in the affairs of the SABC; that such interference is unlawful; and that there was no curtailment of freedom of expression in curbing such conduct.

173.2 This was undisputed. The SABC never suggested that the interviewers had not sanctioned, promoted and glamourised unlawful conduct. Instead, at the hearing of the matter, the SABC’s representative for the first time contended that the Free-to-Air Code did not apply because the Full View was aired on the DSTV subscription bouquet. In reply, MMA and SOS’s representative informed the Appeal Tribunal that the Full View is also aired on the SABC free-to-air channel.

WRB
BdS
68

173.3 The SABC abandoned this point in its heads of argument (which it filed after the hearing). It limited its submission to a contention that promoting unlawful conduct "*was never part of or premeditated as the subject of the interview, but a consequence of the emotive and restive environment at the time which led to unintentional statements being uttered.*"

173.4 In their replying heads of argument, MMA and SOS noted that the SABC had "*provided almost no answer to the argument that it breached clause 3(b) of the Free-to-Air Code.*" They addressed in detail the spurious suggestion that premeditation is a requirement for the application of clause 3(b) of the Code. On the specific question of the application of the Free-to-Air Code, the replying heads of argument said the following:

6. At the hearing of the matter, the SABC had only one defence to the argument that it had breached clause 3(b) of the Free-to-Air Code. It was that the Free-to-Air Code did not apply to The Full View, because – so claimed the SABC's representative – The Full View is aired on channel 404, a subscription channel.
7. That was the only reason advanced at the hearing for why clause 3(b) did not apply. It was a startling submission. It was raised for the very first time in the appeal hearing. And it was entirely untrue.
8. The point has rightly been abandoned in the SABC's heads of argument. The SABC therefore appears to concede, as it must, that the Free-to-Air Code applies. For the avoidance of any doubt:
 - 8.1. The Full View is broadcast on Channel 404, hence the Subscription Code applies.

WMB
Pds
69

8.2. The Full View is re-broadcast on the SABC's Free-to-Air channels, including SABC2, hence the Free-to-Air Code applies."

174 There was thus no dispute that the Full View interview encouraged intervention in the affairs of the SABC. The interviewers actively goaded, encouraged and persuaded Mr Magashule, the Minister, and the President to intervene in the affairs of the SABC board. They made no attempt to hide their own views: the ANC, the Minister and the President must intervene, they said, including by removing members of the board.

175 The Appeal Tribunal indeed found that to be so, explaining that "*the interview was opportunistic and publicly advanced political interference into the internal affairs of the [SABC] of the Respondent by asking the former Secretary General of the ANC, Mr Ace Magashule to intervene on behalf of the Respondent's employees, which he agreed to do as the persuasion escalated*".

176 It is also plain that interference by the ANC, the Minister and the President in the affairs of the SABC, including by removing board members, is unlawful.

177 The proper conclusion was therefore self-evident: the SABC had breached section 3(b) of the Free-to-Air Code by broadcasting "*material that, judged within context...sanctions, promotes, or glamorises...unlawful conduct*".

178 However, the Appeal Tribunal reached, with respect, the astonishing conclusion that the Free-to-Air Code did not apply. While it accepted that the Full View was re-broadcast on the SABC's free-to-air channels, it held that "*that*

WB 70
Bols

will always be a secondary channel of broadcast” and that this “precludes the BCCSA from applying the provisions of Clause 3(b) of the Free-to-Air”.

179 This conclusion is plainly mistaken. Quite simply, the Free-to-Air Code applies to any programme that is broadcast on a Free-to-Air channel. The Codes draw no distinction between a “*primary*” and “*secondary*” channel of broadcast. The only relevant question is whether a programme is broadcast on a Free-to-Air Channel. If it is, then the Free-to-Air Code applies – whether or not the programme is also broadcast on a subscription channel (in which case the Subscription Channel applies).

180 The approach adopted by the BCCSA Appeal Tribunal is not only contrary to the Codes, it is also a stark departure from its own approach in previous cases. I am not aware of any previous decision in which it has declined to apply either of the Codes on the basis of a distinction between the “*primary*” or “*secondary*” channel of broadcast. Indeed, in the e.tv matter, despite the fact that the interview with Mr Icke was broadcast first on eNCA (e.tv’s subscription channel) and only subsequently on e.tv, there was never any suggestion that e.tv was not bound by the Free-to-Air Code.

181 Such a distinction would in any event be entirely irrational. It makes no difference to the viewer of a programme whether a subscription channel or free-to-air channel is the “*primary*” or “*secondary*” channel of broadcast. What matters is that the viewer is subjected to the programme on the channel they are able, or choose, to watch it. The purpose of the Codes is to protect such viewers from unethical and unprofessional broadcasting. The BCCSA’s

Bds
LMB 71

approach would undermine that central purpose, and would deprive every person who watches the Full View on the free-to-air SABC 2 channel of the benefit of the protection of the Free-to-Air Code.

182 The approach of the Appeal Tribunal was misguided and unlawful for another reason. The first BCCSA Tribunal had found that the SABC had breached clauses 11(1), 11(3) and 13(1) of the Free-to-Air Code by broadcasting news that was untruthful and inaccurate and by failing to fairly present opposing points of view. There was no appeal by the SABC against this part of the first Tribunal's order. Despite this, the Appeal Tribunal in effect overturned that aspect of the first Tribunal's decision.

The summary of findings was irrational

183 The Appeal Tribunal agreed with MMA and SOS that it was necessary, in order to undo the public harm caused by the Full View interview, to direct the SABC to broadcast a summary of findings.

184 However, the content of the summary of findings was confused, incoherent and utterly irrational.

185 First, the summary of findings failed properly to describe MMA and SOS's complaint. While it was not strictly necessary to describe the complaint at all, having decided to do so, it was incumbent on the Appeal Tribunal not to *misdescribe* it.

185.1 The complaint was not, as the Appeal Tribunal sought to suggest, "*specifically focused on...the potential of inciting political violence or*

WFB
SOS
72

rather of creating tension between the Executive Management of the SABC and the ruling party."

185.2 The complaint was instead about the SABC's failure to report the news truthfully, fairly and accurately, about the SABC's breach of its duties as the public broadcaster, and about the promotion and glamourisation of interference in the affairs of the SABC.

186 Second, the summary of findings failed properly to describe the findings of the first BCCSA Tribunal.

186.1 Quite simply, the first BCCSA Tribunal found that the SABC contravened clause 28 of the Subscription Code and clause 11 and 13 of the Free-to-Air Code, in that the interview was not truthfully, accurately and fairly presented, was not presented in the correct context and the right of reply was contravened.

186.2 Apart from the fact that the summary of findings omitted any reference to the Free-to-Air Code, it did nothing more than say that the first BCCSA Tribunal found that clause 28 of the Subscription Code was contravened. It provided no explanation to viewers of what this meant. No ordinary viewer would know, without more, what it means that "*clause 28 of the Subscription Code*" was breached. The point which the summary of findings never communicated was that the interview "*was not truthfully, accurately and fairly presented*".

186.3 This was a critical component of the summary of findings, as its very purpose was to inform members of the public that the interview they

had seen contained information that was untruthful, inaccurate and unfairly presented.

187 Third, the Appeal Tribunal ruled that it was “*satisfied that steps have been taken against the journalists who conducted the interview and that the SABC is to continue with applicable internal processes in order to rectify any elements of misconduct.*”

187.1 But no such steps had ever been described by the SABC. While the SABC referred obliquely to its intention to take steps to ensure that the unethical journalism exhibited in the interview did not occur again, it never explained what it had done.

187.2 It was therefore entirely irrational for the Appeal Tribunal to be “*satisfied*” that such steps had been taken. There was simply no rational connection between the information before it and its conclusion.

187.3 In any event, this could hardly be considered a central feature of the Appeal Tribunal's ruling. On the contrary, the Appeal Tribunal found at paragraph 5 that although the SABC had implemented corrective measures internally, in the absence of a published summary of findings, there was no way for the public to know about this. Including the finding as to corrective measures in the summary of findings presented an entirely distorted picture. The essence of the proceedings was that the SABC had acted unethically by presenting untruthful and inaccurate news. That essence was lost at the expense

WB Bels

of the Appeal Tribunal's satisfaction with the SABC's internal processes was emphasised.

188 Fourth, the Appeal Tribunal misdescribed the relief that MMA and SOS had sought in respect of an apology, and misunderstood its own powers to award such relief.

188.1 MMA and SOS merely asked, that as part of the summary of findings, the SABC be directed to apologise to the public for the misinformation contained in the broadcast.

188.2 The Appeal Tribunal appeared to misunderstand what was being sought, describing it as "*a need for the SABC to apologize to the SABC Executive Management and the general South African public for making false statements during the interview.*" MMA and SOS certainly never asked the SABC to issue an apology to the SABC Executive Management.

188.3 The summary of findings then explained that the Appeal Tribunal had held that it could not compel the SABC to issue an apology to the Executive Management or the public "*as the BCCSA never received a complaint from either the SABC Executive management or the broader South African public*".

188.4 This finding is irrational in the extreme. As already mentioned, no apology was ever sought to be given to the Executive Management. Insofar as the public apology is concerned, it is entirely appropriate for two organisations, acting in the public interest, to seek a public

apology. The Appeal Tribunal's approach amounts to the utterly irrational and unworkable position that no public apology can ever be directed unless every member of the public seeks such an apology.

188.5 It is of course directly contrary to the decision of the first Tribunal in the e.tv matter, which directed e.tv to broadcast a public apology to the public.

188.6 Moreover, the inclusion of this in the summary of findings once again did more to obscure than to clarify the essence of the findings against the SABC. Nowhere did the summary of findings say expressly and unequivocally that the SABC had been found to have broadcast news that was untruthful, inaccurate and unfair. Instead, the summary emphasised that the SABC could not be ordered to apologise (and that the Appeal Tribunal was satisfied with the corrective steps it had taken).

Failure to waive costs

189 The Appeal Tribunal found that it could not waive the administrative costs payable when an appeal is lodged. It concluded, in other words, that it was *powerless* to waive such costs.

190 The Appeal Tribunal was plainly mistaken as to its own powers.

191 Section 4.4 of the Procedure of the Commission (appended to the BCCSA Constitution), which I attach marked "WRB36", is clearly couched in discretionary terms: "*Where such leave is granted, the said Chairperson may*

W/B Bole
76

require from the party who applied for such leave to provide security for the costs”.

192 At the direction of the Chairperson, MMA and SOS were invoiced for and paid security in the amount of R10 000 ex VAT (R11 500 including VAT).

193 Section 4.8 provides that the Appeal Tribunal may, where it is deemed appropriate, order an appellant to pay the costs which the BCCSA had in determining the appeal. It was thus plainly within the power of the Appeal Tribunal to hold that that MMA and SOS should not be liable for any costs.

194 The considerations in favour of waiving the costs award were overwhelming.

195 As MMA and SOS explained, they are non-profit, media watchdog entities. Neither organisation has large financial reserves. While it is clearly appropriate for broadcasters or commercial complainants acting in their own interests to pay costs, the same is not true of non-profit organisations acting in the public interest.

196 Indeed, the issues raised in the appeal were of significant public and indeed constitutional significance. MMA and SOS appealed on two points of principle, because of the public importance of those principles for the South African broadcasting environment. They should not have been mulcted with costs for doing so.

197 Lastly, there is a profound inequity in the fact that two non-profit public interest organisations, which lodged a complaint in the public interest, and achieved

MB Bds
77

substantial success, were required to pay costs in the same amount as the fine imposed on the SABC, where the SABC was found to have breached numerous provisions of the Codes.

Grounds under PAJA and the principle of legality

198 In the circumstances, the Appeal Tribunal decision falls to be reviewed and set aside on the following grounds:

- 198.1 Section 6(2)(a) of PAJA and the principle of legality, as the Appeal Tribunal was not authorised to make the decision by the empowering provisions in the Codes;
- 198.2 Section 6(2)(d) of PAJA and the principle of legality, as the Appeal Tribunal's decision was materially influenced by errors of law;
- 198.3 Section 6(2)(e)(iii) of PAJA and the principle of legality, as irrelevant considerations were taken into account and relevant considerations were not considered;
- 198.4 Section 6(2)(e)(vi) of PAJA and the principle of legality, as the Appeal Tribunal's decision was made arbitrarily or capriciously;
- 198.5 Section 6(2)(f)(i) of PAJA and the principle of legality, as the Appeal Tribunal decision contravened the Codes and were not authorised by the empowering provision in the Codes;
- 198.6 Section 6(2)(f)(ii) of PAJA and the principle of legality, as the Appeal Tribunal decision was irrational;

MB Bds
78

198.7 Section 6(2)(i) of PAJA and the principle of legality as the Appeal Tribunal decision was otherwise unconstitutional or unlawful.

REMEDY

199 Once this Court has found a reviewable irregularity, I am advised that it has a wide remedial discretion in relation to the just and equitable remedy.

200 In respect of both the e.TV and SABC matters, the applicants contend that the appropriate remedy is to substitute the Appeal Tribunal's decisions. I appreciate that this is a remedy that a court will only grant in exceptional circumstances. However, I respectfully submit that this is an entirely appropriate case for substitution relief.

201 In particular, the Appeal Tribunal's errors are mistakes of law. Once those errors of law are corrected by this court, there are no remaining disputes of fact, and the outcome is a foregone conclusion. No purpose would accordingly be served by remitting the matter to the Appeal Tribunal for a fresh decision.

202 In respect of the e.TV matter:

202.1 The applicants submit that the just and equitable remedy in the present case is for this Court to substitute the Appeal Tribunal's decision and replace it with the First Tribunal's ruling on the merits and sanction.

202.2 The applicants submit that this Court is in as good a position to make the decision as the Appeal Tribunal and, once the correct test is

MB *Bds*
79

applied, the result is a foregone conclusion because the broadcaster never pleaded (nor could it) that there was any truth value whatsoever to any of the statements made by Icke.

202.3 Once that is so, remittal would serve no purpose. On the contrary, remittal would delay the finalisation of this matter where there is public interest both in the matter being finalised and the public being informed of the reckless nature of the e.TV's broadcast.

203 In respect of the SABC matter:

203.1 The applicants seek an order replacing the Appeal Tribunal decision with a decision:

203.1.1 upholding the appeal;

203.1.2 declaring that the SABC contravened clause 3(b) of the Free-to-Air Code; and

203.1.3 waiving the applicants' obligation to pay costs.

203.2 This relief follows as a matter of course once it is accepted that the BCCSA Tribunal erred as a matter of law. In particular:

203.2.1 Once it is accepted that the Free-to-Air Code applies, there can be no dispute that the SABC contravened clause 3(b) of the Free-to-Air Code;

MB Bds
80

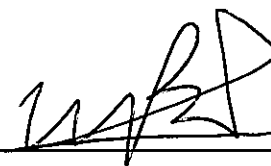
203.2.2 Once it is accepted that the Appeal Tribunal had the power to waive the costs of the appeal, there can be no dispute that MMA and SOS had made out a proper case for such waiver.

203.3 MMA and SOS accept that the SABC should not now be directed to broadcast yet another summary of findings. While it is unfortunate that an irrational summary of findings was published, MMA and SOS accept that it would not be just and equitable, so long after the interview, and in light of the fact that a summary of findings has already been broadcast, for yet another summary of findings to be published.

CONCLUSION

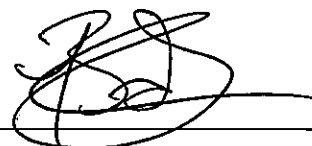
204 For the reasons set out above, the applicants submit that they have made out a proper case for the relief sought in the notice of motion.

mb *Bds*
81



WILLIAM ROBERT BIRD

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Johannesburg on this the 10th day of **DECEMBER 2021**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



COMMISSIONER OF OATHS

Benjamin da Silva
Commissioner of Oaths
Practicing Attorney R.S.A
37 Glenhove Road, Melrose Estates, 2196
Johannesburg
Tel: 011 442 8400



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

THE BCCSA'S CODE OF CONDUCT FOR SUBSCRIPTION BROADCASTING SERVICE LICENSEES

Foreword

- 1 Section 54(1) of the Electronic Communications Act 2005 ("ECA") provides that all broadcasting licensees must adhere to the prescribed Code of Conduct for Broadcasting Services. However, section 54(3) will not apply to a broadcasting licensee if that broadcasting licensee is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a code of conduct enforced by that body by means of its own disciplinary mechanisms, and provided such code of conduct and disciplinary mechanisms are acceptable to the Authority.
- 2 The Position Paper on Subscription Broadcasting Services recognised that the current prescribed Code of Conduct and the BCCSA's Code of Conduct are inappropriate for subscription broadcasting service licensees.
- 3 Accordingly, the National Association of Broadcasters ("NAB") has developed this Code of Conduct for Subscription Broadcasting Service Licensees in accordance with section 54(3) of the ECA.

LMB Eds

Definitions and interpretation

- 4 In this Code, unless the context indicates otherwise, terms have the meaning assigned to them in the ECA, and –
- 4.1 "audience" means the viewers and/or listeners of a subscription broadcasting service;
- 4.2 "BCCSA" means the Broadcasting Complaints Commission of South Africa established by the NAB;
- 4.3 "child" means a person below eighteen years of age;
- 4.4 "child pornography" means any image –
- (a) explicitly depicting a person, real or simulated, who is shown as being under the age of 18 years' –
 - (i) engaged in sexual conduct;
 - (ii) engaged in a display of genitals;
 - (iii) participating in sexual conduct; or
 - (iv) assisting another person to engage in sexual conduct;and
 - (b) which viewed in context and objectively by a reasonable viewer has as its purpose to stimulate sexual arousal in the target audience;
- 4.5 "Code" means this Code of Conduct for Subscription Broadcasting Service Licensees;
- 4.6 "EPG" means an electronic programme guide;
- 4.7 "family viewing" refers to the classification of programming which is suitable for all ages;

Bals
*MB*²

- 4.8 "Films and Publications Act" means the Films and Publications Act, 1996;
- 4.9 "subscription broadcasting service licensee" means the holder of a subscription broadcasting service licence issued by the Authority;
- 4.10 "NAB" means the National Association of Broadcasters of South Africa;
- 4.11 "sexual conduct" includes –
- (i) male genitals in a state of arousal or stimulation;
 - (ii) the undue display of genitals or of the anal region;
 - (iii) masturbation;
 - (iv) sexual intercourse, whether real or simulated, including anal sexual intercourse;
 - (v) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any objects;
 - (vi) the penetration of a vagina or anus with any object;
 - (vii) oral genital contact, or
 - (viii) oral anal contact; and
- 4.12 "watershed period" means the period between 20h00 and 05h00.

Application of the Code

- 5 This Code applies to all subscription broadcasting service licensees who are members of the NAB.

All these subscription broadcasting service licensees must –

- 6.1 comply with this Code; and

Bals₃
MB

- 6.2 have adequate procedures in place in order to comply with this Code.
- 7 These subscription broadcasting service licensees must advise their subscribers on a regular basis that –
- 7.1 their subscription broadcasting service is subject to this Code; and
- 7.2 a subscriber may lodge a complaint with the BCCSA if the subscriber believes that a licensee has contravened this Code.

Only authorized channels may be broadcast

- 8 A subscription broadcasting service licensee may not broadcast a channel on its service unless the Authority has authorised the channel in terms of Regulation 3 of the Subscription Broadcasting Services Regulations, published in Government Gazette No. 28452, Notice 152 of 2006 on 31 January 2006.

Content which may not be broadcast

Child pornography, bestiality, incest, rape, sexual conduct and violence

- 9 A subscription broadcasting service licensee may not knowingly broadcast material which, judged within context, contains a scene or scenes, simulated or real, of any of the following –
- 9.1 child pornography;
- 9.2 bestiality, incest or rape;
- 9.3 explicit violent sexual conduct;
- 9.4 explicit sexual conduct which violates the right to human dignity of any person or which degrades a person and which constitutes incitement to cause harm; or
- 9.5 the explicit infliction of or explicit effects of extreme violence which constitutes incitement to cause harm.

Bds
*MB*⁴

Advocating war, violence or hatred

- 10 A subscription broadcasting service licensee may not knowingly broadcast material which, judged within context –
- 10.1 amounts to propaganda for war;
 - 10.2 incites imminent violence; or
 - 10.3 advocates hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm.

Exemptions

Clauses 9 and 10 do not apply to –

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

Watershed period

- 12 A television or composite subscription broadcasting service licensee, wherever practicable, must avoid broadcasting programming material, including promotional material, which is unsuitable for children and/or contains nudity, explicit sexual conduct, violence or offensive language before the watershed period.
- 13 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.

MB⁵ Bds

Programme classification

- 14 A subscription broadcasting service licensee, wherever practicable, and having particular regard to the protection of children, must classify the programming it intends to broadcast.

The classification must indicate –

- 15.1 the appropriate age restriction for viewing or listening to a programme; and
- 15.2 whether the programme contains nudity, sexual conduct, violence or offensive language.
- 16 If a Films and Publications Board classification exists in terms of the Films and Publications Act for a film or programme to be broadcast, such classification may be used by a subscription broadcasting service licensee.
- 17 Clauses 14 and 15 of this Code do not apply in relation to channels packaged outside of South Africa. In relation to those channels, a subscription broadcasting service licensee, wherever practicable, must ensure that any programming on those channels, other than programming which would be classified as "family viewing" in the country in which the channel is packaged, is classified. The classification must indicate the appropriate age restriction for viewing or listening to a programme.

Information to be provided about programming

- 18 A subscription broadcasting service licensee must provide clear and consistent information to its audience about the classification thereof, so that its audience may select the programming –
- 18.1 they do not wish to view or listen to;
- 18.2 they do not wish their children to view or listen to.

MB
Pds
6

- 19 A subscription broadcasting service licensee must therefore clearly and consistently indicate in relation to all its programming, other than programming which it would classify as "family viewing" -
- 19.1 the classification thereof in its hard copy programme guide and its EPG; and
- 19.2 the classification thereof in any material advertising or promoting programming to be broadcast.
- 20 If a programme to be broadcast is classified as anything other than "family viewing", a subscription broadcasting service licensee, wherever practicable, must clearly indicate, immediately prior to the commencement of that programme, the classification thereof.

Parental control mechanism

- 21 A subscription broadcasting licensee must, wherever practicable, implement adequate mechanisms to enable a subscriber, using a reasonably secure mechanism, such as a PIN number selected by the subscriber, to block a programme, based on the classification of the programme, or a channel, included in its service.
- 22 In order to enable a subscriber to block a programme, based on the classification of the programme, a subscription broadcasting service licensee must, wherever practicable –
- 22.1 capture the programming classification information electronically ("the classification data"); and
- 22.2 add the classification data to the output signal of the subscription broadcasting service in the transmission broadcast stream received by a subscriber's decoder so that the subscriber's decoder receives a message that the programme being received has a particular classification.

WMB ^{*Bals*} 7

- 23 A subscription broadcasting service licensee must ensure that any decoders which it promotes or sells are capable of allowing a subscriber to block any programme, based on the classification of the programme, or channel included in its service.
- 24 A subscription broadcasting service licensee must inform all its subscribers of the parental control mechanism available and provide the subscriber with a step-by-step guide on how to use it ("parental control guide").

A subscription broadcasting service licensee must –

- 25.1 provide every subscriber a copy of the parental control guide when a subscriber subscribes to its subscription broadcasting service;
- 25.2 ensure that the parental control guide may always be accessed by its subscribers through the EPG;
- 25.3 post a copy of the parental control guide on its website; and
- 25.4 provide a call centre facility to assist subscribers in using the parental control mechanism.

In addition, a multi-channel subscription broadcasting service licensee must –

- 26.1 broadcast brief inserts across a variety of channels on the service from time to time informing subscribers of the parental control mechanism and how the parental control guide may be accessed; and
- 26.2 include the parental control guide on an information channel on the subscription broadcasting service which information channel must be accessible by subscribers at any time.

27 If a programme or channel has been blocked due to a subscriber's use of a parental control mechanism, the licensee must –

27.1 display a message on the subscriber's screen advising the subscriber that the content has been blocked by the parental control mechanism; and

27.2 enable the subscriber to unblock the programme or channel should the subscriber so wish.

News and comments on matters of public importance

28 If a subscription broadcasting service licensee includes in its service news or comment on matters of public importance that it has produced or commissioned, then the following provisions apply to that licensee –

28.1 News

28.1.1 Licensees must report news truthfully, accurately and fairly.

28.1.2 News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by –

28.1.2.1. distortion, exaggeration or misrepresentation;

28.1.2.2. material omissions; or

28.1.2.3. summarisation.

28.1.3 Only that which may reasonably be true, having due regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with due regard to context and importance. If a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate clearly that such is the case.

Bals
MB 9

- 28.1.4 If there is reason to doubt the correctness of the report and it is practicable to verify the correctness thereof, it must be verified. If such verification is not practicable, that fact must be mentioned in the report.
- 28.1.5 If it subsequently appears that a broadcast report was incorrect in a material respect, it must be immediately rectified and without reservation. The rectification must be presented with such a degree of prominence and timing as in the circumstances may be adequate and fair so as to readily attract attention.
- 28.1.6 The identity of rape victims and other victims of sexual violence must not be divulged in any broadcast without the prior consent of the victim concerned.
- 28.1.7 Licensees must advise viewers in advance of scenes or reporting of extraordinary violence, or graphic reporting on delicate subject-matter such as sexual assault or court action related to sexual crimes, particularly during afternoon or early evening newscasts and updates when children would probably be in the audience.
- 28.1.8 Licensees must employ discretion in the use of explicit or graphic language related to stories of destruction, accidents or sexual violence which could disturb children and sensitive audiences.

28.2 Comment

- 28.2.1 Licensees may broadcast comment on and criticism of any actions or events of public importance.
- 28.2.2 Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to

W/B *Bols*
10

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

28.3 Controversial issues of public importance

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.

28.4 Privacy

Insofar as both news and comment are concerned, broadcasting licensees must exercise exceptional care and consideration in matters involving the private lives, private concerns and dignity of individuals, bearing in mind that the rights to privacy and dignity may be overridden by a legitimate public interest.

28.5 Paying a criminal for information

No payment may be made to persons involved in crime or other notorious behaviour, or to persons who have been engaged in crime or other notorious behaviour, in order to obtain information concerning

W.B. Bds
11

any such behaviour, unless compelling societal interests indicate the contrary.

Interpretation and amendment of the Code

This Code is subject to interpretation in the light of changing circumstances.

- 30 This Code may be amended in accordance with clause 11 of the BCCSA Constitution.

W.B. Bels
12



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

BCCSA FREE-TO- AIR CODE OF CONDUCT FOR BROADCASTING SERVICE LICENSEES 2009

**This Code will replace the Code as agreed to by the BCCSA in 2003 and will come
 into effect on 1 January 2011**

1. Definitions

In this Code, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act has the meaning so assigned.

“Act” means the Electronic Communications Act, Act no 36 of 2005;

“audience” refers to both the viewers and listeners of television and sound Broadcasting service licensees;

“broadcasting service licensee” means a free-to-air South African broadcasting service licensee as defined in section 1 of the Act and which: has agreed to the jurisdiction of the Broadcasting Complaints Commission of South Africa (BCCSA) as constituted in 1993 by the National Association of Broadcasters and which was formally approved by the Independent Broadcasting Authority of South Africa (now ICASA) in 1995; and has thereby also agreed to the Constitution, Free-to-Air Broadcasting Code and Procedural Rules of the BCCSA;

“child pornography” means any description or visual image, real or simulated, however created, explicitly depicting a person who is or who is depicted as being under the age of 18 years (a) engaged in or participating in sexual conduct;(b)

WRB ^{Bals}
1

engaged in an explicit display of genitals; or (c) assisting another person to engage in sexual conduct which, judged within context, has as its predominant objective purpose, the stimulation of sexual arousal in its target audience;

“**child**” means a person under the age of 18 years;

“**ICASA Act**” means the Independent Communications Authority of South Africa Act 13 of 2000;

“**sexual conduct**” means: (i) the display of genitals or of the anus; (ii) masturbation; (iii) sexual intercourse including anal sexual intercourse; (iv) in the case of child pornography, the fondling or touching of breasts, genitalia or the anus; (v) the penetration of a vagina or anus with any object; (vi) oral genital contact; or (vii) oral anal contact;

“**watershed period**” means the period between 21h00 and 05h00 for free-to-air television Broadcasting service licensees.

2. **Scope of Application**

- (1) Broadcasting service licensees must ensure that all broadcasts comply with this Code.
- (2) Broadcasting service licensees must ensure that relevant employees and programme producers, including those from whom they commission programmes, understand the contents and significance of this Code.
- (3) All broadcasting service licensees should also have procedures for ensuring that programme producers can seek guidance as to the application of the Code from them.

MB Bds
2

3. Violence and Hate speech

Broadcasting service licensees must not broadcast material which, judged within context

- (a) contains violence which does not play an integral role in developing the plot, character or theme of the material as a whole; or
- (b) sanctions, promotes or glamorises violence or unlawful conduct.

4. (1) Broadcasting service licensees must not broadcast material which, judged within context, sanctions, promotes or glamorises violence or unlawful conduct based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability.

(2) Broadcasting service licensees must not broadcast material which, judged within context, amounts to (a) propaganda for war; (b) incitement of imminent violence; or (c) the advocacy of hatred that is based on race, ethnicity, religion or gender and that constitutes incitement to cause harm.

5. Exclusions

Clauses 3 and 4 do not apply to:

- (1) a broadcast which, judged within context, amounts to a *bona fide* scientific, documentary, dramatic, artistic, or religious broadcast;
- (2) a broadcast which amounts to a discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or
- (3) a broadcast which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.

Bds
MB 3

6. Children

- (1) Broadcasting service licensees must not broadcast material which is harmful or disturbing to children at times when a large number of children are likely to be part of the audience.
- (2) Broadcasting service licensees must exercise particular caution, as provided below, in the depiction of violence in children's programming.
- (3) In children's programming portrayed by real-life characters, violence may, whether physical, verbal or emotional, only be portrayed when it is essential to the development of a character and plot.
- (4) Animated programming for children, while accepted as a stylised form of story-telling which may contain non-realistic violence, must not have violence as its central theme, and must not incite dangerous imitation.
- (5) Programming for children must with reasonable care deal with themes that could threaten their sense of security when portraying, for example, domestic conflict, death, crime or the use of drugs or alcohol.
- (6) Programming for children must with reasonable care deal with themes which could influence children to imitate acts which they see on screen or hear about, such as the use of plastic bags as toys, the use of matches or the use of dangerous household objects as toys.
- (7) Programming for children must not contain realistic scenes of violence which create the impression that violence is the preferred or only method to resolve conflict between individuals.
- (8) Programming for children must not contain realistic scenes of violence which minimise or gloss over the effect of violent acts. Any realistic depictions of violence must portray, in human terms, the consequences of that violence to its victims and its perpetrators.

Eds
MB 4

- (9) Programming for children must not contain frightening or otherwise excessive special effects not required by the story line.
- (10) Offensive language, including profanity and other religiously insensitive material, must not be broadcast in programmes specially designed for children.
- (11) No excessively or grossly offensive language should be used before the watershed period on television or at times when a large number of children are likely to be part of the audience on television or radio.

7. Watershed Period

- (1) Programming on television which contains scenes of explicit violence and/or sexual conduct and/or nudity and/or grossly offensive language intended for adult audiences must not be broadcast before the watershed period.
- (2) Promotional material and music videos which contain scenes of explicit violence and/or explicit threatening violence and/or sexual conduct and/or the fondling or touching of breasts and/or genitalia or the anus and/or nudity and/or offensive language intended for adult audiences must not be broadcast before the watershed period.
- (3) Some programmes broadcast outside the watershed period may not be suitable for very young children. Licensees must provide sufficient information, in terms of regular scheduling patterns or audience advisories, to assist parents and *de facto* or legal guardians to make appropriate viewing choices.
- (4) Television broadcasting service licensees may, with the advance of the watershed period, progressively broadcast more adult material.

MB 5
BLS

- (5) Broadcasting service licensees must be particularly sensitive to the likelihood that programmes which commence during the watershed period and which run beyond it may then be viewed by children.

8. Sexual Conduct

- (1) Broadcasting service licensees must not broadcast material which, judged within context, contains a scene or scenes, simulated or real, of any of the following:
- (a) child pornography;
 - (b) bestiality;
 - (c) sexual conduct which degrades a person in the sense that it advocates a particular form of hatred based on gender and which constitutes incitement to cause harm;
 - (d) explicit sexual conduct;
 - (e) explicit extreme violence or the explicit effects thereof; or
 - (f) explicit infliction of domestic violence.
- (2) Sub-clause 8(1) shall not be applicable to *bona fide* scientific, documentary, dramatic or artistic material which, judged within context, is of such a nature; provided that it is broadcast with due audience advisory after the watershed on a sliding scale according to its content.

9. Audience Advisories

- (1) To assist audiences in choosing programmes, television broadcasting service licensees must provide advisory assistance which, when applicable, must include guidelines as to age, where such broadcasts contain violence, sex, nudity and/or offensive language. The advisory must be visible on the screen for a minimum of 90 seconds at the commencement of the programme and for a minimum of 30 seconds after each advertisement or other break. Where the frequency of the said subject matters, or any one or some of them, is high, a continuous advisory will be necessary, whether it is broadcast before or after the watershed.

MB 6
Bols

- (2) The following visual advisory age system must be used: 10, 13, 16 and 18. The following symbols must be used in accordance with the relevant content: V(violence), L(language), N(nudity), S(sex), PG(Parental Guidance).
- (3) An audio advisory before the commencement of the programme must also accompany the broadcast of a film with an age restriction of 18.

10. Classification by Films and Publications Board

- (1) Where a Films and Publications Board classification for a film exists in terms of the Films and Publication Act No. 65 of 1996, such classification may be used as a guideline for an advisory to the broadcast of the film.
- (2) No film which carries an XX classification in terms of the Films and Publications Act may be broadcast.

11. News

- (1) Broadcasting service licensees must report news truthfully, accurately and fairly.
- (2) News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by:
 - (a) Distortion, exaggeration or misrepresentation.
 - (b) Material omissions; or
 - (c) Summarisation
- (3) Only that which may reasonably be true, having reasonable regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with reasonable regard to context and importance.
- (4) Where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate, clearly that such is the case.

MB ^{Bols} 7

- (5) Where there is reason to doubt the correctness of the report and it is practicable to verify the correctness thereof, it must be verified. Where such verification is not practicable, that fact must be mentioned in the report.
- (6) Where it subsequently appears that a broadcast report was incorrect in a material respect, it must be rectified forthwith, without reservation or delay. The rectification must be presented with such a degree of prominence and timing as in the circumstances may be adequate and fair so as to readily attract attention.
- (7) The identity of rape victims and other victims of sexual violence must not be divulged in any broadcast, whether as part of news or not, without the prior valid consent of the victim concerned.
- (8) Broadcasting service licensees must advise viewers in advance of scenes or reporting of extraordinary violence, or graphic reporting on delicate subject-matter such as sexual assault or court action related to sexual crimes, particularly during afternoon or early evening newscasts and updates.
- (9) Broadcasting service licensees must not include explicit or graphic images or language, related to news of destruction, accidents or sexual violence which could disturb children or sensitive audiences, except where it is in the public interest to include such material.

12. Comment

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

*MB*⁸
Bds

- (3) Where a person has stated that he or she is not available for comment or such a person could not reasonably be reached, it must be stated in the programme.

13. Controversial Issues of Public Importance

- (1) 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.
- (2) A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given the right to reply to such criticism on the same programme. If this is impracticable, reasonable opportunity to respond 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.

14. Elections

During any election period, as defined in the Act, sections 56, 57, 58 and 59 of the Act and regulations issued in terms thereof apply. The BCCSA does not have jurisdiction in these matters and complaints must be directed to the Complaints and Compliance Committee of the Independent Communications Authority of South Africa.

15. Privacy, Dignity and Reputation

- (1) Broadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest.

MB ^{Bols} 9

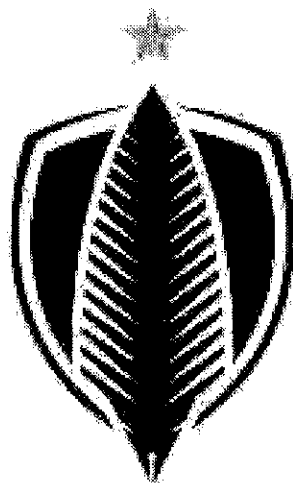
- (2) In the protection of privacy, dignity and reputation special weight must be afforded to South African cultural customs concerning the privacy and dignity of people who are bereaved and their respect for those who have passed away.
- (3) In the protection of privacy, dignity and reputation special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled.

16. Competitions and Audience Participation

- (1) Where audiences are invited on air to react to a programme or competition broadcasting service licensees must make known the full cost of a telephone call or a SMS.
- (2) Broadcasting service licensees must specify the proportion of the cost of the call or SMS, as the case may be, which is intended for any specified charitable cause.
- (3) Broadcasting service licensees must ensure that audiences who are invited to compete in any competition are made aware on air of the rules of the competition. Such rules must include the closing date and the manner in which the winner is to be determined.

-----0000-----

"WRB3"



PRESS FREEDOM
COMMISSION

report on
press regulation
in south africa

Eds
WRB

PUBLICATION DATE: APRIL 2012

PUBLISHERS:

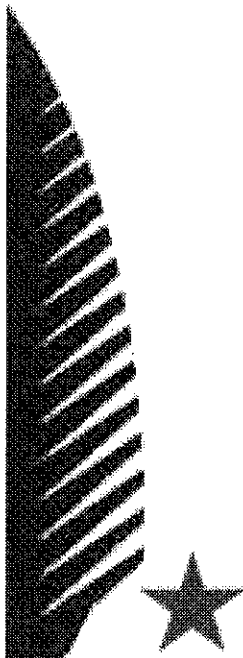


Print Media South Africa
 Address: PO Box 47180, Parklands, 2121
 Phone: +27 11 551.9600
 Fax: +27 11 551 9650
 Email: printmediasa@printmedia.org.za



South African National Editors' Forum
 Address: PO Box 47184, Parklands, 2121
 Phone: +27 11 484 3630 / 3617
 Fax: +27 11 484 3593
 Email: director@saneff.org.za

Cover photographs: Bongwiwe Mchunu/The Star
 Other photographs: Lucky Nxumalo/City Press
 Cover: Senzi Molotsane • senzylwazy@gmail.com
 Inside design and layout: Shahn Irwin • irwinshahn@gmail.com
 Co-editor: Elizabeth Barratt • elizabeth@barrattjournalism.co.za
 Bibliography: Ticha Tsedu • tichatsedu@gmail.com



Bds

WB

Executive Summary

The Print Media SA (PMSA) and the SA National Editors Forum (Sanef) set up the Press Freedom Commission (PFC), a body of nine persons selected from outside the media community, as part of the media organisations' work to review the system of press regulation in South Africa. Chaired by Honourable former Chief Justice of South Africa Pius Langa, the independent PFC was inaugurated in July 2011 with the task to complete its work and submit its report by March 2012.

According to the Terms of Reference, the primary objective of the PFC was to ensure press freedom in support of enhancing our democracy which is founded on human dignity, the achievement of equality and the advancement of human rights and freedoms. The secondary objective was to research the regulation of specifically print media, locally and globally. Self-regulation, co-regulation, independent regulation and state regulation were examined.

From the expansive studies conducted, the PFC concludes that an independent co-regulatory mechanism, not including state participation, will best serve press freedom in the country. This will also enhance the role, accountability and responsibility of the press in the promotion of the values of a free and democratic South Africa, and in upholding the rights, dignity and legitimate interests of the people.

To be an effective and responsible regulatory system, this mechanism must manifest administrative fairness and institutional independence from the industry it is to regulate. It must also ensure optimal accessibility by removing the waiver requirements of complainants and removing the characterisation of the complaints procedure as arbitration.

Hence, the Commissioners recommend a system of co-regulation that is independent of government, composed mostly by persons drawn from various sections of the public outside of the press industry. This is designed to ensure the system's independence from the subjective inclinations and sentiments of the press profession and business. The preference for this mechanism is in response to the expressed public dissatisfaction with the current system and with the public's rejection of government involvement in press regulation.

Independent co-regulation can be defined as: a system of press regulation that involves public and press participation with a predominant public membership but without State or government participation. It is accountable to the public.

Bds

WB

For considerable sections of the public, a vexing issue of the current regulatory system is the perceived ineffectiveness of the sanctions applied against press infractions. The Commissioners recommend a revised regime of sanctions based on a hierarchy of infractions and their corresponding sanctions. The report introduces a scale of "space fines" for offences pertaining to content of the press and "monetary fines" for guilty publications that flout the summons and rulings of the Ombudsman.

A critical and new dimension that the PFC introduces into the regulatory framework is the subject of how the press must handle children and issues concerning children. This section provides an elaborate guide on protecting the dignity, rights, privacy, image and interests of children. The report therefore expands and improves the provisions on children in the current Press Code.

The Commission considered the issue of "media transformation" (structural and content) because significant sections of the society consider it important in the overall democratisation of the new South Africa, and view ownership as having an influence on content. The PFC's recommendations include considerations for content diversification, skills development and training, a media charter and support for community newspapers.

In fulfillment of these proposals, the PFC has recommended significant changes in the governance of the PCSA, in its composition and appointment processes, in the Appeals Panel, as well as in the Complaints Procedure. The Commission also makes proposals to the Press Code for strengthening ethical standards.

Thus, the Commission's recommendations:

- Widen the role of the public in the regulatory system by proposing that there are more members of the public (7) than media industry (5) in the PCSA;
- Similarly strengthen the participation of the public in the Appeals Panel by increasing the number of public members above that of press members;
- Widen accessibility by limiting the Public Advocate's sole power of deciding what complaints are eligible for hearing;
- Widen accessibility to the adjudicating system by expunging the waiver requirement of complainants;
- Strengthen public access to the regulatory system by widening the basis of third party complaints;
- Strengthen the protection of children and their rights, dignity, privacy, image and interests;
- Strengthen the Press Code with regard to the right of reply and on court reporting;
- Revise the regime of sanctions based on a hierarchy of infractions

Bds

MB

- and their corresponding sanctions, with a scale of "space fines" and "monetary fines"; and
- Suggest considerations for content diversification, skills development and training, a media charter and support for community newspapers.

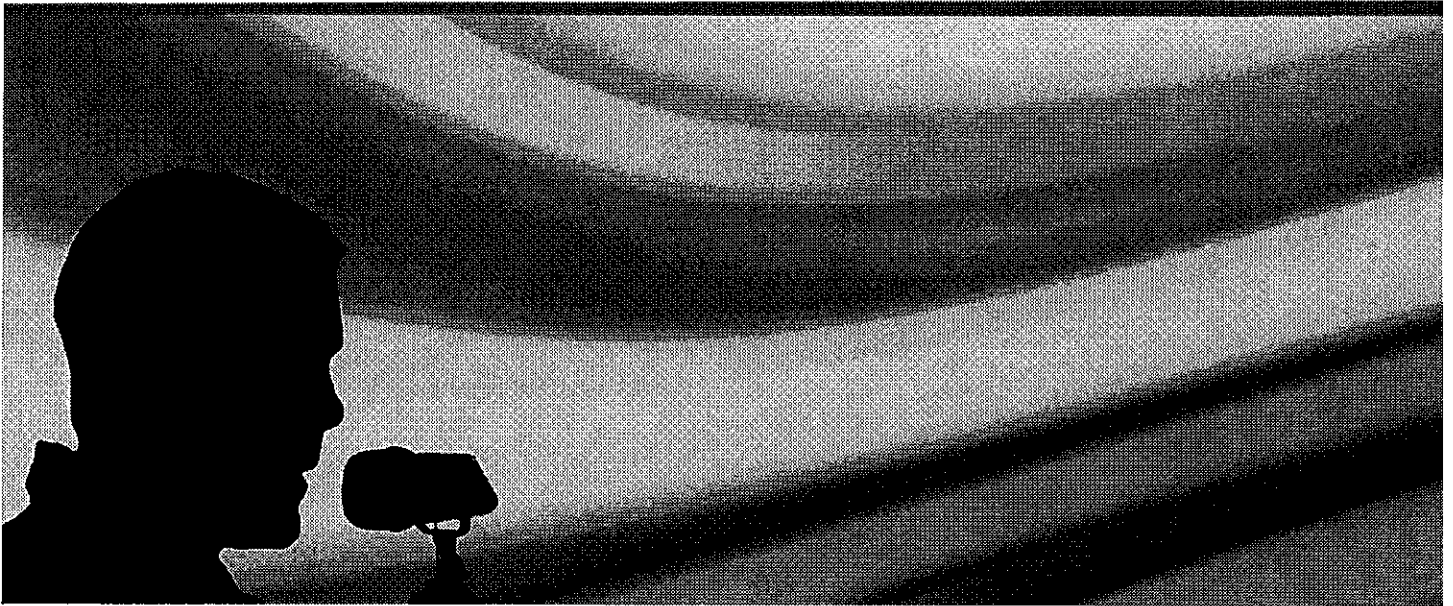
W/S
Sds

intellidex[®]

Researching Capital Markets & Financial Services

"WRB4" RESEARCH
REPORT

July 2016



WHO OWNS THE NEWS MEDIA?

A study of the shareholding of South Africa's major media companies

ANALYSTS:
Stuart Theobald, CFA
Colin Anthony
PhibionMakuwerere, CFA

ACKNOWLEDGEMENTS

We approached all of the major media companies in South Africa for assistance with information about their ownership. Many responded, and we are extremely grateful for their efforts.

We also consulted with several academics regarding previous studies and are grateful to Tawana Kupe at Wits University for guidance in this regard.

Finally, we are grateful to Times Media Group who provided a small budget to support the research time necessary for this project.

The findings and conclusions of this project are entirely those of Intellidex.

COPYRIGHT

© Copyright Intellidex (Pty) Ltd

This report is the intellectual property of Intellidex, but may be freely distributed and reproduced in this format without requiring permission from Intellidex.

DISCLAIMER

This report is based on analysis of public documents including annual reports, shareholder registers and media reports. It is also based on direct communication with the relevant companies. Intellidex believes that these sources are reliable, but makes no warranty whatsoever as to the accuracy of the data and cannot be held responsible for reliance on this data.

DECLARATION OF CONFLICTS

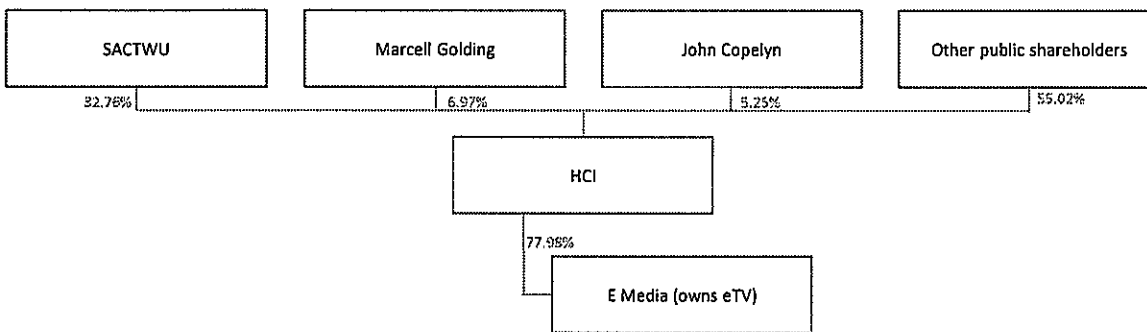
Intellidex has, or seeks to have, business relationships with the companies covered in this report. In particular, in the past year, Intellidex has undertaken work and received payment from, Times Media Group, Independent Newspapers, and Moneyweb.

MB
Bds

4.5 HOSKEN CONSOLIDATED INVESTMENTS

South Africa's only privately held free-to-air TV channel eTV is the main media asset in the group. The primary shareholder is the listed Hosken Consolidated Investments (HCI). HCI's black ownership is at 67.8%, according to its BEE scorecard. There is strong union ownership in this group with the Southern African Clothing and Textile Workers' Union owning a third of HCI.

E Media ownership structure



Source: Inet Bridge
 Nota: Organogram confirmed by company

E Media main titles

TELEVISION		
Station	Number of viewers	Cumulative reach
e-TV	41,167,380	93.0%
eNCA (DSTV)	n/a	21.0%
ONLINE		
Site	Daily average unique browsers	Unique browsers % reach
enca.com (Sabido is owner)	72,104	7.5%

MB
Bds

BCCSA Constitution

CONSTITUTION

Definition of Terms

The following terms shall have the meanings assigned to them hereunder:

"**BCCSA**" means this Broadcasting Complaints Commission of South Africa established in terms of this constitution

"**Broadcasters**" means the broadcaster members of the NAB

"**Code of Conduct**" means the Free-to-Air and Subscription Broadcasting Codes of Conduct respectively

"**Commissioners**" means persons appointed in terms of clause 7, to administer the Code of Conduct and Procedure

"**ECA**" means the Electronic Communications Act 36 of 2005, as amended

"**ICASA**" means the Independent Communications Authority of South Africa established in terms of section 3 of the ICASA Act 13 of 2000, as amended

"**NAB**" means the National Association of Broadcasters, a voluntary association established by radio and television broadcasters, representing all three tiers of broadcasting

"**Procedure**" means the complaints procedure administered by the BCCSA in conjunction with the Codes of Conduct

FOUNDING PRINCIPLES OF THE BCCSA:

The BCCSA is a voluntary association formed by agreement between the Broadcasters for the administration of the Code of Conduct and Procedure. The members of the BCCSA are accordingly the Broadcasters who subscribe to the BCCSA's constitution.

The BCCSA shall adjudicate complaints against the Broadcasters on an entirely independent and impartial basis, without fear, favour or prejudice. It does so by enforcing the Code and Procedure and exercising its powers under this constitution.

The adjudicatory independence of the BCCSA shall remain sacrosanct.

The BCCSA shall at all times be governed in a manner which is in line with best corporate governance and shall uphold the principles of the Constitution of the Republic of South Africa, 1996.

1. Establishment of the Broadcasting Complaints Commission of South Africa

1.1 In order to promote freedom of speech, the free flow of information and the maintenance of high standards of broadcasting in South Africa, the broadcasting members of the NAB

Sds

WB

established the BCCSA, which is a voluntary association, capable of suing and being sued in its corporate name, and of performing all such acts as are necessary for or incidental to the carrying out of its objects, and for the performance of its functions and duties under this Constitution.

1.2 The BCCSA is a self-regulatory body for broadcasters as provided for in the ECA in terms of Section 54(3). This section provides that the code of conduct prescribed by ICASA shall not apply to a broadcasting service licensee who is a member of a body which has proved to ICASA's satisfaction its members subscribe and adhere to an acceptable code of conduct enforced by that body by means of its own disciplinary mechanisms, which are also acceptable to ICASA.

2.Aims and Objectives of the BCCSA

The aims and objectives of the BCCSA are to ensure the adherence to high standards in broadcasting as well as a speedy and cost effective settlement of complaints against the Broadcasters who have submitted themselves to its jurisdiction, the Code of Conduct and Procedure. Where a settlement cannot be attained between the complainant and the Broadcaster, the BCCSA shall adjudicate upon a complaint and take appropriate steps in accordance with clause 12 of this Constitution.

3.Acceptance of Code of Conduct and Procedure

3.1 The Broadcasters hereby adopt a Code of Conduct and Procedure as set out in the appendices to this Constitution. The Broadcasters further undertake not only to adhere to the Code of Conduct and Procedure, but to also abide by rulings of the Chairperson, the Tribunal, an Appeal Tribunal or an Adjudicator as provided for under this Constitution.

4. The Appointment Committee

4.1 Appointments of the Chairperson, Deputy Chairperson, Registrar and Commissioners to the BCCSA shall be made by an Appointment Committee, chaired by a retired judge, or attorney or advocate with at least 10 years' experience, who shall be appointed by the NAB after consultation with the Commissioners of the BCCSA.

4.2 The remainder of the Appointment Committee shall consist of four further external persons appointed by the Chairperson of the Appointment Committee, who shall be selected from members of the public after a suitable advertisement and interview process. The Chairperson shall ensure that at least two members of the Appointment Committee have expertise in broadcasting, journalism and media and/or broadcasting law. The members of the Appointment Committee shall also be representative of a broad cross-section of the population of South Africa.

4.3 The decisions of the Appointment Committee are taken by way of a majority of votes.

4.4 The Chairperson of the Appointment Committee will serve a term of five years which may be renewed once at the instance of the NAB.

4.5 The members of the Appointment Committee (other than the Chairperson of the Appointment Committee) are appointed for a term of four years, which may be renewed once by the Chairperson of the Appointment Committee, if his or her appointment is itself renewed.

Boks
MB

4.6 The NAB shall pay an honorarium to the Appointment Committee at a rate determined by the NAB. The reasonable expenses of all the members of the Appointment Committee will also be paid by the NAB.

5. Functions of the Appointment Committee

5.1 The Appointment Committee acts independently and at arm's length of the members and is responsible for performing the following functions:

5.1.1 the appointment of the Commissioners, the Registrar and administrative staff of the BCCSA;

5.1.2 the management of the Commissioners and/or the employees of the BCCSA in accordance with the constitution and in line with generally accepted principles of performance management (for the avoidance of doubt, this cannot relate to the decisions of the Commissioner concerning complaints against broadcasters);

5.1.3 the removal of the Commissioners; and

5.1.4 in consultation with the NAB, determining the remuneration and/or fees and/or expenses to be paid to the Chairperson, Deputy Chairperson, the Registrar, administrative staff and the Commissioners of the BCCSA, as the case might be.

5.2 Nothing in this Constitution shall be construed as removing the power of the Chairperson and Deputy Chairperson of the BCCSA to manage the daily functions of the employees of the BCCSA.

6. Appointment of Registrar

6.1 The Appointment Committee shall appoint a Registrar, who shall be a permanent employee of the BCCSA.

6.2 The Registrar shall manage the affairs of the office of the BCCSA under the supervision of the Chairperson and Deputy Chairperson of the BCCSA, including proposing to the Appointment Committee such appointments of administrative staff as may be necessary.

6.3 The Registrar shall receive complaints from the public and attempt to settle complaints against the Broadcasters.

7. Appointment of Commissioners

7.1 The BCCSA Tribunal shall consist of nine Commissioners, including a Chairperson and a Deputy Chairperson of the Tribunal, who will be engaged as, and will acknowledge their engagement, as independent contractors.

7.2 The Chairperson and Deputy Chairperson of the BCCSA Tribunal must be an attorney or advocate with at least ten years' post qualification experience, or a retired judge.

7.3 The Chairperson and the Deputy Chairperson of the BCCSA Tribunal are appointed by the Appointment Committee for a term of five years, which may be renewed once, if the Appointment Committee so determines.

Bals
WB

7.4 Commissioners, other than the Chairperson and Deputy Chairperson of the BCCSA Tribunal, are appointed by the Appointment Committee for a term of four years, which may be renewed once, if the Appointment Committee so determines.

7.5 The Commissioners shall be appointed by the Appointment Committee after the positions are advertised widely and suitable candidates are interviewed. Advertisements for the posts must be broadcast by broadcasters under the jurisdiction of the BCCSA at their own cost.

7.6 Persons appointed to be Commissioners must be persons who –

7.6.1 are committed to fairness, freedom of expression, openness and accountability; and

7.6.2 when viewed collectively –

7.6.2.1 are representative of a broad cross-section of the population (race, age, gender, persons with disabilities) of the Republic; and

7.6.2.2 possess suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting, electronic communications, law, information technology, social/ digital media, or any other relevant expertise or qualifications.

7.7 A Commissioner appointed under this section must, before he or she begins to perform his or her functions, take an oath or affirm that he or she –

7.7.1 is committed to fairness, freedom of expression, openness and accountability; and

7.7.2 will uphold and protect the Constitution and the laws of the Republic, as well as the BCCSA Constitution, Code of Conduct, Procedure, and any other code or guideline as may be determined by the Broadcasters.

8. General appointment provisions

8.1 All appointment terms including that of the Registrar on re-appointment are to run from 1 January of the year in which the appointment becomes effective.

8.2 If the position of a Commissioner becomes vacant during a term, the Appointment Committee may appoint someone to fill the vacancy for the balance of the term of that Commissioner. The Appointment Committee may appoint any competent person, provided the person complies with the appointment criteria mentioned in clause 7.6 and is not disqualified in terms of clause 9.

9. Disqualification for appointment as Commissioner

9.1 A person may not be appointed as a Commissioner if he or she –

9.1.1 is not permanently resident in the Republic;

9.1.2 is a public servant or the holder of any other remunerated position under the State;

Sols
MB

9.1.3 is a member of Parliament, any provincial legislature or any municipal council;

9.1.4 is an office-bearer or employee of any party, movement or organisation of a party-political nature;

9.1.5 he or she has a direct or indirect financial interest in the broadcasting industry, becomes an employee, director of any Broadcaster or ICASA, or any government department which has oversight over broadcasting in South Africa;

9.1.6 his or her family member or business partner holds an office in or with, or is employed by, any person or body, whether corporate or unincorporated, which has an interest contemplated in paragraph (9.1.4);

9.1.7 is an un-rehabilitated insolvent;

9.1.8 has been declared by a court to lack mental capacity;

9.1.9 has at any time been convicted, whether in the Republic or elsewhere, of –

9.1.9.1 theft, fraud, forgery or uttering a forged document, perjury, an offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act 1992 (Act 94 of 1992), Part 1 of 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any other offence involving dishonesty; or

9.1.9.2 has been sentenced, after the commencement of the Constitution of the Republic of South Africa, 1993, to a period of imprisonment of not less than one year without the option of a fine; or

9.1.9.3 has at any time been removed from an office of trust on account of misconduct.

9.2 A person who is subject to a disqualification contemplated in subsection 9.1 may be nominated for appointment as a Commissioner, but may only be appointed if at the time of such appointment he or she is no longer subject to that disqualification.

10. Termination of term of office as Chairperson, Deputy Chairperson or Commissioner of the BCCSA

The term of office of Chairperson, Deputy Chairperson or of a Commissioner of the BCCSA shall be terminated if

10.1 he or she of his or her own volition terminates the relationship in writing;

10.2 he or she becomes disqualified on any of the grounds mentioned in paragraph 9;

10.3 he or she has been found by the Appointment Committee to have been guilty of gross misconduct or gross negligence, following a complaint by any other person or on its own initiative;

10.4 he or she has been found by the Appointment Committee to be unable to perform the duties of his or her office effectively, following a complaint by any other person or on its own initiative.

Boles
MB

11. Proceedings of the BCCSA Tribunal

11.1 The quorum for a Tribunal shall be three Commissioners.

11.2 The Chairperson of the BCCSA will select three Commissioners to sit for a Tribunal (which may include the Chairperson or the Deputy Chairperson).

11.3 Where the Chairperson is not available to chair a session of a Tribunal, the Deputy Chairperson shall chair the session. If the Deputy Chairperson is not available, the three selected Commissioners shall elect by majority vote one Commissioner from amongst themselves to chair such a session.

12. Powers of a Tribunal

Following any investigation of an alleged infringement of the Code of Conduct by a Broadcaster, a Tribunal may

12.1 dismiss the complaint;

12.2 reprimand any respondent adjudged to have been guilty of an infringement of the Code;

12.3 direct that a correction and/or a summary of the findings of a Tribunal be broadcast by the respondent in such manner as may be determined by the Tribunal;

12.4 impose a fine not exceeding R100,000 on any respondent adjudged to have infringed the Code of Conduct, 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;

12.5 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;

12.6 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.

13. Appeals

13.1 A party aggrieved by the decision of a Tribunal may appeal this decision in accordance with the Procedure for appeals.

13.2 The Chair of the Appointment Committee shall be the Chair of Appeals.

13.3 All appeals shall be presided over by the Chair of Appeals.

13.4 The Chair of Appeals shall appoint two Commissioners for each appeal provided that such persons did not form part of the Tribunal that made the decision being appealed.

14. Meetings of the BCCSA

Bde
WB

14.1 The chairperson of the NAB shall call an Annual General Meeting (AGM) of the Broadcasters where BCCSA matters arising from this Constitution are discussed and decided upon. At least 21 business days' written notice of any AGM of the BCCSA shall be given to the Broadcasters.

14.2 A Special General Meeting (SGM) shall be convened by the chairperson of the NAB, at the written request of not less than a third of the Broadcasters.

14.3 Subject to clause 14.1, not less than 14 days' notice in writing shall be given of any meeting of the BCCSA unless all the Broadcasters agree to accept shorter notice, whether given orally or in writing.

14.4 A request for submission of items to be included in the agenda of any AGM and SGM shall be sent to the Broadcasters and the Commissioners in the notice referred to in 14.3 above. Both the Broadcasters and the Commissioners shall be entitled to propose agenda items for the AGM and SGM, for consideration by the chairperson of the NAB.

14.5 A representative of the NAB shall act as secretary and shall prepare an agenda and minutes of the proceedings at all meetings held in terms of this clause.

14.6 A quorum for meeting under this clause shall be three-quarters of the Broadcasters, failing which the meeting shall be adjourned to the same day in the next week, at the same place and time.

14.7 Decisions shall be taken by way of a simple majority of votes unless it relates to the amendment of the Constitution or the dissolution of the BCCSA, which are decisions which are regulated below.

14.8 The Chairperson, Deputy Chairperson, Registrar of the BCCSA and the Chairperson of the Appointment Committee shall be entitled to attend meetings of the Broadcasters as contemplated by this clause.

14.9 The Commissioners shall be entitled to convene their own meetings to discuss issues relevant to the operations and functions of the Commissioners, at any time as may be necessary.

15. Notices

15.1 Notices in writing of annual or special meetings of the BCCSA shall be sent to Broadcasters at the email addresses provided by them in writing to the chairperson of the NAB. Such notices shall be sent by email.

15.2 An unintentional omission to notify a Broadcaster or non-receipt by intended recipient of such notice shall not invalidate the proceedings of the meeting to which the notice relates.

16. Financing of the BCCSA

16.1 The NAB shall ensure that the BCCSA is housed in offices which will serve the purpose of the BCCSA.

16.2 The NAB shall determine the remuneration, fees and expenses to be paid to the Appointment Committee.

WB
Sols

16.3 The Appointment Committee shall determine the remuneration, fees and expenses to be paid to the Chairperson of the BCCSA, Deputy Chairperson of the BCCSA, the Commissioners, the Registrar and the administrative staff in consultation with the NAB.

16.4 The proceeds of any fines imposed by the Tribunal or Appeal Panel shall be retained by the BCCSA. The Chairperson of the BCCSA or his or her delegate shall apply such proceeds only to:

16.4.1 causes connected with the training and/or updating of the expertise of the BCCSA Commissioners;

16.4.2 providing information to the public about the BCCSA; or

16.4.3 for legal expenses for defending judicial reviews which may be brought against the BCCSA in respect of its decisions.

16.5 Such monies may be kept in a separate account by the BCCSA.

16.6 Before the end of every calendar year, the Chairperson and Deputy Chairperson of the BCCSA shall meet to discuss a budget for the next calendar year. This budget shall be presented to the NAB.

16.7 The NAB shall consider the annual budgetary request and after consultation with the Chairperson and the Deputy Chairperson of the BCCSA determine the amount to be allocated to the BCCSA in a calendar year.

