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**CASE NUMBER: 05/2014**

**DATE OF HEARING: 13 MARCH 2014**
**JUDGMENT RELEASE DATE: 02 APRIL 2014**

**MASWANGANYI** **COMPLAINANT**

**vs**

**TALK RADIO 702** **RESPONDENT**

**TRIBUNAL:** **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
**DR L VENTER**
**MS G HARPER**
**MS N MAKAULA-NTSEBEZA**
**MR A MELVILLE**

**FOR THE COMPLAINANT: The Complainant in person.**

**RESPONDENT: Ms Khahliso Mochaba, Group Human Capital & Regulatory Affairs Executive, Primedia Broadcasting**

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*News – second bulletin not including fact which it had included the previous day in a broadcast – not a contravention of the Broadcasting Code since there was a reasonable connection between the two bulletins – Maswanganyi vs Talk Radio 702, Case: 05/2014(BCCSA)*

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## SUMMARY

**Radio 702 broadcast two aspects relating to the opening of a Saldanha Bay project on 31 October 2013 at 15:00: the relevant aspects were, firstly, that the Premier of the Western Cape, Ms Helen Zille, was booed when she was attempting to deliver a speech**

**and, secondly, that the President, during his speech, admonished the crowd, telling them that they should grant a person an opportunity to express his or her view, even if they did not agree with that view. The next morning, at 07:30, only the Helen Zille aspect of the matter was broadcast. It was argued that this second broadcast was in conflict with the Broadcasting Code by omitting the rectifying speech by the President.**

**The Tribunal held that, as long as two news bulletins are reasonably connected in time and subject – which was the case here – it is not necessary for the radio station to broadcast both aspects again.**

**In conclusion it was pointed out that the present judgment does not relate to a situation where a first news bulletin omits to provide balance and no excuse for that omission can be provided.**

**The complaint was, accordingly, not upheld.**

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**JUDGMENT**

**JCW VAN ROOYEN SC**

[1] A complaint was received in regard to a 07:30 newscast by Radio 702 on 1 November 2013 which covered the fact that Ms Helen Zille, Premier of the Western Cape, had not been granted the opportunity to open an official function as a result of the fact that she had been booed by the audience. The President of South Africa, Mr. Zuma, was also present at the function, and he later delivered an address. Ms Zille commented while leaving the function that she had informed the President the previous evening of the possibility that the audience might not grant her the opportunity to speak, and that he had not done anything to intervene on her behalf. At the core of the complaint lay the accusation by the Complainant, a member of the public, that the Respondent radio station had omitted to include the fact that the President had in fact, on the occasion referred to, lectured the crowd, as part of his speech, that it is in conflict with democracy to deny a person the right to speak, even if one does not agree with that person's views.

[2] The complaint reads as follows:

**"**I watched eNCA 20h00 news on Thursday, October 31st and was disappointed to learn that Western Cape Premier, Mrs Helen Zille was heckled by ANC supporters in the presence of ANC and the Republic Of South Africa's President Zuma at the Saldanha Bay Industrial Development function. The Western Cape Premier spokesperson was on the phone to the prime news anchors stating that there was 'no political leadership' even though more than three cabinet ministers were in attendance, nobody attempted to stop the rowdy crowd or did anything afterwards. (This complaint was withdrawn after the Complainant had the opportunity of watching the relevant broadcasts from eNCA in the Registrar's office – it having surfaced that eNCA had, ultimately, as the news reached it from its news sources, complied with the Code)

On Friday, November 1st, the same was reported on Talk Radio 702's 07h30 Eye Witness News with a clip of Mrs Zille complaining that President Zuma DID NOTHING when '*ANC supporters*' disturbed her speech at the function.

Interestingly on November 1st at 07h15 SAFM played a full text of the President appealing to the Saldanha Bay audience at the function to allow divergent views coming from people of different political affiliations. He urged the crowd to learn to listen to others, whether they are in opposition or in agreement with any view as democracy dictates to us to live side by side in a constitutional democracy. SAFM's news gave a balanced view.

I feel it is wrong for Talk Radio 702 … to mislead South Africans into thinking the President allowed the Western Cape Premier to be heckled and did nothing afterwards. Surely the President could not be expected to address people like small children when they behave in an unacceptable manner. What I heard on SAFM was a statesman addressing people in a diplomatic, reasonable and logical manner. Stating facts while referring to the Constitution of the country.

The kind of news report on Talk Radio 702 …. (is) quite offensive and misleading and should be investigated and stopped as it is irresponsible. The … news channel.. should be sanction for such recklessness."

