

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

CASE NO: 21/58810

In the matter 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

FOURTH AND FIFTH RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

ANTONIO SERGIO LEE

do hereby make oath and state that:



1 I am:

1.1 the Chief Operating Officer of eMedia Investments Limited, the holding company and director of the Fourth and Fifth Respondents; and

1.2 duly authorised to depose this affidavit on behalf of the Fourth and Fifth Respondents.

2 Unless the context indicates otherwise, the facts contained in this affidavit are within my personal knowledge, and are, to the best of my knowledge, both true and correct.

3 Where I make submissions on the law I do so on the advice of my legal representatives.

4 For ease of reference, I will refer to the Applicants in this matter as "**MMA**", and to the Fourth and Fifth Respondents as "**e.tv**".

5 I have read the founding affidavit deposed to by William Robert Bird on behalf of MMA. This affidavit responds to the founding affidavit only insofar as it relates to the application to review and set aside the decision of the BCCSA Appeal Tribunal in *ENCA & e.tv v Media Monitoring Africa*, Case No: 010/2021 (BCCSA), handed down on 5 July 2021 ("**the e.tv decision**").

6 e.tv was not a party to the SABC decision in Case No: 012/2021. I express no views on the review of that decision, except to point out that the two decisions

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involve entirely separate provisions of the BCCSA's Codes and entirely different circumstances. The conflation of the two matters is unwarranted.

INTRODUCTION

7 The e.tv decision concerned an alleged breach of the "fair comment" clause in the BCCSA Codes. This clause provides that:

"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."
(Emphasis added)

8 According to MMA, this clause means that broadcasters can only air the opinions of interview subjects and members of the public that are supported by provably true facts. MMA seeks to wish away the plain text, which allows comments based on facts that are either "*truly stated*" or "*fairly indicated and referred to*". It seeks to create an unworkable standard, that would stifle robust commentary and debate. Both the BCCSA's Tribunal and Appeal Tribunal correctly rejected MMA's interpretation.

9 This matter arose from an interview with Mr David Icke, a notorious conspiracy theorist, on the show "*So What Now?*", first broadcast in July 2020.

10 Mr Icke is most famous for his theory that the world is controlled by shape-shifting lizard aliens 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.

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- 11 On 21 August 2020, Media Monitoring Africa (“**MMA**”) submitted a complaint to the BCCSA regarding the interview. The focus of MMA’s complaint was Mr Icke’s opinion that Covid-19 does not exist.

- 12 MMA has always accepted that Mr Icke’s remarks were an honest expression of his opinions. Its submissions to the BCCSA stated that “*it is not in contention that Mr Icke was expressing his opinion*”. Nevertheless, MMA argued that reasonable viewers would be misled into believing that Covid-19 does not exist. This was despite the fact that:
 - 12.1 The “*So What Now?*” show was devoted to opinion and commentary;
 - 12.2 The entire premise of the show and the discussion preceding the interview with Mr Icke was that Covid-19 is real and that “*curbing this pandemic and saving lives is critical*”;
 - 12.3 The programme was first aired at the height of the first wave of the Covid pandemic, following the evening news, which was filled with reports of rising Covid infections, deaths, and a strained healthcare system;
 - 12.4 Mr Icke was introduced with the explicit disclaimer that he is a notorious conspiracy theorist and the definitions of “*conspiracy theory*” and “*conspiracy theorist*” flashed across the screen for the benefit of viewers;
 - 12.5 The programme’s host, Gareth Rhydal Cliff (“**Mr Cliff**”), challenged and openly mocked Mr Icke and his far-fetched views;

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- 12.6 Mr Icke referred to “research” supporting his view that has been conducted by unknown scientists who, Mr Icke acknowledged, have been discredited and banned from mainstream media;
- 12.7 Mr Icke conceded that he is not a doctor. It was clear to the viewers that he had no basis to make claims of a scientific or medical nature;
- 12.8 Mr Cliff’s introduction made it clear that Mr Icke’s views are controversial and that he has been banned by mainstream broadcasters; and
- 12.9 Reference was repeatedly made to Mr Icke’s theory that the world is controlled by shapeshifting alien lizards who assume human form.
- 13 The BCCSA Tribunal partially upheld MMA’s complaint. While the Tribunal rejected MMA’s narrow interpretation of the fair comment clause, it proceeded to conclude that comment is fair only if it is “reasonable and justifiable”. That onerous standard had no basis in the Codes and conflicted with previous decisions of the BCCSA. The Tribunal further concluded that viewers would be misled by Mr Icke’s views into believing that Covid-19 is a hoax, without any evidence and without regard to the true context of the interview.
- 14 The Appeal Tribunal set aside the Tribunal’s decision. It concluded that the comment clauses do not demand that comment be reasonable or justifiable. It instead requires that comment be based on facts “*truly stated or fairly indicated and referred to*”. The facts underpinning a comment need not be proven to be true, so long as they are “*fairly indicated and referred to*”, thus allowing viewers to distinguish comment from assertions of fact. It further held that while Mr Icke’s

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views may be offensive and distasteful, that does not render a comment unfair under the Code. On the facts, it further held that there was no prospect that reasonable viewers would be misled by Mr Icke's far-fetched opinions.

- 15 The Appeal Tribunal's interpretation of the comment clauses accords with their text, context, and purpose, and followed previous decisions of the BCCSA. It also struck an appropriate balance between media freedom and the protection of the public.
- 16 In this review application, MMA seeks to relitigate the appeal, attacking the correctness of the Appeal Tribunals' findings of law and fact. This approach suffers from three fundamental flaws.
- 17 First, MMA has failed to identify any material error of law in the Appeal Tribunal's interpretation of the fair comment clause. Instead, MMA advances a fair comment test that was rejected by both the Tribunal and the Appeal Tribunal. That test has no recognisable basis in the text of the Codes and would result in an unworkable standard for comment and opinion that would stifle media freedom.
- 18 Second, MMA asks this Court to second-guess the Appeal Tribunal's careful evaluation of the evidence and its balancing of the competing rights and interests. This is far beyond the bounds of what is permissible in a review. It is also remarkable given that MMA has elected not to bring this application in terms of Rule 53, thus depriving this court of a full record.

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19 Third, this attempt to relitigate the appeal undermines the role of the BCCSA Appeal Tribunal, which is an expert adjudicative body that allows for quick, cost-effective resolution of complaints. The three BCCSA commissioners who constituted the Appeal Tribunal are experienced lawyers, two of whom hold PhDs. I attach a copy of the commissioners' profiles as Annexure "AL1". By reason of, inter alia, their being members of the BCCSA, they are also steeped in media issues. By reason of their qualifications and experience, they are well versed in the difficult balancing exercises that these matters often involve. The Appeal Tribunal also affords parties a wide appeal, involving a full rehearing of the merits which is not confined to the record. While the Appeal Tribunal's decisions are not immune from review, a review cannot be turned into yet another appeal, in which the courts are called on to reconsider the evidence and competing interests afresh. Doing so would subvert the BCCSA's system of self-regulation, not advance it.

20 In what follows, I address the following topics:

20.1 The relevant background;

20.2 MMA's inaccurate framing of this case;


20.3 Relevant principles;

20.4 MMA's grounds of review;

20.4.1 The alleged material error of law;

20.4.2 The alleged failures of Mr Icke and Mr Cliff;

20.4.3 The alleged misapplication of the test.



20.5 Remedy; and

20.6 Responses to individual paragraphs in MMA's founding affidavit.

BACKGROUND

The programme

21 "So What Now?" was hosted by Gareth Cliff once a week at 20h30 on eNCA and repeated at 23h00 on e.tv the following day. The premise for the show is described in MMA's founding affidavit but is worth citing in full:

"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."

22 The interview with Mr Icke came at the end of the show as an approximately 15-minute insert in a 48-minute programme. A transcript of the initial portion of the show is attached to MMA's papers as WRB 7 and the interview transcript appears at WRB 8. The Appeal Tribunal's decision was based on a full viewing of the programme, the tone and presentation of which is not fully conveyed by a written transcript. A recording of the programme is accessible here: <https://www.enca.com/shows/so-what-now-22-july-2020>. I respectfully request that the judge appointed to hear this case view the programme.

Cliff

- 23 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.
- 24 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. The opening credits then roll over upbeat music, with words flashing across the screen: "*fresh perspectives*", "*critical thinkers*" and so on.
- 25 No reasonable viewer could mistake this for the news.
- 26 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.
- 27 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*".
- 28 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?*"



- 29 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.
- 30 The discussion that follows is opinionated, robust, and at times light-hearted. Commentary on serious matters is tempered with humour.
- 31 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.*" 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.
- 32 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.
- 33 The second airing of the programme was at 23h00 on 23 July 2020. Earlier that night, (at 20:00), President Ramaphosa's addressed the nation in which he provided an update on matters related to the pandemic. 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,

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and South Africa had the fifth highest number of confirmed coronavirus cases in the world at the time. I attach a copy of that address as Annexure "AL2".

34 Reasonable viewers would not consider the short segment on Mr Icke in isolation devoid of the broader context in which the reality of the pandemic was portrayed by e.tv on a daily basis. Indeed, there are probably few events since the last World War which have attracted greater attention domestically and internationally. This barrage of daily information has been conveyed in all media – print, radio, television and digital.

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

36 At minute 33 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".

37 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?"

38 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." (Emphasis added)

- 39 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)"

- 40 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".