16.8 The Broadcasters will be invoiced annually by the Registrar of the BCCSA based on the approved budget.

16.9 The Chairperson of the BCCSA or his or her delegate must submit a written report on its financial performance, and its financial position, quarterly to the NAB.

16.10 In the event of any unforeseen expenses which have not been budgeted for (and where there is insufficient money reserved from fines) the Chairperson of the BCCSA or his or her delegate shall present the NAB with a written motivation for such expenses and, after consultation with the BCCSA, the NAB shall determine any further amount to be allocated to the BCCSA.

16.11 If a dispute arises between the BCCSA and the NAB regarding the payment of costs or expenses, an arbitrator will be appointed by mutual consent to resolve such a dispute or if mutual consent cannot be reached on the arbitrator, an arbitrator appointed by chairperson of the Arbitration Foundation of Southern Africa. The cost of such arbitration shall be borne by the NAB.

16.12 The Chairperson of the BCCSA shall appoint an auditor, who shall be an auditor approved by the NAB. The BCCSA shall annually present its audited financial statements to the NAB for the preceding calendar year.

16.13 The Chairperson of the BCCSA shall authorise the Deputy Chairperson, the Registrar and two Commissioners to authorise all expenditure on behalf of the BCCSA. The Chairperson may also authorise such expenditure.

WNB
Bds

17. Reporting requirements

17.1 In addition to the requirement to annually present its audited financial statements to the Broadcasters for the preceding calendar year, the Chairperson of the BCCSA shall also be required to present an annual report to the Broadcasters fines charged and collected in the preceding calendar year.

18. Amendment of the Constitution, Procedure, and the Code of Conduct

18.1 Amendments of this Constitution, the Procedure and the Codes shall require the approval of at least two-thirds of the Broadcasters, after consultation with the Commissioners.

18.2 No amendment shall be effective unless at least 21 days' written notice of a proposed amendment shall have been given to the Commissioners and the Broadcaster.

18.3 The Commissioners shall be entitled at any stage to propose amendments to this Constitution, the Procedure and the Codes which proposals shall be considered by the Broadcasters.

19. Termination of membership

19.1 A Broadcaster may at any time give written notice to the Chairperson of the BCCSA that it will no longer regard itself bound by this Constitution, and the BCCSA shall strike that signatory's name from the list of members to this Constitution: provided that such Broadcaster shall remain bound to contribute its financial share to the costs of the running of the BCCSA for twelve months after the said notice is given, and provided further that a Broadcaster shall remain subject to the Code in so far as any breach during the said twelve month term had taken place.

20. Dissolution

20.1 The Broadcasters may at any time terminate the BCCSA's existence if a resolution to dissolve the BCCSA is passed at a special general meeting, called for such purpose, by a resolution of at least three-quarters of the Broadcasters after consultation with the Commissioners.

20.2 Not less than 21 days' written notice shall be given of any such meeting and such notice shall give particulars of the purpose for which the meeting is called.

20.3 All the assets of the BCCSA shall, on dissolution, be transferred to the NAB.

21. Transitional provisions

21.1 It is recorded that the current commissioners of the BCCSA have been appointed for a 5 year term from 1 January 2017. This period expires on 31 December 2021. The provisions above in relation to appointments of commissioners shall not impact on the term of the current commissioners. The Appointment Committee will appoint commissioners who will begin their term with effect from 1 January 2022.

Hereby signed and adopted by the Broadcaster listed below: (TV, radio, community)

WB
Sols

PROCEDURE OF THE COMMISSION

****POPI ACT – SEE RULE 8****

It shall be of the essence of the BCCSA's proceedings:

That complaints be considered and adjudicated upon within the shortest possible time after the broadcast of the matter giving rise to the complaint; that complaints be considered and adjudicated upon in an informal manner; and that whenever possible the adjudicator, Tribunal and Appeal Tribunal and the parties will strive for a speedy and amicable settlement.

1. Complaints

1.1 "Complainant" shall include any person who or any association, body, corporation, institution, political party, organization or movement, society or union, which lodges a complaint or any office-bearer duly nominated in writing to represent such association, body, corporation, institution, political party, organization or movement, society or union for the purposes of pursuing the complaint.

1.2 The "respondent" in respect of a complaint shall be the proprietor of the broadcasting station which may delegate its chief executive or in his or her absence, a deputy chief executive or other suitable managerial representative of the member concerned, to act and appear in its stead in respect of any complaints dealt with either by an adjudicator or the Tribunal.

1.3 Subject to rule 1.6 a complaint shall be made as soon as possible, but not later than thirty days after the date of the broadcast, or the date of any other alleged breach of the Code giving rise to the complaint.

1.4 The complaint shall be made to the Registrar either in person, by telephone or in writing. "Writing" shall include cable, telegram, telex, e-mail and fax messages. Where a complaint is made other than in writing it shall be confirmed forthwith in writing or the registrar shall assist the complainant to do so. Upon the receipt of a complaint by the Registrar, the Registrar shall be entitled to request from the broadcaster concerned, a copy of the material broadcast, giving rise to the complaint, and the broadcaster shall be obliged to forward such a copy to the Registrar forthwith.

1.5 The Registrar shall only accept a complaint:

1.5.1 which is not anonymous, or which, in his or her opinion, is not fraudulent, frivolous, malicious or vexatious and which prima facie falls within the ambit of the Code;

1.5.2 which is directed at a signatory; and

1.5.3 which does not concern an advertisement broadcast by a signatory who is also subject to the Code of Advertising Practice of the Advertising Regulatory Board ("ARB"): provided that "advertisement" bears the meaning which that Code attributes to it: and provided further that even if that Code were to be amended so as to have a bearing on political advertising, a complaint concerning such advertising or sponsorship is acceptable in terms of these Procedural rules: provided further that any advertisement which, according to the Regulations of the ICASA, falls within the jurisdiction of the BMCC of the ICASA in its relationship to the ARB, such advertisement will also fall under the jurisdiction of the BCCSA in its relationship to the ARB,

MB
Bals

unless the IBA Act or any under Act has placed such an advertisement under the exclusive jurisdiction of the Broadcasting Monitoring and Complaints Committee of the ICASA.

1.6 The registrar may upon reasonable grounds accept late complaints if in his or her opinion there is good and satisfactory explanation for the delay.

1.7 Where the Registrar has accepted a complaint and the respondent offers to settle the matter complained of by way of broadcast or otherwise, which in the opinion of the Registrar constitutes a reasonable and sufficient offer of settlement of such complaint, the Registrar may withdraw his or her acceptance of the complaint.

1.8 Where the Registrar declines to accept a complaint on any of the grounds specified in rules 1.3 or 1.5 or withdraws his or her acceptance of a complaint under rule 1.7 the complainant may, within seven days, request the Chairperson of the BCCSA to review the Registrar's decision. In the event of the Chairperson overruling the Registrar's decision, the matter shall proceed in terms of rule 2.

2. Conciliation and Adjudication Procedure by Adjudicator

2.1 Upon acceptance of a complaint by the Registrar, he or she shall immediately no-tify the respondent in writing of the complaint, giving sufficient details to enable the respondent to investigate the matter and respond.

2.2 Unless the Chairperson decides to directly bring the matter before a Tribunal in terms of Procedural Rule 5.4, the adjudicator or a person appointed by the Chair-person shall forthwith endeavour to achieve a settlement in terms of the Constitution.

2.3 The adjudicator shall hold discussions with the parties on an informal basis with the object of achieving a speedy settlement. The parties shall not be entitled to legal or any other representation at such proceedings, but may be accompanied by advisers.

2.4 If the complaint is not settled within 7 days of its notification to the respondent, the Adjudicator shall, in a written opinion to the parties, give his or her decision as to the resolution of the dispute.

2.5 Within 4 days of receipt of the opinion, any one of the parties may appeal to the Tribunal by filing grounds of appeal against the decision of the Adjudicator with the Chairperson.

3. Adjudication Procedure of the Tribunal

3.1 Where the dispute has been brought before the Tribunal in terms of rule 2.5, the complainant shall within two days of his or her being informed thereof submit a written statement to the Registrar of the BCCSA.

3.2 The written statement by the complainant shall contain or be accompanied by:

3.2.1 full particulars of the complaint and the substantive bases for the dispute (if material facts or events are alleged these should be presented in affidavit form);

3.2.2 copies of relevant correspondence;

Bals
WB

3.2.3 whenever possible, a video or tape recording or transcript of the broadcast giving rise to the complaint;

3.2.4 names and addresses of witnesses, if applicable;

3.2.5 any other evidence, including affidavits, in support of the complaint.

3.3 The Registrar shall submit a copy of the complainant's statement to the respondent. The respondent shall within 5 days of the receipt of such statement submit a written statement to the Registrar which shall set out fully his or her defence to the complaint together with reference to supporting evidence, where necessary, including the names and addresses of witnesses, if applicable. The Registrar shall submit a copy of respondent's statement and supporting documents to the complainant, and if the Chairperson so determines, he or she may allow the complainant to respond, in which case the complainant shall deliver such response to the Registrar and the respondent within 2 days after receiving notice that the Chairperson has so determined. The Registrar ensures that the Chairperson and the members of the Tribunal are in possession of all the documents referred to in this paragraph.

3.4 The Registrar shall, within 2 days after an appeal has been lodged, submit to the Chairperson a written report on the dispute, the adjudicator's decision and the reasons for it, which may be in the form of his or her opinion given to the parties in terms of rule 2.4.

3.5 The Chairperson shall determine a date, time and venue for adjudication of the complaint, which shall be within seven days, or as soon as possible thereafter, after receipt by him of the documents referred to in rule 3.3.

3.6 The Registrar shall notify the parties of the date, time and venue at which the dispute will be adjudicated upon. It shall not be obligatory for either party to appear personally before the Tribunal, but they are entitled to attend and to address the Tribunal and the Tribunal is, in any case, entitled to question them on the matter: provided that a respondent is not under a duty to disclose the identity of an informant.

3.7 The Chairperson may request the parties to appear personally. The Chairperson may advise parties that an adverse inference may be drawn from failure to comply with such request without good cause.

3.8 The parties shall be entitled to legal or other representation when appearing before the Tribunal.

3.9 If one or more parties do appear before the Tribunal, the proceedings shall take the form of a round table discussion and not a trial.

3.10 On completion of the discussions the parties shall leave and the Tribunal shall come to its decision.

3.11 If the Tribunal finds against a respondent who is present, the respondent shall be given an opportunity to address the Tribunal in mitigation of any penalty that may be imposed in terms of clause 14 of the Constitution.

3.12 The hearings of the Tribunal shall be open to the public.

4. Appeal to Appeal Tribunal

Bds
WB

4.1 If any of the parties to a matter which has been decided upon by the Tribunal is aggrieved by the decision, that party may, within 5 days, apply to the Chairperson of the Tribunal in writing for leave to appeal to an Appeal Tribunal of the Commission.

4.2 A party who files such an application must set out the grounds fully upon which that party believes that an Appeal Tribunal is likely to come to a different decision.

4.3 The Chairperson of the Tribunal may decide the application on the papers and a copy of the broadcast in the matter and without hearing the parties, if the parties agree to such a procedure.

4.3 Where such leave is granted, the said Chairperson may require from the party who applied for such leave to provide security to the Registrar for the costs of the appeal by the Appeal Tribunal, which costs would include the foregoing procedural costs and would be based on an appeal, which does not last longer than one day.

4.4 Where leave to appeal is refused, a party who is aggrieved by such a refusal may, within 5 days, apply to the Chairperson of the Commission or an alternate Chairperson of the Commission or another Commissioner designated by the Commission for leave to appeal – such Chairperson, Alternate Chairperson or Commissioner not having sat in the first Tribunal. Such application is decided on the papers, unless the Chairperson, Alternate Chairperson or other Commissioner re-requests the parties to address him or her.

4.5 Where leave to appeal is granted, the Chairperson or other Commissioner, which has granted such leave, may suspend the sanction imposed by the Tribunal pending the outcome of the appeal.

4.7 The Appeal Tribunal and its Chairperson shall apply the same procedure which is applied by the first Tribunal of the Commission when it decides upon a matter. In this procedure, the grounds of appeal and response thereto, as lodged within a time frame determined by the Chairperson of the Appeal Tribunal, plus the reasons given by the Tribunal, shall be considered. The Chairperson of the Appeal Tribunal may co-opt a maximum of two persons who are not Commissioners for the hearing of an appeal and such persons will have the right to partake in the proceedings and vote. An Appeal Tribunal shall not consist of more than five persons, including the Chairperson. Where the Chairperson or Deputy of the Commission is not available or may not (as a result of having been on the first Tribunal) sit in such a matter, the Appeal Tribunal will be chaired by another Commissioner designated for that purpose by the Commission.

4.8 The Appeal Tribunal may, where it is deemed appropriate, order an appellant to pay the costs which the Commission had in determining the appeal. Such costs would consist of the fees and costs payable to the persons who were involved in the allowing of the appeal, the hearing thereof plus an administrative fee determined by the Chairperson of the Commission from time to time. An Appellant shall be notified by the Registrar of the possible costs involved when the appeal is lodged.

4.9 An Appeal Tribunal shall not set aside or amend a decision of the first Tribunal unless it is clearly wrong.

5. Variation of Procedure

The Chairperson of the BCCSA may, if satisfied that no injustice will result, and upon such conditions as he or she may impose:

Bals
WB

- 5.1 extend any time period contemplated in these rules;
- 5.2 at any stage require any allegation of the fact in the statements filed in terms of rule 3 to be verified on oath;
- 5.3 call upon the parties to a dispute to furnish such further information as he or she may consider necessary;
- 5.4 dispense with the usual forms and procedures and give such directions as he or she deems fit for the adjudication of a complaint without first attempting to have the complaint settled or adjudicated upon by an adjudicator.

6. Findings of the Commission

- 6.1 The Chairperson shall cause any findings, reasons for a finding and/or requirements of a Tribunal to be sent to the complainant and to the respondent who shall carry out the Tribunal's directives and comply with any decision which the Tribunal may have taken in terms of clause 14 of the constitution.
- 6.2 The Registrar shall keep on record all findings and reasons for findings by the Tribunal.
- 6.3 The records referred to in rule 6.2 shall be public documents except insofar as those documents are privileged in terms of the Promotion of Access to Information Act 2000.

7. Computation of time periods

Any reference in these rules to a number of days includes Saturdays, Sundays and public holidays, unless the adjudicator or Chairperson, as the case may be, determines otherwise and notifies the parties accordingly.

8. Consent – POPI Act

By lodging a complaint with the BCCSA the complainant agrees that the BCCSA may process the personal information of the complainant on the express understanding that:

- 8.1 *This constitutes consent as required by the Protection of Personal Information Act 4 of 2013 ("POPI Act").*
- 8.2 *The BCCSA will have access to the personal information of the complainant only to the extent that it is necessary to adjudicate the complaint against a broadcaster.*
- 8.3 *A requester may obtain access under certain conditions to the personal information of the complainant in terms of section 50 of the Promotion of Access to Information Act, 2 of 2000.*
- 8.4 *The personal data of the complainant will be used only for the purposes mentioned in 2 and 3 of this consent.*

Bals
MB

About eNCA

eNews Channel Africa: South Africa's most watched TV news channel.

ENEWS CHANNEL AFRICA: SOUTH AFRICA'S MOST WATCHED TV NEWS CHANNEL. eNCA is South Africa's most trusted independent TV and online news brand. It launched on June 1st, 2008 to become the country's first 24-hour television news service. Since then, the channel's signature live reports, breaking news, sport, weather, entertainment and business updates have become an indispensable source of local and international news for millions of South Africans. In 2013 eNCA launched its comprehensive multimedia news website, enca.com, which was soon followed by the launch of the eNCA news app on the Android and iOS phone and tablet platforms. Staffed by a dedicated team of developers and editorial personnel, eNCA's digital division provides an audience of 1.5 million monthly users with an immersive experience, combining the power of text, image and video with the accessibility and portability of online news.

TV Adverts

[View our latest TV adverts...](#)



Bds
WB



On Demand on eVOD (<https://watch.evod.co.za/>)



(/).

About us

On TV (/shows)

Scoop (/scoop)

09 December 2021

WHO WE ARE

e.tv News (/news)

eCommunity (/ecomunity)

TV Guide (/tvguide)

e.tv is South Africa's biggest independent and free-to-air television channel. Established in 1998, the channel has been in existence for over two decades and appeals to all races, genders, ages and income groups.

As the most viewed English channel in the country, we are the destination of choice for local and international entertainment; the ultimate home of great stories.

e.tv ONLINE

Welcome to our mobile eFamily.

The heart of our entertainment is readily available to you at your finger-tips, wherever you are.

Watch full episodes of your favourite shows or interact with us on our social media pages. Make www.etv.co.za your first stop for everything entertainment.

Follow us - [Twitter \(https://twitter.com/etvsa\)](https://twitter.com/etvsa)

Be our friend - [Facebook \(https://www.facebook.com/etvSA\)](https://www.facebook.com/etvSA)

Bals
MB

"WRB7"**SO WHAT NOW? | 22 July 2020***GC – Gareth Cliff**PN – Phumlani Majazi**JV – John Vlismas**GT – Giulietta Talevi**DI – David Icke*

GC 0:03 Well it's another confusing week all the do's and don'ts and the shifting degrees within the levels of lockdown. So alcohol is banned, tobacco is still banned, provincial travel is still banned and family visits are still banned. But the good news is you can now pack your family into a taxi and have a nice intimate reunion. Like sands through the hourglass, these are the days of our lives. We need all the support that we can get right now so I called in some solid reinforcements – maybe they'll help us save the world. Thank you to our studio audience. So What Now?

GC 1:00 This is our sixth episode, so let me level with you. I've really had to get used to hosting a socially distanced show. Since you and my guests are all in your own homes, I decided to make this feel a bit like my own home. So this is my study. As you can see I do love books and ja, I have read some of them. To be honest, I've never loved TV. Radio, which is where I come from always felt a lot more intimate and real. TV is a production. There are lights, there are cameras, there are people running around behind the scenes and if I look awkward, it's because I am. I'm a tall, gangly, guy who always looks uncomfortable. So we'll just have to get used to each other. It's also weird being all my guests being on Skype, the delays, the fact that the conversation doesn't flow and you know all about this because every conversation that you have now with your work colleagues, your family and your friends is also

WRB
Bals

online. It sucks. And I'm going to try not to suck from here on. I promise you that I'm not always a controversial, opinionated, I can be, but that's not all. But that is how the media and the weekend on Twitter like to portray me.

GC 2:13 Diversity of thought is one of the things I value. It is one of the most valuable tools to open our minds and prepare us for change, which is the only thing we can be really sure of. It's not always comfortable. This is an unsafe space. So after last week's presidential dressing down, I spoke about it on my Cliff Central show, a small portion of what I said was picked up by various media outlets and there were headlines all week. Headlines like "Gareth Cliff reacts to the new alcohol ban and takes aim at Cyril Ramaphosa". There's another one. "This is 'b***', you don't get to decide for free people in a free country': Gareth Cliff to Ramaphosa." And how this is – "Forget Gareth Cliff, a constitutional law expert shares his views on alcohol and the curfew". Really? Who writes these headlines? The article that I just mentioned went on to say that we asked constitutional law professor Pierre de Vos to comment on Cliff's rant and he declined, describing him (me) as "irrelevant" and the rant as "ridiculous". Am I missing something here? They say he declined to comment but went on to say I'm irrelevant and the rant was ridiculous. Now isn't that a comment, or was it supposed to be a legal opinion? You can't blame him, he is the chair of the constitutional governance at UCT and they're asking him about me. Really Prof I'm sorry. This surely must have been a career low for you. By the way I did invite Professor de Vos on to the show but he declined. Of course he would.

GC 3:54 In other news apparently Professor Karim who's the head of government's medical response team to Covid said on Sky News last week that the Eastern Cape Hospitals are in trouble due to corruption and incompetence. And he said fixing the problem starts with identifying it. So Times Live and IOL why isn't that your headline?

GC 4:15 How do you feel about all of your liberties being stripped away? Now I don't smoke, I don't drink much, the curfew doesn't really inconvenience me and

Bds
LWS

I'm not personally affected by those restrictions. But when we are spoken to like naughty school children, like it's our fault that the hospitals are sub-standard, that the country is being run badly, it annoys me. Yes, curbing this pandemic and saving lives is critical. But according to the President, South Africa has one of the lowest death rates in the world. We're not even seeing the data. Even the scientists are pleading with government for transparency. But take heart, here's the global picture. This was issued by the WHO last week. Look at these numbers.

- GC 5:04 In the meantime three million jobs have been lost and counting. Load shedding is back and rolling. The court cases are mounting. Food parcels and UIF funds are missing and the list goes on and on. Who's standing up for you and your rights in the process – government, big business, the banks? Do you know where your taxes are even going right now? Now I've got that off my chest, maybe our panel will have some answers. We've got our report card from the President, but how is he doing? What is the economic outlook for the country? And what should we be doing? What Now? Join the conversation on social media. #SOWHATNOW?
- GC 5:50 Later on in the show we will talk to David Icke the world's most famous conspiracy theorist and first a panel of clever people who may have a point of view that you might not have heard before. The point is you get to make up your own mind. I'm not selling any narrative. Do we have a deal?
- GC 6:07 Our first guest tonight is money and investment editor for the Financial Mail. Thank you for joining us Giuletta Talevi. Very nice to see you. You're a financial journalist so you'll hopefully be up to speed with the facts. I look forward to hearing your thoughts.
- GC 6:21 Our next guest is a senior fellow at African Liberty an economic and political commentator. Hi Phumlani Majosi. Nice to see you. Thank you for joining us. I know that you've been very vocal on Twitter. So I look forward to hearing what you have to say in more than 280 characters this time.

MB
Bals

- GC 6:39 And our third guest is a man who pivoted his career long before pivoting became a fashionable thing. He is a well known comedian who's also the head of marketing for Henley Business School. Welcome John Vlismas. Nice to see you.
- GC 6:52 So before we get into talking about business and leadership with the alcohol and tobacco ban being so controversial John you're somebody who's spoken very openly about your challenges with alcohol and drugs. You used to be a binge drinker. You added drugs to the mix, and it nearly took your life. So how do you think this ban has helped or hindered addicts.
- JV 7:13 It has two effects, I think. The one is that it hopefully makes things slightly less available which has failed hopelessly because obviously drug dealers are not people who respect lockdowns or laws and so that hasn't really helped. More menacing is that it's put a lot of addicts in isolation which is a very bad space where a lot of bad behaviour will start to spiral. So its not a great thing at all - switching off a tap which isn't really switched off is hardly a great solution for - from that point of view. So that's a big problem.
- GC 7:47 And while we're on it, I mean do you think it was clever that they banned it in the beginning then they unbanned it for a while. Now they've banned it again. It almost makes it seem like it's a bit higgledy piggildy, right?
- JV 7:58 Ja. Given how passionate most people are about their drug of choice, you don't have to be in rehab to have a drug of choice by the way, you just have to be a higher mammal, I wouldn't take the toy away and then give it back and then take it away again. That's just dumb parenting.
- GC 8:14 And you should know, you're a parent too. All right so Giulietta and Phumlani how do you think our leadership are doing. I mean people were saying we are led at the beginning of this. Are we led, you know what do you think of this? Giulietta you go first.

Bols

MB

- JT 8:31 Well, I mean it's very curious that you are having this discussion the day after, or this week really after the Sunday Times ran a series of articles talking about how absent Cyril Ramaphosa is. And there are some really hard hitting pieces in there. There's one from Mcebisi Jonas who of course used to be in government. He was the former deputy Finance Minister and he talks about this total absence of state capacity and it reflects on poor leadership. Then you've Barney Mthombothi saying you know what was the point of contesting the Presidency when you're not going to stand up and lead the country or your own government. You know you've got all these ministers pulling in different directions. It does seem as though NDZ has the upper hand in these bizarre bans as John was talking about, giving the kids their fix and then taking it away again. So you know why did he want this role? And he does seem to be absent. And if I can just maybe, I don't want to rant on, but you know the press has been asking him to take questions from the media and he doesn't. And there was an undertaking at SANEF do so at the end of May and he still has not taken any media questions. Now even Donald Trump who is as thin skinned as they come, takes questions from the press. I don't know what this says about Cyril.
- GC 9:57 What do you think it says about Cyril, Phumlani?
- PM 10:00 Well it seems he's a man who is very much confused. We saw over the past few months what's been happening when it comes to us going on Covid-19 in – over of the past few months actually. What's been going on with Covid 19, the mishandling of the pandemic. I'm one of those people, Gareth, who have been arguing that the most damage in this country has been done by the response, the government policy, for the pandemic you know. It's not the pandemic itself. So we saw a lot of things that they had gotten very much wrong. I believe that Ramaphosa, he was very much in the beginning was among those people who thought the lockdowns were necessary right in beginning, in order for us to prepare. But quickly after that we had to get back to the economy, right. Because people are losing their jobs. And it's

Eds
WB

been crazy. People are, you know, being even, they are losing apartments, they are losing their jobs and when it comes to this issue of alcohol and cigarettes and so on, what surprises me is with South Africa is that ... demand consumption point of view, right. We don't think of how many people are losing jobs because the beverage or the alcohol industry has been shut down, therefore there's no supply and people are sitting home, right. So don't look at those aspects when it comes to regulations and how we're handling Covid 19. So Cyril Ramaphosa over the past months has been very much confused and ... absent and very much as well as being contradicted by his ministers which is basically a shame in a way when you look at it.

GC 11:39 Well I'm just very pleased that you managed to find earphones that matched your shirt. That's very important. So Phumlani, Giulietta and John will join the conversation with us in a moment. #SOWHATNOW, if you want to join and we'll be right back.

11:56 [break]

GC 12:12 This is So What Now? We have Giulietta Talevi, Phumlani Majozi and John Vlismas with us to share their wisdom. When lockdown started we saw a lot of social media posts about this we are led thing. How are the leaders of our country faring. How do you balance saving lives with saving livelihoods. Some of these questions you may think we have answered before but there are little nuances that are cropping up all the time. I hear there are some protests afoot this week. Are any of you likely to join any of these protests.

GT 12:40 Hell yeah.

GC 12:44 Hell yes from Giulietta. What about you and John, Phumlani?

PM 12:49 Well for me, I - you know these protesting things, they are quite – they tend to be something else these days, you know. Because protesting means you have to go around rioting. We saw people demolishing or destroying

eds
MB

properties across the western world. You know protesting means that we are now in a society where people are basically making some baseless accusations, in many, you know many, many ways.

- GT 13:19 I disagree.
- PM 13:20 I think protesting is quite important. they are part of our democracy to protest.
- GC 13:25 Come on Giulietta. She wants to argue with you. Which is good, I've been hoping for this all week.
- GT 13:31 I mean you don't have to burn things down. You can just peacefully take your top off and lie down in the middle of the road for example, say. You know the restaurant industry needs – they are protesting this week. They're going to put you know tables out in roads and block things off because they need to be heard. So, and sure, this is a way of –
- PM 13:54 Well I'm for protests not riots.
- GT 13:57 Ok ok we can leave it there.
- JV 14:00 Can I protest against protests? Is that an option?
- GC 14:02 Sure.
- JV 14:03 How about a protest against summary judgment of the President in the absence of understanding the complexity that we were facing before Covid. The fact that it's really hard to get a country back from a bunch of thieves who don't want to be arrested, but are still in power. I mean I know he's had no-one arrested yet. And I know it takes longer and we are all very tired, but we were pretty financially bugged before this all started. Now we throw in a global pandemic. It's not going to fix itself quickly.
- GC 14:31 No, and actually here's a Facebook message from one of our viewers Diane Zin said this "Job security. Job losses all around. My friends family and

MB Eds

acquaintances are being affected. Yes, I am afraid of the spread but right now we need to provide for our families." The lockdown has created unemployment where we are seeing the most unemployment. I mean John you've started off marketing for Henley and you must deal with many people who are interested in starting their own businesses, people who have skills and entrepreneurship, people who have ambitions to build their own place in this economy. How are they feeling at the moment? I mean it can't be easy telling people there's all this opportunity when there really isn't.

JV 15:11 Ja, ja, there isn't. And weirdly we have more people trying to study now than we did before the lockdown and even more than last year. The idea is that a lot of us have had it quite easy for quite a long time. We've become quite a cut – we've benchmarked at kind of you know ease plus an amount. It's tougher now and we've got to martial our privilege actually, and I'm a big believer in this and spread it a little thinner because there wasn't a lot to go around in the beginning. So ja, there are people coming. Some are struggling, and we are giving away more education than we've ever given away before, more than anyone else in Africa. We've got to give our scholarships when times are tough. You've got to, you know, but the idea is hopefully well get a bunch of people who will be educated and not whine with their degree. You can hold your degree up, you can fold it up and go "rurr" and then talk about Uni. And it's a little bit tiring at the moment. We need smart people to have grit and resilience and be inventive. You know, that's my thinking.

GT 16:13 Can I just say something though. I mean if you are, if you take a – join Henley in order to get a business degree because you think I've got entrepreneurial ambitions, you also need capital behind you, right? You need experience. And you know Cyril Ramaphosa was this weekend saying young people need to take a leap of faith into the world of self employment. Well generally employers actually happened to have been in their jobs - sorry entrepreneurs have often been in their jobs for extended periods of time before then. They have the skills and they know their market they know where the gaps are and

eds

MB

they go to the self employment routes. And I think you need a strong economy before you can kind of just -

- GC 16:56 Well don't you think that tells us quite a lot about what Cyril knows about entrepreneurship –
- JV 17:01 I was going to say –
- GC 17:04 Phumlani –
- PM 17:06 Sorry can I talk about the economy here. I want to talk about the economy here. Because one of the very troubling things that we hear from the President over the past weeks was that he would like to see government taking the lead in making sure that this economy recovers. And for me I don't think that's the best approach right now because we've seen how our government has failed over the past years, right, in terms of you know having the driver of the economy. I think business has to be at the forefront of the economy right now. It's not the time where the state, the state, that is indebted, the state that is going around borrowing money, including trying to get loans from the IMF. This is not the time that we can afford it to be Trevor Govind leading the economy. We need a private sector, you know things like tax breaks, you know, deregulating, making sure that people are going back to work with precautions. Those are the things that will get the economy going. Not this thing of putting government again at the forefront when you can see their failure that they are failing you know how they are failing at this point in time.
- JV 18:03 I think we can see – they have built some magnificent businesses. Government have done some, I mean Eskom, a shining example. SAA, genius, I mean brilliant places that –
- GC 18:12 Well don't we have a new we have a new airline this week don't we?
- JV 18:15 Apparently, apparently.

Pds
MB

- GC 18:17 We just launched that 16 billion of our tax money apparently going down that tube. But guys, let me play, let me play devil's advocate for a second here because there isn't really one from the other side. Does all of this mean that you three don't care about peoples lives and health?
- GT 18:34 No
- JV 18:35 No I think we I think I do. I am - I think what I'm trying to say is that number one, this idea that entrepreneurship is a thing which works, it doesn't. It's a very small pyramid. Almost all of them fail. So to tout that as a sort of an instant cure is a bad idea. Also unfortunately, we are going to lose people because we have a really crippled health system. We have a lot of comprised people. We've also got a very unhealthy world. A lot of people have got the comorbidities, not from having a disease, simply from eating what you can buy at a drive through and not doing any exercise. So it's not just South Africa. It is human beings are being designed to be handled by plagues more efficiently. So it's much more complicated than that's the bad guy, we're the good guy. This is the solution. It's a proper - I really want to say what it really is Gareth but I promised I wouldn't use that language on your show.
- GC 19:32 Phumlani, do you agree. Do you not care about peoples health or if have you got the same position that John does that actually there is a balance to be struck somewhere in the middle of this where you can do both and they should go together in a good economy.
- PM 19:44 What has stunned me or surprised me is that people have this tendency of trying to sort of separate between there's an economy and then there's lives you know therefore we can too... [*bad connection*] misunderstanding of a situation. At the end of the day my key argument is that you have to get back into - get people back into the system by making sure they are taking precautions, right. It is not a matter of choosing between the two. You know someone the other day I was having an engagement with on radio was talking about you know if you get people back to work it means you don't care about

Bds
WB

lives. No because people are going to lose jobs and they don't know when are going to get them back so they are causing more misery and more poverty at the same time.

- GC 20:28 Well let's turn our attention to some - a group of people who really do know their maths they all have degrees. They keep telling us so. The EFF. here is Mbuyiseni Ndlozi, and I mean this is maybe - your comments will be welcome here especially since you have an MBA scholar and an economics expert and you know people who comment on these things. So here's a Dr. Mbuyiseni Ndlozi telling us how maths works.
- Dr. Mbuyiseni Ndlozi 20:53 *"So you need to understand the origins of profit. The origins of profit is wages. And this is because - I will just basically do the maths for those interested in the maths. So for instance, the theory goes or the theorem or the formula goes if 5 multiply by 5 - 5 multiply by 5, okay let's say 2 multiply by 5 is equals to 2 divide 2 multiply by 5. If 2 multiply by 5 is 10 and also 2 divide by 20 is 10. The common denominator here is 10. We only know that 2 multiply by 5 is equals to 2 divided by 10. Because they both result into 10."*
- GC 21:50 We are schooled.
- GT 21:53 If I were Dr Ndlozi's bank manager I think I would refuse him that loan. What was that?
- JV 22:01 This is why I left comedy Gareth.
- GC 22:05 Oh boy. Well all right, Mbuyiseni, just for your information I would love to have you on the show. You can WhatsApp me because Julius has my number. We'll have you on anytime. So guys just what do you think the best ways are to encourage growth in the economy. Well one of my guests a couple of shows ago said we should just print more money. Why can't we do just that?
- GT 22:27 We are not the reserve currency of the world. If we were the US maybe we could do it. We have a sort of tending towards banana republic currency so it'll just stuff us up completely. You know what we need, Gareth, we need confidence. And confidence is born from certainty in government policies.

MB
Sds

So if they were - even if those policies are actually bad but you knew that this was it for the next 20 years you can kind of make do with it. So I mean - business needs to be able to plan, know that they can get a certain margin or rate of return or what not, or when you on your radio show need to feel ok well the advertising is going to come in so I'm going to hire an extra couple of people. That's confidence. That has this huge multiply effect. But then you need, you need a kind of a transparent government saying this is what we're doing, these are the plans, if you don't like them leave them, but we're in the state of constant limbo, and I think that's maybe one of the most damaging things that we have to grapple with all the time.

GC 23:30 Well, yes John?

JV 23:33 Orange overalls. That is what we need. Just orange overalls. Four or five a week. The currency will stabilize. The judiciary can do they work. But get back to it.

GC 23:44 GC - All right you can join the conversation on social media #SOWHATNOW. Your questions are coming up next with our esteemed panel.

[break]

GC 24:11 This is so what now. I've still got my panel of guests and these are your social media questions but just before that, guys do you three have any ideas of which parts of the economy are actually thriving or at least doing ok under this oppressive situation. Obviously illegal tobacco and cigarettes, but who else? Go on Phumlani, you want to try?

PM 24:34 Well it's hard to say right now but there are things like, well, online e-commerce is still at least functioning, at least for now. So maybe that business is operational quite effectively. Of course we do not see that the restaurant industry has been quite hard hit. So it's hard to - some - Mining is back. It's back in full capacity but still though, and manufacturing as well. But still you things aren't really fully back on track because of the constraints around the

Bds
WB

whole pandemic situation. But I want to say this, Gareth, to you and the viewers. One of the critical sort of things that need to be done by the ANC by President Ramaphosa, by Minister Tito Mboweni, is to confront the public wage, I mean sector wage bill. It is massive. To touch on the labour reforms that they, the ANC, have been running away from in fear of confronting the unions, right. The reason why we are not seeing reform in state-owned enterprises is because the unions have said we are not going to allow any kind of private sector kind of you know involvement or reform. So these things need leaders who are committed, and who are willing to check on the fight against the unions.

- GC 25:55 I think that is a very valid point. I think its something we have very little disagreement outside of the unions about, but I do want to get to these questions because I know you guys have got some thoughts on these. Haley Pascali who's on Facebook says loss of freedom of rights high levels of corruption and continued economic collapse. What do you do you make of those comments and do you have any to add to that or is that a long enough laundry list of ugliness for you to throw at me, is that enough?
- GT 26:24 I mean - do we agree or disagree?
- GC 26:25 Well have a go. It's kind of obvious by the facial expressions I'm seeing from you John and Phumlani. So let's just leave that on Twitter, Sonwabo Cibi says "Gareth two questions. What could have been done differently to curb the rise in infections and what solutions can the panel propose moving forward. "
- JV 26:44 Well I think for an esteemed panel to discuss the answers to that question –
- GC 26:56 Well your guess is as good as anyone else. I mean we don't know because Zweli Mkhize won't let us know what his advisors say so your guess is as good as mine. Go ahead Giulietta.

Bds
MB

- GT 27:00 I mean, what I think is maybe now admit that you're messing up in terms of UIF – I know the Commissioner says there is no backlog but we haven't got our claims back from May applications so, rope in the private sector where you have rapid payments ability so rope in the bank ok so that's what you could have done. Use like the whole banking network and SAPO for that matter to get kind of the UIF payments out and maybe say ok we need your help. Let's bring you in now and you know we're still grappling with this. You know that's one maybe sort of fairly quick fix I think, I hope.
- PM 27:37 Gareth, my main concern is I think we are looking at – we are obsessed with the wrong kind of data, right? The infection rate. And for me the infection rate, yes it's fast, but I don't think it's the most critical thing we need to look at especially in the context of Africa. Remember pandemics don't behave the same around the world right? What happened in Europe and North America, we can't expect it's going to happen here in you know in Africa where there is a younger population and so on and so on and a different climate and so on and so on. So I mean for me I think we should be more concerned about the fatality rate, the death rate, instead of looking at the infection rate, because we're going to mad to look at the statistics. This thing goes, spreads very very fast and we cannot justify the shutdowns and continue us in ourselves in what we would have done and so on. The key thing here is to look at how is our death rate behaving than the infection rate on Facebook.
- GC 28:37 GC – Nazeema Brey Akram on Facebook asks, "Why are we still in level 3 lockdown when 80% of people are not in any kind of lockdown. Life is normal for most people other than wearing a mask and social distancing." So why don't we open it all up and get on with it?
- PM 28:51 I will tell you why. If you look at the President's speech that he gave last time, it was nothing, at least in my assessment it was nothing other than ... right? You know when you want to look like you're doing something that's what you do as a politician. You are starting a curfew from 9pm up until 4am what exactly is the effect in terms of stopping the pandemic if you take that policy

Bds
WB

the policy direction. So I mean much of what has been done has been done for the purposes of looking as doing something when in fact it has no effect in terms of this pandemic

- GC 29:33 Ja, we have learned this new word. The word is performative right? And this is what everybody in the world is doing now. They're showing how - what good people they are they're making sure they put little black square on their Instagram but it's all performative because we don't know what they're really doing to improve other peoples lives or to do anything good even for themselves at this stage. But do you agree we should get out of level 3 lockdown and move on. Giulietta, John
- GT 29:48 Ja, And I think – sorry John, go for it
- JV 29:52 I'm just going to say I mean a lot of people aren't in lockdown level 3 they just thought that when we get out of level 4 its just back to life as normal. It's actually got its there a whole point to level 3 which if you stick to it less people will die. I mean it's a simple bit of science. Stay away from each other. Stay home when you can and wear a mask. And you know I mean don't go to funerals. I mean it's ironic the only person who the funeral is good for is the one who is dead and they're not even there its pointless.
- GC 30:17 Ja, well that's a sensitive issue at the moment, too, and Giulietta I will let you answer in second. But obviously we saw Zindzi Mandela buried and there are videos going around of like more than 50 people are not wearing masks. Different rules for different people?
- GT 30:34 We are the serfs and then we then have our glorious political overlords. And I think, if you got the sense that we were all in this together that's public servants had taken the same pain that most of us in the private sector have, then I think you would have a feeling of national solidarity over this, but the private sector has been decimated, jobs are lost. I mean everyone I know has had they salaries cut.

Bde
MB

- GC 31:00 And particularly not just corporate South Africa but particularly like small and medium businesses right, those the guys have really taken it hard.
- GT 31:07 Ja, so if you felt at the same pain was taken you know in the government then you think ok, you know, we can do this together and we will be a united force. But otherwise –
- GC 31:18 All right guys so –
- PM 31:19 Well you know Gareth,
- GC 13:20 Yes Phumlani –
- PM 13:21 I just want to say the small to medium enterprises in townships in our neighbourhoods, and our mechanics and hair salons and so on, these are people that have been hard hit by our policies in how we have responded to Covid 19. But for me I want to emphasise this Gareth – the main thing here unfortunately, yes there is so much talk, everyone is trying to come up with a solution, that could somehow magically –
- GC 31:47 This is my last question to you, and you can start Phumlani. So What Now ?
- PM 31:56 Well what now is that government needs to hit hard on making sure that the message gets out there. Take the pandemic seriously right – social distance make sure that you wear a mask. We need to push on the message in here. We don't have much option. We can't go back to level 5, that's impossible, right. You can't lock down. So we need to push on messaging on people to tell them that remember to take the pandemic seriously and make sure that you change your social behaviour.
- GC 32:27 All right John do you have an answer.
- JV 32:30 Don't listen to Twitter. Don't get your news from Facebook. Try and find – you know it's the same old – I have always said this, the people who've got the most should be the biggest sharers. And we should also be held

Eds
WB

responsible for the best thinking and not be looking for a villain or poster boy or pointing at people. Just get better, just be better. This thing is going to play out. So much loss is going to happen. There is going to be damage but someone has to carry on. So we may as well try and do the best we can. I agree with Phumlani. Get the message to as many people as possible and try and educate people. But South Africans are on one hand resilient and on the other hand defiant. So they are going to ignore it...

GC 33:11 Well I mean I think everyone is trying. And Giuletta the last word is yours.

GT 3:15 Oh thank you. Throw everything that you can at the hospitals. Get them into shape. Just put all your backing behind them. And then open everything else up. And maybe just do a little bit more policing in terms of drunk driving so you don't end up with huge cases in the casualty ward, but back the hospitals and then open up the economy.

GC 33:38 Well thank you all very very much. Our guests this evening Giuletta Talevi, Phumlani Majozi and John Vlismas.

GC 33:40 GC - Coming up next – he's been called a madman, crazy and a lunatic. World famous conspiracy theorist David Icke is standing by in London #SOWHATNOW. Join the conversation

[break]

David Icke interview

GC 34:15 My next guest definitely has some controversial opinions. David Icke welcome to the show. You're a former footballer, who had a promising career; then a BBC sports commentator. Since then you've been warning for 30 years of a global Orwellian state in the making. I need to put a disclaimer upfront, you have been banned from most of the major social media platforms and you've even been banned from being interviewed on TV internationally for putting out what has been reported as harmful information. Now, some of what you say may sound crazy to some people, some of it makes sense to some people.

Eds
MB

But I'm a proponent of free expression, even if I don't buy it, and everyone gets to decide for themselves.

- GC 34:57 Thank you for joining us and how do you think it was that you became the world's most famous conspiracy theorist?
- DI 35:05 Well 30 years of hard work, and you say conspiracy theorist. Let's first of all establish where that came from. The terms conspiracy theory or conspiracy theorist came into widespread use, thanks to the CIA in the 1970s, 1967 it was. They were getting concerned that people were not buying the official story of the Kennedy assassination which involved bullets doing U-turns and going through several people – at the same time. I mean it was ludicrous. And so they wrote, and the documents exist, you can see them – they wrote to various media organisations in America saying, they should use the terms conspiracy theory and conspiracy theorist, to discredit those that were not accepting the official narrative. And that's now become the official label of derision, world-wide, of anyone that says, actually governments lie to us. And when governments tell us things and authority tell us things, we should check it out, we should research it, and see if it stands up. And I'll tell you after 30 years of doing it, it really does. Not least with the current events, with the coronavirus, as we are told to believe in."
- GC 36:30 Okay, now you've been very vocal about this coronavirus pandemic being a planned conspiracy theory, a conspiracy rather, for global governance. Now we won't have time to interrogate this in any detail but I am curious. With you being banned from so many platforms and so many other fake news stories across the mainstream platforms – I mean, Donald Trump talks about fake news all the time – how can we find the balance between blocking, in your opinion, perceived harmful narratives and allowing actual freedom of expression and who gets to decide David?

Eds
WB

- DI 37:03 Well, who gets to decide currently is the authorities! And the authorities include the giant corporations of Silicon Valley. Once you start saying that people cannot express their opinions or deliver their detailed research because it challenges the official narratives, and that's what is happening world-wide, nevermore so than during this, what I would call a pandemic hoax, and I can talk at great length, maybe some time else, when we've got the time, about the absolute factual evidence to support that. So, in this period now, we have this quite obvious scam going on in terms of communication of information. The World Health Organisation was created by people like the Rockefeller family, to control global health policy from a central health point. It's fronted up by a guy called Ted Ross, the Director-General, who is just an asset of Bill Gates who owns the World Health Organisation. He's the second biggest funder and if Trump pulls the funding as he says he's going to, Gates will be the biggest funder.
- GC 38:22 I mean, part of the reason I was curious to have you on is because this almost feels like the perfect storm of this kind of, suppression of information, conspiracy theory stuff. It looks like the world is ripe for all of this to take root at the moment because people just don't know who to believe, right?
- DI 38:42 This is what I would say – don't believe me. Certainly, don't believe the official narrative. But check it out for yourself. Instead of just saying, okay I'm going to take my opinions and my perceptions like a sponge, from some external source, what I'm going to do is say, well this is what this official narrative says, this is what this guy Icke says, which is very different so, what I'm going to do is check them out. And, you can do that. The information still exists but you have to look for it. It's not going to be put in front of you."
- GC 39:15 So, if I take some of the David Icke stuff and I take a little bit of it and I'd say that the rest is - you know maybe I don't believe in the lizard people stuff or any of that, what's so dangerous....
- DI 39:28 You should have talked to Credo Mutwa about that – the Zulu shaman...

Eds
WB

- GC 39:31 I'm going get to Credo Mutwa in a moment, because you and he were quite close and its really your connection with South Africa but if I decide to take some and not the rest and I decide to find evidence for myself of what I believe and what I'd like to believe and what I'm going to buy and what I won't, why is that threatening to some people?
- DI 39:50 Well if you are trying to sell a story, a narrative and why you're trying to do that? Because you're trying to control perception because from perception comes behaviour. If you want to control behaviour, you've got to control perception. How do you control perception? You control information that people receive from which they form those perceptions. So, you want to control the narrative, so you control perception. And the danger is that someone like me comes along, having done 30 years of research and predicted all this stuff that's going on now in my books decades ago by the way, and says actually they're lying to you. So, suddenly this control of perception is being threatened because control of information that people hear and receive is being threatened and that's why we having this mass frenzy of censorship by Silicon Valley which is owned by the – those corporations are owned by the same people that own the web of deceit that I have been exposing for three decades. And therefore, they're coming out now, they are coming out of the shadows basically and they openly in the public eye saying, no we're not going to allow this. And I was banned after doing a live interview, stream on YouTube which got a phenomenal audience because I said one thing. And this is what they are terrified of people realising, there is no virus. That's what they're terrified of, there is no virus. Did you know that there is not a scientific paper on planet earth that has isolated the virus they call SARS-COV2 or COVID19. It was never isolated it to show it exists, never been done. They've had to admit that. Secondly, do you know the RT PCR test, that is deciding if you've got it or not, that was developed by a man called Kary Mullis in the 1980's. He got the Nobel Prize for it. And he

Bds
WB

said this test must never be used to diagnose infectious disease, which is exactly what they are using.

GC 42:05 David, there are actual people who are dead and...

DI 42:10 Yes, of course.

GC 42:11 It comes across as particularly insensitive. I mean look, I don't want to get into...

DI 42:17 No answer my question. How do you know they died of COVID 19? Let me give you just one very quick example of how this is being scammed. In America they changed the law when this pandemic first started to arrive, in which hospitals who diagnosed people with regular pneumonia were paid \$4 600. Suddenly if they diagnosed COVID 19 pneumonia, they now been paid \$13 000. And if they put a COVID-diagnosed patient on a ventilator they get \$39 000. Now if you are running an organisation that is reacting to a proper virus, then you don't have to do those things because the virus effect will take care of itself. So, why you are you introducing this massive financial incentive to get people to diagnose what you want them to diagnose? Do you know 99% of people diagnosed who have died – [interruption of telephone]

99% of the people who were designated to who have died in Italy of COVID 19, this has been admitted by the Italian authorities, had one, two, three or four other, what they call morbidities, reasons to die. It's been well documented
43:30 that people who have died of many and various things have been designated COVID 19 on the death certificate. And these things need discussing. If people don't want to accept them, fair enough. But let's debate it, and let's put all the evidence on the table and let's see where we go from there. If you're trying to silence someone, so this stuff is never discussed you've got something to hide.

GC 44:12 Well, I'm only inclined to agree with you to the point where I think that if you try to push these things underground they actually get more and more powerful so, if you trying to silence people [pause]

Bals
MB

- DI 44:23 You've done no research on this at all! So, you're saying well I don't agree with this. Well, if you had done the research I've done then you -
- GC 44:31 Well I'm not a doctor.
- DI 44:34 That's fair enough but you've done no research on it.
- GC 44:35 Neither have you!
- DI 44:37 I've done 30 years of research on it -
- GC 44:39 As a doctor?
- DI 44:41 ... And the information comes from doctors, virologists and medical specialists who will never get on a mainstream programme because they've sussed, there is no virus.
- GC 44:51 All right, David you knew Credo Mutwa very well. You've been to South Africa before. The two of you used to communicate regularly. Is he your main connection with South Africa and do we feature in any of your work?
- DI 45:04 Oh, you've featured in my work many times over the years I've written a stream of books. I came across Credo Mutwa, a long long time ago. I didn't know who Credo was, he didn't know who I was. And I by that time had come to certain conclusions about what has happening from a western research, I'm a journalist, that is my background, from a western journalistic research point of view. I started having these long conversations with Credo Mutwa about the Zulu legends, the Zulu information passed on through the generations and what he was telling me and what I had researched in America and Britain and the western world in general was amazingly similar in many ways the same. And what I found, if you look and research these ancient cultures, whether they are the Aborigines in Australia or wherever you go, there is a common theme and that theme is of a force manipulating human society and all I've

Bds
MB

done is bring that into the 21st century and show them that it's still going on today, big time. And that's the force that is behind this fake pandemic.

- GC 46:24 Well I'm pleased to have given you a place to tell your story and to explain your position because so many people would rather shut you down. But I think maybe there are many of us who are left more confused than when we started this. David thank you very much for joining us.
- DI 46:39 More confused, because this is a few minutes. Read a book and you'll see how much sense it actually makes.
- GC 46:46 I'll get you on the radio show as well to give you some room
- DI 46:51 That will be good.
- GC 46:53 Thank you very much. I hope you are as confused as I am. Don't worry just pour yourself a glass of – oh wait - If any of our lizard overlords are watching, please let us know what we can do to get our lives back to normal because I think we are all gatful of this lockdown, winter and the rest. That is it for this week. Thanks to all my guests and to you for joining us tonight. Please share your comments and suggestions on social media #SOWHTNOW or you can call into my show on CliffCentral.com. That's every weekday morning from 6am. Upload your 30 second question or comment at upload.enca.com, the subject there So What Now? And join us again next week as we continue navigating the way forward together. [48:07]

Closing credits

Bds
LMB

"WRB8"**Transcription of So What Now?**

Broadcast: 22 July 2020

Gareth Cliff Interview with David Icke

GC – Gareth Cliff

DI – David Icke

GC: He's been called a mad man, crazy and a lunatic, world-famous conspiracy theorist, David Icke is standing by.

GC: My next guest definitely has some controversial opinions.

GC: I need to put a disclaimer up front, you have been banned from most of the major social media platforms and you've even been banned from being interviewed on TV internationally for putting out what has been harmful information, now some of what you say may sound crazy to some people, some of it makes sense to some people but I'm a proponent of free expression even if I don't buy it and everyone gets to decide for themselves. How do you think it was that you became the world's most famous conspiracy theorist?

DI: 30 years of hard work. Explains background of 'conspiracy theorist' people not buying official story of Kennedy assassination. (*Incomplete transcription*)

GC: You've been very vocal about this corona virus pandemic being a planned conspiracy theory, a conspiracy rather for global governance. We won't have time to interrogate this in any detail, but I am curious, with you being banned from so many platforms, and do many other "fake news" (gestured) stories around the mainstream platforms, I mean Trump talks about fake news all the time, how can we find the balance between blocking, in your opinion, perceived harmful narratives and allowing actual freedom of expression, and who gets to decide?

DI: Who gets to decide currently- is the authorities, which includes giant corporations of silicon valley. Once you start saying that people cannot express their opinions, or deliver their detailed research because it challenges the official narrative, and that's what's happening world- wide never more so than during this, what I would call a pandemic hoax, and I can talk at great length, maybe some time else when we got the time, about the absolute factual evidence to support that. So in this period now, we have this quite obvious scam going on in terms of communication of information. (GC made noises- mhm mhm -). The WHO was created by people like the rockefeller family to control global health policy from a central point, its fronted up by a guy called Ted Ross, the DG, who is just an asset of Bill gates , who owns the WHO, he is the 2nd biggest funder, and if Trump pulls the funding which he says he's going to do, Gates will be the biggest funder.

GC: Part of the reason I was curious to have you on is because this almost feels like a perfect storm for this kind of suppression of information, conspiracy theory stuff – it looks like the world is ripe for all of this to take root at the moment because people just don't know who to believe, right?

DI: This is what I would say - don't believe me, certainty don't believe the official narrative, but check it out for yourself. Instead of just saying I'm going to take my opinions and perceptions like a

Bals
WB

sponge. What I'm going to do is say well, this is what this official narrative says, this is what this guy Icke says which is very different (*incomplete transcription*).

GC: So if I take some of the David Icke stuff, and I take a little bit of it, and I say the rest is you know - maybe I don't believe in the lizard people stuff or any of that, um what's so dangerous about that (*GC and DI briefly mention Credo Mutwa, incomplete transcription*) but if I decide to take some and not the rest, and I decide to find evidence for myself of what I believe and what I would like to believe and what I'm going to buy and won't, why is that so threatening to some people?

DI: Well, if you are trying to sell a story, a narrative and why are you trying to do that, because you're trying to control perception because from perception comes behaviour if you want to control behaviour you got to control perception, how do you control perception you control information that people receive from which they form those perceptions, so you want to control the narrative so you control perception and the danger is that someone like me comes along, having done 30 years of research and predicted all this stuff that's going on now in my books, decades ago by the way, and says actually they're lying to ya, so suddenly this control of perception is being threatened because control of information that people hear and receive is being threatened and that's why we are having this mass frenzy of censorship by silicon valley, which is owned by the same people that own the web of deceit that I've been exposing for three decades and therefore they're coming out now um they're coming out of the shadows basically and they're openly in the public eye saying no we aren't going to allow this. And I was ah 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.

GC: - well (*interrupted*).

DI: that what they're afraid of (*muffled*) there is no virus. Did you know -

GC: (*laughing*)

DI: there is not a scientific paper on planet earth that has isolated the virus they call Cov- SARS COV2 or COVID 19, they've never isolated it to show it exists. Never been done, they've had to admit that. Secondly, do you know the RTCPDR test that is deciding if you've got it or not, um, that was developed by a man called Kerry Mulice in the 1980's, he got the noble prize for it, and he said this test must never be used to diagnose infectious disease which is exactly what they're using it for and

GC: (*interrupting*) but David, I mean there are there are actual people who are, there are people who are dead and I you know, it comes across as particularly insensitive, I mean look look, I don't want to get into -

DI: (*interrupting, and had mostly been speaking over GC the whole time*) answer my question, how do you know they died of COVID 19? let me give you a just one very quick example of how this is being scammed. In America they changed the law when this pandemic first started to arrive ah in which hospitals who diagnosed people with regular pneumonia were paid \$ 4 600, suddenly if they diagnosed COVID 19 pneumonia they're now being paid \$ 13 000 and if they put a COVID 19 diagnosed patient on a ventilator, they get \$ 39 000 now if you are a running a an organisation that's reacting to a proper virus then you don't have to do those things because the virus effect will take care of itself. So why you introducing this massive financial incentive to um get people to diagnose what you want them to diagnose, do you know 99% of people diagnosed to have died from COVID19 (*phone has been ringing in the background*)

Bob
WB

GC: (*interrupting*) you might want to get that call in case its uh the overlords, just check if ah –

DI: I will get rid of that yeah, thanks. Yeah 99% of um the people who were designated to have died in Italy of COVID19, this has been omitted/admitted by the Italian authorities,

GC: yeah

DI: and had one, two, three or four other, what they call morbidities, reasons to die. It's been well documented that people who have died of many and various things have been designated COVID19 on the death certificate and these things need discussing. If people don't want to accept them fair enough but lets debate it lets put all the evidence on the table and lets see where we go from there. If you're trying to silence someone so this stuff is never discussed, you've got something to hide

GC: (*interrupting*) I'm only inclined to agree with you to the point where I think that if you try to push these things underground they actually get more and more powerful so if you're trying to silence people –

DI: (*interrupting*) Research, you've done no research on this at all. See you're saying, well I don't agree with this –

GC: yeah –

DI: well if you've done the research I've done and then you say –

GC: well I'm not a doctor –

DI: that's fair enough, but you've done no research on it

GC: well neither have you –

DI: I've done thirty years research on it, and I've been researching this since January

GC: (*interrupting*) as a doctor?

DI: and 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.

GC: alright David, you knew Credo Mutwa very well, (*DI agrees*) you've been to SA before, the two of you used to communicate regularly. Is he your main connection with SA and do we feature in any of your work?

DI: well you feature in my work ah many times over the years I mean I've written a stream of books, but um I came across Credo Mutwa a long, long time ago, um I didn't know who Credo Mutwa was, he didn't know who I was and I by that time had come to certain conclusions about what was happening, um from a western research, I'm a journalist that's my background, from a western journalistic research point of view and then I started having these long conversations with a Credo Mutwa about um the um the Zulu legends, the zulu ah information passed on through the generations and what he was telling me, and what I had researched in America, and Britain and the Western world in general was amazingly similar, in many ways the same and what I found, um if you look and research these ancient cultures whether they are the aborigines in Australia or wherever you go, there's a common theme: and that theme is of a force manipulating human society and all I've done is bring that into the um 21st century and shown that its still going on today, big time and that's the force that's behind this fake pandemic.

Bds
WB

GC: Well I'm pleased to have given you a place to tell your story and to explain your position because so many people would rather shut you down but I think there are many of us who are left more confused than when we started this, ah David thank you very much for joining us.

DI: more confused because this is a few minutes, read a book and um you'll see how much sense it actually makes.

GC: I'll get you on the radio show as well, give you some, some room.

DI: very good.

GC: Thank you very much, I hope you're as confused as I am. Don't worry, pour yourself a glass of, oh wait ah if any of our lizard overlords are watching, please let us know what we can do to get our lives back to normal because I think we're all gatvol of this lockdown, winter and the rest. That is it for this week, thanks to all my guests and to you for joining us tonight please share your comments and suggestions on social media #sowhatnow, or you can call into my show on Cliff Central.com, its every week day morning from 6am. Upload your 30seconds comment (*transcription incomplete*).

Beds
MB

// POWER SINGH INCORPORATED

LCP Reg. No: F18433 | CIPC Reg. No: 2018/071686/21

Public Interest Law.

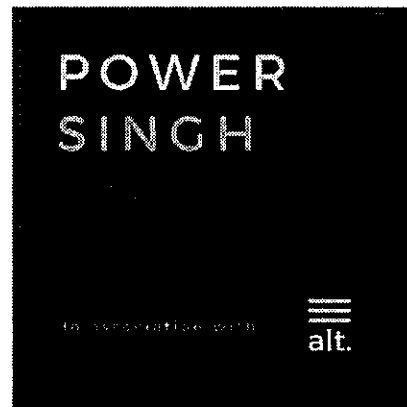
a. 20 Baker Street, Rosebank, South Africa, 2196

t. +2711 268 6881

f. +2786 614 5818

e. connect@powersingh.africa

w. powersingh.africa



This message contains information which is confidential and/or legally privileged. It is intended for the addressee only. If you are not the addressee and you have received this message in error, you may not read, use, disseminate, distribute, or copy its information. Please notify us immediately and we shall arrange for the return of this message at our own cost.

Date: 21 August 2020

Your ref: --

Our ref: PSIMM-201912

TO: Broadcasting Complaints Commission of South AfricaBy email: hccsa@nabsa.org.za

To whom it may concern,

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.

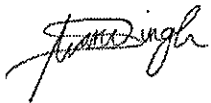
// Directors: A Singh B.Comm., LL.B. (UP), M] Power B.A., LL.B., LL.M. (Wits) | Associates: T Power B.A., LL.B., LL.M. (Wits), T Davis B.A. (RU), LL.B. (UCT) | Office Manager: J Rashid | Technology Officer: K Nwana. Power Singh Incorporated is a law firm registered with the Legal Practice Council (F18433) and a personal liability company registered in the Republic of South Africa (2018/071686/21).

WB Bals

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.

Yours faithfully,



POWER SINGH INC.

Per: Avani Singh | *Director*

E-mail: avani@powersingh.africa

Bds
WB



**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

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.

"[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:

"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.

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/>.

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

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.aspx#>.

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.

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

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>.

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

Bds
MB



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.

Bole
WB



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.

Bds
Wb





28 August 2020

Attention: Ms Shouneez Martin

The Registrar
 Broadcasting Complaints Commission of South Africa
 Block No 8
 Burnside Island Office Park
 410 Jan Smuts Avenue
 Craighall
 2196

Fax (011) 325-5736

Dear Ms Martin

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

Bds
 WRB



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.

Bds

MB



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

Bols
WB



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.

Bols
MB



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.

Bds

WBS



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.

Yours faithfully

Philippa Rafferty
Executive Legal and Regulatory

Fds
WRB

"WRB11"

**COMPLAINT TO THE BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA
REFERENCE BCC152/08/2020**

REPLY SUBMITTED BY MEDIA MONITORING AFRICA

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:

Bols
MB

- 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”.¹ 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’**”.²
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:

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	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

¹ [2011] ZACC 11 at para 81.

² Id at para 83. (Emphasis added.)

	<p>relation to COVID-19 "have been widely described as a sign of what dedicated leaders can achieve".³ 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."⁴</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</p>	<p>No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts</p>

³ Brightness Mangolotho & Malesela Maubane, 'Effective communication from leadership is essential during a crisis', *Mail & Guardian*, 15 April 2020.

⁴ Charles Shey Wiysonge, 'South Africa's war on COVID-19', *Think Global Health*, 20 April 2020.

	is independent from any state or private sector actor, and is not owned by any single individual.	
“this is what they are terrified of people realising: there is no virus”	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.	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
“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”	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. ⁵ 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. ⁶	No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts.

⁵ Stellenbosch University, ‘South Africa obtains first laboratory isolate of SARS-CoV-2’, *News Medical*, 11 May 2020.

⁶ Harry Cockburn, ‘Coronavirus: Scientists isolate virus responsible for deadly COVID-19 outbreak’, *Independent*, 13 March 2020.

<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 of South Africa.</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>
---	---	--

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.”⁷ 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.

