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CASE NUMBER: 29/2013

Date of Judgment: 15 July 2012
JUDGMENT RELEASE DATE: 18 JULY 2013

In the matter between:

LORGAT **APPELLANT**

vs

SABC (SAFM) **RESPONDENT**

Editorial activities of SABC not within the jurisdiction of the BCCSA. Right to reply limited to persons or organisations directly or indirectly affected by a broadcast. Application for leave to appeal not granted. Lorgat v SABC Case No: 29/2013 (BCCSA).

SUMMARY

An application for leave to appeal was lodged by the Applicant. The Chairperson held as follows:

> **The Applicant's case relates to the alleged inner workings of the SABC. There is no reasonable basis upon which an Appeal Tribunal of the BCCSA is likely to come to a different decision (i.e. that the first Tribunal was "clearly wrong", or even that it was "wrong") to that of the first Tribunal in this regard. The BCCSA has no jurisdiction to pronounce upon the inner editorial workings of the SABC.**
>
> **The right of reply is a right which is granted to persons and organisations which are directly or indirectly affected by the alleged omission by the SABC to grant**

them such a right in a *broadcast*. It is not for the Applicant to apply for that right without the mandate of such persons and organisations.

JUDGMENT

JCW VAN ROOYEN SC

[1] This an application to me as Chairman for leave to appeal against the judgment of the BCCSA Tribunal in case 13/2011, in which the complaint of the Applicant was not upheld.

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

"INTRODUCTION

The dispute failed to deal with the essential concern of media activists, like the complainant about the need to protect the public broadcaster from non transparent lobby groups that threaten the mandate of the public broadcaster. The complainant spelt out his motivations for taking up the matters at the hearing. In addition, the complainant implied in correspondence to the SABC prior to the hearing, that he considered public broadcasting as a public good and part of the commons, and thus an essential vehicle for the democracy and given our history the democratization in our society.

A serious drawback of the proceedings is that the arguments were heard but not fully considered. I feared that non recording of proceedings would prejudice my lengthy input, sent the speaking notes to the registrar which was forwarded to the presiding office of the tribunal. I will show hereunder what the presiding panel and the chair failed to apply their mind to.

1. The judgment of 2 July 2013 failed to understand the purpose of the complaint when it ruled : "(7) In so far as the right to reply is concerned, the Complainant stated that it was not his intention to call upon the BCCSA to grant him a right to reply. His argument is that more persons or organisations should be called upon by the SABC to reply when discussion programmes are aired. That brings the matter to a close. If another person or entity believes that it had a right to reply, it should have lodged a complaint. The present Complainant does not have the right to do so on their behalf."

   By seeking to confine the complainants interest in the matter around direct personal interest in granting or denying a right to reply is silly as ignored the thrust of the complaint's argument as outlined in the opening lines of the speaking notes (attached). These relate to a media activist's commitment to exposing non-transparent and illegitimate influence of some lobby groups on the public broadcaster. It was not a personal matter and of public interest and importance.

2. The failure to "take calls from listeners" in the shows in question, rendered the interviews as platforms for uncontested propaganda. The chairperson rules in favour of the SABCs censorship of public engagement in a programme "in the Spotlight" that usually takes calls from the public. This decision, I (the complainant) argued, was against the public interest and the public's right to know and is depended on the

arbitrariness of some committee of the SABC, something we believed we left behind with Apartheid. This decision to have calls or not is not based on policy or law and is left to arbitrariness. Let me explain this failure: The SABC Editorial Policy (page 15), simply asks that diligent records be kept of callers and not a denial of citizen's rights. It states:

PHONE-IN AND DISCUSSION PROGRAMMES

Phone-in and discussion programmes are an accepted and important means of broadcasting

individual points of view on topics. However, the hosts are expected to take special care to uphold the SABC's editorial principles of fairness, impartiality and balance, and to ensure that a wide range of views are broadcast. A host should steer callers and guests away from making comments that may be against the law, or SABC policy, and reprimand or contradict them tactfully, when necessary. It is important to ensure, as far as possible, that programmes do not become a focus or platform for organised pressure groups and irresponsible individuals. A short pre-interview by a "screener" should be used for these purposes. A record is to be kept of the names of all the speakers and their contact information, and retained for at least 30 days. When written comments are received, hosts should be vigilant not to read out comments on air with factual inaccuracies or with content which violates the law or SABC policy.

Since phone-in and discussion programmes are not a scientific way of surveying public opinion on any matter, there should be no suggestion - explicit or implicit - that the views broadcast reflect wider public opinion. More on this subject is given in the News, Current Affairs and Information Programming Policy."