- 41 Mr Cliff proceeds to ask five questions:

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

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- 41.2 He asks how one finds the balance between preventing the dissemination of harmful narratives and free expression.
- 41.3 He asks about whether the current state of the world makes it easier for conspiracy theories take hold.
- 41.4 He asks why it is threatening if people obtain their own evidence.
- 41.5 Mr Cliff then asks Mr Icke about his relationship with South African writer, Credo Mutwa.
- 42 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*". 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.
- 43 When Mr Icke lays out his theories about the pandemic and the WHO, Mr Cliff pushes back and openly mocks him. For instance:
- 43.1 Mr Cliff repeatedly refers to Mr Icke's belief in "*lizard people*" who control the world, providing context to Mr Icke's sweeping claims.
- 43.2 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.

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- 43.3 When Mr Icke claims there is no virus, Mr Cliff looks incredulous, laughs at him, and later interjects to correct him that people have died from Covid-19: *"David, there are actual people who are dead"*. Mr Icke responds, *"Yes of course."*
- 43.4 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"*
- 43.5 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.
- 43.6 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 of his own.
- 43.7 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.
- 43.8 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 back into the 21st century and show that it is still going on

Cliff

until today big time. And that's the force behind this fake pandemic.

43.9 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".¹

44 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 repeatedly primed on the need to consider these views critically and to form their own opinion.

45 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.

e. tv's coverage of the Covid-19 pandemic

46 e.tv has arguably done more than any other broadcaster to provide its viewers with clear, accurate and timely information about the Covid-19 virus and the pandemic. For more than two years, e.tv has presented the science of Covid-19 and sought out the views of experts in public health and epidemiology. This

¹ Timestamp: 47:00



information has been presented as news and met the rigorous requirements imposed by the Code that apply to news.

47 e.tv has also broadcast rigorous comment and debate on the government's response to the Covid-19 pandemic. "So What Now?" is an example of this. The episode which featured Mr Icke's interview included a lively panel discussion about how government should balance lives and livelihoods in its response to the pandemic. This commentary was always clearly distinguished from the news.

48 MMA's repeated, emotive attacks on e.tv and its record of Covid-19 coverage are entirely unwarranted. The Appeal Tribunal rightly rejected these allegations and I need say no more in response. In any event, they are irrelevant to the issues in this review.

MMA's complaint

49 On 21 August 2020, Media Monitoring Africa ("**MMA**") submitted a complaint to the BCCSA regarding the interview. MMA alleged three breaches of the BCCSA's Code of Conduct for Subscription Broadcasting Service Licensees ("**the Subscription Code**")² and the BCCSA Free-to-Air Code of Conduct for Broadcasting Service Licensees ("**the FTA Code**").³

² In respect of eNCA.

³ In respect of etv.

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The Tribunal's decision

50 On 20 October 2020, the Tribunal dismissed two of MMA's three complaints. It upheld a single complaint, holding that the broadcast contravened the Codes' comment clause.

51 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.⁴

52 The Tribunal reasoned as follows:

52.1 The comment clauses require that comment must be made on facts truly stated or fairly indicated and referred to. The Tribunal did not – contrary to what MMA now contends in this review – require that all facts must be demonstrated to be true. Instead, the Tribunal held that:⁵

"In interpreting this clause, the Complainant [MMA] 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." (Emphasis added)

52.2 It is not sufficient, however, for the comment to be based on facts that are genuinely perceived by the person who made them. According to the Tribunal, comments must also be broadcast "justifiably and reasonably" and must themselves be reasonable and justifiable.⁶

⁴ Tribunal decision p 222 para 32.

⁵ Tribunal decision p 209 para 19.

⁶ Tribunal decision p 210 para 20.

52.3 The Tribunal rejected e. tv's argument that the test for comment is whether it is honestly held, holding that "*irrational*" or "*far-fetched*" comments contravene the comment clause.⁷

52.4 The comments Mr Icke made in relation to COVID-19 being a hoax and to the effect that there is not virus, were not justified or reasonable because they were not true.⁸

52.5 The broadcast of Mr Icke's comments by the respondent was also "irresponsible" and "reckless" in light of the Covid-19 pandemic.

52.6 The Tribunal considered Mr Icke's comments to be potentially harmful to the public and had "life-and-death consequences on society at large".⁹ 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.¹⁰ 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."¹¹

53 The Tribunal's endorsement of a "reasonable and justifiable standard" and its assessment of the evidence was fundamentally flawed:

53.1 The "reasonable and justifiable" standard is derived from SCA authority concerning the defence of reasonable publication in the context of a defamation action. That standard has no place in a fair comment defence.

⁷ Tribunal decision p 210 para 21.

⁸ Tribunal decision p 210 para 20.

⁹ Tribunal decision p 211 para 22.

¹⁰ Tribunal decision p 211 para 22.

¹¹ Tribunal decision p 211 para 22.

I am also advised that it was flatly rejected by the Constitutional Court in

McBride:

“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.”¹²

53.2 The standard imposed by the Tribunal had no basis in the text of the comment clauses, nor did it serve to their narrow purpose. That purpose is to ensure that when opinion is presented to a viewer, he or she is able to distinguish that opinion from fact and assess the value of that opinion for herself. The fair comment clause is not intended to shield viewers from unreasonable or unjustifiable opinions.

54 It is notable that MMA does not endorse the Tribunal's “reasonable and justifiable” standard for comment in this review. Instead, it contends that comment must be restricted to views based on facts that may reasonably be true. Notably, this is an interpretation of the comment clauses that neither the Tribunal nor the Appeal Tribunal accepted.

The Appeal Tribunal's decision

55 e.tv brought an appeal against the Tribunal's finding that it had contravened the comment clause. MMA did not cross-appeal the Tribunal's dismissal of its other two complaints.

56 The Appeal Tribunal upheld the appeal and reasoned as follows:

¹² *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) para 82.

56.1 In the first place, the “[t]he 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”.¹³

56.2 Mr Icke’s comments may have been offensive and in bad taste, but the crucial question for determination is whether they contravened the fair comment clause.

56.3 For purposes of the comment clause, the facts on which comment is based need not be true, only truly stated or fairly referred to.¹⁴ As the Appeal Tribunal put it, 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”.¹⁵

56.4 Mr Icke’s comments were based on “research” he attributed to doctors, medical practitioners and virologists. Although Mr Icke did not identify these scientists, the research he referred to was a “fact truly stated”.

56.5 The views expressed by Mr Icke were therefore identifiable as comment, as opposed to fact.

57 The Appeal Tribunal’s analysis of Mr Icke’s views was sensitive to the context in which they were expressed. It accorded weight to the full suite of contextual factors that would have enabled a reasonable viewer to discern that Mr Icke’s statements were comment, not fact, and were based on non-existent facts that

¹³ Appeal Tribunal decision p 218 para 14.

¹⁴ Appeal Tribunal decision p 319 and 320 paras 16 and 20.

¹⁵ Appeal Tribunal decision p 319 para 16.

were inextricably bound up in Mr Icke's far-fetched conspiracy theories. For example, it had regard to the following:

57.1 Although Mr Icke referred to "research", he "was not able to advance any scientific research paper in support [of] his opinion".¹⁶

57.2 Mr Icke was "confronted with the fact that he had done no research on his statements about the pandemic", which caused Mr Icke to "retaliate" by referencing the abovementioned "research".¹⁷

57.3 Mr Icke admitted that his comments were based on research by unidentified doctors, virologists and medical practitioners who have been shunned by mainstream media.¹⁸

57.4 Mr Icke is a person "without any qualifications in the field of virology and related fields of medicine".¹⁹

57.5 Mr Icke was introduced as a person whose background was in sport, not medicine, and who has been banned from social media and international television. Mr Icke was also expressly introduced as a conspiracy theorist.²⁰

57.6 A reasonable viewer would have realised "that the real hoax was Mr Icke and not the pandemic".²¹

¹⁶ Appeal Tribunal decision p 319 para 17.

¹⁷ Appeal Tribunal decision p 319 para 17.

¹⁸ Appeal Tribunal decision p 319 and 320 paras 17 and 18.

¹⁹ Appeal Tribunal decision p 320 para 18.

²⁰ Appeal Tribunal decision p 320 para 19.

²¹ Appeal Tribunal decision p 320 para 19.



57.7 Mr Icke's theory about the pandemic is "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.²²

58 The Appeal Tribunal concluded that a reasonable viewer would realise that:

58.1 Mr Icke's comments were unsubstantiated and based on facts ("research") that have been discredited by mainstream media.

58.2 Mr Icke's comments are speculative. He is a conspiracy theorist, and his latest views are inextricably linked to his general theory that the world is controlled by a shadowy network of humanoid lizards.²³

59 The Appeal Tribunal recognised that although the factual basis for Mr Icke's opinions was not exhaustively spelled out, that is not what is required for comment.

THE INACCURATE FRAMING OF THIS CASE

60 At this point, it is necessary to say something about the harm of misinformation, and the relevance of this concern in the context of this review.

61 MMA has sought to frame its complaint of unfair comment under the Codes as an urgent stand against the mounting threat of misinformation. However well-intentioned that might be, the fair comment clause in the Codes is not an all-purpose prohibition.

²² Appeal Tribunal decision p 320 para 20.

²³ Appeal Tribunal decision p 320 paras 19 and 20.



62 As a responsible broadcaster, e.tv recognises that the scourge of misinformation threatens the very possibility of informed and open public debate. It undermines rather than promotes the right to freedom of expression and is a legitimate public concern.

63 But should the BCCSA decide that misinformation ought to be regulated in greater detail, it must do so by amending the Code. Invoking the Code's fair comment clause in an attempt to restrict the dissemination of all possible misinformation, as MMA does, is not competent. A blanket requirement that comment must be based on true facts might address some misinformation but in doing so it would eviscerate the protection of free comment in our media. Comment would become the exclusive domain of those who can marshal specific, verifiable facts to justify their comment. The distinction between news and comment would be collapsed and public debate in the broadcast media would be stultified.