⁷ *Grove v eTV*, BCCSA Case No. 29/2004, 22 July 2004 at para 6.

JB
WB

11. Furthermore, the present matter is distinguishable from *Rautenbach v Electronic Media Network*⁸ 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."⁹
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 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.

⁸ BCCSA Case No. 02/2007, 31 January 2007.

⁹ 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.

Handwritten signatures in black ink, including a signature that appears to be 'Bds' and another that appears to be 'MB'.

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:¹⁰

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

¹⁰ [2002] ZACC 12 at para 24.

Bals
MB

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.

"WRB12"



PO Box 412,668 • Craighall • Tel (011) 326 3198 • Fax (011) 326 3196 • email: bccsa@nca.gov.za
 Block No 6 • 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).

eds 1
MB

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>.

Bds
WB

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.

Bob
MB

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/>.

eds
WB

"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.

GROUND 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".

eds
WB

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>.

Bds
MB

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.

Boles
WB

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?

Eds
WB

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

Eds
MB

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

Sds
MB

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."

BdS
MB

[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.)

Bals
WB

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

Bals
MB

	<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.

Sds
WB

<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.

Bals
MB

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:
- The broadcast in *Rautenbach* was an interview with an **author**.
 - The objective of the broadcast was solely to **profile** the author.
 - As explained by the BCCSA, "**the objective with the programme was clearly not to illicit discussion** but only to profile an author".
 - 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.

Bols
WB

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.

Bals
UMB

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

Bols

MB

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.

Bds
MB

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

Bds
WB

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

WB Bds

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.

Bds
MB

- [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

Bde
MB

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).

Bds
WBS

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.

Bals
WB

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.

Bds
WB

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.

WB Bds

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.

Bds
MB

- [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.

WB
Bals

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.

WB
Bals

- 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);

WB
Bols

- 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 Icke, 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

Bols
MB

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.

Bals
WB

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.

Bals
MB

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.

MB
Rals

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.

MB
eds

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.

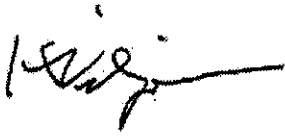
Media Monitoring Africa complained that the show breached the relevant broadcasting codes in a series of respects. Its complaint has now been upheld by the Broadcasting Complaints Commission of South Africa, which has held that the show breached the codes. This was because the show contained views expressed 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.**

Eds
MB



PROF HENNING VILJOEN

CHAIRPERSON: BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA

Commissioners Fakude and Naidu concurred in the above judgment.



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

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

In the matter:

ENCA

First Appellant

e.TV

Second Appellant

and

MEDIA MONITORING AFRICA

Respondent

APPELLANTS' HEADS OF ARGUMENT

CONTENTS

INTRODUCTION.....	1
BACKGROUND	4
FREEDOM OF EXPRESSION AND THE <i>JERSILD</i> DISTINCTION	12
THE COMMENT CLAUSES AND PRINCIPLES OF INTERPRETATION	18
THE COMMENT CLAUSES DO NOT APPLY TO MR ICKE'S INTERVIEW.....	21
MR ICKE'S VIEWS WERE PROTECTED COMMENT	26
SANCTION.....	37
CONCLUSION	39

MB Bds

"The idea of reptilians was popularised by David Icke, a conspiracy theorist who claims shapeshifting reptilian aliens control Earth by taking on human form and gaining political power to manipulate human societies."

– Wikipedia 'Reptilian Conspiracy Theory'¹

"When you get back into the ancient world, you find this recurring theme of a union between a non-human race and humans – creating a hybrid race. ... From 1998, I started coming across people who told me they had seen people change into a non-human form. ... The basic form is like a scaly humanoid, with reptilian rather than humanoid eyes." – David Icke²

INTRODUCTION

- 1 On 22 July 2020 at 20h30, eNCA broadcast an interview with Mr David Icke, a notorious conspiracy theorist, on a show titled "So *what now?*". The interview was re-broadcast on etv on 23 July 2020 at 23h00.³
- 2 Mr Icke is most famous for his theory that the world is controlled by shapeshifting alien lizards who assume human form. This was frequently referenced in the interview. Mr Icke has repurposed this theory into a bizarre version of Covid-19 denialism. He believes that the pandemic is a hoax concocted, in part, by our lizard overlords.
- 3 On 21 August 2020, Media Monitoring Africa (**MMA**) submitted a complaint to the BCCSA regarding this interview. The focus of MMA's complaint was Mr Icke's remarks that Covid-19 does not exist. MMA alleged three breaches of the BCCSA's Code of Conduct for Subscription Broadcasting Service Licensees (**the**

¹ Wikipedia "Reptilian Conspiracy Theory" https://en.wikipedia.org/wiki/Reptilian_conspiracy_theory.

² The Royal Family are bloodsucking alien lizards – David Icke", The Scotsman, 30 January 2006, available at <https://www.scotsman.com/news/uk-news/royal-family-are-bloodsucking-alien-lizards-david-icke-2478194>.

³ The broadcast is accessible here: <https://www.enca.com/shows/so-what-now-22-july-2020>.

MB Bels

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

- 4 On 20 October 2020, the Tribunal dismissed two of MMA's three complaints. It upheld a single complaint, holding that the broadcast contravened clause 28.2.2 of the Subscription Code and clause 12.2 of the FTA Code (**the comment clauses**).⁶ These clauses provide, in relevant part, that: "*[c]omment must be an honest expression of opinion and must be presented in such a manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.*"
- 5 Based on this single finding of a breach, the Tribunal imposed a fine of R10,000 and ordered the broadcasting of an apology, in wording prescribed by the Tribunal.⁷
- 6 The appellants now appeal to the Appeal Tribunal, with the leave of the Acting Chairperson of the BCCSA, granted in terms of clause 4.4 of the Procedure of the Commission.⁸ This appeal is confined to the finding of a breach of the comment clauses and the sanction. There has been no cross-appeal against the dismissal of MMA's other complaints.

⁴ In respect of eNCA.

⁵ In respect of etv.

⁶ Tribunal decision p 29 para 26(1).

⁷ Tribunal decision p 37 para 32.

⁸ Leave to appeal ruling, handed down on 13 January 2021.

MB Bds

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

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

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

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

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

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

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

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

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

Bds
MB

BACKGROUND

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

"The Coronavirus pandemic has swept the planet, leading to global lockdowns and extraordinary changes to all of our lives. What is the 'new normal' that everyone is talking about? Virtually everything that defines us has been turned inside-out. Diversity of thought is one of the most valuable things we can expose ourselves to in finding the answers.

Gareth Cliff hosts smart and creative guests – both left and right-of centre thinkers, opinion makers, thought leaders and alternate voices to open our minds and prepare for change – the only thing of which you can really be certain. You may not always agree but... great minds don't always think alike."¹¹

- 9 The show has a two-part structure. The first segment is a panel discussion on a particular topic with a number of guests. The second half of the show profiles an individual who is interviewed one-on-one by Mr Cliff.¹²
- 10 The interview with Mr Icke came at the end of the show as an approximately 15-minute insert in a 48-minute programme. A rough transcript of this interview is attached as **Annexure A**.
- 11 From its opening moments, the programme is presented as an irreverent take on current affairs, presenting robust commentary on the pandemic and life under lockdown.

¹⁰ Response to complaint, para 6.

¹¹ Response to complaint, para 7.

¹² Response to complaint, para 8.

MB Bds

- 12 Mr Cliff begins the show with an attempt at lockdown humour, an imitation of a soap-opera announcer (*"Like sands through the hourglass, these are the days of our lives"*), and a clip of cartoon characters as a stand-in for a live studio audience.¹³ The opening credits then roll over upbeat music, with words flashing across the screen: *"fresh perspectives"*, *"critical thinkers"* and so on.¹⁴
- 13 No reasonable viewer could mistake this for the news.
- 14 The first six minutes of the programme are Mr Cliff's introductory remarks, focusing on the Covid-19-related events of the previous week and personal grievances about his portrayal in the media.
- 15 He presents a brief taster of Mr Icke's presentation: *"Later in the show, we'll talk to David Icke, the world's most famous conspiracy theorist [knowing nod], and first a panel of clever people who may not have a point of view you might have heard before"*.¹⁵
- 16 Mr Cliff explains the premise for the show as follows: *"the point is, you get to make up your own mind. I'm not selling any narrative. Do we have a deal?"*¹⁶
- 17 The majority of the programme, from minutes 6 to 33, is taken up by the panel discussion, involving a financial journalist, a political analyst, and a former comedian.

¹³ Timestamp: 00:00 – 00:36.

¹⁴ Timestamp: 00:37 – 1:00.

¹⁵ Timestamp: 05:50 – 05:56.

¹⁶ Timestamp 06:00 – 6:07.

WB Boks

- 18 The discussion that follows is opinionated, robust, and at times light-hearted. Commentary on serious matters is tempered with humour.¹⁷
- 19 Despite the irreverent tone, the entire premise of the introductory remarks and the panel discussion is that Covid-19 is real. Mr Cliff states that “*curbing this pandemic and saving lives is critical.*”¹⁸ Among other things, the panellists are asked to comment on government’s response to the pandemic, and how the balance between lives and livelihoods should be achieved. At no point is it ever suggested that Covid-19 is anything other than a serious public health threat, despite the divergent views expressed about how to address it.
- 20 The programme was first aired at 20:30 on 22 July 2020, after the 20:00 evening news on eNCA. This was at the height of South Africa’s first wave. The news that night, as with every night, was filled with reports of rising Covid-19 infection rates, deaths, and an overwhelmed and under-resourced healthcare system.¹⁹
- 21 The second airing of the programme, at 23h00 on 23 July 2020, followed after President Ramaphosa’s address to the nation at 20h00 that night.²⁰ In that address, the President announced that more than 130,000 new coronavirus cases had been confirmed since mid-July, the total number of confirmed cases stood at 408,052, and South Africa had the fifth highest number of confirmed coronavirus cases in the world at the time.

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

¹⁸ Timestamp: 4:40.

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

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

MB Bde

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

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

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

“Mr Cliff: I’m not a doctor.

Mr Icke: That’s fair enough. But you’ve done no research on it.

Mr Cliff: Neither have you!

Mr Icke: I’ve done thirty years’ research!

Mr Cliff: Yes, but, as a doctor?”²¹

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

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

²¹ Timestamp: 33:57 – 34:06.

²² Timestamp: 34:17 – 34:56.

MB
Bals

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

"conspiracy theory ... a belief that an event or situation is the result of a secret plan made by powerful people"

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

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

28 Mr Cliff proceeds to ask five questions:

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

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

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

²³ Timestamp: 34:42 – 34:56.

WB
Bals

- 28.4 He asks why it is threatening if people obtain their own evidence.
- 28.5 Mr Cliff then asks Mr Icke about his relationship with South African writer, Credo Mutwa.
- 29 At no point does Mr Cliff ask Mr Icke to provide his views on COVID-19. In fact, Mr Cliff makes clear that he is not seeking to give airtime to Mr Icke's Covid-denialism, saying "*we won't have time to interrogate this in any detail*".²⁴ The focus of Mr Cliff's questions is on the existence of conspiracy theories, their prevalence during the pandemic, and who gets to decide on the balance between free expression and the suppression of harmful narratives.²⁵
- 30 When Mr Icke lays out his theories about the pandemic and the WHO, Mr Cliff pushes back and openly mocks him. For instance:
- 30.1 Mr Cliff repeatedly refers to Mr Icke's belief in "*lizard people*" who control the world,²⁶ providing context to Mr Icke's sweeping claims.
- 30.2 There are many points during the interview where Mr Cliff stares in disbelief and laughs at Mr Icke, communicating that his views are plainly ridiculous – in particular, where Mr Icke says there is a "*web of deceit*" surrounding the pandemic.²⁷
- 30.3 When Mr Icke claims there is no virus,²⁸ Mr Cliff looks incredulous, laughs at him, and later interjects to correct him that people have died from Covid-

²⁴ Timestamp: 36:30 – 36:40.

²⁵ Timestamp: 36:40 – 37:03.

²⁶ Timestamp: 39:20 – 39:25 ; 47:00.

²⁷ Timestamp: 40:58 – 41:03.

²⁸ Timestamp 41:15 – 42:00.

WB eds

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

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

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

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

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

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

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

²⁹ Timestamp: 42:00 – 42:18.

³⁰ Timestamp: 43:20 – 43:30.

³¹ Timestamp: 44:10 – 44:25.

³² Timestamp: 44:20 – 44:52.

³³ https://en.wikipedia.org/wiki/Vusamazulu_Credo_Mutwa#%22Reptilian_agenda%22.

WB
Bels

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

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

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

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

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

³⁴ Timestamp: 47:00

MB Bds

FREEDOM OF EXPRESSION AND THE *JERSILD* DISTINCTION

33 The value of freedom of expression and media freedom needs no elaboration. The section 16(1) constitutional right not only encompasses views that are favourable, but also those that “*offend, shock and disturb*”. The Constitutional Court³⁵ has repeatedly cited the European Court of Human Rights’ (ECtHR) judgment in *Handyside*³⁶ in emphasising this point:

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

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

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

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

³⁵ *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at paras 15 – 16; *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC) at para 49.

³⁶ *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754.

³⁷ *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) at para

³⁸ *R v Bunting* 1916 TPD 578 at 583.

WB Bals

in terms of which “we are obliged to delineate the bounds of expression generously.”³⁹

- 36 The interpretive process should be informed by South Africa’s painful history of censorship. As the Constitutional Court explained in *Mamabolo*,⁴⁰ “[h]aving regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression - the free and open exchange of ideas - is no less important than it is in the United States of America”. The Court cautioned that “we should be particularly astute to outlaw any form of thought control, however respectably dressed.”⁴¹
- 37 The underlying principle is eloquently captured by Justice Brandeis in *Whitney v California*⁴² where he memorably stated:

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

³⁹ *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) at para 47.

⁴⁰ *S v Mamabolo* 2001 (3) SA 409 (CC) at para 37.

⁴¹ *Ibid.*

⁴² *Whitney v California* 274 US 357, 375-376 (1927).

WB
Bals

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

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

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

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

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

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

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

MP
Bds

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

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

39.3 The ECtHR noted that –

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

39.4 It concluded that:

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

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

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

⁴⁶ *Jersild v Denmark* (1995) 19 EHRR 1 (ECtHR Grand Chamber) at para 31.

⁴⁷ *Ibid* at para 35.

WBS
Bols

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

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

"[T]he methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."⁴⁹
(Emphasis added)

...

Admittedly the item did not explicitly recall the immorality, dangers and unlawfulness of the promotion of racial hatred and ideas of superiority of race. However, in view of the abovementioned counterbalancing elements and the natural limitations in spelling out such elements in a short item within a longer programme as well as the journalist's discretion as to the form of expression used, the Court does not consider the absence of such precautionary reminders to be relevant."⁵⁰

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

⁴⁸ Ibid at para 33.

⁴⁹ Ibid at para 31.

⁵⁰ Ibid at para 34.

⁵¹ See note 45 above.

WB Eds

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

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

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

...

[25] Lastly, e-tv did not ultimately choose sides, but instead left the question open as to whether the policy of the National Commissioner was likely to be effective, given the attitudes of the two interviewees. Although many viewers might, from the point of view of patriotism,

⁵² BCCA 2014 Annual report.

⁵³ *National Commissioner of the South African Police Service and Others v e.tv (Pty) Ltd* Case No 05/2010.

⁵⁴ *Ibid* at paras 16 to 22.

WB Eds

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

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

THE COMMENT CLAUSES AND PRINCIPLES OF INTERPRETATION

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

- 43.1 Clause 28.2 of the Subscription Code provides that:

"28.2.1 Licensees may broadcast comment on and criticism of any actions or events of public importance.

28.2.2 Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to."

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

"(1) Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance.

(2) Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to."

WB Bds

- 44 These comment clauses set out three explicit requirements for comment:
- 44.1 First, it must be an honest expression of opinion.
- 44.2 Second, it must be presented as comment rather than fact.
- 44.3 Third, the comment must be made on facts truly stated or fairly indicated and referred to.
- 45 Section 39(2) of the Constitution compels the Appeal Tribunal to interpret these comment clauses in a manner that both avoids limiting rights and best promotes freedom of expression.⁵⁵
- 45.1 This Tribunal has repeatedly emphasised that the comment clauses must be implemented in a manner that does not unduly limit freedom of expression. In *Grové*,⁵⁶ the Tribunal made the following remarks:

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

⁵⁵ *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at para 87, referring to *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC).

⁵⁶ *Grové v e-tv*, Case No 29/2004 (BCCSA), 22 July 2004.

⁵⁷ *Grové* *ibid* at para 5.

WB Pds

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

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

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

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

⁵⁸ *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at paras 129-131. See further *Hira v Booyesen* 1992 (4) SA 69 (A) at 78.

⁵⁹ *Philip v Talk Radio 702*, Case No 02/2015 (BCCSA), 4 March 2015 at para 7.

⁶⁰ *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28.

⁶¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (CC) at para 18.

⁶² *Karson v Multichoice ANN7 Channel*, Case No 15/2017 (BCCSA), 14 June 2017.

MB
Bale

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

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

- 46 The comment clauses must be interpreted in light of the *Jersild* distinction and the principles that underpin it. Properly interpreted, the restrictions contained in these clauses can only apply meaningfully to comment made by the broadcaster itself, or comment which could be reasonably perceived to be endorsed by the broadcaster.
- 47 To hold otherwise would jettison the vital distinction between mere airing of offensive opinions and endorsement. It would threaten to stifle media freedom and the robust exchange of ideas, by forcing the media to censor views expressed by controversial interview subjects, no matter the public interest in the subject matter, and despite all reasonable steps being taken to distance the broadcaster from these views.
- 48 It would also produce a direct conflict between the provisions of the Codes that deal with hate speech and other harmful forms of speech, on the one hand, and the comment clauses, on the other.
- 49 Both the Subscription Code⁶⁴ and the FTA Code⁶⁵ prohibit the publication of hate speech, incitement of violence, propaganda for war and a range of other harmful

⁶³ *Karson* *ibid* at para 4.

⁶⁴ Subscription Code, clauses 9 – 11.

⁶⁵ FTA Code, clauses 3 – 5.

MB Bds

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

“11.1 broadcasts of bona fide scientific, documentary, artistic, dramatic, literary or religious programming material, which, judged within context, is of such nature;

11.2 broadcasts which amount to a bona fide discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or

11.3 broadcasts which amount to a bona fide discussion, argument or opinion on a matter of public interest.” (Subscription Code)

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

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

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

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

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

WB Bds

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

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

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

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

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

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

ZMB Bds

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

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

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

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

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

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

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

LB Sde

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

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

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

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

⁶⁸ *National Commissioner of the South African Police Service and Others v e.tv (Pty) Ltd* Case No 05/2010 at para 24.

⁶⁹ *Jersild v Denmark* (1995) 19 EHRR 1 (ECtHR Grand Chamber) at para 31

⁷⁰ *Ibid.*

⁷¹ *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) at para 110.

MB Bds

MR ICKE'S VIEWS WERE PROTECTED COMMENT

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

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

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

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

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

⁷² MMA Reply at para 5, reproduced in Tribunal decision p 12 para 4.

⁷³ Tribunal decision at pp 25 – 26 para 21.

⁷⁴ Clause 28.1.3 of the Subscription Code.

LMB Bds

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

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

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

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

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

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

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

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

MB Bds

meaning of these terms. The Constitutional Court explained this in detail in

McBride:⁷⁶

"[81] Nearly a century ago, in the judgment that firmly authenticated the defence in South African law, Innes CJ remarked that the use of the term 'fair' to describe the defence is 'not very fortunate'. He was right. As he explained, the criticism sought to be protected need not 'commend itself' to the court. Nor need it be 'impartial or well-balanced'. In fact, 'fair' in the defence means merely that the opinion must be one that a fair person, however extreme, might honestly hold, even if the views are 'extravagant, exaggerated, or even prejudiced'. The comment need be fair only in the sense that objectively speaking it qualifies 'as an honest, genuine (though possibly exaggerated or prejudiced) expression of opinion relevant to the facts upon which it was based, and not disclosing malice'.

[82] So to dub the defence 'fair comment' is misleading. If, to be protected, comment has to be 'fair', the law would require expressions of opinion on matters of fact to be just, equitable, reasonable, level-headed and balanced. That is not so. An important rationale for the defence of protected or 'fair' comment is to ensure that divergent views are aired in public and subjected to scrutiny and debate. Through open contest, these views may be challenged in argument. By contrast, if views we consider wrong-headed and unacceptable are repressed, they may never be exposed as unpersuasive. Untrammelled debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.

[83] Protected comment need thus not be 'fair or just at all' in any sense in which these terms are commonly understood. Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true. In the succinct words of Innes CJ, the defendant must 'justify the facts; but he need not justify the comment'.

[84] Perhaps it would be clearer, and helpful in the understanding of the law, if the defence were known rather as 'protected comment'. ..."
(Emphasis added)

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

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

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

MB Rds

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

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

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

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

⁷⁸ Tribunal decision p 25 para 20.

⁷⁹ Tribunal decision p 25 para 20.

⁸⁰ Tribunal decision p 25 paras 20-21.

WB Bole

- 69.3 The Tribunal considered Mr Icke's comments to be potentially harmful to the public, and that they had "*life-and-death consequences on society at large*".⁸¹ This was because, if people were convinced by the broadcast that there was no virus, "*people would probably disobey all the regulations*", leading to a new outbreak and many more deaths.⁸² The Tribunal's role, it held, was "*to protect the people of South Africa from harm being caused by the obvious misinformation contained in the broadcast under consideration.*"⁸³
- 70 None of these requirements are to be found in the comment clauses, nor are they consistent with a constitutionally compatible, restrictive interpretation of those provisions. They evince a paternalistic approach which denies that reasonable people are capable of making up their own minds. It is a reversion to the kind of "*thought control*" that characterised censorship under apartheid.⁸⁴
- 71 The only requirement that ought to have been applied was whether the comments were made based on facts fairly stated and referred to.
- 72 The requirement that facts be fairly indicated and referred to does not require the person voicing their opinion to provide an exhaustive reference list to each factual assertion underpinning their opinion. Nor is it clear what "facts" the Tribunal had

⁸¹ Tribunal decision pp 26 - 28 para 22.

⁸² Tribunal decision pp 26 - 28 para 22.

⁸³ Tribunal decision pp 26 - 28 para 22.

⁸⁴ See Gilbert Marcus "Reasonable Censorship?" in H Corder (ed) *Essays on Law and Social Practice in South Africa* (Juta & Co Ltd) 1988 at pp 349 - 360; JCW Van Rooyen *Censorship in South Africa* (Juta & Co Ltd) 1987.

WB Bds

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

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

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

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

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

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

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

WB Bds

- 75.1 There can be no event in the past 75 years that has more dominated the news cycle and the media generally, than the Covid-19 pandemic.
- 75.2 The public generally is informed virtually on an hourly basis of the lethal effect of the pandemic with updates on the number of infections and the number of deaths.
- 75.3 The public is repeatedly reminded of the need for stringent precautions. These are broadcast on all media and by way of daily SMS.
- 75.4 The fact of the pandemic is constantly visible with the wearing of masks being compulsory and the need for social distancing and sanitising.
- 75.5 No reasonable person can be unaware of this, including reasonable viewers of the programme.
- 75.6 The very premise of the programme is the factual existence of the pandemic. As already noted, Mr Cliff states, *inter alia*, that "*curbing this pandemic and saving lives is critical.*"⁸⁷ The question is posed "*how do you balance saving lives with saving livelihoods?*". In his exchange with Mr Icke, Mr Cliff puts it bluntly: "*There are people who are dead.*"⁸⁸
- 75.7 All of this, together with the incredulity and challenges to Mr Icke, are more than sufficient to allow viewers to make up their own minds.

⁸⁷ Timestamp: 4:40.

⁸⁸ Timestamp: 42:00 – 42:18.

MB Bds

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

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

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

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

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

⁸⁹ *Churr v eNCA*, Case No 10/2018 (BCCSA), 20 June 2018.

⁹⁰ *Ibid* at para 7.

⁹¹ *Ibid* at para 14.

⁹² *Gaye Derby-Lewis v Talk Radio 702*, case 19/2013 (BCCSA), 2 July 2013.

Bob
WB

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

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

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

⁹³ Ibid at para 7.

⁹⁴ Ibid at para 8.

⁹⁵ Ibid at para 10.

MB Bels

- 79 When dealing with a self-confessed conspiracy theorist of an extreme sort like Mr Icke, it is difficult to insist on requirements of “facts” from him in any evidential understanding of the term. Mr Icke refers to “*factual evidence*” to support his claim of a “*pandemic hoax*”; he refers to his own books and “*research*”; and he refers to his information having come from “*doctors, virologists and medical specialists*”. Throughout the interview, a screen behind Mr Icke directs viewers to his personal website, “*Ickonic.com*”, where viewers looking to interrogate his comments could access his books, podcasts and films.
- 80 The factual basis for Mr Icke’s opinions is not exhaustively spelled out in the 15 minutes interview, but that is not what is required. The key point is that the viewer is provided with enough information about the factual basis (or lack thereof) for Mr Icke’s opinions and where to find more, should they wish to examine his claims in greater detail. The reasonable viewer, on seeing the interview, would recognise that the opinions expressed are largely speculative conspiracy theories. The purpose of the comment clauses is accordingly met. Moreover, the reasonable viewer will make up his or her own mind, not simply on what Mr Icke says but also on the basis of common sense and the daily inundation of countervailing facts on the pandemic.
- 81 To hold that the broadcast does not meet the requirements of the comment clauses would lead to absurdity. It would mean that a broadcaster is required, in an interview situation, where a person’s personal views are sought on a particular issue, to refrain from broadcasting the interview where the opinion of the interviewee is not exhaustively referenced to detailed facts, or where the interview subject can produce no facts to support their opinions. One can imagine

MB Bds

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

Bals
MB

SANCTION

- 82 For the reasons set out above, the sanction imposed on the appellants cannot stand. Even if the Appeal Tribunal finds that there was a breach of the Codes, the sanction imposed by the Tribunal was manifestly disproportionate and clearly incorrect.
- 83 No reasonable viewer would take the broadcast of the interview as providing them with a reason to stop obeying Covid-19 protocols, any more than they would see it as a good reason to believe in lizard people, or a global governance conspiracy.
- 84 In addition, the Tribunal failed to give appropriate weight to the following factors:
- 84.1 the broadcaster's broad discretion over the means of expression;
 - 84.2 the context of the broadcast;
 - 84.3 the fact that the statements complained of were clearly presented as opinion and not fact; and
 - 84.4 The daily reporting on all media of the lethal nature of the pandemic.
- 85 At the very most, the Tribunal ought simply to have ordered the appellants to broadcast an apology, in the terms they initially proposed.⁹⁶ The imposition of a financial penalty was entirely unwarranted.

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

Bds
WB

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

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

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

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

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

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

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

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

WB Sds

CONCLUSION

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

GILBERT MARCUS SC

CHRIS MCCONNACHIE

10 March 2021

Chambers, Sandton

mb *Bds*

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

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

In the matter between:

eNCA

First Appellant

eTV

Second Appellant

and

MEDIA MONITORING AFRICA TRUST

Respondent

MEDIA MONITORING AFRICA'S WRITTEN SUBMISSIONS

WB Bds

TABLE OF CONTENTS

INTRODUCTION	1
THE TEST ON APPEAL	5
THE LACK OF VALUE IN FALSE STATEMENTS AND THE RISK OF MISINFORMATION	8
THE COMMENT CLAUSE PLAINLY APPLIED	13
<i>The broadcasters' new test is untenable</i>	13
<i>In any event, at best for the broadcasters there was a heightened duty on the to knock down the false statements</i>	19
THE COMMENT CLAUSE WAS PLAINLY BREACHED	27
<i>The meaning of the comment clause</i>	27
<i>The statements by David Icke breached the clause</i>	33
<i>The failures by Gareth Cliff breached the clause</i>	38
THE QUESTION OF SANCTION	42
<i>Cumulative sanctions</i>	44
<i>Wording of the apology</i>	45
CONCLUSION	46

WB
Bds

INTRODUCTION

1 For well over a year, our country and the world have had to grapple with an unprecedented threat from the Covid-19 virus. More than 2.6 million people worldwide have died from the disease, including more than 50 000 South Africans. As the Full Bench of the High Court explained in *FITA*:

“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.”¹

2 eNCA proclaims itself to be “*South Africa’s most watched TV news channel*” and “*South Africa’s most trusted independent TV and online news brand.*”² e.tv proclaims itself to be “*the most viewed English channel in the country*”.³

3 Given the circumstances and these lofty claims, one would have expected that eNCA and e.tv (the broadcasters) would ensure that their broadcasts contributed to providing useful and reliable information regarding the Covid-19 pandemic.

4 Yet, they did exactly the opposite.

5 On 22 and 23 July 2020 – four months into the pandemic – they broadcast an interview between Gareth Cliff and David Icke. During that interview, Mr Icke

¹ Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another [2020] ZAGPPHC 246 at para 1

² <https://www.enca.com/about-enca>

³ <https://www.etv.co.za/about>

made various false claims about the Covid-19 pandemic. He said that it was “a *pandemic hoax*”, that there was an “*obvious scam going on*” and that “*there is no virus*” at all. At no point did the host, Gareth Cliff, ever make clear to viewers that these claims were false.

- 6 In a complaint by Media Monitoring Africa (MMA), the BCCSA Tribunal rightly held that this breached the provisions of the BCCSA Codes dealing with the broadcast of comment. It emphasised the extraordinarily irresponsible nature of the broadcast:⁴

“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.”

- 7 Both the Subscription Code and the FTA Code are quite clear. They allow the broadcast of comment, but the comment “*must be made on facts truly stated or fairly indicated and referred to*”. Or, as the Constitutional Court has explained in a defamation context, a person seeking to establish fair comment “*must justify the facts; but need not justify the comment*”.⁵

- 8 For the broadcaster to succeed in this appeal, they must persuade this Tribunal that the comments of Mr Icke:

⁴ Ruling of the Tribunal at para 22.

⁵ The Citizen 1978 (Pty) Ltd and Others v McBride 2011 (4) SA 191 (CC) at para 83.

Bols
WB

- 8.1 were based on facts; and
- 8.2 those facts were truly stated or fairly indicated and referred to.
- 9 The broadcasters know that they cannot overcome this hurdle. So they try two strategies to muddy the waters and avoid their difficulty.
- 9.1 First, they say that the comment clauses do not apply at all to Mr Icke's comments. This a new argument – it was not pleaded or advanced previously. It has no basis at all in this Tribunal's jurisprudence or in the Code itself. As we show, it is plainly bad.
- 9.2 Second, they say that the "facts" on which a comment must be based need not be true. In other words, they contend that the Code allows for comments based on false facts. That argument too has no basis at all in this Tribunal's jurisprudence or in the Code itself. Again, we show below it is plainly bad.
- 10 We make one last preliminary point:
- 10.1 Throughout their heads, the broadcasters repeatedly pour scorn on Mr Icke and his views. In doing so, they try to suggest that no-one should take his views seriously.
- 10.2 The trouble for them is that this is not what Mr Cliff did during the interview. If the interview was to be aired at all (which it should not be), that is what Mr Cliff ought to have done. But he did not.

- 10.3 Equally, the broadcasters' heads seek to imply that Mr Icke is infamous and therefore no reasonable viewer would take him seriously. But this again not pleaded in the response to the complaint and, moreover, it is plainly wrong.
- 10.4 As the Tribunal's members explained in their ruling:
- "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...."*
- 10.5 It is thus quite clear that members of the Tribunal did not know who Mr Icke was, nor was there any reason for them to know. Are the broadcasters suggesting that Professor Viljoen, Ms Fakude and Mr Naidu are somehow unreasonable viewers?
- 10.6 If so, the broadcasters should say so expressly. If not, their attempt to rely on Mr Icke's supposed infamy is plainly unsustainable.
- 11 In what follows, we address the following issues in turn:
- 11.1 The test on appeal;
- 11.2 The lack of value in false statements and the risk of misinformation;
- 11.3 The comment clause plainly applied;
- 11.4 The comment clause was plainly breached;
- 11.5 The question of sanction.

THE TEST ON APPEAL

- 12 Clause 4.9 of the Procedure of the BCCSA stipulates that “[a]n Appeal Tribunal shall not set aside or amend a decision of the first Tribunal unless it is clearly wrong” (emphasis added). This is a high threshold to meet, and one which we submit the broadcasters have failed to establish in the present matter.
- 13 In *Belter v eTV*, the BCCSA explained that a mere difference of opinion between the Appeal Tribunal and the Tribunal would not constitute grounds for interference by the Appeal Tribunal; rather, intervention at an appeal level will only occur where there was a gross procedural irregularity or where the sanction was clearly inappropriate.⁶ This threshold is applied to ensure that the Tribunal is not treated as a mere stepping stone towards a final appeal, as this would not be acceptable within a structure such as the BCCSA.⁷
- 14 As emphasised in *Belter*, “[t]he first Tribunal is given a particular task and when concluded in a procedurally fair manner, its finding should, in the ordinary course, be final.”⁸ MMA submits that this approach should be followed in the present matter as well, taking into account the following considerations:
- 14.1 The matter was fully ventilated before the Tribunal, both in written submissions and in oral argument. The broadcasters have neither

⁶ BCCSA Case No. 01/2010, undated at para 4.

⁷ Ibid.

⁸ Ibid.

alleged nor established that there was any procedural irregularity in the handling or determination of the complaint.

14.2 It is apparent from the Tribunal's ruling that careful regard was paid to the submissions of the parties, including in meticulously considering the previous cases raised by the broadcasters and distinguishing them on their facts.

14.3 There is nothing raised by the broadcasters to credibly suggest that the Tribunal overlooked or misdirected itself in finding that the Codes had been contravened.

15 Indeed, the Tribunal's ruling is quite consistent with the approach taken in other jurisdictions towards the broadcast of Mr Icke's statements.

15.1 In April 2020, Ofcom – the communications regulatory authority of the United Kingdom – sanctioned a broadcaster for the broadcast of an interview with Mr Icke.⁹

15.2 In a ruling that that closely aligns with the reasoning of the Tribunal in the BCCSA, Ofcom similarly expressed the view that Mr Icke's statements "*had the potential to cause significant harm at a time when health care systems around the world are fighting to contain the deadly impact of the Coronavirus and the scientific consensus is that social*

⁹ Ofcom, 'Ofcom decisions on recent programmes featuring David Icke and Eamonn Holmes', 20 April 2020, accessible at <https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/david-icke-and-eamonn-holmes-decision>.

*distancing, and the public's compliance with it, is a key step to restricting the spread of the disease."*¹⁰

15.3 Notably, in Ofcom's summary of its ruling, it stated as follows:¹¹

"Our investigation found David Icke expressed views which had the potential to cause significant harm to viewers in London during the [Covid-19] pandemic. We were particularly concerned by his comments casting doubt on the motives behind official health advice to protect the public from the virus. ... These claims went largely unchallenged during the 80-minute interview and were made without the support of any scientific or other evidence."

16 Importantly, and contrary to eTV's approach, Ofcom did not hold that David Icke's views about Covid-19 were so far-fetched that they could simply be aired and the viewers could decide. Or that it was notorious that David Icke should not be believed.

16.1 Indeed, Ofcom actually made clear in its decision that it was "*prioritising cases related to the Coronavirus which could cause harm to audiences*".¹²

16.2 Ofcom explained that this would include:

16.2.1 Health claims related to the virus which may be harmful;

16.2.2 Medical advice which may be harmful; and

¹⁰ Ibid.

¹¹ Ibid. (Emphasis added.)

¹² Ofcom decision at p 1

16.2.3 Accuracy or materially misleading programmes in relation to the virus or public policy regarding it.¹³

17 The OfCom ruling makes plain that there was nothing “clearly wrong” in the ruling of the Tribunal that would warrant an interference on appeal.

18 That is precisely the reason that on appeal eTV has had to resort to new arguments that (a) were never pleaded; and (b) have no basis whatsoever in the BCCSA Codes or the BCCSA’s jurisprudence.

THE LACK OF VALUE IN FALSE STATEMENTS AND THE RISK OF MISINFORMATION

19 This appeal is not about the dissemination of ideas or views which are merely controversial ideas or which may be considered offensive to some.

20 This appeal is about the dissemination of Icke’s statements on Covid-19 which were (a) false; (b) known to be false by the broadcaster at the time of the interview; (c) without any indicators to the viewers that the factual claims were false. For instance, it was known that Icke’s claim that no medical research had yet been able to isolate the Covid-19 virus was demonstrably false.

¹³ Ofcom decision at p 1

Eds
MB

21 The Courts both here and abroad have made clear that the publication of false statements are not protected in the same way as the publication of controversial political opinions.

22 In ***Khumalo v Holomisa*** the Constitutional Court held:¹⁴

"There can be no doubt that the constitutional protection of freedom of expression has at best an attenuated interest in the publication of false statements. As Cory J observed in the Canadian case, Hill v Church of Scientology of Toronto¹⁵:

'False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society'."

23 In ***Bogoshi***,¹⁶ the Supreme Court of Appeal made clear that:

"Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper. ... [A] high degree of circumspection must be expected of editors and their editorial staff on account of the nature of their occupation; particularly, I would add, in light of the powerful position of the press and the credibility which it enjoys amongst large sections of the community."¹⁷

24 Most recently in the ***Manuel*** decision the Supreme Court of Appeal held:¹⁸

¹⁴ *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 35

¹⁵ *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 (SCC) at para 106.

¹⁶ *National Media Ltd. and Others v Bogoshi* 1998 (4) SA 1196 (SCA)

¹⁷ *Bogoshi* at para 31

¹⁸ *Economic Freedom Fighters and Others v Manuel* [2020] ZASCA 172, [2021] 1 ALL SA 623 at para 112

"We accept that the spread of misinformation and disinformation on social media platforms is, notoriously, a worldwide concern. ... The spread of falsehoods that threaten or infringe the rights of individuals and the public at large is a legitimate concern."

25 eTV seeks to rely on jurisprudence from the European Court of Human Rights. But the European Court has flatly rejected revisionism on various occasions (similar to Icke's revisionist views on Covid-19).

26 For instance, in ***Garaudy v France***¹⁹ the European Court said the following:

"The book which gave rise to the applicant's criminal convictions analyses in detail a number of historical events relating to the Second World War, such as the persecution of the Jews by the Nazi regime, the Holocaust and the Nuremberg Trials. Relying on numerous quotations and references, the applicant questions the reality, extent and seriousness of these historical events that are not the subject of debate between historians, but – on the contrary – are clearly established. ... There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. ... The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

27 The European Court concluded that, in accordance with Article 17 of the European Convention, the applicant was not entitled to rely on the right to freedom of expression to espouse views denying the holocaust.²⁰

¹⁹ *Garaudy v France*, Application 64496/17

²⁰ The right to freedom of expression under the European Convention is expressly limited in two ways. First, Article 10(2) of the Convention provides: under this provision the exercise of the freedom of expression, "since it carries with it duties and responsibilities may be subject to such formalities, conditions, restrictions or penalties

- 28 The general need of limiting misleading revisionist views is amplified when dealing with a public health crisis like Covid-19. As the WHO Director-General has explained: "*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.*"²¹
- 29 Disinformation about Covid-19 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 ("DMA"), which makes it an offence to publish any statement with the intention to deceive another person about Covid-19 or any measure taken by the government to address Covid-19.²² Icke's views plainly fell into that category, and eTV provided the platform for Icke to air them.

as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Second, Article 17 of the European Convention – the effect of which is that "*no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms*" (see the judgment by the European Court of Human Rights in *Lawless v. Ireland*, judgment on 1 July 1961, Series A no.3, pp 45 - 46 § 7)

²¹ <https://www.who.int/news-room/feature-stories/detail/immunizing-the-public-against-misinformation>

²² Regulation 11(5) of the Regulations issued under section 27(2) of the DMA, as published on 18 March 2020, provides that:

"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."

- 30 Various international experts on freedom of expression have stressed that disinformation undermines – rather than promotes – the right to freedom of expression:²³

“[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.”

- 31 Gareth Cliff’s claim that he gave David Icke a platform to speak because he (Cliff) believes in freedom of speech demonstrates the problem. David Icke has no right to free speech which permits him to engage in the known dissemination of revisionist facts regarding Covid-19 that have the potential to harm others.

- 32 eTV claims in its heads of argument that: *“Truth-finding, the Constitutional Court has held, is best advanced by airing such views, no matter how far-fetched, wrong-headed or offensive they may seem”* and then cites the following passage from the decision in **DA v ANC**:²⁴

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

²³ Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda, 2017. This was published by the Special Rapporteur on Freedom of Opinion and Expression of the United Nations, the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe, the Special Rapporteur on Freedom of Expression of the Organization of American States, and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples’ Rights.

²⁴ 2015 (2) SA 232 (CC) at para 122

33 We agree whole-heartedly that when the topic is Covid-19, then truth-finding matters. But the David Icke interview was not about “truth-finding”.

33.1 Importantly, the very passage that eTV cites emphasises that the value of airing the far-fetched view is to make clear that it is wrong. Cliff did not do so. As we show below, he lent credence to Icke’s statements.

33.2 The same passage that eTV cites emphasises the value of “open debate”. But again there was none of this on Cliff’s show regarding Icke’s statements. Icke was merely given a platform to propound and advance his position and there was no “*debate*” whatsoever with him. He was permitted a platform to espouse his false views without any correction of the content.

THE COMMENT CLAUSE PLAINLY APPLIED

The broadcasters’ new test is untenable

34 Much of eTV’s heads of argument are devoted to positing a new test under the comment provision based on the *Jersild* decision by the European Court of Human Rights.²⁵ In summary, eTV claims the comment clause only applies if the broadcaster itself *endorses* a view. If the broadcaster does not *endorse* the view then the clause does not apply at all.

35 eTV’s appeal on that ground should be rejected for four reasons.

²⁵ *Jersild v Denmark* (Application 15890/89) (23 September 1994)

36 First, the Appeal Panel should not even consider this argument because it was never raised by eTV in its response to the complaint or before the BCCSA Tribunal. As set out above, the broadcaster must show that the Tribunal was clearly wrong – but here eTV is raising new arguments that the Tribunal did not even have an opportunity to consider.

37 Second, the argument is entirely at odds with the text of the BCCSA Code. Clause 28.2.1 of the BCCSA Code makes clear that the comment clause applies where a licensee has decided to "broadcast" comment – not where that licensee "agrees with the comment that it has broadcast".²⁶ There is no inkling whatsoever of eTV's construction in the language of the Code – it would be a complete rewrite of the provision, which is plainly impermissible.

37.1 Knowing this, eTV tries to rely on section 39(2) of the Constitution, in a desperate attempt, to argue that the Tribunal must prefer a construction that better gives effect to the right to freedom of expression. But the Constitutional Court has made clear – time and time again – that section 39(2) of the Constitution is limited to what the words of a provision can reasonably mean, and that the actual text used cannot be "unduly strained".²⁷

37.2 In ***Chetty v M-Net***,²⁸ the Tribunal held that the comment clause in clause 28.2 of the Subscription Broadcasting Code did not apply to a

²⁶ The Comment clause in clause 28.2.2 applies to comment that is referred to in clause 28.2.1: "Licensees may broadcast comment on and criticism of any actions or events of public importance".

²⁷ *Investigating Directorate; Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* 2001 (1) SA 545 (CC) at para 24

²⁸ Case 41/2012

reality show like the cooking challenge *Masterchef* because clause 28.2 only applies to programmes which feature matters of public importance. The Tribunal dismissed an argument that section 39(2) of the Constitution permitted the Tribunal to disregard the wording of the text and held:²⁹

"It is clear that this Tribunal would have to lift the words 'public importance' from clause 28 if it were to broaden the scope of the clause to include all mistakes made by a broadcaster. That would amount to a fundamental change to a clause which obviously does not deal with mundane matters such as the results of a reality show. ... [T]here is no basis upon which we are permitted by section [39(2) of the Constitution] to fundamentally change clause 28.2 to cover the set of facts before us."

37.3 eTV's attempted reliance on general free speech principles are equally misplaced. eTV, for instance, seeks to bolster its argument by referring to the general principle that freedom of speech also applies to speech that "*shocks and disturbs*".³⁰ But those general principles are subject to various requirements and exceptions that have already been considered and built into the fabric and text of BCCSA Codes. There is no challenge to the constitutionality of those Codes. It follows that the Codes must be interpreted and applied as they stand.

37.4 In *Reinhardt's Place*, the Appeal Tribunal set aside the Tribunal's decision where the Tribunal had 'lifted' words from one clause of the

²⁹ Ibid at para 12

³⁰ *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754

BCCSA Code and imposed them on another clause on the basis of section 39(2) of the Constitution.³¹

"[I]t is clear that Clause 28.4 already incorporates the spirit, objects and purport (Section 39(2) of the Constitution) of the Bill of Rights insofar as privacy and dignity are protected with the corrective of public interest, which does not go against the Human Rights Bill. Therefore, it is not necessary to widen the clause any further."

... The members of the Appeal Tribunal are of the opinion that the language used in Clause 28(4) is not ambiguous and that broadcasters are not in the dark with regard to its meaning. ... It seems that it was a conscious decision of the drafters of the Subscription Code to protect dignity only in news, comment and in cases of public interest and not in entertainment programmes ..."

38 Third, eTV's construction is at odds with the purpose of the BCCSA Codes. The overarching purpose and theme that runs through the Codes is that the buck stops with the broadcaster. eTV is held accountable because it viewed the finished programme (one assumes) and considered the content of the interview between David Icke and Gareth Cliff and decided to air it – as is.

38.1 eTV's construction would create a free-for-fall where broadcasters could broadcast whatever they liked – no matter how damaging or false, as long as they did not expressly "endorse" it. Accountability could be side-stepped simply by broadcasters obscuring their attitude towards the views expressed in the programme.

38.2 The point of the Codes is that the broadcaster provides the stage and platform for the message, it therefore bears responsibilities in relation

³¹ MultiChoice Kyknet Channel 144 v Reinhardt's Place and Another Case Number 43/2014 (AT) at paras 8 – 10

to the content of that message. Cliff himself admitted that he provided a platform for Icke to explain his position.

39 Fourth, eTV's construction is entirely at odds with the jurisprudence of the BCCSA Tribunal and Appeal Panel. Critically none of the BCCSA cases cited by eTV, which refer to the **Jersild** case, dealt with the comment clause in the BCCSA Code. Most of those cases dealt with hate speech. And – critically – none of the dozens of BCCSA comment cases in the Tribunal or the Appeal Panel introduced the requirement that a broadcast needs to endorse a view before the comment clause applies.

39.1 Indeed, the **Kriel** case³² – one of the cases eTV refers to as citing **Jersild** demonstrates the opposite. The BCCSA Tribunal made clear that the key question was not whether the host endorsed the hateful view but whether the host stepped in where there was a duty to do so.

39.2 The BCCSA held that "*an experienced interviewer will know when to step in and bring balance or a correction to the interview*"³³ and in that instance the host "*brought in a correction where she reminded the interviewee that the freedom that South Africans now enjoy was fought for by both Black and White people. She furthermore did not concur with the hatred nor did she encourage such views.*"³⁴

³² *Kriel and Lombard v SABC2*, Case number 22/A/2014

³³ *Ibid* at para 10

³⁴ *Ibid* at para 10

39.3 Whether the host endorsed the views was merely one factor in assessing whether the host complied with the duty to bring balance and correct the interviewee where necessary. Cliff – by contrast – remained entirely silent when Icke uttered known falsities about the Covid virus.

39.4 The *Kriel* case was not just a one-off. The same approach was followed in the case of *Nzimande v SABC (SAFM)*.³⁵ During a programme with three panellists the host took comments from callers. One caller claimed that the entire Cabinet was corrupt without providing any factual basis for that claim. Minister Nzimande complained and the Tribunal found as follows:

*[4] ... Although we accept, as stated unconditionally by the SABC, that the caller's view is not the view of the SABC, the SABC has to take responsibility for the content of its broadcasts – including this one. An omission to correct or comment may, in certain circumstances, also amount to a contravention of the Code. There is no reason to deviate from a long line of cases in the law of delict which have made it clear that an omission may also amount to a delict in circumstances where it was reasonable to have acted.*³⁶

*[12] ... My view is that the caller's words, which were so clearly defamatory, were in need of some form of qualification by the SABC's presenter. She, however, said nothing to counter them. I should add that I do not believe that there was any evidence of malice on her part. It was a difficult situation to address, and clearly required extensive broadcasting experience.*³⁷ (Emphasis added)

³⁵ *Nzimande v SABC (SAFM)* Case Number: 30/2014

³⁶ *Ibid* at para 4

³⁷ That case dealt with a complaint based on clause 15 of the BCCSA Code, which provides: "Broadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest. ... Public interest will, of course, not be a defence on its own. In the case of defamation, for example, the defence is public interest and truth."

39.5 Like eTV's broadcast, it took place in the context of a programme that was not news but comment. There was no suggestion that unless there was endorsement by the host the broadcaster is off the hook because the comment provisions in the Code are not triggered.

In any event, there was a heightened duty on the to knock down the false statements

40 eTV's construction would require a radical departure from previous comment cases and for the reasons above, the construction is entirely without merit. Even if the position in *Jersild* were somehow applicable, the holding in *Jersild* was not, as eTV suggests, that endorsement is always required for liability to a broadcaster. Rather, the European Court found that the criminal punishment of a journalist for publishing the statements made by another person should not be envisaged "unless there are particularly strong reasons for doing so".

41 If the Icke interview was to be aired at all, there are "*particularly strong reasons*" that the host was required to indicate and demonstrate that Icke's views are false. In other words, merely refraining from "endorsing" Icke's statements was patently insufficient.

42 First, the interview was with someone whom Cliff knew (but the public did not know) generally ignores and manipulates facts.

42.1 In assessing whether a broadcast – whether news or comment – was lawful some consideration is given to "*the nature of the information on*

which the allegations were based and the reliability of their source".³⁸

David Icke is neither a respected journalist nor a researcher of any kind. Quite the opposite, David Icke has some of the most absurd views and frequently distorts facts and misleads the public. But the viewers were not told this.

42.2 eTV claims that there was frequent reference³⁹ to David Icke's views about reptilian overlords. With respect, that is entirely incorrect. There were a few extremely vague references made to "lizard overlords". These were unexplained and would have meant nothing to most viewers, who – like the three Tribunal members who heard the matter – did not know who Icke was.

42.3 The viewer was not provided with any real context on Icke or that the references to "lizards" were not metaphorical – nor figurative or hyperbole – but that David Icke actually claims to believe that the world is run by actual lizards. That is precisely why eTV for the first time on appeal – seeks to explain Icke's position in more detail and then to suggest that Icke was obviously a lunatic thus Cliff need not refer to the fact that Icke's views were false. We agree that this background context about Icke was critical but it was entirely absent in Cliff's broadcast.

42.4 If the Cliff was serious about presenting the viewers with an accurate picture of Icke's lack of credibility, Cliff would have done at least the following:

³⁸ *Bogoshi* at para 31

³⁹ eTV's heads of argument at p 1 para 2.

- 42.4.1 Cliff would have told viewers clearly that David Icke claims to truly believe that an elite group of people, including Queen Elizabeth, George W. Bush, and Bill and Hillary Clinton are not human beings at all. Instead they are shape-shifting reptilian humanoids – in fact many of the elite are part of this reptilian race.
- 42.4.2 Cliff would have explained that this is not a science fiction novel but Icke's "factual" account of how the world actually works.
- 42.4.3 Cliff would have provided viewers with a choice quote or two from the "facts" set out in Icke's book '*The Biggest Secret: The book that will change the world*' – first published in 1998 where he says the following:

"[A] reptilian race from another dimension has been controlling the planet for thousands of years. I know other people who have seen [George] Bush shape-shift into a reptilian."⁴⁰

"[There is an] obsession with interbreeding among the Elite bloodline families. They are seeking to maintain a genetic structure which allows them to move between dimensions and shape-shift between a human and reptilian appearance."⁴¹

"These reptile full-bloods and reptile-possessed people hold the major positions of power in the world or work in the background controlling those in the positions of apparent power like prime ministers and presidents. Having a reptilian or reptilian-controlled human as president might sound fantastic if you have allowed yourself to have your vision of possibility suppressed to

⁴⁰ The Biggest Secret at p 64

⁴¹ The Biggest Secret at p 65

the size of a pea, but when you see the evidence put together over thousands of years, it makes perfect sense of the 'mysteries' of history".⁴²

42.5 But Cliff did none of that. Instead, he afforded David Icke the same courtesy as all other guests on the programme where the premise is: *"you get to make up your own mind. I'm not selling any narrative. Do we have a deal?"⁴³*

42.6 While David Icke might well be "notorious" in other countries – the extent of him publishing untruths and distorted and misleading facts is not known to the reasonable South African viewer. The members of the BCCSA Tribunal made clear that they had no idea who Icke was and thought he was possibly a medical doctor.⁴⁴

43 Second, there was the need to stop the spread of misinformation surrounding the Covid-19 pandemic. Governments around the world are having enough trouble ensuring that the public comply with social distancing measures and proper hygiene. The last straw – as far as YouTube, Facebook, the BBC and Chris Roper (a former editor of the Mail & Guardian) are concerned – was David Icke's Covid-19 theories.

43.1 As the Tribunal correctly explained:⁴⁵

⁴² The Biggest Secret at p 454

⁴³ Timestamp: 06:00 – 06:07

⁴⁴ Ruling of the Tribunal at para 20.

⁴⁵ Ruling of the Tribunal at para 22.

“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.”

43.2 Since March 2020, the Covid-19 pandemic has posed an unprecedented threat to the lives of South Africans. Our courts have recognised this in emphatic terms.

43.2.1 In **Democratic Alliance v President**, a Full Bench of the High Court explained that the “invasion of the Covid-19 virus into South Africa, threaten[s] untold physical, social and economic harm”.⁴⁶

43.2.2 In **Mohammed v President**, the High Court held:

“This pandemic poses a serious threat to every person throughout South Africa and their right to life, dignity, freedom of movement, right to access healthcare and their right to a clean, safe and healthy environment. In a country where we are dominated by so much poverty, where people don’t have access to basic amenities such as clean running water, housing, food and healthcare, the potential risk to those households poses a further threat which places an additional burden on the Government to combat – the risk then, in light of those circumstances rises exponentially.”⁴⁷

43.2.3 In **Moela v Habib**, the High Court took a similar approach:

⁴⁶ *Democratic Alliance v President of the Republic of South Africa and Others (Economic Freedom Fighters Intervening)* [2020] ZAGPPHC 237 at para 1

⁴⁷ *Mohamed and Others v President of the Republic of South Africa and Others* [2020] 2 All SA 844 (GP) at para 62

"The world has changed, and we are all in a quandary as to how to go about our daily lives in view of the pandemic. I would implore the applicants and all other students seeking to ignore the Directives issued by the University, in the spirit of Ubuntu, to follow the protocols issued by the University, the President, the NCID and the WHO. This is an unprecedented time for all of us. We are stronger if we work together. Nkosi sikelel' iAfrica."⁴⁸

43.3 eTV as a leading broadcaster should have shown scrupulous responsibility and compliance to their obligations under the BCCSA Code when it comes to dealing with Covid-19. eTV did precisely the opposite.

44 Third, David Icke's views on Covid-19 are not "controversial" as Cliff suggested – they are patently false once a viewer has been provided with the facts. But eTV failed to ensure that those facts were presented as part of the interview with David Icke.

44.1 Following an interview in April 2020 – months before the eTV interview – David Icke's views were discredited, pulled from various reputable sites and David Icke was banned from YouTube⁴⁹ and Facebook.⁵⁰ Moreover, as set out above, the UK Regulator – Ofcom found on 20 April 2020 that the London Real interview with Icke violated the applicable UK Code.

⁴⁸ Moela and Another v Habib and Another [2020] ZAGPJHC 69 at para 60

⁴⁹ "YouTube terminates David Icke's account over Covid-19 conspiracy theories", dated 2 May 2020 – available at: <https://www.itv.com/news/2020-05-02/youtube-terminates-david-ickes-account>

⁵⁰ "Coronavirus: David Icke kicked off Facebook", dated 1 May 2020 – available at: <https://www.bbc.com/news/technology-52501453>

- 44.2 All that eTV says of the Ofcom decision is that the relevant UK code catered for a *“far broader category of prohibited material than the comment clauses under the BCCSA Codes”*⁵¹ and that, by contrast to Gareth Cliff, the *“interviewer offered no meaningful challenge”*⁵² to Mr Icke and gave him *“free rein to espouse his view that Covid-19 is a hoax”*.⁵³
- 44.3 But the complaints are similar in material respects. As we show below, like the London Real piece, Mr Cliff offered no meaningful challenge to Icke’s views. Quite the opposite, he expressly refrained from commenting on them and repeated his refrain that the public would decide for themselves – importantly – without being told the full context. Importantly, the premise underlying the UK Ofcom decision was that – even though Icke’s information was patently false and far-fetched – there was still risk that UK reasonable viewers may believe Icke.
- 44.4 Critically, Cliff and eTV knew all of this at the time the interview was conducted and aired but still Cliff failed to squarely test Icke’s propositions (when there had already been worldwide criticism of Icke’s position) but the viewer would not necessarily know about it and was not given the proper context from Cliff’s interview.
- 44.5 It was extremely simple for him to do so. For example, on 1 May 2020, for instance, the BBC reported that “Facebook has taken down the

⁵¹ eTV’s heads of argument at p 38 para 86.1

⁵² eTV’s heads of argument at p 38 para 86.3

⁵³ eTV’s heads of argument at p 38 para 86.2

official page of conspiracy theorist David Icke for publishing ‘health misinformation that could cause physical harm’.” Note that the BBC reporting about Icke says: “Mr Icke has made several false claims about coronavirus, such as suggesting 5G mobile phone networks are linked to the spread of the virus. In one video, [Icke] suggested a Jewish group was behind the virus”.⁵⁴ Icke’s comments were – rightly – not described as ‘controversial views’ that make sense to some people (as Cliff did).

44.6 Cliff not only failed in his duty to push back and demonstrate that Icke’s claims were false. Cliff suggested that a viewer might not “*buy*” the “*lizard stuff*” but might buy some of Icke’s other ideas – the clear implication of that was that some of Icke’s other views may be more reliable and have merit.

45 The arguments advanced on appeal appear to be that a broadcaster can comfortably broadcast statements even when (a) they are entirely false; and (b) the broadcaster does not demonstrate that falsity to its viewers. This grossly misunderstands what is required of a broadcaster – as is illustrated by the decisions in *Kriel* and *Nzimande*.

46 We now show how the Codes were breached.

⁵⁴ <https://www.bbc.com/news/technology-52501453>

THE COMMENT CLAUSE WAS PLAINLY BREACHED

The meaning of the comment clause

47 eTV's case rests on the premise that under the BCCSA Codes a comment can be made on "false facts". eTV claims:

*"The facts upon which the comment is based may be true, false, far-fetched or entirely made up, as long as some 'fair' reference is made to them."
(Emphasis added)*

48 This makes no sense whatsoever, textually or at the level of principle.

49 Clause 28.2.2 of the Subscription Code and clause 12.2 of the FTA Code 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.)

50 Clause 28.2.2 of the Subscription Broadcasting Code and clause 12.2 of the Free to Air Broadcasting Code recognise that comment may be broadcast, provided that the following requirements are met:

50.1 The comment must be an honest expression of opinion.

50.2 The comment must be presented in such a manner that it clearly appears to be comment.

50.3 The comment must be made on facts truly stated or fairly indicated and referred to.

51 Read purposively and contextually as clause 28.2.2 must be,⁵⁵ the word “facts” means what it says.

51.1 The Oxford Shorter English dictionary defines a fact as “*a thing known for certain to have occurred or to be true*”.⁵⁶

51.2 The Cambridge Dictionary defines a fact as “*something that is known to have happened or to exist, especially something for which proof exists, or about which there is information*”.⁵⁷

51.3 The South African Oxford Dictionary defines a fact as “*a thing that is indisputably the case*”.

52 Indeed, at a textual level, the very idea of “*false facts*” is a contradiction in terms.

53 eTV’s interpretation is also entirely at odds with the various other references to the term “*facts*” in the BCCSA Codes. For instance, Clauses 28.1.3, dealing with news, make clear that the word facts means “true facts”:

“28.1.3 Only that which may reasonably be true, having due regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with due regard to context and importance. If a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate clearly that such is the case”

⁵⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras 18 – 19

⁵⁶ Shorter Oxford English Dictionary, Oxford University Press (2007 edition)

⁵⁷ <https://dictionary.cambridge.org/dictionary/english/fact>

- 54 If facts could be “*entirely made up*” then the journalists and broadcasters who agreed to be bound by the BCCSA Code would not have used the term “facts” at all. At the very least, there would have been some form of explanation in the provisions of the Code.
- 55 eTV’s construction would render the comment clause entirely pointless. The notion of facts being “far-fetched” or entirely “made-up” is equally misguided when the common law legal position is considered, which has been frequently cited by the BCCSA Tribunal.
- 56 Our courts have made clear – with unwavering clarity – that the purpose of requiring facts to be true or fairly indicated is to ensure that viewers are able to make a clear distinction between fact and comment. If this is not done, then viewers are left to assume the authoritative nature of the statements being made, even in cases where they may be patently false (as Icke’s claims are).

56.1 In ***Roos v Stent and Pretoria Printing Works Ltd***, quoting from ***Hunt v Star Newspapers Co***, Innes CJ explained as follows:

“[I]f fact and comment be intermingled, so that it is not reasonably clear what portion purports to be inference, [the reader or viewer] will naturally suppose that the injurious statements are based on adequate grounds known to [the writer or broadcaster], though not necessarily set out by him.”⁵⁸

56.2 Innes CJ explained further as follows:

“I do not desire to say that in all cases the facts must be set out verbatim and in full; but in my opinion there must be some reference in the [article

⁵⁸ *Roos v Stent and Pretoria Printing Works Ltd* 1909 TS 988 at 999. (Emphasis added.)

or broadcast] which indicates clearly what facts are being commented upon. If there is no such reference, then the comment rests merely upon the writer's [or broadcaster's] own authority."⁵⁹

57 The approach by the Tribunal is consistent with the findings of the Constitutional Court in **McBride**,⁶⁰ where it was explained that "to receive the benefit of the defence [of protected comment] it must be clear to those reading a publication 'what the facts are and what comments are made upon them'."⁶¹ In sum, "the defendant must justify the facts; but need not justify the comment."⁶²

58 eTV's position is also entirely at odds with the manner in which the Tribunal has applied the comment clause before. It follows that if eTV's radical approach were to be adopted then heaps of prior cases decided over the last decade by the BCCSA would have been wrongly decided. eTV has not shown that this is so. If that is eTV's position then, again, it must say so expressly. Investigative journalist programmes such as *3rd Degree* and *Carte Blanche* have not been permitted to base their comments on facts that they have themselves made up. Quite the opposite, the Tribunal interrogates the truth value of the facts. This is clear from the various decisions referred to elsewhere in these heads.

59 As this Tribunal has held in upholding a clause 28.2.2 complaint against *Carte Blanche* in **Diamond v Carte Blanche**:⁶³

⁵⁹ Ibid at 999-1000.

⁶⁰ *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC)

⁶¹ Above n **Error! Bookmark not defined.** at para 88.

