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CASE NUMBER: 012/2021

DATE OF HEARING: 22 JUNE 2021

JUDGMENT RELEASE DATE: 20 SEPTEMBER 2021

**SUPPORT PUBLIC BROADCASTING COALITION (SOS) &
MEDIA MONITORING AFRICA**

APPELLANT

vs

SABC CHANNEL 404

RESPONDENT

**TRIBUNAL: ADV BOITUMELO TLHAKUNG (CHAIRPERSON)
 DR MOHAMED CHICKTAY (COMMISSIONER)
 MR RUFUS KHARIDZHA (BCCSA COMMISSIONER)**

**FOR THE APPELLANT: ADV MICHAEL MBIKIWA
 MS AVANI SINGH [of POWER SINGH ATTORNEYS]
 MS DUDUETSANG MAKUSE
 MR WILLIAM BIRD**

FOR THE RESPONDENT: MR. NYIKO SHIBAMBO: BROADCAST COMPLIANCE.

Appeal against the Tribunal's sanction – Appellants submitted that the fine of R 10 000 should be accompanied by an apology from the Respondent or a correction or issue a summary of the First Tribunal's findings.

Appeal upheld – Respondent compelled to broadcast a summary of the First Tribunal's finding as per the provisions of section 12.3 and 12.6 of the BCCSA Constitution. Support Public Broadcasting Coalition (SOS) & Media Monitoring Africa (MMA) vs SABC Channel 404, Case No:012/2021 (BCCSA).

SUMMARY

The Tribunal upheld the Appellants' complaint and imposed a fine of R 10 000 against the Respondent. The Appellants appealed the First Tribunal's sanction including the BCCSA's rule that Appeal Administrative Fees should be paid. The Appellants hold the view that despite imposing a R10 000 fine against the Respondent, the First Tribunal should have also compelled the Respondent to issue an apology to the SABC Board, correction of all the untrue statements made during the interview and / or broadcast summary of the BCCSA's findings.

The appeal was allowed – and the Appeal Tribunal upheld the R10 000.

Fine- but compelled the Respondent to broadcast the summary of the First Tribunal's findings within a dedicated Full View programme.

JUDGMENT

B TLHAKUNG

[1] This appeal was jointly lodged by the Support Public Broadcasting Coalition [*referred to as 'SOS'*] and Media Monitoring Africa [*referred to as 'MMA'*] and hereinafter referred to as the Appellants. The South African Broadcasting Corporation [*referred to as the 'SABC'*] is the Respondent in this matter. The Chairperson of the Tribunal granted leave to appeal and referred the matter to the Appeal Tribunal of the BCCSA. The appeal is based on the contents of paragraphs 23 and 24 of BCCSA Judgment *Case No: 003/2021* regarding the issue of an appropriate sanction.

[2] **The application for leave to appeal reads as follows:**

“APPLICATION FOR LEAVE TO APPEAL AGAINST PART OF THE DECISION THE BCCSA TRIBUNAL AND AGAINST THE SANCTION IMPOSED BY THE BCCSA TRIBUNAL IN THE CASE OF SOS AND MMA V SABC (Case No. 3/2021)

1. INTRODUCTION

- a. The SOS Coalition (SOS) and Media Monitoring Africa (MMA) appreciates that it is unusual for a complainant whose complaint has been largely upheld by BCCSA Tribunal to make application for leave to appeal.
- b. SOS and MMA do, of course, welcome the ruling by the BCCSA Tribunal (Case No.3/2021) that the SABC contravened numerous clauses of the Subscription and Free to Air Codes in that:

- (a) the news report/interview with Ace Magashule (which was the subject of our complaint) was “not truthfully, accurately and fairly presented and... was not presented in the correct context” (at paragraph [23(1)] of the ruling); and
- (b) the right of reply in the same program and in the same timeslot was not given (at paragraph [23(4)] of the ruling) – Note that this is a numbering error, but we retain the reference as it appears in the ruling.
- c. However, two parts of the decision are in our respectful submission quite incorrect and indeed, produced a sense of shock in the complainants.
- d. After seeking the advice of Senior Counsel, SOS and MMA hereby apply for leave to appeal these two parts of the decision as set out in the Tribunal ruling, in terms of rule 4.1 of the BCCSA’s Appeal to Appeal Tribunal Rules (the Appeal Rules), provided to us by the BCCSA, together with a copy of the ruling, on Wednesday 24 February 2021.

