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CASE NUMBER: 27/2013

DATE OF HEARING: 30 JULY 2013

JUDGMENT RELEASE DATE:

LEVY

COMPLAINANT

vs

SABC (LOTUSFM)

RESPONDENT

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
 PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)
 ADV BOITUMELO MMUSINYANE
 DR LINDA VENTER

FOR THE COMPLAINANT: Ms Felicity Levy, South African Zionist Federation accompanied by Ms Charisse Zeifert, Head: Communications, South African Jewish Board of Deputies.

RESPONDENT: Mr Fakir Hassen: Manager: Broadcasting Compliance assisted by Ms Veronica Barnard: Compliance Officer, Broadcast Compliance.

Balance lacking, in certain respects, in programme dealing with controversial issues – SAJBD vs SABC (LotusFM), Case No: 27/2013(BCCSA)

SUMMARY

Drama that included argument presenting extremely one-sided views on questions concerning the relationship between Israel and Palestine, called for some form of corrective. This amounted to a contravention of clause 13 of the Code.

Since the contravention amounted to a bona fide error, no sanction was imposed by the Commission.

JUDGMENT

JCW VAN ROOYEN SC

[1] A complaint was received concerning an insert broadcast by a radio station that falls under the SABC, the public broadcaster, in terms of the Broadcasting Act 1999. I referred the matter to a hearing before a Tribunal of the Commission.

[2] **The complaint reads as follows:**

"We wish to lodge a complaint against Lotus FM for a programme which it broadcast on the 21 January 2013 at 09:45. This programme would seem to be in clear violation of ... Clause 12 and Clause 13(1) of the Broadcasting Code of Conduct ["the Code"]. I will argue that Clauses 12 and 13 can be said to be applicable to material other than to news and current affairs and can include fictional programmes. I will expand on this argument during the hearing.¹

I contend that the above programme would seem to be in clear violation of Clause 12 (1) through to (3) and Clause 13(1) of the Broadcasting Code of Conduct ["the Code"].

Summary and Analysis of Complaint

The essence of the complaint is that the relevant programme inserted into what was supposedly a drama programme a lengthy section that very clearly took the form of a politically motivated comment. This was presented in such a manner as to come across to a listener as a statement of indisputable, objective fact rather than as an expression of opinion. As such, it contravened Clause 12 (2) of the Code, which requires that comment has to be "an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to".

It is my contention that Clauses 12 and 13 of the Code are also applicable to material other than to news and current affairs and can include fictional programmes as well. We will argue at the hearing that a fictional drama programme can be so framed as to constitute a vehicle for propagating a political viewpoint. As such, they should be subject to the terms of Clauses 12 and 13 of the Code in the same way as are conventional discussion programmes on controversial issues of public importance.

The programme was an episode of a series entitled Sunshine Mall ['the programme']. In the course of the episode one of the characters, playing the part of the Mall's PR employee ['Character One'], discusses the Israeli-Palestinian conflict with her boss ['Character Two'] against the backdrop of an anti-Israel demonstration then taking place against one of the shops in the complex.

The central point to stress is that the 'discussion' was very obviously framed as a vehicle for the character to propagate an extended, completely one-sided anti-Israel diatribe. In tone and

¹ The introductory paragraph is shortened since the Complainant, correctly, conceded that clause 11, which deals with News, is not applicable to the programme broadcast.

content, it comes across as anti-Israel propaganda and an endorsement of those campaigning for Israel to be boycotted by the international community. Indeed, the segment concludes with the main character overtly endorsing this agenda.

What is said against Israel goes completely unchallenged. Occasional interjections by Character Two, far from contesting or seriously questioning what was being said, are so non-committal and perfunctory as to merely provide an opening for Character One to present further anti-Israel viewpoints. At one point, even Character Two explicitly agrees that Israel is guilty of acts of unprovoked aggression against the Palestinians. In essence, the Israeli-Palestinian dispute is so presented as to depict Israel as being solely the guilty party, one continually guilty of acts of unprovoked aggression and ruthless exploitation against a helpless, wholly innocent Palestinian victim.

It is significant to note that the viewpoint being put forward about the Israel-Palestine issue is explicitly stated by Character One to be a non-mainstream one. In other words, she purports to be telling the 'real' story about what is taking place, as opposed to the supposedly false version that is presented by the mainstream media. In doing so, she asserts that the 'truth' about the situation is being deliberately suppressed by special interest groups ("certain powers of interest") that control the mainstream media. The effect is to insert into what is supposedly a politically neutral, local drama programme an obviously controversial, conspiratorial viewpoint, one unequivocally expressed as an established, demonstrable fact. Again, no challenge, even a token one, is offered. No attempt was made by the producer to present opposing points of view.