⁶² Ibid at para 83. (Emphasis added.)

⁶³ at para 13

“The next alleged error in the programme is significant. There is reference to an eviction order having been granted against the Diamonds and the allegation made that, in spite of this, the Third Complainant – and thus Mrs Diamond (as sole director of the Third Complainant) and indirectly Mr Diamond, remained in occupation of the property. ... The implication [i.e. the comment or opinion] is clear: the Complainants had been occupying La Montanara illegally during the time they were operating it as a wedding venue, in spite of an eviction order. This reference to an eviction order is not based on the truth”.

60 The Tribunal concluded that: *“It is simply not true or reasonably connected to the truth that an eviction order had been issued. The implication of criminality was, accordingly, unfounded”*. If eTV's radical construction of the BCCSA Codes were correct and facts can simply be made up as long as they are referred to then the **Diamond** decision, the **isiMangaliso** decision⁶⁴ and various other careful decisions previously given by the Tribunal were wrongly decided. This demonstrates how untenable eTV's position is.

61 In **eNCA v Strydom and Taylor**⁶⁵ the Appeal Panel analysed a comment made by a news anchor at the end of a broadcast. The reporter made the following remark: *“[Orania] ... that enclave of White people, designed to be like that, and I repeat that Black people are only welcome there if they are domestics or they are [gardeners].”* The Appeal Panel held:⁶⁶

“The [broadcaster] submitted to members of the Tribunal that the comment was based on facts and was truly stated based on the overall reputation of the [Orania community], which the [broadcaster] stated it deduced from

⁶⁴ *Isimangaliso Wetland Park Authority v Electronic Media Network BCCSA 02/2016* – see for instance paras 55 to 57

⁶⁵ Case Number 14/2019

⁶⁶ *Ibid* at para 12

its social media platforms where there were numerous allegations of racism against the [Orania community]. ... These views did not form part of the broadcast and could not be relied on as the factual basis for the newsreader's comment."

62 The Appeal Panel rejected the so-called inside information about the Orania community from other sources because "*this was not referenced in the comment made by the newsreader in the broadcast, with the result that the comment was not made on facts truly stated, or fairly indicated and referred to*".⁶⁷

63 Critically, in the **Strydom** case the comment made by the host was not based on the facts. The facts that emerged from the people interviewed in that particular segment were, as set out in the BCCSA, that:

"Representatives from Orania said repeatedly that the community was built on three principles including the fact that all forms of labour be done by Afrikaners – even gardening and house cleaning. At one stage the field reporter remarked that he himself made the observation that all the work, [including] the domestic work as the hotel, was done by Afrikaners".⁶⁸

64 In other words, the evidence presented in the programme as true was that: in Orania black people are not permitted to be part of the community, all jobs including gardeners and domestic workers must be Afrikaans people. The host was – of course – entitled to express his view on the Orania system being reprehensible, exclusionary and racist. But what the host could not do was invent a fact. Broadcasters and journalists must present the facts, not invent them.

⁶⁷ Ibid at para 14

⁶⁸ Outlined at para 4 of the Appeal Judgment.

The statements by David Icke breached the clause

65 In the present matter, no effort was made to provide a factual basis for the impugned statements. For instance, in describing COVID-19 as “a pandemic hoax”, Icke states that he has “absolute factual evidence” to support the statement. However, he does not indicate or refer to any facts in support of this. This is similarly so in respect of the other impugned statements identified in MMA complaint and reply,⁶⁹ as the table below (reproduced from the papers) demonstrates:

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 COVID-19 “have been widely described as a sign	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

⁶⁹ MMA complaint, 21 August 2020 at paras 14-17; MMA reply, 7 September 2020 at para 7.

	of what dedicated leaders can achieve". ⁷⁰ 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." ⁷¹	
"[The World Health Organization] was created by people like the Rockefeller family to control global health policy from a central point"	No. The World Health Organization is a specialised agency of the United Nations, and was created by member states to the United Nations.	No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts
"[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"	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.	No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts

⁷⁰ Brightness Mangolothi & Malesela Maubane, 'Effective communication from leadership is essential during a crisis', *Mail & Guardian*, 15 April 2020.

⁷¹ Charles Shey Wiysonge, 'South Africa's war on COVID-19', *Think Global Health*, 20 April 2020.

MB Sds

<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. Again, that is false and was known to be false at the time of the interview. In fact, various studies in fact were able to isolate the pathogen in patients from as early as February 2020.⁷² 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 2020.⁷³ 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</p>	<p>No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts.</p>

⁷² J Kim, Y Chung et al, “Identification of Coronavirus Isolated from a Patient in Korea with COVID-19”, Osong Public Health Research Perspective, republished in the US National Library of Medicine, National Institutes of Health available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7045880/>

⁷³ Stellenbosch University, ‘South Africa obtains first laboratory isolate of SARS-CoV-2’, *News Medical*, 11 May 2020.

WB Sds

	it in a secure containment facility. ⁷⁴	
“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”	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 of South Africa.	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

66 As regards Icke’s reference to unspecified “doctors, virologists and medical specialists” who backed up his version – in the discredited London Real interview that was the subject of the Ofcom complaint – David Icke referred to one of the actual sources: a YouTube video of a New York Doctor who Icke alleges “*broke ranks*” and confessed that there was no such thing as Covid-19. But when one goes and looks at the interview with the Doctor nothing could be further than the truth.⁷⁵

67 Again, this is not a scenario of an individual forgetting to refer to factual information that actually exists. It is an individual who distorts factual information and who – eTV and Gareth Cliff – knew had distorted the only ‘facts’ that Icke referred to. But still there was no attempt to state that Icke was incorrect or refer to the fact that Icke’s views on Covid-19 were demonstrably false.

⁷⁴ Harry Cockburn, ‘Coronavirus: Scientists isolate virus responsible for deadly COVID-19 outbreak’, *Independent*, 13 March 2020.

⁷⁵ Dr Cameron Kyle-Sidell was not saying (as Icke suggests) that Covid-19 did not exist. Rather his discussion was questioning the use of ventilators and the new nature of Covid-19 and how it could better be treated: https://www.youtube.com/watch?v=UmS4AL_jUeE

68 At no stage – either in response to the complaint or in either of the applications for leave to appeal – have the broadcasters sought to refute the abovementioned falsehoods contained in the broadcasts.

69 Instead, the broadcasters claim that Mr Icke does make some reference to the facts on which his opinion rests. But those facts are demonstrably false.

70 Contrary to the position espoused by the broadcasters, MMA submits that these blithe references made by Mr Icke exacerbated the harmful nature of the broadcasts. In particular, Mr Icke created the false impression that he had credible information to verify the claims he was making, without pointing the viewer to any such evidence to be able to test the credibility of his claims. In this regard, as correctly noted by the Tribunal:

“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 COVID-19 because this virus was only identified towards the end of 2019 ... If Mr Icke’s statement was intended to create the impression that he had done 30 years’ research on COVID-19, this comment was not justified – plainly put, it was a lie.”⁷⁶ (Emphasis added)

71 It is also not helpful to the broadcasters’ case that the other segments in the show contained more credible guests discussing the COVID-19 pandemic. To the contrary, this would likely result in the ordinary viewer treating Mr Icke with the same level of credibility as the other guests. In any event, the Codes require

⁷⁶ Ruling of the Tribunal at para 20. (Emphasis added.)

each expression of comment to themselves be justifiable by facts that are true or fairly indicated and referred to. In the present matter, Mr Icke was given a platform to disseminate patent falsehoods regarding the global pandemic, without any substantiation and in circumstances where the host himself made little to no credible effort to counter these views. This is simply not countenanced by Clause 28.2.2 of the Subscription Broadcasting Code and clause 12.2 of the Free to Air Broadcasting Code.

72 MMA submits that there was ample evidence before the Tribunal for it to have correctly come to the conclusion that the comments contained in the broadcasts were not based on facts truly stated or fairly indicated and referred to. The broadcasters have failed to provide any evidence to the contrary. Accordingly, there is no basis to find that the Tribunal was “clearly wrong” in finding that the broadcasts contravened clause 28.2.2 of the Subscription Broadcasting Code and clause 12.2 of the Free-to-Air Broadcasting Code, and the appeal falls to be dismissed.

The failures by Gareth Cliff breached the clause

73 Importantly, when the interview was broadcast on 22 and 23 July 2020 there was nothing “*controversial*” about David Icke’s opinions or the facts that they were based on. Quite the opposite, Icke’s views were demonstrably false.

74 Cliff said the following:

74.1 He described David Icke as “*having some controversial opinions*”

74.2 “Now some of what you say may sound crazy to some people, some of it makes sense to some people, but I’m a proponent of free expression, even if I don’t buy it, and everyone gets to decide for themselves”.

74.3 “We won’t have time to interrogate this in any detail”

74.4 “With you being banned from so many platforms ... how can we find the balance, in your opinion, between blocking perceived harmful narrative and allowing actual freedom of expression? And who gets to decide, David?”

75 eTV seeks to place a lot of emphasis on what Cliff apparently *intended* by including the interview segment with David Icke and its apparent purpose. eTV then claims that: “At no point does Mr Cliff ask Mr Icke to provide his views on Covid-19. In fact, Mr Cliff makes clear that he is not seeking to give airtime to Mr Icke’s Covid-denialism”.⁷⁷

76 With respect that is expressly contradicted by Gareth Cliff himself when he says:

“Well I’m pleased to have given you a place to tell your story and to explain your position because so many people would rather shut you down but I think there are many of us who are left more confused than when we started”. (Emphasis added)

77 Cliff then says he plans to get Icke “on the radio show as well, give you some room” – to give further airtime for Icke to explain his views.

⁷⁷ eTV’s heads of argument at p 9 para 29.

78 In fact, portraying something that is patently false as “debatable” or “controversial” is a technique that has been used throughout history to counter actual evidence that: (a) there is a link between smoking and lung cancer; (b) there is a link between HIV and AIDS; (c) that the holocaust, in which approximately 6 million Jewish people were murdered by the Nazi party, took place.

79 The reasonable viewer would assume that a trusted source like eTV would not host someone actively spreading disinformation, which was known to be false, without demarcating this. Particularly where, as eTV points out, the premise of the show is:

“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.”⁷⁸ (Emphasis added)

80 David Icke is not a great mind. Cliff did not say that David Icke’s views were nothing more than a harmful untrue narrative. Quite the opposite, Cliff said Icke’s views were merely “perceived” by some as harmful while “some of it makes sense to some people”. Which parts? The viewer was never told.

81 In response to the extraordinary statements by Icke that “what I would call a pandemic hoax” and “The WHO was created by people like the rockerfeller family

⁷⁸ eTV’s heads of argument at p 4 para 8; Response to complaint at para 7.

to control global health policy from a central point”, the host’s immediate response is not to disagree at all but say:

“Part of the reason I was curious to have you on is because this almost feels like a perfect storm for this kind of suppression of information, conspiracy theory stuff – it looks like the world is ripe for all of this to take root at the moment because people just don’t know who to believe, right?”

82 In various instances, Cliff was either silent, or expressed affirmation or agreement with such views, including by stating that *“I’m pleased to have given you a place to tell your story and to explain your position”*.

83 Indeed, at times the host repeated the views expressed by Icke without in any way gainsaying or challenging them, for example:

“You’ve been very vocal about this coronavirus pandemic being a planned conspiracy theory, a conspiracy rather for global governance. We won’t have time to interrogate this in any detail”. (Emphasis added)

84 The word “interrogate” implies that there was a view that could still be interrogated, i.e. that there might possible be some degree of merit in Icke’s view. But Cliff suggesting as much is patently false.

85 Chris Roper, a former editor of the Mail & Guardian, summed up Cliff’s various failures as a host in an opinion piece:⁷⁹

“Is it OK to hate Jews, and to blame them for the creation of the coronavirus? Is it OK to decide that the coronavirus doesn’t exist, and that if it does it’s spread by 5G technology, so it’s OK to beat up mobile technicians and set

⁷⁹ C Roper, “How conspiracist David Icke ‘confused’ Gareth Cliff”, published in *Financial Mail*, dated 6 August 2020 available at: <https://www.businesslive.co.za/fm/features/2020-08-06-how-conspiracist-david-icke-confused-gareth-cliff/>

fire to mobile infrastructure? I don't know! Can we ever know? You decide for yourself. That's freedom, buddy. I didn't invent it.

Some people on social media proffered a defence of Cliff's decision to host Icke [before the programme aired], by claiming that he would use his Superior Intellect™ to demolish Icke's arguments. That never happened, of course, and in fact Cliff very openly laid out his own rationale for his decision. 'I need to put a disclaimer upfront. You have been banned from social media platforms, and even from appearing on television internationally, for putting out what has been reported as harmful information,' he said."

86 Ironically, as Roper notes, a "controversy" is defined as a discussion marked by the expression of opposing views.⁸⁰ There was nothing of the sort in Cliff's broadcast. For these reasons, too, the programme failed to comply with the comment clause in the BCCSA Codes.

THE QUESTION OF SANCTION

87 As noted above, the Appeal Panel will not upset the Tribunal's decision at all unless it was clearly wrong.

88 But this is particularly so in relation to the question of sanction. Even in court proceedings, appeal courts defer to the lower court on the issue of sanction, it can only do so where there is an irregularity of such an extreme nature that the irregularity is said to result in "a failure of justice".⁸¹

⁸⁰ Ibid

⁸¹ *Bogaards v S* 2013 (1) SACR 1 (CC) at paras 41 – 42

89 eTV was, with respect, extremely lucky that the Tribunal was a lenient as it was. Given the content of the broadcasts and the conduct of the broadcasters, as well as the seriousness of the contravention, MMA submits that the broadcasters were appropriately sanctioned with both an apology and a fine for the following key reasons:⁸²

89.1 First, the broadcasts were harmful in nature in the context of a global health crisis. In this regard, the broadcasts were a clear example of disinformation pertaining to the COVID-19 pandemic.

89.2 Second, the broadcasts were unlawful in terms of the Regulations issued section 27(2) of the Disaster Management Act.

89.3 Third, the harmful and unlawful content was intentionally broadcast in circumstances where the broadcasters were aware thereof.

89.4 Fourth, the broadcasters have shown no remorse or contrition for their conduct or the violation of the Codes.

89.5 Fifth, the broadcasters have elected to continue to perpetuate the harm of the broadcasts through the ongoing publication on their website.

90 It is apparent from the ruling of the Tribunal that the sanction was informed by a confluence of considerations, including the sincerity of the broadcasters' proposal to broadcast an apology while the broadcasts remain accessible on the eNCA website;⁸³ the potential harm to the population resulting from the

⁸² Ibid at para 27

⁸³ Ibid at para 29.

broadcasts;⁸⁴ the failure by the host to counter the misinformation divulged by Mr Icke;⁸⁵ and the seriousness of the contravention and the potential harm it could have caused.⁸⁶

91 In the light of these considerations, MMA submits that the Tribunal was not wrong, let alone “clearly wrong”, in making its determination regarding the sanction. Accordingly, the application for leave to appeal falls to be dismissed.

Cumulative sanctions

92 According to eTV, there is no precedent for both an apology and a fine being ordered by the Tribunal. There is, however, ample authority which shows that cumulative sanctions may be imposed:

92.1 In ***Loonat v Radio Islam***, the Tribunal ordered both an apology and a fine taking into consideration the seriousness of the contravention.⁸⁷

92.2 In ***Hubbard and Warburton v Multichoice***, the Tribunal accepted the apology by Multichoice, but was still of the view that the error amounted to aggravated negligence that was likely to have a very harmful effect on a substantial number of persons.⁸⁸ The Tribunal therefore decided to impose a fine of R20 000, in addition to the apology, to demonstrate its conclusion that this was a serious transgression.⁸⁹

⁸⁴ Ibid at para 30.

⁸⁵ Ibid.

⁸⁶ Ibid at para 32.

⁸⁷ Ibid at para 8.

⁸⁸ BCCSA Case No. 21/2011, 14 June 2011 at para 11.

⁸⁹ Ibid.

92.3 In *Mthembu v Multichoice ANN7 Channel 405*, the Tribunal ordered both an apology and the maximum fine of R80 000, and added that the apology must be broadcast for two consecutive days that correspond with the times on which the offending broadcasts were flighted.⁹⁰

Wording of the apology

93 Clause 14 of the Constitution of the BCCSA provides the Tribunal with broad powers in determining an appropriate sanction. In particular, clause 14.7 empowers the Tribunal to "*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.*"

94 An apology is an important remedy in addressing the harmful nature of the broadcasts. MMA submits that the apology set out in the ruling of the Tribunal complies with the requirements of *Prince v Heart 104.9 FM*, which stipulated 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.⁹¹ Notably, in *eNCA v Strydom and Taylor* – where eNCA similarly argued that it should be reprimanded for its contravention rather than be directed to apologise – the Appeals Tribunal of the BCCSA dismissed the appeal and ordered eNCA to broadcast an apology in line with the prescribed wording set out by the

⁹⁰ BCCSA Case No. 01/2018, 9 February 2018 at paras 24-25.

⁹¹ BCCSA Case No. 43/2013, 14 January 2014 at para 4.

Tribunal.⁹² Furthermore, in *Loonat v Radio Islam*, the Tribunal rejected the apology tendered by the broadcaster on the basis that it was not convinced that such apology was indeed sincere, and instead prescribed the wording to be used by the broadcaster.⁹³

95 Clause 14 of the Constitution of the BCCSA (in particular clause 14.7 thereof) make clear that there is nothing impermissible in the Tribunal providing the wording of the apology. MMA notes that the parties to the complaint were provided with an opportunity to make submissions on the content of the apology before the Tribunal reached its ruling. The broadcasters also do not point to anything incorrect or untoward in the content of the apology.

CONCLUSION

96 For the above reasons, MMA submits that the Tribunal was not wrong, let alone “clearly wrong”, either in its decision on the merits or the sanction. Quite the opposite, it is telling that eTV has had to resort to two radical arguments in order to attempt to justify the host’s conduct during the broadcast. Neither of these strategies is consistent with the text of the Code, the jurisprudence of the BCCSA or the particular need – as identified by the WHO – to curb the spread of disinformation during the Covid-19 pandemic in order to curb the virus.

97 And while virtually the rest of the free world has deemed it not only acceptable but appropriate to limit David Icke’s views on Covid-19 and actively denounce

⁹² BCCSA Case No. 14/2019, 23 August 2019 at para 16.

⁹³ BCCSA Case No. 03/2008, 14 February 2008 at para 8.

LWB Boks

them as false, eTV – which proclaims itself to be “South Africa’s most trusted independent TV and online news brand”⁹⁴ and “the most viewed English channel in the country”⁹⁵ – still gives Icke’s views a platform on its website today, and does so without any additional warning to potential viewers.

98 The appeal should be dismissed in its entirety.

STEVEN BUDLENDER SC

STUART SCOTT

Counsel for Media Monitoring Africa

AVANI SINGH

Attorney for Media Monitoring Africa

28 April 2021

⁹⁴ <https://www.enca.com/about-enca>

⁹⁵ <https://www.etv.co.za/about>

MB Bds

"WRB15"

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

CASE NUMBER: 010/2021

JUDGMENT DATE: 3 MAY 2021
JUDGMENT RELEASE DATE: 05 JULY 20212

ENCA
E-TV

FIRST APPELLANT
SECOND APPELLANT

and

MEDIA MONITORING AFRICA

RESPONDENT

TRIBUNAL: ADV SUNETTE LÖTTER (CHAIRPERSON)
DR MOHAMED CHICKTAY (COMMISSIONER)
ADV BOITUMELO TLHAKUNG (COMMISSIONER)

FOR THE APPELLANTS: ADV GILBERT MARCUS, INSTRUCTED BY MR DAN ROSENGARTEN OF ROSENGARTEN & FEINBERG AND MS PHILLIPPA RAFFERTY AND MR OSCAR MACHABA OF eNCA/etv.

FOR THE RESPONDENT: ADV STEPHEN BUDLENDER SC, INSTRUCTED BY TARA DAVIS OF POWER SINGH INC.

Appeal against BCCSA Judgment 09/2020 - 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 – Appeal Tribunal finding that it was clearly his honest opinion based on facts truly stated – added qualification by first tribunal that comment must be reasonable or justifiable rejected. e.tv and eNCA vs Media Monitoring Africa vs e.tv and eNCA, Case No: 10/2021 (BCCSA).

W B Bds¹

SUMMARY

This is an appeal against the finding of the First Tribunal that the broadcaster contravened Clause 28.2.2 of the Subscription Broadcasting Code and Clause 13 of the Free-to-Air Broadcasting Code respectively. The appeal was upheld. The comments of the guest, Mr Icke, was his honest opinion based on facts truly stated. The added requirement that comment in terms of Clauses 28(2)(2) and 12(2) should be reasonable and justifiable, is unfounded and rejected.

JUDGMENT

S LÖTTER

[1] The Applicants filed an application for leave to appeal against the finding and the sanction imposed by the First Tribunal in Case No: 9/2020 released on 30 October 2020.

[2] The Chairperson of the Tribunal refused leave to appeal as he was of the opinion that

“... the Applicants have not made out a case that the finding of the Tribunal was clearly wrong and I do not think that there is a reasonable possibility that an Appeal Tribunal will find that the finding by the Tribunal was clearly wrong. This applies to the finding of a contravention of the Code and to the sanction imposed. The Applicants are ordered to broadcast the apology at the start of the episode of the programme “So what now?” following directly after receiving this ruling. The Applicants are also ordered to pay the fine of R10 000 (ten thousand Rand) to the Registrar not later than 15 December 2020, by the applicants jointly; the one paying, the other to be absolved.”

[3] After having been refused leave to appeal, the Applicants submitted an application for leave to appeal in terms of Clause 4.4. of the Procedure of the Commission which

WB Bds

was granted based on the view that there is a likelihood that an Appeal Tribunal may reasonably come to a different decision.

- [4] This appeal deals with the finding of the First Tribunal that Clause 28.2.2 of the Code of Conduct for Subscription Broadcasting Service Licensees and Clause 12.2 of the Code of Conduct for Free-to-Air licensees were infringed. The wording of these clauses is exactly the same and reads as follows:

Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.

- [5] The crisp issue to be decided is whether the impugned broadcast complied with the requirements regarding comment as set out in Clause 28(2) of the Code of Conduct for Subscription Broadcasting Service Licensees and Clause 12(2) of the Code of Conduct for Free to Air Licensees.

Appellants' Submissions

- [6] Counsel for the Appellants, Adv Marcus SC emphasised the importance of freedom of expression with reference to *Handyside v United Kingdom*¹ which has been cited with approval by the Constitutional Court on many occasions. In terms of this decision freedom of expression includes information or ideas that offend, shock or disturb the State or any other sector of society. It can be accepted that sec 16 (1) of the Constitution of South Africa, 1996 does not include the expression of views that are favourable only, but also those that “offend, shock and disturb”.

- [7] Counsel proceeded to argue that not only can ideas that offend, shock or disturb in terms of sec 16(1) be aired, but if views are found to be offensive, one should distinguish between the mere airing of these views and endorsing them. Counsel

¹ (1976) 1 EHRR 737 at 754.

MF *Bals*

referred us to *Jersild v Denmark*², a decision of the European Court for Human Rights, where the court came to the conclusion that broadcasters cannot be held accountable for merely airing offensive views expressed by persons participating in a programme. While the court cannot be prescriptive on how balanced reporting should be achieved, in this instance, Jersild (the interviewer) achieved balance by not endorsing the offensive views. This case dealt with racial hatred.

[8] Counsel also submitted additional heads of argument in which the whole issue regarding information was extensively argued/

Respondent's submissions

[9] Counsel for the respondent, Adv S Budlender SC, argued that the Appeal Tribunal can only set aside or amend a decision if it is clearly wrong. In his argument, Counsel further stated that the test set out in the Rules of Procedure to determine whether the first Tribunal was clearly wrong, entails whether:

10.1 there was a gross procedural irregularity; and / or

10.2 whether the sanction is clearly inappropriate.

[10] The Appeal Tribunal was referred to *Belter v eTV*³ where the BCCSA held that the threshold to set aside or amend a decision of the first Tribunal is set high so as to prevent the first Tribunal becoming a mere stepping stone towards a final appeal. An Appeal Court will only intervene where the Court a quo reached its decision as a result of a gross procedural⁴ irregularity or where the sentence was clearly inappropriate⁵.

[11] Counsel submitted that the first Tribunal was correct in its finding that the appellant contravened Clauses 28(2)(2) 12(2) as it had come to the same conclusion as OFCOM based on similar reasons.

² (1994) 19 EHRR 1

³ CASE 1/2010.

⁴ CASE 1/2010 [4].

⁵ CASE 1/2010 [

Bds
MB

[12] Adv Budlender SC strongly argued against the inclusion of false statements, disinformation and misinformation as protected speech.

Discussion

[13] The BCCSA has referred with approval to the *Jersild*-decision previously and specifically with reference to the factors⁶ that the Court took account of to determine whether the interviewer associated himself with the views expressed by the interviewees. The following factors were highlighted:

(t)he interview was part of a news programme; the interviewer introduced the interview by making reference to a recent public discussion and press comments on racism in Denmark; the interviewer then announced that the object of the programme was to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background; and the manner in which the interviewer conducted the interview clearly indicated that he did not associate himself with their views. ⁷

[9] Although the impugned interview formed part of a programme, the programme cannot be described as a news programme. The BCSSA has referred to and applied the *Jersild*- principle to complaints relating to news programmes. Furthermore, the first Tribunal found that the broadcaster has contravened Clauses 28(2)(2) and 12(2) which deal with comment.

[10] It is indeed clear that the matter was fully ventilated and that the first Tribunal took all the submissions and previous cases raised into consideration in arriving at its conclusion. Leave to appeal was granted in this instance to determine whether the

⁶ The National Commissioner of the South African Police Service, WATERS AND BAUM VS e.tv CASE NO: 05/2010

⁷ CASE NO: 05/2010 [20]

MB Sds

first Tribunal was correct to introduce the requirement that comment must be reasonable or justifiable.

[11] The fact that OFCOM reached a similar conclusion as the first Tribunal based on similar reasons when they sanctioned a broadcaster for broadcasting an interview with Mr Icke, does not have any bearing on this matter. The OFCOM judgment was clearly based on the Code of Conduct which its broadcasters sign. The BCCSA applies the Code of Conduct that is signed by the broadcasters and approved by ICASA. Furthermore, the English broadcast lasted eighty minutes and the broadcaster did not introduce or offered any opposing comments. In contrast, the duration of the impugned interview was thirteen minutes and it did not form part of a news programme.

[12] It is indeed correct that Mr Icke's statements contained misinformation, disinformation and even a false statement. However, the question to be determined is whether these statements were presented as Mr Icke's honest opinion made on facts truly stated, or fairly indicated as required in terms of Clauses 28(2)(2) and 12(2).

[13] The *raison d' être* for the BCCSA is to uphold freedom of expression. It is trite that no human right is absolute. The BCCSA therefore strives to find a balance between freedom of expression which includes the right of the viewer/listener to receive information versus the individual's rights of dignity and privacy. The BCCSA's approach in enforcing the Codes of Conduct applicable to broadcasters is underpinned by these constitutional values.

[14] It has been the belief of the BCCSA since its inception that broadcasters should provide enough information about the content of a programme so as to enable the viewer/listener to make an informed decision whether to watch the programme or not. Hence, warnings about age restriction and content are prescribed in the Codes. The function of the BCCSA is not to decide what is acceptable to viewers but rather what is unacceptable content in terms of the Code of Conduct.

WB Bds

- [15] In terms of Clauses 28(2)(2) and 12(2) the broadcaster is expected to ensure that any comment expressed on a programme is supported by facts truly stated or fairly indicated. This is a further refinement of the general approach set out above. The second leg of the test is required so as to inform the viewer on which facts the comment is based. Once the viewer is aware of these facts, he/she can decide how much weight to attach to the veracity thereof. If this requirement is not complied with, a comment, even if it is an expression of an honest opinion, may easily result in the dissemination of false information.
- [16] The requirement does not refer to the veracity of the facts, but to the fact that, the facts must be truly stated or fairly referred to. A comment would for example fall foul of this clause if the facts were stated but twisted to support the comment or if the reference does not support the opinion because it is not fairly stated.
- [17] If the requirements of these two clauses are applied to the impugned interview it is clear that Mr Icke's outrageous comments were backed up with facts truly stated. He referred the presenter to books that he authored; although no titles were mentioned. He was also not able to advance any scientific research paper in support his opinion. In his interview he stated that:

'Someone like me comes along, having done 30 years of research and predicted all this stuff that is going on now in my books decades ago by the way, and says they're lying to you.'

The fact of the matter is that Covid-19 had only been identified with the recent (at the time of the broadcast) outbreak of the pandemic which means that he could not have predicted the virus. When confronted with the fact that he had done no research on his statements about the pandemic, he retaliated and stated that he is not a doctor but he has done thirty years of research on information that comes from doctors, virologists and medical practitioners who will never get on any mainstream programme.

MB
Sds

- [18] The question is what value can be attached to research regarding the existence of Covid-19 when it was done by only one person without any qualifications in the field of virology and related fields of medicine. Mr Icke explains that although he is not a doctor, his research is based on views of doctors, medical practitioners and virologists. These scientists are never identified. According to him they are unknown because they will not be granted opportunities to explain their views on “mainstream” programmes.
- [19] Mr Icke’s comments should not only be judged on the facts set out above. The viewer is also guided by the information provided by the presenter. He introduced Mr Icke as a former footballer and a BBC sports commentator, banned from social media and also from being interviewed on TV internationally and lastly as the world’s most famous conspiracy theorist. Based on this introduction and the facts Mr Icke stated to support his claim that the corona pandemic is a hoax, it is clear that the reasonable viewer would have realised that the real hoax was Mr Icke and not the pandemic.
- [20] The second leg of the test set out above, only comes into play once it has been established that the comment had been an honest opinion. In this instance it is clear that Mr Icke expressed his honest opinion however unacceptable. To him the pandemic serves as further proof of his general theory and consistent belief over thirty years that governments control citizens by scaring them with false information. Time has proven Mr Icke wrong but then, the facts upon which the comment are based need not be true, only truly stated. The court explained the difference between a comment and a statement of fact as follows:

In *Pearce v Argus Printing & Publishing Co Ltd*⁸ Davis J said:

‘What differentiates a comment from a statement of fact? I venture to think that the test may be thus stated. If the statement is such that a reasonable

⁸ 1943 CPD 137 at 144

WB
Bds

hearer or reader will perceive it to be an opinion or inference drawn from the facts stated, then it is a comment. An opinion may be wrong or unjustified but it cannot be said to be false.'

[21] Was this interview offensive? Yes. Was it in bad taste? Yes. Was it insensitive? Yes. However, the crucial question is whether it was a contravention of Clause 28(2)(2) and Clause 12(2). Cameron J referred to unacceptable views and freedom of expression as follows:

*"The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values."*⁹

[22] Having considered the broadcast, the comprehensive heads of argument submitted by both counsel as well as argument on the day of the hearing, we find that the appellants did not contravene Clause 28.2.2 of the Code of Conduct for Subscription Broadcasting Service Licensees and Clause 12.2 of the Code of Conduct for Free-to-Air licensees. **The appeal is upheld.**


ADV S LÖTTER
CHAIRPERSON OF THE BCCSA APPEAL TRIBUNAL
Commissioners Chicktay and Tlhakung concurred with the judgment

⁹ *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) [122].

MB
BLS

■ FEATURES

How conspiracist David Icke 'confused' Gareth Cliff

By hosting conspiracy theorist David Icke and giving misinformation a platform on his TV show, Gareth Cliff shows himself happy to privilege 'likes' over lives

BL PREMIUM

06 AUGUST 2020 - 05:00 by CHRIS ROPER



David Icke and Gareth Cliff.

Perhaps the funniest part of Gareth Cliff's new show on eNCA is the backdrop of fake encyclopaedias that some rebellious wag has chosen for set design. If you wanted a metaphor for the shallowness of the show's intellectual rigour, you'd be hard pressed to find one better. And even more deliciously, on the episode I watched, the words on the encyclopaedias appeared to be reversed, highlighting the fundamental fakery.

The show's title is also pretty funny. *So What Now?* could be the mating cry of the entitled citizen, forever demanding reassurance and whining about wanting things.

A while ago, Cliff invited conspiracy theorist David Icke onto his show. Introducing his guest, Cliff described Icke as "having some controversial opinions".

This website uses cookies to run essential services and improve or personalise your reading experience. Read more about how we manage your information in our privacy and cookie policies

Accept
Cookies

Bds
WRB

discussion marked especially by the expression of opposing views".

Apparently it's vital to democracy and freedom and stuff, that people have the chance to decide for themselves about several "controversial" issues.

Is it OK to hate Jews, and to blame them for the creation of the coronavirus? Is it OK to decide that the coronavirus doesn't exist, and that if it does it's spread by 5G technology, so it's OK to beat up mobile technicians and set fire to mobile infrastructure? I don't know! Can we ever know? You decide for yourself. That's freedom, buddy. I didn't invent it.

Some people on social media proffered a defence of Cliff's decision to host Icke, by claiming that he would use his Superior Intellect™ to demolish Icke's arguments. That never happened, of course, and in fact Cliff very openly laid out his own rationale for his decision. "I need to put a disclaimer upfront. You have been banned from social media platforms, and even from appearing on television internationally, for putting out what has been reported as harmful information," he said.

"Now some of what you say may sound crazy to some people, some of it makes sense to some people, but I'm a proponent of free expression, even if I don't buy it, and everyone gets to decide for themselves."

Here's a summary of some of Icke's views (some of which will "make sense to some people", apparently), from the Centre for Countering Digital Hate (CCDH). They form part of a letter the organisation wrote to social media platforms asking them to ban Icke's accounts.

On YouTube, Icke claimed that a Jewish group was behind the coronavirus (I'd say "falsely claimed", but hey — apparently you can decide that for yourself), and that it isn't possible to catch a virus from shaking hands.

On Instagram, he (falsely!) claimed that 5G mobile networks left people unable to absorb oxygen.

And on Twitter he falsely claimed that Germany was moving to

This website uses cookies to run essential services and improve or personalise your reading experience. Read more about how we manage your information in our privacy and cookie policies.

Accept
Cookies

Bds
MB

According to the CCDH, "during this time, we have seen a spate of arson attacks on 5G masts, which Icke has claimed are being erected under the cover of lockdown.

A recent academic study suggests that belief in conspiracy theories, of the type promoted by Icke on your platforms, makes members of the public less likely to follow the official guidance to wash their hands regularly, stay at home, and socially distance."

Cliff's intent was never to counter any of Icke's views, but only to portray himself as a swashbuckling defender of freedom. In one revealing, sickening bit, in response to Icke characterising the coronavirus as nonexistent (he later calls it "a pandemic hoax"), Cliff says: "We won't have time to interrogate this in any detail," and asks him: "With you being banned from so many platforms ... how can we find the balance, in your opinion, between blocking perceived harmful narrative and allowing actual freedom of expression? And who gets to decide, David?" (Yes, he did say "perceived" harmful narrative.)

Oh dear. The idea that Cliff, the master of indignant open letters, could ever be a match for the seasoned Icke is laughable.

Take this bit. "The reason I was keen to have you on," says Cliff, narrowing his eyes meaningfully, "is that there seems almost a perfect storm for this 'suppression of information', conspiracy theory stuff." (Cliff uses his fingers to put air quotes around this, as he does with "fake news".)

"It looks like the world is ripe for all this to take root at the moment, because people just don't know who to believe, right?"

Seriously? People don't know who to believe? Icke's solution is, go and research it yourself. Don't believe the experts, don't believe Icke — go check it out.

The fact that this means Cliff's for-profit misinformation is now just functioning as marketing for Icke's for-profit disinformation — with all the potential for harm that this creates — doesn't appear to bother Cliff. Bros Defending Freedom™ is what counts here — and the bottom line.

in annual revenue, primarily generated by advertisers seeking to reach Icke's fans as well as the money Icke and his collaborators spend to reach a wider audience."

Cliff then unashamedly co-opts Icke into a defence of his choice of guests. If I get to decide for myself which bit of Icke I believe in, he says, "why is that so threatening to some people?"

Icke — who by this stage can't believe his luck at being interviewed by someone whose idea of a probing question is: "Do we [SA] feature in any of your work?" — actually lays out for Cliff why it's so damaging to give a platform to proponents of hate speech and disinformation.

Cliff, grunting along approvingly, doesn't realise Icke is talking about himself, and how disinformation thrives when people like Cliff give it a platform. "If you are trying to sell a story ... why are you trying to do that? Because you're trying to control perception, because from perception comes behaviour. How do you control perception? You control information that people receive, because that controls perception."

That this is a refutation of Cliff's own formulation — "If you push these things underground, they only get more and more powerful" — doesn't seem to occur to the oblivious Cliff.

When Icke says Covid-19 doesn't exist, Cliff responds: "There are people who are dead, it comes across as particularly insensitive."

That's it. That's Cliff's refutation of the dozens of "facts" Icke has at his fingertips — facts that "prove" people are being paid to falsely claim that cause of death is the coronavirus, but that nobody can demonstrate it's true. It's insensitive.

Gareth Cliff has hit a new low by giving a platform to sinister conspiracy theories

Cliff's conclusion (and you can imagine the heroic music swelling up in the background before the closing credits) is: "I'm pleased to have

This website uses cookies to run essential services and improve or personalise your reading experience. Read more about how we manage your information in our privacy and cookie policies

Accept
Cookies

Bds
MB

maybe there are many of us who are left more confused than when we started this."

Let me get this straight. You're pleased that you have made people confused about whether the coronavirus is real, or whether "Bill Gates owns the World Health Organisation"? Why is that a good thing?

In Cliff's sign-off to his audience, he says: "Well, I hope you're as confused as I am."

What are you confused about, Gareth? What? Please give an example of one thing Icke said where you can't decide on its veracity? There aren't two sides to this story, there's truth, and then there are lies.

If Cliff were a journalist (and I don't think he's ever claimed to be one, in his defence), he'd be trying to achieve clarity here, and trying to convey facts. But as someone who makes his money from sensationalist pandering, it's in his interests to give misinformation a platform, to privilege "likes" over lives, and to pretend that it's a crusade for freedom that he is fighting on behalf of all of us.

BusinessLIVE Comment Policy

We welcome comments that are civil and considered. Any comments that are racist, bigoted or vulgar are not allowed. Please read our Comment Policy before commenting.



Comments Community

Favorite Tweet Share

Sort by Best ▾

Join the discussion...



Mark Crozier • a year ago

I wasn't aware that people still watched eNCA for any length of time. I can only stand it for about 30 seconds. It's the television equivalent of day-old oatmeal.

This website uses cookies to run essential services and improve or personalise your reading experience. Read more about how we manage your information in our privacy and cookie policies.

Accept Cookies

Bds
MB

"WRB17"

THE BIGGEST SECRET

The book that will change the world



David Icke

UPDATED SECOND EDITION

WB Bds

claimed to be an 'alien' himself and appeared, before her eyes, to transform 'like a chameleon' into a reptile. Cathy believed that some kind of hologram had been activated to achieve this and from her understanding at the time I can see why she rationalised her experience in this way. Anyone would, because the truth is too fantastic to comprehend until you see the build up of evidence. There's no doubt that alien-based mind programmes are part of these mind control projects and that the whole UFO-extraterrestrial scene is being massively manipulated, not least through Hollywood films designed to mould public thinking. Cathy says in her book that George Lucas, the producer of *Star Wars*, is an operative with NASA and the National Security Agency, the 'parent' body of the CIA.²⁹ But given the evidence presented by so many other people, I don't believe that what Bush said and Cathy saw was just a mind control programme. I think he was revealing the Biggest Secret, that a reptilian race from another dimension has been controlling the planet for thousands of years. I know other people who have seen Bush shape-shift into a reptilian.

The president of Mexico in the 1980s, Miguel De La Madrid, also used Cathy in her mind controlled state. She said he told her the Legend of the Iguana and explained that lizard-like extraterrestrials had descended upon the Mayans in Mexico. The Mayan pyramids, their advanced astronomical technology and the sacrifice of virgins, was inspired by lizard-like aliens, he told her.³⁰ He added that these reptilians interbred with the Mayans to produce a form of life they could inhabit. De La Madrid told Cathy that these reptile-human bloodlines could fluctuate between a human and iguana appearance through chameleon-like abilities -- "a perfect vehicle for transforming into world leaders", he said. De la Madrid claimed to have Mayan-lizard ancestry in his blood which allowed him to transform back to an iguana at will. He then changed before her eyes, as Bush had, and appeared to have a lizard-like tongue and eyes.³¹ Cathy understandably believed this to be another holographic projection, but was it really? Or was De La Madrid saying something very close to the truth? This theme of being

WB
Bos

like a chameleon is merely another term for 'shape-shifting', a theme you find throughout the ancient world and, among open minded people, in the modern one too. Shape-shifting is the ability to use your mind to project another physical image for people to see. Everything is energy vibrating at different speeds, so if you use your mind to re-vibrate that energy to a different resonance, you can appear in any form you choose. Many witnesses have described how the so-called 'Men in Black' materialise and dematerialise when they threaten people who are communicating information about extraterrestrials and UFOs. They can do this because they are interdimensional beings who can appear in any form. This is the main reason for the obsession with interbreeding among the Elite bloodline families. They are seeking to maintain a genetic structure which allows them to move between dimensions and shape-shift between a human and reptilian appearance. Once the genetic structure falls too far from it's reptilian origin, they can't shapeshift in this way or at least not as easily. As Credo Mutwa explains, shapeshifting is a constant phenomena in African traditions.

Mono-atomic (monatomic) gold

While preparing this second edition I came across new information that would explain shapeshifting and much else too, according to the research of Brian Desborough. It is mono-atomic gold which comes in the form of a white powder and has a two-dimensional atomic structure (one or two atoms working together) while regular gold has a three-dimensional structure (ten or more atoms working together). Without going into all the scientific detail, when you consume this mono-atomic gold by mouth or injection, it increases the current carrying capacity of the nervous system by *ten thousand* times. This would allow a person to process fantastic amounts of information like a super computer and when enough has been absorbed it would allow them to consciously move through other dimensions and shapeshift because suddenly the brain is activated to open those vast areas that we do not use in today's world. It aligns the brain cells so they

At the heart of the web, or the top of the pyramid, whichever analogy you choose, are the reptilians. These operate mostly in the background from underground bases and overwhelmingly by possessing the reptilian-human bloodstreams which resonate most closely to the reptile consciousness of the lower fourth dimension. These reptile full-bloods and reptile-possessed people hold the major positions of power in the world or work in the background controlling those in the positions of apparent power like prime ministers and presidents. Having a reptilian or reptilian-controlled human as president might sound fantastic if you have allowed yourself to have your vision of possibility suppressed to the size of a pea, but when you see the evidence put together over thousands of years, it makes perfect sense of the 'mysteries' of history. People ask me the understandable question of why anyone would want to dedicate their lives to taking over a planet when they knew they were going to die long before it was achieved. Answer: The consciousness controlling that body is only using it as an overcoat, a space suit, until it wears out. When that happens, it possesses another one. These same reptilians have been occupying the bodies of all the main players in the conspiracy going back to ancient times. The obsession with interbreeding within the Brotherhood bloodstreams comes from the need to hold the reptilian genetic inheritance and therefore maintain the vibrational connection between the human body on the third dimension and its controlling force on the lower fourth. It was to hide this truth that they arranged for the destruction of ancient historical records, texts, and accounts over the centuries as they ravaged and raped the native societies of the world. The reptilians wanted to destroy all memory and records of their earlier open existence and control in the past. If they could do that, humanity would have no idea that they were being controlled through physical bodies that look human by a fourth-dimensional force that is not human.

Tech

Coronavirus: David Icke kicked off Facebook

🕒 1 May 2020

Coronavirus pandemic



Facebook has taken down Mr Icke's official page

Facebook has taken down the official page of conspiracy theorist David Icke for publishing "health misinformation that could cause physical harm".

Mr Icke has made several false claims about coronavirus, such as suggesting 5G mobile phone networks are linked to the spread of the virus.

In one video he suggested a Jewish group was behind the virus

Bds
WRB

Following the ban, his Twitter account posted: "Fascist Facebook deletes David Icke - the elite are TERRIFIED."

Facebook said in a statement: "We have removed this Page for repeatedly violating our policies on harmful misinformation".

Campaign

On Friday, campaign group the Center for Countering Digital Hate (CCDH) **published an open letter calling on tech companies to ban Mr Icke's accounts.**

The letter said Amazon, Facebook, Twitter and YouTube had amplified "Icke's racism and misinformation about Covid-19 to millions of people".

It was co-signed by MP Damian Collins, as well as celebrity medics Dr Christian Jessen, Dr Dawn Harper and Dr Pixie McKenna.

The CCDH said videos of Mr Icke making "untrue and conspiracist claims about Covid-19" had been watched more than 30 million times online.

As examples, it cited:

- a YouTube interview in which Mr Icke falsely claimed that a Jewish group was behind coronavirus
- an Instagram post in which he falsely claimed 5G mobile networks left people unable to absorb oxygen
- a YouTube video in which he falsely claimed it was not possible to catch a virus from shaking hands
- a Twitter post in which he falsely claimed Germany was moving to "legalise rape" for Muslim men

The letter was published after Facebook had removed Mr Icke's page.

In April, YouTube removed an interview with Mr Icke in which he said there "is a link between 5G and this health crisis".

When asked for his reaction to reports of 5G masts being set on fire in England and Northern Ireland, he responded: "If 5G continues and reaches where they want to take it, human life as we know it is over... so people have to make a decision."

Facebook later removed the same video saying it broke its rules on misinformation.

Later, the **telecoms regulator Ofcom found local TV channel London Live in breach of standards** for an interview it aired with Mr Icke about coronavirus.

MB
Bde

Analysis

By Marianna Spring, Specialist disinformation and social media reporter

David Icke has promoted several conspiracy theories on social media throughout the pandemic - and has consequently found himself in hot water with social media sites and broadcasting regulators.

The health misinformation that he's been spreading, including linking 5G to coronavirus, has played a role in platforms like YouTube tightening their policies about conspiracy theories.

This is a difficult area for social media sites to tackle.

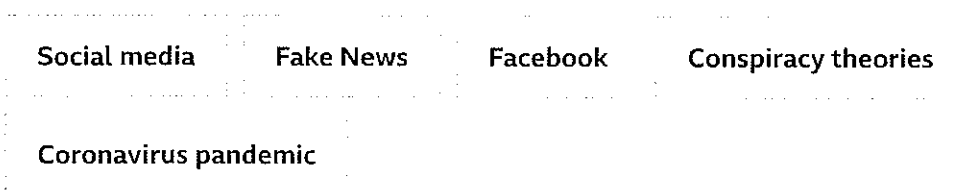
Medical myths and speculation that could cause harm are easier to act on, while conspiracy theories occupy a grey area where companies risk accusations of censorship if they take action.

But the setting alight of mobile phone towers and abuse of telecommunications workers linked to this 5G coronavirus conspiracy has pushed sites like Twitter and TikTok to tighten their rules.

Facebook has also recognised that the conspiracy theories repeatedly promoted by Icke fall into their bracket of harmful misinformation. This isn't the first time it has removed content from him - but the platform has gone one step further in taking down his page.

Governments and social media sites alike grapple with the fine balance between stemming harmful narratives and allowing freedom of expression. But experts point out that they can do both with effective moderation and collaboration.

Related Topics



More on this story

YouTube tightens Covid-19 rules after Icke interview

7 April 2020

MB
Bols

London Real: Covid-19

Type of case	Broadcast Standards
Outcome	In Breach and Sanction
Service	London Live
Date & time	8 April 2020, 22:00
Category	Harm
Summary	This programme featured potentially harmful statements about the Coronavirus pandemic and adequate protection was not provided to viewers. In breach of Rule 2.1 of the Broadcasting Code.

Introduction

London Live is a local television channel serving the London area. The licence for London Live is held by ESTV Limited ("ESTV" or "the Licensee"). *London Real*¹ is a talk show featuring interviews hosted by Brian Rose, broadcast on Thursdays at 22:00.

Ofcom received 48 complaints from viewers who were concerned about potentially harmful statements made by the guest, David Icke, on this programme about the Coronavirus pandemic. On 7 April 2020, YouTube removed a London Real interview between Brian Rose and David Icke in which David Icke made unsubstantiated claims about a link between the roll out of 5G technology and the spread of the Coronavirus. This was a separate interview to the one that is the subject of this Decision. The interview broadcast on London Live did not contain any discussion about 5G technology.

Ofcom is prioritising cases related to the Coronavirus which could cause harm to audiences. This could include:

- health claims related to the virus which may be harmful;
- medical advice which may be harmful; and,
- accuracy or materially misleadingness in programmes in relation to the virus or public policy regarding it.

¹ The programme is produced by London Real, a media company founded by Brian Rose.

We therefore informed ESTV that it was necessary for us to depart from our normal published procedures to expedite this investigation.

The interview was recorded on 18 March 2020 when the global number of confirmed cases of the Coronavirus had reached 200,000, 104 people had died in the UK, and the Government was advising those with symptoms of the Coronavirus to stay at home for seven days and the wider public to avoid all non-essential gatherings and work from home where possible.

When the interview was broadcast on 8 April 2020, global infections were estimated to be at around 1.4 million people, with 83,615 deaths worldwide and 7,097 deaths in the UK. While the virus was most significantly affecting older people and those with underlying health conditions, the World Health Organisation had issued a warning of its effects on younger people, including serious cases of hospitalisation and death. The UK Government had introduced its lockdown policy curtailing individual freedoms in order to prevent the transmission of the virus. People were advised to stay at home except in very specific circumstances and to remain socially distant from people who were not members of their immediate household. Younger people and those with no underlying health conditions had died in the UK as a result of the Coronavirus.

During the 80-minute interview (excluding advertisements) the presenter Brian Rose ("BR") interviewed the former footballer and sports broadcaster David Icke ("DI") who was introduced as a *"writer and public speaker known since the 1990s as a professional conspiracy theorist, calling yourself a full-time investigator into who and what is really controlling the world. You're the author of over 21 books and 10 DVDs and have lectured in over 25 countries, speaking live for up to 10 hours to huge audiences, filling stadiums like Wembley Arena"*.

The programme was preceded by a continuity announcement which stated:

"Now on London Live, another chance to get behind the media spin and straight to the heart of the story in London Real".

A full screen slate was broadcast at the start of the programme and at the beginning and end of each programme part which stated:

"The views contained in this programme are those of the individuals articulating them and not necessarily those of London Live. For advice on Covid-19 please visit www.gov.uk/coronavirus".

At the start of the interview, Brian Rose gave the following clarification of his own views:

BR: *"I personally don't believe the Coronavirus was created by a third party. I do think it occurred naturally. I do believe in the science and I do believe in vaccines...I do plan on getting my flu vaccine and any future Coronavirus vaccines although you might talk me out of it, we'll see. I'm now obeying the orders of the government, I'm complying with their requests for information and behaviour...That being said, I do believe at this point that the virus can no longer be controlled in the Western*

BR
DI

world, so over the long term I do think 70-80% of the population is going to get it and hopefully become immune to it, but also I understand due to the safety of the elderly...and those with lower immune systems and respiratory problems, I understand and I agree with this policy of social distancing in order to flatten the curve and not to overwhelm our medical system".

David Icke started the interview by setting out his view that the world is controlled by a cult which wishes to create a tyrannical "technocracy" enabled by artificial intelligence. *"For 30 years I've been warning people...that this world is controlled by a cult...It wants to create a beyond Orwellian global state in which a tiny few people dictate to everyone else. I've referred to this as the Hunger Games society²..."*.

Ofcom considered the whole programme (which lasted an hour and 45 minutes) as broadcast, noting the following comments made by David Icke about the Coronavirus, as well as comments by Brian Rose:

DI: *"In the same 30 years I've been saying there are two major techniques that are being used to bring about this situation. One I've called since the 1990s 'problem-reaction-solution', where you covertly create a problem, you use the unquestioning, pathetic, mainstream media to tell the public the version of the problem you want them to believe, and you're looking at stage two, the reaction, for fear, outrage...and either demand from the public that something must be done, or at least an acceptance from the public that things needs to change because of the problem...Those who created the problem got that reaction openly...offer the solutions to the problems they have themselves covertly created".*

DI: *"If you don't know where this world is being taken by this cult then everything seems random. Coronavirus, random. Climate change, random. Economic crash, random. But when you know where we're being taken, you know the outcome, this Hunger Games structure society, now the apparently random events become clear stepping stones to that outcome...Let people decide for themselves if they think that the fact that the Coronavirus hysteria ticks every single box of that outcome, that goal, whether that's a coincidence. I absolutely do not believe that it is..."*

² *The Hunger Games* is a trilogy of dystopian novels set in the fictional North American country of Panem which consists of a wealthy Capitol supported by 12 districts. In an annual entertainment event entitled 'The Hunger Games' the Capitol selects children from the districts to fight to the death as a reminder of a failed past rebellion initiated by the districts.

BR: *"The Coronavirus is real and it is dangerous. You do believe that?"*

DI: *"Not as a black and white, no...Obviously there is a strain of this Coronavirus, because there are many coronaviruses, which appears to be different. Do you know mainstream doctors...they are saying...80% of people that are diagnosed with Coronavirus...have 'very mild symptoms'. The ones that are in danger, and by the way in danger from any virus including classic flu, are those that have compromised immune systems,...elderly people and...people with pre-existing health problems...Have we not learned yet to take what the authorities tell us with a pinch of salt, until it is proved otherwise?"*

DI: *"One of the things I said was coming in my earlier books was a pandemic because of all the boxes it ticks...what I've been saying for the best part of 30 years is that they are planning an enormous economic crash...this Coronavirus hysteria gives the excuse to do what they're doing and the outcome and the consequences of what they're doing is to dismantle the world economic system".*

DI: *"We're living in an electromagnetic, technologically generated soup of radiation toxicity, and this system has allowed that to happen, has allowed corporations to do that. Now, having done all that, that's devastated the lives and the immune systems of old people...We are being asked to believe now that this system cares about old people. 'We must protect the old people. We must destroy the world economy to protect the old people'...they don't give a shit about the elderly, the elderly are an excuse to impose the very society [the Hunger Games society] that I am talking about".*

DI: *"They want a cashless society...which has phenomenal implications for freedom...What was it this guy, Tedros³, the head of the World Health Organisation, a man I wouldn't trust to tell me the time in a room full of clocks...he said 'don't touch cash, use cards because the virus can pass on through cash'...the whole surveillance is going to move on exactly as it has in China. If people thought China had reached the point of beyond*

³ Dr Tedros Adhanom Ghebreyesus was appointed the Director-General of the World Health Organisation in 2017.

Orwellian, just look what they've brought in as a result of this Coronavirus".

DI: *"The strain that is prevalent in Italy is something of a stronger nature than what's generally circulating, and also in Iran. That's something else...we have a country [Iran] targeted by America, targeted by Israel...and as this virus came out of China, of all the countries in all the world, Iran got it smack, worse than anyone before it started to appear in in Italy...So not only did Iran have this, what again seems a stronger strain of it, but it was killing the people within the regime at a very early stage, and you know, that's a coincidence? How many coincidences do you want?"*

DI: *"Another thing is that...10,000 military personnel and support staff were attending the World Military Games in Wuhan, China. So...again, I'm not saying this happened, but...if we're not going to be scammed and just believe the official narrative, we have to explore possibilities. Another possibility is that that World Military Games was a wonderful front to release some kind of virus in that same area. So, all these things are something that have to be explored and put into the mix...What happens if you only believe the official version of everything is, the official solution for the problem you believe in, is going to take us further and further down the road to a society that would make George Orwell bloody wince. And all the things that I've said this cult wants, this cult is getting".*

DI: *"The way the whole economic system is being shut down is suicide. And what happens when it reaches a point where in its present state it cannot continue, it cannot survive? A whole new economic system comes in, which is the one this cult wants...Another thing I've been going on for years and years and years about...the idea of human-caused climate change is a joke, it's a hoax. And people say why would they hoax climate change? You look at all the solutions to climate change...they are exactly the same solutions and consequences as with the Coronavirus...This cult want to transform the world economic order into this technocratic, AI-controlled tyranny, and both the Coronavirus and climate change hoax are providing the problem".*

DI: *"What I keep coming back to is the effect on the health of the overwhelming vast majority which have immune systems that just basically slap it aside. And it's this small group of elderly people who, for reasons I've described, have weakened immune systems, and those who have other health conditions and therefore weakened immune systems, they're the ones in danger. So, if we focused everything on them, and if necessary, isolate them and focus your resources on them so no one goes hungry and no one is in need. But the rest of the population, 80% 'very mild' symptoms or no symptoms, others with moderate symptoms. Well, are we going to destroy the world economic system by saying that those people also have to isolate and not go to work? For me, that's crazy..."*

DI: *"I'll give you an analogy...years ago...we used to have this thing called weather, and weather used to change and there used to be storms and...strong weather situations...now every time that happens...it's always climate change. We're all going to die. And what we have now is the Coronavirus version of that. Everything is Coronavirus. We don't even know if so many people have been logged as having had it actually have it...they're not dying from it, but not even most of them being affected more than [with] very mild symptoms. So why are we locking them away, and bringing down the world economic system...Why are we doing that and not just focusing on totally on those that could have a serious problem because of their immune system deficiencies?"*

BR: *"I don't know. And they're telling us-"*

DI: *"I'll tell you why, because if they carried on and allowed that to happen the world economic system would not be demolished, and the idea is to demolish it so you can replace it..."*

BR: *"They're telling us that we have to lock everybody down to save the elderly and the less immune. That's what they're telling us"*

DI: *"But as always with this cult, there's method in the madness...look at the outcome, the outcome will tell you what's behind it...who benefits from what's happening and what's being justified on the basis of this, quote, 'virus'? Anyone that wants to transform human society into an Orwellian state"*

DI: *"The survival mechanism will agree to anything, no matter how draconian and how fascistic...what a pandemic does is it kicks in this*

survival mechanism and means not only will you accept authority imposing tyranny, you will demand that authority imposes tyranny...Tell you what one of the punchlines of this virus is, is the bloody vaccine... We had already had Denmark announce that any vaccine for Coronavirus will be mandatory. Now if you can give me a better definition of fascism than the state telling you what will go into your body, then I'd like to bloody hear it...When this vaccination for this virus comes up, there is going to be enormous pressure to make it compulsory. And people with a brain who say 'hold on a minute-'

BR: *"What if it's the only cure?"*

DI: *"Well, is it a cure? Who decides that?"*

BR: *"I don't know. A scientist might".*

DI: *"Oh, god, science..."*

BR: *"Well science isn't always wrong. For smallpox the vaccine works".*

DI: *"Science is massively wrong with the benefit of hindsight".*

BR: *"Some vaccines work. Smallpox vaccine".*

DI: *"...Who decides that it's [vaccines] the only solution? My children, my boys, have not been vaccinated once in their life. They didn't have childhood diseases. Their immune systems are on fire because they weren't compromised by a tidal wave of toxic shite while their immune systems were still developing...So what mandatory vaccinations are saying is we are going to insist by law that your children are vaccinated, and we know by doing that that some of them who wouldn't otherwise have been vaccinated are going to take the consequences".*

BR: *"Because it's for the greater good".*

DI: *"Oh, the greater good. They couldn't care less about the greater good. Can we just understand that? And then we might get some kind of grasp on how this world is run. They don't care about us, they use the excuse of caring about us to justify what they want to do. It's as simple as that".*

DI: *"What does every tyranny want to do? Centralise everything, including perception. The more we celebrate our uniqueness, the more we are withdrawing from the ability of the centre to dictate to everybody...why do people acquiesce and self-censor? Fear. Get rid of fear and the world changes..."*

- BR: *"David, it's always a pleasure having you on-".*
- DI: *"Real pleasure. I'm going to shake your hand. [David Icke and Brian Rose shake hands] Don't you give me anything nasty".*
- BR: *"I won't, and let me just say clearly I don't agree with you on everything, but that's okay because I feel like I can speak my mind in front of you...I'm so glad I had you on. About three years ago when I was going to have you on, I thought of all the reasons I shouldn't have you on...Who is his crazy guy? And people said 'don't have David Icke on your show'...in that first episode you blew me away, most of the things you said made total sense to me... I'll be honest David, a lot of people told me not to have you on today...and I thought every time I have David on he always shows me that he's got some amazing knowledge and amazing perspective about what's going on here, and I'm so glad I had you on to talk about this stuff".*

We considered this content raised potential issues under the following Broadcasting Code ("the Code") rule:

- Rule 2.1: *"Generally accepted standards must be applied to the content of television and radio services...so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material".*

We requested comments from ESTV on how this material complied with this rule.

Response

ESTV said that it takes compliance with the Code "extremely seriously", and that it had taken steps to comply the original full-length interview through appropriate editing by a "highly experienced" compliance team, and the use of an information slate. The Licensee stated it had carefully balanced freedom of expression with the protection of public health, and took account of Ofcom's Note to Broadcasters regarding the Coronavirus⁴. It added it had removed any content that could have been considered to be medical advice or contrary to government guidance, and it had removed a comment from David Icke which suggested that younger people were less at risk to the Coronavirus than the elderly to reflect the increased understanding of the scientific and medical community of the virus since the recording of the interview.

The Licensee stated that, in the current circumstances, broadcasters have an important role in informing audiences, but also in "holding power to account", and that it would be concerned if Ofcom censored anyone that questioned the official government version of events. ESTV said that freedom of expression was particularly important in the current circumstances when civil liberties are being "constrained" and "threatened", and that it was essential to question "conventional wisdom" and government action in a "responsible" manner. It added that David Icke's views about the impact of

⁴ On 23 March 2020, Ofcom published a Note to Broadcasters about the Coronavirus.

lockdown measures, accuracy of testing, use of tracking technology and compulsory vaccinations were legitimate areas of debate as explored by other commentators, including comments from the UK Health Secretary, Chief Medical Officer and Chief Scientific Officer about the dangers of false negatives in testing.

ESTV acknowledged that the programme included “challenging”, “controversial” and “unorthodox” material, and that many considered David Icke’s ideas to be “extraordinary”. It said that this material would not have caused harm to the audience as it did not:

- dispute guidelines given by the NHS, World Health Organisation or UK Government, including on handwashing, social distancing or staying at home;
- deny the existence of the Coronavirus or offer “phony science” on the virus’ impact on the body;
- present David Icke as a medical or scientific expert and made clear that much of David Icke’s contributions were conspiracy theories; or
- include direction or advice from David Icke that sought to “change behaviours”.

The Licensee considered the programme to be an exploration of David Icke’s theories about the origins of the virus and the responses of governments, views which it stated David Icke has the right to hold and express. It said that the information slate broadcast around each programme part served to put David Icke’s views into context and sought to establish that the channel did not “support” or “defend” his ideas which were “simply views and opinions”. The Licensee said that discussing conspiracy theories which may be considered “absurd”, such as that a cult was controlling the world or, by comparison, that the Apollo moon landing was a hoax, or the Pope’s view that the Coronavirus was “caused by climate change” and demonstrated nature’s “disapproval of humanity’s actions”⁵, cannot cause harm or potential harm to viewers alone. It added that viewers of London Live, who are not “especially vulnerable” and are capable of “independent and critical” thought would be “familiar” with David Icke’s views.

