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CASE NUMBER: 41/2013

DATE OF HEARING: 27 NOVEMBER 2013
JUDGMENT RELEASE DATE: 31 DECEMBER 2013

GLOBAL VISAS **COMPLAINANT**

vs

M-NET **RESPONDENT**

TRIBUNAL: **PROF HP VILJOEN (DEPUTY CHAIRPERSON)**
DR N MAKAULA-NTSEBEZA
ADV R SEWLAL

For the Complainant: Liam Clifford, Director of Global Visas

For the Respondent: Dr Dario Milo: Partner, Duncan Wild: Associate, Stuart Scott: Candidate Attorney of Webber Wentzel Attorneys and Mr George Mazarakis: Executive Director, Carte Blanche.

Complaint that programme on company that provides service to obtain visas on behalf of clients was partially presented and factually incorrect, was guilty of misrepresentation, breached the privacy and impaired the dignity of the director/owner - Tribunal finding that comment was honest expression of opinion made on facts truly stated or fairly indicated and referred to, that Complainant had himself to blame for not presenting his side of the case - Tribunal finding balance in presentation - Tribunal finding Complainant's rights to privacy and dignity overridden by legitimate public interest - Global Visas vs M-Net, Case No: 41/2013(BCCSA)

SUMMARY

Complaint about a programme in which company that provides service in obtaining visas on behalf of clients was exposed, according to the Broadcaster, as a business that made inaccurate representations to the public as to the likelihood of obtaining visas and employment in other countries and to shift the risk of failure to obtain such onto the clients. The Complainant averred that the exposé was partially presented and factually incorrect, that the programme amounted to a misrepresentation, breached the privacy and impaired the dignity of the director/owner. The Tribunal found that the comment by the Broadcaster was an honest expression of opinion made on facts truly stated or fairly indicated and referred to, that Complainant had himself to blame for not presenting his side of the case. The Tribunal found there was balance in the presentation and that the Complainant's rights to privacy and dignity were overridden by a legitimate public interest.

JUDGMENT

PROF HENNING VILJOEN

[1] The Registrar received a complaint concerning a programme called "Visa to Nowhere" which was televised during a Carte Blanche broadcast on 28 July 2013 between 19:00 and 20:00. Carte Blanche is a well known television programme of investigative journalism. The complaint was lodged by Mr Liam Clifford, a director of Copyright Immigration Compliance Services Limited, trading as Global Visas. For purposes of this judgment we will refer to the Complainant (Global Services) and Mr Clifford interchangeably and to the Respondent as Carte Blanche.

[2] **The complaint comprises the following:**

2.1 "The insert was impartially (*sic*) presented and also factually inaccurate". We will assume for purposes of the judgment that the Complainant means "partially presented". The Complainant then refers to certain statements put by him to the broadcaster which were not broadcast.

2.2 Misrepresentation, in that:

2.2.1 the immigration expert consulted by the Broadcaster was not an accredited representative;

2.2.2 the example presented by the Broadcaster was inappreciable as it was founded on only one of two possible emigration routes;

2.2.3 the Broadcaster alleged that the Complainant's business acted in contravention of the Consumer Protection Act;

2.2.4 the Broadcaster suggested that the Complainant posed unlawfully as a director while he had been barred from being a director in the United Kingdom in 2008.

In respect of the last complaint, the Complainant also endeavoured to bring it under the heading of breach of privacy and impairment of dignity.

2.3 Lastly the Complainant alleged that fundamental material was not put to him, thereby implying that he/Global Visa did not have a reasonable opportunity to respond.

[3] The Broadcaster responded to the complaint in a document of some 33 pages. The response will be discussed in the body of this judgment.

[4] On 1 October 2013 the Complainant sent a "Supplement to complaint" to the BCCSA. The Broadcaster (Respondent) alleges that this supplement contains new complaints and that, because the new complaints were lodged outside the 30 day time limit which the rules of the BCCSA determine, we should disregard what the Respondent calls the "second complaint". In view of the fact that the Respondent has nevertheless responded in detail to the "second complaint" and that the "Supplement" pertains to the same broadcast, we have deemed it reasonable and in the interest of justice to hear arguments on this point from both sides.

EVALUATION

[5] This programme about the actions of a company whose business it is to try and secure visas and work permits for their clients in other countries, and the way in which it allegedly treated its customers falls squarely in the area covered by clauses 28.2 (comment on actions or events of public importance) and 28.3 (the right of reply in a broadcast on controversial issues of public importance) of the Code of Conduct for Subscription Broadcasting Service Licensees.

[6] In the first instance the Code requires that the comment must be an honest expression of opinion and that it must be presented in such manner that it appears clearly to be comment, and it must be made on facts truly stated or fairly indicated and referred to.

The following dictum from the case of Grove v e-tv[1] demonstrates the Tribunal's approach to the requirement of comment being an honest expression of opinion:

"Yet it has constantly been our approach to clause 35 (clause 28.2 of the current Code) that only in cases where it is absolutely clear that there was an unfair comment on a matter of public importance would we find against a broadcaster under this clause. Balance and fairness are difficult aims to meet, and so, in order not to stifle freedom of expression, in cases where doubt exists we would rather come to the finding that a programme has not contravened this clause of the code, than stifle debate and free speech, even though such speech may not have been wholly sensitive or balanced. Freedom of expression is too precious an asset in our new democracy to chip away at without very good reason."