In addition, and as I was writing up this Appeal on the 4 July, SAFM in a show hosted by Mr Garda (currently hosting a morning show) quite correctly hosted one Zweli Sangweni, who presented himself as a founder and leader of a group whom I think called themselves Mzas'ebuye, who advocated on the radio for the removal of Indians generally or in the KZN from the provisions of the Broad based Black Economic Empowerment legislation. I can imagine that a large number from the Indian community may regard Mr Sangweni as racist and therefore should have no space on the airwaves. Mr Sangweni said that these arguments must be heard, and I agree with him. Importantly, calls were allowed and, whilst I am in agreement others may have offended others, I see it as the mandate of the public broadcaster which must, interalia, use "controversial matters" to inform and educate citizens and not censor the public. So, how does management justify not having callers?

Why is it that some controversial matters can be opened to the public and others not? I can only conclude that the panel and the presiding officer have failed to embrace freedom offered by the new constitution and limiting the capacity of people 20 years into our new democracy to handle relatively complex debates.

1. Israel – Palestine and the integrity of the public broadcaster: the judgement of the BCCSA, page 6, Prof van Rooyen et all get it wrong when they assert that "in this specific instance, the subject of the broadcast was not the Israeli-Palestine issue per se, but rather interviews with two persons, one a Palestinian author and the other an ex-child slave from the Sudan, which inter alia touched upon the deeper issue of Israel and Palestine". In the motivation for the tribunal hearing the complainant expressly stated that the automatic right to reply was present for

some groups, eg the SAJBD's hence they were given balance / right of reply even before Ms Abulhawa had spoken.

At all times, the complainant (I), hinted at some unspoken written or unwritten relationship between the public broadcaster and the SAJBDs, hence they get a right of reply – balance before a programme is even aired. The complainant strongly suggested that the SABC explains how is it that the SAJBD can offer a guest when the public at large were not informed who the guest would be on the show. It challenged the SABC to show how this offer was made.

The complainant contrasted this with the initial rejection of a legitimate right of reply for what was said by the representative of the SAJBD's who was a person from South Sudan, Mr Simon Deng. The right of reply was only granted after the Sudan embassy wrote a longer email spelling out the consequences for failure to have a speedy right to reply to secure the interests of their country and people. Thus, whilst the original programmes were held in mid- March, the true right of reply or balance, was given only on 5 April.

In elaboration of the dispute, I pointed out that more evidence would be shared at the hearing, which I presented (see below) and which was ignored. Thus we find:

a) The panel failed to apply its mind on the preferential treatment to some lobby group viz the SAJBD vs the begging for a right to be heard and for balance by the Sudan embassy.

b) In addition, the presiding panel failed to heed the SABC's editorial policy on the use of guests, analysts and specialist commentators (page 23) and thus failed to rule fairly. It expressly states that **"**the SABC's principle of providing the full spectrum of opinions, perspectives and comment also applies to selection and use of guests, analysts and specialist commentators. This requires editorial staff to choose, as participants, people who have a wide range of views, opinions and perspectives, and are drawn from all over the country. Such people should be required to declare any vested interest they may have in the matter to be discussed." When Mr Deng was asked who he was representing, I pointed out in the hearing, that Deng was vague and indeed lied. From the transcript he was asked by Mr Ashraf Garda:

<u>Extract from Transcript (done by author)</u>

ASHRAF: ok just to tell the listeners that yesterday we chatted to Susan Abulhawa who is a Palestinian refugee, living in the USA now and she has written a book called Mornings in Jenin and she is the guest of the Israel Apartheid Week and has spoken at a few engagements around that issue and certainly agrees with the phrase very much so, that Israel is in fact an Apartheid state an Apartheid Nation.

Ashraf Garda : Yourself if I understand it correctly, Simon are a guest of what... the South African Jewish Board of Deputies?

Minute 18:12

Deng: I'm a. ..I'm the guest of the friends happen to be a Jewish by race here in South Africa

And i am here also to, injected myself into this argument which i rejected a long time ago, four years ago when other people talk about it, i say that it is not true...and

Let's make a comparisons

Let's make a comparison with the state of Israel and the country of Sudan based on the fact that i put before everybody...."