64 In any event, concerns of misinformation do not arise in this case. Mr Icke's comments were presented as comment, not fact. This distinction is important, because "information", by definition, means only factual statements, not comments or opinions. I am advised that the Constitutional Court has held that "false information" does not apply to opinion or comment, but only to statements of facts.

65 Once the emotive label of "misinformation" is done away with, much of the sting is gone from MMA's complaint. No reasonable viewer watching the interview is left with the impression that there is no virus. At most, the impression they are left

A handwritten signature in black ink, appearing to be 'Ced' followed by a vertical line.

with is that Mr Icke believes that there is no virus. And, as the interview makes clear, to agree with Mr Icke is to agree with a conspiracy theorist, who has been banned from various platforms, and who believes that the world is controlled by shadowy network of humanoid lizards.

RELEVANT PRINCIPLES

66 There are five sets of principles which are vital to a proper understanding of this matter, which have featured prominently in the BCCSA Appeal Tribunal's decisions.

News vs comment

67 News and comment are regulated very differently under the Codes. When news is reported, information may only be presented as fact if it "may reasonably be true" and broadcast "fairly with due regard to context and importance". Comment, by contrast, need only be based on facts that are "truly stated or fairly indicted and referred to".

68 The reason why news is so stringently regulated is not hard to find. Information presented as fact in a news programme claims to be authoritative. The extent to which that claim is believed thus depends on the authority of the person or broadcaster that publishes it. As MMA correctly notes, e.tv is South African's most watched TV news channel and takes pride in being South Africa's most trusted independent TV and online news brand. e.tv appreciates that when it broadcasts facts in the context of a news programme, reasonable viewers may be inclined to accept these facts as being true. The duty to ensure that facts presented in a



news programme as such are reasonably true is therefore especially acute for organisations like e.tv.

69 But whereas the aim of news is to inform the public about what is reasonably true, the broadcast of comment aims to facilitate the sharing of opinion, in which divergent views are expressed and disagreements are aired publicly. News informs the public, whereas comment engages (and sometimes enrages) it.

70 Free comment allows ordinary people to voice their opinions, however ill-formed or imperfect. Reasonable people formulate their opinions based on the facts available and intelligible to them. They may form views based on anecdotal evidence that is easily discredited. In that sense, their comment may be based on facts which many others know to be false or so incomplete that they are practically false.

71 The very essence of comment is that it does not itself claim to be authoritative. Comment is vulnerable to criticism either on the basis that it is grounded in facts that are wrong, or because the inference the speaker has drawn from those facts is faulty. It is the inherent vulnerability of comment that justifies a far more permissive approach to the regulation of comment as opposed to news.

72 The greater latitude that is given to comment is also necessary due to the unfiltered and sometimes chaotic nature of broadcasts. Radio call-in programmes, interviews with controversial figures, or audience participation segments on television are clear examples. In such spaces, a broadcaster cannot

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necessarily control what opinions are expressed or what facts, if any, individuals may choose to provide in support of their views.

- 73 When e.tv broadcasts comment – as it did when it aired the interview with Mr Icke – it does not hold out that comment as being true. Nevertheless, e.tv does have a responsibility to ensure that its viewers appreciate that they are not being presented with authoritative fact, and that they are given enough context to discern the value of the comment. And that is precisely what e.tv did in this case.

Endorsement vs airing offensive views

- 74 Offensive and even sensational views have their place in a constitutional democracy. The airing of such views on matters of public interest, falling short of endorsement by the media, is vital to open debate.

- 75 When offensive views are not aired in public, they do not disappear – they merely fester elsewhere. Unless brought to light they may never be exposed as unpersuasive.

- 76 I am advised that the BCCSA has acknowledged in a range of contexts, including the publication of alleged hate speech and even incitement of violence, that there is a vital distinction between *airing* such offensive views and *endorsing* them. When such views are aired, the public is made aware that they exist, and can be presented with information and comment that challenges and discredits those views.

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77 MMA does not appreciate the distinction between airing and endorsing offensive views. It mistakenly believes that e.tv should be punished for merely airing Mr Icke's views because "investigative journalism programmes such as 3rd Degree and Carte Blanche have never been permitted to base their comments on facts that they have been made up".²⁴ But this misses the fact that we are not dealing with Mr Cliff's comments or comments endorsed by e.tv. The comparison MMA seeks to draw is therefore inapt.

Self-regulation vs editorial judgment

78 I am advised that the right to freedom of expression protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. A broadcaster's right to include or exclude material in its programme and determine the manner in which it presents that material is thus an incident of its right to freedom of expression. The BCCSA has in various decisions affirmed the right of a broadcaster to freely decide what to include in its broadcast and the manner in which it is included.

79 Editorial freedom is foundational to a free press and the applicant acknowledges, one of the purposes of self-regulation is to preserve editorial freedom.

80 Save for the imperative of balanced reporting in programmes that address controversial issues of public importance, the Codes regulate the content of what is broadcast and not the manner in which that content is presented. The Codes restrict editorial freedom indirectly by prohibiting certain content from being

²⁴ Review application at para 95.



broadcast. They are not concerned with whether broadcasters have exercised poor judgment or poor taste in their reporting.

81 When adjudicating complaints in terms of the Code, it is not for the BCCSA and its Tribunals to impose their own view as to what technique of reporting should have been adopted by a journalist or broadcaster. When controversial comment is broadcast and a complaint is made about that comment, the sole issue before the BCCSA is whether the requirements for fair comment have been met. The BCCSA might be disappointed that the interviewer did not do more to refute the comment, but as long as a reasonable viewer can discern that it is comment and ascertain its factual basis, the fair comment requirements are satisfied.

82 We can debate endlessly what Mr Cliff ought to have said in response to Mr Icke's comments. But that is all irrelevant. As long as the content and context of Mr Icke's views – which includes Mr Cliff's response – were such that the facts were fairly stated and referred to, the requirements for fair comment were met.

Fair comment vs censorship of offensive views

83 Far-fetched and irrational comments are broadcast every day - on radio talk shows, in interviews with politicians, and in numerous other settings.

84 Comment clauses are aimed not at restricting far-fetched or irrational comment, but at ensuring that it is presented in a manner which enables audiences to decide for themselves whether the comment has value. The public needs to know

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that what is being presented is comment, not fact, and then given sufficient information and context to assess the facts on which the comment is based, and the merit and value of the comment itself.

85 Even if all comment that is published is fair according to the Codes, the air waves and broadcasts would still be awash with comment that some find offensive, shocking, or disturbing. And rightly so – after all, freedom of expression extends even to views that “*offend, shock and disturb*”.

86 So long as listeners and viewers are equipped to appreciate that those comments are not authoritative, and to challenge the underlying facts and information on which they are based, the comment, however odious, may be published.

NO GROUNDS OF REVIEW

87 MMA accepts that the comment clauses impose only three requirements for comment:

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

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

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

88 MMA has never disputed that the first two requirements were met. Mr Icke's was an honest expression of opinion, which was clearly presented opinion rather than fact.



89 Before the Appeal Tribunal, the only question was therefore whether Mr Icke's comments satisfied the third requirement for protected comment. MMA's review is therefore concerned only with whether Mr Icke's comments were based on facts "truly stated or fairly indicated and referred to".

90 MMA groups its grounds of review under three headings:

90.1 The alleged material error of law in the Appeal Tribunal's interpretation of "facts truly stated or fairly indicated and referred to";

90.2 The failures by Mr David Icke and the host, Mr Cliff;

90.3 The alleged incorrect application of the fair comment test.

91 The legal basis of this review is the Promotion of Administrative Justice Act. While e.tv accepts that the Appeal Tribunal's decisions involve administrative action that is reviewable under PAJA, I deny that MMA's grounds of review have any merit.

No material error of law

92 The Appeal Tribunal held that the "*facts truly stated or fairly indicated and referred to*" requirement in the comment clauses "*does not refer to the veracity of the facts*". Its purpose is to ensure that the viewer is aware of the facts on which the comment is based so that she can decide how much weight to attach to them.

93 MMA contends that the Appeal Tribunal ought to have interpreted the comment clause as requiring that comment may not be based on "false facts" and that the



facts relied upon must "reasonably be true". It submits that this alleged misinterpretation was a material error of law.

94 I deny that the Appeal Tribunal committed any error of law, or that any error was material. The proper interpretation of the fair comment clause is a matter for legal argument. I will nevertheless outline why this ground of review must fail.

95 I am advised that a proper interpretation of the comment clauses must be informed by the following considerations:

95.1 Section 39(2) of the Constitution, which dictates that the comment clause must be interpreted in a manner that both avoids limiting rights and best promotes freedom of expression.

95.2 Because a breach of a comment clause carries potentially serious consequences, it must be interpreted restrictively.

95.3 It must also be interpreted in a manner that gives effect to its purpose.

96 The narrow purpose of the comment clauses is to ensure that the public can distinguish comment from statements of fact and assess the value of that comment for themselves. As the Appeal Tribunal correctly held, the requirements for fair comment are trained on the identification of the facts upon which the comment is based and not the veracity of those facts. If a viewer has the facts, he or she can evaluate and challenge the comment, on the basis that the facts it is based on are wrong, or because the comment misinterprets or miscalculates the facts.



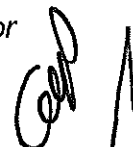
97 Moreover, what constitutes the facts must be assessed in the context of the programme as a whole. This would include the segment prior to Mr Icke's interview in which Mr Cliff and other panellists unequivocally recognised the reality of the pandemic and its lethal consequences.

98 Unlike the fair comment standard in defamation law, there is no requirement that the facts upon which the comment is based must be true. It suffices if the comments are either "*made on facts truly stated*" or "*fairly indicated and referred to*". 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.