ESTV said that Brian Rose’s opening statement contextualised some of David Icke’s “more extreme” views, and referred to Brian Rose as a “reputable”, “experienced” and “professional” interviewer. The Licensee stated that the interviewer challenged David Icke at “several points” in a “discursive” but “non-combative style” comparable to “Louis Theroux”, and corrected David Icke on potentially harmful views, such as on the comparative infection rates and risks of Coronavirus and flu and the effectiveness of vaccines. It added that it was clear Brian Rose was “sceptical” about his views, and that the close of the interview in which Brian Rose expressed his admiration for David Icke despite disagreeing with him on “several” matters, and David Icke emphasised the importance of being “unique” and open-minded, highlighted that no harm was caused to viewers.

It was the Licensee’s view that it would be “illogical” and “unfair” for Ofcom to penalise it for broadcasting material that was “readily available” on YouTube and has not been removed by the platform. ESTV said that it had intended to broadcast a repeat of this programme at midnight on 12

⁵ In an [interview on 8 April 2020](#), the Pope described the pandemic as an opportunity to “move from using and misusing nature to contemplating it” and advised humanity to slow production and consumption.

April, but it pulled this broadcast due to the “seriousness” with which it is treating these complaints until Ofcom’s investigation has concluded.

ESTV concluded by describing the interview as a legitimate discussion on whether the UK Government had “got the balance right” on matters of economics and public health, in which David Icke argued that the Government’s approach was “worse than the problem”. It reiterated that the discussion was not harmful to viewers and that it had “fully complied” with Rule 2.1.

Ofcom gave the Licensee the opportunity to comment on its Preliminary View that the programme was in breach of Rule 2.1. In response ESTV said that the programme had been through a “rigorous” compliance process and the programme would not have caused actual or potential harm to viewers. It said that it remained of the view that in accordance with Article 10 of the Human Rights Act⁶ it had the right to broadcast the material. It said that Ofcom must exercise its powers proportionately and take care when “significantly curtailing” freedom of expression.

ESTV stated it was “potentially patronising” for Ofcom to refer to viewers in London as particularly vulnerable during the Coronavirus crisis and disagreed that they would be likely to be “taken in” by David Icke’s theories. The Licensee said that, when complying the programme, it had believed its audience to be “intelligent enough” to distinguish these theories from current government guidelines. It said that Mr Icke’s statements that the “vast majority” of individuals were not severely affected by the virus reflected reporting more widely on the pandemic.

The Licensee said it had taken care to ensure it did not broadcast material which challenged medical and public health guidance. It stated it did not present David Icke as an authority in matters “medical, scientific or otherwise”. It added it appreciated the “fine line” between ensuring public health and freedom of expression, but questioned whether as the communications regulator Ofcom should “boost the public’s confidence” in public authorities and government information and “fetter legitimate and essential journalistic” debate about government policy or information during the crisis.

ESTV considered that establishing a view on whether there was sufficient context and challenge to David Icke’s theories was, to some extent, “subjective” and “of an editorial nature”. The Licensee stated that it will ensure Ofcom’s Decision is “fully understood” across its business and review its compliance procedures and editorial processes to take account of Ofcom’s findings.

In addition, the Licensee was concerned that, under Ofcom’s expedited process to investigate the programme, a decision on whether to consider the imposition of a sanction in this case would not be independently reviewed by a panel of the Ofcom Content Board, which it considered to be “fundamentally unfair”.⁷

⁶ Article 10 of the European Convention on Human Rights is included in Schedule 1 to the Human Rights Act 1998.

⁷ Ofcom responded to ESTV’s procedural points in a letter of 17 April 2020, explaining that we did not consider this caused unfairness and giving ESTV an opportunity to make representations on our proposed direction and sanction process.

Decision

Reflecting our duties under the Communications Act 2003, Section Two of the Code provides protection for members of the public from the inclusion of harmful and/or offensive material.

When considering whether a broadcaster has provided its audience with adequate protection from potentially harmful material, Ofcom must have regard to the broadcaster's right to freedom of expression and the audience's right to receive information and ideas as set out in Article 10 of the European Convention on Human Rights ("ECHR").

We acknowledge that during the Coronavirus pandemic, Ofcom licensees will want to broadcast content about the crisis and that the communication of accurate and up-to-date information to audiences will be essential. However, broadcasters should be alert to the potential for significant harm to audiences related to the Coronavirus, which could include: harmful health claims; harmful medical advice; and misleading statements about the virus or public policy on it.

We recognised that this broadcast took place during a period in which the Government's lockdown policy to encourage social distancing in response to the Coronavirus crisis has led to an unprecedented restriction on public freedoms in peacetime. In such circumstances, and reflecting the fundamental importance of freedom of expression in our democratic society, it is clearly legitimate for broadcasters to question public policy and the rationale behind it and to robustly hold the Government to account, but in doing so they must ensure compliance with the Code.

The Code enables broadcasters to include challenging or contentious viewpoints in programmes, as in this case. However, they must ensure they provide adequate protection for the audience from the inclusion of potentially harmful material. This is set out in Rule 2.1. It is for the broadcaster to decide how to secure such protection where necessary. Ofcom has published guidance on this to assist broadcasters.

When considering a programme's compliance with Rule 2.1, Ofcom must assess the nature of its content and whether there is a reasonable likelihood of it causing members of the public actual or potential harm. Context is important and the extent of any protection required will depend on all the circumstances, including the service on which the material is broadcast, the degree of harm likely to be caused, the likely expectation of the audience and the effect of this material on viewers who may come across it unawares.

First, Ofcom examined statements made by David Icke in this programme to assess whether they were potentially harmful to viewers. In considering the potential for harm, Ofcom takes into account a number of factors, such as: the severity of the situation; whether the material was targeted at a particularly vulnerable audience; and whether the claims were made by a speaker who is portrayed as having authority. We also take into account factors such as contextual information, whether there was a degree of challenge or the inclusion of opposing views.

In our view it was clear that the subject of this discussion was particularly sensitive given the current global Coronavirus crisis and people in the UK were subject to severe restrictions on their lives with social and economic consequences for them. In addition, London has been the epicentre of the outbreak in the UK. In its representations on our Preliminary View, ESTV said it was "potentially

patronising” for Ofcom to claim that viewers of London Live would have been particularly likely to be “taken in” by David Icke’s conspiracy theories. Ofcom’s guidance on Section Two of the Code states that health claims can be especially harmful to people who are vulnerable, for example those who are suffering from serious medical conditions. Given the particular prevalence of Coronavirus in London at the time of broadcast, we considered there was an increased likelihood of viewers either suffering from the virus or being at risk of catching it. We therefore considered that viewers of a local television service for London were likely to have been particularly vulnerable to any misleading or unsubstantiated claims that could be potentially harmful to them.

During the course of this interview, David Icke set out his theory that “a cult” was using the Coronavirus to establish a “*beyond Orwellian global state in which a tiny few people dictate to everyone else*”. He considered this could be achieved through a technique he called “*problem-reaction-solution, where you covertly create a problem, you use the unquestioning pathetic mainstream media to tell the public the version of the problem you want them to believe, and you’re looking at stage two, the reaction, for fear*”. He said that the public would demand or at least accept changes in order to resolve the problem that had been established, enabling the cult to offer solutions and make progress towards its eventual ambition of global control and implementing “*the Hunger Games society*”. David Icke considered the Coronavirus pandemic and the measures being implemented by various governments to combat this, and the ensuing impact of these on the global economy, were an example of his “*problem-reaction-solution*” theory. David Icke also clearly set out his view that national governments and organisations such as the World Health Organisation (WHO) were all working to serve this covert agenda.

David Icke also made a number of more specific claims about the Coronavirus:

- He suggested that the World Military Games in Wuhan may have served as a front for releasing the virus, “*Another possibility is that that World Military Games was a wonderful front to release some kind of virus in that same area*”.
- He suggested the significant impact of the virus in Iran was due to its geopolitical differences with Israel and the West: “*we have a country [Iran] targeted by America, targeted by Israel...and as this virus came out of China, of all the countries in all the world, Iran got it smack, worse than anyone before it started to appear in Italy. So not only did Iran have this, what again seems a stronger strain of it, but it was killing the people within the regime at a very early stage, and you know, that’s a coincidence? How many coincidences do you want?*”

He also cast doubt on the use of vaccines, which is widely seen in the scientific and medical communities as a potential key to ending the global Coronavirus pandemic, describing them as a “*tidal wave of toxic shite*” and any decision to make them mandatory as a form of “*fascism*”. There was some brief, limited challenge to this by Brian Rose who said “*some vaccines work*” and cited the example of the smallpox vaccine as an example.

However, of particular concern to Ofcom were the views put forward by David Icke, without evidence and without challenge, which cast doubt on the motives behind the official health advice aimed at reducing the spread of the virus. In particular, David Icke repeatedly suggested that these measures

were being implemented to further the ambitions of a clandestine cult, rather than to protect public health:

"They [the cult] are planning an enormous economic crash...this Coronavirus hysteria gives the excuse to do what they're doing".

"This cult want to transform the world economic order into this technocratic, AI-controlled tyranny, and both the Coronavirus and climate change hoax are providing the problem".

"The survival mechanism will agree to anything, no matter how draconian and how fascistic...what a pandemic does is it kicks in this survival mechanism and means not only will you accept authority imposing tyranny, you will demand that authority imposes tyranny..."

"They [the cult] want a cashless society...which has phenomenal implications for freedom...What was it this guy, Tedros, the head of the World Health Organisation, a man I wouldn't trust to tell me the time in a room full of clocks...he said 'don't touch cash, use cards because the virus can pass on through cash'..."

"We're living in an electromagnetic, technologically generated soup of radiation toxicity, and this system has allowed that to happen, has allowed corporations to do that. Now, having done all that, that's devastated the lives and the immune systems of old people...We are being asked to believe that the system cares about old people 'We must protect the old people. We must destroy the world economy to protect the old people'...they don't give a shit about the elderly, the elderly are an excuse to impose the very society [the Hunger Games society] that I am talking about ..."

In its representations, the Licensee said that as "absurd" as David Icke's theory may be, it did not consider his theory would "cause harm in itself". It also compared David Icke's views on the measures being taken by governments to curb the spread of Coronavirus with other political commentators highlighting the long-term negative impact of the current lockdown measures. Ofcom emphasises that it is vital that broadcasters are free to hold those making public health and economic decisions to account, particularly during a public health emergency such as the Coronavirus pandemic. We acknowledge, for example, that many programmes have questioned the effectiveness and raised concerns about the consequences of the Government's strategy to deal with the pandemic. However, in Ofcom's view, David Icke's comments went far beyond a discussion of this nature. David Icke alleged that the steps being taken by the UK Government, other national governments and international health bodies such as the WHO were designed to serve the malevolent ends of a clandestine cult wishing to "transform the world economic order into this technocratic AI controlled tyranny" rather than to curb the spread of the Coronavirus.

We were therefore concerned that David Icke's statements, which were provided without scientific or other evidence, had the potential to undermine confidence in the motives of public authorities for introducing restrictions and therefore discourage viewers from following current official rules around social distancing. This was because David Icke proposed that the public were being misled and the measures were being introduced to further the ambitions of a cult seeking to introduce a new economic and social order rather than to combat the spread of the Coronavirus. In Ofcom's view, this had the potential to cause significant harm at a time when health care systems around the world are fighting to contain the deadly impact of the Coronavirus and the scientific consensus is that social distancing, and the public's compliance with it, is a key step to restricting the spread of the disease.

Ofcom went on to consider whether the Licensee provided adequate protection to viewers from this potentially harmful material. As set out above, it is an editorial decision for the individual broadcaster as to how adequate protection might be achieved and our published guidance states that there are various methods broadcasters can consider.

In its representations, the Licensee said it had edited the interview from a version that was made available on YouTube to ensure it complied with the Code, and particularly to reflect the increased understanding of the scientific and medical community of the virus since the initial recording. It said it had removed any content that could have been considered to be contrary to government guidance, including David Icke suggesting that younger people were less at risk of suffering serious effects from the Coronavirus than the elderly. The Licensee argued that given the interview's availability on YouTube, it would be illogical and unfair for Ofcom to take action against the broadcast of an edited version of it. It provided a link to what it said was the video on YouTube. In Ofcom's view, the availability of a version of the video on YouTube was irrelevant to its compliance with the Code and, in any event, the link provided by the Licensee appeared to be to a version of the interview which was different (it was 45 minutes in duration, compared to the 80 minute interview as broadcast).

We took into account that a slate was broadcast at the start of the programme and at the beginning and end of each programme part which stated:

"The views contained in this programme are those of the individuals articulating them and not necessarily those of London Live. For advice on Covid-19 please visit www.gov.uk/coronavirus".

The Licensee said it considered that this information helped viewers put David Icke's views "into context". It also considered that the slate indicated that the content may contain views which go against "conventional wisdom" and sought to establish London Live did not "support or defend" David Icke's position.

In Ofcom's view, this slate only provided limited protection to viewers from potential harm. Ofcom's published research on health and wealth claims found that warnings can have questionable impact if directly contradicted by comments made by an authoritative speaker⁸. In this case, we considered the reference in the slate to the official government advice was contradicted by the repeated assertions

⁸ Health and wealth claims in programming: audience attitudes to potential harm, setting out audience views on the potential harm arising from programmes involving health or wealth claims.

made by David Icke that the official advice of the UK Government (as well as other governments and health bodies) was being given in order to undermine the world economy and establish a new social order controlled by a cult.

The Licensee said that it did not present David Icke as an authority in matters “medical, scientific or otherwise”. The programme introduced David Icke as a “*writer and public speaker known since the 1990s as a professional conspiracy theorist, calling yourself a full-time investigator into who and what is really controlling the world. You're the author of over 21 books and 10 DVDs and have lectured in over 25 countries, speaking live for up to 10 hours to huge audiences, filling stadiums like Wembley Arena*”. Ofcom considered that this introduction presented David Icke as speaking with authority and knowledge on the theories he set out, having spoken and written about them “*for 30 years*”. We recognised that David Icke was likely to have been well known by some viewers. We therefore considered that viewers may well have expected David Icke’s views to be controversial, in conflict with mainstream thinking and for his theories to not necessarily be supported by scientific or other empirical proof, but we also took into account that they were likely to be particularly vulnerable in the current circumstances. We also took into account that the presenter of the programme, Brian Rose, set out his views on the Coronavirus as the start of the interview which substantively differed from those of David Icke. He said he:

- didn’t believe the virus was “*created by a third party*” and “*occurred naturally*”;
- believed in the “*science*” and “*vaccines*”;
- was following government orders;
- believed that the virus could “*no longer be controlled in the Western World*”, and that 70-80% of the population would get it; and,
- understood and agreed with social distancing to avoiding overwhelming hospitals, due to risks to the elderly, those with weaker immune systems and respiratory problems.

The Licensee considered that this opening statement set the interview and some of David Icke’s more “extreme positions” in context.

We acknowledged that Brian Rose’s views expressed briefly at the start of this programme were broadly in agreement with mainstream scientific thinking and supported the current measures imposed to suppress the spread of the Coronavirus. However, we considered that for the vast majority of this lengthy interview (which was just over 80 minutes in duration excluding advertisements) David Icke was allowed to set out his conspiracy theories about the current pandemic. In light of the extended nature of the interview and its sensitive subject matter, we considered that the challenge and context required to ensure that this programme adequately protected viewers from harm would have been significant. However, David Icke was allowed to set out his highly controversial and unsubstantiated views on the Coronavirus and the public policy response to it in significant detail with very little challenge or context. We also considered that the impact of the limited challenge that was present in the programme was minimised by Brian Rose’s final comments to David Icke. In particular, after shaking hands Brian Rose said that David Icke had “*amazing knowledge and amazing perspectives about what’s going on here*”.

Given the length of the interview and the minimal challenge within the programme, which was broadcast during a global public health emergency, it is our Decision that the Licensee did not provide adequate protection for viewers from the inclusion of potentially harmful material in this programme.

Conclusion

Ofcom was concerned that this programme had the potential to cause significant harm to viewers in London during the Coronavirus crisis.

The Licensee gave David Icke a platform for some 80 minutes, largely unchallenged, to put forward views which the Licensee itself said “may be absurd”. His views cast doubt on the motivation behind mainstream health advice being given by governments and health organisations to protect the public from the Coronavirus. While we acknowledged that David Icke has a right to hold these views and to express them, given the current circumstances, they had the potential to cause significant harm to viewers who may have been particularly vulnerable at the time of broadcast.

Ofcom stresses that there is no prohibition on broadcasting views which diverge from or challenge official authorities on public health information, but it was the responsibility of ESTV to ensure viewers were adequately protected from potential harm by, for example, challenging those views and placing them in context. Ofcom’s Decision is therefore that the Licensee did not adequately protect viewers from potential harm, in breach of Rule 2.1, and we considered this breach to be serious.

Decision: Breach of Rule 2.1

Sanction

Given the serious breach in this case and in order to remedy the potential harm caused as quickly as possible, Ofcom directs the Licensee to broadcast a summary of Ofcom’s Decision in a form and manner to be decided by Ofcom.

Ofcom is also considering whether to impose any further sanction in addition to the Direction. Whilst the Licensee accepts the Direction, it considers that any sanction above and beyond a Direction would be disproportionate.

The Ofcom Sanctions Panel will consider the matter further, following due process which provides for the Licensee to make written and oral representations to the Panel before reaching its decision.



Suite 2, Art Centre, 22 4th Ave, Cnr 4th Ave & 6th Street, Parkhurst, Johannesburg, 2193
Tel: +27 11 788 1278 | Email: info@soscoalition.org.za | www.soscoalition.org.za
242-668 NPO



Suite No.2, Art Centre, 22 6th St, Parkhurst, Johannesburg, 2193
PO Box 1560, Parklands, 2121 | Tel: +27 11 788 1278 | Fax: +27 11 788 1289
Email: info@mma.org.za | www.mediamonitoringafrica.org

Philly Moilwa

GM, Policy and Regulatory Affairs

SABC

Email: moilwap@sabc.co.za

30 November 2020

Dear Mr Moilwa

COMPLAINT AGAINST THE SABC IN RESPECT OF CONTENT HOSTED ON THE SABC'S FREE TO AIR DIGITAL CHANNELS, NEWS CHANNEL ON DSTV, AND ON ITS ONLINE PLATFORMS

1. The SOS Support Public Broadcasting Coalition (SOS) is a registered not-for-profit organisation, which itself is a civil society coalition that is committed to, and campaigns for, broadcasting services that advance the public interest. While the SABC is our primary focus – as the key site of and the institution established to drive public interest broadcasting – SOS also engages in the advancement of community broadcast media in South Africa. SOS is made up of a broad range of civil society organisations, trade unions and their federations, and individuals (including academics, freedom of expression activists, policy and legal consultants, actors, script-writers, film makers, producers and directors).
2. The SOS Coalition campaigns tirelessly for an independent and effective public broadcaster. SOS engages with policymakers, regulators, and lawmakers to secure changes that will promote citizen-friendly policy, legislative and regulatory changes to broadcasting and its associated sectors.

BoS
WRB

3. Media Monitoring Africa (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.
4. MMA aims to contribute to this vision by being the premier media watchdog in Africa to promote a free, fair, ethical and critical media culture. MMA has over 20 years' experience in media monitoring and direct engagement with media, civil society organisations 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.
5. As part of their aims to promote a public broadcaster that is governed and acts in accordance with international best practice standards for public broadcasting, it is incumbent upon SOS and MMA to act when the South African Broadcasting Corporation falls short of its stated commitment to ethical journalism, including in respect of news content that is distributed via its online portals.
6. The SABC recently published its updated Editorial Policies.
7. SOS and MMA hereby lay a formal complaint against the SABC in respect of programming flighted by the SABC on its news channel which is carried on the DStv bouquet, channel 404, and in particular, on the show, Full View, which is broadcast daily between 18h00 and 31h00, which channel is also carried on the SABC's digital terrestrial free to air channels.
8. The complaint concerns an interview with ANC Secretary-General, Mr Ace Magashule, conducted by two SABC journalists on Wednesday 18 November 2020 at approximately 18:34 CAT, during a broadcast of the show, The Full View. A copy of this interview is available online at: <https://www.youtube.com/watch?v=lq6YQRZ9ufc>
9. The SABC is the public broadcaster. And as the public broadcaster, it not only has a significant public service mandate, it also has a unique role in providing access to news and information for the majority of people in South Africa. The High Court has held in *SOS Coalition and Others v the SABC and Others* Case Number 81056/14, that the SABC is required to provide "significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests." [at paragraph 36, Available at: <http://www.saflii.org/za/cases/ZAGPJHC/2017/289.pdf>]

Sds
MB

10. SOS and MMA hereby lay a formal complaint in terms of clause 11.3 of the Editorial Policies in respect of the above-mentioned programming that violates the Editorial Policies and in particular the stated obligation (at clause 5.1) of the SABC that "the SABC considers it a duty to provide... bias free, credible and useful top-quality news, information and analysis, which the public can trust in their daily decision making about their lives, in participating in processes geared at enhancing, and advancing the country's democracy and in building a common future".

11. The interview conducted by the SABC news staffers violates a number of provisions of the Editorial Policies, relating to News and Editorial Content, namely:
 - a. Clause 5.3.1. which requires the SABC to report, contextualise and present news and current affairs honestly, accurately and transparently and to disclose all essential facts and information and not conceal relevant, available facts or distorting by wrong or improper emphasis.
 - b. Clause 5.3.2 which requires the SABC to not allow... political, state... and personal considerations to influence the SABC's editorial decisions.
 - c. Clause 5.3.3 which requires the SABC to strive for balance by presenting a plurality of views at all times, and particularly on matters of national importance.
 - d. Clause 5.3.13 which provides that SABC news coverage should be accurate, fair, impartial and balanced. The public justifiably expects SABC news and current affairs content to not reflect personal views of editorial staff.
 - e. Clause 5.3.15 which requires SABC editorial staff to always endeavour to present stories in a fair and balanced manner. Every attempt should be made to include a right of reply when required to ensure such balance and fairness in the same story or in a subsequent program with comparable prominence.
 - f. Clause 5.4 which entitles SABC journalists to comment upon and report on any actions or events of public interest. Comment or criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, under the following circumstances when it:
 - 5.4.1 expresses an honestly held opinion;
 - 5.4.2 is without malice;
 - 5.4.3 is on a matter of public interest;
 - 5.4.4 has taken fair account of all material facts that are substantially true;
 - 5.4.5 is presented in such manner that it appears clearly to be comment.
 - g. Clause 5.7 which requires commentary to be held to the same standards of factual accuracy as news content.

Sds
WB

12. The interview published online transgresses all of the above clauses of the Editorial Policies in that it is conducted in a manner that makes it clear that the journalists are not complying with the requirements of the Editorial Policies set out above. The one-sided, self-interested, interview style and inflammatory language used by the interviewers undermines the above-listed provisions of the Editorial Policies. We think that even if it could be argued that the broadcast constituted "comment" which is, in our view, doubtful, given the fact that it is an in-depth interview with the ruling party's Secretary-General on what was a breaking news topic, the commentary did not take account of material facts that were substantially true and the commentary did not reach the levels of factual accuracy standards as news content, as required in terms of the Editorial Policies. In this regard:

- a. One of the interviewers begins the interview by stating that directors earn "millions of Rands" without giving any details or differentiation between, for example, executive and non-executive directors' remuneration.
- b. The interviewer goes on to state that the staff are "earning peanuts", that the retrenchments are a jobs "bloodbath". And that "atrocities are being done to peoples' lives".
- c. In the introduction, there is no attempt to put forward a disinterested, dispassionate, balanced view of the retrenchments processes at the SABC, which staff were notified about recently, in order to contextualise the interview, whether as a news item or as commentary.
- d. The dangers of the obvious personal conflicts of interest of a member of staff engaging in a topic regarding retrenchments of members of staff were not raised at all, let alone dealt with in a manner that sought to emphasize the need for balance and a careful presentation of fact versus opinion on the issue. The style of the interview clearly demonstrated that the journalists allowed their personal considerations to influence reporting and the interview constituted a conflict of interest in the manner it was carried out, in direct violation of clause 5.3.2 of the Editorial Policies.
- e. The actual salary scale figures, which had been published in the day before in the SABC's 2019/20 Annual Report (available at: <https://www.sabc.co.za/sabc/wp-content/uploads/2020/11/SABC-AR-2020.pdf>) were not referred to, even although they showed that the average salary of the lowest level of SABC staffer is R464 000.00. p.a. – an amount that is nearly double the average salary of a non-agricultural worker in the formal sector which is R257 460.00 p.a., according to the latest Quarterly Employment Survey for Q2 issued by Stats SA on 15 October 2020 as reported on here: <https://businesstech.co.za/news/finance/440963/this-is-the-average-salary-in-south-africa-right-now-5/>. In the context of available wage data for South Africa, the

eds
MB

characterization of the salaries being earned by staffers (other than top or senior management at the SABC) which range from an average of R1,234 000.00 p.a. for middle management to the above-mentioned average of R464 000.00 p.a. for the lowest level of staff, as "peanuts", is not an accurate or fair description of such salary scales and even if this was commentary, it did not meet the requirements of clauses 5.4 and 5.7 of the Editorial Policies.

- f. Similarly, it is clear that there has indeed been a "bloodbath" of job losses in the country recently as a result of the Covid-19 Pandemic. The latest unemployment figures reflect this with unemployment at 30.8%. (See EWN reporting on the figures available here: <https://ewn.co.za/2020/11/12/sa-unemployment-rate-increases-to-30-8-in-q3-of-2020-gifs#:~:text=JOHANNESBURG%20%2D%20South%20Africa's%20unemployment%20rate,data%20from%20Statistics%20South%20Africa.>) And the media sector has been particularly hard hit (See Sanef's report on job losses in the sector: <https://sanef.org.za/wp-content/uploads/2020/06/SANEF-Covid-Impact-Research-Final-Report8.pdf>). However, the SABC journalists have failed to provide any justification for characterising the retrenchments process at the SABC as a "bloodbath", particularly when retrenchments have been specifically required to be undertaken by: Parliament as a result of the ad hoc Committee Report on the SABC, the National Treasury as a precondition for two separate bailouts, recommendation of the Auditor-General and the Special Investigative Unit, as have been widely reported in recent years in the press. The proper contextualisation of these state-imposed requirements and bail-out pre-conditions, to counter the legacy of state capture at the SABC, is not made, indeed they are not even mentioned.
- g. The statement that "atrocities are being done to people's lives" is also a violation of the Editorial Policies' stated commitment not to distort, exaggerate or misrepresent. The Compact Edition of the Oxford English Dictionary, Vol 1 defines "atrocious" as "savage enormity, horrible or heinous wickedness" [at page 136]. The Constitution of the Republic of South Africa, 2006 (the Constitution) does not countenance an organ of state, such as the SABC, engaging in atrocities. Indeed, retrenchments are considered to be, as a matter of law and of fact, part and parcel of normal commercial life as is evidenced by the provisions of section 189 of the Labour Relations Act, 1995 – a post-Apartheid flag-ship statute specifically designed to protect the rights of labour.
- h. Mr Magashule states that some members of the Board "support privatization" and are "arrogant" and "intransigent". No mention is made of the fact that the decision to initiate the retrenchments process was taken by a majority of a quorate Board in accordance with the requirements of the Broadcasting Act, 1999 and general company law. No basis is provided for the statement on privatisation and none of those Board members

Eds
WB

were given an opportunity to respond, either individually or collectively, as required by the Editorial Policies.

- i. When Mr Magasule says that the ANC and its Alliance partners and their deployees, including Minister of Communications and Digital Technologies, Ms Stella Ndabeni-Abrahams, are to “put a stop to arrogance”, presumably of the above-mentioned board members, the interviewers make no attempt to contextualise his remarks for the public. This is a crucial failure on the part of the interviewees and is a violation of clauses 5.3.1, 5.3.2, 5.3.3, 5.3.13, 5.3.15, 5.4 and 5.7 of the Editorial Policies, including, *inter alia*, because such statements are in clear contradiction of the provisions of the SABC's governing statute, the Broadcasting Act and this important factual background and legal context was required to have been provided by the interviewers. In this regard:
- (a) the SABC Board is to “control the affairs of the Corporation” - at s13(11) of the Broadcasting Act;
 - (b) the High Court has held in *SOS Coalition and Others v the SABC and Others* and with regards to the SABC: “The ultimate decision-making power is that of the Board and not the Minister...” [at paragraph 125] and, at paragraph 127 “The effect of section 13(11) therefore is to confer on the Board the exclusive powers to control the affairs of the SABC. The Minister is accordingly precluded from exercising any powers by which she may control the Directors in how they control the affairs of the SABC”;
 - (c) Mr Magashule is proposing to ensure unlawful conduct on the part of the Minister and others by interfering in Board matters. This, in our view, is a required the interviewers to point out the implications of such a course of action for the viewers of the interview; and
 - (d) further, not only are Mr Magashule's statements not properly contextualised by the interviewers, they are actively encouraged. The interviewers pose a series of questions to Mr Magashule including: “The Governing Party has yet to call the SABC Board and address them, what is the ANC doing to save jobs at the public broadcaster?”; “What have you (the ruling party) done in halting the process of s189?” “Mr Magashule, let me put it bluntly, the SABC is forging ahead with retrenchments, whether we like it or not. You are sitting there as Secretary General of the governing party. What is stopping you from extending a call right now, to president Ramaphosa, ... to say President, please make sure that those poor workers of the SABC do not lose their jobs.” And they called on Ace Magashule to remove the executives and board members “because they were appointed by Parliament and not by SABC workers”. These questions do not, in our view, fall within the

Bds

MB

parameters of fair comment or news presentation because, again, the underlying facts (particularly in respect of the SABC's legal position) are not indicated or referred to at all, let alone in a fair and truthful manner. Indeed in their forceful demanding of action on the part of Mr Magashule to secure unlawful political intervention in their own labour dispute with the SABC, the journalists are violating clauses 5.3.2, 5.3.13 and 5.7 of the Editorial Policies.

13. Unfortunately, the interview referred to above, and which is the basis of this complaint, has not been an isolated example of the kinds of broadcasts that the public has been subjected to by the SABC news team in the past week or so. This has been evidenced by the number of media outlets that have published opinion pieces and editorials decrying the abuse of its media platforms by the news team in broadcasting or publishing material that undermines the basic tenets of ethical journalism. In this regard please see:

<https://www.businesslive.co.za/bd/opinion/columnists/2020-11-23-carol-paton-sabc-a-dangerous-proxy-war-that-can-harm-ramaphosa/>

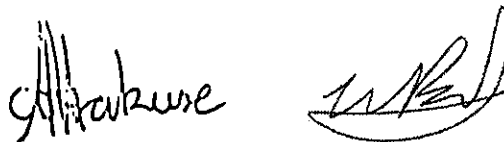
<https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2020-11-22-the-sabc-nettle-will-have-to-be-grasped-eventually/>

<https://www.news24.com/news24/columnists/guestcolumn/opinion-sabc-crisis-this-is-a-watershed-moment-for-independent-public-broadcasting-20201119>

14. We look forward to this matter being dealt with by the SABC as expeditiously as possible.
15. As a matter of courtesy, we advise that similar complaints in respect of the interview that was broadcast on DSTV and on the SABC's digital free to air channels and is available online, have been simultaneously lodged with the Broadcasting Complaints Commission of South Africa and with the Press Council.

Thank you,

Sincerely



Duduetsang Makuse and William Bird

cc Ms Phathiswa Magopeni, Editor in Chief, SABC MagopeniPP@sabc.co.za

cc Mr Bongamusa Makhathini, Chair of the SABC Board MakhathiniBE@sabc.co.za

MB
Bds

cc Ms Mary Papaya, Chair of the SABC Board's Editorial Committee marybpapaya@gmail.com

cc Mr Madoda Maxakwe, CEO, SABC MxakweM@sabc.co.za

cc Adv. Ntuthuzelo Vanara, Head, SABC Legal Services VanaraNJ@sabc.co.za

MB
Bols



Policy and Regulatory Affairs "WRB21"
 Radio Park; Henley Road Auckland Park
 2006
 Private Bag X1; Auckland Park; 2006
 Johannesburg; Gauteng; South Africa.
 Tel +27 11 714-3708 Fax +27 11 714
 4508
 E-mail: moilwap@sabc.co.za

10 December 2020

National Coordinator: SOS Coalition

Suite 1 Art Centre
 PARKHURST
 Johannesburg
 2193

Tel: +27 (11) 788 1278

E-Mail: info@soscoalition.org.za

Dear Ms. Duduetsang Makuse,

SOS COALITION - COMPLAINT AGAINST MULTI-CHOICE SA AND THE SABC

1. This is a response to the complaint lodged by the Media Monitoring Africa and the SOS Coalition against the South African Broadcasting Corporation, regarding an interview conducted by two SABC News journalists with ANC Secretary General, Mr. Ace Magashule on Wednesday, 18 November 2020.
2. It is a fact, as reflected in the regulatory framework and the Editorial Policies of the SABC that the news operation and its journalists must abide by and conduct themselves, as well as execute their journalistic activities in manner that is consistent with prescribed rules. This is an obligation that SABC journalists understand very well, including the consequences of any deliberate deviations from the policies. It is also noted that editorial breaches have broader implications not only for the journalists themselves or editorial staff broadly, but the integrity of the institution itself.
3. It is worth indicating upfront that the interview was intended to deal with a wide range of matters including challenges facing state-owned entities generally, charges against Mr. Magashule, border controls and Bushiri's escape.
4. Without treating every single aspect of the complaint in detail, the concern about the editorial quality and journalistic posture of the interview, in relation to editorial policies and prescribed Codes, is noted and fully accepted. It is correct that while the interview sought to deal with several issues,

South African Broadcasting Corporation SOC Limited: Registration Number: 2003/023915/30

Non-Executive Directors: Mr B E Makhathini (Chairperson); Ms M Mohlala-Mulaudzi (Deputy Chairperson); Prof S Cooper; Adv M B B Lekalaka; Mr D M Maimela;
 Mr M G Markovitz; Mr D K Mohuba; Ms J Patel; Mr J H Phalane; Ms M B Papayya; Dr M Socikwa
 Executive Directors: Mr M T Mxakwe (Group Chief Executive Officer); Mr I C Plaatjes (Chief Operations Officer); Ms Y van Biljon (Chief Financial Officer); Company
 Secretary: Ms L V Bayi

WRB
Sols

what became dominant were SABC matters. There are several considerations that need to be made in examining the interview and the related complaint.

- In the first editorial meeting following the interview, editors discussed it extensively and expressed serious concerns about its editorial quality. A number of issues were raised, and the Politics Editor was tasked with looking into ensuring that they were addressed with the journalists, and that mechanisms were in place to prevent recurrence. The Editors did observe the problems as reflected in the complaint and moved swiftly to address them.
- The context and the timing of the interview are factors for consideration. The public discourse on SABC retrenchments had just peaked at the time of the interview, following the well-publicized newsroom incident which took place the day before. This made it central to the interview. However, there is no question that the issues raised in relation to this aspect could have been treated differently and dealt with without compromising editorial independence and impartiality.
- Reporting and covering SABC retrenchments has been a serious test for the newsroom. Journalists are directly affected by the process and must deal with the prospect of losing their jobs while covering the story daily.
- Whereas there are legal and editorial obligations for SABC journalists to always exercise good editorial judgement, the sheer proximity of the story to their lives makes the task of distancing themselves and remaining unaffected, an exceptionally difficult one. In fact, one of the journalists points out during the interview that he "speaks as an affected person", which is necessary to make the viewers aware of the conflict of interest.
- Also, although it does not excuse their editorial and journalistic accountability, this is an uncharted territory for the two journalists. It must therefore be understood that the resulting editorial drifts were not preconceived as the complaint seems to suggest but arose out of the journalists being too emotionally close to the story of SABC retrenchments as a subject of the interview.

Sols
WB

- To demonstrate the absence of intent to breach the principle of fairness, one of the journalists asks this question during the interview, "The ANC is not holier than though when it comes to dismantling and destroying of the public broadcaster, the ANC has to answer to a lot of questions as to what has gone wrong at the public broadcaster. When are you as the governing party going to sit down and introspect"? Read within the context of the rest of the questions, there does not seem to be any intention to absolve the ANC from what has and is happening at the SABC or portray it as the 'redeemer'.
- Another issue for consideration is the fact that even Mr. Magashule himself does point out that "at times we have problems with you as journalists, people working with the SABC". This should also be taken as clear indication that there is no malicious intent by the journalists as they have always carried their assignments independently and with impartiality and journalistic rigour. This makes this interview out of pattern with their own established regular journalistic conduct.
- In relation to the right to reply on matters concerning the Board, particularly executive pay, the Chairperson of the Board was interviewed on Morning Live on 19 November 2020, a day after the interview with Magashule. He responded to questions that were raised.
- On the cited failure to distinguish executive from non-executive directors' remuneration, while it is not done upfront when the issue is raised for the first time in the interview, further into the discussion the journalist reads the exact figures with names of the executives directly from his phone. This should be considered sufficient to demonstrate the reference to the 'millions'.
- The reference to the term "bloodbath" is not a singular allusion to SABC retrenchments, but is made within a broader context, where the interviewer says the "jobs bloodbath continues not only in the private sector, but now in the public sector", and goes on to make a direct reference to the SABC.

WB
Eds

5. It is therefore our view that while the editorial breaches are egregious and unacceptable, it must be considered that they were not premeditated. The prevailing circumstances, the highly emotive context and the timing must be considered in assessing the matter.
6. The SABC will deal with its employees according to its personnel regulations which we are not at liberty to converse with the complainant.

The SABC remains committed to upholding its principles as an independent public broadcasting service.

Kind Regards,



**PHILLY MOILWA
GENERAL MANAGER
POLICY AND REGULATORY AFFAIRS
SABC**

*Bds
MB*



Suite 1, Art Centre, 22 4th Ave, Cnr 4th Ave & 6th Street, Parkhurst, Johannesburg, 2193
Tel: +27 11 788 1278 | Email: info@soscoalition.org.za | www.soscoalition.org.za



Suite No.2, Art Centre, 22 6th St, Parkhurst, Johannesburg, 2193
PO Box 1560, Parklands, 2121 | Tel: +27 11 788 1278 | Fax: +27 11 788 1289
Email: info@mma.org.za | www.mediamonitoringafrica.org

Ms Shouneez Martin

Registrar, BCCSA

Email: bccsa@nabsa.co.za

17 December 2020

Dear Ms Martin

COMPLAINT AGAINST MULTI-CHOICE SA AND THE SABC IN RESPECT OF PROGRAMMING FLIGHTED ON THE SABC NEWS CHANNEL ON THE DSTV BOUQUET AND ON THE SABC'S FREE TO AIR DIGITAL CHANNELS: REPLY TO THE SABC'S RESPONSE

1. We refer to the complaint in the above matter lodged by the SOS Coalition (SOS) and Media Monitoring Africa (MMA) on 30 November 2020.
2. We are in receipt of the SABC's response which is undated but which we received on 10 December 2020.
3. We set out our response below.
4. Ad paragraph: 4, 4 (bullet point 1), 4 (bullet point 2), 4 (bullet point 4), 4 (bullet point 5), 4 (bullet point 7), and 5:

Bals
WB

a. We note that in each of the above paragraphs (seven in all), the SABC admits that the interview complained of failed to meet acceptable standards of ethical journalistic professionalism, namely, and in order:

- (a) “[T]he concern about the editorial quality and journalistic posture of the interview... is noted and fully accepted.”
- (b) “[E]ditors discussed [the interview] extensively and expressed serious concerns about its editorial quality”.
- (c) “[T]here is no question that the issues raised in relation to this aspect [namely the retrenchments] could have been treated differently and dealt with without compromising editorial independence and impartiality”.
- (d) “[T]he sheer proximity of the story to [the journalists’] lives makes the task of distancing themselves and remaining unaffected, an exceptionally difficult one. In fact, one of the journalist points out during the interview that he ‘speaks as an affected person’, which is necessary to make the viewers aware of the conflict of interest”.
- (e) “Also, although it does not excuse the editorial and journalistic accountability, this is an uncharted territory for the two journalists...the resulting editorial drifts were not preconceived.... But arose out of the journalists being too emotionally close to the story”.
- (f) “This makes the interview out of pattern [sic] with their own established regular journalistic conduct”.
- (g) “[T]he editorial breaches are egregious and unacceptable”. (our emphasis)

b. These admissions are welcome. But they point, clearly, to systemic failures in the newsroom regarding its ability to report on matters involving itself with the level of professionalism required of the SABC, by law, as set down in the BCCSA Codes. The failures are such that they cannot be blamed only on fairly low-level reporters, responsibility must also be borne by programme editors, news and politics editors, including the executive responsible for news.

5. Ad paragraph: 4 (bullet point 5), 4 (bullet point 6), 4 (bullet point 7), and 5:

Sds
MB

- a. We note that in each of the above paragraphs (four in all), the SABC makes submissions on the levels of intention on the part of the SABC staff, namely and in order:

- (a) "[T]he resulting drifts were not preconceived".
- (b) "There does not seem to be any intention to absolve the ANC from what has [sic] and is happening at the SABC or portray it as the 'redeemer'."
- (c) "[T]here is no malicious intent by [sic] the journalists".
- (d) "[T]he editorial breaches...were not pre-meditated" (our emphasis)

- b. The issue of the absence of premeditation or malicious intention cannot constitute legitimate defences or justifications for the breaches of the BCCSA Codes because:

- (a) nowhere in the Free to Air or Subscription Codes do the concepts of premeditation or malicious intention even arise;
- (b) the only reference to intention or negligence arises in clauses 11(2) and 28.1.2 of the Free to Air and Subscription Codes, respectively, which each provide that "news must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts" (our emphasis); and
- (c) the fact that the numerous editorial breaches repeatedly admitted to were made without premeditation and/or malice does not render them unintentional nor without negligence with regard to news, nor fair with regard to comment.

- c. Again, we stress the importance of the nature of the SABC; that it is the public broadcaster, with a public mandate to inform and educate the nation. This requires the SABC to adhere to the highest standards of ethical conduct and professional journalism.

6. Ad paragraph 4 (bullet point 8):

- a. The SABC submits that an SABC interview with the Board Chair, Mr Bongumusa Makhathini, conducted and broadcast the next morning, constituted a "right of reply" on matters concerning the Board.
- b. That interview is available here: <https://www.youtube.com/watch?v=Dom3V4sklzs>

WB
Bds

c. The mere fact that an interview is conducted with the Board chairperson after the flighting of the original interview does not constitute a "right of reply" or the "presentation of opposing views" as provided for in clauses 13 and 28.3 of the Free to Air and Subscription Codes, respectively, both of which clauses provide that:

(a) "In presenting a programme in which a controversial issue of public importance are discussed, the broadcaster must make reasonable efforts to fairly present opposing points of view either in the same program or in a subsequent program forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same slot". (our emphasis). In this regard:

1. Nowhere in the second interview does the SABC interviewer reference the previous evening's interview much less present the second interview as an opportunity to "present opposing points of view" to the matters canvassed in the initial interview.
2. Further, an interview on Morning Live the following day is not a subsequently 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 slot.
3. For the second interview to have met these requirements, the interviewer would have had specifically to reference the points of view aired the previous night and the second interview ought to have taken place during that night's airing of The View, not on Morning Live which is in a time slot that has a 12 hour time difference to that of The View.

(b) "The person whose views are to be criticised in a broadcasting program on a controversial issue of public importance must be given the right to reply to such criticism on the same programme. If this is impracticable, reasonable opportunity to respond to the program should be provided where appropriate, for example in a right to reply programme or in a prearranged discussion programme with the prior consent of the person concerned." In this regard, nowhere in the second interview does the SABC interviewer even reference the previous evening's interview.

d. Consequently, we submit that the Morning Live interview of 19 November 2020 did not met the requirements of the Codes in respect of controversial issues of public importance as provided for in the relevant sections of the Code.

Bds
W/B

e. We also think it important to point out other problems with the Morning Live interview which we think needs to be done given that that interview is held up by the SABC in mitigation of the previous evening's interview with Mr. Ace Magashule:

(a) In the Morning Live interview, the interviewer states, as a matter of fact: "*Mr Makhathini, one of the issues that staff have been crying for since the start of these talks, was that there should be a transparency and fairness of process. That hasn't happened.*"

(b) However, that statement of fact is and was incorrect. As the Labour Court in the matter of *BEMAWU and Others v SABC and Others* [Case No. J1199/20] (a copy of which is provided herewith) held at paragraphs [80], [81] and [85], respectively:

All considered, it is my view that it was BEMAWU that failed to properly consult with the SABC on the consultation topics... It obviously, in my view, deliberately went about doing all it could to obstruct the proceedings as much as possible. It is simply not in the interests of the SABC, nor can I fathom any logical reason on its part, to have 16 consultations in four months and consult about nothing. The glimpse I received from the partial extract provided, showed me the accusatory and obstructive attitude of BEMAWU in the consultation process...

BEMAWU had every opportunity to participate in the consultation process. It also had every opportunity to table its own proposals. But to adopt the approach of point taking, obstructive conduct and effective non-participation in the process, and wait until the end when the process was in the throes of conclusion to in effect after the fact complain about the process, is just not proper...

To the contrary, I am satisfied that the SABC properly conducted itself in the process, provided all the consulting parties with sufficient information, and constructively engaged with the view to reach consensus on all consultation topics as contemplated in section 189(2). Its financial position was clearly disastrous, and restructuring, no matter how one may look at it, was essential. It substantially reduced the number of affected employees in the course of the process. It was willing to compromise, where needed to ensure a fair process. Its conduct is not open to legitimate criticism.

WMB

We think that the BCCSA must take account of what appears to be self-interest of an employee (whether in respect of herself or her colleagues) again distorting the facts with regard to the SABC's retrenchments consultation processes, the truth of which were confirmed, definitively, by the Labour Court.

7. Ad paragraph 4 (bullet point 9):

The response by the SABC does not deal with the real nub of the complaint made which is in regard to the statement, presented as one of fact, that the staff earn "peanuts". We reiterate our original complaint in this regard.

8. Ad paragraph 4 (bullet point 10):

The response by the SABC does not deal with the real nub of the complaint made which is in regard to the statement, presented as one of fact, that the retrenchments process constitutes a jobs "bloodbath" at the SABC. In this regard, the Morning Live interview presented by the SABC as programming in mitigation repeats this statement as a matter of fact. Consequently, we reiterate our original complaint in this regard.

9. We think it is critical to draw the BCCSA's attention that the SABC's vaguely worded apology (not a single paragraph number of our complaint nor clause of either of the BCCSA codes is referenced) failed to deal, in detail or indeed at all, with the following three issues that formed part of our complaint, namely:

- a. the statement that "atrocities are being done to people's lives" which we said was a violation of the Codes' obligations not to distort, exaggerate or misrepresent;
- b. the fact that the interviewers made no mention of the fact that the decision to initiate the retrenchments process was taken by a majority of a quorate Board in accordance with the requirements of the Broadcasting Act, 1999 and general company law; and
- c. the actions of its staff, live on air, in repeatedly requesting the Secretary-General of the ruling party to intervene, unlawfully, in operational issues of the independent public broadcaster.

10. Further, in our complaint we stated that the interview which formed the basis of this complaint, was not "an isolated example of the kinds of broadcasts that the public has been subjected to by the SABC news team". In this regard, we think it is critical to point out to the BCCSA that the very video footage that the SABC refers to in mitigation of its unlawful broadcast (which illegality it has admitted to repeatedly in its response) itself repeats many of the same actions that gave rise to the complaint in the first place and demonstrates again, clear conflicts of interest in the manner in which the interview was conducted, aspects of which have been highlighted above.

MB Bds

11. Sanctions

- a. We reiterate that in terms of section 14 of the Constitution of the BCCSA, the BCCSA may, in response to a complaint, take a number of courses of action. We reiterate that SOS and MMA are of the view that the broadcast complained of reflected a number of breaches of the Code of the most serious kinds as has been admitted by the SABC.
 - b. We are of the view that an appropriation sanction would be to:
 - (a) impose a fine of R80 000.00 as provided for in section 14.5 of the BCCSA Constitution;
 - (b) record criticism of the conduct of the SABC's news department in relation to the complaint as is provided for in clause 14.6 of the BCCSA Constitution;
 - (c) direct that a summary of the findings of the BCCSA be broadcast by the SABC at the beginning of each broadcast of The Full View on three consecutive days, as is provided for in clause 14.3 of the BCCSA Constitution; and
 - (d) recommend, as is provided for in clause 14.7 of the BCCSA Constitution, that the SABC take steps to ensure that these kinds of Code violations do not occur again, including though:
 1. embarking on an internal training programme in the newsroom as to the requirements of the BCCSA Codes of Conduct, and
 2. engaging in internal disciplinary processes with the news staffers responsible for the violations of the Code, including editors and people with supervisory responsibilities,
 3. to ensure that all news staff understand that what happened was series of egregious breaches of the most serious kind which undermined the standing of the SABC as the public broadcaster and damaged the trust that the South African public has in the ethics, fairness and professionalism of its news production operation, and that the SABC report back to the BCCSA on such steps within three months.
12. Given the importance and the nature of the admitted violations of the Codes, we are of the respectful view that this matter ought to be dealt with by the BCCSA Tribunal.

WB
Bols

Thank you,

Sincerely



Duduetsang Makuse

National Coordinator



William Bird

Director

cc Ms Phathiswa Magopeni, Editor in Chief, SABC MagopeniPP@sabc.co.za

cc Mr Bongamusa Makhathini, Chair of the SABC Board MakhathiniBE@sabc.co.za

cc Ms Mary Papaya, Chair of the SABC Board's Editorial Committee marybpapaya@gmail.com

cc Mr Madoda Maxakwe, CEO, SABC MxakweM@sabc.co.za

cc Adv. Ntuthuzelo Vanara, Head, SABC Legal Services VanaraNJ@sabc.co.za

cc Mr Philly Moilwa, GM, Regulatory Affairs moilwap@sabc.co.za

W.B. Blk



Suite 1, Art Centre, 22 4th Ave, Cnr 4th Ave & 6th Street, Parkhurst, Johannesburg, 2193
Tel: +27 11 788 1278 | Email: info@soscoalition.org.za | www.soscoalition.org.za



Suite No.2, Art Centre, 22 6th St, Parkhurst, Johannesburg, 2193
PO Box 1560, Parklands, 2121 | Tel: +27 11 788 1278 | Fax: +27 11 788 1289
Email: info@mma.org.za | www.medianmonitoringafrica.org

Ms Shouneez Martin

Registrar, BCCSA

Email: bccsa@nabsa.co.za

1 February 2021

Dear Ms Martin

COMPLAINT AGAINST MULTI-CHOICE SA AND THE SABC IN RESPECT OF PROGRAMMING FLIGHTED ON THE SABC NEWS CHANNEL ON THE DSTV BOUQUET AND ON THE SABC'S FREE TO AIR DIGITAL CHANNELS: ADDITIONAL INFORMATION REQUESTED

1. We refer to the complaint in the above matter lodged by the SOS Coalition (SOS) and Media Monitoring Africa (MMA) on 30 November 2020, the oral hearing in respect of which took place on Friday, 29 January 2021 via Zoom.
2. We think it is critical to address certain of the statements that were made by the SABC representatives during the SABC's oral reply to our complaint. In this regard, we formally request that an electronic copy of the recorded hearing be made available to us at your earliest convenience.
3. In the hearing, the SABC's Mr Nyiko Shibambo:

A handwritten signature in black ink, appearing to be 'W.B. Boks'.

- a. made a number of false and defamatory statements regarding the complainant organisations, SOS and MMA, including statements to the effect that:
 - (a) they do not act in the public interest; and
 - (b) they always seem to know about management decisions before we (presumably SABC staff?) do;
 - b. made a statement to the effect that we (presumably the SABC News Department) do not agree with numerous judgments to which the SABC has been a party, including:
 - (a) the judgment of the High Court in *SOS Coalition and Others v SABC and Others*, which judgment protected, as a matter of law, the SABC Board right to manage the affairs of the SABC without executive interference on the part of the Minister; and
 - (b) the Labour Court's judgment in *BEMAWU v SABC* which found the conduct of the SABC with regard to the retrenchment issues to have been procedurally fair and in accordance with all relevant labour laws,and reserved the right to criticize these; and
 - c. denied emphatically that there was jurisprudence which would allow the BCCSA to impose the sanctions provided for in its own Constitution and as requested by the SOS and MMA.
4. We submit it is important to respond to each issue raised by Mr Shibambo in turn:
- a. We think it is extraordinary that a senior SABC employee should cast aspersions, in a public hearing, on two of South Africa's leading media freedom organisations by saying that they do not act in the public interest. In this regard:
 - (a) SOS has been in operation for 13 years and has only one paid officer, its national co-ordinator Ms Duduetsang Makuse. Its work is carried out by a number of volunteers – people who give up their time and energy because they believe in the principles of public broadcasting.
 - (b) Ms Makuse, and SOS's previous national co-ordinator, Sekoetlane Phamodi, both featured in the Mail and Guardian's Top 200 Young South Africans for their work at SOS;

Boles
WB

- (c) William Bird, MMA's national coordinator was elected a global Ashoka Fellow in 2008 for his work involving children and the media.
- (d) Both SOS and MMA launched the ground-breaking case of *SOS and Others v SABC* to ensure that a human rights-based interpretation of the Broadcasting Act was adopted by our courts and in this way has assisted in securing the long-term independence of the SABC from Ministerial interference in our jurisprudence.
- (e) SOS and MMA have a history of bringing public interest-based complaints to support ethical journalism and media freedom including:
1. *MMA v ENCA Channel 403* (2020), a complaint lodged at the BCCSA about medical misinformation on Gareth Cliff's show. Available At: <https://mediamonitoringafrica.org/wp-content/uploads/2020/10/09-Media-Monitoring-Africa-vs-eNCA-Judgment.pdf>
 2. *SOS and MMA v SABC* (2018,) a complaint lodged at ICASA's Complaints and Compliance Committee (the CCC) about the SABC's failure to notify its viewers that certain flighted content (a Ministerial interview) was sponsored content. Available at: <https://www.icasa.org.za/complaints-and-compliance-committee/sos-and-mma-vs-sabc-28-sept-2018-287-2018>
 3. *SOS and MMA v SABC* (2016), a complaint lodged at the CCC about the SABC's failure to provide for a public notice and comment procedures on its draft Editorial Policies. Available at: <https://www.icasa.org.za/complaints-and-compliance-committee/sabc-vs-sos-and-media-monitoring-09-december-2016-214-2016>
 4. *MMA and SOS v SABC* (2016), a complaint lodged at the CCC about the SABC's refusal to air protest visuals in the run up to the 2016 municipal elections. Available at: <https://www.politicsweb.co.za/documents/icasas-ruling-against-the-sabc>
 5. Submissions given by both organisations to the regulator ICASA on a variety of issues relating to broadcasting and broadcasting policy.

WB
Bd

MMA and SOS were successful in all of the above matters. It is also important to note that this is only a sample of the cases or complaints that the organisations have launched or been involved in to protect the public interest in media-related matters, and other matters include their respective submissions to Parliament's *Ad Hoc Enquiry into the SABC Board* and number court appears as *amicus curiae* on the part of MMA on children and the media.

- b. SOS and MMA reject as untrue and defamatory Mr Shibambo's statement to the effect that SOS and MMA "always seem to know what management is doing before we (presumably the SABC staff?) do". Not only does this suggest that MMA and SOS are in the pocket of management at the SABC (a ludicrous allegation given the number of times the two organisations have challenged the SABC) but, more astonishingly, Mr Shibambo's aspersions boomerang and the implications are, of course, much more damning for his own organisation's management.
- c. SOS and MMA know full well that the SABC has the right to freedom of expression and editorial independence. And if the SABC, as a matter of editorial policy, is of the view that the cases of *SOS and Others v SABC and Others* and *BEMAWU v SABC* were wrongly decided, it may, of course, voice legitimate criticism of the judgments and indeed the SABC itself is entitled to appeal those cases if it is of the view that they were wrongly decided in its favour. However, the SABC's news team may not act as if the cases do not exist and it may not:
 - (a) call (as its journalists repeatedly did in the Ace Magashule interview) for unlawful political interference in SABC Board/management matters such as the retrenchments processes; or
 - (b) state as a matter of fact that there had been no consultations with staff in the retrenchments processes (as Ms Kamwendo did in the Morning Live interview) when (as the court in *BEMAWU v SABC* confirmed [at paragraph 23]), there had in fact been sixteen separate consultations with staff representatives.
- d. In the hearing, we referred the BCCSA to the CCC ruling in *Maswangani v Giyani Community Radio* in which a detailed apology was ordered to be flighted for five consecutive days. The BCCSA Chair asked us to provide a reference for the CCC ruling which is available at: <https://www.icasa.org.za/uploads/files/giyani-community-radio.pdf>. We also refer the BCCSA to the case of *F v SABC* (available at: <https://bccsa.co.za/wp-content/uploads/2015/02/Case-No-01-2009.pdf>) in which the highest possible fine was imposed upon the public broadcaster. We note that both of these cases involved damage to the reputations of private individuals. However, the

Bds
WB

fact that the interview that is the subject of our complaints did not involve such damage, does not mean that significant sanctions should not be imposed in this case. The SABC (at least in its written response) accepted the seriousness of the Code violations that occurred as a result of the Ace Magashule interview. These violations are particularly egregious when one considers the unique role that the SABC plays in the life of the nation. As Matojane J held in *SOS and Others v SABC*:

The ability of the SABC to reach a vast number of people renders it a powerful tool that potentially could impact on the quality of democracy if it is not independent and pluralistic because the majority of South Africans receive their news and information . rimilarly through the SABC's radio and television broadcasts. [at para 39]

The SABC has a unique role and responsibility to play as the public service broadcaster. The high rate of illiteracy in the country, the limited distribution and cost of newspapers and the cost of subscription television makes the SABC be the primary source of information for the majority of South Africans. [at para 40]

The SABC is a public service broadcaster must promote alternative views to encourage debate that is vital to the functioning of democracy... The public broadcaster plays a crucial role in strengthening democracy and democratic governance by ensuring that the general public, in particular, those with neither political nor economic influence or power, have access to a broad spectrum of views on issues of public concern. [at para 42]

We respectfully submit that the violations of the Code complained of are so serious that they undermine the unique role the public broadcaster must play in the life of our democracy. And, if the BCCSA is also of the view that the Code violations complained of by SOS and MMA (and admitted by the SABC) were serious, it must impose sanctions that are proportional to the egregious nature of the offence to send a clear message to the SABC that such conduct is unacceptable and must not be repeated.

5. One last aspect of the oral hearing that we found particularly disturbing and at odds with the SABC's written response acknowledging the various Codes violations that had taken place was the GE of News, Ms Phathiswa Magopeni's defence of the journalists' use of the word "atrocitiy" when refencing to the SABC's retrenchment process. We think it is critical to refer the BCCSA to the findings of the Labour Court in *BEMAWU v SABC* [at paragraph 85]:

I am satisfied that the SABC properly conducted itself in the process, provided all the consulting parties with sufficient information, and constructively engaged with the view to reach consensus on all consultation topics as contemplated in section 189(2). Its financial position was clearly disastrous, and restructuring, no matter how one may look at it, was essential. It substantially reduced the number of affected employees in the course of the process. It was willing to

BLS
MB

compromise, where needed to ensure a fair process. Its conduct is not open to legitimate criticism. (our emphasis)

For Ms Magopeni to insist on describing the s189 process as an "atrocious" in the face of clear evidence to the contrary, reflects extremely poorly on genuineness of the SABC's written response admitting to its various violations of the Code and on her own understanding, as head of News, of the nature of a s189 process as a matter of law.

6. It goes without saying that SOS and MMA were, alarmed at the conduct of the SABC representatives at the oral hearing which was, in our view, at odds with the SABC's written response to the complaint which acknowledged the various Codes violations and did not challenge a single aspect of the complaint. In the light of such conduct, we reiterate the need for the BCCSA to send a strong message, by way of the imposition of sanctions, to the SABC that these numerous violations were unacceptable and must not be repeated.

Thank you,

Sincerely



Duduetsang Makuse

National Coordinator



William Bird

Director

cc Ms Phathiswa Magopeni, Editor in Chief, SABC MagopeniPP@sabc.co.za

cc Mr Bongamusa Makhathini, Chair of the SABC Board MakhathiniBE@sabc.co.za

cc Ms Mary Papaya, Chair of the SABC Board's Editorial Committee marybpapaya@gmail.com

cc Mr Madoda Maxakwe, CEO, SABC MxakweM@sabc.co.za

cc Mr Ian Plaatjes, COO, SABC IanP@sabc.co.za

cc Adv. Ntuthuzelo Vanara, Head, SABC Legal Services VanaraNJ@sabc.co.za

cc Mr Philly Moilwa, GM, Regulatory Affairs moilwap@sabc.co.za

Bds
WB



Policy and Regulatory Affairs
 Radio Park, Henley Road, Auckland Park, 2006
 Private Bag X1 Auckland Park 2006, Gauteng,
 South Africa.
 Tel +27 11 714-3708
 Fax +27 11 714-4508
 Email: moilwap@sabc.co.za
www.sabc.co.za

03 February 2021

Ms Duduetsang Makuse
 National Coordinator: SOS Coalition
 Suite 1 Art Centre
 22 6th Str, Cnr 4th Avenue
 Parkhurst
 Johannesburg
 2193

Tel: +27 (11) 788 1278
E-Mail: info@soscoalition.org.za

Dear Duduetsang

**SOS COALITION: COMPLAINT AGAINST MULTI-CHOICE SA AND THE SABC -
 ADDITIONAL INFORMATION**

The SABC acknowledges receipt of your letter dated 1 February 2021 in respect of additional information provided to the BCCSA.

Please note that we will respond to your letter after receiving and reviewing the recordings of the oral hearings held on Friday, 29 January 2021.

I hope you find this in order.

Kind Regards

PHILLY MOILWA
GENERAL MANAGER
POLICY AND REGULATORY AFFAIRS



377
"WRB25"

Policy and Regulatory Affairs
Radio Park, Henley Road, Auckland Park, 2006
Private Bag X1 Auckland Park 2006, Gauteng,
South Africa.
Tel +27 11 714-3708
Fax +27 11 714-4508
Email: moilwap@sabc.co.za
www.sabc.co.za

17 February 2021

Ms Duduetsang Makuse
National Coordinator: SOS Coalition
Suite 1 Art Centre
22 6th Str, Cnr 4th Avenue
Parkhurst
Johannesburg
2193

Tel: +27 (11) 788 1278
E-Mail: info@soscoalition.org.za

Dear Duduetsang

**SOS COALITION: COMPLAINT AGAINST MULTI-CHOICE SA AND THE SABC -
ADDITIONAL INFORMATION**

We refer you to the SOS Coalition's letter dated 1 February 2021 in respect of additional information provided to the BCCSA.

The SABC would like to thank the SOS Coalition & MMA for their indulgence in allowing us time to deal with issues that were raised at the BCCSA tribunal. The SABC wishes to clarify its position with regards to the issues raised as follows:

1. The position of the SABC on retrenchments is clear and has been approved by the SABC Board. We also have an approved corporate position welcoming the judgment of the Labour Court in the BEMAWU and Others v SABC, confirming that the SABC substantially complied with the provisions of section 189 of the Labour Relations Act in its consultation with employees and/or organised labour.