Allegations against Israel made by Character One

- Palestinians are said to be forcibly removed by Israel and put into refugee camps without water, electricity and freedom of movement. The context indicates that this is currently happening. There is no mention of the refugee camps in fact being under United Nations supervision and located not in Israeli-controlled territory, but in the neighbouring Arab states of Syria, Lebanon, Iraq and elsewhere.
- Palestinians are said to be subjected to unprovoked bombings by the Israeli military on a daily basis, with children and women being the first to be targeted. This is an extremely contentious, inflammatory and emotive accusation.
- Israel's claims to have been attacked first before responding are declared to be false. This denies that incidents such as rocket and terrorist attacks against Israel by Palestinian militants are taking place.
- Israel is said to be guilty of assassinating Palestinian leaders working for peace, as a deliberate strategy of preventing any peaceful solution to the conflict from being negotiated.
- Israel is likened to Apartheid-era South Africa, with the argument then being made that just as South Africa was boycotted by the international community because of its unjust policies, so should Israel be.
- The relevant segment concludes with a bowdlerised quote by Nelson Mandela purportedly stating that South Africa's freedom was not complete until the freedom of the Palestinians was achieved. What Mandela actually said was: "But we know too well that our Freedom is incomplete without the Freedom of the Palestinians; without the resolution of conflicts in East Timor, The Sudan and other places" (1997 speech on the International Day of Solidarity with the Palestinian People). Hence Mandela did not, as falsely intimated, suggest that the Palestinian cause was of especial importance but rather listed it as one of many others.

The above are some of the damning allegations against the State of Israel made by Character One. Every one of them is, at the very least, highly contentious and open to being challenged on a wide variety of evidential-factual grounds. However, they are presented as indisputable fact, without being subjected to any level of critical examination. The same can be said for various other accusations levelled against Israel in the course of the programme.

Conclusion

In summary, this particular episode of 'Sunshine Mall' was turned into a vehicle for the dissemination of hardline anti-Israel propaganda and media conspiracy theories. Despite these views very much fitting the definition of 'Controversial material' as per Section 13 of the Broadcasting Code of Conduct, the whole is presented as undisputed, authoritative fact without a counter opinion. The programme turns what should be a politically neutral public broadcaster into a platform for the propagation of a wholly biased, accusatory political viewpoint overtly adopting a particular side over an issue over which there exists, in reality, a wide range of interpretations.

This complainant is strongly of the opinion that the viewpoints expressed in the programme can objectively be shown to be factually baseless. However, for purposes of this complaint, it is not necessary for them to be thus refuted; all that is required is to show that the views put forward are of such a nature as to be open to being challenged. It is clear that the programme is one in which a controversial issue of public importance was discussed, and the broadcaster in question (namely the SABC) did not make any effort to fairly present opposing points of view. I believe that any objective person listening to the full broadcast would regard what was being said as being very one-sided and would conclude that there must be another side to the story. The failure of Lotus FM to provide this 'other side', either in the same programme or in a subsequent programme, therefore constitutes a contravention of the Broadcasting Code of Conduct, and in particular Section 13 thereof.

I refer in this regard to the decision of the BCCSA in *Polakow v Radio Islam* ([2003] JOL 10768 (BCTSA)) (based on what was then clause 7.2.1. of a prior version of the BCCSA Code, which is the same as section 13 of the current Code). The BCCSA held as follows:

"A broadcaster which obtains use of the airwaves, which is public property, by way of a license from the State, simply does not have the same rights that a politician might have when addressing the electorate at a rally. A broadcaster has a duty to be fair when addressing an issue of public controversy, as foreseen in clause 7.2.1, which provides as follows... . We ... find that the broadcaster should have afforded substantial time to the contrary view."

It is the task of the BCCSA "to ensure that in programmes dealing with controversial issues of public importance, fairness is obtained".^[1]

While a broadcaster enjoys freedom of expression and editorial autonomy, "the producer of the programme has the responsibility to treat opposing points of view fairly. ... The producer should always be wary of the temptation of propaganda and sensationalism".^[2]

[3] The Broadcaster responded as follows:

"BCCSA COMPLAINT - SAJBD - LOTUS FM SUNSHINE MALL DRAMA - ALLEGED HATE SPEECH - 21.01.13

[1] M-Net v CT International Finance (Case number 42/2012), para 7

[2] M-Net v CT International Finance (Case number 42/2012), paras 8 and 9

1. We agree entirely with the initial statement by the complainant that “a fictional drama programme can be so framed as to constitute a vehicle for propagating a political viewpoint.” This has in fact occurred in many instances in fictional drama programmes, where such viewpoints are often expressed, and the Code makes provision for allowing this.
2. However, we disagree with the complainant’s view that Clauses 12 and 13 are applicable to drama programmes, which by their nature allow for controversial issues to be aired. As stated in our earlier response, this was a drama programme and not a discussion programme, which again negates the applicability of these clauses.
3. We respectfully submit that if the complainant wishes to have the Code of the BCCSA revised, as appears to be the intent here, that it be addressed as a separate issue directly with the Commission. We will not argue this principle issue further, but address some of the other issues raised in the complainant’s submission which will also highlight the inapplicability of the clauses cited by the complainant.
4. The programme was not “supposedly a drama” but has been clearly known as a drama series to its audience since its inception. It has never purported to be and has never been understood by its audience as anything else.
5. The comments in question on this episode were not “politically motivated”, as alleged by the complainant, but were expressions of opinion by the characters in the drama series, which were in line with the Code provisions that allows for this.
6. As the complainant correctly points out, the discussion on Israel was against the backdrop of an anti- Israeli demonstration taking place outside the store at which the characters work. However, her assertion that the discussion was “very obviously framed as a vehicle for the character to propagate an extended ... anti-Israeli diatribe” is rejected, as this was done to reflect on the reasons for the demonstration.
7. Being a drama, the script allows for opinions to be expressed by characters without the need to have a counter-view to this opinion, even though, as the complainant concedes, there was an attempt to do so by the second character in the discussion.
8. The reference to the comments attributed by the character to former President Nelson Mandela suggests that these are “falsely intimidated.” This is not true, as there was indeed a reference to Palestine by the President, which was paraphrased by the character in the drama, which again is within the limits of the prescripts of this programme genre.
9. There are huge, well-documented campaigns internationally, as well as in South Africa, calling for sanctions against Israel in diverse ways, many of them comparing the situation there to apartheid-era South Africa.
10. It is argued by the complainant that the statements made by the character could be “open to being challenged on a wide range variety of evidential-factual grounds. While that may well be true, we again have to point out that this was a drama, and not a documentary or news programme where the provisions of the Code would certainly have demanded this.
11. The complainant brings into question the political neutrality of the SABC as a public broadcaster. We would point her to our commitment not only to the BCCSA Code of Conduct and our ICASA licence conditions, but also our own Editorial Policies which debar such bias. But again, we have to point out that this would be the rule that is carefully adhered to in programme genres that demands this, such as documentaries or News items, but not drama.
12. Drama by its nature allows for characters to express opinions and act in ways which

could be seen by members of its audiences as contrary to their own views, opinions or social norms. As the complainant correctly points out, “I believe that any objective person listening to the full broadcast would regard what was being said as being very one-sided and would conclude that there must be another side to the story.” We would argue that one of the purposes of drama is also to get audiences to investigate by themselves this “other side” to the one presented by characters in a drama. It is not the terrain of drama to present opposing views, as would indeed have to be done in other programme genres which demand it.

13. We might add that the drama series, with its intent to be as topical as possible when its characters discuss events, has indeed had characters expressing opinions or views on a wide range of issues, including the Marikana massacre; the Gupta plane landing at Waterkloof Air Base; the Indian court ruling which had an impact for people’s access to generic medicines in South Africa; Eskom’s request for a 16% price hike and government’s granting of 8%; the passing of the Information Bill; and the huge drug bust in Durban. In all instances, there was no right of reply afforded to any of the parties named in these discussions, as is effectively being demanded by the complainant.
14. The reference to the decision of the BCCSA in *Polakow v Radio Islam* (2003) does not apply in this instance, as it was related to a discussion programme and not a drama. It just serves to highlight further our assertion that the matter at hand does not fall subject to the provisions of the Code for this Tribunal to rule that the drama series should have ensured an opposite view to that expressed by characters in the drama.”

EVALUATION

[4] **The relevant clauses of the Code read as follows:**

12. Comment

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

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.

[5] Firstly, for the purposes of this judgment, we will accept without deciding, that the programme did indeed amount to drama.² However, drama is not explicitly excluded