99 This is for good reason. The fair comment clause applies to a vast range of opinions and comments that may be expressed in the broadcast media, in many different contexts. The spectrum of comment ranges from earnest opinions on weighty events to satirical comments; from the opinions of experts to the half-baked ramblings of radio callers on live talk shows. In these different contexts, the purpose of the comment clause is simply to ensure that viewers are enabled to distinguish comments from factual claims and to come to their own conclusions.

100 MMA counters that a fact can only be a fact if it is proven to be true. There are no "false facts", it claims, for the purposes of assessing whether a comment is based on facts fairly stated and referred to.

101 MMA cherry-picks three dictionary definitions, including the *Shorter Oxford Dictionary* which defines a fact as "*a thing known for certain to have occurred or*



to be true". A brief look at the complete Oxford English Dictionary turns up an equally valid definition of a "fact" which reflects its nuance: "A piece of information allegedly or conceivably true; something presented as a fact ... but which is disputed or unproven; (more strongly) an unproved assertion, an allegation."

102 A contextual reading of the fair comment clause supports this interpretation. If, as MMA contends, a "fact" is necessarily a true statement, it would have been unnecessary for the Codes to state expressly in Clause 21.1.3 that facts presented in the context of a news programme must "reasonably be true". The Codes anticipate that information which is not reasonably true can be presented as fact and then stipulates that, in the context of a news programme, only facts which are reasonably true may be presented as such.

103 I am advised that the following principles emerge from case law and the decisions of the BCCSA involving the application of the comment clauses:

103.1 The person voicing their opinion need not provide an exhaustive reference list to each factual assertion underpinning their opinion. It is enough that their comment refers to the facts it relies upon.²⁵

103.2 Facts, in this context, should be regarded as facts as genuinely perceived by the person who made the comment.²⁶ Even if it later turns out that the facts are contradicted, the speaker was nevertheless entitled to express a view on what he sincerely perceived the facts to be.

²⁵ *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at para 151

²⁶ *Phillips v Talk Radio 702 Case No 0212015 (BCCSA)*, 4 March 2015

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103.3 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.²⁷

103.4 The absence of facts supporting the comment is itself a fact. It is sufficient that the reasonable viewer has enough to assess the value of the opinion for herself. The facts that there is no authority referred to in itself would provide the viewer with information relevant to assessing the value of the opinion.²⁸

103.5 A comment might be fair even where no supporting evidence is put forward, provided that the context in which the comment was made, and the identity of the speaker, make it clear that the comment is speculative and not based on evidence.²⁹

104 The relevant BCCSA decisions that give rise to these principles were debated at some length before the Appeal Tribunal. Copies of these decisions will be made available to the Court before the hearing of this matter, or on request.

105 In the face of these well-established principles, MMA insists that unless comment is based on true facts, audiences will be incapable of appreciating that is comment and incapable of refuting or critically examining the comment. It insists that imposing a blanket "true fact" requirement is the only way to protect viewers from conspiracy theorists like Mr Icke.

²⁷ *The Citizen 1978 (Pty) Ltd and Others v McBride* at para 89, citing *Roos v Stent & Pretoria Printing Works Ltd* 1909 TS 988.

²⁸ *Churr v e NCA* 10/2018 (BCCSA), 20 June 2018.

²⁹ *Gaye Derby-Lewis v Talk Radio 702*, case 19/2013 (BCCSA), 2 July 2013 and *Churr v eNCA*, Case No 10/2018 (BCCSA), 20 June 2018.

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106 What MMA fails to appreciate is that, depending on the context in which it is made, even a comment based entirely on falsehoods may be easily identified as comment and scrutinised by a reasonable viewer. I am advised that in previous decisions dealing with fair comment, the BCCSA has taken into consideration the identity of the speaker, what a reasonable viewer would know about the speaker, the facts that were referred to, the facts that were not referred to, and the broader social and political context in which the comments were made.³⁰ For example, I am advised that in one case, the BCCSA Tribunal even had regard to “the current political situation in the country” and matters “that anyone who follows what is currently happening in the country would be aware of”.³¹

107 A blanket requirement that comments be based on true facts would make this kind of context irrelevant. If the comment – however outlandish and easy to discredit - is not based on true facts, it must be censored, regardless of context.

108 The extreme consequences of MMA’s position are illustrated by several examples. In each instance, comment is premised on facts that are not detailed by the speaker and not reasonably true. On MMA’s interpretation, the broadcaster in each case would be obliged to prevent the comment from being made or face sanctions if they fail to do so:

108.1 During a live radio interview, a politician says that he believes that renewable energy sources are too expensive, and that South Africa should rely solely on coal, which is cheaper. The politician is asked for facts supporting the comment and he replies, somewhat cryptically, that “the

³⁰ For example, see *Churr v e NCA* 10/2018 (BCCSA) at para 14.

³¹ *Karson v Multichoice ANN7 Channel*, Case No 15/2017 (BCCSA), 14 June 2017 at para 7.



facts are there for everyone to see". There are, however, no true facts supporting these statements, which contradict government's own economic data.

108.2 A listener calls in to a live radio interview and introduces herself as a massage therapist. Shortly thereafter she declares that the South African government should not provide Covid-19 vaccinations and that "they will use it to track you through 5G". The radio interviewer laughs at her, tells her "go away, my 5G reception improved when I got the vaccine", and ends the call abruptly, remarking sarcastically "and there you have it from South Africa's leading epidemiologist".

108.3 A comedian and podcast host who is known for voicing unsubstantiated, misogynist views, opines in an interview that training men as emergency room doctors should be prioritised over the training of female doctors. When asked what factual basis there is for his comment he replies that "This is my opinion, from my experience, and I don't need to give you the facts – this is something everyone knows but is too afraid to admit".

109 If these examples sound familiar, that is because they are: broadcasters regularly air politicians who make comments they cannot substantiate, commentators who provide social commentary in bad taste, and lay people who form strong views without conducting anything resembling rigorous research. If these views were shut out, public debate would be winnowed down to the views of experts and those studious enough to fact check their views. This censorship would go well beyond the scope of the comment clauses.



110 And then there is the practical difficulty of ensuring that comment is always based on reasonably true facts. Pausing live programmes continuously to elicit detailed reference to each fact relied upon by every interview subject or caller would be overly cumbersome and onerous. Broadcasters would be obliged to screen call-in listeners according to the veracity of facts upon which their opinions are based. Callers who cannot point to easily verifiable facts to justify their views would be turned away, shut out of the conversation. And if a caller or interview subject has blurted out an opinion without true supporting facts, while live on air, the broadcaster would be in breach of the Code and face sanctions, no matter what the broadcaster may do to distance itself from these opinions.

111 MMA's answer to all this, it seems, is that this case is somehow different because Mr Icke's comments concerned the Covid-19 pandemic. There are three difficulties with this argument.

111.1 First, the comment clause does not distinguish fair comment from prohibited comment on the basis of the comment's subject matter. Provided the three requirements are met, the comment is fair. Of course, the subject matter of the comment, and the nature of the evidence on which it is based, as well as the prevailing situation in the country, will all inform an assessment of whether a reasonable viewer would be able to identify the comment as such and identify the facts on which it is based (or not based, as the case may be). And that is precisely why the comments made by Mr Icke fall within the bounds of fair comment: they were made by a known conspiracy theorist, were not supported by credible evidence,

and are contradicted by the deluge of Covid-19 news coverage by responsible broadcasters like e.tv.

111.2 Second, MMA's real concern is that Mr Icke's views amount to misinformation, not unfair comment. To the extent that certain fair comment ought to be regulated by a misinformation restriction, it is for the BCCSA to amend the Codes accordingly. Instead, the applicant has attempted to shoehorn a complaint about misinformation into a general complaint about unfair comment.

111.3 Third, the applicant's grievance, which is made clear by the grounds of review it now advances, is that Mr Cliff should have done more to counter Mr Icke's views. This is precisely the complaint that was dismissed by the Tribunal.

112 For these reasons, the correct interpretation of the comment clauses, which was endorsed by the Appeal Tribunal, is that they require only that the facts on which the comment is based are fairly indicated, not that they are true. As I have demonstrated, this interpretation coheres with the text, context and purpose of the clauses and was in accordance with established precedent.

113 On this basis, I deny that its decision was based on a material error of law.

Alleged failures by Mr Icke and Mr Cliff

114 MMA seeks a review of the Appeal Tribunal's decision on the basis that the various "failures" of Mr Icke and Mr Cliff breached the comment clauses. The gist



of the complaint in relation to Mr Icke is that he espoused views based on facts that were not true and created "the false impression that he had credible information to verify the claims he was making". Mr Cliff's alleged failure was that he did not do enough to explain to viewers that Mr Icke's views were false or that they lacked any factual foundation.

115 MMA's submissions under this heading re-hash its central complaint that Mr Icke's comments were not based on true facts. I have already explained why this does not constitute a breach of the comment clause.

116 In any event, MMA's complaints, in essence, attack the correctness of the Appeal Tribunal's evaluation of the evidence before it and its assessment of how a reasonable viewer would have perceived Mr Icke's statements. I am advised that such attacks do not engage any recognisable grounds of review. This is a point that will be addressed in legal argument.

117 These complaints are in any event misconceived for several reasons:

117.1 First, as explained, fair comment may be based on facts which are not true. The Appeal Tribunal recognised that Mr Icke's views were not substantiated and not based on true facts but reasoned, correctly, that the comment clauses are not concerned with the "*veracity of the facts, but ... that the facts must be truly stated or fairly referred to*". Its decision cannot be impugned on the basis that it failed to appreciate the falsity of Mr Icke's claims.



