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CASE NUMBER: 44/2014

DATE OF HEARING: 25 NOVEMBER 2014
JUDGMENT RELEASE DATE: 18 DECEMBER 201

NGCOBO

COMPLAINANT

vs

e.tv (eNCA)

RESPONDENT

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
 PROF HP VILJOEN (DEPUTY CHAIRPERSON)
 MR ALAN MELVILLE
 PROF SUNETTE LÖTTER (ACTING COMMISSIONER)

The Complainant in person.

FOR THE RESPONDENT: Mr Ben Said, News Editor accompanied by Mr Olefile Tshweu, Johannesburg Compliance Officer and Mr Morapedi Pilane, Johannesburg Assistant Compliance Officer.

Dignity impaired by incorrect identification -Ngcobo vs e.tv, Case: 44/2014(BCCSA)

SUMMARY

Footage showing the Complainant, Mr Chris Ngcobo, who was previously head of the Johannesburg Metro Police and is currently security adviser to the Mayor of Johannesburg, was recently again broadcast in a news story that in fact referred to his namesake, General Chris Ngcobo, acting head of the Police's crime intelligence unit. The latter was placed on special leave this year owing to concerns raised in regard to his qualifications. The Respondent conceded the error and informed us that steps had been taken earlier this year to ensure that this error was not repeated. Indeed, an apology

had been sent to the Complainant. However, an administrative error led to this unfortunate mistake being repeated in October.

Held that this contravention amounted to a serious contravention of the Subscription Broadcasting Code and that, as conceded by the Broadcaster, it was attributable to gross negligence of the broadcaster.

The BCCSA directed that the following be implemented by the Respondent:

1. That an apology with a photo of the Complainant be broadcast on two 19:00 news broadcasts within the first five minutes before 31 December 2014.
2. That a fine of R20 000 be paid.

JUDGMENT

JCW VAN ROOYEN SC

[1] Footage showing the Complainant, Mr Chris Ngcobo, who was previously head of the Johannesburg Metro Police and is currently security adviser to the Mayor of Johannesburg, was recently again¹ broadcast in a news story that in fact referred to his namesake, General Chris Ngcobo, acting head of the Police's crime intelligence unit. The latter was placed on special leave this year owing to concerns raised in regard to his qualifications.² The Respondent conceded the error and informed us that steps had been taken earlier this year to ensure that this error was not repeated. Indeed, an apology had been sent to the Complainant. However, an administrative error led to this unfortunate mistake being repeated in October.

[2] The discussion during the hearing took place in an amicable atmosphere and when I requested the Complainant not to base his complaint on an intentional contravention, he accepted my intervention. I intervened since, in my experience as Chair of the

¹ We were told that this happened four times this year. In two instances a complaint was lodged with the BCCSA.

² To be fair, it should be mentioned that according to online material, there is probably a reasonable explanation for this. It is not, in any case, our task to decide that matter. Fact is that this occurrence impacted negatively on the Complainant at the time of the errors.

BCCSA I have never come across a broadcaster who intentionally contravened the Code. In this case, Mr Said from etv, however, conceded that a repetition of the error amounted to gross negligence. It emerged that the Cape Town archive was not adapted in the light of the past errors and that this had been the cause of the repeated error.

- [3] Both the reputation and dignity of the Complainant were infringed upon seriously. The mere fact that the General has been suspended and that it related to questions in regard to his qualifications (justifiably or not) is a particularly serious matter. Dignity is a core value of our Constitution. Justice O'Regan, to underpin this ground norm of our society, has stated as follows in *Khumalo and Others v Holomisa*³:

"The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected. This right serves to foster human dignity. Accordingly, no clear distinction can be made between reputation, dignitas and privacy in giving effect to the value of human dignity in the Constitution."

- [4] Mere infringement of dignity or reputation by the media does not amount to a contravention of the Code. It is only an intentional or negligent infringement by the media which is actionable in our civil law and we, understandably, apply the same principle when adjudicating in terms of the Broadcasting Code. The Respondent has conceded that the broadcast was due to gross negligence. We are grateful for the outright manner in which this was conceded by the Respondent's representatives at the hearing. We agree with their view.
- [5] The Constitutional Court⁴ has held that there cannot, in law, be a finding of both defamation and *iniuria* based on the same act. Brand AJ states as follows:

[141] Traditional learning generally defines *iniuria* as the wrongful and intentional impairment of a person's physical integrity (*corpus*), dignity (*dignitas*), or reputation (*fama*). Academic

³ 2002 (5) SA 401 (CC) at para

⁴ *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) per Brand AJ at paras [140]-[142].

authors are in agreement, however, that although the time-honoured threefold distinction is a useful classificatory device to highlight the different interests involved, these interests often overlap. Thus, for example, although assault is classified as an infringement of physical integrity, it will also often infringe the victim's sense of dignity; malicious attachment of property will frequently carry with it an infringement of the plaintiff's reputation or dignity, or both, while the infringement of reputation will almost always be accompanied by an affront to dignity.

[142] In view of this constant overlapping of manifestations of *iniuria*, duplication of *actiones* would therefore have been expected as a matter of common occurrence, if it were allowed in principle. Yet, like Harms DP, I am unaware of a single case where two actions for *iniuria* were allowed on the same facts. On the contrary, as pointed out by the majority in the Supreme Court of Appeal, it is recognised that an award of damages for defamation should compensate the victim for both wounded feelings and the loss of reputation. I see that as an implicit endorsement of the principle that the plaintiff will not be able to succeed in separate claims for both defamation and infringement of dignity, arising from the same facts. In the same way as the majority of the Supreme Court of Appeal did, I therefore conclude that the corollary of Dr Dey's success in his defamation claim is that his claim based on dignity must fail.

[143] To complete the picture I may add that, if the defamation claim were to fail, Dr Dey should, in my view, succeed in his dignity claim. Broadly stated, the claim for impairment of dignity comprises both a subjective and an objective element. The subjective element requires that the plaintiff must in fact feel insulted. To satisfy the objective element our law requires that a reasonable person would feel insulted by the same conduct. (footnotes omitted)

We, accordingly, find that the unlawful and grossly negligent use of the complainant's photo by the broadcaster amounted to a serious impairment of his dignity. That also, indirectly, covers the impairment of his reputation.

[6] **The complaint is accordingly upheld.**

[7] In so far as sanction is concerned, the Respondent offered to broadcast an apology. The Complainant is of the view that two apologies would be required. The Complainant's point of view is justified. The maximum number of viewers should be informed of the error. Given the conciliatory approach of the Respondent, we have decided not to require from it to mention that the BCCSA has directed that such apologies be broadcast. The apologies must be broadcast on two separate days and during the first five minutes of the 19:00 News on eNCA. This must be done before 31 December 2014. The broadcaster is requested to let the Registrar have the wording at least on the day preceding the first broadcast so that the wording may be approved by the Chairperson. A photo of the Complainant must be included in the broadcast. The approach in impairment of dignity cases has been to impose a fine of R30 000. In the light of the apologies which will be broadcast and the acknowledgement by the

Respondent that a gross error had been made, we believe that a fine of R20 000 would be in order. This amount must be paid to the BCCSA on or before 31 January 2015.

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, Melville and Acting Commissioner Lötter concurred with the judgment of the Chairperson.