² In accepting for purposes of this judgment that the broadcast was a drama, without deciding the point, it was not necessary to apply the well known rule of law that whatever the parties or a party to a dispute calls the document, the true nature should be established. Thus Innes JA (as he then was) stated as follows in *Zandberg v Van Zyl* 1910 AD...”Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not

from clauses 12 and 13 of the Code. Clause 12 requires opinions on matters of public importance to be based on the truth or to have a reasonable connection to the truth, and clause 13 requires balance when matters of public importance are discussed. Secondly, we do not agree with the Complainant that the programme amounted to propaganda and that the SABC overstepped its general mandate in terms of the Broadcasting Act 1999. Thirdly, we have often stated that perfect balance is generally impossible to achieve in programmes which deal with matters of public importance. Fourthly, we have also held that there are some foreign issues that do not qualify as matters of public interest. Of course, “public interest” does not, in law, amount to matters “that are interesting to the public”.³ The reason for being less strict on some foreign issues is that it is often extremely difficult to establish what “balance” may constitute in a context that is foreign. Balance in the broadcast of local issues of public interest is important for South Africans since the issues discussed frequently pertain to matters that are politically relevant and significant. Lastly, although clauses 12 and 13 pertain especially to local issues, that does not mean that the SABC and other broadcasters may broadcast news on foreign matters that is not balanced. The news

infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is: not what in form it purports to be. The maxim then *applies plus valet quod agitur quam quod simulate concipitur*. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.”

³ See *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) Corbett CJ said in delivering the majority judgment (at 464C-D): “(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known . . . (2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest...” Quoted with approval by Hoexter JA in *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A) at 779 and Hefer JA in *National Media Ltd v Bogoshi & Others* 1998(4) SA 1196(SCA) at 1212 where reference is made to Asser *Handleiding tot de Beoefening van het Needelands Burgerlijk Recht* (9th Ed vol III at 224 para 238: “Een belangrijke grond ter rechtvaardiging van de uitlatingen, waarop in zaken van aantasting van eer en goede naam veelvuldig een beroep wordt gedaan, is het algemeen belang. . . . In de praktijk wordt zij vooral ingeroepen ter zake van uitlatingen die via de pers en radio en televisie worden verspreid: het algemeen belang is hier uiteraard gelegen in de, door Grondwet en verdragen gewaarborgde, vrijheid van meningsuiting die de pers in staat stelt al dan niet vermeende misstanden aan de kaak te stellen. Met name - doch niet alléén - in deze gevallen berust het oordeel omtrent de onrechtmatigheid op een afweging van belangen, waarvan de uitkomst afhankelijk is van alle omstandigheden van het geval.”(italics added) Translated this means: “In practice the public interest is especially employed in matters concerning views expressed via the printed media and television: public interest is, within this context, based on freedom of expression, as guaranteed by the Constitution and by treaties, to expose alleged abuse (and or evil in society). In deciding whether the defence of public interest was lawful usually depends on a balancing of interests – the outcome of which is dependent on the facts of each case.”

clause 11 requires high standards of neutrality and balance, particularly because of the nature of news, which should be broadcast in a manner that is succinct and to the point.

[6] Having said the above, the overall impression of the drama which the Complainant focuses on, is that it supports an anti-Israel view. Of course, dramatic (or literary or artistic) works are permitted to be one-sided, and it would amount to a form of dictatorial censorship if this were not the case.

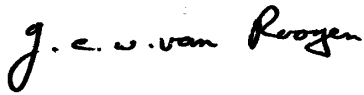
[7] The Constitutional Court has stated that no right is absolute.⁴ This also applies to the right to freedom of artistic expression. It should be mentioned that if we had not known beforehand that the broadcast amounted to play acting, the programme may very well have been categorised as an ordinary discussion in regard to the political situation in Israel. Ultimately, the broadcast amounted to the presentation of one-sided views, some of which called for some form of balance, which was lacking. We will limit the latter finding to the first two points complained about. The claim in the first is clearly incorrect; the statement that children are targeted first by the Israeli military amounts to a suspicion being elevated to the level of fact. Both claims called for an answer or, at least, a question as to whether they were true. The assassination claim is of so general a nature, clearly amounting to hyperbole, moreover, that no corrective is needed. The view concerning Israeli policy and apartheid is, of course, a view which has frequently been expressed, and listeners would have known that this is a perspective which is not held by Israel and its supporters and is, in any case, debatable. The reference to what Nelson Mandela said is not so significant that we need to express an opinion on that.

[8] We accordingly find that clause 13 of the Broadcasting Code was contravened by the first two matters raised by the complainant.

⁴ De Reuck v DPP and Others 2004(1) SA 406(CC) where Langa DCJ states as follows: “[55] In the High Court judgment, the view is expressed that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, and that s 28(2) of the Constitution 'trumps' other provisions of the Bill of Rights. I do not agree. This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36. (Note: section 28 deals with the rights of children)

[9] We are of the view that the contravention amounted to a *bona fide* error, and that it is not necessary to reprimand the SABC or impose another sanction.

The complaint is, accordingly, upheld. We have decided not to impose a sanction.

A handwritten signature in black ink, reading "J.C.W. van Rooyen". The signature is written in a cursive, flowing style.

JCW VAN ROOYEN SC
CHAIRPERSON

Commissioners Viljoen, Mmusinyane and Venter concurred with the judgment of the Chairperson.