117.2 Second, Mr Icke was not obliged to refute his own views and to advise viewers that his views were not based on credible facts. MMA has always accepted that Mr Icke's views are honestly held by him. The programme properly contextualised his views as those of a notorious conspiracy theorist, who has been called a lunatic and a madman.

117.3 Third, it is somewhat ironic that MMA has in its affidavit set out a detailed background of Mr Icke's dubious exploits as a conspiracy theorist, provided the outlines of Mr Icke's "lizard theory" and quoted at length from one of Mr Icke's books. MMA even references the fact that Mr Icke has been caught relying on false facts before. This is information that a reasonable viewer could have uncovered with a simple Google search based only on information gleaned from the interview. It formed the context which a reasonable viewer would or could have used to interpret Mr Icke's comments.

117.4 Fourth, the comment clause does not impose a requirement on broadcasters, in all cases, to disprove or refute comments based on facts that are fairly stated and referred to, but untrue. To impose such a requirement would be to intrude on the editorial prerogatives of broadcasters. It was not for the Appeal Tribunal to substitute its view as to how Mr Icke's ought to have been reported on for those of e.tv and Mr Cliff. Freedom of expression entails the protection of both the substance of ideas and information as well as the form in which they are presented. The Appeal Tribunal accordingly focused on the issue at hand, which was whether e.tv and Mr Cliff provided enough information about the basis for

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and context of Mr Icke's comments to enable a reasonable viewer to make up their own mind.

117.5 Fifth, MMA has already laid a complaint that Mr Cliff did not do enough to counter Mr Icke's views. That complaint, which was brought in terms of Clauses 38.3.1 and 13(1) of the Codes, was dismissed by the Tribunal and MMA did not appeal that decision.

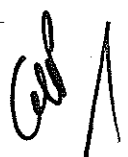
118 The Appeal Tribunal's distillation of the evidence cannot be faulted on review: Mr Icke is a known conspiracy theorist, and his views are based on research by unnamed, discredited scientists that have been collated by Mr Icke, including in his books. A reasonable viewer would appreciate this and conclude that his views are comment, not fact, and that they are based on bogus "research" by Mr Icke, who has no medical training. As the Appeal Tribunal put it, a reasonable viewer would realise "that the real hoax was Mr Icke and not the pandemic".³²

Misapplication of the test for fair comment

119 MMA contends that even if the Appeal Tribunal's interpretation of the comment clause is applied, the conclusion must be that Mr Icke's comments were not fair comment.

120 Under this heading, MMA has again repeated its complaint that Mr Icke's views were "demonstrably false". I have already explained that the comment clauses

³² Id at para 19.



do not require comment to be based on true facts. All that is required is that the facts be "truly stated" or "fairly indicated and referred to".

121 The correctness of the Appeal Tribunal's evaluation of the evidence as to whether Mr Icke's comments were based on "*facts truly stated or fairly indicated and referred to*" is once again a matter that falls beyond the scope of a review application.

122 In any event, the Appeal Tribunal's conclusions are unassailable.

123 The underlying factual basis for Mr Icke's comments is referenced throughout: he believes, based on his "research", 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 Google search.

124 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 are directly relevant to any sensible assessment of the programme and Mr Icke's statements. Any reasonable viewer, watching the programme in July 2020, would have been steeped in these facts:

124.1 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.



124.2 In July 2020, at the height of the first wave, the media, including e.tv, informed the public virtually on an hourly basis of the lethal effect of the pandemic with updates on the number of infections and the number of deaths.

124.3 The public was also repeatedly reminded of the need for stringent precautions. These were broadcast on all media and by way of daily SMS.

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

124.5 I repeat that the premise of the programme was the factual existence of the pandemic. Mr Cliff stated, *inter alia*, that "*curbing this pandemic and saving lives is critical.*" 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.*"

124.6 All of this, together with Mr Cliff's incredulity, mocking tone, and challenges to Mr Icke, are more than sufficient to provide the factual context to Mr Icke's comments and to allow viewers to make up their own minds.

125 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.

126 The factual basis for Mr Icke's opinions is not exhaustively spelled out in the 15-minute 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.

127 The Appeal Tribunal recognised that a reasonable viewer, on seeing the interview, would recognise that the opinions expressed are largely speculative conspiracy theories. The purpose of the comment clauses was 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.

128 The underlying premise of MMA's case has been that while MMA, e.tv, Mr Cliff and the members of the Tribunal are capable of scrutinising Mr Icke's views, members of the South African public are not. It also assumes the reasonable viewer cannot be expected to know anything more than what they are expressly told by e.tv and Mr Cliff in the brief 15 minutes of the interview. While MMA and its lawyers are clearly capable of conducting a basic Google search on Mr Icke – which immediately reveals that he is discredited and that he believes humanoid lizards control the world – MMA asks the Court to believe that reasonable members of the South African public are incapable of doing the same. This



evinces a paternalistic approach which denies that reasonable people are capable of making up their own minds.

129 Unlike the Tribunal, the Appeal Tribunal correctly concluded that a reasonable viewer would have appreciated that Mr Icke's views were comment, not fact, and discerned the factual basis for his views. On this basis, I deny that MMA has made out any case to suggest that the Appeal Tribunal misapplied the comment clauses to the facts of the case.

130 The interpretation and approach advanced by MMA to the comment clause, if accepted, would be menacing to free expression. It would apply to all cases where the "facts" on which an opinion or belief is held cannot be proved to be true. For example, "facts" relating to central tenets of the Judeo-Christian faith system would be imperilled: the parting of the Red Sea, the virgin birth, turning water into wine. The decision in this matter cannot be tailored only to Mr Icke. It would apply to all comment.

REMEDY

131 To the extent that any reviewable irregularities have been established, MMA has failed to identify exceptional circumstances that would warrant the substitution of the Appeal Tribunal's order. A remittal to the Appeal Tribunal would be the appropriate result.

132 On the merits, the outcome is not a foregone conclusion, nor is this Court better placed than the Appeal Tribunal to evaluate the evidence. As an expert



adjudicative body, with powers to conduct a wide appeal, the Appeal Tribunal is best placed to reconsider the matter.

133 In respect of the sanction, this too is far from a foregone conclusion. The Appeal Tribunal is again best placed to convene a further hearing and to receive further evidence and argument on the matter.

134 The proposed reinstatement of the Tribunal's order, including both a financial penalty and an order of an apology, would be grossly disproportionate in the circumstances. This is best illustrated by comparing the facts of this case with a previous decision of the UK Regulator, Ofcom, in a matter involving Mr Icke. Ofcom's decision on the merits appears at WRB 19 to MMA's founding papers. I further attach a copy of the decision on sanction as Annexure "AL3".

134.1 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.

134.2 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.

134.3 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

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amazing perspective about what's going on here, and I'm so glad I had you on to talk about this stuff" (Emphasis added)

134.4 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.

135 Given these complexities, the Appeal Tribunal would again be best placed to decide the question of sanction, which requires a balance to be struck between addressing any breach of the Code without unduly constraining media freedom.

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RESPONSES TO SPECIFIC PARAGRAPHS

136 I now turn to address, to the extent necessary, the individual allegations contained in the founding affidavit that relate to the e.tv decision.

137 I request that my responses be read together with the contents of this affidavit and e. tv's submissions before the BCCSA. Any allegation which is not addressed, and which is inconsistent with what is set out above or e. tv's previous submissions, must be taken to be denied.

Ad paragraphs 1 to 4

138 I note the contents of these paragraphs.

Ad paragraph 5

139 I admit the contents of this paragraph to the extent that it accords with the Subscription Code and Free-to-Air Code.

Ad paragraph 6

140 I admit the content of this paragraph but emphasise that the BCCSA's role is not limited to offering a "critical check on the conduct of broadcasters". The BCCSA is also tasked with upholding media freedom and encouraging freedom of expression.

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Ad paragraph 7

141 Save to admit that this is an application to review and set aside two decisions of the Appeal Tribunal of the BCCSA, the content of this paragraph is denied. I specifically deny that the Appeal Tribunal's ruling in the e.tv decision threatens the integrity and legitimacy of the BCCSA and undermines its core purpose.

Ad paragraphs 8 and 9

142 I note the contents of these paragraphs.

Ad paragraph 10

143 While I express no views on the Appeal Tribunal's decision in the SABC matter, I deny the emotive descriptions of the e.tv decision contained in these paragraphs. In the e.tv matter, the Appeal Tribunal interpreted and applied the comment clauses in line with their text, context and purpose and in line with established precedent. It did not fundamentally alter the scope of the Codes.

Ad paragraph 11

144 I have no knowledge of the SABC decision and note the content of this paragraph as it related to that decision. I deny that the Appeal Tribunal's approach in the e.tv matter threatens to undermine self-regulation. If anything, the argument advanced by MMA, requiring that that all comment be based on true facts, will

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radically constrain the scope of public debate, which in turn will threaten the BCCSA's legitimacy as a watchdog of freedom of expression.

Ad paragraph 12 to 19

145 I note the contents of these paragraphs.

Ad paragraph 17 to 21

146 I admit the content of these paragraphs save that e.tv now operates from 4 Albury Road, Dunkeld West, Johannesburg.

Ad paragraph 23

147 Save to deny that the first two "fundamental principles" mentioned in this paragraph are relevant to the review, the content of this paragraph is noted.

148 The importance of the BCCSA's regulatory role tells us nothing about whether Mr Icke's views are protected comment. Censorship by the BCCSA that exceeds the bounds of the Codes is just as harmful as a failure to censor content prohibited by the Codes.