Bds
MB

2. Management has never discussed any developments at the SABC with either SOS Support Public Broadcasting or Media Monitoring Africa, as the two organisations do not feature in the governance structures of the SABC.
3. The SABC's founding documents are clear on the role of the SABC Board in directing the affairs of the organisation vis-à-vis the role of the Shareholder. The SABC has long accepted the judgment by Matojane J in the matter of SOS Coalition and Others v SABC and Others, and the Board has publicly pronounced its support on this.
4. We have noted that the position presented at the hearing was not in line with the SABC's position as outlined above.

I hope you find this in order.

Kind Regards



PHILLY MOILWA
GENERAL MANAGER
POLICY AND REGULATORY AFFAIRS

Eds
MB



P.O. Box 412265 • Craighall • Tel (011) 326 3136 • Fax (011) 326 3198 • email: bccsa@mds.co.za
 Block No 8 • Burnside Island Office Park • 410 Jan Smuts Avenue • Craighall Park • 2196 • www.bccsa.co.za

CASE NUMBER: 003/2021

DATE OF HEARING: 29 JANUARY 2021

JUDGMENT RELEASE DATE: 24 FEBRUARY 2021

**SUPPORT PUBLIC BROADCASTING COALITION (SOS) &
 MEDIA MONITORING AFRICA**

COMPLAINANTS

vs

SABC CHANNEL 404

RESPONDENT

**TRIBUNAL: MR BRIAN MAKEKETA (DEPUTY CHAIRPERSON)
 DR LINDA VENTER (COMMISSIONER)
 MR EDWIN NAIDU (COMMISSIONER)**

FOR THE COMPLAINANT: Prof Justine Limpitlaw: Head Legal Sub-Committee accompanied by Ms Duduetsang Makuse of the Support Public Broadcasting Coalition (SOS) and Mr William Bird of the Media Monitoring Africa (MMA).

FOR THE BROADCASTER: Mr Nyiko Shibambo: Broadcast Compliance accompanied by Mr Njanji Chauke: Editor for SABC News, Mr Khaya Mwelase: Legal Department and Ms Phathiswa Magopeni: Head of News & Current Affairs at SABC.

Complaint about the contravention of Clause 28 of the Subscription Code of Conduct and Clause 11 of the Free-to-Air Code of Conduct about news. This matter is between the Support Public Broadcasting Coalition (SOS) & Media Monitoring Africa vs SABC channels 192 and 404, Case No:003/2021(BCCSA).

SUMMARY

The gist of the complaint is that the news was not presented in a fair, truthful and accurate manner. It is further stated in the complaint that statements presented by the interviewers were factually incorrect and amounted to negligence. Lastly the Complainants are of the opinion that this matter

W B Pds

was of public importance, but that the right of reply was given on a completely different programme. All the complaints were upheld and a fine of R10 000.00 is imposed upon the broadcaster.

JUDGMENT

[1] This is a joint complaint by *Support Public Broadcasting Coalition (SOS) and Media Monitoring Africa (MMA)* about an interview with ANC Secretary-General, Mr Ace Magashule, conducted by two SABC journalists, on Wednesday 18 November 2020. The gist of the complaint is that the interview conducted by the SABC news staffers violates a number of provisions of Clause 28 of the Code of Conduct for Subscription Broadcasters and Clauses 11 and 13 of the Code of Conduct for Free-to-Air Broadcasters relating to News.


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

“COMPLAINT AGAINST MULTI-CHOICE SA AND THE SABC IN RESPECT OF PROGRAMMING FLIGHTED ON THE SABC NEWS CHANNEL ON THE DSTV BOUQUET AND ON THE SABC'S FREE TO AIR DIGITAL CHANNELS

1. The SOS Support Public Broadcasting Coalition (SOS) is a registered not-for-profit organisation, which itself is a civil society coalition that is committed to, and campaigns for, broadcasting services that advance the public interest. While the SABC is our primary focus – as the key site of and the institution established to drive public interest broadcasting – SOS also engages in the advancement of community broadcast media in South Africa. SOS is made up of a broad range of civil society organisations, trade unions and their federations, and individuals (including academics, freedom of expression activists, policy and legal consultants, actors, script-writers, film makers, producers and directors).
2. The SOS Coalition campaigns tirelessly for an independent and effective public broadcaster. SOS engages with policymakers, regulators, and lawmakers to secure changes that will promote citizen-friendly policy, legislative and regulatory changes to broadcasting and its associated sectors.
3. Media Monitoring Africa (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.
4. MMA aims to contribute to this vision by being the premier media watchdog in Africa to promote a free, fair, ethical and critical media culture. MMA has over 20 years' experience in media monitoring and direct engagement with media, civil society organisations 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.

mb eds

5. As part of their aims to promote a public broadcaster that is governed and acts in accordance with international best practice standards for public broadcasting, it is incumbent upon SOS and MMA to act when the South African Broadcasting Corporation (SABC) falls short of its stated commitment to ethical journalism, including in respect of its news channel flighted on DStv, operated by MultiChoice SA (MultiChoice), and as part of its digital free-to-air channels.
6. The SABC is a member of the National Association of Broadcasters and has committed to complying with the provisions of the BCCSA Codes of Conduct for both Free to Air and Subscription Broadcasters. Similarly, MultiChoice SA is a member of the NAB and has committed to complying with the provisions of the BCCSA Code of Conduct for Subscription Broadcasters
7. SOS and MMA hereby lay a formal complaint against both the SABC and MultiChoice SA in respect of programming flighted by the SABC on its news channel which is carried on the DStv bouquet, channel 404, and in particular, on the show, Full View, which is broadcast daily between 18h00 and 31h00, which channel is also carried on the SABC's digital terrestrial free to air channels.
8. The complaint concerns an interview with ANC Secretary-General, Mr Ace Magashule, conducted by two SABC journalists, on Wednesday 18 November 2020 at approximately 18:34 CAT, during a broadcast of the show, The Full View. A copy of this interview is available online at: <https://www.youtube.com/watch?v=lq6YQRZ9ufc>
9. We are of the respectful view that the BCCSA must take account of the fact that the SABC is the public broadcaster. And as the public broadcaster, it not only has a significant public service mandate, it also has a unique role in providing access to news and information for the majority of people in South Africa. The High Court has held in *SOS Coalition and Others v the SABC and Others* Case Number 81056/14, that the SABC is required to provide "significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interest." [at paragraph 36, Available at: <http://www.saflii.org/za/cases/ZAGPJHC/2017/289.pdf>]
10. The interview conducted by the SABC news staffers violates a number of provisions of the:
 - a. Code of Conduct for Subscription Broadcasters, relating to News and commentary on matters of public importance, namely:
 - (a) Clause 28.1.1 which requires broadcasting services licensees to report news truthfully, accurately and fairly.
 - (b) Clause 28.1.2 which requires news to be presented in the correct context and in a fair manner without intentional or negligent departure from the facts, whether by
 - 28.1.2.1 Distortion, exaggeration or misrepresentation;
 - 28.1.2.2 Material omissions; or
 - 28.1.2.3 Summarisation.
 - (c) Clause 28.1.3 which provides that "only that which may be reasonably true, having reasonable regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with reasonable regard to context and importance".
 - (d) Clause 28.2.1 which provides that "licensees may broadcast comment on and criticism of any actions or events of public importance".
 - Clause 28.2.2 which provides that "comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be

LB 

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

- (e) Clause 28.3.1 provides that "in presenting a programme in which a controversial issue of public importance as discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same program or in a subsequent program forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially that same timeslot'.
- b. Code of Conduct for Free to Air Broadcasters, relating to News and commentary on matters of public importance, namely:
- (a) Clause 3(b) which prohibits a broadcaster from broadcasting materials which, judged within context sanctions, promotes or glamorises... unlawful conduct.
 - (b) Clause 11(1) which requires broadcasting services licensees to report news truthfully, accurately and fairly.
 - (c) Clause 11(2) which requires news to be presented in the correct context and in a fair manner without intentional or negligent departure from the facts, whether by
 - (a) Distortion, exaggeration or misrepresentation;
 - (b) Material omissions; or
 - (c) Summarisation.
 - (d) Clause 11(3) which provides that "only that which may be reasonably true, having reasonable regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with reasonable regard to context and importance'.
 - (e) Clause 11(4) which provides that "where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate, clearly, that such is the case'.
 - (f) Clause 12 Comment:
 - (1) Licensees may broadcast comment on and criticism of any actions or events of public importance.
 - (2) Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.
 - (g) Clause 13(1) which provides that "in presenting a programme in which a controversial issue of public importance as discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same program or in a subsequent program forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially that same timeslot'.
11. In our view, the interview transgresses each and all of the above clauses of the Codes in that it is conducted in a manner that makes it clear that the journalists are not complying with the requirements of the Codes set out above. The one-sided, self-interested, interview style and inflammatory language used by the interviewers undermines the above-listed provisions of the Codes. We think that even if it could be argued that the broadcast constituted "comment" which is, in our view, doubtful, given the fact that it is an in-depth interview with the ruling party's Secretary-General on

breaking news topic, the commentary was not made on facts truly stated or fairly indicated and referred to as required in terms of the Codes. In this regard:

- a. One of the interviewers begins the interview by stating that directors earn "millions of Rands" without giving any details or differentiation between, for example, executive and non-executive directors remuneration.
- b. The interviewer goes on to state that the staff are "earning peanuts", that the retrenchments are a jobs "bloodbath". And that "atrocities are being done to peoples lives".
- c. In the introduction, there is no attempt to put forward an accurate, disinterested, dispassionate, balanced view of the retrenchments processes at the SABC, which staff were notified about recently, in order to contextualise the interview, whether as a news item or as commentary.
- d. The dangers of the obvious personal conflicts of interest of a member of staff engaging in a topic regarding retrenchments of members of staff were not raised at all, let alone dealt with in a manner that sought to emphasize the need for balance and a careful presentation of fact versus opinion on the issue.
- e. The actual salary scale figures, which had been published in the day before in the SABC 2019/20 Annual Report (available at: <https://www.sabc.co.za/sabc/wp-content/uploads/2020/11/SABC-AR-2020.pdf>) were not referred to, even although they showed that the average salary of the lowest level of SABC staffer is R464 000.00. p.a. - an amount that is nearly double the average salary of a non-agricultural worker in the formal sector which is R257 460.00 p.a., according to the latest Quarterly Employment Survey for Q2 issued by Stats SA on 15 October 2020 as reported on here: <https://businesstech.co.za/news/finance/440963/this-is-the-average-salary-in-south-africa-right-now-5/>. In the context of available wage data for South Africa, the characterization of the salaries being earned by staffers (other than top or senior management at the SABC) which range from an average of R1,234 000.00 p.a. for middle management to the above mentioned average of R464 000.00 p.a. for the lowest level of staff, as "peanuts", is not an accurate or fair description of such salary scales, properly contextualised.
- f. Similarly, it is clear that there has been a "bloodbath" of job losses in the country recently as a result of the Covid-19 Pandemic. The latest unemployment figures reflect this with unemployment at 30.8%. (See EWN reporting on the figures available here: <https://ewn.co.za/2020/11/12/sa-unemployment-rate-increases-to-30-8-in-q3-of-2020-qlfs#:~:text=JOHANNESBURG%20%2D%20South%20Africa's%20unemployment%20rate.data%20from%20Statistics%20South%20Africa.>) And the media sector has been particularly hard hit (See Sanef's report on job losses in the sector: <https://sanef.org.za/wp-content/uploads/2020/06/SANEF-Covid-Impact-Research-Final-Report8.pdf>). However, the SABC journalists have failed to provide any justification for characterising the retrenchments process at the SABC as a "bloodbath", particularly when retrenchments have been specifically required to be undertaken by Parliament as a result of the ad hoc Committee Report on the SABC, the National Treasury as a precondition for two separate bailouts, recommendation of the Auditor-General and the Special Investigative Unit, as have been widely reported in recent years in the press. The proper contextualisation of these state-imposed requirements and bail-out pre-conditions, to counter the legacy of state capture at the SABC, is not made, indeed these are not even mentioned.

WB Bds

- g. The statement that "atrocities are being done to people's lives" is also a violation of the Codes' obligations not to distort, exaggerate or misrepresent. The Compact Edition of the Oxford English Dictionary, Vol 1 defines "atrocious" as "savage enormity, horrible or heinous wickedness" [at page 136]. The Constitution of the Republic of South Africa, 2006 (the Constitution) does not countenance an organ of state, such as the SABC, engaging in atrocities. Indeed, retrenchments are considered to be, as a matter of law and of fact, part and parcel of normal commercial life as is evidenced by the provisions of section 189 of the Labour Relations Act, 1995 – a post-Apartheid flag-ship statute specifically designed to protect the rights of labour.
- h. Mr Magashule states that some members of the Board "support privatization" and are "arrogant" and "intransigent". No mention is made of the fact that the decision to initiate the retrenchments process was taken by a majority of a quorate Board in accordance with the requirements of the Broadcasting Act, 1999 and general company law certainly those Board members were not given an opportunity to respond, either individually or collectively, as required by both Codes as set out above.
- i. When Mr Magashule says that the ANC and its Alliance partners and their employees, including Minister of Communications and Digital Technologies, Ms Stella Ndabeni-Abrahams, are to "put a stop to arrogance", presumably of the above-mentioned board members, the interviewers make no attempt to contextualise his remarks for the public. This is a crucial failure on the part of the interviewees and is a violation of clauses 28.1.1, 28.2.2 and 28.3.1 of the Subscription Code and of clauses 3(b), 11(1), 11(2) and 13(1) of the Free-to-Air Codes including, *inter alia*, because such statements are in clear contradiction of the provisions of the SABC's governing statute, the Broadcasting Act and this important factual background and legal context was required to have been provided by the interviewers. In this regard:
- (a) the SABC Board is to "control the affairs of the Corporation" - at s13(11) of the Broadcasting Act;
 - (b) the High Court has held in *SOS Coalition and Others v the SABC and Others* referred to above and with regard to the SABC: "The ultimate decision-making power is that of the Board and not the Minister..." [at paragraph 125] and [at paragraph 127] "The effect of section 13(11) therefore is to confer on the Board the exclusive powers to control the affairs of the SABC. The Minister is accordingly precluded from exercising any powers by which she may control the Directors in how they control the affairs of the SABC";
 - (c) Mr Magashule is proposing to ensure unlawful conduct on the part of the Minister and others by interfering in Board matters. This, in our view, is a direct contravention of clause 3(b) of the Free-To-Air Code and required the interviewers to point out the implications of such a course of action; and
 - (d) further, not only are Mr Magashule's statements not properly contextualised by the interviewers, they are actively encouraged. The interviewers pose a series of questions to Mr Magashule including: "The Governing Party has yet to call the SABC Board and address them, what is the ANC doing to save jobs at the public broadcaster?"; "What have you (the ruling party) done in halting the process of s189?"; "Mr Magashule, let me put it bluntly, the SABC is forging ahead with retrenchments, whether we like it or not. You are sitting there as Secretary General of the governing party. What is stopping you from extending a call right now, to president Ramaphosa, ... to say President,

WB
Bds

please make sure that those poor workers of the SABC do not lose their jobs. And they called on Ace Magashule to remove the executives and board members "because they were appointed by Parliament and not by SABC workers". These questions do not, in our view, fall within the parameters of fair comment or news presentation because, again, the underlying facts (particularly in respect of the SABC's legal position) are not indicated or referred to at all, let alone in a fair and truthful manner. Worse, these questions and comments, on their own terms, promote unlawful conduct in violation of clause 3(b) of the Free-To-Air Code.

12. Unfortunately, the interview referred to above, and which is the basis of this complaint, has not been an isolated example of the kinds of broadcasts that the public has been subjected to by the SABC news team in the past week or so. This has been evidenced by the number of media outlets that have published opinion pieces and editorials decrying the abuse of the airwaves by the news team in broadcasting material that undermines the basic tenets of ethical journalism. In this regard please see:

<https://www.businesslive.co.za/bd/opinion/columnists/2020-11-23-carol-paton-sabc-a-dangerous-proxy-war-that-can-harm-ramaphosa/>

<https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2020-11-22-the-sabc-nettle-will-have-to-be-grasped-eventually/>

<https://www.news24.com/news24/columnists/guestcolumn/opinion-sabc-crisis-this-is-a-watershed-moment-for-independent-public-broadcasting-20201119>

13. Sanctions

- a. In terms of section 14 of the Constitution of the BCCSA, the BCCSA may, in response to a complaint, take a number of courses of action.
- b. SOS and MMA are of the view that the above-mentioned broadcast (which, we reiterate, is one of many similar broadcasts) resulted in a number of serious breaches of both of the BCCSA Codes.
- c. We are of the view that an appropriate sanction would be to:
 - (a) impose a fine of R80 000.00 as provided for in section 14.5 of the BCCSA Constitution;
 - (b) record criticism of the conduct of the SABC in relation to the complaint as is provided for in clause 14.6 of the BCCSA Constitution;
 - (c) direct that a summary of the findings of the BCCSA be broadcast by the SABC at the beginning of each broadcast of The Full View on three consecutive weekdays, as is provided for in clause 14.3 of the BCCSA Constitution; and
 - (d) recommend, in terms of clause 14.7 of the BCCSA Constitution, that the SABC take steps to discipline the news staff responsible for the violations of the Code to ensure that all news staff understand that what happened was series of egregious breaches of the most serious kind which undermined the standing of the SABC as the public broadcaster and damaged the trust that the South African public has in the ethics, fairness and professionalism of its news production operation.

Wb *Bole*

14. We look forward to this matter being dealt with by the BCCSA as expeditiously as possible.
15. As a matter of courtesy, we advise that a similar complaint in respect of copies of the interview that have been posted, and remain, online, has been simultaneously lodged with the Press Council. Thank you."

[3] Mr Philly Moala obo of the Broadcaster responded as follows:

"SOS COALITION - COMPLAINT AGAINST MULTI-CHOICE SA AND THE SABC

1. This is a response to the complaint lodged by the Media Monitoring Africa and the SOS Coalition against the South African Broadcasting Corporation, regarding an interview conducted by two SABC News journalists with ANC Secretary General, Mr. Ace Magashule on Wednesday, 18 November 2020.
2. It is a fact, as reflected in the regulatory framework and the Editorial Policies of the SABC that the news operation and its journalists must abide by and conduct themselves, as well as execute their journalistic activities in manner that is consistent with prescribed rules. This is an obligation that SABC journalists understand very well, including the consequences of any deliberate deviations from the policies. It is also noted that editorial breaches have broader implications not only for the journalists themselves or editorial staff broadly, but the integrity of the institution itself.
3. It is worth indicating upfront that the interview was intended to deal with a wide range of matters including challenges facing state-owned entities generally, charges against Mr. Magashule, border controls and Bushiri's escape.
4. Without treating every single aspect of the complaint in detail, the concern about the editorial quality and journalistic posture of the interview, in relation to editorial policies and prescribed Codes, is noted and fully accepted. It is correct that while the interview sought to deal with several issues, what became dominant were SABC matters. There are several considerations that need to be made in examining the interview and the related complaint.
 - In the first editorial meeting following the interview, editors discussed it extensively and expressed serious concerns about its editorial quality. A number of issues were raised, and the Politics Editor was tasked with looking into ensuring that they were addressed with the journalists, and that mechanisms were in place to prevent recurrence. The Editors did observe the problems as reflected in the complaint and moved swiftly to address them.
 - The context and the timing of the interview are factors for consideration. The public discourse on SABC retrenchments had just peaked at the time of the interview, following the well-publicized newsroom incident which took place the day before. This made it central to the interview. However, there is no question that the issues raised in relation to this aspect could have been treated differently and dealt with without compromising editorial independence and impartiality.
 - Reporting and covering SABC retrenchments has been a serious test for the newsroom. Journalists are directly affected by the process and must deal with the prospect of losing their jobs while covering the story daily.

MB
Bals

- Whereas there are legal and editorial obligations for SABC journalists to always exercise good editorial judgement, the sheer proximity of the story to their lives makes the task of distancing themselves and remaining unaffected, an exceptionally difficult one. In fact, one of the journalists points out during the interview that he “speaks as an affected person”, which is necessary to make the viewers aware of the conflict of interest.
 - Also, although it does not excuse their editorial and journalistic accountability, this is an uncharted territory for the two journalists. It must therefore be understood that the resulting editorial drifts were not preconceived as the complaint seems to suggest but arose out of the journalists being too emotionally close to the story of SABC retrenchments as a subject of the interview.
 - To demonstrate the absence of intent to breach the principle of fairness, one of the journalists asks this question during the interview, “The ANC is not holier than though when it comes to dismantling and destroying of the public broadcaster, the ANC has to answer to a lot of questions as to what has gone wrong at the public broadcaster. When are you as the governing party going to sit down and introspect”? Read within the context of the rest of the questions, there does not seem to be any intention to absolve the ANC from what has and is happening at the SABC or portray it as the ‘redeemer’.
 - Another issue for consideration is the fact that even Mr. Magashule himself does point out that “at times we have problems with you as journalists, people working with the SABC”. This should also be taken as clear indication that there is no malicious intent by the journalists as they have always carried their assignments independently and with impartiality and journalistic rigour. This makes this interview out of pattern with their own established regular journalistic conduct.
 - In relation to the right to reply on matters concerning the Board, particularly executive pay, the Chairperson of the Board was interviewed on Morning Live on 19 November 2020, a day after the interview with Magashule. He responded to questions that were raised.
 - On the cited failure to distinguish executive from non-executive directors’ remuneration, while it is not done upfront when the issue is raised for the first time in the interview, further into the discussion the journalist reads the exact figures with names of the executives directly from his phone. This should be considered sufficient to demonstrate the reference to the ‘millions’.
 - The reference to the term “bloodbath” is not a singular allusion to SABC retrenchments, but is made within a broader context, where the interviewer says the “jobs bloodbath continues not only in the private sector, but now in the public sector”, and goes on to make a direct reference to the SABC.
5. It is therefore our view that while the editorial breaches are egregious and unacceptable, it must be considered that they were not premeditated. The prevailing circumstances, the highly emotive context and the timing must be considered in assessing the matter.
 6. The SABC will deal with its employees according to its personnel regulations which we are not at liberty to converse with the complainant.

The SABC remains committed to upholding its principles as an independent public broadcasting service.”

MB Bds

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

"COMPLAINT AGAINST MULTI-CHOICE SA AND THE SABC IN RESPECT OF PROGRAMMING FLIGHTED ON THE SABC NEWS CHANNEL ON THE DSTV BOUQUET AND ON THE SABC'S FREE TO AIR DIGITAL CHANNELS: REPLY TO THE SABC'S RESPONSE

1. We refer to the complaint in the above matter lodged by the SOS Coalition (SOS) and Media Monitoring Africa (MMA) on 30 November 2020.
2. We are in receipt of the SABC's response which is undated but which we received on 10 December 2020.
3. We set out our response below.
4. Ad paragraph: 4, 4 (bullet point 1), 4 (bullet point 2), 4 (bullet point 4), 4 (bullet point 5), 4 (bullet point 7), and 5:
 - a. We note that in each of the above paragraphs (seven in all), the SABC admits that the interview complained of failed to meet acceptable standards of ethical journalistic Professionalism, namely, and in order:
 - (a) "[T]he concerns about the editorial quality and journalistic posture of the interview is noted and fully accepted."
 - (b) "[E]ditors discuss [the interview] extensively and expressed serious concerns about its editorial quality".
 - (c) "[T]here is no question that the issues raised in relation to this aspect [namely the retrenchments] could have been treated differently and dealt with without compromising editorial independence and impartiality".
 - (d) "[T]he sheers proximity of the story to the [journalist] lives makes tasks of distancing themselves and remaining unaffected, an exceptionally difficult one. In fact, one of the journalist points out during the interview that he 'speaks as an affected person', which is necessary to make viewers aware of the conflict of interest".
 - (e) "Also, although it does not excuse the editorial and journalistic accountability, this is uncharted territory for the two journalists... the resulting editorial drifts were not preconceived...But arose out of the journalists being too emotionally close to the story."
 - (f) "This makes the story out of pattern [sic] with their own established regular journalistic conduct".
 - (g) "[T]he ~~at~~ breaches are egregious and unacceptable". (our emphasis)
 - b. These admissions are welcome. But they point, clearly, to systemic failures in the newsroom regarding its ability to report on matters involving itself with the level of professionalism required of the SABC, by law, as set down in the BCCSA Codes. The failures are such that they cannot be blamed only on fairly low-level reporters, responsibility must also be borne by programme editors, news and politics editors,

W.B. P.S.

including the executive responsible for news.

5. Ad paragraph: 4 (bullet point 5), 4 (bullet point 6), 4 (bullet point 7), and 5:

- a. We note that in each of the above paragraphs (four in all), the SABC makes submissions on the levels of intention on the part of the SABC staff, namely and in order:
 - (a) "[T]he resulting drifts were not preconceived".
 - (b) "[T]here does not seem to be any intention to absolve the ANC from what has [sic] and is happening at the SABC or portray it as the 'redeemer'".
 - (c) "[T]here is no malicious intent [sic] by the journalists".
 - (d) "[T]he editorial breaches...were not pre-meditated' (our emphasis)
- b. The issue of the absence of premeditation or malicious intention cannot constitute legitimate defences or justifications for the breaches of the BCCSA Codes because:
 - (a) nowhere in the Free to Air or Subscription Codes do the concepts of premeditation or malicious intention even arise;
 - (b) the only reference to intention or negligence arises in clauses 11(2) and 28.1.2 of the Free to Air and Subscription Codes, respectively, which each provide that "news must be presented in the correct context and in a fair manner, without intentional or negligent from the facts (our emphasis); and
 - (c) the fact that the numerous editorial breaches repeatedly admitted to were made without premeditation and/or malice does not render them unintentional nor without negligence with regard to news, nor fair with regard to comment.
- c. Again, we stress the importance of the nature of the SABC; that it is the public broadcaster, with a public mandate to inform and educate the nation. This requires the SABC to adhere to the highest standards of ethical conduct and professional journalism.

6. Ad paragraph 4 (bullet point 8):

- a. The SABC submits that an SABC interview with the Board Chair, Mr Bongumusa Makhathini, conducted and broadcast the next morning, constituted "a right of reply" on matters concerning the Board.
- b. That interview is available here: <https://www.youtube.com/watch?v=Dom3V4sklzs>
- c. The mere fact that an interview is conducted with the Board chairperson after the flighting of the original interview does not constitute "a right of reply" or "the presentation of opposing views" as provided for in clauses 13 and 28.3 of the Free to Air and Subscription Codes, respectively, both of which clauses provide that:
 - (a) "In presenting a programme in which a controversial issue of public importance is discussed, the broadcaster must make reasonable efforts to fairly present opposing points of view either in the same program or in a subsequent program forming part of the same series of programmes presented within a reasonable period of time of the original ~~board~~ and within substantially the same slot'. (our own emphasis). In this regard:
 1. Nowhere in the second interview does the SABC interviewer reference in previous evening's interview much less present the second interview as an opportunity to "present opposing points of view" to the matters canvassed in the initial interview.

MB Bds

2. Further, an interview on Morning Live the following day is not a subsequently 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 slot.
 3. For the second interview to have met these requirements, the interviewer would have had specifically to reference the points of view aired the previous night and the second interview ought to have taken place during the night 's airing of The View, not on Morning Live which is in a time slot that has a 12-hour time difference to that of The View.
- (b) "The person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given the right to reply to such criticism on the same programme. If this is impracticable, reasonable opportunity to respond to the program should be provided where appropriate, for example in a right to reply programme or in a prearranged discussion programme with the prior consent of the person concerned". In this regard, nowhere in the second interview does the SABC interviewer even reference the previous evening's interview.
- d. Consequently, we submit that the Morning Live interview of 19 November 2020 did not met the requirements of the Codes in respect of controversial issues of public importance as provided for in the relevant sections of the Code.
 - e. We also think it important to point out other problems with the Morning Live interview which we think needs to be done given that that interview is held up by the SABC in mitigation of the previous evening's interview with Mr. Ace Magashule:
 - (a) In the Morning Live interview, the interviewer states, as a matter of fact: "*Mr Makhathini, one of the issues that staff have been crying for since the start of these talks, was that there should be a transparency and fairness of process. That hasn't happened.*"
 - (b) However, that statement of fact is and was incorrect. As the Labour Court in the matter of *BEMAWU and Others v SABC and Others* [Case No. J1199/20] (a copy of which is provided herewith) held at paragraphs [80], [81] and [85], respectively:

All considered, it is my view that it was BEMAWU that failed to properly consult with the SABC, on the consultation topics... It obviously, in my view, deliberately went about doing all it could to obstruct the proceedings as much as possible. It is simply not in the interests of the SABC, nor can I fathom any logical reason on its part, to have 16 consultations in four months and consult about nothing. The glimpse I received from the partial extract provided, showed me the accusatory and obstructive attitude of BEMAWU in the consultation process...

BEMAWU had every opportunity to participate in the consultation process. It also had every opportunity to table its own proposals. But to adopt the approach of point taking, obstructive conduct and effective non-participation in the process, and wait until the end when the process was in the throes of conclusion to in effect after the fact complain about the process, is just not proper...

To the contrary, I am satisfied that the SABC properly conducted itself in the process, provided all the consulting parties with sufficient information, and constructively engaged with the view to reach consensus on all consultation topics as contemplated in section 189(2). Its financial position was clearly disastrous, and restructuring, no matter how one may look at it, was essential. It substantially reduced the number of affected employees in the course of the process. It was willing to compromise, where needed to ensure a fair process. Its conduct is not open to legitimate criticism.

WB Sds

We think that the BCCSA must take account of what appears to be self-interest of an employee (whether in respect of herself or her colleagues) again distorting the facts with regard to the SABC's retrenchments consultation processes, the truth of which were confirmed, definitively, by the Labour Court.

7. Ad paragraph 4 (bullet point 9):

The response by the SABC does not deal with the real nub of the complaint made which is in regard to the statement, presented as one of fact, that the staff earn "peanuts". We reiterate our original complaint in this regard.

8. Ad paragraph 4 (bullet point 10):

The response by the SABC does not deal with the real nub of the complaint made which is in regard to the statement, presented as one of fact, that the retrenchments process constitutes a jobs "bloodbath" at the SABC. In this regard, the Morning Live interview presented by the SABC as programming in mitigation repeats this statement as a matter of fact. Consequently, we reiterate our original complaint in this regard.

9. We think it is critical to draw the BCCSA attention that the SABC vaguely worded apology (not a single paragraph number of our complaint nor clause of either of the BCCSA codes is referenced) failed to deal, in detail or indeed at all, with the following three issues that formed part of our complaint, namely:

- a. the statement that "atrocities are being done to people's lives" which we said was a violation of the Codes' obligations not to distort, exaggerate or misrepresent;
- b. the fact that the interviewers made no mention of the fact that the decision to initiate the retrenchments process was taken by a majority of a quorate Board in accordance with the requirements of the Broadcasting Act, 1999 and general company law; and
- c. the actions of its staff, live on air, in repeatedly requesting the Secretary-General of the ruling party to intervene, unlawfully, in operational issues of the independent public broadcaster.

10. Further, in our complaint we stated that the interview which formed the basis of this complaint, was not an "isolated example of the kinds of broadcasts that the public has been subjected to by the SABC news team". In this regard, we think it is critical to point out to the BCCSA that the very video footage that the SABC refers to in mitigation of its unlawful broadcast (which illegality it has admitted to repeatedly in its response) itself repeats many of the same actions that gave rise to the complaint in the first place and demonstrates again, clear conflicts of interest in the manner in which the interview was conducted, aspects of which have been highlighted above.

11. Sanctions

- a. We reiterate that in terms of section 14 of the Constitution of the BCCSA, the BCCSA may, in response to a complaint, take a number of courses of action. We reiterate that SOS and MMA are of the view that the broadcast complained of reflected a number of breaches of the Code of the most serious kinds as has been admitted by the SABC.
- b. We are of the view that an appropriation sanction would be to:
 - (a) impose a fine of R80 000.00 as provided for in section 14.5 of the BCCSA Constitution;
 - (b) record criticism of the conduct of the SABC's news department in relation to the complaint as is provided for in clause 14.6 of the BCCSA Constitution;

W B Boks

- (c) direct that a summary of the findings of the BCCSA be broadcast by the SABC at the beginning of each broadcast of The Full View on three consecutive days, as is provided for in clause 14.3 of the BCCSA Constitution; and
 - (d) recommend, as is provided for in clause 14.7 of the BCCSA Constitution, that the SABC take steps to ensure that these kinds of Code violations do not occur again, including though:
 1. embarking on an internal training programme in the newsroom as to the requirements of the BCCSA Codes of Conduct, and
 2. engaging in internal disciplinary processes with the news staffers responsible for the violations of the Code, including editors and people with supervisory responsibilities,
 3. to ensure that all news staff understand that what happened was series of egregious breaches of the most serious kind which undermined the standing of the SABC as the public broadcaster and damaged the trust that the South African public has in the ethics, fairness and professionalism of its news production operation, and that the SABC report back to the BCCSA on such steps within three months.
12. Given the importance and the nature of the admitted violations of the Codes, we are of the respectful view that this matter ought to be dealt with by the BCCSA Tribunal. Thank you."

EVALUATION

- [5] It is important to state, from the onset, that although the Complainant refers to both Clause 28 of the BCCSA Subscription Code of Conduct and Clause 11 of the BCCSA Free to Air Code of Conduct, these clauses materially and substantially deal with the same issues and the Tribunal will use Clauses 28 and 11 of the respective Codes of Conduct interchangeably.
- [6] Our primary task as a Tribunal is to ascertain whether the broadcast complained about has indeed contravened the Codes of Conduct. Taking into account the SABC's admittance that the interview failed to meet acceptable standards of ethical journalistic professionalism (and as a result breached the Code), the Tribunal decided to address only those issues which were deemed to aggravate or mitigate the contravention of the above-mentioned Clauses of the Codes of Conduct.
- [7] Clause 28 of the BCCSA Subscription Code of Conduct reads as follows:
- 28.1 News**
- 28.1.1 Licensees must report new truthfully, accurately and fairly**

WB Boks

28.1.2 News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by-

28.1.2.1 distortion, exaggeration or misrepresentation;

28.1.2.2 material omissions; or

28.1.2.3 summarization.

28.1.3 Only that which may reasonably be true, having due regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with due regard to context and importance. If a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate clearly that such is the case.

PLEASE NOTE THAT CLAUSE 11 OF THE FREE-TO-AIR CODE READS THE SAME AS ABOVE.

Both Clauses 28.3.1 of the Prescription Code and Clause 13(1) of the Free-to-Air reads as follows:

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.

- [8] Firstly the Tribunal had to establish whether the *Full View* programme complained about was news or comment. The Tribunal did its own research about the programme and found that the SABC Twitter Account @FullViewSABC describes the programme thus: *The Full View focuses on the general news of the day.* The Tribunal members also watched other *Full View* programmes and concluded that essentially it is a news programme, although the distinction between news and comment becomes blurry in long interviews with more than one interviewer such as this one. Therefore, some reference will be made to comment and we will deal with the Clauses regarding controversial issues of public importance as well.
- [9] The Code of Conduct requires broadcasting services licensees to report news truthfully, accurately and fairly. The Online Free Law Dictionary¹ describes **truthful** as *the practice of disclosing all material facts truthfully and completely to avoid any misunderstanding.*

¹ www.freelawdictionary.org

The same dictionary² describes **accurate** as *authentic, undistorted evidence of being what it says it is*. The dictionary³ lastly describes **fair** to mean *the level of even handedness used in dispensing justice where claims are recognized in order of legal and contractual priority*. Thus, the reasonable test for news as envisaged in the Code is truth, accuracy and fairness.

[10] In *Damarah v SABC 2 & Channel 404*,⁴ the BCCSA states: “*one cannot even imagine the chaos and anarchy that would result, were the media allowed to distort, exaggerate or misrepresent the facts or omit material facts when reporting news.*”

In *Dimbleby v ANN7*,⁵ the BCCSA states that *due to the rapid social changes, instability and conflict in South Africa, citizens depend to a great extent on the mass media for reliable information and news organisations play an important role in their perception of reality. In essence, news broadcasters sell ways of thinking, seeing and talking about the world. Therefore, they are morally obligated and responsible to report news as truthfully, accurately, fairly, and in the correct context, as possible. It should be borne in mind that especially disadvantaged and illiterate audiences have no means of evaluating media content and may thus be extremely susceptible to the effects of news reports.*

In *Kreel v MixFM*,⁶ the BCCSA states that *one of the basic principles of good journalism is that news stories should be verified. Proper verification shows the journalist’s respect for the audience. It allows the audience to judge the validity of the information, the process by which it was secured and the potential motives or biases of the source. A golden guideline for journalists is to provide information in such a way that the audience can assess it and then make up their own minds what to think.*

² www.freelawdictionary.org

³ www.freelawdictionary.org

⁴ *Damarah v SABC 2 & Channel 404*. BCCSA Case no.10/2016.

⁵ *Dimbleby v Multichoice (ANN7)*. BCCSA Adjudication no.20/A/2017.

⁶ *Kreel v MixFM*. BCCSA Case no. 11/2016.

[11] The requirement that news should be truthful and accurate is part of our Code for obvious reasons. For this reason, we view the following in a serious light: The fact that one of the interviewers begins the interview by stating that directors earn “*millions of Rands*” without providing any details or making any differentiation between them, and then goes on to state that the staff are “*earning peanuts*”, that the retrenchments are a “*bloodbath*” and that “*atrocities are being done to people’s lives*”. There is no explanation or substantiation of any of these statements.

[12] The Code further requires that the news be presented in the correct context and in a fair manner without intentional or negligent departure from the facts. This is to create a crucial legal deterrent against manipulating people with untrue statements presented as facts.

In *MNet v Cape Town International Finance*⁷, the BCCSA describes the test for fair reporting as follows: *Fairness is determined by the overall impression that the programme conveys, by context and by the tenor of voice and demeanour of the presenter..... The danger is that the producer and/or presenter can get overenthusiastic with what is perceived to be a scoop and fall into the trap of not presenting evidence that may favour the other side.... Fairness implies that one is able to see both sides of a case and to objectively give credit where credit is due.*

In *Philip v Talk Radio 702*⁸ the BCCSA states that *a presenter may express his or her own opinion on a matter being broadcast, as long as it is a genuinely held opinion on facts fairly indicated and referred to.*

[13] While it is understandable that the interviewers felt very close to and were very passionate about the subject matter of the pending retrenchments at the SABC, in the process of their reporting, they failed to observe the cardinal journalistic rule of objectivity and left the reasonable viewers with half-truths in that they did not produce

⁷ M-Net v CT International Finance, BCCSA Appeal Tribunal, Case No. 42/2012, at para 9 and 18.

⁸ Philip v Talk Radio 702. BCCSA Case no. 02/2015.

facts of what they were referring to. The test for correct context and fair manner of reporting is **facts fairly indicated and referred to** and the failure to do so compromises the news story.

- [14] Clause 28.3 holds that the broadcasting of controversial issues of public importance must fairly present opposing points of view. This Clause refers to the duties of the interviewer when controversial issues of public importance are discussed. The basic requirement of Clause 28.3 of the Code is that balance should be obtained between opposing viewpoints and that people should be treated fairly. These requirements have been expounded in various judgments of this Tribunal.

*In South African Jewish Board of Deputies & Others v Cape Talk*⁹ the BCCSA refers to *what is expected of the presenter if reference is made during the debate to some statement falsely attributed to a person of whom the presenter knows it is not true. We think that the presenter should immediately step in and correct the false impression, especially if the false impression is damaging to the extreme.*

- [15] The question relating to Clause 28.3.1 is whether the broadcaster made reasonable efforts to fairly present opposing points of view either in the same program or in a subsequent program forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same timeslot. We take note that the Chairperson of the SABC board was interviewed about the matter of pending retrenchments the following morning on the SABC's programme *Morning Live*. However, not once did the interviewer refer back to the previous night's programme on *Full View*. The question is whether this satisfies Clause 28.3.1 which demands that a right of reply be given in a subsequent programme and in the same timeslot. The reason for this requirement is that the same audience should be exposed to the right of reply in order to obtain both sides of a story. This is also evident in cases where broadcasters have contravened the Code and have been ordered to broadcast an apology, where the BCCSA

⁹ South African Jewish Board of Deputies & Others v Cape Talk; BCCSA Case No: 35/99

MB Bds

has insisted that the apology should be broadcast in a subsequent programme forming part of the same series. *Morning Live* cannot be seen as a subsequent programme. Audiences who have watched *Full View* (Channel 404), would probably not have watched *Morning Live* (Channel 193) wherein the Chairperson of the SABC Board was interviewed. The target audiences of these two programmes are different.

- [16] It has to be emphasise that the importance of editorial control, and the freedom to choose the focus of a programme, has also been addressed in a number of decisions of this Tribunal. For example, in *SA Dental Association V M-Net* the Tribunal stated as follows at para [19]:

“One of the objectives of the Code is to ensure fair and balanced comment on matters of public importance. This objective, however, must be reconciled amongst others with the respondent's right to freedom of speech, and its editorial prerogative to determine what in its view should form the content of the programme it broadcasts.”

It is not in dispute that the right to media freedom must be exercised responsibly with due regard to the rights of others and in accordance with the Code. This Tribunal has often emphasised, especially in matters pertaining to balance, that too rigorous an interpretation of the Code would chill broadcasters in their reporting on matters of public interest; and to chill amounts to censorship, which is anathema to a free and open democracy such as ours.”

- [17] 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*¹⁰ where O'Regan J said:

¹⁰ 19 [1999] ZACC 7;1999(4) SA 469 (CC) para [7]; 1999(6) BCLR 615.

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.

- [18] Clause 28 reminds broadcasters that news must be reported truthfully, accurately and fairly. We, however, found that in this interview, the interviewers used words which a reasonable viewer would have found to be inaccurate. References to *bloodbath*, *atrocities*, *salaries of staff are peanuts*, were not fair, accurate and truthful. This is important as the inappropriate use of the language can create an impression of something which is not true.
- [19] While we do acknowledge the proximity of the story to the journalists, the cardinal rule of objectivity in journalism should apply at all times. The coverage of the SABC retrenchments in this news programme comes across as very subjective and emotional, with the result that the news was not fairly presented.
- [20] We agree that the issue of retrenchments of staff at the SABC is an issue of public importance and therefore we expected the Broadcaster to have arranged a right of reply. The failure to announce that the Chairman of the SABC Board will be afforded an opportunity to explain the other side of the story the following morning, left the reasonable viewer with a one-sided viewpoint. The Broadcaster is adamant that the right of reply was given to the Chairperson of the SABC, when he was interviewed on *Morning Live* about the issue of retrenchment of staff. As already stated, *Morning Live* is broadcast in the morning on Channel 192, which has a completely different viewership than *Full View* which is broadcast in the evening on Channel 404. The audiences and the target markets are not the same. It should also be noted that in the *Morning Live* programme, even though the subject matter was the same, the interviewer was a different

WBS
Bols

person. The Code of Conduct does allow for a right of reply to be broadcast at a later date and time, but it emphasises that it should be in the same programme and at the same time.

[21] We do not agree with the Complainant that it was unlawful for the interviewer to ask Mr. Magashule to intervene in their plight at the SABC. This would have been curtailing freedom of expression, which is the cornerstone of our democracy. As quoted in paragraph 16 above, this Tribunal has often emphasised, especially in matters pertaining to balance, that too rigorous an interpretation of the Code would chill broadcasters in their reporting on matters of public interest, which is anathema to a free and open democracy such as ours.

[22] As for disciplining the interviewers, we leave that matter to the internal processes of the SABC. We have taken note of the steps that have already been taken to prevent a recurrence thereof.

[23] **In the result we find the following:**

- (1) that the Broadcaster (SABC) contravened Clauses 28.1.1, 28.2.2 and 28.3.1 of the Subscription Code and Clauses 11(1), 11(3) and 13(1) of the Free-to-Air Code in that the news report/interview was not truthfully, accurately and fairly presented and it was not presented in the correct context. The complaints in this regard are upheld;**
- (4) that the right of reply in the same programme and in the same timeslot was not given. Therefore Clause 28.1.6 of the Subscription Code and Clause 13(1) of the Free-to-Air Code were contravened and the complaints in this regard are upheld.**
- (5) that the BCCSA does not have the jurisdiction to order the disciplining of SABC journalists.**

SANCTION

[24] During the tribunal hearing, arguments both in mitigation and in aggravation of sanction were received from the Complainant and the Broadcaster. Mitigating factors that were considered are the following:

- It was a story of considerable interest and importance to the public and that the SABC journalists have never before been faced with a similar situation so emotionally close to them;
- It was impossible to make use of journalists from outside the SABC because of the element of strong competition between broadcasters;
- There are always risks (such as emotional remarks) during live productions;
- Clearly the interviewers became emotionally carried away (perhaps understandably) but no malice was intended by the Broadcaster.

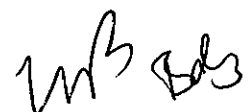
After much discussion and consideration of the facts before us, the Tribunal decided to impose a **fine of R10 000.00** upon the Broadcaster. This fine must be paid by the Broadcaster, to the BCCSA Registrar, **within 15 days of having received this judgment.**



MR BRIAN MAKEKETA
DEPUTY CHAIRPERSON OF THE BCCSA
Commissioners Venter and Naidu concurred with the above judgment.

NB. TECHNICAL CHALLENGES DURING THE TRIBUNAL HEARING

The BCCSA procedures require that a tribunal hearing should be heard by a minimum of three Commissioners. This hearing took place virtually and at a certain stage of the hearing, two Commissioners experienced technical challenges with their connections to the meeting. This means that at some stages they would be disconnected from the meeting only to reconnect again after the discussion has progressed.



After the tribunal meeting, the three Commissioners who formed part of the tribunal reconvened on a different day and together watched the recording of the entire tribunal from the beginning until the end. The Acting Chairperson of the BCCSA wrote a letter to both the Complainant and the Broadcaster informing them of the procedural and technical challenges experienced and the fact that the members of the tribunal reconvened and together watched the recordings of the tribunal from the beginning until the end. She further asked both the Complainant and the Broadcaster whether they were happy with the members of the tribunal going ahead and issuing a judgment or whether they wanted a completely new tribunal meeting.

The Complainant came back to the Acting Chair to say that they are happy and see no need for a new tribunal meeting. The Broadcaster initially said it wanted a new tribunal only to later change its mind and say they are happy with the judgment concluded based on the recording and therefore no new tribunal was necessary.

MB Eds 23



Suite 1, Art Centre, 22 4th Ave, Cnr 4th Ave & 6th Street, Parkhurst, Johannesburg, 2193

Tel: +27 11 788 1278 | Email: info@soscoalition.org.za | www.soscoalition.org.za



Suite No.2, Art Centre, 22 6th St, Parkhurst, Johannesburg, 2193

PO Box 1560, Parklands, 2121 | Tel: +27 11 788 1278 | Fax: +27 11 788 1289

Email: info@mma.org.za | www.mediamonitoringafrica.org

Ms Shouneez Martin

Registrar, BCCSA

Email: bccsa@nabsa.co.za

For the Attention of the Chairperson of the BCCSA Tribunal

1 March 2021

Dear Ms Martin

APPLICATION FOR LEAVE TO APPEAL AGAINST PART OF THE DECISION THE BCCSA TRIBUNAL AND AGAINST THE SANCTION IMPOSED BY THE BCCSA TRIBUNAL IN THE CASE OF SOS AND MMA V SABC (Case No. 3/2021)

1. INTRODUCTION

- a. The SOS Coalition (SOS) and Media Monitoring Africa (MMA) appreciates that it is unusual for a complainant whose complaint has been largely upheld by BCCSA Tribunal to make application for leave to appeal.
- b. SOS and MMA do, of course, welcome the ruling by the BCCSA Tribunal (Case No. 3/2021) that the SABC contravened numerous clauses of the Subscription and Free to Air Codes in that:

WB Bds

- (a) the news report/interview with Ace Magashule (which was the subject of our complaint) was "not truthfully, accurately and fairly presented and... was not presented in the correct context" (at paragraph [23(1)] of the ruling); and
- (b) the right of reply in the same program and in the same timeslot was not given (at paragraph [23(4)] of the ruling) – Note that this is a numbering error, but we retain the reference as it appears in the ruling.
- c. However, two parts of the decision are in our respectful submission quite incorrect and indeed, produced a sense of shock in the complainants.
- d. After seeking the advice of Senior Counsel, SOS and MMA hereby apply for leave to appeal these two parts of the decision as set out in the Tribunal ruling, in terms of rule 4.1 of the BCCSA's Appeal to Appeal Tribunal Rules (the Appeal Rules), provided to us by the BCCSA, together with a copy of the ruling, on Wednesday 24 February 2021.

2. APPLICATION FOR LEAVE TO APPEAL IN RESPECT OF THE SANCTION

- a. In its ruling, the BCCSA Tribunal imposed a sanction of a fine of R10 000.00 upon the SABC, for the numerous Code violations it found to have been committed by the journalists in question.
- b. SOS and MMA is extremely disappointed that no apology was required to be broadcast in regard to the numerous Code violations that the BCCSA found to have occurred as a result of the broadcast of the interview and of the SABC's failure to provide the Board/management with a right of reply.
- c. The BCCSA Tribunal's powers in regard to its sanctions are set out in section 14 of the BCCSA's Constitution. These include at 14.3 that it may direct that a correction and/or a summary of the findings of a Tribunal be broadcast by the respondent in such manner as may be determined by the Tribunal.
- d. We make application to appeal the sanction because we are of the view that the sanction was clearly wrong in not requiring that an apology and/or a summary of the findings of the BCCSA Tribunal be required to be broadcast by the SABC. This is critical for the harm occasioned by the breach to be addressed. A fine alone does not achieve this.
- e. We are of the view that a requirement that an apology and/or a summary of the findings of the BCCSA Tribunal be imposed by the Appeal Tribunal either instead of, or in

WB Bds

addition to, (we leave that to the Appeal Tribunal to decide) the R10 000.00 fine imposed by the BCCSA Tribunal.

- f. This is of vital public importance because the public ought to be made aware that, as the BCCSA Tribunal held:

(a) at paragraph [13]: *the journalists... failed to observe the cardinal journalistic rule of objectivity and left the reasonable viewers with half-truths in that they did not produce facts of what they were referring to. The test for correct context and fair manner of reporting is **facts fairly indicated and referred to** and the failure to do so compromises the news story.* (emphasis in the original);

(b) at paragraph [18]: *We, however, found that in this interview, the interviewers used words which are reasonable viewer would have found to be inaccurate. References to **bloodbath, atrocities, salaries of staff are peanuts**, were not fair accurate and truthful. This is important as the inappropriate use of the language can create an impression of something which is not true.* (emphasis in the original); and

(c) at paragraph [19]: *The coverage of the SAB's era retrenchments in this news programme comes across as very subjective and emotional, with the result that the news was not fairly presented.*

- g. We are of the respectful view that the BCCSA Appeal Tribunal must take account of the fact that the SABC is the public broadcaster. And as the public broadcaster, it not only has a significant public service mandate, it also has a unique role in providing access to news and information for the majority of people in South Africa. The High Court has held in *SOS Coalition and Others v the SABC and Others* Case Number 81056/14, that the SABC is required to provide to provide "significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests." [at paragraph 36, Available at: <http://www.saflii.org/za/cases/ZAGPJHC/2017/289.pdf>]

- h. In this regard we think it vital to point out the SABC made numerous admissions in its written response to the SOS and MMA complaint that the interview complained of failed to meet acceptable standards of ethical journalistic professionalism. These include the following admissions:

WNB Bds

- (a) "[T]he concern about the editorial quality and journalistic posture of the interview... is noted and fully accepted."
- (b) "[E]ditors discussed [the interview] extensively and expressed serious concerns about its editorial quality".
- (c) "[T]here is no question that the issues raised in relation to this aspect [namely the retrenchments] could have been treated differently and dealt with without compromising editorial independence and impartiality".
- (d) "[T]he sheer proximity of the story to [the journalists'] lives makes the task of distancing themselves and remaining unaffected, an exceptionally difficult one. In fact, one of the journalist points out during the interview that he 'speaks as an affected person', which is necessary to make the viewers aware of the conflict of interest".
- (e) "Also, although it does not excuse the editorial and journalistic accountability, this is an uncharted territory for the two journalists...the resulting editorial drifts were not preconceived.... But arose out of the journalists being too emotionally close to the story".
- (f) "[T]he editorial breaches are egregious and unacceptable". (our emphasis)
- i. However, despite these admissions having been made in December 2020, the SABC did not take any steps, of its own accord, to broadcast an apology for these failures so as to ensure that the public was made aware of the errors that the news team had ostensibly all agreed had occurred and were serious.
- j. Consequently, for the public not to be made aware, via an order that the BCCSA broadcast an apology and/or a summary of the above findings, leaves the public only with the interviewers' version of the SABC's 189 retrenchments process, which version, the BCCSA Tribunal correctly (and unanimously) held, was inaccurate, unfair, and untrue. Consequently, the failure to order the broadcast of an apology and/or a summary of the above findings was clearly wrong (as is required in terms of rule 4.9 of the Appeal Rules), given the paramount importance of ensuring the highest standards of journalism are required of the SABC, as upheld by the High Court in the case referred to above, and is clearly not in the public interest.

3. APPLICATION FOR LEAVE TO APPEAL THE DISMISSAL OF PARTS OF THE COMPLAINT

Bob
WB

- a. In its ruling, the BCCSA Tribunal unanimously held at paragraph [21] that: *We do not agree with the Complainant that it was unlawful for the interviewer to ask Mr Magashule to intervene in their plight at the SABC. This would have been curtailing freedom of expression, which is the cornerstone of our democracy. As quoted in paragraph 16 above, this Tribunal has often emphasised, especially in matters pertaining to balance, that too rigorous an interpretation of the Code would chill broadcasters in the reporting on matters of public interest, which is anathema to a free and open democracy such as ours.*
- b. SOS and MMA make application to appeal this part of the decision as set out in the ruling as being "clearly wrong" as required in terms of rule 4.9 of the BCCSA Appeal Rules.
- c. We reiterate that the journalists promoted unlawful conduct in violation of clause 3(b) of the Free-To-Air Code when they posed a series of questions to Mr Magashule including: *"The Governing Party has yet to call the SABC Board and address them, what is the ANC doing to save jobs at the public broadcaster?"; "What have you (the ruling party) done in halting the process of s189?" "Mr Magashule, let me put it bluntly, the SABC is forging ahead with retrenchments, whether we like it or not. You are sitting there as Secretary General of the governing party. What is stopping you from extending a call right now, to president Ramaphosa, ... to say President, please make sure that those poor workers of the SABC do not lose their jobs."* And they called on Ace Magashule to remove the executives and board members *"because they were appointed by Parliament and not by SABC workers"*.
- d. Further the interviewers were clearly supportive of Mr Magashule's statement that the ANC and its Alliance partners and their "deployees", including Minister of Communications and Digital Technologies, Ms Stella Ndabeni-Abrahams, are to "put a stop to arrogance", on the part of certain board members.
- e. For the BCCSA Tribunal to describe such conduct on the part of the interviewers as:
 - (a) being a "matter of balance"; and/or
 - (b) requiring protection to avoid "curtailing freedom of expression" and the chilling of "broadcasters in their reporting on matters of public interest, which is anathema to a free and open democracy such as ours",

is clearly wrong.
- f. Section 3(b) of the Free to Air Code prohibits the broadcasting of *"material, that, judged within context ...sanctions, promotes, or glamorises...unlawful conduct"*. In our view

W/B
Bds

the BCCSA Tribunal is clearly wrong in its failure to find that the behaviour of the interviewers did not sanction or promote unlawful conduct. In this regard:

- (a) the SABC Board is to "control the affairs of the Corporation" - at s13(11) of the Broadcasting Act;
 - (b) the High Court has held in *SOS Coalition and Others v the SABC and Others* referred to above and with regard to the SABC: "*The ultimate decision-making power is that of the Board and not the Minister...*" [at paragraph 125] and [at paragraph 127] "*The effect of section 13(11) [of the Broadcasting Act, 1999] therefore is to confer on the Board the exclusive powers to control the affairs of the SABC. The Minister is accordingly precluded from exercising any powers by which she may control the Directors in how they control the affairs of the SABC*"; and
 - (c) the interviewers clearly supported and even directly and openly encouraged Mr Magashule's assurance of unlawful conduct on the part of the Minister (and indeed the interviewers also expressly called for unlawful conduct on the part of President Ramaphosa) by interfering in Board matters. This conduct, in our view, was a clear and direct contravention of clause 3(b) of the Free-To-Air Code and the Tribunal's failure to make such a finding was clearly wrong.
4. We trust that this application for leave to appeal will be successful and we look forward to participating in any Appeal Tribunal proceedings that may be required by the Appeals Tribunal in terms of Rule 4.7 of the Appeal Tribunal Rules.

Bds
WMB



05 March 2021
The Registrar
Broadcasting Complaints Commission of South Africa
P O Box 412365
CRAIGHALL
2024

Dear Ms Martin,

**RE: APPLICATION FOR LEAVE TO APPEAL AGAINST PART OF THE DECISION
THE BCCSA TRIBUNAL AND AGAINST THE SANCTION IMPOSED BY THE
BCCSA TRIBUNAL IN THE CASE OF SOS AND MMA V SABC (CASE NO. 3/2021)**

In respect of the above-mentioned matter, the SABC would like to comment as follows:

1. The SABC notes the application for leave to appeal lodged by the SOS and MMA against the Tribunal judgment released last week.
2. The SABC is of the view that the decision taken by the BCCSA was well thought-out and fair. It further allows SABC News to work intensely on the editorial reconstruction and reimagining strategy it initiated in 2018.
3. The incident has revealed historical gaps in the system, and these are receiving urgent treatment, including measures to prevent recurrence of similar problems in the future.
4. We however leave it to the BCCSA to decide on the SOS and MMA's application and believe that the decision will be just, fair and in the best interest of all parties.
5. The SABC is determined to exercise observance of the BCCSA Code as well as other related editorial prescripts and continue complying with BCCSA's judgments.

Yours Sincerely,

**PHILLY MOILWA
GENERAL MANAGER
POLICY AND REGULATORY AFFAIRS**



P.O. Box 412365 • Craighall • Tel (011) 726 3150 • Fax (011) 726 3190 • email: bccsa@bcsa.co.za
Block No 8 • Bunside Island Office Park • 410 Jan Smuts Avenue • Craighall Park • 2196 • www.bccsa.co.za

CASE NUMBER: 005/2021

DATE OF HEARING: 28 APRIL 2021
JUDGMENT RELEASE DATE: 11 MAY 2021

**SUPPORT PUBLIC BROADCASTING COALITION (SOS) &
MEDIA MONITORING AFRICA**

APPELLANT

vs

SABC CHANNEL 404

RESPONDENT

TRIBUNAL: MR B MAKEKETA (CHAIRPERSON OF THE TRIBUNAL)

**FOR THE APPELLANT: MR. STEVEN BUDLENDER SC AND MS. JUSTINE
LIMPITLAW: MMA & SOS COALITION**

**FOR THE RESPONDENT: MR. PHILLY MOILWA, GENERAL MANAGER: POLICY
AND REGULATORY AFFAIRS AND MS. PHATISWA MAKGOPHENI HEAD OF
NEWS, SABC.**

Application for leave to appeal the sanction and glamorisation of unlawful conduct in a matter of Support Public Broadcasting Coalition (SOS) & Media Monitoring Africa vs SABC CHANNEL 404, Case N: 005/2021 (BCCSA).

SUMMARY

The MMA & SOS Coalition have applied for leave to appeal against the finding of the Tribunal in the matter of *SOS Coalition & MMA v SABC, Case No: Case 003/2021* on two grounds, namely the imposed sanction and the possible glamorisation of unlawful conduct. The applicant argues that the imposed fine should be accompanied by a public apology. The Applicant further argues that if the issue of glamorisation of unlawful conduct is left

unattended, the general public may form an impression that the conduct is acceptable. The SABC argues that it has accepted responsibility for its mistake and does not oppose the imposition of the fine as it is fair. However, they oppose the additional sanction of an apology. Application for leave to appeal is granted.

JUDGMENT

B MAKEKETA

[1] This is an MMA & SOS Coalition application for leave to appeal against the BCCSA Judgment *Case No: 003/2021* in the matter of *SOS and MMA vs SABC* judgment.

[2] **The application for leave to appeal reads as follows:**

"APPLICATION FOR LEAVE TO APPEAL AGAINST PART OF THE DECISION THE BCCSA TRIBUNAL AND AGAINST THE SANCTION IMPOSED BY THE BCCSA TRIBUNAL IN THE CASE OF SOS AND MMA V SABC (Case No. 3/2021)

1. INTRODUCTION

- a. The SOS Coalition (SOS) and Media Monitoring Africa (MMA) appreciates that it is unusual for a complainant whose complaint has been largely upheld by BCCSA Tribunal to make application for leave to appeal.
- b. SOS and MMA do, of course, welcome the ruling by the BCCSA Tribunal (Case No.3/2021) that the SABC contravened numerous clauses of the Subscription and Free to Air Codes in that:
 - (a) the news report/interview with Ace Magashule (which was the subject of our complaint) was "not truthfully, accurately and fairly presented and... was not presented in the correct context" (at paragraph [23(1)] of the ruling); and
 - (b) the right of reply in the same program and in the same timeslot was not given (at paragraph [23(4)] of the ruling) – Note that this is a numbering error, but we retain the reference as it appears in the ruling.
- c. However, two parts of the decision are in our respectful submission quite incorrect and indeed, produced a sense of shock in the complainants.
- d. After seeking the advice of Senior Counsel, SOS and MMA hereby apply for leave to appeal these two parts of the decision as set out in the Tribunal ruling, in terms of rule 4.1 of the BCCSA's Appeal to Appeal Tribunal Rules (the Appeal Rules), provided to us by the BCCSA, together with a copy of the ruling, on Wednesday 24 February 2021.

