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CASE NUMBER: 37(2)/2012

In the matter between

94.7 Highveld Stereo **APPLICANT**

and

Stevens **RESPONDENT**

Application for condonation for late filing of application for leave to appeal. Complainant and Respondent entitled to certainty as to judgment of BCCSA. Strict compliance required except where special circumstances are shown. Misunderstanding or ignorance of the Rules not in itself a ground for condonation. Judgments of the BCCSA do not attain validity on publication, but simply by sending them to the parties. Highveld Stereo v Stevens Case No: 37/2011 (BCTSA)

JUDGMENT

JCW VAN ROOYEN SC

[1] On 20 June 2012 I handed down a judgment of the BCCSA Tribunal with regard to a complaint that was lodged with the Registrar of the Commission against 94.7 Highveld Stereo, a broadcaster which falls under the jurisdiction of the BCCSA in terms of section 54(3) of the Electronic Communications Act 2005. The Tribunal held that 94.7 Highveld Stereo had contravened the Broadcasting Code. However, given the fact that the matter decided by the Commission was a novel one, the Respondent was merely reprimanded.

[2] The grounds for the application for leave to appeal read as follows:

"APPLICATION FOR LEAVE TO APPEAL

1. 94.7 Highveld Stereo hereby wishes to lodge an appeal against the Tribunal's judgement in the case of Steven vs 94.Highveld Stereo case no 31/2012 delivered to the station on Wednesday 20 July 2012."

2. 94.7 Highveld Stereo's grounds for appeal are that the Tribunal erred in fact and/or in law in the following respects:

    2.1 when it held in relation to the news bulletin in question that "clues as to the identity of the girl had, indirectly, been given." Mere reference to the fact that the video had gone viral in "Soweto" cannot with any degree of certainty be said to be enough or even close to providing the identity of the victim. Bearing in mind the number of people living in Soweto, it cannot be said with any conviction that mere mention of an incident that occurred there is enough to identify the victim;

    2.2 the video had gone viral in Soweto when the video had in fact gone viral on social media platforms;

    2.3 the girl's voice cannot be heard on the audio clip and therefore, even people who know her would not be able to recognise her voice from the clip; and

    2.4 the Tribunal's finding is flawed in law and would in fact amount to a ban on the reporting of any such incidents as the mere mention of a crime and where it occurred would in the absence of any other aggravating factors based on the Tribunal's ruling in this matter, amount to indirect identification of the victim and therefore be seen as a contravention of the Code. This in our respectful view, is an unjustifiably broad interpretation and which in our respectful submission also amounts to an unjustified limitation of the right to freedom of expression in respect of both the media's right to report on matters of public interest as well the public's right to receive the information and cannot stand constitutional scrutiny.

3. **Application for Condonation for late filing of Leave to Appeal**

    I refer to my email of 26 June 2012 accompanying our leave to appeal. In that email, it is clearly stated that we did receive the judgment on 20 June 2012, as such there is no dispute as to when the judgment was sent to us hence, we are not sure of the relevance of the trail of emails below.

    Having gone through the Judgment on the matter, it became very clear to us that in our view the Tribunal had erred in fact and in law in its conclusion of the matter, as a result, we decided that we would appeal the Judgment. I then on Friday 22 June 2012, advised you in writing that we would be filing an appeal against the judgment (I attach a copy of the said email). You acknowledged receipt of the email and confirmed that we have five days within which to lodge the appeal. Our error it now appears, was in calculating the five days which to our minds excluded weekends based on the standard commercial and legal computation of days unaware of clause 7 of the BBCCSA Procedure– hence the Tribunal's decision that we are out of time. We therefore asked that the one day out of time be condoned.

[3] The notice received from the Applicant that an appeal would be lodged did not request an extension of the time period. In fact, it mentioned that an application for leave to appeal would be lodged the following Monday, which was within the five-day period. Of course, the five-day period is determined by excluding the first day on which the judgment is handed down, and then adding five days. On the fifth day, the

application for leave to appeal, together with the grounds, must be received. However, in the present instance the application was received on the sixth day.

[4] I handed down a judgment in which I dismissed the application for condonation. The precedents show a strict application which does not permit condonation where the rules have merely been misinterpreted. The reasoning was as follows:

[5] The question before me at this stage is whether a sufficient case has been made out to extend the five-day period for the filing of an appeal so as to condone the late filing of the application in terms of clause 5 of the Procedural Rules of the BCCSA.

Clause 5.1 provides as follows:

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

5.1 extend any time period contemplated in these rules;"

[6] The Procedural Rules of the BCCSA must be read within the context of the following aim of the BCCSA, as set out in its Constitution:

"The objects of the BCCSA are to ensure the adherence to high standards in broadcasting and to achieve a *speedy* and cost effective settlement of complaints against full members of NAB who have submitted themselves to the jurisdiction of the BCCSA and its Code and, where a settlement cannot be attained, to adjudicate upon a complaint and take appropriate steps in accordance with clause 14 of this Constitution."