Ad paragraphs 24 to 27

149 The contents of these paragraphs are noted. It must be emphasised that it is not only excessive involvement by the state in the affairs of the media that undermines media freedom. Media freedom would also be threatened if the



BCCSA's tribunals adopted a heavy-handed approach which exceeds the bounds of the Codes.

Ad paragraphs 28 to 36

150 The contents of these paragraphs are noted.

151 While these paragraphs provide interesting background reading, the virtue and importance of self-regulation in the media does not have any bearing on the present matter. Self-regulation is only successful if that regulation is even-handed and within the bounds of the regulator's powers. Regulation also cuts both ways: excessive regulation threatens freedom of expression, whereas too little regulation invites state intervention and can undermine the integrity of the press. The importance of regulation does not itself dictate a particular outcome in this case.

152 MMA accepts that 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". The ultimate question in this case is therefore whether the BCCSA Appeal Tribunal took a decision in accordance with the Code.

Ad paragraph 37 and 38

153 I admit the contents of this paragraphs to the extent that they reflect the provisions of the ECA.



Ad paragraph 39

154 MMAs' support for the BCCSA is noted but I deny that the decision of the Appeal Tribunal in the e.tv matter undermines the system of self-regulation and denudes the Codes of their bite. I also deny that upholding the Appeal Tribunal's decision would invite future state regulation.

Ad paragraph 40

155 I note the contents of paragraph 40 and 40.1. However, I deny the contents of paragraph 40.2 insofar as it refers to e. tv's viewership. The figure is based on a report which provides no source information or methodology as to how this figure was calculated. The figures in the report are exaggerated and incorrect. Moreover, the report constitutes hearsay evidence. Additionally, viewership of the programme on eNCA on 22 July 2020 peaked at less than 44000 viewers and averaged less than 30000 viewers. On e.tv the corresponding figures show that the audience peaked at less than 430000 viewers and averaged less than 300000 viewers.

Ad paragraphs 41 and 42

156 The paragraph as it relates to the SABC broadcast is noted. The remainder is denied:

156.1 MMA accepted that Mr Icke's views were an honest expression of his opinion, not statements of fact.



156.2 There is no prohibition on the broadcast of all "controversial or offensive" views that do not fall foul of any prohibition in the Code.

156.3 The falsity of the facts upon which Mr Icke's opinions were based is irrelevant.

156.4 Mr Icke's views were challenged and ridiculed by Mr Cliff, as explained above.

Ad paragraph 43

157 This will be addressed in legal argument, to the extent necessary.

Ad paragraphs 44 and 45

158 I note the contents of these paragraphs but deny that the interview "fell into the category of deliberate misinformation designed to undermine the response to the Covid-19 pandemic".

159 I further repeat that the fair comment clause in the Codes cannot be distorted to create an all-purpose prohibition on offensive or distasteful views.

Paragraphs 46 to 48

160 I note the contents of these paragraphs, which have no bearing on the e.tv review.



Ad paragraphs 49 to 57

161 e.tv accepts that the Appeal Tribunal's decisions are administrative action under PAJA, but denies that MMA has established tenable grounds of review.

Paragraphs 58

162 I admit the contents of this paragraph.

Paragraphs 59 and 60

163 I note the contents of these paragraphs.

Paragraph 61

164 I admit the contents of this paragraph.

Paragraph 62 to 63

165 I deny the emotive allegations in these paragraphs. There was no failure by e.tv to provide reliable information regarding the Covid-19 pandemic. Mr Icke's views were presented as comment, not news. In broadcasting his views, e.TV did not provide its viewers with "information regarding the Covid-19 pandemic". It presented its viewers with the bizarre views of a conspiracy theorist, which were easily identifiable as comment and were based on facts fairly stated or referred to. Viewers were given the necessary context and disclaimers to form their own

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impression of Mr Icke's far-fetched opinions. Moreover, as stated above, e.tv has covered the pandemic almost daily during its news broadcasts.

Paragraphs 64 to 66

166 I admit the contents of these paragraphs.

Paragraph 67

167 I admit the contents of this paragraph to the extent that annexures "WRB7" and "WRB8" are accurate transcriptions of the programme and interview with Mr Icke. I repeat that the transcripts do not fully capture the tone and presentation of the programme. I understand that it is the practice of the Appeal Tribunal to watch the full programme or broadcast in arriving at its decisions and I request the presiding Judge to do so as well.

Paragraph 68

168 I note MMA's approval of the first segment and deny that its complaint regarding the interview with Mr Icke has any merit. The first segment contained robust expression of comment on controversial matters. If MMA's standard of fair comment were applied to that segment, requiring that any expression of opinion be fully supported by provably true facts, it is doubtful that many of these opinions would pass that unworkable test.

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Paragraph 69


169 Save to admit that Mr Icke referred to “a pandemic hoax” and “an obvious scam going on” and claimed that “there is no virus”, I deny the contents of this paragraph. MMA accepted that Mr Icke was expressing his opinions, not making statements of fact.

170 Mr Icke was first and foremost described “a former footballer, who had a promising career, then a BBC sports commentator”. He was further described as a leading conspiracy theorist.

171 As I have explained, 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.

Paragraph 70

172 I repeat that it has always been common cause that Mr Icke’s views were expressions of opinion. These opinions were based on “research” referred to by Mr Icke during the interview. It is true that e.tv has never sought to defend this research or suggest that Mr Icke’s claims are based on true facts.

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Paragraphs 71 to 74

173 Save to deny that the broadcast was irresponsible, the contents of these paragraphs are noted to the extent that they accord with the Tribunal's decision and the sanction it imposed.

Paragraph 75

174 I admit the contents of this paragraph to the extent that they accurately record what was said by the Tribunal but deny that leave to appeal was correctly refused by the Tribunal.

Ad paragraph 76

175 I admit the contents of this paragraph.

Ad paragraph 77

176 The heads of argument filed by the parties speak for themselves.

Ad paragraphs 78

177 I admit the contents of this paragraph.

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Ad paragraph 79

178 I deny the contents of this paragraph. The Appeal Tribunal made no definitive finding on this issue. e.tv maintains that there is a crucial distinction between the mere airing of offensive views and the endorsement of those views and that, flowing from this, the comment clause ought not to apply in this case. Even if the comment clause does apply, its application must be sensitive to this important distinction.

Ad paragraphs 80 to 81

179 I note the contents of these paragraphs, but deny that the paragraphs quoted by MMA provide a complete picture of the Appeal Tribunal's reasoning. MMA has omitted paragraphs in which the Appeal Tribunal set out important principles that informed its approach:

179.1 The BCCSA's approach in enforcing the Code must be informed by its mission, which is to uphold freedom of expression.³³

179.2 As a general rule, broadcasters should provide enough information about the content of a programme as to enable the viewer/listener to make an informed decision whether to watch the programme or not.³⁴

179.3 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.³⁵

³³ Appeal Tribunal decision p 318 para 13.

³⁴ Appeal Tribunal decision p 318 para 13.

³⁵ Appeal Tribunal decision p 318 para 14.



Ad paragraph 82 and 83

180 I deny the contents of these paragraphs. There is no ground for reviewing and setting aside the Appeal Tribunal's decision. This will be addressed in legal argument.

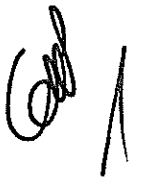
Ad paragraphs 84 to 96 (the alleged material error of law)

181 I deny that there is merit to MMA's first ground of review: the alleged material error of law in the Appeal Tribunal's interpretation of the fair comment clause. I have addressed this ground of review in detail above.

Ad paragraphs 97 to 112 (the alleged failures by Mr Icke and Mr Cliff)

182 I have addressed the alleged failures by Mr Icke and Mr Cliff in detail above. MMA's attempt to second-guess the Appeal Tribunal's evaluation of the evidence does not engage any recognisable grounds of review. Furthermore, its arguments have no merit, for the reasons addressed in detail in my thematic response above.

183 I specifically deny that there is any merit to the repeated attacks on e.tv or Mr Cliff for having given credibility or support to Mr Icke's far-fetched opinions. These are all matters that were argued at length before the Appeal Tribunal, which weighed up the evidence and the competing principles. There is no basis to relitigate these matters in a review.



Ad paragraphs 118 to 124 (alleged incorrect application of the test)

184 I deny that MMA's final ground of review has any merit. The correctness of the Appeal Tribunal's evaluation of the evidence is again not a matter which is the proper focus of a review. In any event, the Appeal Tribunal did not misapply the test, for the reasons outlined above in my thematic responses.

Ad paragraphs 125 to 129

185 I note the contents of these paragraphs, which seek to introduce new evidence not placed before the BCCSA tribunals. In any event, these materials illustrate the ease with which any reasonable viewer can confirm the Mr Icke's views have been scorned and discredited. MMA cites publicly accessible online articles and YouTube links, not obscure peer reviewed papers. Clearly, it does not take any expertise or even much time to uncover all this. Viewers were one Google search away from learning the full details of Mr Icke's bizarre "lizard theory".

Ad paragraph 130

186 Save to admit that the Tribunal expressed uncertainty as to whether Mr Icke is a doctor, I deny the contents of this paragraph.

186.1 MMA has not put up any evidence that Mr Icke is "not generally known to the reasonable South African viewer" and I reiterate that Mr Bird is not the only person capable of conducting a rudimentary Google search on Mr Icke.



186.2 The fact that Mr Icke was not a doctor was clearly established in the clip showing the testy exchange with Mr Cliff which was used to introduce the interview.

186.3 The Appeal Tribunal had no difficulty in concluding that the reasonable viewer would not be misled into believing that Mr Icke had any credibility.