2
MB Bds

2. APPLICATION FOR LEAVE TO APPEAL IN RESPECT OF THE SANCTION

- a. In its ruling, the BCCSA Tribunal imposed a sanction of a fine of R10 000.00 upon the SABC, for the numerous Code violations it found to have been committed by the journalists in question.
- b. SOS and MMA is extremely disappointed that no apology was required to be broadcast in regard to the numerous Code violations that the BCCSA found to have occurred as a result of the broadcast of the interview and of the SABC's failure to provide the Board/management with a right of reply.
- c. The BCCSA Tribunal's powers in regard to its sanctions are set out in section 14 of the BCCSA's Constitution. These include at 14.3 that it may direct that a correction and/or a summary of the findings of a Tribunal be broadcast by the respondent in such manner as may be determined by the Tribunal.
- d. We make application to appeal the sanction because we are of the view that the sanction was clearly wrong in not requiring that an apology and/or a summary of the findings of the BCCSA Tribunal be required to be broadcast by the SABC. This is critical for the harm occasioned by the breach to be addressed. A fine alone does not achieve this.
- e. We are of the view that a requirement that an apology and/or a summary of the findings of the BCCSA Tribunal be imposed by the Appeal Tribunal either instead of, or in addition to, (we leave that to the Appeal Tribunal to decide) the R10 000.00 fine imposed by the BCCSA Tribunal.
- f. This is of vital public importance because the public ought to be made aware that, as the BCCSA Tribunal held:
 - (a) at paragraph [13]: the journalists... failed to observe the cardinal journalistic rule of objectivity and left the reasonable viewers with half-truths in that they did not produce facts of what they were referring to. The test for correct context and fair manner of reporting is **facts fairly indicated and referred to** and the failure to do so compromises the news story. (emphasis in the original);
 - (b) at paragraph [18]: We, however, found that in this interview, the interviewers used words which are reasonable viewer would have found to be inaccurate. References to **bloodbath, atrocities, salaries of staff are peanuts**, were not fair accurate and truthful. This is important as the inappropriate use of the language can create an impression of something which is not true. (emphasis in the original); and
 - (c) at paragraph [19]: The coverage of the SAB's era retrenchments in this news programme comes across as very subjective and emotional, with the result that the news was not fairly presented.
- g. We are of the respectful view that the BCCSA Appeal Tribunal must take account of the fact that the SABC is the public broadcaster. And as the public broadcaster, it not only has a significant public service mandate, it also has a unique role in providing access to news and information for the majority of people in South Africa. The High Court has held in SOS Coalition and Others v the SABC and Others Case Number 81056/14, that the SABC is required to provide to provide "significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government,

WMB Rde

commercial and other interests." [at paragraph 36, Available at: <http://www.saflii.org/za/cases/ZAGPJHC/2017/289.pdf>]

- h. In this regard we think it vital to point out the SABC made numerous admissions in its written response to the SOS and MMA complaint that the interview complained of failed to meet acceptable standards of ethical journalistic professionalism. These include the following admissions:
- (a) "[T]he concerns about the editorial quality and journalistic posture of the interview... is noted and fully accepted."
 - (b) "[E]ditors discussed [the interview] extensively and expressed serious concerns about its editorial quality".
 - (c) "[T] here is no question that the issues raised in relation to this aspect [namely the retrenchments] could have been treated differently and dealt with without compromising editorial independence and impartiality".
 - (d) "[T]he sheers proximity of the story to [the journalists'] lives makes the task of distancing themselves and remaining unaffected, an exceptionally difficult one. In fact, one of the journalist points out during the interview that he 'speaks as an affected person', which is necessary to make the viewers aware of the conflict of interest".

[3] The SABC responded as follows:

"RE: APPLICATION FOR LEAVE TO APPEAL AGAINST PART OF THE DECISION THE BCCSA TRIBUNAL AND AGAINST THE SANCTION IMPOSED BY THE BCCSA TRIBUNAL IN THE CASE OF SOS AND MMA V SABC (CASE NO. 3/2021)

In respect of the above-mentioned matter, the SABC would like to comment as follows:

1. The SABC notes the application for leave to appeal lodged by the SOS and MMA against the Tribunal judgment released last week.
2. The SABC is of the view that the decision taken by the BCCSA was well thought-out and fair. It further allows SABC News to work intensely on the editorial reconstruction and reimaging strategy it initiated in 2018.
3. The incident has revealed historical gaps in the system, and these are receiving urgent treatment, including measures to prevent recurrence of similar problems in the future.
4. We however leave it to the BCCSA to decide on the SOS and MMA's application and believe that the decision will be just, fair and in the best interest of all parties.
5. The SABC is determined to exercise observance of the BCCSA Code as well as other related editorial prescripts and continue complying with BCCSA's judgments."

4
WB Bds

EVALUATION

- [4] Applicant applied for leave to appeal against the judgment and sanction delivered by the Tribunal in *SOS Coalition & MMA v SABC*. The first ground of appeal refers to the nature of the sanction and the second ground of appeal concerns the result of the finding of the Tribunal that the impugned broadcast may have resulted in the glamorisation of unlawful conduct.
- [5] The Tribunal imposed a fine of R 10 000.00 on the Broadcaster. The Applicant argues that the sanction of a fine should be accompanied by a public apology from the SABC. The Applicant argues that the general public has been misled about the infringement of the Code by the SABC which happened on a public platform as the SABC is the public broadcaster. By not offering a public apology, the Applicant further argues, the SABC will still be in violation of the Code of Conduct because the reason why a public apology should be offered is to remedy the wrong that had been done to the general public.
- [6] On the issue of the glamorisation of unlawful conduct, the applicant argues that the SABC journalists had, by calling on the intervention of the ANC through the person of its Secretary General, its President and its Minister of Communications, not only acted unlawfully but also contravened the Code in that they glamorised unlawful conduct. In so doing the Respondent had compromised its own independence and impartiality. It is also wrong for politicians to intervene in the matters of the independent SABC.
- [7] The Respondent argued that the sanction of R10 000 was fair and that they had not opposed the sanction in order to indicate that they have accepted responsibility for the broadcast as the independent broadcaster. However, they argued that an apology at this point in time, when one of the interviewed public figures, Mr. Magashule, who has a high media profile at present, may create an impression that they, as the SABC and public broadcaster are pushing a particular political narrative.

5
WB Babs

- [8] The Respondent further argues that the journalists who conducted the interview were junior employees. Following the judgment, Respondent has gone a step further and put in place a couple of measures to ensure that a similar incident does not re-occur. The measures taken include the review of the SABC's editorial policies, conducting workshops with their journalists on the BCCSA Code of Conduct, interrogating the issue of the segregation of duties and structural gaps and also, rebuilding the staff moral in the news room.
- [9] I pondered on the arguments advanced by both the applicant and respondents and came to the conclusion that while the respondent may be apologetic, had accepted its responsibility and the sanction and put in place some corrective measures, its resistance to an apology as sanction is based on political reasons. The arguments and fears raised by the broadcaster against airing a general public apology appears to be aimed at the possible political implications if such apology is broadcast, rather than the upholding of journalistic principles.
- [10] Secondly, the general public is unaware of all the new measures and changes that had been implemented by the Respondent, and they may still be left with the impression that the interview was proper and correct. It follows that it may be possible that another Tribunal may find that the only way in which the general public's (possible) incorrect perceptions and views as a result of this broadcast can be addressed is through a public apology.
- [11] Thirdly, an appeal by journalists themselves to ask politicians, in the manner and language they used to meddle in the internal affairs of the public broadcaster is tantamount to the glamorisation of unlawful conduct which is against the Code of Conduct. It is also unfortunate given the history of our country and the persecution of the many journalists who fought for the freedom of the media and their constitutional right to freedom of speech.

6
WB

[12] In the end, having looked at everything in totality, I conclude that the application for leave to appeal paragraph 24 and 21 of the BCCSA *Case No: 003/2021* judgment is granted

[13] **The Appeal Tribunal will be held via ZOOM on the 26th May at 09:00.**

[14] **The Appellants will be invoiced for the security fee which is payable before the date of the Appeal Tribunal.**



**MR BRIAN MAKEKETA
CHAIRPERSON OF THE 1ST TRIBUNAL OF THE BROADCASTING COMPLAINTS
COMMISSION**

7
MB Bds

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

Case number: 005/2021

In the matter between:

**SOS SUPPORT PUBLIC BROADCASTING
COALITION**

Appellants

MEDIA MONITORING AFRICA TRUST

and

SABC CHANNEL 404

Respondent

HEADS OF ARGUMENT

ON BEHALF OF MMA AND SOS

MB
Sds

TABLE OF CONTENTS

INTRODUCTION	3
ISSUE 1: APOLOGY / CORRECTION	7
ISSUE 2: PROMOTION OF UNLAWFUL CONDUCT	16
The journalists sanctioned, promoted and glamorized interference in the affairs of the SABC	17
Political interference in the affairs of the SABC is unlawful	22
No infringement of freedom of expression	26
CONCLUSION	29

MB Bds

INTRODUCTION

- 1 The complainants in this matter are two non-profit media watchdog organisations, the SOS Support Public Broadcasting Coalition (“SOS”) and Media Monitoring Africa (“MMA”).
- 2 Their complaint arises from a broadcast by the SABC of an interview with the Secretary-General of the African National Congress, Mr Ace Magashule, on 18 November 2020. The interview formed part of the *Full View* programme, which describes itself as focusing “*on the general news of the day*”.¹
- 3 Much of the interview focused on the retrenchment process that was then underway at the SABC.
- 4 In their complaint, SOS and MMA contended that the journalists used language that was not only emotive, but without factual basis, explanation or substantiation, particularly in their description of the process as a “*jobs bloodbath*” and an “*atrocity...being done to people’s lives*”, and in describing the staff as “*earning peanuts*”, and directors as earning “*millions of Rands*”.
- 5 In short, the journalists presented a one-sided and inflammatory interview, without making any attempt to put forward an accurate, disinterested, dispassionate, balanced view of the retrenchment process.
- 6 The SABC admitted that the broadcast had breached numerous provisions of the Code. It accepted that the interview amounted to a failure of editorial and journalistic professionalism and ethics.

¹ BCCSA Tribunal decision para 8.

Wb
Bols
3

7 The BCCSA Tribunal upheld the complaint. It found that the SABC had committed multiple breaches of the BCCSA Codes, including of:

7.1 Clauses 28.1.1, 28.2.2 and 28.3.1 of the Subscription Code and Clauses 11(1), 11(3) and 13(1) of the Free-to-Air Code, in that the news report/interview was not truthfully, accurately and fairly presented and it was not presented in the correct context.

7.2 Clause 28.1.6 of the Subscription Code and clause 13(1) of the Free-to-Air Code, in that a right of reply in the same programme and in the same timeslot was not given.

8 The BCCSA thus imposed a fine of R10 000 on the SABC.

9 This appeal comes before this Tribunal on a narrow basis. It concerns only two issues, in respect of which SOS and MMA respectfully submit that the BCCSA Tribunal clearly erred.

9.1 First, while it directed the SABC to pay a fine, the BCCSA Tribunal failed to order any form of correction or apology. This means that, unless this Tribunal intervenes on appeal, no steps will be taken to correct the admittedly untruthful and inaccurate information which was broadcast to the public.

9.2 Second, the BCCSA Tribunal erred in failing to find that the SABC breached clause 3(b) of the Free-to-Air Code, in that the journalists sanctioned, promoted and/or glamorised unlawful conduct.

WB Bds
4

- 10 Before addressing these two issues, it is useful to emphasise what is not at issue in this appeal. A significant number of issues were admitted by the SABC, and accepted by the BCCSA, and have not been challenged on appeal.
- 11 It is thus not in dispute that:
- 11.1 the interview failed to meet acceptable standards of editorial quality, ethical journalistic professionalism, and breached the Code;²
 - 11.2 the interview could have been conducted differently without compromising editorial independence and impartiality;³
 - 11.3 the interviewers were subject to a conflict of interest and were too emotionally close to the story of retrenchments at the SABC;⁴
 - 11.4 there were “*editorial drifts*” which arose;⁵
 - 11.5 the interview was “*out of pattern*” with the journalists’ own established journalistic conduct;⁶
 - 11.6 the editorial breaches were “*egregious and unacceptable*”;⁷
 - 11.7 the journalists “*failed to observe the cardinal journalistic rule of objectivity and left the reasonable viewers with half-truths in that they did not produce facts of what they were referring to*”;⁸

² SABC response para 4; BCCSA Tribunal decision paras 11 and 13;

³ SABC response para 4, bullet point 2

⁴ SABC response para 4, bullet points 4 and 5

⁵ SABC response para 4, bullet point 5

⁶ SABC response para 4, bullet point 6

⁷ SABC response para 5

- 11.8 the references to "*bloodbath, atrocities, salaries of staff are peanuts*" were not fair, accurate and truthful;⁹
- 11.9 the interview was subjective and emotional, with the result that the news was not fairly presented;¹⁰
- 11.10 there should have been a right of reply, and viewers were left "*with a one-sided viewpoint*".¹¹
- 12 The SABC does not challenge any of these findings. Far from it. In its response to the application for leave to appeal,¹² it says that the BCCSA Tribunal's decision was "*well thought-out and fair*" and that it will allow SABC News to work on its editorial reconstruction and reimagining strategy. It also admits that "*the incident has revealed historical gaps in the system*", which the SABC is working to prevent happening again.
- 13 To summarise, therefore, there is no dispute that:
- 13.1 the SABC breached the Codes in numerous respects;
- 13.2 the SABC failed to adhere to acceptable standards of ethical journalistic professionalism; and
- 13.3 the SABC presented a view to the public that was not fair, not accurate, and not truthful, and was one-sided.

⁸ BCCSA Tribunal decision para 13

⁹ BCCSA Tribunal decision para 18.

¹⁰ BCCSA Tribunal para 19.

¹¹ BCCSA Tribunal para 20.

¹² Dated 5 March 2021.

WB Bds
6

ISSUE 1: APOLOGY / CORRECTION

- 14 Before the BCCSA Tribunal, MMA and SOS sought a sanction including:
- 14.1 a fine of R80 000;
 - 14.2 criticism of the SABC's conduct in terms clause 14.6 of the BCCSA Constitution (clause 12.5 of the Constitution as it now reads);¹³
 - 14.3 that a summary of the BCCSA's findings be broadcast by the SABC at the beginning of each broadcast of *The Full View* on three consecutive weekdays, as provided for in clause 14.3 of the BCCSA Constitution (clause 12.3 as it now reads); and
 - 14.4 a recommendation that the SABC take steps to discipline the news staff responsible for the violations of the Code.
- 15 The BCCSA Tribunal imposed a fine of R10 000. It did not impose any of the other sanctions sought by the complainants. Most importantly for purposes of this appeal, it did not require the SABC to broadcast a summary of the BCCSA Tribunal's findings at the beginning of consecutive broadcasts of *The Full View*.
- 16 In determining the appropriate sanction, the BCCSA Tribunal identified various factors in mitigation.¹⁴ These included that:
- 16.1 the story was of considerable interest and importance to the public;

¹³ We understand that the BCCSA Constitution was amended in May 2021. This has no implications for this appeal, save that the powers of the Tribunal which were previously contained in clause 14 of the BCCSA Constitution are now contained in clause 12.

¹⁴ BCCSA Tribunal decision para 24.

mb Eds
7

- 16.2 the journalists were emotionally invested in the story, and the SABC could not make use of journalists from outside the SABC;
- 16.3 there are always risks during live productions; and
- 16.4 while the interviewers became emotionally carried away, there was no malice.
- 17 In this appeal, MMA and SOS do not take issue with the reduced fine that the BCCSA Tribunal chose to impose on the SABC.
- 18 However, MMA and SOS are concerned that, in failing to require the SABC to broadcast a summary of the BCCSA Tribunal's findings, and thereby to correct and apologise for the misinformation in the broadcast, the BCCSA Tribunal failed to impose a sanction that serves the public interest.
- 19 Clause 14.3 of the BCCSA Constitution (as it then read; now clause 12.3) allows a Tribunal to "*direct that a correction and/or a summary of the findings of a Tribunal be broadcast by the respondent in such manner as may be determined by the Tribunal*". The BCCSA Tribunal was accordingly expressly empowered to direct the SABC to correct the misinformation in its broadcast.
- 20 We respectfully submit that, in the present case, such a sanction is essential. The BCCSA Tribunal clearly erred in failing to require a correction of the misinformation in its initial broadcast. We say this for at least three reasons.
- 21 **First**, in the absence of such a correction, the sanction does nothing to remedy the harm which the broadcast caused to the public.

WB Bole
8

- 21.1 On the SABC's own version, and as the BCCSA Tribunal correctly found, the broadcast was "*not truthfully, accurately and fairly presented*". The public were, in the words of the BCCSA Tribunal, "*left with half-truths.*"¹⁵
- 21.2 SOS and MMA accept that insofar as future conduct is concerned, the SABC appears to have learnt from this incident. The SABC says that it has put in place measures to prevent a recurrence of a similar incident in future, including a review of its editorial policies, conducting workshops with its journalists on the Codes, and rebuilding morale in the newsroom.¹⁶ This suggests that the BCCSA's decision, and the imposition of a fine, has had a positive effect: it serves to deter future breaches of the Code.
- 21.3 However, none of these measures do anything to address the harm already done to the public. The public has, in short, received a one-sided broadcast which was not truthful, not accurate and not fairly presented. That much is common cause. Every day that the misconception created by the broadcast is not corrected, the public harm is ongoing.
- 21.4 Viewers of the *Full View* have, to date, seen nothing to contradict what they saw in the interview with Mr Magashule. They have not been informed that the broadcast was flawed in any way. They continue to

¹⁵ BCCSA Tribunal decision para 13.

¹⁶ BCCSA Tribunal leave to appeal decision para 8; SABC letter of 5 March 2021.

MB Sds
9

labour under the impression that the views expressed during the broadcast were truthful, accurate and fair.

21.5 There is only one way to remedy that harm. It is by requiring the SABC to tell the public that, as the BCCSA has confirmed, the broadcast was not truthful, not accurate and not fair.

21.6 Indeed, in its judgment granting leave to appeal, the BCCSA Tribunal appeared to appreciate the importance of this remedy in order to address the harm to the public, where it held as follows:

“Secondly, the general public is unaware of all the new measures and changes that had been implemented by the Respondent, and they may still be left with the impression that the interview was proper and correct. It follows that it may be possible that another Tribunal may find that the only way in which the general public’s (possible) incorrect perceptions and views as a result of this broadcast can be addressed is through a public apology”.¹⁷

22 **Second**, in recognition of the public harm caused by incorrect and inaccurate broadcasting, the Codes expressly require a correction when a broadcast is found to have been incorrect in a material respect. In terms of clause 28.1.5 of the Subscription Code and clause 11(6) of the Free to Air Code:

“Where it subsequently appears that a broadcast report was incorrect in a material respect, it must be rectified forthwith, without reservation or delay. The rectification must be presented with such a degree of prominence and timing as in the circumstances may be adequate and fair so as to readily attract attention.”

23 **Third**, the mitigating factors listed by the BCCSA Tribunal have no bearing on the importance of a correction and apology.

¹⁷ BCCSA Tribunal leave to appeal decision para 10.

WB
Bols
10

- 23.1 Even if one accepts the difficulty of the journalists' situation, and the absence of malice on their part, these can at most be taken into account in reducing the fine. As we have explained, SOS and MMA do not take issue with the reduced fine.
- 23.2 However, none of these considerations can have any bearing on the requirement to correct the public misinformation. Put differently, the mitigating factors do not mitigate the harm that the public has suffered in receiving a broadcast that was not truthful, not accurate, and not fairly presented. These factors can accordingly have no bearing on the requirement to remedy that harm by way of a public correction and apology.
- 23.3 Indeed, if anything, the existence of mitigating circumstances ought to have pointed the BCCSA towards a requirement to broadcast a correction. That is because the broadcasting of a correction is a less invasive and burdensome remedy than the imposition of a fine.
- 24 **Fourth**, the BCCSA Tribunal overlooked the fact that where a broadcast is untruthful or inaccurate, then – irrespective of whether a fine may also be appropriate – a correction or apology has regularly been regarded as essential to remedy the harm caused. For example:
- 24.1 In *Damarah v SABC2 & Channel 404*,¹⁸ the BCCSA declined to impose a fine for a failure to report news truthfully, accurately and fairly, but

¹⁸ BCCSA Case No 10/2016.

held that an apology and correction "*would be the best way to contain the damage caused by the broadcast concerned*".¹⁹

24.2 In *Strydom v eNCA*,²⁰ the complainants argued that "*at the very least an apology should be issued in the same timeslot as the untruthful comment was made*".²¹ The BCCSA accepted that the broadcast had "*no deliberate malicious intent and that the comment was not scripted*".²² However, it held that an apology was required because "*the public has a right to be informed fairly and accurately in so far as news is concerned, and in a balanced manner in so far as comment is concerned*".²³ This remedy was confirmed on appeal.²⁴

24.3 In *Beydon v Algoa FM*,²⁵ where the Tribunal found that the broadcaster had expressed a view based on an entirely incorrect perception of the judiciary, the parties agreed that the appropriate sanction would be an apology and retraction. Despite this agreement, the Tribunal went further, requiring in addition that "*there must be a reference to this judgment of the BCCSA*".²⁶

24.4 In *Loonat v Radio Islam*,²⁷ the complainant argued for the imposition of an apology plus the maximum fine at the time of R50 000. The

¹⁹ Para 4.

²⁰ BCCSA Case No 14/2019.

²¹ Para 4.

²² Para 7 [14].

²³ Id.

²⁴ Para 16.

²⁵ BCCSA Case No 48/2014.

²⁶ Para 6.

²⁷ BCCSA Case No 03/2008; [2008] JOL 21628 (BCCSA)

WB
Sds

broadcaster claimed that an appropriately formulated apology on air, repeated as often as directed by the Tribunal, would be sufficient. It tendered an apology which included that the remarks were unconditionally retracted and without any foundation. However, the Tribunal rejected the apology tendered by the broadcaster on the basis that it was not convinced that such apology was indeed sincere, and prescribed the wording to be used by the broadcaster instead.²⁸

24.5 The Tribunal also considered the significance of an apology as a remedy in *Prince v Heart 104.9 FM*.²⁹ It held that an apology must be heartfelt, must seek to rectify the matter, must be in the usual language style of the broadcasters, and must be done with the necessary gravity.³⁰

24.6 This remedy also accords with the growing recognition by our courts – albeit predominantly in the context of defamation – that a public apology and retraction is an important means of undoing the harm caused by speech-acts.

24.7 As the Constitutional Court explained in *Dikoko*,³¹ a public apology will usually be far less costly than an award of damages and it can both “set the record straight” and “encourage, rather than inhibit, freedom of

²⁸ Paras

²⁹ BCCSA Case No 43/2013; [2014] JOL 31164 (BCCSA).

³⁰ Paras 4 and 6.

³¹ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 64.

WB
Bols

expression". The Court thus held that courts should be "*pro-active encouraging apology and mutual understanding wherever possible*."³²

24.8 This was affirmed by the Court in *Le Roux v Dey*, where it explained that proper reconciliation – the heart of the constitutional project – requires recantation of past wrongs and apology for them.³³ Retractions and apologies are now routinely ordered in such matters.³⁴ As the High Court recently explained in *Independent Media v Ramos*:

The respondents are members of the media. It is by no means unusual for the media to publish corrections and apologies without a court directing them to do so. I see no reason why, in circumstances where the respondents elect not to offer an apology, this court should not order them to do so.

25 The complainants do not intend to embarrass the SABC or the journalists. That is not the purpose of this remedy. The purpose of the remedy is simply to tell the viewers of the *Full View* that the broadcast did not meet the requirements of the Codes.

26 In pursuance of this objective, the complainants accordingly recommend that the following wording would be reasonable and appropriate:³⁵

On 18 November 2020, an interview with the ANC's Secretary-General, Mr Ace Magashule was broadcast on The Full View.

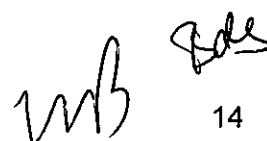
The Broadcasting Complaints Commission of South Africa has ruled that in that interview, the SABC contravened clause 28 of the Subscription Code and clauses 11 and 13 of the Free to Air Code in that

³² Id.

³³ *Le Roux and Others v Dey* para 202.

³⁴ See for example *Mountain Oaks Winery (Pty) Ltd v Smith* 2018 JDR 0879 (WCC) paras 57 and 62; *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and others as amici curiae)* 2011 (5) SA 329 (SCA) para 74; *Hanekom v Zuma* [2019] ZAKZDHC 16 (6 September 2019) paras 84 and 85; *Ramos v Independent Media (Pty) Ltd* [2021] ZAGPJHC 60 (28 May 2021) paras 132 to 134.

³⁵ This wording has been drafted on the basis that the second ground of appeal, regarding the breach of clause 3(b) of the Free to Air Code, is also upheld.



the interview was not truthfully, accurately and fairly presented, was not presented in the correct context and the right of reply was contravened.

On Appeal, the Broadcasting Complaints Commission of South Africa also ruled that the SABC had contravened clause 3(b) of the Free to Air Code, as the interviewers promoted unlawful conduct on the part of the ruling party and members of the executive arm of government, by requesting their interference in the SABC board and management affairs.

The SABC was fined R10 000.00 and was ordered to broadcast this statement for three consecutive days on The Full View.

The SABC apologises to the public for these breaches and the News Team assures the public that it has taken steps to avoid similar occurrences in future.

mb
Bals
15

ISSUE 2: PROMOTION OF UNLAWFUL CONDUCT

- 27 Clause 3(b) of the Free-to-Air Code prohibits the broadcasting of "*material that, judged within context...sanctions, promotes, or glamorises...unlawful conduct*".
- 28 Clause 3(b) thus has essentially two requirements.
- 28.1 First, it must be determined whether, understood in context, the broadcast sanctioned, promoted or glamorised any particular conduct.
- 28.2 Second, if so, it must be determined whether the conduct that was sanctioned, promoted or glamorised is unlawful.
- 29 If these two requirements are satisfied, then clause 3(b) has been breached.
- 30 We respectfully submit that both these requirements are plainly satisfied in this case.
- 30.1 First, the journalists quite clearly sanctioned, promoted and glamorised the interference by the ANC (in its capacity as the governing party), the Minister of Communications, and the President, in the affairs of the SABC Board. Indeed, the journalists expressly goaded and encouraged such interference.
- 30.2 Second, the conduct in question – that is, the interference by the ANC, the Minister and the President in the affairs of the SABC Board – would plainly be unlawful. As we explain below, this is put beyond question by

wb Bds
16

a judgment of the High Court³⁶ – a judgment which the SABC has said it accepts and endorses.

31 We address each of these two requirements below.

The journalists sanctioned, promoted and glamorized interference in the affairs of the SABC

32 The test for determining whether a broadcast sanctions, promotes or glamorizes unlawful conduct is the “*objective standard of the reasonable listener who is broadminded, balanced and not overly sensitive*”, taking the context of the remarks into account.³⁷

33 The test is an objective one, and the actual effect on, or reaction of the audience is irrelevant.³⁸ The question is ultimately whether the broadcast is aimed at highlighting or informing listeners of unlawful conduct – which is permissible – or whether a reasonable, objective listener would view it as sanctioning, promoting or glamorising the conduct – which is not.³⁹

34 The BCCSA has previously adopted the ordinary grammatical meanings of “*sanction*”, “*promote*” and “*glamorise*”. It has understood these terms to bear the following meanings:⁴⁰

³⁶ SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; [2017] ZAGPJHC 289 (17 October 2017).

³⁷ See Motsepe v YFM BCCSA Case No 02/2009; [2009] JOL 23393 para 8 (albeit determining whether a broadcast sanctions, promotes or glamorizes violence rather than unlawful conduct).

³⁸ National Commissioner, SAPS & others v e.tv (Pty) Ltd [2010] JOL 25644 (BCCSA) para 11.

³⁹ Vermeulen v Tuks FM Case No 19/2011 [2012] JOL 28492 (BCCSA) para 8.

⁴⁰ Mathe v SABC (MetroFM) BCCSA Case No 26/2014 para 4; National Commissioner SAPS & others v e.tv (Pty) Ltd [2010] JOL 25644 (BCCSA) para 15; Le Roux v Heart 104.9FM Case No 28/2011 [2011] JOL 27727 (BCCSA) para 7.

- 34.1 "*sanction*" as meaning "*permission or approval for an action*" and as "*permit, approve, endorse, authorise and the like*";
- 34.2 "*promote*" as meaning "*further the progress of, support or encourage*", "*encourage, support and endorse*" and to "*advance, develop, further, propagate, expedite and facilitate*";
- 34.3 "*glamorise*" as meaning "*make (something) seem glamorous or desirable, especially spuriously so*".
- 35 It is not prohibited for a broadcaster merely to "*discuss or depict the contravention of law*".⁴¹ That is because merely reporting on unlawful behaviour does not generally amount to sanctioning, promotion or glamorisation.⁴² Indeed, reporting on unlawful conduct will sometimes be important and necessary to bring to light the "*harsh reality*" of unlawful conduct in South Africa. It may also be permissible to allow a platform to those that commit unlawful and criminal conduct, if one of the clear purposes of such a broadcast is to reveal and critique the unlawful conduct.⁴³
- 36 But what is plainly not permissible is for the journalists themselves to encourage the unlawful conduct. To do so is not only to sanction or glamorise the unlawful conduct; it is actively to promote it.

⁴¹ Vermeulen v Tuks FM Case No 19/2011 [2012] JOL 28492 (BCCSA) para 10.

⁴² National Commissioner, SAPS & others v e.tv (Pty) Ltd [2010] JOL 25644 (BCCSA) paras 15 to 20, citing Jersild v Denmark (1994) 19 EHRR 1.

⁴³ Id para 22.

- 37 Nor may the journalists listen to an interviewee describe his or her intention to act unlawfully, without any attempt to challenge the interviewee, or to explain the unlawfulness of the conduct, or to portray it in a negative light.⁴⁴
- 38 This was confirmed in *Vermeulen v Tuks FM*, where – although the broadcaster did not expressly endorse the bribery of police officers – contextually there was not a sufficient “*countering factor*”, because at no point did the broadcaster issue a warning or disclaimer to listeners not to repeat what they had heard on air.⁴⁵ Similarly in *Motsepe*, the Tribunal held that a YFM DJ had sanctioned violence “*by failing to adequately address and counter the comments*”.⁴⁶
- 39 That brings us to the facts of this case.
- 40 In their interview with Mr Magashule, the interviewees actively goaded, encouraged and persuaded Mr Magashule, the Minister, and the President to intervene in the affairs of the SABC board. They made no attempt to hide their own views: the ANC, the Minister and the President must intervene, they said, including by removing members of the board.
- 41 We highlight only the following remarks and questions by the journalists, which we submit amply demonstrate that they actively promoted (and, at a very minimum, sanctioned and glamorised) political interference in the affairs of the SABC board:

⁴⁴ See *National Commissioner, SAPS & others v e.tv (Pty) Ltd* [2010] JOL 25644 (BCCSA) paras 12 and 22, where it was pivotal that the National Commissioner had expressed his “abhorrence” and that the criminal interviewees were portrayed in negative light.

⁴⁵ *Vermeulen v Tuks FM* Case No 19/2011 [2012] JOL 28492 (BCCSA) para 11.

⁴⁶ *Motsepe v YFM* BCCSA Case No 02/2009; [2009] JOL 23393 para 15.

WB
Bels
19

- 41.1 *"The Governing Party is yet to call this Board and address them. What is the ANC doing to save jobs at the public broadcaster?" (0:49 – 0:57 of the recording).*
- 41.2 *"Mr Magashule you are seemingly a tenant that is absent in his own party. The governing party is governing this country – the ANC – it is your employees who are running and who are in charge of the portfolio committee, it is your Minister who is there, Stella Ndabeni-Abrahams, it's your Deputy Minister Pinky Kekane who is there, but the ANC is seemingly afloat and aloof when it comes to the issues of the workers in the public broadcaster. What have you done to proactively and actively engage with halting the process of section 189?" (02:25-03:00 of the recording).*
- 41.3 *"Mr Magashule are you saying that the SABC Board is renegade and is not listening to those who employed them to do their job and they've just gone amok?" (06:05-06:14 of the recording).*
- 41.4 *"This board, when it was brought in, together with the executive, was meant to save the SABC. But it seems the SABC has been leaping from one problem to the other. Do you think, as the ANC and the governing party, that this board and its executive, have reached its sell by date and maybe they must just pack and go?" (11:08-11:34 of the recording).*
- 41.5 *"What has the President of the Republic of South Africa and the President of the ANC done to instruct the Minister to halt the job retrenchments at the SABC? Has he engaged the Minister, Stella*

Ndabeni-Abrahams, on halting the process of retrenchments at the public broadcaster?” (15:21-15:37 of the recording).

41.6 *“Mr Magashule, let me put it to you bluntly, the SABC is forging ahead with retrenchments, whether we like it or not. You are sitting there right now as the Secretary-General of the governing party. What is stopping you from extending a call right now, to President Ramaphosa...to say President, please make sure that those poor employees of the SABC do not lose their jobs” (35:45-36:21 of the recording).*

42 These are not cherry-picked quotations, taken out of context. They reflect the consistent and sustained questioning, and the putting of propositions to Mr Magashule, all of which was aimed at encouraging him, the ANC, the Minister and the President to intervene in the affairs of the SABC. Not a single question was asked which suggested that such an intervention might be unlawful.

43 For his part, Mr Magashule eagerly accepted the journalists' encouragement. He described the board members as *“intransigent”* and *“arrogant”*, and as having acted *“against the ANC position”*. He explained that the ANC and its alliance partners had taken firm decisions to rally behind the Minister and the Deputy-Minister and *“bring a stop to these people who are becoming arrogant.”* Most chillingly, in response to the journalists' question whether the board must *“just pack and go”*, Mr Magashule said, in express terms: *“The Minister needs to talk to these people and if they don't listen she must show them the door”*. (11:50-12:00).

44 It is difficult to imagine what more the journalists could have done to actively promote interference by the ANC, the Minister and the President in the affairs of the SABC, including by removing board members.

Political interference in the affairs of the SABC is unlawful

45 The next question is whether the conduct that the journalists were promoting, sanctioning and glamorising – that is, interference by the ANC, the Minister and the President in the affairs of the SABC, including by removing board members – is unlawful.

46 This question has been put beyond any doubt by the judgment of the Johannesburg High Court in *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others*.⁴⁷

46.1 The background to the case was clear evidence of improper ministerial interference in the affairs of the SABC. These had been highlighted in a report of the ad hoc Committee, which found that former Minister Faith Muthambi had unlawfully interfered in the affairs of the SABC board, as well as a report by then Public Protector, Adv Thuli Madonsela, which highlighted the “*history of Ministerial interference in the affairs of the SABC*” particularly during the tenure of former Minister Dina Pule.⁴⁸

46.2 The Court carefully sketched the provisions of the Broadcasting Act which entrench the independence of the SABC,⁴⁹ and referred to the

⁴⁷ [2017] ZAGPJHC 289 (17 October 2017)

⁴⁸ Paras 1 to 3.

⁴⁹ Paras 25 and following.

WB Eds

numerous authorities⁵⁰ which have emphasised that the media – and particularly the SABC as the public broadcaster and the primary source of political information for the majority of South Africans⁵¹ – is the bearer of constitutional obligations to foster free expression, to promote plural programming, including that which criticises government, and to perform a watchdog function.⁵²

46.3 The Court explained that to perform these duties, the SABC “*must be free from Executive control and influence to be able to perform its function*” and that “*the SABC has an independent Board to govern it*” which does not report to the Minister and “*is meant to be strictly independent and does not have to work with other government agencies*”.⁵³

46.4 The nub of the case concerned the role of the Minister in the appointment, disciplining, suspension and removal of directors.

46.5 The Court cautioned that the influence wielded by the executive leadership can be easily abused, as evidenced in the SABC’s unfortunate history of internal censorship.⁵⁴

46.6 It held that the provisions of the SABC’s Memorandum of Incorporation and Board Charter, which at the time gave extensive powers to the

⁵⁰ See for example *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); *South African National Defence Union v Minister of Defence* 1999 (4) SA 469; *SABC v Democratic Alliance* 2016 (2) SA 522 (SCA)

⁵¹ Paras 40 and 42.

⁵² Paras 44 to 59.

⁵³ Para 48.

⁵⁴ Paras 82 to 86.

WB
Bds

Minister over the SABC Board, were unlawful and invalid. The Court held as follows:

"The powers granted to the Minister to appoint, re-appoint and discipline Executive Directors undermine the independence of the SABC which is required by the right to freedom of expression (including the freedom of the media) under s 16 of the Constitution. These powers are inconsistent with the specific independence and pluralism required of public service broadcaster".⁵⁵

46.7 The Court also held that these powers were contrary to the provisions of the Broadcasting Act, which does not allow the Minister to manage the SABC's business or affairs:

"The Minister, as the representative of the sole shareholder and not a member of the Board, does not have the right to act on behalf of SABC or to manage its business or affairs."⁵⁶

...

The effect of section 13(11) therefore is to confer on the Board the exclusive power to control the affairs of the SABC. The Minister is accordingly precluded from exercising any powers by which she may control the Directors in how they control the affairs of the SABC".⁵⁷

46.8 The Court specifically considered the lawfulness of the removal by the Minister of three directors. The Minister contended that their removal was lawful because it complied with the Companies Act 71 of 2008. In rejecting the Minister's argument, the Court held as follows:

"Sections 15 and 15A of the Broadcasting Act ensure that there is a level of oversight in the removal of a SABC Director, neither the Minister or the Board can remove the Director unilaterally. Removal requires an inquiry and must

⁵⁵ Para 117.

⁵⁶ Para 122.

⁵⁷ Para 127.

MB Bds

be based on specified, objective grounds for removal and where the National Assembly recommends removal, the President has no discretion and must remove the Director from office.”⁵⁸

46.9 The Court accordingly:⁵⁹

46.9.1 declared the impugned provisions of the SABC MOI and Board Charter unlawful and invalid;

46.9.2 deleted the reference to the Minister’s approval from the portion of the MOI regulating disciplinary powers;

46.9.3 declared that “*members of the SABC Board may not be removed save in compliance with sections 15(1) and (2) and 15A of the Broadcasting Act*”;

46.9.4 a reviewed and set aside the removal of two non-executive directors “*as they were unlawfully taken*”.

47 In short, therefore, the High Court judgment protected the right of the SABC Board to manage the affairs of the SABC, without executive interference. It held unequivocally that such interference is unlawful. It held, in particular, that the removal of board members by the Minister is unlawful.

48 During the course of the hearing before the BCCSA Tribunal, the SABC’s representative appeared to suggest that the SOS judgment may have been incorrectly decided.

⁵⁸ Para 139.

⁵⁹ Para 146.

WB Sds

49 The complainants therefore wrote to the SABC on 1 February 2021 to clarify the position. The SABC responded on 17 February 2021, confirming that *“the position presented at the hearing was not in line with the SABC’s position”*. Specifically on the issue of the SOS decision, the SABC explained that:

“The SABC’s founding documents are clear on the role of the SABC Board in directing the affairs of the organisation vis-à-vis the role of the Shareholder. The SABC has long accepted the judgment by Matojane J in the matter of SOC Coalition and Others v SABC and Others, and the Board has publicly pronounced its support on this.”

50 There can accordingly be no dispute. The intervention by the Minister in the affairs of the SABC – and especially in the removal of members of the Board – is unlawful and unconstitutional. The SABC accepts and supports the judgment which declares this to be so.

No infringement of freedom of expression

51 We have demonstrated above that:

51.1 the journalists actively promoted, and, at a very minimum, sanctioned and glamorised, political interference in the SABC;

51.2 political interference of the kind promoted by the journalists is plainly unlawful and unconstitutional.

52 The two requirements for a finding under clause 3(b) of the Free-to-Air Code were thus clearly met.

WB
Bols

53 However, the BCCSA Tribunal declined to make such a finding. It held that to do so “*would have been curtailing freedom of expression, which is the cornerstone of our democracy.*”⁶⁰

54 This reasoning is, with respect, difficult to understand. The Free-to-Air Code is clear: it prohibits the broadcasting of material that sanctions, promotes or glamorises unlawful conduct.

54.1 At no stage did the BCCSA Tribunal find that the interviewers did not sanction, promote or glamorise interference in the affairs of the SABC.

54.2 Nor did the BCCSA Tribunal at any stage find that such intervention would not be unlawful.

54.3 It is therefore unclear on what basis such a finding would constitute a curtailment of the right to freedom of expression.

55 Indeed, we respectfully submit that the reliance on the right to freedom of expression in this context is inapposite.

55.1 First, where speech sanctions, promotes or glamorises unlawful conduct, then prohibiting such speech does not infringe the right to freedom of expression. As this Tribunal has previously held, citing the Constitutional Court decision in *S v Mamabolo*:

“I want to make clear that this judgment is not primarily about freedom of speech or freedom of expression, but about whether judged as a whole and in context, this broadcast glamorized unlawful conduct.”⁶¹

⁶⁰ BCCSA Tribunal decision para 21.

⁶¹ Vermeulen v Tuks FM Case No 19/2011 [2012] JOL 28492 (BCCSA) para 8 (emphasis added).

243
27

55.2 Second, the unlawful conduct that the journalists sought to promote is itself conduct that seeks to threaten freedom of expression.

55.2.1 This was made clear by the Court in *SOS*, which explained that the independence of the public broadcaster is integrally linked to the right to freedom of expression.

55.2.2 Put differently, if the ANC, the President and the Minister were to interfere in the affairs of the SABC, that would constitute a grave threat to freedom of expression – the “core” of which “*is not the right of the media to publish, but the right of the public to be informed.*”⁶²

55.3 Third, and relatedly, because the promotion of unlawful conduct in this case was itself based on misinformation, the constitutional protection of freedom of expression had “*at best an attenuated interest*”.⁶³

56 The judgment granting leave to appeal to this Tribunal could not have been clearer on this point. We can put it no better than the Deputy Chairperson of the BCCSA did, when he held as follows:

“Thirdly, an appeal by journalists themselves to ask politicians, in the manner and language they used to meddle in the internal affairs of the public broadcaster is tantamount to the glamorisation of unlawful conduct which is against the Code of Conduct. It is also unfortunate given the history of our country and the persecution of the many journalists who fought for the freedom of the media and their constitutional right to freedom of speech.”⁶⁴

⁶² National Commissioner, SAPS & others v e.tv (Pty) Ltd [2010] JOL 25644 (BCCSA) para 11.

⁶³ Khumalo v Holomisa 2002 (5) SA 401 (CC) para 35.

⁶⁴ Leave to appeal decision para 11.

WB Bels
28

CONCLUSION

57 In the circumstances, we submit that the appeal should be upheld, and that the order of the BCCSA Tribunal should be amended to include:

57.1 a requirement that the SABC must publish a summary of the findings of the Tribunal, as amended by this Tribunal on appeal;

57.2 a finding that the SABC breached clause 3(b) of the Free-to-Air Code, by promoting unlawful political interference in the affairs of the SABC.

58 Lastly, we respectfully request, in light of the non-profit status of the complainants, and the public importance of the issues raised, that this Tribunal waives and reimburses the administrative fee associated with the appeal.

MICHAEL MBIKIWA

Counsel for the appellants
Chambers, Sandton
21 June 2021

MB



25 June 2021

The Registrar
Broadcasting Complaints Commission of South Africa
P O Box 412365
CRAIGHALL
2024

Dear Ms Martin

SABC RESPONDS TO THE HEADS OF ARGUMENT SUBMITTED BY SOS&MMA BEFORE THE BCCSA TRIBUNAL

In respect of the above-mentioned matter, the SABC makes the following submission:

1. The SABC concedes that the interview with the ANC Secretary-General Mr. Ace Magashule was not conducted in the highest standard required of the public broadcaster.
2. The SABC submits that the R10 000 fine imposed by the BCCSA Tribunal is sufficient and in line with the severity of the transgression, as the outcome of the interview was not predetermined but influenced by the prevailing circumstances.
3. The SABC finds the cases cited by the Appellant to strengthen their resolve that the SABC must broadcast the summary of findings and a correction to be irrelevant. The cases relate specifically to complainants who were directly affected by the content of the broadcasts or who found the infringement to be personal and thus sought remedies for personal satisfaction. The cases deal with identifiable persons who had been prejudiced as a result of the broadcasts. The Appellant in this matter is not directly affected by what was broadcast however it raises subjective issues of perceptions that were possibly created as a result of an interview that was conducted by the SABC.
 - 3.1 In *Damarah v SABC2 & Channel 404* – the matter related to the integrity of Mr Damarah as a person. It was therefore important that his name is cleared on air.
 - 3.2 In *eNCA VS Strydom and Taylor* – the matter related to what the newsreader said about the respondent in an interview. It directly impacted on the complainant's personality.
 - 3.3 In *Beydon v Algoa FM* – the complainant was aggrieved about what the presenter had said about the text message that the complainant had sent to the station to be read. He had personal interest in the complaint.
 - 3.4 *Loonat v Radio Islam*, - the presenter had directly implicated the complainant to criminal activities. The complainant was directly affected as a result of the broadcast.

4. It is the SABC's submission that the above-mentioned cases cannot be used to support the call for the SABC to air an apology.
5. The SABC submits that there is significant amount of time, 7 months, that has lapsed since the broadcast of the interview with Mr. Magashule which should be considered when deciding whether the BCCSA Tribunal should accede to the Appellant's demand, as this may drag SABC News into the ANC internal conflicts currently playing out. This is an integrity and reputational risk that the public news entity cannot afford at this stage of its restoration.
6. Also requiring consideration is the fact that another interview has since been conducted with Mr. Ace Magashule on a separate matter, about his battles within his party. An apology at this stage could cause confusion as to exactly which interview is being referred, as both were conducted by the same journalists.
7. It is the SABC's submission that broadcasting of the summary of findings and a correction will be damaging to the public broadcaster. As a result, the SABC might be seen to be playing politics. The correction could easily be misconstrued to mean that the public broadcaster is taking sides on ANC conflicts. The timing of the broadcast will also be questionable in the eyes of many viewers given the events that have since happened in the political life of Mr. Magashule.
8. Another relevant matter to consider relates to the comprehensive interventions that have since been instituted to anticipate and prevent a recurrence of what happened. Coupled with this is the observable recovery of the newsroom and renewed commitment to public service journalism that reflects editorial independence and impartiality. To revisit what has been corrected internally already through an apology, may take the newsroom backwards and undo the work that has been done to rebuild confidence which is reflected in audience performance over the past few months.
9. It is the SABC's contention that viewers have long forgotten about the interview in question. The Appellant has not demonstrated through evidence that there are viewers who are still questioning them about the rationale of that interview and its impact on society. This to the SABC is an indication that there is no demonstrable public interest in the case.
10. Broadcasting an apology is not the only way that the public can access the BCCSA Tribunal's ruling. There are many ways through which the public source information, for an example; the Appellant can issue a press statement which can be published by different media outlets. The BCCSA normally publishes its findings on its website and any interested party can access it. The Appellant indicated that the *Business Day* newspaper wrote about the story when it initially broke, and will possibly be interested in the outcome of the complaint too.
11. The BCCSA is a public institution that is accessible to all. Its services are advertised widely across SABC platforms and private media outlets. Had there been a public outrage, as suggested by the Appellant, the public could have long contacted the BCCSA and the SABC about the negative impact of the interview and that has not happened. The Appellant instead referred to an article written in the *Business Day* newspaper. It is therefore the SABC's submission that, when the BCCSA Tribunal makes a determination, it needs to

MB Bds

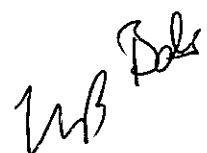
critically quantify whether an article in a single upmarket newspaper equates to public outrage as suggested by the Appellant.

12. The Appellant has submitted that the SABC has called for unlawful interference by external parties in to the running of its affairs. As indicated in the initial submission, the SABC reiterates that this was never part of or premeditated as the subject of the interview, but a consequence of the emotive and restive environment at the time which led to unintentional statements being uttered. In this context, this cannot be viewed as the SABC's call for unlawful interference by external parties, as there was no instruction to the journalist by the institution to do so. Also, the nature of live interviews lends itself to such occurrences and these can only be remedied post-facto. This is also accounted for in the SABC Editorial Policies
13. The Appellant has requested the BCCSA Tribunal to waive the balance of payment required when lodging an appeal. The Appellant has on record indicated that they only paid R10 000 of the R21 000 required fee when lodging an appeal. It is the SABC's submission that the reasons advanced by the applicant for such condonation will have to be assessed as an appeal process is not mandatory but voluntary. The reasons for such condonation if granted, will be important to set a precedent for future appeals.

It is the SABC's submission that given the time that has lapsed since the interview took place, the current political environment and the steps taken by the SABC internally to address this matter, a reprimand will be a suitable sanction



PHILLY MOILWA
HEAD OF POLICY AND REGULATORY AFFAIRS



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

Case number: 005/2021

In the matter between:

**SOS SUPPORT PUBLIC BROADCASTING
COALITION**

Appellants

MEDIA MONITORING AFRICA TRUST

and

SABC CHANNEL 404

Respondent

REPLYING HEADS OF ARGUMENT

ON BEHALF OF SOS AND MMA

WB Bds

TABLE OF CONTENTS

INTRODUCTION.....	3
PROMOTION OF UNLAWFUL CONDUCT.....	4
APOLOGY / CORRECTION.....	8
The basis for the sanction.....	9
Previous BCCSA decisions requiring a correction and/or apology.....	11
The lapse of seven months.....	14
The alleged damage to the SABC	18
Internal corrections at the SABC	19
Publicity and acknowledgment	20
COSTS	21
CONCLUSION.....	24

W.B. B.S.
2

INTRODUCTION

- 1 This appeal was heard on 22 June 2021. At the hearing of the matter, the SABC's representative sought and was granted leave to file heads of argument by 25 June 2021. The appellants sought and were granted leave to file replying submissions by 2 July 2021.
- 2 The purpose of these replying submissions is to respond briefly to the SABC's submissions of 25 June 2021. In doing so, we endeavour not to repeat what has already been stated in our main heads of argument, and we ask that these submissions be read together with our earlier submissions.
- 3 This appeal comes before the Tribunal on only two discrete questions:
 - 3.1 First, whether the SABC should be directed to broadcast a summary of the BCCSA's findings and apology for the admittedly untruthful and inaccurate information which was broadcast to the public.
 - 3.2 Second, whether the BCCSA erred in failing to find that the SABC breached clause 3(b) of the Free-to-Air Code, in that the journalists sanctioned, promoted and/or glamorised unlawful conduct.
- 4 The SABC has devoted much of its submissions to the first question – that is, the broadcasting of a summary of the BCCSA's findings and an apology. It has provided almost no answer to the argument that it breached clause 3(b) of the Free-to-Air Code.
- 5 It is accordingly convenient to address the grounds of appeal in reverse order. In other words:


3

- 5.1 We begin by briefly addressing the breach of clause 3(b) of the Free-to-Air Code, and explain that, on this ground of appeal, the SABC has put up no genuine answer, and the appeal must plainly succeed.
- 5.2 We then address the appropriate sanction and demonstrate that while the SABC has explained its *hesitation* to broadcast a public correction, and has appealed to various irrelevant and inappropriate *political* considerations, it has provided no sustainable reason for a departure from the BCCSA's consistent approach in matters of this kind, which is to require that a summary of its findings be broadcast.

PROMOTION OF UNLAWFUL CONDUCT

- 6 At the hearing of the matter, the SABC had only one defence to the argument that it had breached clause 3(b) of the Free-to-Air Code. It was that the Free-to-Air Code did not apply to *The Full View*, because – so claimed the SABC's representative – *The Full View* is aired on channel 404, a subscription channel.
- 7 That was the only reason advanced at the hearing for why clause 3(b) did not apply. It was a startling submission. It was raised for the very first time in the appeal hearing. And it was entirely untrue.
- 8 The point has rightly been abandoned in the SABC's heads of argument. The SABC therefore appears to concede, as it must, that the Free-to-Air Code applies. For the avoidance of any doubt:
- 8.1 *The Full View* is broadcast on Channel 404, hence the Subscription Code applies.

WNB Sds
4

- 8.2 *The Full View* is re-broadcast on the SABC's Free-to-Air channels, including SABC2, hence the Free-to-Air Code applies.
- 9 As we explained in our main heads of argument, clause 3(b) has two straightforward requirements:
- 9.1 First, it must be determined whether, understood in context, the broadcast sanctioned, promoted or glamorised any particular conduct.
- 9.2 Second, if so, it must be determined whether the conduct that was sanctioned, promoted or glamorised is unlawful.
- 10 We made detailed submissions on both these requirements. We demonstrated, with reference to direct extracts from the interview, that the broadcast consisted of consistent and sustained questioning, and the putting of propositions to Mr Magashule, all of which was aimed at encouraging him, the ANC, the Minister, and the President to intervene in the affairs of the SABC by halting retrenchments and dismissing board members. We also explained, with reference to the High Court decision in *SOS Broadcasting*,¹ that political interference of precisely this kind is unlawful.
- 11 Despite this, the SABC has not engaged with the requirements of clause 3(b) at all. The SABC does not dispute that the broadcast sanctioned, promoted and glamorised political interference in the SABC – including by halting retrenchments and removing board members. The SABC also does not dispute that such interference would be unlawful.

¹ *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others* [2017] ZAGPJHC 289 (17 October 2017)

- 12 That is the end of the enquiry. The requirements of clause 3(b) have self-evidently been met, and the clause has clearly been breached.
- 13 However, the SABC now raises arguments not raised at the appeal hearing for why it says it did not contravene clause 3(b) of the Free-to-Air Code.
- 13.1 First, the SABC says that calling for unlawful interference in the affairs of the SABC was "*not premeditated*" (paragraph 12).
- 13.2 Second, the SABC seeks to distance itself from its own journalists, claiming that it cannot be viewed as the SABC's call for unlawful interference, as "*there was no instruction to the journalist by the institution to do so*" (paragraph 12).
- 14 However, neither of these arguments provides any defence to the SABC's contravention of clause 3(b).
- 15 Premeditation is not an element of clause 3(b). It therefore does not matter whether the journalists acted with premeditation. The absence of premeditation is no defence to a contravention of clause 3(b), just as it is no defence to other breaches of the Codes. It is, at most, a consideration relevant to sanction (and it was indeed taken into account in imposing a fine of only R10 000).
- 16 This was made clear in *Strydom v eNCA*² – a decision referred to in our main heads of argument. In that case, the BCCSA accepted that the journalists in question "*had no deliberate malicious intent*", but nevertheless found that they had breached the Code. Notably, it also held that, despite the lack of malice, eNCA should be required to broadcast an apology.

² BCCSA Case No 14/2019.

17 It is also not open to the SABC to attempt to distance itself from its own journalists. It is trite that broadcasters are responsible for breaches of the Code, whether or not their journalists act on their instructions.

17.1 It is therefore never a defence for a broadcaster to say that a journalist breached the Code, but that the broadcaster did not. To hold otherwise would run contrary to virtually every decision of the BCCSA. It would also enable broadcasters routinely to avoid accountability under the Codes by blaming their own journalists.

17.2 This has been made clear in numerous decisions.

17.2.1 In *MCU of ICASA & others v SABC1*,³ the Tribunal made clear that the negligence or otherwise of any particular SABC employee was irrelevant, and the Tribunal was required to "*ascertain whether, viewed objectively, the broadcast contravened the Broadcasting Code and whether a sanction should be imposed.*"

17.2.2 In *Loonat v Radio Islam*,⁴ the Tribunal held unequivocally that: "*Radio Islam must take responsibility for the conduct of its hosts.*"⁵

17.2.3 In *Greeff v Jacaranda 94.2FM*,⁶ the Tribunal held as follows:

³ [2004] JOL 13236 (BCTSA) para 1.

⁴ Case No. 03/2008.

⁵ Id at para 5.

⁶ Case No. 50/2012, 7 November 2012.

MB Bds
7

"In so far as sanction is concerned, a broadcaster is held vicariously responsible for the acts and omissions of its presenters during a broadcast, where such acts or omissions amount to contraventions of the Broadcasting Code. It is irrelevant whether this rule would seem unfair: it is simply a rule of law which has often, over many years, been applied by our Courts and this Commission."⁷

- 18 In short, it is irrelevant whether or not the SABC "*instructed*" the journalists to sanction, promote or glamorise unlawful conduct. The fact is that they did so. Therefore, the SABC breached the Code.

APOLOGY / CORRECTION

- 19 Much of the SABC's heads of argument are devoted to the question whether it should be directed to publish a correction and apology.

- 20 The SABC's arguments on this score can be summarised as follows:

20.1 First it contends that the cases upon which MMA and SOS relied in their main heads of argument do not assist, as in those cases the remedy was for "*personal satisfaction*" of complainants who were directly affected and prejudiced by the broadcast. Notably, and despite being expressly called upon to do so by the Chair at the hearing of this matter, the SABC does not refer to a single decision in support of its own case that a summary of findings and apology should not be directed.

20.2 Second, the SABC says that a significant period of seven months has lapsed since the broadcast of the interview, and that viewers have long forgotten about the interview.

⁷ Id at para 14.

20.3 Third, the SABC suggests that an apology at this stage will be damaging to the public broadcaster and might be misconstrued to mean that it is taking sides on ANC conflicts.

20.4 Fourth, the SABC says that it has made comprehensive interventions internally to prevent a recurrence of what happened.

21 These arguments are entirely meritless. We address each of them in turn below.

22 First, however, we respectfully remind the Tribunal of the basis for the relief in the Codes and the BCCSA Constitution – an issue which the SABC has either overlooked or ignored.

The basis for the sanction

23 This Tribunal has the power to require the publication of a summary of the BCCSA's findings and an apology in terms of the BCCSA Constitution.

23.1 Clause 12.3 of the BCCSA Constitution allows a Tribunal to direct that a correction and/or a summary of the findings of a Tribunal be broadcast by the respondent in such manner as may be determined by the Tribunal.⁸

23.2 Clause 12.6 allows a Tribunal to make any supplementary or ancillary orders or directions that it may consider necessary for carrying into

⁸ The BCCSA Constitution was amended in May 2021. At the time of the complaint the relevant provisions were clauses 14.3 and 14.7. Nothing turns on this, however, as they are reproduced in identical terms in what are now clauses 12.3 and 12.6.

effect orders or directives made in terms of this clause and, more particularly, give directives as to the broadcasting of its findings.

24 These are the BCCSA's general powers to require that a summary of its findings and an apology be broadcast in appropriate cases. We submit that this is a manifestly appropriate case.

25 However, where it is found that a broadcaster has reported news or comment which is untruthful inaccurate and unfairly presented, the position is different. In these cases, the requirement to broadcast a public correction is not merely a discretionary matter within the remedial power of the Tribunal. It is an express obligation imposed by both the Subscription Code and the Free-to-Air Code.

26 In terms of clause 28.1.5 of the Subscription Code and clause 11(6) of the Free to Air Code:

"Where it subsequently appears that a broadcast report was incorrect in a material respect, it must be rectified forthwith, without reservation or delay. The rectification must be presented with such a degree of prominence and timing as in the circumstances may be adequate and fair so as to readily attract attention."

27 There is no dispute that the SABC's broadcast was "*incorrect in a material respect*". The SABC admits that it was. That means that the incorrect broadcast must be publicly rectified.

28 There is good reason for this requirement in respect of a broadcast report that is incorrect in material respects. As we explained in our main heads of argument, the reason is that in broadcasts of this kind, the harm lies in the fact that public has been misinformed. No fine, no reprimand, and no internal

MB
Bols
10

interventions or disciplinary measures can remedy that harm. Only a public correction can.

29 The SABC does not address these provisions of the BCCSA Constitution and the Codes at all.

30 What is more, in arguing that it should not be required to publish a correction, the SABC is in fact arguing against its own editorial policy. In particular, the SABC's Editorial Code, at clause 3(o), "*enjoins the employees of the public broadcasting service to...correct any inaccuracies and misrepresentations in content timeously*".

Previous BCCSA decisions requiring a correction and/or apology

31 In our main heads of argument, we referred the Tribunal to a series of decisions in which broadcasters have been directed to publish a summary of the BCCSA's findings, an apology, and/or a correction. These were simply a sample of cases, intended to demonstrate to the Tribunal that this is a sanction regularly imposed, particularly where it is found that a broadcast is untruthful, inaccurate, and not fairly presented.

32 At the hearing of the matter, the Chairperson pertinently asked the SABC representative to refer the Tribunal to any decisions in which the BCCSA had declined to require a correction or apology when it had been asked to do so. Despite this request, the SABC's heads of argument are silent on this issue.

33 Instead, the SABC has attempted to dispute the relevance of the decisions upon which MMA and SOS relied in the main heads of argument. In essence, the SABC contends that these decision are inapposite, because they involved

MB Bds
11

complainants who were directly affected by the broadcast in some way. The SABC suggests that these were thus remedies for “*personal satisfaction*”.

34 This is entirely misconceived for at least three reasons.

35 **First**, the decisions we referred to did not primarily involve broadcasts that were alleged to have impacted on the privacy or dignity of individuals. That was not the primary nature of the complaints. They were, like this case, decisions involving the broadcasts alleged to be untruthful, inaccurate, and unfairly presented. In cases such as these, the identity of the complainant is irrelevant, and the purpose of the remedy is not “*personal satisfaction*” – it is to undo the harm of misinformation.

36 **Second**, it is, in any event, simply untrue that the complainants in those cases were all persons directly affected.

36.1 For example, in *Beydon v Algoa FM*, the complainant was merely a listener of the broadcast. He complained when he heard a broadcast involving information about the judiciary that was untruthful and inaccurate. Not only did the Tribunal agree that an apology and retraction must be broadcast, but also that “*there must be a reference to this judgment of the BCCSA*”.⁹

36.2 To this we add the recent decision in *Media Monitoring Africa v Icke*,¹⁰ where eNCA was found to have breached the Subscription and Free-to-Air Codes, and the Tribunal directed it to broadcast a public correction

⁹ Para 6.

¹⁰ Case No 09/2020.

and apology. The complainant in that case was, of course, one of the complainants in the present case. There can be no suggestion of the complaint being about “*personal satisfaction*”. While this matter is currently on appeal, it is notable that eNCA itself proposed the wording of a suitable apology before the Tribunal, in the event that the Tribunal was against it on the merits.¹¹

37 **Third**, as we have explained above, the cases to which we referred in the main heads of argument were merely a sample of previous decisions in which broadcasters were ordered to broadcast a summary of findings and apology. But the BCCSA in fact orders sanctions of this kind routinely. There are many more such decisions to which we could have referred. For example:

37.1 In *Mail & Guardian Media Limited and Another v SABC3 and Another*,¹² the Tribunal directed the SABC to broadcast a statement on SABC3 during the 19:00 news programme, based on the fact that it had broadcast an untruthful news item.

37.2 In *Keswa v Multichoice Newzroom Africa Channel 405*,¹³ the Tribunal held that a news insert was not presented in the correct context, was untruthful and unfair, and therefore required the broadcaster to broadcast a correction and apology according to the wording prescribed by the Tribunal.

¹¹ Page 31.

¹² Case No. 05/2011, 24 March 2011.

¹³ Case No. 12/2019, 5 August 2019.

37.3 In *Mthembu v Multichoice ANN7 Channel 405*,¹⁴ although ANN7 had apologised of its own accord, it accepted and the BCCSA found that that this was insufficient, because it was merely a written scroll and not an audio apology.

37.4 In *Gooding v Talk Radio 702*,¹⁵ the BCCSA granted an order directing that a correction must be broadcast. However, the complainant was dissatisfied with the correction, and appealed, contending that it did not address his main problem with the broadcast. On appeal, the Tribunal directed that the prescribed statement must be re-worded and broadcast.

38 Notably, the SABC has not referred to a single decision that has adopted the contrary stance for which it advocates.

The lapse of seven months

39 The SABC's next argument is that, given the lapse of seven months since the broadcast, it would be inappropriate to direct now that there should be a correction and apology. It contends that viewers have "*long forgotten*" about the interview, and that MMA and SOS have "*not demonstrated through evidence that there are viewers still questioning them about the rationale for that interview and its impact on society*" (paragraph 9).

40 This argument too is entirely misconceived.

¹⁴ Case No. 01/2018, 9 February 2018.

¹⁵ Case No. 08/2012, undated.