[7] In *South African Police Services vs e.tv*[2] the Tribunal said the following about clause 35 of the Free-to-Air Broadcasting Code which is identical to clause 28.3 of the Subscription Code:

"Since clause 35 places a rather vague duty on broadcasters which is practically, and almost always, unattainable, the approach has constantly been that it must be unequivocally clear that the requirements of the clause have not been complied with before a finding against a broadcaster is made. This is a freedom-of-speech orientated approach, and it accords with the approach of the Constitutional Court that the primary question should be whether the freedom of expression guarantee could not accommodate the material broadcast. So, even if the material broadcast demonstrates some bias or is even offensive, it does not automatically follow that the Broadcasting Code has been contravened. It is only in cases where it is clear that a limit to the fundamental right is justified in terms of section 36 of the Constitution of the Republic of South Africa, that a finding against the broadcaster would be justified."

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[1] Case 29/2004.
[2] Case 12/2008.

[8] After viewing the programme and listening to the arguments on both sides, we have come to the conclusion that the comments by Carte Blanche were honest expressions of opinion and were made on facts truly stated or fairly indicated and referred to. Of all 7 instances which the Complainant alleges were factually inaccurate, the Broadcaster either did not comment on them in the programme or broadcast the Complainant's version in the programme. Global Visas also complained that Mr Kerr, who was interviewed in the programme, was not an expert on Canadian migration requirements. The Broadcaster admitted that he was not accredited to give advice on migration to Canada for a fee but stated that he was in the business of giving advice on migration matters for 20 years. Mr Kerr stated that it was his "belief" that it is "very difficult" to get into Canada if you are over 45. Countries to which South Africans usually immigrate probably do not differ so much in their requirements for visas, so the statement was not so far off the mark. The Broadcaster was therefore not in contravention of the requirement that the comment was fairly indicated and referred to.

[9] There emerged considerable argument around the so-called emigration routes. From the "Supplement to complaint" it appears that there was a second route which the Broadcaster did not refer to when it commented on the way Global Visas treated and advised clients. In the "terms of engagement" document which was handed to the 2 reporters with a hidden camera, no mention was made of the country to which they purported to intend to emigrate and mention is only made of the "working and living route". In the 2 case studies which were included in the programme the point was made that not sufficient information was given to the clients of Global Visas. The question is not whether insufficient information was given on the programme but whether the comment was an honest expression of opinion and was made on facts truly stated or fairly indicated and referred to.

[10] Part of the comment related to alleged contraventions of the Consumer Protection Act by Global Visas. We must make it clear that it is not within the purview of this Tribunal to find that Global Visas was in breach of the Consumer Protection Act or not. This is for a court of law to decide. The question for us to decide is whether the comments by Carte

Blanche was made honestly and on facts truly stated or fairly indicated and referred to. The allegation was made in the programme that Global Visas contravened the said Act by, *inter alia* purporting that the estate agents Pam Golding would assist clients of Global Visas in finding accommodation in Canada. This promise was apparently not true and it was admitted as such by Global Visas. Some misrepresentations were also made to the 2 reporters from Carte Blanche and in the 3 sets of terms and conditions regarding the limitation of their liability.

[11] In the context of an investigative programme like this one it is inevitable that opinions would differ and the complainant would invariably question the truth of certain of the comments made by the broadcaster. This is the reason why clause 28.2 of the Code should be read with clause 28.3, where controversial issues of public importance are involved. The requirement for a programme such as this is that reasonable effort must be made by the broadcaster to fairly present opposing points of view. The purpose is obviously to give the complainant a fair chance to refute any comments by the broadcaster that the complainant deem to be incorrect. It is important to note that clause 28.2 does not require absolute truthfulness of the comments. It merely requires that the comment must be an honest expression of opinion, that it must clearly be understood to be comment and that the broadcaster must be able to demonstrate its reasons or motivation for the comment, in other words that it must be able to point to the facts on which the comments were made. In light of this we conclude that all the comment by Carte Blanche in this programme comply substantially with the requirements of clause 28.2.

[12] Clause 28.3 is very important and is one with which we must deal with great circumspect. While we have the duty to protect the right of broadcasters to freedom of expression, we equally have the duty to protect the right of others to the goodwill of their business undertakings against broadcasting that might damage their business. This duty is especially big in a situation in which the broadcaster can use the airwaves to bring an

undertaking into disrepute[3]. We must decide whether balance was obtained in the programme in the sense that the business had the opportunity to refute allegations against it and put its view across. The question is therefore whether Carte Blanche complied with the requirement to fairly present opposing points of view or not.