Ad paragraph 131 to 132

187 MMA's reliance on the Ofcom ruling, which sanctioned London Live for broadcasting a lengthy interview with Mr Icke on his Covid-19 conspiracy theories, is misplaced. I am advised that Ofcom based its decision on a provision which is entirely different to our comment clauses. Rule 2.1 of the UK Broadcasting Code prohibits the publication of "*harmful and / or offensive material*" in the widest terms:

"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".

188 Given the vast difference between Rule 2.1 and the fair comment clause in the BCCSA Codes, there was no duty on manner in which the interview was conducted. I further deny the suggestion that e.tv was required to censor Mr Icke's interview on the basis of the Ofcom ruling.

189 MMA also ignores the fact that Mr Cliff did inform the audience that Mr Icke has been banned by mainstream media outlets. Mr Cliff stated explicitly that "*I need to put a disclaimer upfront, you have been banned from most of the major social*

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media platforms and you've even been banned from being interviewed on TV internationally for putting out what has been reported as harmful information."

Ad paragraph 133

190 I note the content of these paragraphs but deny the suggestion that e.tv failed in its duties under the Code:

190.1 I have already explained why the regulation of comment under the Code does not allow the BCCSA to second guess a broadcaster's editorial decisions. The editorial decisions of other media outlets are entirely irrelevant.

190.2 MMA's complaint that Mr Cliff did not do enough to balance Mr Icke's views was dismissed by the Tribunal. The only complaint before the Appeal Tribunal was the alleged breach of the comment clauses.

190.3 Paragraph 133.1 concerns the regulation of misinformation by Facebook. The fact that Mr Icke's views have been labelled as misinformation by Facebook is irrelevant in this matter, which concerns the regulation of comment.

Ad paragraph 134

191 I deny the contents of this paragraph. Mr Cliff did not fail in his duty to challenge Mr Icke's claims. If anything, Mr Cliff's reference to Mr Icke's lizard theory discredited and made a mockery of Mr Icke.

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Ad paragraphs 135 and 136

192 I reiterate that MMA's reliance on the Ofcom ruling is misplaced:

192.1 First, as I have said, Ofcom based its decision on a provision which is entirely different to our comment clauses.

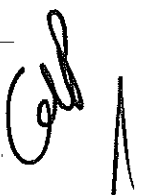
192.2 Second, London Live broadcast the full 80-minute interview with Mr Icke, in which he was given free rein to expand on his views on Covid-19 without any meaningful challenge. Ofcom summarised this as follows:

"[W]e 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."³⁶

192.3 This is in clear contrast with the brief 15-minute interview with Mr Cliff, in which he openly mocked Mr Icke, repeatedly cut him off, and challenged his statements.

192.4 Third, the London Live interviewer gave the impression that he endorsed Mr Icke's views. At the end of the interview, he even shook Mr Icke's hand and thanked him for his "amazing knowledge and amazing perspectives about what's going on here".

³⁶ Ofcom decision on merits (20 April 2020) p 15.



192.5 Compare this with Mr Cliff's treatment of Mr Icke. For instance, when Mr Icke claims there is no virus, Mr Cliff looks on in disbelief, laughs at him, and later interjects to correct him that people have died from Covid-19: "*David, there are actual people who are dead*".

192.6 Fourth, even in the extreme circumstances of the London Live broadcast, which are plainly distinguishable from the present case, Ofcom held that a financial penalty was an unwarranted imposition on freedom of expression and that an apology would suffice.

Ad paragraph 137

193 I deny the contents of this paragraph. The Appeal Tribunal interpreted and applied the comment clauses correctly. There are no grounds for reviewing and setting aside its decision.

Ad paragraph 138

194 I deny that MMA has established any of these grounds to review and set aside the decision for the reasons set out above, which will be amplified in legal argument.

Ad paragraphs 139 to 201

195 I do not deal with these paragraphs as they deal solely with the review of the SABC decision.

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Ad paragraphs 199 – 202

196 For the reasons set out in detail above, I deny that there are any grounds for a substitution order. I specifically deny that:

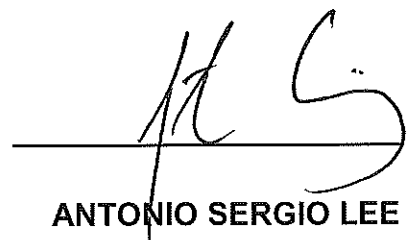
196.1 There are any exceptional circumstances warranting such an order;

196.2 The outcome on the merits and sanction is a foregone conclusion, or that this court is better placed than the Appeal Tribunal to determine these matters.

196.3 The public interest would be served by substitution and the imposition of a manifestly disproportionate sanction.

CONCLUSION

197 For these reasons, e.tv submits that the review application in respect of the e.tv decision ought to be dismissed with costs.


ANTONIO SERGIO LEE

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 18th day of February 2022, 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

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Our Commissioners

Commissioners

Members of the appointment committee

▲ Dr Sunette Lötter (Chairperson of the BCCSA)

Dr Lotter holds a BA LLB from Rand Afrikaans University (now the University of Johannesburg) and an LLM and LL.D from the University of Pretoria. She was a Professor in Criminal Law at Unisa from 1997-2019. Dr Lotter first served as a commissioner of the BCCSA from 2000-2010. She was again appointed as a commissioner in 2017 and reappointed in 2022. She is a member of the Pretoria Society of Advocates.

▶ **Mr Brian Makeketa (Deputy Chairperson of the BCCSA)**

▶ **Dr Melanie Chait**

▶ **Mr Richard Anthony Chemaly**

▲ **Dr Mohamed Alli Chicktay**

Dr Chicktay holds a BProc degree as well as an LLB, LLM and a PhD degree from Wits University. He also studied Negotiation and Mediation at Harvard Law School. He has lectured in Alternative Dispute Resolutions (ADR), Labour Law and Constitutional Law at Wits University and has published extensively in accredited South African and international law journals. He has co-published a number of books relating to ADR with Mr Patelia, including *Mediation, Negotiation and Arbitration – a practical guide to Dispute Resolution* (2014) and *Appropriate Dispute Resolution* (2015). In addition to his academic work, Dr Chicktay is also a practicing mediator and arbitrator in labour law, commercial law and land disputes.

▶ **Mr Isaac Dhludhlu**

▶ **Ms Palesa Kadi**

▶ **Dr Linda Venter**

▲ **Adv Boitumelo Tlhakung**

Advocate Tlhakung was admitted as an advocate of the High Court in July 2003 after having served pupillage with the Johannesburg Bar (Group 21). She was recruited by SARS and appointed as an in-house tax litigation counsel in June 2004. She joined the Nedbank Group at the end of 2008, where she was appointed Group Tax Law Specialist. She re-joined SARS LBC – Revenue Risk and Intelligence Division in July 2011 as a Tax Compliance Risk Specialist and now holds the position of Intelligence Analysis Specialist for the Global Banking Sector. She currently serves on the ECSA Board as a VC – Finance and Staff Committee Member.

▶ **Justice Johan Froneman – Chairperson**

▶ **Mr Tshifhiwa Chris Khorommbi**

▶ **Ms Kgololesego Mumsey Ledibane**

▶ **Ms Cynthia Stimpel**

OFFICE OF THE BCCSA

Ms Shouneez Martin – Registrar
Ms Deonno Julius – Secretary

<https://www.bccsa.co.za/our-commissioners/>



READ: President Ramaphosa's full address to the nation

ewn.co.za/2020/07/23/read-president-ramaphosa-s-full-address-to-the-nation

Eyewitness News

July 23, 2020



My fellow South Africans,

I wish to address you this evening on two matters that are of great interest and concern to South Africans as we struggle to overcome the coronavirus pandemic.

The first issue is the re-opening of schools and the second is the management of the resources that we have dedicated towards the fight against COVID-19.

Since I last addressed the nation 11 days ago, more than 130,000 new coronavirus cases have been confirmed.

As of this evening, the total number of confirmed cases stands at 408,052.

South Africa now has the fifth highest number of confirmed coronavirus cases in the world and accounts for half of all the cases in Africa.

The coronavirus storm has indeed arrived, with the provinces of Gauteng, Eastern Cape and KwaZulu-Natal experiencing a rapid rise in infections.

Even as the country braces for the difficult weeks ahead, it is significant that more than half of those people who we know to have been infected have now recovered.

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We have also seen a levelling-off of infections in the Western Cape since the third week of June.

Although it may be too early to tell, this development provides some hope that the province may have passed the peak of infections.

However, we need to remain cautious and vigilant – and continue to follow strict prevention measures – to avoid another rise in infections.

South Africa continues to have one of the lowest case fatality rates in the world, experiencing far fewer COVID-19 deaths than many countries with similar or even lower numbers of infections.

Since the outbreak of the disease in South Africa, more than 6,000 people have succumbed to the virus.

It remains our utmost priority to ensure that we do everything possible to minimise the loss of life.

We must do this, firstly, by taking practical steps to prevent the spread of the virus, and, secondly, by ensuring that we implement correct clinical guidelines and have the health infrastructure capacity to care for all those people who need treatment.

Since the beginning of May, we have been undertaking a gradual easing of lockdown restrictions.

Most economic activity has returned, some restrictions on movement have been lifted and schools and other educational institutions have resumed classes in a phased manner.

In approaching the opening of schools, we have always said that the health and well-being of learners and educators is critical.

We have also said that it is vital that the development and progress of learners is not impeded.

A major and lasting disruption to learning would have a devastating impact on the prospects of an entire generation of young people.

It was in balancing these imperatives that we adopted a cautious and phased return to schooling, beginning on 8 June with the return to school of learners in grades 7 and 12.

On 6 July, learners from grades R, 6 and 11 returned to school.

Now, with the number of infections rising in several parts of the country, there have been calls for schools to be closed again.

Over the last few days, the Department of Basic Education has met with more than 60 organisations representing parents, school governing bodies, principals, educators, independent schools and civil society organisations.