2. APPLICATION FOR LEAVE TO APPEAL IN RESPECT OF THE SANCTION

- a. In its ruling, the BCCSA Tribunal imposed a sanction of a fine of R10 000.00 upon the SABC, for the numerous Code violations it found to have been committed by the journalists in question.
- b. SOS and MMA is extremely disappointed that no apology was required to be broadcast in regard to the numerous Code violations that the BCCSA found to have occurred as a result of the broadcast of the interview and of the SABC’s failure to provide the Board/management with a right of reply.
- c. The BCCSA Tribunal’s powers in regard to its sanctions are set out in section 14 of the BCCSA’s Constitution. These include at 14.3 that it may direct that a correction and/or a summary of the findings of a Tribunal be broadcast by the respondent in such manner as may be determined by the Tribunal.
- d. We make application to appeal the sanction because we are of the view that the sanction was clearly wrong in not requiring that an apology and/or a summary of the findings of the BCCSA Tribunal be required to be broadcast by the SABC. This is critical for the harm occasioned by the breach to be addressed. A fine alone does not achieve this.
- e. We are of the view that a requirement that an apology and/or a summary of the findings of the BCCSA Tribunal be imposed by the Appeal Tribunal either instead of, or in addition to, (we leave that to the Appeal Tribunal to decide) the R10 000.00 fine imposed by the BCCSA Tribunal.
- f. This is of vital public importance because the public ought to be made aware that, as the BCCSA Tribunal held:
 - (a) at paragraph [13]: the journalists... failed to observe the cardinal journalistic rule of objectivity and left the reasonable viewers with half-truths in that they did not produce facts of what they were referring to. The test for correct context and fair manner of reporting is **facts fairly indicated and referred to** and the failure to do so compromises the news story. (emphasis in the original);
 - (b) at paragraph [18]: We, however, found that in this interview, the interviewers used words which are reasonable viewer would have found to be inaccurate. References to **bloodbath, atrocities, salaries of staff are peanuts**, were not fair accurate and truthful. This is important as the inappropriate use of the language can create an impression of something which is not true. (emphasis in the original); and

- (c) at paragraph [19]: The coverage of the SABC's era retrenchments in this news programme comes across as very subjective and emotional, with the result that the news was not fairly presented.
- g. We are of the respectful view that the BCCSA Appeal Tribunal must take account of the fact that the SABC is the public broadcaster. And as the public broadcaster, it not only has a significant public service mandate, it also has a unique role in providing access to news and information for the majority of people in South Africa. The High Court has held in *SOS Coalition and Others v the SABC and Others* Case Number 81056/14, that the SABC is required to provide "significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests." [at paragraph 36, Available at: <http://www.saflii.org/za/cases/ZAGPJHC/2017/289.pdf>]
- h. In this regard we think it vital to point out the SABC made numerous admissions in its written response to the SOS and MMA complaint that the interview complained of failed to meet acceptable standards of ethical journalistic professionalism. These include the following admissions:
 - (a) "[T]he concern about the editorial quality and journalistic posture of the interview... is noted and fully accepted."
 - (b) "[E]ditors discussed [the interview] extensively and expressed serious concerns about its editorial quality".
 - (c) "[T]here is no question that the issues raised in relation to this aspect [namely the retrenchments] could have been treated differently and dealt with without compromising editorial independence and impartiality".
 - (d) "[T]he sheer proximity of the story to [the journalists'] lives makes the task of distancing themselves and remaining unaffected, an exceptionally difficult one. In fact, one of the journalist points out during the interview that he 'speaks as an affected person', which is necessary to make the viewers aware of the conflict of interest".