There was no reason to lie or be coy, unless there was something to hide, as both SABC management and SAFM station manager, spelt out in their correspondence that Mr. Deng was a guest of the SAJBDs. It is my contention that the right of users of the SABC to be informed of whom the guests are and whom or whose vested interests they represent is a principle of quality public broadcasting, and citizen centred reporting. This was ignored which undermined my case.

c) In the presentation, I began to read a letter from Wendy Kahn of the SAJBD's and their agreement with the SABC. As I read it, mid-way through I asked the chairperson Van Rooyen if I should continue to read, he replied that I must continue and he found it interesting. However, he failed to consider the impact of such "agreements" on the functioning of a public broadcaster's editorial policy which expressly guards its independence. The SABC chose not to comment on this document in the hearing. This is a failure that must be remedied in this or other forum. The letter is reproduced hereunder.

SAJBD Cuts a Deal with the SABC

Response at 30-07-2007

We contacted the SAJBD for comment in response to our earlier criticism of the deal they made with the SABC around last year's blacklisting scandal. Their response, from National Director Wendy Kahn, follows.

SAJBD Response to Criticism over SABC Deal

Thank-you for giving us the opportunity to respond to your comments on the SAJBD's decision not to go ahead with its complaint against Dr Snuki Zikalala.

The points raised go to the heart of what the SAJBD is and what we seek to achieve on behalf of the Jewish community.

The Board is first and foremost a Jewish advocacy organisation. We intervene in all cases in which we believe Jewish civil rights have been infringed. In this regard, much of our work involves media activism. Thus, when we learned that Dr Zikalala had blacklisted Paula Slier from reporting on the Middle East because the SABC as a matter of policy took a pro-Palestinian stance, we had no hesitation in lodging a formal complaint with the Independent Communications Authority of South Africa.

The decision to withdraw our complaint was not an easy one to make. It is

a very serious matter when a senior official of the State Broadcaster declares, contrary to the SABC's policy, that its news coverage must be slanted towards a particular political point of view. That this bias was explicitly in favor of the Palestinian (and therefore, by definition, against the Israeli) standpoint made this of particular concern to the Jewish community.

On the other hand, pursuing an official complaint with ICASA is not a matter to be adopted lightly. For over nine years now, the Board has been involved with ICASA regarding its complaint against Radio 786, and the matter is still not at an end. The process has been enormously complicated by matters of a technical nature, and there is every prospect that a complaint against the SABC might follow a similar route. This is not in itself a reason to shy away from the legal route, but it does very much come into the reckoning when an opportunity presents itself of settling the matter "out of court".

In making our decision, we had to make a judgment call as to what would best serve the interests of the constituency we represent. It was decided to provisionally meet with Dr Zikalala to see whether the core dispute we had with him could be resolved without the matter going to a formal ICASA hearing.

It cannot be too strongly emphasized that we did not decide to withdraw our complaint on the basis of a single "feel-good" meeting and a few verbal reassurances. We asked for, and received, a number of concrete undertakings by the SABC to work with us in addressing the problem of anti-Israel bias within the organisation. These undertakings, which we now have in writing, are:

1) *An independent monitoring organisation will monitor the coverage of the SABC news on the topic of the Middle East for at least a year. The SABC is currently using Media Tenor, and this will most likely be the organisation used for this purpose. The SABC and the SA Jewish Board of Deputies will meet on a quarterly period to discuss the content of the coverage by Media Tenor. The latter will commence operation as from the 1 August 2007, and the first meeting will take place in the first week of November.*

2) *The leadership of the Jewish Board of Deputies would meet with the editorial staff of the SABC, to provide an understanding of the SA Jewish community and its views on the Middle East.*

3) *The Jewish Board strongly recommended that where debates on the Middle East take place, moderates from both sides be used. They noted that there was no insight to be gained by allowing those who refuse to recognize the right of the other side to exist, to debate the Middle East. The suggestion was made that genuinely even-handed academics be used to discuss the situation. If the appropriate people were unavailable in South Africa the journalists should look*

elsewhere.

We have since already had the opportunity to address and engage with senior members of the SABC editorial staff in Johannesburg and nationally via teleconference facilities. This was an excellent forum for us to develop relationships with these key people in the SABC, answer their questions, bring to their attention our concerns over the way the Middle East conflict has been depicted and in general provide a face for the SAJBD and the SA Jewish community.

The process of engagement we have initiated with the SABC will be an ongoing one. The quarterly reports of Media Tenor will be of special significance since they will provide a considered analysis by a respected, wholly impartial media monitoring body, whose views cannot be casually dismissed as partisan.