The Preamble to the Procedural Rules reads as follows:

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

The somewhat short period of five days within which an application for leave to appeal must be filed, should thus be read against the background of these aims.

[7] The Applicant states the following reason for its late filing: "Our error it now appears, was in calculating the five days which to our minds excluded weekends based on the standard commercial and legal computation of days unaware of clause 7 of the BCCSA Procedure – hence the Tribunal's (*sic*) decision that we are out of time. We therefore asked that the one day out of time be condoned."

[8] The following was stated in an application for condonation by a complainant in *Mahamed v SABC(SAFM) :*[1]

> "Mr Mahamed, no doubt, knows clause 4 of the Procedural Rules well since he based his application for leave to appeal to me and now, the Deputy Chairperson, on it. Had the day on which the judgment denying the first application for leave to appeal been the first day of the five days, one could have had some understanding for the miscalculation. However, "within five days" is interpreted generously as granting five full days. Even if the application had been lodged before midnight on the fifth day, it would still have been in time. It is not as if it is expected that the application must be filed before the "close of business" on the fifth day. Of course, modern communication technology has contributed to the ease with which one could file such an application electronically before midnight."

The application for condonation was not granted.

[9] In the present matter the applicant simply states that it has misunderstood the rule, believing that Saturdays and Sundays do not form part of the computation of the time period. The applicant had obviously not read Rule 7, which provides as follows:

> "Any reference in these Rules to a number of days includes Saturdays, Sundays and Public Holidays, unless the adjudicator or Chairperson, as the case may be, determines otherwise and notifies the parties accordingly."

[10] Given the necessity for the speedy adjudication and finalisation of complaints, I do not believe that a case has been made out on the basis that "no injustice will result". The complainants and broadcasters before the BCCSA are entitled to have matters finalised as speedily as possible. A mere misunderstanding or ignorance of the rules is insufficient to justify a departure from the five-day limit, based on a finding that "no injustice will result". This is well illustrated in the *Mahamed* matter, where not even a Complainant – who might generally not be as conversant with the rules as a Broadcaster is – was successful in his application for condonation. Also see *e.tv v IFP*.[2] As to the meaning of the words "no injustice will result", compare the condonation judgment in *F v SABC*.[3]

[11] After handing down this judgment in the ordinary course, and without a hearing (as is the tradition in these cases for application for condonation), the Applicant approached me to re-open the matter to hear a new point that had not been argued before. In fairness I decided to grant the Applicant an opportunity to address me.

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[1] (Case 27/2011; [2011] JOL 27571(BCCSA) [JOL = Lexis Nexis Judgments Online]
[2] (Case 24/2011; [2012] JOL 28440(BCCSA)
[3] (Case 24/2008); [2009] JOL 22981) (BCCSA).

[12] Ms Mochaba argued two points: to include weekends in the calculation of the number of days was unfair and, secondly, the five days should not run from the date on which the judgment is sent to the parties, but from the day when it is published to newspapers, etcetera. However, the publication one day later than the notification of the judgment to the broadcaster and the complainant, is a practical measure which the BCCSA has taken to address concerns raised by some broadcasters that they needed a day or so to study the judgment so that when the judgment goes to the press and comment is requested, the broadcaster would be informed as to what the judgment conveys and be prepared to answer questions from the press.

[13] As to the inclusion of weekends, the BCCSA, after consultation with the National Association of Broadcasters (NAB), amended the original rule, which did not include Saturdays and Sundays and public holidays; the NAB agreed with the amendment on the basis that – given the principle that these matters should be finalised speedily – dissatisfied complainants should not have the privilege of weekends and public holidays not forming part of the calculation of the number of days. The NAB felt that the broadcasters it represented would be familiar with the case and act swiftly where they are not in agreement with a judgment. Speed was of the essence.

[14] My view is, accordingly, that if the NAB wishes the BCCSA to consider the amendment of the rule, it should inform us with full reasons as to why we should revert to the original rule, which excluded weekends and public holidays.

[15] As to the second point that the days should run from the date of "publication" of the judgment, i.e. the day on which the public is informed via the press of the decision, it should be pointed out that the Rules of Procedure do not refer to the *publication* of a judgment. The BCCSA Tribunal is not a court of law where judgments must be handed down in open court to attain validity. A judgment is simply sent to the parties and it is not necessary to publish the judgment to anyone else. The fact that we do this, and that we moreover have a website where our judgments are published, and also publish a fair number of judgments on the online service provided by LexisNexis, has nothing to do with a quest for validity, but is simply intended to inform the public as to what we have decided and what the reasons for our decisions are.

[16] The decision is, accordingly, that the day on which a judgment is emailed to the parties is the date of "publication". To be fair and realistic, we do not count that day as the first day for purposes of the five days within which an appeal must be lodged. The five days only start running from the next day and end on the fifth day at 24:00.

[17] Since both these further points are not convincing in law, I have decided not to correct my ruling on these grounds. The original ruling thus remains intact.

The application for extension of the five-day period is accordingly dismissed.

JCW VAN ROOYEN SC
CHAIRPERSON

DATE OF ISSUE OF JUDGMENT: 26 July 2012