[3] The SABC responded as follows:

"SABC RESPONDS TO THE HEADS OF ARGUMENT SUBMITTED BY SOS&MMA BEFORE THE BCCSA TRIBUNAL

In respect of the above-mentioned matter, the SABC makes the following submission:

1. The SABC concedes that the interview with the ANC Secretary-General Mr. Ace Magashule was not conducted in the highest standard required of the public broadcaster.
2. The SABC submits that the R10 000 fine imposed by the BCCSA Tribunal is sufficient and in line with the severity of the transgression, as the outcome of the interview was not predetermined but influenced by the prevailing circumstances.
3. The SABC finds the cases cited by the Appellant to strengthen their resolve that the SABC must broadcast the summary of findings and a correction to be irrelevant. The cases relate specifically to complainants who were directly affected by the content of the broadcasts or who found the infringement to be personal and thus sought remedies for personal satisfaction. The cases deal with identifiable persons who had been prejudiced as a result of the broadcasts. The Appellant in this matter is not directly affected by what was

broadcast however it raises subjective issues of perceptions that were possibly created as a result of an interview that was conducted by the SABC.

- 3.1 In *Damarah v SABC2 & Channel 404* – the matter related to the integrity of Mr Damarah as a person. It was therefore important that his name is cleared on air.
- 3.2 In *eNCA VS Strydom and Taylor* – the matter related to what the newsreader said about the respondent in an interview. It directly impacted on the complainant's personality.
- 3.3 In *Beydon v Algoa FM* – the complainant was aggrieved about what the presenter had said about the text message that the complainant had sent to the station to be read. He had personal interest in the complaint.
- 3.4 *Loonat v Radio Islam*, - the presenter had directly implicated the complainant to criminal activities. The complainant was directly affected as a result of the broadcast.
4. It is the SABC's submission that the above-mentioned cases cannot be used to support the call for the SABC to air an apology.
5. The SABC submits that there is significant amount of time, 7 months, that has lapsed since the broadcast of the interview with Mr. Magashule which should be considered when deciding whether the BCCSA Tribunal should accede to the Appellant's demand, as this may drag SABC News into the ANC internal conflicts currently playing out. This is an integrity and reputational risk that the public news entity cannot afford at this stage of its restoration
6. Also requiring consideration is the fact that another interview has since been conducted with Mr. Ace Magashule on a separate matter, about his battles within his party. An apology at this stage could cause confusion as to exactly which interview is being referred, as both were conducted by the same journalists.
7. It is the SABC's submission that broadcasting of the summary of findings and a correction will be damaging to the public broadcaster. As a result, the SABC might be seen to be playing politics. The correction could easily be misconstrued to mean that the public broadcaster is taking sides on ANC conflicts. The timing of the broadcast will also be questionable in the eyes of many viewers given the events that have since happened in the political life of Mr. Magashule.
8. Another relevant matter to consider relates to the comprehensive interventions that have since been instituted to anticipate and prevent a recurrence of what happened. Coupled with this is the observable recovery of the newsroom and renewed commitment to public service journalism that reflects editorial independence and impartiality. To revisit what has been corrected internally already through an apology, may take the newsroom backwards and undo the work that has been done to rebuild confidence which is reflected in audience performance over the past few months.
9. It is the SABC's contention that viewers have long forgotten about the interview in question. The Appellant has not demonstrated through evidence that there are viewers who are still questioning them about the rationale of that interview and its impact on society. This to the SABC is an indication that there is no demonstrable public interest in the case.
10. Broadcasting an apology is not the only way that the public can access the BCCSA Tribunal's ruling. There are many ways through which the public source information, for an example; the Appellant can issue a press statement which can be published by different media outlets. The BCCSA normally publishes its findings on its website and any

interested party can access it. The Appellant indicated that the *Business Day* newspaper wrote about the story when it initially broke, and will possibly be interested in the outcome of the complaint too.