It has also consulted with the Council of Education Ministers, representing the provincial education departments.

These consultations provided important insights into the experiences of the different stakeholders in education, and produced a broad range of divergent views.

It is necessary to report that it was difficult to find consensus on the best approach, just as there are differing views among both international and local experts on the circumstances under which schools should be re-opened.

What everyone does agree on, however, is that the health, academic and social development of learners must remain our foremost concerns.

This is consistent with the advice of the World Health Organization, which argues for a balanced consideration of the educational needs of the child and trends in the development of the disease.

Officials from the WHO have also said that the best and safest way to reopen schools is in the context of low community transmission.

Taking into account the views of the various stakeholders and expert bodies, Cabinet has decided that all public schools should take a break for the next four weeks.

This means that schools will be closed from 27 July and will re-open on 24 August.

There are, however, some exceptions.

Grade 12 learners and teachers will only take a one-week break, returning to school on 3 August.

Grade 7 learners will take a two-week break, returning to school on 10 August.

Specific arrangements will be made for different categories of special schools.



As a result of the disruptions caused by the pandemic, the current academic year will be extended beyond the end of 2020.

The Minister of Basic Education will provide details on the management of the remainder of the school year.

We have taken a deliberately cautious approach to keep schools closed during a period when the country is expected to experience its greatest increase in infections.

Throughout this period, the National School Nutrition Programme will continue to operate so that all learners or their parents can collect food directly from schools.

I am aware that this arrangement will disappoint many learners who want to be back at school and may cause inconvenience and difficulty for many families who need to make alternative childcare arrangements.


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We ask you to do this because we believe it is important to ensure that schools do not become sites of transmission at a time when infections are rising fast.

I want to thank all of our teachers and other staff at schools across the country who have been on the frontline during this pandemic under conditions of great difficulty.

My fellow South Africans,

The coronavirus pandemic continues to cause our economy great damage, threatening the viability of many businesses, leading to job losses and badly affecting the income of those that can least afford it.

That is why in April, we announced a historic R500 billion social relief and economic support package to direct resources towards our coronavirus response and assist businesses, workers and households.

The resources for this package come from the reprioritisation of funds within the budget and through the mobilisation of loans from funders.

These funders include multilateral development banks, who have heeded the call to support their member countries during this crisis.

We have received approvals for funding from the African Development Bank and the New Development Bank and are in discussion with the International Monetary Fund.

The R500 billion package that we announced has several parts and focuses on giving the greatest assistance to those in greatest need.

Firstly, it redirects resources to fund the health response to coronavirus.

This includes additional expenditure on personal protective equipment, community screening, increased testing capacity, additional beds in field hospitals, ventilators, medicine and staffing.

Secondly, it provides direct support to households and individuals for the relief of hunger and social distress.



By the end of this month, an additional R15 billion will have been paid out to social grant recipients.

Over 4.4 million people have now received the special COVID-19 grant, which assists those who are unemployed and do not receive other forms of support.

So far, an amount of R2.2 billion has been paid out to these recipients.

There were delays in paying this amount but future payments will be made more quickly now that the necessary systems are in place.

As we announced, this grant will continue to be paid over the full six-month period.


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This special COVID 19 assistance has provided essential support to the most vulnerable people in our country.

Thirdly, the package provides assistance to companies in distress and seeks to protect jobs by supporting workers' wages.

For the months of April, May and June, the UIF's special COVID-19 benefit has paid out R34 billion, helping over seven-and-a-half million workers and preventing retrenchments in a number of companies.

This scheme has now been extended by another 6 weeks to 15 August 2020.

We continue to provide assistance – in the form of loans, grants and debt restructuring – to small businesses, spaza shop owners and other informal businesses.

Special assistance has also been provided to businesses in the tourism, sports and creative industries.

To date, a total of R1.5 billion in support has been provided to all these businesses.

In partnership with the banks, through the R200 billion loan guarantee scheme, financial support has been provided to more than 8,600 small and medium-sized companies to the value of R12 billion.

The rules of the scheme have been adjusted to expand the eligibility criteria and increase uptake, making it easier for businesses to access finance during this period.

I am confident that we will be seeing more companies making use of this facility going forward.



Over R70 billion in tax relief has also been provided to companies.

I mention all these figures because they clearly illustrate that the various parts of the social and economic relief package are being implemented and that the much-needed support is reaching its recipients.

This is making a real difference in the lives of millions of people and is providing vital support to thousands of companies in these very difficult times.

But what concerns me, and what concerns all South Africans, are those instances where funds are stolen, where they are misused, where goods are overpriced, where food parcels are diverted from needy households – where there is corruption and mismanagement of public funds.

Increasingly, we are hearing allegations about fraudulent UIF claims, overpricing of goods and services, violation of emergency procurement regulations, collusion between officials and service providers, abuse of food parcel distribution and the creation of fake non-profit organisations to access relief funding.


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From the outset of our response to the pandemic, we have been quite clear that there should be no scope for corruption in the use of these resources.

More so than at any other time, corruption puts lives at risk.

We therefore put in place several preventative measures.

National Treasury issued regulations to ensure that emergency procurement of supplies and services meet the constitutional requirements of fairness, transparency, competitiveness and cost effectiveness.

Regulations were put in place to prohibit unjustified price hikes and ensure the availability of essential goods.

Since the declaration of the national state of disaster, the Competition Commission has investigated over 800 complaints of excessive pricing.

It has so far prosecuted or reached settlements with 28 companies, imposing penalties and fines of over R16 million.

The Auditor-General has also adopted special measures to safeguard funds committed to the fight against COVID-19. Special audits have been undertaken to detect and prevent misuse of these funds and to identify risks in the system.

In addition to all these measures we have established a collaborative and coordinating centre to strengthen the collective efforts among law enforcement agencies so as to prevent, detect, investigate and prosecute COVID-related corruption.

This centre brings together nine state institutions.

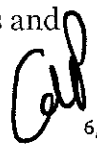

These are the Financial Intelligence Centre, the Independent Police Investigative Directorate, the National Prosecuting Authority, the Hawks, Crime Intelligence and the SAPS Detective Service, the South African Revenue Service, the Special Investigating Unit and the State Security Agency.

With an operational hub at the FIC, this centre is investigating allegations of corruption in areas such as the distribution of food parcels, social relief grants, the procurement of personal protective equipment and other medical supplies, and UIF special COVID-19 scheme.

At least 36 cases are currently at various stages of investigation and prosecution.

We are determined that every instance of alleged corruption must be thoroughly investigated, that those responsible for wrongdoing should be prosecuted and that all monies stolen or overpriced are recovered.

In order to speed up and strengthen the process of dealing with corruption, I have today signed a proclamation authorising the Special Investigating Unit – the SIU – to investigate any unlawful or improper conduct in the procurement of any goods, works and


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services during or related to the national state of disaster in any state institution.

This empowers the SIU to probe any allegations relating to the misuse of COVID-19 funds across all spheres of the state.

If the SIU finds evidence that a criminal offence has been committed, it is obliged to refer such evidence to the prosecuting authority.

It is also empowered to institute civil proceedings for the recovery of any damages or losses incurred by the state.

To ensure that action is taken speedily, I will be getting interim reports on investigations every 6 weeks.

The fight against the coronavirus pandemic is stretching our capabilities and resources to their limit.

We are therefore determined that there should be no theft, no wastage and no mismanagement of public funds.

The consequences for those who break the law or bypass regulations will be severe.

The people of South Africa require nothing less than full accountability from those who have been elected and appointed to serve them.

We commend those provincial governments and municipalities that have already started taking disciplinary action against officials accused of improper conduct and, where appropriate, have reported them to the law enforcement agencies.

All the funds that we have committed must reach their intended recipients and must be put to their proper use.

We will take steps to recover all funds that have been stolen or where goods have been overpriced.

The success of our fight against corruption depends on the involvement of all citizens and all parts of society.

We will work with various leaders and social formations to strengthen our efforts to safeguard the precious resources that we need to overcome the disease and to protect our people from its damaging effects.

As all South Africans work together to limit transmission and prepare for the peak of infections throughout the country, we are also looking towards the extraordinary measures that will be needed to rebuild our economy.

We cannot wait until the COVID-19 threat has passed, because the virus will continue to be part of our lives for some time to come.


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We need to work now on a social compact for economic recovery, growth and transformation.

As government, we are engaging with all social partners on a common economic recovery programme that uses every means at our disposal to unlock growth and create employment.

We see a great deal of alignment across the various plans and proposals that have been put forward by various groups in society, and we are building a consensus on the practical measures we need to take now and in the coming months.

Through working together, we have achieved much as a country in the last few months.

We delayed the spread of the virus, saving many lives and giving ourselves time to improve our health response.

We put in place the largest social and economic relief package in our history under severe constraints, and have mitigated the worst impact of the pandemic.

Across society, people have changed their behaviour, observing social distancing, wearing masks and observing hygienic practices.

As a country, we have never before faced such a severe crisis or such an abrupt disruption of our lives.

Under the most challenging conditions, our response as a nation has been remarkable.

Even as we may have made some mistakes, we have shown an extraordinary capacity for innovation, for solidarity and for collective action.

We have mobilised a whole-of-society effort to combat this threat and we have continued to adapt and improve our response.

The next few weeks will put our resources and resolve to the test as never before.

I call on all South Africans to remain strong, to remain disciplined and, above all, to stay safe.

We will overcome this pandemic.

We will protect lives and livelihoods.

And we will restore our people and our country to health.

I thank you.



Ofcom Broadcast and On Demand Bulletin

20 April 2020

London Real: Covid-19

"AL3"

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.

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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*

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"*

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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.

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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.