[3] The Broadcaster responded as follows:

"We submit that the news bulletin in question did not contravene any provisions of the Code. The news item in dispute was very clearly attributed to a source and it was something that happened at the time of the news bulletin. The news item was on what happened during the speech not afterwards and we submit that the actuality did not contravene the Code."

[4] The Complainant replied as follows:

''I am extremely annoyed by Talk 702's arrogance.

If you refer back to my original November 2nd email sent to you at 00h17, I wrote:

….. (the first complaint was repeated as above)…

Talk Radio 702 did not give a balanced report on November 1st regarding what happened in Saldanha Bay the previous day. SAFM presented a true account of the events of October 31st in Saldanha Bay. Such biased reporting by Talk 702 MUST be stopped.

I want this matter to be taken to the next level as I am NOT satisfied by Talk 702's response to my complaint."

[5] Radio 702's representative at the hearing added to her initial Response by referring the Tribunal to a Radio 702 broadcast which took place the previous day, on the 31st of October 2013 at 15:00, which related the following:

"President Jacob Zuma has called for political tolerance while addressing a crowd at the launch of a new project in Saldanha Bay.

He was responding to an incident that played out at the event earlier today when Western Cape premier Helen Zille tried to address the gathering.

Zille is furious because she was booed off stage.

She says the event has been organized as an ANC rally….

Zuma says other people's views should not be suppressed…

The Saldanha Bay Industrial Development Zone is one of 18 projects that forms part of Government's Infrastructure Programme."

## EVALUATION

[6] The clear question that arises in this matter is whether a radio station may omit from a 07:30 news bulletin relevant material that it had included in a bulletin at 15:00 on the previous day. It is informative to compare clause 13(1) of the Broadcasting Code, which provides as follows:

### 13. Controversial Issues of Public Importance

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

In contrast to the matter currently before us, clause 13 has a bearing on a broadcaster that omits an opposing point of view on a controversial issue of public importance from a *first* broadcast and then has a duty to fill the gap in a *subsequent* programme that forms part of the same series of programmes, presented within a reasonable period of time from the original broadcast. Clause 13 does not deal with news but with other material which contains controversial aspects of public importance and which calls for balancing. In the present case, both crucial aspects debated before us were, of

course, sketched in the 31 October 15:00 broadcast, though only one aspect of that broadcast was repeated the next morning.

[7] The British OFCOM Code for broadcasters contains a "combining" provision in so far as news is concerned.[1] Also compare the Australian Code of Practice and Guidelines for Broadcasters (2011). Although regarded as constitutionally *permissible* by the US Supreme Court in 1969,[2] the Federal Communications Commission in the USA in 1989 decided to no longer apply the fairness doctrine. In August 2011 the FCC formally removed the language from their rules which implemented the doctrine. The balance requirement has accordingly fallen away in the USA.

[8] From a broader perspective, Rule 13 of the Code is based on the premise that the same listener would also be listening during the next programme, and that people listen to all broadcasts of a broadcaster within a reasonable time period. The clause clearly originates from times when the Republic only had a few broadcasters, with the SABC dominating the scene before 1994. Given the wide variety of news bulletins and programmes from which a listener may currently choose, and, furthermore, the fact that it is unlikely that the general public would choose to listen to only one radio station, clause 13(1) of the Broadcasting Code is based on an assumption which does not, necessarily, accord with the prevailing reality of broadcasting in South Africa today. The test is an objective one: was the balancing done within a reasonable period; it is irrelevant whether a listener had also listened to a subsequent programme.

[9] The question is whether the rule relating to the combining of programmes may also be applied to news. If the available newsfeed only provides for one aspect, then that aspect may be broadcast. However, where a further newsfeed provides the required balance, then that will also have to be broadcast. Nevertheless, the question is whether it is permissible to select one aspect from a previous news item that was balanced, and to focus on that aspect only in a subsequent newscast. The news clause does not provide for this and would seem to require balance in every newscast, despite the fact that the full item had already been broadcast earlier. Given the wide choice of news

[1] See OFCOM Code clause 5.5,5.9 and 5.11. where due impartiality may, according to the Rule, be achieved "within a programme or over a series of programmes as a whole".
[2] *Red Lion Broadcasting Co. v FCC* 395 US 267(1969).

services available to listeners and viewers, it would be unreasonable not to make it possible for a broadcaster, which has already broadcast a balanced story, to focus in a subsequent newscast on a specific aspect that has already been covered, as long as this is done within a reasonable time. Balance would, however, have to be ensured in the *first* newscast if the newsfeed has already provided the material. It would, in our view, be unreasonable to expect a broadcaster to repeat material that it had already broadcast a *reasonable* time before the subsequent broadcast. What amounts to a "reasonable time" would depend on the circumstances of each case. The nature of a specific broadcaster would also have to be considered. Regular listeners to Radio 702 would know that this radio station, which specialises in "talk radio", especially during morning broadcasts such as that broadcast on 1 November 2013, uses short, sharp news items from the newsfeed that radio personalities such as John Robbie and Redi Tlhabi then discuss with a phone-in public.