11. The BCCSA is a public institution that is accessible to all. Its services are advertised widely across SABC platforms and private media outlets. Had there been a public outrage, as suggested by the Appellant, the public could have long contacted the BCCSA and the SABC about the negative impact of the interview and that has not happened. The Appellant instead referred to an article written in the *Business Day* newspaper. It is therefore the SABC's submission that, when the BCCSA Tribunal makes a determination, it needs to critically quantify whether an article in a single upmarket newspaper equates to public outrage as suggested by the Appellant.
12. The Appellant has submitted that the SABC has called for unlawful interference by external parties in to the running of its affairs. As indicated in the initial submission, the SABC reiterates that this was never part of or premeditated as the subject of the interview, but a consequence of the emotive and restive environment at the time which led to unintentional statements being uttered. In this context, this cannot be viewed as the SABC's call for unlawful interference by external parties, as there was no instruction to the journalist by the institution to do so. Also, the nature of live interviews lends itself to such occurrences and these can only be remedied post-facto. This is also accounted for in the SABC Editorial Policies
13. The Appellant has requested the BCCSA Tribunal to waive the balance of payment required when lodging an appeal. The Appellant has on record indicated that they only paid R10 000 of the R21 000 required fee when lodging an appeal. It is the SABC's submission that the reasons advanced by the applicant for such condonation will have to be assessed as an appeal process is not mandatory but voluntary. The reasons for such condonation if granted, will be important to set a precedent for future appeals.

It is the SABC's submission that given the time that has lapsed since the interview took place, the current political environment and the steps taken by the SABC internally to address this matter, a reprimand will be a suitable sanction."

EVALUATION

[4] After reading through the First Tribunal documentation, respective parties' Heads of Arguments [*hereinafter referred to as 'HOA'*], the clip of the impugned broadcast it is clear that the Appeal Tribunal will confine itself to the contents of paragraph 23 and 24 of the First Tribunal's judgement. Furthermore, the merits of the already sanctioned actions of the Respondent as per the clauses of the BCCSA's Code of Conduct will thus not be dealt with in this appeal as the latter had already been dealt with by the First Tribunal. As a motivation for this appeal, and in light of the First Tribunal's sanction, the Appellants requested that:

- (a) The Appeal Tribunal should direct the Respondent to broadcast a correction and /

or summary of the First Tribunal's findings at the beginning of each broadcast of *The Full View* on three consecutive weekdays, as provided for in Section 12 (3) of the BCCSA Procedure.

- (b) They be exempted from the payment of the BCCSA's Appeal administrative fees; and
- (c) Even though this is not mentioned at the conclusion of the Appellants' HOA, their dissatisfaction regarding 'the failure by the First Tribunal to address the provisions of Clause 3 (b) of Free-to-Air as the latter was dealt with at the Appeal Tribunal hearing however for the sake of the record and clarity for the Appellants – the Appeal Tribunal will accordingly address it.

[5] The provisions of Section 12 of the BCCSA Procedure, sets out the powers of the BCCSA if an infringement of the Code has been found. Section 12 (3) states that the Tribunal may amongst other sanctions:

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

At the hearing and from the Appellants' HOA, the need to compel the Respondent to issue a correction and or have the summary of the First Tribunal's finding broadcast were substantially argued. The Appellant strongly felt that the South African public is entitled to the truth and to objective news reporting which is detached from the journalists' emotional state – within reasonable and responsible limits. The Respondent conceded that these limits were transgressed by the journalists' use of tone, level of intensity and the persuasive approach that was displayed during the interview. The Appeal Tribunal took cognisance and applauds the Respondent for having implemented corrective measures to curtail a repetition of opportunistic journalism in future. However, the question remains – how will the public be made aware of the latter?