[13] As stated above, Carte Blanche is an investigative journalism programme which probably works according to the idiom: "There's no smoke without a fire". It so happened that Carte Blanche became aware of numerous complaints about the service provided by Global Visas and many complaints about the company were posted on the Internet consumer complaints site called hellopeter.com. After investigating the complaints against the company by talking to disgruntled customers and even to some staff, the team from Carte Blanche endeavoured to interview the manager of the company in Cape Town, Mr Wallace. Although at first Mr Wallace agreed to be interviewed on camera, he later through his lawyers set conditions for the interview: i*nter alia* requesting the names of people who complained about the company. After the information had been supplied, Mr Wallace failed to respond to further requests for an interview. Instead, he consulted another firm of attorneys, Fasken Marthineau, who then submitted certain statements about Global Visas to Carte Blanche. As the deadline for the production team had expired, Carte Blanche went forth to broadcast the programme about Global Visas without having done the interview. The facts stated above have not been refuted by the Complainant, so we accept them to be correct.

[14] In fairness to the Complainant we refer to an e-mail (Annexure "A" of the Complainant's bundle of documents), dated 27 February 2013, by the Complainant to Sasha of Carte Blanche. In this e-mail the Complainant invited Carte Blanche to visit the offices of Global Visas in South Africa or in the UK "... to experience first hand the efforts that our team put into their work and their dedication to their clients." Carte Blanche did not respond to this e-mail. However, during argument they stated that their investigation into

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[3] See *Video Care Services v Talk Radio 702*, Case no. 44/2002.

the complaints against Global Visas was only completed in July 2013, by which time they were ready to conduct the interview and they then took steps to arrange such interview. It should be emphasised that the decision whom and when to interview during such an investigation is a decision of the producer of such a programme and no negative conclusion can be drawn from the fact that someone from the company was not interviewed in February 2013. The conclusion that we have arrived at is that the Complainant has only himself to blame that no interview was conducted with him (either Mr Clifford or Mr Wallace). The question remains, however, whether the views of Global Visas were fairly presented in the programme.

[15] Global Visas' attorneys Fasken Marthineau sent the response to the allegations against their client to Carte Blanche. This was on the last day possible for an interview according to the production schedule for the programme, of which the Complainant was informed. It is important to note that in the letter from the attorneys (Annexure "L") it was stated: "The attached document however addresses the allegations raised by your client against our client and as such an interview is not necessary." The "attached document" referred to contains responses to certain questions put by Carte Blanche. Not all the questions and their responses were included in the final programme that was broadcast. The gist of the responses was summarised in Carte Blanche's own words and presented in the programme as Global Visas' views as follows:

[15.1] "Their argument is that they run a professional advocacy and advice service, but they can't guarantee a visa." This was a summary of the following response: "Each application received for employment or a visa is unique, and we never guarantee success ..... It is the role of an immigration officer and government to approve visas and our legal services assist people to secure the best possible outcome based on the merits of their case."

[15.2] "They asserted that they have millions of successful clients and the allegation that their clients don't get jobs is unfounded." This was a summary of the following responses taken together: "We have many successful clients daily who secure a

job offer that allows them to secure a work permit to live and work overseas" and "Global Visa completed over one million successful cases in recent years alone. Any suggestion of us being a scam is factually incorrect."

[15.3] In a further response Global Visas dealt with the fact that clients were being given the terms of service. As this was not denied in the broadcast, it was considered not necessary to broadcast this response. Another response dealt with the centre of excellence working hard to ensure that every client receives the best service. No allegations regarding the training of staff were made and it was considered not necessary to include this response in the broadcast.

[16] Given the fact that it was the Complainant's view that an interview was not necessary, as expressed by his attorney to the legal representatives of Carte Blanche, and because, to our minds, some balance was achieved by broadcasting a summary of the Complainant's point of view, we find that the provisions of clause 28.3 of the Code have been complied with.

[17] There remains the complaint that the comment in the programme, namely that Mr Clifford was barred for 5 years from being a company director in the UK in 2008, breached the Complainant's right to his dignity and privacy in contravention of clause 28.4. Only 2 remarks are required to decide this point. The first is that information of this nature flowed from the fact that his previous company was declared insolvent. This is a matter of public interest and public record and he cannot rely on any right to privacy in this regard. It was also not stated in the programme that he was debarred from acting as director of companies in South Africa. Secondly, clause 28.4 states that "... the rights to privacy and dignity may be overridden by a legitimate public interest". We find that this is a case where his rights to privacy and dignity have indeed been overridden by legitimate public interest, bearing in mind all the complaints and unhappiness about a company which impacted on the dreams about the future of many people. We find that clause 28.4 had not been violated.

[18] Lastly, the Complainant stated that he had not been made aware of an allegedly dissatisfied employee. No clause in the Code imposes a duty upon a broadcaster to disclose the identity of a confidential source or even make known to the subject of an intended programme that such source will be presented in the programme. It is a fundamental principle of freedom of the media that they should not be forced to disclose the identity of their sources, lest their sources dry up[4]. This complaint cannot be entertained.

In the result no contravention of the Code of Conduct could be found and the complaint is not upheld.

HP VILJOEN
DEPUTY CHAIRPERSON

Commissioners Makaula-Ntsebeza and Sewlal concurred in the above judgment.

[4] See *Bosasa Operations (Pty) Ltd v Basson & Another* 2013(2) SA 570 (GSJ)