[10] Section 39(2) of the Constitution of the Republic of South Africa 1996 provides that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." The Constitutional Court has stated the following in regard to this subsection in *Phumelela Gaming and Leisure Ltd v Gründlingh and Others*[3]

> 'A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common-law or customary law. *In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common-law or customary law.* The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common-law or customary law.' (emphasis added)

There is no doubt that freedom of expression was extensively suppressed under apartheid legislation[4] and that section 16 of the Constitution has led to a new era in

[3] 2007(6) SA 350 (CC).
[4] See *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) where Van der Westhuizen J (Yacoob ADCJ and Froneman J concurring) states as follows: "[94] Our history illustrates the crucial importance of free expression for democracy, even when its regulation and limitation deal with sexual conduct and related matters. Censorship was central in the legal system of the apartheid era. Not only were political activity, books, articles and even songs banned, but the apartheid state also imposed the narrow

which freedom of expression is regarded as lying at the heart of democracy.[5] Although it is true that, before a balancing of rights takes place, all rights lie at the same level,[6] I have no doubt that requiring the same balance in a news bulletin which, within a reasonable time, repeats one of the aspects of a news bulletin which had previously complied with the balance rule, would not be in accord with freedom of expression and the right of a broadcaster to give prominence to an aspect of the preceding news bulletin. In this sense, this judgment also accords with section 39(2) of the Constitution in broadening the freedom of broadcasters.[7] For this purpose we have developed the Broadcasting Code towards more freedom. This Code was, with amendments over the years, adopted by the National Association of Broadcasters in 1993, 2004 and 2010. The fact that the Code also accords with the Regulations of ICASA as promulgated in 2011, does *not* change the Code into a legislative instrument. That is why I have justified the adaptation of the News Clause with reference to section 39(2) of the Constitution, which pertains to *Common Law*.

[11] We have come to the conclusion that there is a reasonable connection between the 15:00 news bulletin on 31 October 2013 and the 07:30 news bulletin of the following morning. The fact that, shortly before the latter broadcast, SAFM broadcast what had substantially been broadcast the previous day on Radio 702, is irrelevant. Each radio station ultimately has the right to broadcast news in the manner it chooses: one station might repeat the full story over and over again, while another might merely select a

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Calvinist and cultural notions of morality and good taste of the ruling minority on all. For example, the 1974 Publications Act 94 put in place an elaborate system of committees and a 'Publications Appeal Board' to classify, prohibit and restrict. Books, magazines, articles and plays were banned or subjected to age and other restrictions. Globally celebrated films were banned, restricted to small venues, or subjected to the severe excising of language, nudity, sexual conduct and scenes depicting relations across the racial divide of that time. Apart from providing for censorship of material deemed to be 'prejudicial to the safety of the State', vague criteria like 'indecent', 'obscene', 'offensive' and 'harmful to public morals' were central to that Act. The censorship system was a powerful tool to sustain political, cultural and religious dominance. And courts played along, for example, with the banning of books by well- known authors on the basis that the description of sexual conduct in them was 'indecent, obscene and objectionable." (footnotes omitted); also see the *Report of the Ministerial Task Group Films and Publications Control to Dr Buthelezi, Minister of Home Affairs* (1994) – Printed by the Government Printer 3 March 1995 [available on the website of the BCCSA under Annual Reviews] where the following was said: "*We have reached the conclusion that a new Publications Act is necessary. The 1974 Act intrudes upon the freedom of choice of adults in an unreasonable manner by making banning widely possible; employs vague terminology ("offensive, indecent, obscene, harmful to morals"); generally regulates the private domain of an adult too strenuously; gives preference to the Christian religion, which is in conflict with the equal protection clause; provides for political intervention by the minister in certain instances; and does not place sufficient emphasis on the freedoms of artistic expression and of scientific research which are guaranteed by the Constitution."; also see van Rooyen "Censorship in a Future South Africa: A legal Perspective"* 1993(2) *De Jure* 283.

[5] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at [23.]

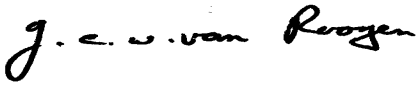
[6] See *De Reuck v DPP and Others* 2004(1) SA 406(CC) at [55].