This question is deemed pertinent because the interview was opportunistic and publicly advanced political interference into the internal affairs of the Respondent by asking the former Secretary General of the ANC, Mr Ace Magashule to intervene on behalf of the Respondent's employees, which he agreed to do as the persuasion escalated. This scene could have easily resulted in serious power tensions between the SABC Board and the ANC. While this did not happen, as a public broadcaster, the Respondent is obliged to inform the public that the journalists infringed the BCCSA's Code of Conduct and that the style of journalism displayed in this matter is not condoned. The Respondent had already effected measures to address this serious infringement of the Code by one of its own reporters internally.

[6] In terms of the provisions of Section 12.6, the Tribunal may:

‘make any supplementary or ancillary orders or directions that it may consider necessary for carrying into effect orders or directives made in terms of this clause and, more particularly, give directives as to the broadcasting of its findings.’

The Appellants argued that the correction and or summary needed to be broadcast over three consecutive days. However, Section 12.6 allows the Appeal Tribunal to exercise its discretion to determine the nature of the ancillary order as well as how and when it should be broadcast. With this in mind, one will have to take into consideration that the impugned programme was broadcast more than seven [7] months ago. The Appeal Tribunal will therefore rather exercise its discretion and compel the Respondent to air a summary of the finding of the First Tribunal and confirm the fine that was imposed. This approach will provide substantive context for viewers to realise what the impugned conduct was and what steps were taken to prevent a repetition thereof in future without stirring up concerns about political interference that did not take place, simultaneously reassuring viewers of the Respondent's commitment to responsible broadcasting.

[7] Having noted the Appellants' persuasion to have the BCCSA rule on the provisions of Clause 3 (b) of Free-to-Air, it is important to highlight the following:

- (a) Full View is broadcast on the SABC News Channel 404, which is a subscription channel;
- (b) This is the reason why the Appellant had lodged the complaint against Multichoice jointly with the Respondent at the initial stages of its complaint;
- (c) Being a subscription channel, complaints against Full View will be dealt with in terms of the Code of Conduct for Subscription Broadcasting Service Licensees;
- (d) It is trite that the latter might have been repeated on a Free-to-Air channel, however that will always be a secondary channel of broadcast.

7.5 Full View is primarily aired on a subscription channel which precludes the BCCSA from applying the provisions of Clause 3 (b) of the Free-to-Air.

[8] Finally, the Appeal Tribunal cannot waive the administrative costs payable when an Appeal is lodged.

[9] After taking all factors into consideration, the sanction, namely the fine of R10 000 that was imposed by the First Tribunal, is confirmed and an ancillary order is included that the Respondent must broadcast a statement containing a brief summary of the finding of the First Tribunal including of the final decision of the Appeal Tribunal. This statement should be broadcast at the beginning of an identified and agreed upon Full View programme.

SUMMARY: THE APPEAL TRIBUNAL FINDINGS TO BE AIRED ON FULL VIEW WITHIN 24-HOURS OF RECEIPT OF THE FINAL JUDGMENT.

“On the 30th of November 2020 the BCCSA received a complaint from MMA/SOS against the SABC News programme, Full View which plays on Channel 404 in which they raised their concerns regarding the manner in which SABC’s journalists conducted an interview

with the former ANC Secretary General, Mr. Ace Magashule. regarding the ongoing retrenchment of SABC's employees. The complaint specifically focused on the issue that the journalists' conduct at the time had the potential of inciting political violence or rather of creating tension between the Executive Management of the SABC and the ruling party.

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

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

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

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

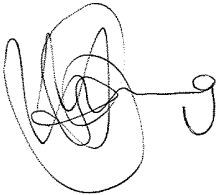
The BCCSA Appeal Tribunal took all factors into consideration and ruled that:

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

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

The SABC is to confirm the date and the time of when the apology will broadcast and a copy must be submitted to the Registrar.

The R10 000 payable to the BCCSA within fourteen [14] working days of the release of this judgment by the Respondent, is confirmed.



**ADV BOITUMELO TLHAKUNG
CHAIRPERSON OF THE APPEAL TRIBUNAL OF THE BROADCASTING
COMPLAINTS COMMISSION**

Commissioners Chicktay and Kharidzha concurred with the above judgment.