41 **First**, it is pure speculation on the part of the SABC that viewers have “*long forgotten*” about the broadcast. We are aware of no previous decision of the BCCSA in which it has required a complainant to produce actual evidence that audiences remember a particular broadcast, or are unhappy about it, before requiring a correction and apology. The need for a correction and apology flows from the fact that the broadcast was untruthful, inaccurate, and unfairly reported – a fact admitted by the SABC.

42 **Second**, the suggestion that viewers are not, as far as the SABC is aware, questioning the rationale for the interview, and that there has not in the SABC’s view been sufficient “*public outrage*” (paragraph 11), misses the point entirely.

42.1 Apart from the fact that there certainly has been public outrage – *Business Day* said that the interview “*had to be seen to be believed for all the journalistic and ethical violations committed by [the] interviewers*”¹⁶ – the relevant question is not whether the interview caused outrage.

42.2 The relevant question is instead whether the interview had the likely effect of misleading and misinforming audiences, by providing them with information that was untruthful, inaccurate, and unfairly presented. It stands to reason that many of the people who were misled and misinformed by the interview did not know they were misled and misinformed – that is the very nature of misinformation, and the very reason that a correction is required. It is to be expected that the

¹⁶ Carol Paton, “SABC a dangerous proxy war that can harm Ramaphosa” *Business Day* 23 November 2020.

misinformed do not express outrage or raise questions, for, in the absence of a correction, there is no reason for them to think have been misinformed.

42.3 Viewers of the *Full View* have, to date, seen nothing to contradict what they saw in the interview with Mr Magashule. They have not been informed that the broadcast was flawed in any way. This means that they continue to labour under the impression that the views expressed during the broadcast were truthful, accurate and fair. That is the harm that requires correction; not some sort of public “outrage”.

43 Third, to take the lapse of time into account would be to allow the SABC to benefit from its own breaches of the Codes.

43.1 MMA and SOS acted with expedition in lodging the complaint. The broadcast was aired on 18 November 2020. Less than two weeks later, on 30 November 2020, MMA and SOS lodged the complaint. Ever since, MMA and SOS have acted diligently to have the matter heard and determined as expeditiously as possible.

43.2 On the other hand, as we have explained above, the SABC has been in breach of the Codes since the moment the broadcast was aired. In particular, as we have explained, the SABC is duty-bound under the Codes to broadcast a correction. The SABC bore that duty from the moment it became apparent that the interview was untruthful and inaccurate.

WB Bde
16

43.3 Put differently, every day after the broadcast that the SABC did not broadcast a correction, it was in direct breach of the Codes for failing to broadcast a correction. It is thus the SABC that is responsible, through its breach, for the fact that no correction or apology has been broadcast for seven months since the interview was broadcast. It would be a perverse result to allow the SABC to benefit from that failure.

44 **Fourth**, while the lapse of time might in certain circumstances be relevant to the question whether a right of reply should be afforded (a sanction which MMA and SOS do not seek), the Tribunal has previously held that the lapse of time does not absolve broadcasters of the obligation to broadcast a correction and apology. This was the approach adopted in *Keswa v Multichoice Newzroom Africa Channel 405*, where the Tribunal held that due to a lapse of three months, a right of reply would serve little purpose (and had in any event not been sought by the complainant)¹⁷, but that the broadcaster should nevertheless be directed to broadcast a summary of the BCCSA's findings and an apology.

45 **Fifth**, and finally, it is commonplace that corrections and apologies are required many months after a broadcast is aired. To name just a few examples:

45.1 In *Loonat v Radio Islam*,¹⁸ the broadcast was on 17 August 2007; the matter was heard six months later on 14 February 2008; and the broadcaster was directed to broadcast a correction and apology by 20 April 2008 – that is, some eight months after the initial broadcast.

¹⁷ Para 20.

¹⁸ BCCSA Case No 03/2008; [2008] JOL 21628 (BCCSA)

WB Sds
17

45.2 In *Mail & Guardian Media Limited and Another v SABC3 and Another*,¹⁹, the broadcast was on 3 November 2010; the matter was heard on 24 March 2011; and the broadcaster was directed to broadcast a correction and apology on 30 March 2011 – that is, four months after the initial broadcast.

45.3 In *Damarah v SABC2 & Channel 404*, the broadcast was on 30 May 2016, and the decision directing that a correction and apology be broadcast was handed down four months later on 29 September 2016 (after argument in mitigation and aggravation of sanction was submitted on 15 August 2016).

The alleged damage to the SABC

46 The SABC suggests that requiring it to broadcast a summary of the BCCSA's findings and correction will be "*damaging*" to the SABC and that the SABC might be seen to be "*playing politics*".

47 However, precisely the opposite is true.

48 We have demonstrated above that requiring a correction and apology in circumstances such as this is routine. A public correction is required by the BCCSA Codes; it is consistent with approach generally adopted by the BCCSA; and it is even required by the SABC's own editorial code. In other words, declining to require a correction and apology will constitute a drastic departure from the BCCSA's practices, precedents and principles.

¹⁹ Case No. 05/2011, 24 March 2011.

- 49 What could be more “*damaging*” – to the BCCSA and the SABC – than being seen, in circumstances such as these, to make an exception because of the perceived “*politics*” of the interview?
- 50 More importantly, political calculations such as this should simply never factor into the BCCSA’s decision-making. The SABC is asking the BCCSA to engage in reasoning of a profoundly dangerous kind – that is, to consider the remedy which is most politically palatable to the public broadcaster. That is not this Tribunal’s role. The role of the Tribunal is to apply the letter and the spirit of the Codes, and to hold broadcasters accountable. If that is what the Tribunal does, and the SABC complies with its order, nobody can ever legitimately be accused of “*playing politics*”.
- 51 In the present case, applying the letter and spirit of the Codes requires that the SABC must broadcast a public correction for the untruthful, inaccurate and unfairly presented broadcast.

Internal interventions at the SABC

- 52 The SABC claims to have made interventions internally to “*prevent a recurrence of what happened*”. It expresses concern that requiring a public correction may “*take the newsroom backwards*”.
- 53 There are three reasons that this can have no bearing on the sanction in this matter.
- 54 **First**, and most importantly, the SABC’s internal interventions have nothing to do with the public harm of misinformation. While they can remedy the risk of future harm, they can do nothing to remedy the past and ongoing harm of an

audience which watched a broadcast which was untruthful, inaccurate and not fairly presented.

55 **Second**, it is unfortunate that the SABC regards a public correction as taking the newsroom backwards. It is intended to do precisely the opposite. It simply means accepting responsibility for what the SABC admits was an egregious breach of the Code, precisely so that the SABC can move forward, having acknowledged the error and accepted responsibility.

56 **Third**, in any event, the SABC's contentions about internal interventions are vague and evasive in the extreme. It does not refer to a single concrete measure that has been taken. It simply asserts, and expects this Tribunal to accept, that its measures are sufficient to prevent a recurrence of what happened.

Publicity and acknowledgment

57 Lastly, the SABC seeks to suggest that the remedy of a public correction is unnecessary, because there are other ways of accessing the Tribunal's decision, and because MMA and SOS can always issue a press statement.

58 This objection only reveals that the SABC fails to appreciate the importance of a public correction and apology.

59 **First**, the vast majority of South Africans do not access the BCCSA's decisions on its website. The only way they hear about the decisions is when a summary of the findings is required to be broadcast. The broadcasting of a summary of the BCCSA's findings is thus a crucial means by which those decisions become

MB Bds
20

publicly known. That is no doubt why the power to order the broadcasting of the BCCSA's findings is express in the BCCSA Constitution.

60 **Second**, the point is not mere publicity. It is public acknowledgement by the SABC. If MMA and SOS were to release a statement, the public would remain uncertain as to whether the SABC accepts that the interview was untruthful, inaccurate and unfairly presented.

The proposed wording

61 For the sake of convenience, we repeat below the wording that MMA and SOS propose would be reasonable and appropriate, and which we submit the SABC should be directed to broadcast at the beginning of each broadcast of The Full View on three consecutive weekdays:

On 18 November 2020, an interview with the ANC's Secretary-General, Mr Ace Magashule was broadcast on The Full View.

The Broadcasting Complaints Commission of South Africa has ruled that in that interview, the SABC contravened clause 28 of the Subscription Code and clauses 11 and 13 of the Free to Air Code in that the interview was not truthfully, accurately and fairly presented, was not presented in the correct context and the right of reply was contravened.

On Appeal, the Broadcasting Complaints Commission of South Africa also ruled that the SABC had contravened clause 3(b) of the Free to Air Code, as the interviewers promoted unlawful conduct on the part of the ruling party and members of the executive arm of government, by requesting their interference in the SABC board and management affairs.

The SABC was fined R10 000.00 and was ordered to broadcast this statement for three consecutive days on The Full View.

The SABC apologises to the public for these breaches and the News Team assures the public that it has taken steps to avoid similar occurrences in future.

COSTS

62 The last issue is the question of the costs of the appeal.

Wb *Bds*
21

- 63 We requested in our main heads of argument, as well as at the hearing of the matter, that given the non-profit status of the complainants, and the public importance of the issues raised, this Tribunal waives the administrative fee associated with the appeal.
- 64 We note that the SABC has retreated from its emphatic – and we submit entirely inappropriate – opposition to this request at the hearing. It now says nothing more than that the appellants’ reasons for waiving the costs will have to be “assessed” (paragraph 13).
- 65 As the Tribunal will be aware, Rule 4.3 of the Procedure of the Commission provides that the Chairperson may require an applicant for leave to appeal to provide security for the costs of the appeal. At the direction of the Chairperson, MMA and SOS have been invoiced for and have paid security in the amount of R10 000 ex VAT (R11 500 including VAT).
- 66 Rule 4.8 provides that the Appeal Tribunal may, where it is deemed appropriate, order an appellant to pay the costs which the Commission had in determining the appeal.
- 67 It is thus within the power of this Tribunal to hold that that the appellants should not be liable for any costs. We would urge the Tribunal to waive the costs of this appeal, for three reasons.
- 68 **First**, MMA and SOS are non-profit, media watchdog entities. Neither organisation has large financial reserves. This is not, for example, a case of a broadcaster bringing an appeal. Nor is it a case of a commercial complainant

bringing an appeal to protect its interests. For appellants such as those, the payment of costs is clearly appropriate. In this case, we submit it is not.

69 **Second**, the issues raised in the appeal are of significant public and indeed constitutional significance. MMA and SOS have appealed on two points of principle, because of the public importance of those principles for the South African broadcasting environment.

70 In ordinary civil litigation, the general rule is – in accordance with the *Biowatch*²⁰ principle – that no costs order should be made against parties that act in the public interest and which argue matters of important constitutional principle, even if they are unsuccessful. The rationale for the rule is that litigation of this kind is to be encouraged, not deterred. We submit that a similar principle should apply in appeals brought in the public interest by non-profit entities before the BCCSA.

71 **Lastly**, there is a profound inequity in the fact that two non-profit public interest organisations, which lodged a complaint in the public interest, and which have pursued two points of considerable public importance on appeal, have paid a security deposit in the same amount as the fine imposed on the broadcaster, where the broadcaster has been found to have breached numerous provisions of the Codes.

72 For these reasons, we reiterate our request that this Tribunal waives the administrative fee associated with the appeal and reimburses the appellants' security deposit.

²⁰ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

CONCLUSION

73 In the circumstances, we submit that the appeal should be upheld, and that the order of the BCCSA Tribunal should be amended to include:

73.1 a requirement that the SABC must publish a summary of the findings against it, as amended by this Tribunal on appeal;

73.2 a finding that the SABC breached clause 3(b) of the Free-to-Air Code, by promoting unlawful political interference in the affairs of the SABC.

MICHAEL MBIKIWA

Counsel for the appellants

AVANI SINGH

Attorney for the appellants

2 July 2021

MB *Bols*
24



P.O.Box 412865 • Craighall • Tel: (011) 326 3100 • Fax: (011) 326 3106 • email: bccsa@bcca.co.za
 Block No 8 • Harwood Island Office Park • 410 Jan Smuts Avenue • Craighall Park • 2196 • www.bccsa.co.za

**CONFIDENTIAL
 DRAFT JUDGMENT**

CASE NUMBER: 012/2021

DATE OF HEARING: 22 JUNE 2021

JUDGMENT RELEASE DATE:

**SUPPORT PUBLIC BROADCASTING COALITION (SOS) &
 MEDIA MONITORING AFRICA**

APPELLANT

vs

SABC CHANNEL 404

RESPONDENT

**TRIBUNAL: ADV BOITUMELO TLHAKUNG (CHAIRPERSON)
 DR MOHAMED CHICKTAY (COMMISSIONER)
 MR RUFUS KHARIDZHA (BCCSA COMMISSIONER)**

**FOR THE APPELLANT: ADV MICHAEL MBIKIWA
 MS AVANI SINGH [of POWER SINGH ATTORNEYS]
 MS DUDUETSANG MAKUSE
 MR WILLIAM BIRD**

FOR THE RESPONDENT: MR. NYIKO SHIBAMBO: BROADCAST COMPLIANCE.

Appeal against the Tribunal's sanction – Appellants submitted that the fine of R 10 000 should be accompanied by an apology from the Respondent or a correction or issue a summary of the First Tribunal's findings.

Appeal upheld – Respondent compelled to broadcast a summary of the First Tribunal's finding as per the provisions of section 12.3 and 12.6 of the BCCSA Constitution. Support Public Broadcasting Coalition (SOS) & Media Monitoring Africa (MMA) vs SABC Channel 404, Case No:012/2021 (BCCSA).

SUMMARY

The Tribunal upheld the Appellants' complaint and imposed a fine of R 10 000 against the Respondent. The Appellants appealed the First Tribunal's sanction including the BCCSA's rule that Appeal Administrative Fees should be paid. The Appellants hold the view that despite imposing a R10 000 fine against the Respondent, the First Tribunal should have also compelled the Respondent to issue an apology to the SABC Board, correction of all the untrue statements made during the interview and / or broadcast summary of the BCCSA's findings.

The appeal was allowed – and the Appeal Tribunal upheld the R10 000

fine – but compelled the Respondent to broadcast the summary of the First Tribunal's findings within a dedicated Full View programme.

JUDGMENT

B TLHAKUNG

[1] This appeal was jointly lodged by the Support Public Broadcasting Coalition [*referred to as 'SOS'*] and Media Monitoring Africa [*referred to as 'MMA'*] and hereinafter referred to as the Appellants. The South African Broadcasting Corporation [*referred to as the 'SABC'*] is the Respondent in this matter. The Chairperson of the Tribunal granted leave to appeal and referred the matter to the Appeal Tribunal of the BCCSA. The appeal is based on the contents of paragraphs 23 and 24 of BCCSA Judgment Case No: 003/2021 regarding the issue of an appropriate sanction.

[2] **The application for leave to appeal reads as follows:**

APPLICATION FOR LEAVE TO APPEAL AGAINST PART OF THE DECISION THE BCCSA TRIBUNAL AND AGAINST THE SANCTION IMPOSED BY THE BCCSA TRIBUNAL IN THE CASE OF SOS AND MMA V SABC (Case No. 3/2021)

1. INTRODUCTION

- a. The SOS Coalition (SOS) and Media Monitoring Africa (MMA) appreciates that it is unusual for a complainant whose complaint has been largely upheld by BCCSA Tribunal to make application for leave to appeal.
- b. SOS and MMA do, of course, welcome the ruling by the BCCSA Tribunal (Case No.3/2021) that the SABC contravened numerous clauses of the Subscription and Free to Air Codes in that:

- (a) the news report/interview with Ace Magashule (which was the subject of our complaint) was "not truthfully, accurately and fairly presented and... was not presented in the correct context" (at paragraph [23(1)] of the ruling); and
 - (b) the right of reply in the same program and in the same timeslot was not given (at paragraph [23(4)] of the ruling) – Note that this is a numbering error, but we retain the reference as it appears in the ruling.
- c. However, two parts of the decision are in our respectful submission quite incorrect and indeed, produced a sense of shock in the complainants.
 - d. After seeking the advice of Senior Counsel, SOS and MMA hereby apply for leave to appeal these two parts of the decision as set out in the Tribunal ruling, in terms of rule 4.1 of the BCCSA's Appeal to Appeal Tribunal Rules (the Appeal Rules), provided to us by the BCCSA, together with a copy of the ruling, on Wednesday 24 February 2021.

2. APPLICATION FOR LEAVE TO APPEAL IN RESPECT OF THE SANCTION

- a. In its ruling, the BCCSA Tribunal imposed a sanction of a fine of R10 000.00 upon the SABC, for the numerous Code violations it found to have been committed by the journalists in question.
- b. SOS and MMA is extremely disappointed that no apology was required to be broadcast in regard to the numerous Code violations that the BCCSA found to have occurred as a result of the broadcast of the interview and of the SABC's failure to provide the Board/management with a right of reply.
- c. The BCCSA Tribunal's powers in regard to its sanctions are set out in section 14 of the BCCSA's Constitution. These include at 14.3 that it may direct that a correction and/or a summary of the findings of a Tribunal be broadcast by the respondent in such manner as may be determined by the Tribunal.
- d. We make application to appeal the sanction because we are of the view that the sanction was clearly wrong in not requiring that an apology and/or a summary of the findings of the BCCSA Tribunal be required to be broadcast by the SABC. This is critical for the harm occasioned by the breach to be addressed. A fine alone does not achieve this.
- e. We are of the view that a requirement that an apology and/or a summary of the findings of the BCCSA Tribunal be imposed by the Appeal Tribunal either instead of, or in addition to, (we leave that to the Appeal Tribunal to decide) the R10 000.00 fine imposed by the BCCSA Tribunal.
- f. This is of vital public importance because the public ought to be made aware that, as the BCCSA Tribunal held:
 - (a) at paragraph [13]: the journalists... failed to observe the cardinal journalistic rule of objectivity and left the reasonable viewers with half-truths in that they did not produce facts of what they were referring to. The test for correct context and fair manner of reporting is **facts fairly indicated and referred to** and the failure to do so compromises the news story. (emphasis in the original);
 - (b) at paragraph [18]: We, however, found that in this interview, the interviewers used words which are reasonable viewer would have found to be inaccurate. References to **bloodbath, atrocities, salaries of staff are peanuts**, were not fair accurate and

truthful. This is important as the inappropriate use of the language can create an impression of something which is not true. (emphasis in the original); and

- (c) at paragraph [19]: The coverage of the SABC's era retrenchments in this news programme comes across as very subjective and emotional, with the result that the news was not fairly presented.
- g. We are of the respectful view that the BCCSA Appeal Tribunal must take account of the fact that the SABC is the public broadcaster. And as the public broadcaster, it not only has a significant public service mandate, it also has a unique role in providing access to news and information for the majority of people in South Africa. The High Court has held in *SOS Coalition and Others v the SABC and Others* Case Number 81056/14, that the SABC is required to provide "significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests." [at paragraph 36, Available at: <http://www.saflii.org/za/cases/ZAGPJHC/2017/289.pdf>]
- h. In this regard we think it vital to point out the SABC made numerous admissions in its written response to the SOS and MMA complaint that the interview complained of failed to meet acceptable standards of ethical journalistic professionalism. These include the following admissions:
 - (a) "[T]he concern about the editorial quality and journalistic posture of the interview... is noted and fully accepted."
 - (b) "[E]ditors discussed [the interview] extensively and expressed serious concerns about its editorial quality".
 - (c) "T]here is no question that the issues raised in relation to this aspect [namely the retrenchments] could have been treated differently and dealt with without compromising editorial independence and impartiality".
 - (d) "[T]he sheer proximity of the story to [the journalists'] lives makes the task of distancing themselves and remaining unaffected, an exceptionally difficult one. In fact, one of the journalist points out during the interview that he 'speaks as an affected person', which is necessary to make the viewers aware of the conflict of interest".

[3] The SABC responded as follows:

"SABC RESPONDS TO THE HEADS OF ARGUMENT SUBMITTED BY SOS&MMA BEFORE THE BCCSA TRIBUNAL

In respect of the above-mentioned matter, the SABC makes the following submission:

1. The SABC concedes that the interview with the ANC Secretary-General Mr. Ace Magashule was not conducted in the highest standard required of the public broadcaster.
2. The SABC submits that the R10 000 fine imposed by the BCCSA Tribunal is sufficient and in line with the severity of the transgression, as the outcome of the interview was not predetermined but influenced by the prevailing circumstances.
3. The SABC finds the cases cited by the Appellant to strengthen their resolve that the SABC must broadcast the summary of findings and a correction to be irrelevant. The cases relate specifically to complainants who were directly affected by the content of the



broadcasts or who found the infringement to be personal and thus sought remedies for personal satisfaction. The cases deal with identifiable persons who had been prejudiced as a result of the broadcasts. The Appellant in this matter is not directly affected by what was broadcast however it raises subjective issues of perceptions that were possibly created as a result of an interview that was conducted by the SABC.

- 3.1 In *Damarah v SABC2 & Channel 404* – the matter related to the integrity of Mr Damarah as a person. It was therefore important that his name is cleared on air.
- 3.2 In *eNCA VS Strydom and Taylor* – the matter related to what the newsreader said about the respondent in an interview. It directly impacted on the complainant's personality.
- 3.3 In *Beydon v Algoa FM* – the complainant was aggrieved about what the presenter had said about the text message that the complainant had sent to the station to be read. He had personal interest in the complaint.
- 3.4 *Loonat v Radio Islam*, - the presenter had directly implicated the complainant to criminal activities. The complainant was directly affected as a result of the broadcast.
4. It is the SABC's submission that the above-mentioned cases cannot be used to support the call for the SABC to air an apology.
5. The SABC submits that there is significant amount of time, 7 months, that has lapsed since the broadcast of the interview with Mr. Magashule which should be considered when deciding whether the BCCSA Tribunal should accede to the Appellant's demand, as this may drag SABC News into the ANC internal conflicts currently playing out. This is an integrity and reputational risk that the public news entity cannot afford at this stage of its restoration
6. Also requiring consideration is the fact that another interview has since been conducted with Mr. Ace Magashule on a separate matter, about his battles within his party. An apology at this stage could cause confusion as to exactly which interview is being referred, as both were conducted by the same journalists.
7. It is the SABC's submission that broadcasting of the summary of findings and a correction will be damaging to the public broadcaster. As a result, the SABC might be seen to be playing politics. The correction could easily be misconstrued to mean that the public broadcaster is taking sides on ANC conflicts. The timing of the broadcast will also be questionable in the eyes of many viewers given the events that have since happened in the political life of Mr. Magashule.
8. Another relevant matter to consider relates to the comprehensive interventions that have since been instituted to anticipate and prevent a recurrence of what happened. Coupled with this is the observable recovery of the newsroom and renewed commitment to public service journalism that reflects editorial independence and impartiality. To revisit what has been corrected internally already through an apology, may take the newsroom backwards and undo the work that has been done to rebuild confidence which is reflected in audience performance over the past few months.
9. It is the SABC's contention that viewers have long forgotten about the interview in question. The Appellant has not demonstrated through evidence that there are viewers who are still questioning them about the rationale of that interview and its impact on society. This to the SABC is an indication that there is no demonstrable public interest in the case.

WB Bds

10. Broadcasting an apology is not the only way that the public can access the BCCSA Tribunal's ruling. There are many ways through which the public source information, for an example; the Appellant can issue a press statement which can be published by different media outlets. The BCCSA normally publishes its findings on its website and any interested party can access it. The Appellant indicated that the *Business Day* newspaper wrote about the story when it initially broke, and will possibly be interested in the outcome of the complaint too.
11. The BCCSA is a public institution that is accessible to all. Its services are advertised widely across SABC platforms and private media outlets. Had there been a public outrage, as suggested by the Appellant, the public could have long contacted the BCCSA and the SABC about the negative impact of the interview and that has not happened. The Appellant instead referred to an article written in the *Business Day* newspaper. It is therefore the SABC's submission that, when the BCCSA Tribunal makes a determination, it needs to critically quantify whether an article in a single upmarket newspaper equates to public outrage as suggested by the Appellant.
12. The Appellant has submitted that the SABC has called for unlawful interference by external parties in to the running of its affairs. As indicated in the initial submission, the SABC reiterates that this was never part of or premeditated as the subject of the interview, but a consequence of the emotive and restive environment at the time which led to unintentional statements being uttered. In this context, this cannot be viewed as the SABC's call for unlawful interference by external parties, as there was no instruction to the journalist by the institution to do so. Also, the nature of live interviews lends itself to such occurrences and these can only be remedied post-facto. This is also accounted for in the SABC Editorial Policies
13. The Appellant has requested the BCCSA Tribunal to waive the balance of payment required when lodging an appeal. The Appellant has on record indicated that they only paid R10 000 of the R21 000 required fee when lodging an appeal. It is the SABC's submission that the reasons advanced by the applicant for such condonation will have to be assessed as an appeal process is not mandatory but voluntary. The reasons for such condonation if granted, will be important to set a precedent for future appeals.

It is the SABC's submission that given the time that has lapsed since the interview took place, the current political environment and the steps taken by the SABC internally to address this matter, a reprimand will be a suitable sanction."

EVALUATION

- [4] After reading through the First Tribunal documentation, respective parties' Heads of Arguments [*hereinafter referred to as 'HOA'*], the clip of the impugned broadcast it is clear that the Appeal Tribunal will confine itself to the contents of paragraph 23 and 24 of the First Tribunal's judgement. Furthermore, the merits of the already sanctioned actions of the Respondent as per the clauses of the BCCSA's Code of Conduct will thus not be dealt with in this appeal as the latter had already been dealt with by the First Tribunal. As a motivation for this appeal, and in light of the First Tribunal's sanction, the Appellants requested that:

- (a) The Appeal Tribunal should direct the Respondent to broadcast a correction and / or summary of the First Tribunal's findings at the beginning of each broadcast of *The Full View* on three consecutive weekdays, as provided for in Section 12 (3) of the BCCSA Constitution;
 - (b) They be exempted from the payment of the BCCSA's Appeal administrative fees; and
 - (c) Even though this is not mentioned at the conclusion of the Appellants' HOA, their dissatisfaction regarding 'the failure by the First Tribunal to address the provisions of Clause 3 (b) of Free-to-Air as the latter was dealt with at the Appeal Tribunal hearing however for the sake of the record and clarity for the Appellants – the Appeal Tribunal will accordingly address it.
- [5] The provisions of section 12 of the BCCSA Constitution, sets out the powers of the BCCSA if an infringement of the Code has been found. Section 12 (3) states that the Tribunal may amongst other sanctions:

'direct that a correction and / or a summary of the findings of a Tribunal be broadcast by the respondent in such manner as may be determined by the Tribunal.'

At the hearing and from the Appellants' HOA, the need to compel the Respondent to issue a correction and or have the summary of the First Tribunal's finding broadcast were substantially argued. The Appellant strongly felt that the South African public is entitled to the truth and to objective news reporting which is detached from the journalists' emotional state – within reasonable and responsible limits. The Respondent conceded that these limits were transgressed by the journalists' use of tone, level of intensity and the persuasive approach that was displayed during the interview. The Appeal Tribunal took cognisance and applauds the Respondent for having implemented corrective measures to

MB⁷
Bos

curtail a repetition of opportunistic journalism in future. However, the question remains – how will the public be made aware of the latter?

This question is deemed pertinent because the interview was opportunistic and publicly advanced political interference into the internal affairs of the Respondent by asking the former Secretary General of the ANC, Mr Ace Magashule to intervene on behalf of the Respondent's employees, which he agreed to do as the persuasion escalated. This scene could have easily resulted in serious power tensions between the SABC Board and the ANC. While this did not happen, as a public broadcaster, the Respondent is obliged to inform the public that the journalists infringed the BCCSA's Code of Conduct and that the style of journalism displayed in this matter is not condoned. The Respondent had already effected measures to address this serious infringement of the Code by one of its own reporters internally.

[6] In terms of the provisions of section 12.6 , the Tribunal may:

'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.'

The Appellants argued that the correction and or summary needed to be broadcast over three consecutive days. However, section 12.6 allows the Appeal Tribunal to exercise its discretion to determine the nature of the ancillary order as well as how and when it should be broadcast. With this in mind, one will have to take into consideration that the impugned programme was broadcast more than seven [7] months ago. The Appeal Tribunal will therefore rather exercise its discretion and compel the Respondent to air a summary of the finding of the First Tribunal and confirm the fine that was imposed. This approach will provide substantive context for viewers to realise what the impugned conduct was and what steps were taken to prevent a repetition thereof in future without

 8

stirring up concerns about political interference that did not take place, simultaneously reassuring viewers of the Respondent's commitment to responsible broadcasting.

[7] Having noted the Appellants' persuasion to have the BCCSA rule on the provisions of Clause 3 (b) of Free-to-Air, it is important to highlight the following:

- (a) Full View is broadcast on the SABC News Channel 404, which is a subscription channel;
- (b) This is the reason why the Appellant had lodged the complaint against Multichoice jointly with the Respondent at the initial stages of its complaint;
- (c) Being a subscription channel, complaints against Full View will be dealt with in terms of the Code of Conduct for Subscription Broadcasting Service Licensees;
- (d) It is trite that the latter might have been repeated on a Free-to-Air channel, however that will always be a secondary channel of broadcast.

7.5 Full View is primarily aired on a subscription channel which precludes the BCCSA from applying the provisions of Clause 3 (b) of the Free-to-Air.

[8] Finally, the Appeal Tribunal cannot waive the administrative costs payable when an Appeal is lodged.

[9] After taking all factors into consideration, the sanction, namely the fine of R10 000 that was imposed by the First Tribunal, is confirmed and an ancillary order is included that the Respondent must broadcast a statement containing a brief summary of the finding of the First Tribunal including of the final decision of the Appeal Tribunal. This statement should be broadcast at the beginning of an identified and agreed upon Full View programme.

SUMMARY: THE APPEAL TRIBUNAL FINDINGS TO BE AIRED ON FULL VIEW WITHIN 24-HOURS OF RECEIPT OF THE FINAL JUDGMENT

*WB*⁹
BoS

“On the 30th of November 2020 the BCCSA received a complaint from MMA/SOS against the SABC News programme, Full View which plays on Channel 404 in which they raised their concerns regarding the manner in which SABC’s journalists conducted an interview with the former ANC Secretary General, Mr. Ace Magashule. regarding the ongoing retrenchment of SABC’s employees. The complaint specifically focused on the issue that the journalists’ conduct at the time had the potential of inciting political violence or rather of creating tension between the Executive Management of the SABC and the ruling party.

The matter was heard by a Tribunal of the BCCSA on the 29th of January 2021 where the Tribunal ruled in favour of the MMA/SOS:

‘that the provisions of clause 28 of the subscription code of conduct was contravened and accordingly issued a R10 000 fine against the SABC’.

In mitigation, the SABC undertook to take internal disciplinary steps against the two journalists, as a risk mitigation step to curb against any future misconduct.

The MMA/SOS lodged an appeal against the sanction imposed by the First Tribunal. They were of the opinion that there was a need for the SABC to apologize to the SABC Executive Management and the general South African public for making false statements during the interview.

The BCCSA Appeal Tribunal took all factors into consideration and ruled that:

- 1. It is satisfied that steps have been taken against the journalists who conducted the interview and that the SABC is to continue with applicable internal processes in order to rectify any elements of misconduct.*
- 2. The BCCSA cannot compel the SABC to issue an apology to the SABC Executive Management or the South African public as the BCCSA never received a complaint from either the SABC Executive management or the broader South African public.*

WB 10
Edy

- The Appellants are the only complainants before the Appeal Tribunal and as such cannot request an apology on behalf of these two parties.*
3. *The Appeal Tribunal confirmed the fine of R10 000 against the SABC which was imposed by the First Tribunal and which is payable within 14 days of the release of the judgment.”*

The respective parties are requested to approve the wording of the statement by the 16th of August.

The R10 000 payable to the BCCSA within fourteen [14] working days of the release of this judgment by the Respondent, is confirmed.

**ADV BOITUMELO TLHAKUNG
CHAIRPERSON OF THE APPEAL TRIBUNAL OF THE BROADCASTING
COMPLAINTS COMMISSION**

Commissioners Chicktay and Kharidzha concurred with the above judgment.

WB
SOS

"WRB34"**// POWER SINGH INCORPORATED**

LPC Reg. No: F18433 | CIPC Reg. No: 2018/071686/21

Public Interest Law.

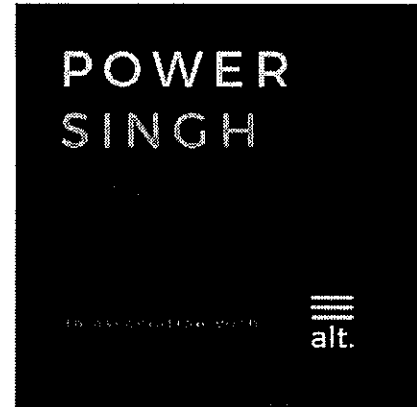
a. 20 Baker Street, Rosebank, South Africa, 2196

t. +2711 268 6881

f. +2786 614 5818

e. connect@powersingh.africa

w. powersingh.africa



This message / correspondence contains information which is confidential and/or legally privileged. It is intended for the addressee only. If you are not the addressee and you have received this message in error, you may not read, use, disseminate, distribute, or copy its information. Please notify us immediately and we shall arrange for the return of this message / correspondence at our own cost.

Date: 31 August 2021

Your ref: Case No. 12/2021

Our ref: PSIMM-201912

**TO: Chairperson: Appeal Tribunal
Broadcasting Complaints Commission of South Africa
c/o Ms Shouneez Martin
Email: shouneez@nabsa.co.za**

Dear Ms Tlhakung

**SUPPORT PUBLIC BROADCASTING COALITION (SOS) AND MEDIA MONITORING AFRICA //
SABC: CONFIDENTIAL DRAFT JUDGMENT**

1. We act for the Support Public Broadcasting Coalition (SOS) and Media Monitoring Africa ("our clients") in the complaint to the Broadcasting Complaints Commission of South Africa ("BCCSA") against the SABC.
2. Our clients appreciate the opportunity to comment on the confidential draft judgment that was circulated to the parties for consideration.
3. We are instructed to advise that our clients have a number of concerns with the draft judgment, and urge that amendments be made to the draft to address these. Our concerns include the following:

*// Directors: A Singh B.Comm., LL.B. (UP), MJ Power B.A., LL.B., LL.M. (Wits) | Senior Associate: T Power B.A., LL.B., LL.M. (Wits).
Associates: T Davis B.A. (RU), LL.B. (UCT), S Khumalo LL.B. (Wits) | Office Manager: J Rashid | Technology Officer: K Nwana.
Power Singh Incorporated is a law firm registered with the Legal Practice Council (F18433) and a personal liability company registered in the Republic of South Africa (2018/071686/21).*

- 3.1. At paragraph 5 of the draft judgment, it states that “[t]he Appeal Tribunal took cognisance and applauds the Respondent for having implemented corrective measures to curtail a repetition of opportunistic journalism in future” and that “[t]he Respondent had already effected measures to address this serious infringement of the Code by one of its own reporters internally”. This is also echoed in the wording of the summary of findings. However, our clients are not aware of any such corrective measures. There is no evidence of such measures in the record that served before the Appeal Tribunal.
- 3.2. At paragraph 7 of the draft judgment, the Appeal Tribunal holds that “Full View is primarily aired on a subscription channel which precludes BCCSA from applying the provisions of Clause 3(b) of the Free-to-Air”.
- 3.2.1. Our clients submit that this is an incorrect interpretation of the Free-to-Air Code, and that there is no basis in law to draw a distinction between the primary and secondary channel of (or first and second) broadcast.
- 3.2.2. Notably, in its heads of argument, the SABC abandoned its argument that the Free-to-Air Code did not apply.
- 3.2.3. That is because the only enquiry is whether a broadcast took place on a free-to-air channel. If it did – which is plainly so in this case – then it must necessarily follow that the Free-to-Air Code is applicable.
- 3.2.4. Our clients submit that the Appeal Tribunal is therefore obliged to engage on the question of whether there was a contravention of clause 3(b) of the Free-to-Air Code. In the light of the decision by Matojane J in *SOS Coalition and Others v the SABC and Others*, it is beyond question that there was indeed a contravention of clause 3(b) of the Free-to-Air Code by the SABC
- 3.3. At paragraph 8 of the draft judgment, the Appeal Tribunal finds that it cannot waive the administrative costs payable when an appeal is lodged. In this regard, our clients submit that the Appeal Tribunal erred in making such a finding, particularly in circumstances where our clients have been substantially successful in the appeal, and given their non-profit status and the public importance of the issues they have raised. Our clients would therefore urge the Appeal Tribunal to revisit this finding and waive the fee that was paid to the BCCSA. In this regard:
- 3.3.1. The wording of section 4.3 of the Procedure of the Commission (appended to the BCCSA Constitution) is clearly couched in discretionary terms: “Where such leave is granted, the said Chairperson may require from the party who applied for such leave to provide security for the costs” (our emphasis).

- 3.3.2. Section 4.8 similarly provides that the Appeal Tribunal may, where it is deemed appropriate, order an appellant to pay the costs which the Commission had in determining the appeal.
- 3.3.3. The Chairperson has already exercised a discretion in the quantum of the security, reducing it from R21 000 to R10 000, thereby proving the discretionary nature of the costs requirement.
- 3.4. In the summary of findings, the Appeal Tribunal finds that it cannot compel the SABC to issue an apology to the South African public “as the BCCSA never received a complaint from either the SABC Executive Management or the broader South African public”. However, it is apparent from the record that our clients instituted these proceedings acting in the public interest – on behalf of the affected public – and it would therefore not be improper for a public apology to be broadcast. Further, one wonders what a complaint from the broader public would look like, if complaints by public interest civil society organisations are insufficient.
4. We are instructed to record that our clients’ reserve their rights to address their concerns with the findings of the Appeal Tribunal before an appropriate forum, should these issues not be resolved by the Appeal Tribunal when finalising its ruling.
5. With regard to the summary of findings, our clients have concerns with the following aspects:
- 5.1. The summary of findings does not explain the essence of the Tribunal’s findings regarding the SABC’s conduct and the import of the contravention of the Subscription Code.
- 5.2. The summary of findings refers to steps taken in mitigation that are not apparent from the record.
- 5.3. The summary of findings errs in stating that a public apology could not be issued, in circumstances where our clients are acting in the public interest.
6. Accordingly, it is submitted that the wording proposed at paragraph 26 of our client’s heads of argument would be more appropriate and effective in resolving this dispute. Our clients also reiterate that this should be broadcast on three consecutive days to remediate the harm that was caused by the broadcasts. For the Appeal Tribunal’s ease of reference, the wording which we suggest is required to be broadcast is as follows:

On 18 November 2020, an interview with the ANC’s Secretary-General, Mr Ace Magashule, was broadcast on The Full View.

The Broadcasting Complaints Commission of South Africa has ruled that in that interview, the SABC contravened clause 28 of the Subscription Code in that the



WNB Bds

interview was not truthfully, accurately and fairly presented, was not presented in the correct context and the right of reply was contravened.

The Broadcasting Complaints Commission of South Africa also ruled that in that interview, the SABC contravened clause 3(b) of the Free-to-Air Code in that the interviewees promoted unlawful conduct by urging Ms Magashule to secure political interference in the affairs of the SABC.

The SABC was fined R10 000.00 and was ordered to broadcast this statement for three consecutive days on The Full View. The SABC apologises to the public for these breaches and the News Team assures the public that it has taken steps to avoid similar occurrences in future.

7. Our clients remain available to assist the Appeal Tribunal with any further submissions that may be useful in the finalisation of the draft judgment.
8. All our clients' rights are reserved.

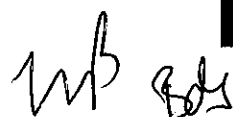
Yours faithfully,



POWER SINGH INC.

Per: Avani Singh | *Director*

E-mail: avani@powersingh.africa





P.O.Box 412365 • Craighall • Tel (011) 326 3136 • Fax (011) 326 3198 • email: complaints@bccsa.co.za
 Block No 8 • Hillside Island Office Park • 410 Jan Smuts Avenue • Craighall Park • 2196 • www.bccsa.co.za

CASE NUMBER: 012/2021

DATE OF HEARING: 22 JUNE 2021

JUDGMENT RELEASE DATE: 20 SEPTEMBER 2021

**SUPPORT PUBLIC BROADCASTING COALITION (SOS) &
 MEDIA MONITORING AFRICA**

APPELLANT

vs

SABC CHANNEL 404

RESPONDENT

**TRIBUNAL: ADV BOITUMELO TLHAKUNG (CHAIRPERSON)
 DR MOHAMED CHICKTAY (COMMISSIONER)
 MR RUFUS KHARIDZHA (BCCSA COMMISSIONER)**

**FOR THE APPELLANT: ADV MICHAEL MBIKIWA
 MS AVANI SINGH [of POWER SINGH ATTORNEYS]
 MS DUDUETSANG MAKUSE
 MR WILLIAM BIRD**

FOR THE RESPONDENT: MR. NYIKO SHIBAMBO: BROADCAST COMPLIANCE.

Appeal against the Tribunal's sanction – Appellants submitted that the fine of R 10 000 should be accompanied by an apology from the Respondent or a correction or issue a summary of the First Tribunal's findings.

Appeal upheld – Respondent compelled to broadcast a summary of the First Tribunal's finding as per the provisions of section 12.3 and 12.6 of the BCCSA Constitution. Support Public Broadcasting Coalition (SOS) & Media Monitoring Africa (MMA) vs SABC Channel 404, Case No:012/2021 (BCCSA).

*Wb Pds*¹

SUMMARY

The Tribunal upheld the Appellants' complaint and imposed a fine of R 10 000 against the Respondent. The Appellants appealed the First Tribunal's sanction including the BCCSA's rule that Appeal Administrative Fees should be paid. The Appellants hold the view that despite imposing a R10 000 fine against the Respondent, the First Tribunal should have also compelled the Respondent to issue an apology to the SABC Board, correction of all the untrue statements made during the interview and / or broadcast summary of the BCCSA's findings.

The appeal was allowed – and the Appeal Tribunal upheld the R10 000.

Fine- but compelled the Respondent to broadcast the summary of the First Tribunal's findings within a dedicated Full View programme.

JUDGMENT

B TLHAKUNG

[1] This appeal was jointly lodged by the Support Public Broadcasting Coalition [*referred to as 'SOS'*] and Media Monitoring Africa [*referred to as 'MMA'*] and hereinafter referred to as the Appellants. The South African Broadcasting Corporation [*referred to as the 'SABC'*] is the Respondent in this matter. The Chairperson of the Tribunal granted leave to appeal and referred the matter to the Appeal Tribunal of the BCCSA. The appeal is based on the contents of paragraphs 23 and 24 of BCCSA Judgment *Case No: 003/2021* regarding the issue of an appropriate sanction.

[2] **The application for leave to appeal reads as follows:**

“APPLICATION FOR LEAVE TO APPEAL AGAINST PART OF THE DECISION THE BCCSA TRIBUNAL AND AGAINST THE SANCTION IMPOSED BY THE BCCSA TRIBUNAL IN THE CASE OF SOS AND MMA V SABC (Case No. 3/2021)

1. INTRODUCTION

- a. The SOS Coalition (SOS) and Media Monitoring Africa (MMA) appreciates that it is unusual for a complainant whose complaint has been largely upheld by BCCSA Tribunal to make application for leave to appeal.
- b. SOS and MMA do, of course, welcome the ruling by the BCCSA Tribunal (Case No.3/2021) that the SABC contravened numerous clauses of the Subscription and Free to Air Codes in that:

- (a) the news report/interview with Ace Magashule (which was the subject of our complaint) was “not truthfully, accurately and fairly presented and... was not presented in the correct context” (at paragraph [23(1)] of the ruling); and
- (b) the right of reply in the same program and in the same timeslot was not given (at paragraph [23(4)] of the ruling) – Note that this is a numbering error, but we retain the reference as it appears in the ruling.
- c. However, two parts of the decision are in our respectful submission quite incorrect and indeed, produced a sense of shock in the complainants.
- d. After seeking the advice of Senior Counsel, SOS and MMA hereby apply for leave to appeal these two parts of the decision as set out in the Tribunal ruling, in terms of rule 4.1 of the BCCSA’s Appeal to Appeal Tribunal Rules (the Appeal Rules), provided to us by the BCCSA, together with a copy of the ruling, on Wednesday 24 February 2021.

2. APPLICATION FOR LEAVE TO APPEAL IN RESPECT OF THE SANCTION

- a. In its ruling, the BCCSA Tribunal imposed a sanction of a fine of R10 000.00 upon the SABC, for the numerous Code violations it found to have been committed by the journalists in question.
- b. SOS and MMA is extremely disappointed that no apology was required to be broadcast in regard to the numerous Code violations that the BCCSA found to have occurred as a result of the broadcast of the interview and of the SABC’s failure to provide the Board/management with a right of reply.
- c. The BCCSA Tribunal’s powers in regard to its sanctions are set out in section 14 of the BCCSA’s Constitution. These include at 14.3 that it may direct that a correction and/or a summary of the findings of a Tribunal be broadcast by the respondent in such manner as may be determined by the Tribunal.
- d. We make application to appeal the sanction because we are of the view that the sanction was clearly wrong in not requiring that an apology and/or a summary of the findings of the BCCSA Tribunal be required to be broadcast by the SABC. This is critical for the harm occasioned by the breach to be addressed. A fine alone does not achieve this.
- e. We are of the view that a requirement that an apology and/or a summary of the findings of the BCCSA Tribunal be imposed by the Appeal Tribunal either instead of, or in addition to, (we leave that to the Appeal Tribunal to decide) the R10 000.00 fine imposed by the BCCSA Tribunal.
- f. This is of vital public importance because the public ought to be made aware that, as the BCCSA Tribunal held:
 - (a) at paragraph [13]: the journalists... failed to observe the cardinal journalistic rule of objectivity and left the reasonable viewers with half-truths in that they did not produce facts of what they were referring to. The test for correct context and fair manner of reporting is **facts fairly indicated and referred to** and the failure to do so compromises the news story. (emphasis in the original);
 - (b) at paragraph [18]: We, however, found that in this interview, the interviewers used words which are reasonable viewer would have found to be inaccurate. References to **bloodbath, atrocities, salaries of staff are peanuts**, were not fair accurate and truthful. This is important as the inappropriate use of the language can create an impression of something which is not true. (emphasis in the original); and

- (c) at paragraph [19]: The coverage of the SABC's era retrenchments in this news programme comes across as very subjective and emotional, with the result that the news was not fairly presented.
- g. We are of the respectful view that the BCCSA Appeal Tribunal must take account of the fact that the SABC is the public broadcaster. And as the public broadcaster, it not only has a significant public service mandate, it also has a unique role in providing access to news and information for the majority of people in South Africa. The High Court has held in *SOS Coalition and Others v the SABC and Others* Case Number 81056/14, that the SABC is required to provide "significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests." [at paragraph 36, Available at: <http://www.saflii.org/za/cases/ZAGPJHC/2017/289.pdf>]
- h. In this regard we think it vital to point out the SABC made numerous admissions in its written response to the SOS and MMA complaint that the interview complained of failed to meet acceptable standards of ethical journalistic professionalism. These include the following admissions:
- (a) "[T]he concern about the editorial quality and journalistic posture of the interview... is noted and fully accepted."
- (b) "[E]ditors discussed [the interview] extensively and expressed serious concerns about its editorial quality".
- (c) "T]here is no question that the issues raised in relation to this aspect [namely the retrenchments] could have been treated differently and dealt with without compromising editorial independence and impartiality".
- (d) "[T]he sheer proximity of the story to [the journalists'] lives makes the task of distancing themselves and remaining unaffected, an exceptionally difficult one. In fact, one of the journalist points out during the interview that he 'speaks as an affected person', which is necessary to make the viewers aware of the conflict of interest".

[3] The SABC responded as follows:

"SABC RESPONDS TO THE HEADS OF ARGUMENT SUBMITTED BY SOS&MMA BEFORE THE BCCSA TRIBUNAL

In respect of the above-mentioned matter, the SABC makes the following submission:

1. The SABC concedes that the interview with the ANC Secretary-General Mr. Ace Magashule was not conducted in the highest standard required of the public broadcaster.
2. The SABC submits that the R10 000 fine imposed by the BCCSA Tribunal is sufficient and in line with the severity of the transgression, as the outcome of the interview was not predetermined but influenced by the prevailing circumstances.
3. The SABC finds the cases cited by the Appellant to strengthen their resolve that the SABC must broadcast the summary of findings and a correction to be irrelevant. The cases relate specifically to complainants who were directly affected by the content of the broadcasts or who found the infringement to be personal and thus sought remedies for personal satisfaction. The cases deal with identifiable persons who had been prejudiced as a result of the broadcasts. The Appellant in this matter is not directly affected by what was

- broadcast however it raises subjective issues of perceptions that were possibly created as a result of an interview that was conducted by the SABC.
- 3.1 In *Damarah v SABC2 & Channel 404* – the matter related to the integrity of Mr Damarah as a person. It was therefore important that his name is cleared on air.
 - 3.2 In *eNCA VS Strydom and Taylor* – the matter related to what the newsreader said about the respondent in an interview. It directly impacted on the complainant's personality.
 - 3.3 In *Beydon v Algoa FM* – the complainant was aggrieved about what the presenter had said about the text message that the complainant had sent to the station to be read. He had personal interest in the complaint.
 - 3.4 *Loonat v Radio Islam*, - the presenter had directly implicated the complainant to criminal activities. The complainant was directly affected as a result of the broadcast.
4. It is the SABC's submission that the above-mentioned cases cannot be used to support the call for the SABC to air an apology.
 5. The SABC submits that there is significant amount of time, 7 months, that has lapsed since the broadcast of the interview with Mr. Magashule which should be considered when deciding whether the BCCSA Tribunal should accede to the Appellant's demand, as this may drag SABC News into the ANC internal conflicts currently playing out. This is an integrity and reputational risk that the public news entity cannot afford at this stage of its restoration
 6. Also requiring consideration is the fact that another interview has since been conducted with Mr. Ace Magashule on a separate matter, about his battles within his party. An apology at this stage could cause confusion as to exactly which interview is being referred, as both were conducted by the same journalists.
 7. It is the SABC's submission that broadcasting of the summary of findings and a correction will be damaging to the public broadcaster. As a result, the SABC might be seen to be playing politics. The correction could easily be misconstrued to mean that the public broadcaster is taking sides on ANC conflicts. The timing of the broadcast will also be questionable in the eyes of many viewers given the events that have since happened in the political life of Mr. Magashule.
 8. Another relevant matter to consider relates to the comprehensive interventions that have since been instituted to anticipate and prevent a recurrence of what happened. Coupled with this is the observable recovery of the newsroom and renewed commitment to public service journalism that reflects editorial independence and impartiality. To revisit what has been corrected internally already through an apology, may take the newsroom backwards and undo the work that has been done to rebuild confidence which is reflected in audience performance over the past few months.
 9. It is the SABC's contention that viewers have long forgotten about the interview in question. The Appellant has not demonstrated through evidence that there are viewers who are still questioning them about the rationale of that interview and its impact on society. This to the SABC is an indication that there is no demonstrable public interest in the case.
 10. Broadcasting an apology is not the only way that the public can access the BCCSA Tribunal's ruling. There are many ways through which the public source information, for an example; the Appellant can issue a press statement which can be published by different media outlets. The BCCSA normally publishes its findings on its website and any

WB BL

interested party can access it. The Appellant indicated that the *Business Day* newspaper wrote about the story when it initially broke, and will possibly be interested in the outcome of the complaint too.

11. The BCCSA is a public institution that is accessible to all. Its services are advertised widely across SABC platforms and private media outlets. Had there been a public outrage, as suggested by the Appellant, the public could have long contacted the BCCSA and the SABC about the negative impact of the interview and that has not happened. The Appellant instead referred to an article written in the *Business Day* newspaper. It is therefore the SABC's submission that, when the BCCSA Tribunal makes a determination, it needs to critically quantify whether an article in a single upmarket newspaper equates to public outrage as suggested by the Appellant.
12. The Appellant has submitted that the SABC has called for unlawful interference by external parties in to the running of its affairs. As indicated in the initial submission, the SABC reiterates that this was never part of or premeditated as the subject of the interview, but a consequence of the emotive and restive environment at the time which led to unintentional statements being uttered. In this context, this cannot be viewed as the SABC's call for unlawful interference by external parties, as there was no instruction to the journalist by the institution to do so. Also, the nature of live interviews lends itself to such occurrences and these can only be remedied post-facto. This is also accounted for in the SABC Editorial Policies
13. The Appellant has requested the BCCSA Tribunal to waive the balance of payment required when lodging an appeal. The Appellant has on record indicated that they only paid R10 000 of the R21 000 required fee when lodging an appeal. It is the SABC's submission that the reasons advanced by the applicant for such condonation will have to be assessed as an appeal process is not mandatory but voluntary. The reasons for such condonation if granted, will be important to set a precedent for future appeals.

It is the SABC's submission that given the time that has lapsed since the interview took place, the current political environment and the steps taken by the SABC internally to address this matter, a reprimand will be a suitable sanction."

EVALUATION

[4] After reading through the First Tribunal documentation, respective parties' Heads of Arguments [*hereinafter referred to as 'HOA'*], the clip of the impugned broadcast it is clear that the Appeal Tribunal will confine itself to the contents of paragraph 23 and 24 of the First Tribunal's judgement. Furthermore, the merits of the already sanctioned actions of the Respondent as per the clauses of the BCCSA's Code of Conduct will thus not be dealt with in this appeal as the latter had already been dealt with by the First Tribunal. As a motivation for this appeal, and in light of the First Tribunal's sanction, the Appellants requested that:

- (a) The Appeal Tribunal should direct the Respondent to broadcast a correction and /

or summary of the First Tribunal's findings at the beginning of each broadcast of *The Full View* on three consecutive weekdays, as provided for in Section 12 (3) of the BCCSA Procedure.

- (b) They be exempted from the payment of the BCCSA's Appeal administrative fees; and
 - (c) Even though this is not mentioned at the conclusion of the Appellants' HOA, their dissatisfaction regarding 'the failure by the First Tribunal to address the provisions of Clause 3 (b) of Free-to-Air as the latter was dealt with at the Appeal Tribunal hearing however for the sake of the record and clarity for the Appellants – the Appeal Tribunal will accordingly address it.
- [5] The provisions of Section 12 of the BCCSA Procedure, sets out the powers of the BCCSA if an infringement of the Code has been found. Section 12 (3) states that the Tribunal may amongst other sanctions:

'direct that a correction and / or a summary of the findings of a Tribunal be broadcast by the respondent in such manner as may be determined by the Tribunal.'

At the hearing and from the Appellants' HOA, the need to compel the Respondent to issue a correction and or have the summary of the First Tribunal's finding broadcast were substantially argued. The Appellant strongly felt that the South African public is entitled to the truth and to objective news reporting which is detached from the journalists' emotional state – within reasonable and responsible limits. The Respondent conceded that these limits were transgressed by the journalists' use of tone, level of intensity and the persuasive approach that was displayed during the interview. The Appeal Tribunal took cognisance and applauds the Respondent for having implemented corrective measures to curtail a repetition of opportunistic journalism in future. However, the question remains – how will the public be made aware of the latter?

MB Eds⁷

This question is deemed pertinent because the interview was opportunistic and publicly advanced political interference into the internal affairs of the Respondent by asking the former Secretary General of the ANC, Mr Ace Magashule to intervene on behalf of the Respondent's employees, which he agreed to do as the persuasion escalated. This scene could have easily resulted in serious power tensions between the SABC Board and the ANC. While this did not happen, as a public broadcaster, the Respondent is obliged to inform the public that the journalists infringed the BCCSA's Code of Conduct and that the style of journalism displayed in this matter is not condoned. The Respondent had already effected measures to address this serious infringement of the Code by one of its own reporters internally.

[6] In terms of the provisions of Section 12.6, the Tribunal may:

'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.'

The Appellants argued that the correction and or summary needed to be broadcast over three consecutive days. However, Section 12.6 allows the Appeal Tribunal to exercise its discretion to determine the nature of the ancillary order as well as how and when it should be broadcast. With this in mind, one will have to take into consideration that the impugned programme was broadcast more than seven [7] months ago. The Appeal Tribunal will therefore rather exercise its discretion and compel the Respondent to air a summary of the finding of the First Tribunal and confirm the fine that was imposed. This approach will provide substantive context for viewers to realise what the impugned conduct was and what steps were taken to prevent a repetition thereof in future without stirring up concerns about political interference that did not take place, simultaneously reassuring viewers of the Respondent's commitment to responsible broadcasting.

[7] Having noted the Appellants' persuasion to have the BCCSA rule on the provisions of Clause 3 (b) of Free-to-Air, it is important to highlight the following:

- (a) Full View is broadcast on the SABC News Channel 404, which is a subscription channel;
- (b) This is the reason why the Appellant had lodged the complaint against Multichoice jointly with the Respondent at the initial stages of its complaint;
- (c) Being a subscription channel, complaints against Full View will be dealt with in terms of the Code of Conduct for Subscription Broadcasting Service Licensees;
- (d) It is trite that the latter might have been repeated on a Free-to-Air channel, however that will always be a secondary channel of broadcast.

7.5 Full View is primarily aired on a subscription channel which precludes the BCCSA from applying the provisions of Clause 3 (b) of the Free-to-Air.

[8] Finally, the Appeal Tribunal cannot waive the administrative costs payable when an Appeal is lodged.

[9] After taking all factors into consideration, the sanction, namely the fine of R10 000 that was imposed by the First Tribunal, is confirmed and an ancillary order is included that the Respondent must broadcast a statement containing a brief summary of the finding of the First Tribunal including of the final decision of the Appeal Tribunal. This statement should be broadcast at the beginning of an identified and agreed upon Full View programme.

SUMMARY: THE APPEAL TRIBUNAL FINDINGS TO BE AIRED ON FULL VIEW WITHIN 24-HOURS OF RECEIPT OF THE FINAL JUDGMENT.

"On the 30th of November 2020 the BCCSA received a complaint from MMA/SOS against the SABC News programme, Full View which plays on Channel 404 in which they raised their concerns regarding the manner in which SABC's journalists conducted an interview

with the former ANC Secretary General, Mr. Ace Magashule, regarding the ongoing retrenchment of SABC's employees. The complaint specifically focused on the issue that the journalists' conduct at the time had the potential of inciting political violence or rather of creating tension between the Executive Management of the SABC and the ruling party.

The matter was heard by a Tribunal of the BCCSA on the 29th of January 2021 where the Tribunal ruled in favour of the MMA/SOS:

'that the provisions of clause 28 of the subscription code of conduct was contravened and accordingly issued a R10 000 fine against the SABC'.

In mitigation, the SABC undertook to take internal disciplinary steps against the two journalists, as a risk mitigation step to curb against any future misconduct.

The MMA/SOS lodged an appeal against the sanction imposed by the First Tribunal. They were of the opinion that there was a need for the SABC to apologize to the SABC Executive Management and the general South African public for making false statements during the interview.

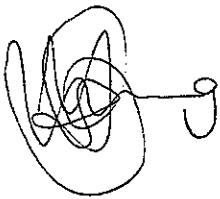
The BCCSA Appeal Tribunal took all factors into consideration and ruled that:

- 1. It is satisfied that steps have been taken against the journalists who conducted the interview and that the SABC is to continue with applicable internal processes in order to rectify any elements of misconduct.*
- 2. The BCCSA cannot compel the SABC to issue an apology to the SABC Executive Management or the South African public as the BCCSA never received a complaint from either the SABC Executive management or the broader South African public. The Appellants are the only complainants before the Appeal Tribunal and as such cannot request an apology on behalf of these two parties.*

3. *The Appeal Tribunal confirmed the fine of R10 000 against the SABC which was imposed by the First Tribunal and which is payable within 14 days of the release of the judgment.*

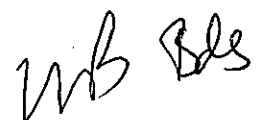
The SABC is to confirm the date and the time of when the apology will broadcast and a copy must be submitted to the Registrar.

The R10 000 payable to the BCCSA within fourteen [14] working days of the release of this judgment by the Respondent, is confirmed.



**ADV BOITUMELO TLHAKUNG
CHAIRPERSON OF THE APPEAL TRIBUNAL OF THE BROADCASTING
COMPLAINTS COMMISSION**

Commissioners Chicktay and Kharidzha concurred with the above judgment.





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

BCCSA - Appeal to Appeal Tribunal

- 4.1 If any of the parties to a matter which has been decided upon by the Tribunal is aggrieved by the decision, that party may, within 5 days, apply to the Chairperson of the Tribunal in writing for leave to appeal to an Appeal Tribunal of the Commission.
- 4.2 A party who files such an application must set out the grounds fully upon which that party believes that an Appeal Tribunal is likely to come to a different decision.
- 4.3 The Chairperson of the Tribunal may decide the matter on the papers and broadcast in the matter and without hearing the parties if the parties agree to such a procedure.
- 4.4 Where such leave is granted, the said Chairperson may require the party who applied for such leave to provide to the Registrar for the costs of the adjudication by the Appeal Tribunal, which costs would include the foregoing procedural costs and would be based on an adjudication which does not last longer than one day.
- 4.5 Where leave to appeal is refused, a party who is aggrieved by such a refusal may, within 5 days, apply to the Chair of the Commission or the Deputy Chairperson of the Commission or another Commissioner designated by the Commission for leave to appeal – such Chair, Deputy or Commissioner not having sat in the first Tribunal. Such application is decided upon on the papers, unless the Chairperson, Deputy or other Commissioner requests the party to address him or her.

WRB
Bols

- 4.6 Where leave to appeal is granted the Chairperson or other Commissioner which has granted such leave, may suspend the sanction imposed by the Tribunal pending the outcome of the appeal.
- 4.7 The Appeal Tribunal and its Chairperson shall apply the same procedure which is applied by the first Tribunal of the Commission when it decides upon a matter. In this procedure the grounds of appeal and response thereto, as lodged within a time frame determined by the Chairperson of the Appeal Tribunal, plus the reasons given by the Tribunal, shall be considered. The Chair of the Appeal Tribunal may co-opt a maximum of two persons who are not Commissioners for the hearing of an appeal and such persons will have the right to partake in the proceedings and vote. An Appeal Tribunal shall not consist of more than five persons, including the Chairperson. Where the Chairperson or Deputy of the Commission is not available or may not (as a result of having been on the first Tribunal) sit in such a matter, the Appeal Tribunal will be chaired by another Commissioner designated for that purpose by the Commission.
- 4.8 The Appeal Tribunal may, where it is deemed appropriate, order an appellant to pay the costs which the Commission had in determining the appeal. Such costs would consist of the fees and costs payable to the persons who were involved in the allowing of the appeal, the hearing thereof plus an administrative fee determined by the Chairperson of the Commission from time to time. An Appellant shall be notified by the Registrar of the possible costs involved when the appeal is lodged.
- 4.9 An Appeal Tribunal shall not set aside or amend a decision of the first Tribunal unless it is clearly wrong.

Clause 7 of our Procedural Rules read as follows:

Computation of time periods

Any reference in these rules to a number of days includes Saturdays, Sundays and public holidays, unless the adjudicator or Chairperson, as the case may be, determines otherwise and notifies the parties accordingly.

BANK DETAILS:

**NEDBANK HYDE PARK
CURRENT ACCOUNT
ACCOUNT NO: 1972141848
BRANCH CODE: 197205**

Eds
MB