[7] Also compare *Maroun & Naude v Talk Radio* 702 (28/2012);2012 Judgments Online 29228(BCCSA)

certain aspect from a previous bulletin broadcast a reasonable time before the subsequent bulletin. To expect news services to repeat, within a reasonable time, the full news item every time they cover a specific event, makes a mockery of broadcasting to an informed audience – which, we believe, constitutes the likely listeners or viewers of news bulletins and, at least, the audience of Radio 702. There is no reason why a broadcaster should not, within a society that is founded on freedom of expression, limit its coverage to one aspect of a news item in a subsequent newscast *within a reasonable time of a newscast where balance had already been achieved.*

[12] In conclusion, it should be mentioned that the present judgment does not deal with the situation where a *first* news bulletin omits to provide balance and no excuse for that omission can be provided. Where the newsfeed has provided facts which need to be broadcast so as to attain balance, those facts must be broadcast in the first bulletin which covers the event.

**In the result the complaint is not upheld.**



**JCW VAN ROOYEN SC**
**CHAIRPERSON**

***Commissioners Harper, Makaula and Venter concurred with the judgment of the Chairperson.***

**ALAN MELVILLE (COMMISSIONER)**

[1] I have read the judgment of the Chairperson and unfortunately cannot agree with the conclusion reached. To my mind, having re-listened to the various broadcasts several times, I still find that the broadcaster has omitted material facts from the following day's Radio 702 news broadcast at 07h30.

[2] The first difference of opinion that I have is the content that is complained of was in and formed part of a News bulletin; and accordingly the matter must be adjudicated principally under the provisions of Clause 11 "News". Whilst the matter is also undoubtedly a "Controversial Issue of Public Importance" (Clause 13), it is perhaps

equally true that all News items can be defined as such. However, to my mind, there is a reason that the News is singled out from all other types of programming and is given its own Clause in the Code, and that reason is the importance placed on reporting "*news truthfully, accurately and fairly" (Clause 11 (1))*

[3] I agree fully with the principle of combining, as well explained by the Chairman in his judgment – however, I believe that combining principally applies to developing stories, where facts emerge over a period of time, thus finally giving a full (or at least fuller) picture – a good current example could be the Malaysian Airlines tragedy of March 2014, where story combining has been done by all of the news networks over an extended time period.

[4] I do not believe that combining, as explained, applies to a News story/event that is already complete, and in fact already fully and accurately reported upon … and where one aspect is subsequently then selectively picked at a point in time (after the event is completed) and then presented in a News bulletin as fact … with the attendant justification that the full story was previously given (in this case on the previous day).

[5] I further do not agree that NEWS can be used as the method for "salting the mine" (so to speak) in terms of providing stories for the presenters (in this case John Robbie) to pick up with listeners as items of controversy – this is not the function of News and as a general rule I personally cannot conceive that the News could ever be used for premeditated story-prods without some element of bias creeping in.

[6] Of course it may be that a production team and/or presenter picks-up a news story and chooses to run with it as part of a subsequent discussion programme; and this would be perfectly acceptable - with the editorial rights of the broadcaster, coupled with the freedom of expression provisions of both our country's constitution and the BCCSA code, allowing the broadcaster to do so in any manner they deem fit (obviously still within other provisions of the BCCSA code).

[7] Returning to my earlier comment about Clause 11, and the specific News genre of broadcasting; this intentionally drafted Clause of the Free-to-Air Code, is quite clear that *News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by: (a) Distortion,*

*exaggeration or misrepresentation. (b) Material omissions; or (c) Summarisation. (Clause 11. (2))*

[8] I should state however that having re-listened to the broadcasts, and having had more time to consider the matter, I find that my view on the "offending" broadcast has softened somewhat (more in line with the views expressed during the tribunal by Dr Makaula-Ntsebeza; namely that the focus of the broadcast was less on the political intolerance and more on the broader issue of turning the event into a political rally).

[9] Nevertheless, I still do not believe that the broadcaster is entirely blameless, and that the subsequent day's broadcast suffered from a lack of the full facts – something that could have been easily rectified, as raised in the Tribunal, by the mere addition of one sentence that placed the News item into its proper context.

[10] I fully concur that the SAFM news is a red herring, and that the fact that they carried a different interpretation of the story at a similar time is indeed irrelevant. However, I still don't think that this therefore allows the respondent broadcaster a different story in fact/s at this point in time… or as the case may be, an omission of contextualising facts.

[11] In the event, I would have found that the broadcaster had contravened the News Clause of the Code. I would however add that I do not think this was a deliberate event to do so, not that there was any personal or political agenda (in the facts of this specific story) that caused the broadcaster to act in the way it did. Accordingly, I would have recommended the mildest sanction available to the BCCSA, namely a reprimand.

**ALAN MELVILLE**
**BCCSA COMMISSIONER**