So far as the broader question of the independence of the national broadcaster goes, this is indeed an issue of national importance, and it concerns Jews no less than it does other South African citizens. Addressing it, however, falls outside the mandate of the SAJBD, whose mission, as already noted, is to act as a lobbying body specifically on matters of Jewish concern. Addressing the wider implications of the blacklisting scandal rightfully falls within the purvey of such democratic watchdog groupings as the Freedom of Expression Institute. The latter is already dealing with the matter in a most dedicated and professional way.

WENDY KAHN, NATIONAL DIRECTOR

2. Finally, in the hearing I asked why the right of reply and balance appears to be most applicable to matters “Middle East” and not on the economy and other spheres of life, like sport. The SABC's Fakir Hassen in response, laughed and adding that there are no other views, or alternatives to the economic news and economic indicators, etc. This was not considered as it was germane to the dispute and again touched on the presence of powerful lobby groups which potentially undermines the functioning of a public service broadcaster.

   In the interest of transparency and accountability, I am referring this appeal to both the South African Human Rights Commission and the Public Protector for their perusal and information.”

[3] **The Respondent filed the following opposing grounds:**

“Thank you for the opportunity to respond to the appeal in this matter. Our comments are as follows on your two requests.

1. The complainant is clearly trying to get the BCCSA to rule on a matter which is completely outside its jurisdiction, i.e. the editorial right of the SABC to decide the form and composition of its content. He has not been able to prove at the hearing any bias in the broadcasts in question, which would obviously be within the ambit of the BCCSA. The Commission has, we believe, correctly ruled in this matter at the hearing, where the complainant was allowed sufficient time to state his case. We do not see any new

relevant material in the submission provided as a basis for appeal which could get an appeal hearing to come to a different conclusion.

2. Although we do not believe that the grounds for appeal are justified, we have no objection to the Chairman deciding the matter on the papers without hearing the parties involved."

EVALUATION

[4] As background to the above, it should be mentioned that section 1(2) of the Broadcasting Act 4 of 1999 provides as follows:

> (2) Any interpretation of the provisions of this Act must be construed and applied in a manner which is consistent with freedom of expression and the journalistic, creative and programming independence of the broadcasters guaranteed by the Constitution.

In addition, section 6 of the same Act provides as follows:

> **6. Charter of Corporation**
>
> (1) The Corporation must comply with the Charter as outlined in this part.
>
> (2) The Authority must monitor and enforce compliance with the Charter by the Corporation.
>
> (3) In terms of this Charter, the Corporation, in pursuit of its objectives and in the exercise of its powers, enjoys freedom of expression and journalistic, creative and programming independence as enshrined in the Constitution.

[5] Whatever the powers of the Independent Communications Authority of South Africa ("ICASA") and its Complaints and Compliance Committee in regard to the internal organisation of the SABC may be[1] – and I withhold any opinion on that – the task of the BCCSA is to adjudicate on material *as broadcast.* Our task is not to delve into the inner workings of the SABC. We adjudicate the actual *broadcast*, and not the internal editorial activities of the SABC. I shall, moreover, refrain from expressing any opinion on the role of the Public Protector and the South African Human Rights Commission as to editorial decisions by the SABC. The functions and powers of these state entities/officials are regulated and circumscribed by legislation which grants them certain powers, which may, of course, not be in conflict with section 192 of the Constitution of the Republic of South Africa, which grants exclusive regulatory powers to an independent entity over broadcasting in the Republic. I mention this

[1] *Cf Freedom of Expression Institute v Chair, Complaints & Compliance Committee & others* [2011] JOL 26704 (GSJ).

since I have noted that the Applicant has copied these entities/officials with this application for leave to appeal.

[6] Both the complaint of the Applicant and the grounds of appeal concentrate on the editorial activities of the SABC. I express no opinion on allegations in this regard, since, even if proved to be true, it would not assist the case of the Applicant before the Appeal Tribunal. The BCCSA has no jurisdiction in this regard. Furthermore, the right of reply is a right which is granted to persons and organisations which are directly or indirectly affected by the alleged omission by the SABC to grant them such a right in a *broadcast*. It is not for the Applicant to apply for that right without the mandate of such persons and organisations. The latter may very well not wish to reply or become involved in a matter before this Tribunal. And were they in fact to apply for this right, they would have to demonstrate that clause 13 of the Broadcasting Code grants them such a right.

[7] There is, accordingly, no reasonable basis upon which an Appeal Tribunal of the BCCSA is likely to come to a different decision (i.e. that the first Tribunal was "clearly wrong", or even that it was "wrong") than that of the first Tribunal.

The application for leave to appeal is, accordingly, not granted.

JCW VAN ROOYEN SC
CHAIRPERSON