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CASE NUMBER: 50/2014

DATE OF HEARING: 12 MARCH 2015
JUDGMENT RELEASE DATE: 4 MAY 2015

LA NEL
A NEL
FRISCHGEWAAGD NO 649
MELKRIVIER (PTY) LTD

FIRST COMPLAINANT
SECOND COMPLAINANT

THIRD COMPLAINANT

vs

SABC2

RESPONDENT

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
 DR LYNDA GILFILLAN
 MR ALAN MELVILLE
 ADV ROBIN SEWLAL

FOR THE COMPLAINANT: Mr Vittorio Greeff from Greeff Attorneys.

FOR THE RESPONDENT: Mr Fakir Hassen, Manager: Broadcasting Compliance, Regulatory Affairs accompanied by Mr Nyiko Shibambo, Compliance Officer.

Documentary – lack of reply by Complainants in terms of BCCSA Code – contravention – Nel & Others vs SABC2, Case: 50/2014(BCCSA)

SUMMARY

A complaint was lodged that an investigative programme broadcast by the Respondent did not include a reply by the Complainants, two of whom were subjected to criticism in a matter of public importance: the matter being the rights of the widow of a farm labourer to remain on the farm after the death of her husband, who had been a worker on the farm for many years. The widow stated on air that she had been instructed by the erstwhile employers of her late husband to leave the farm, and also informed that her children were not permitted to live on the farm. The widow also criticised the first two Complainants on air of not having taken proper care of the first Complainant's father after the latter was attacked with a panga by an intruder who had also killed the man's wife. The truth of this allegation was denied by the first two Complainants and claimed to be defamatory.

The BCCSA Tribunal upheld the Complaints on the basis that a reply by the Complainants was not included in the broadcast. It was accepted, in favour of the SABC and without deciding the point, that the reporter involved had attempted to reach the Complainants for their input. However, this was not mentioned in the programme as broadcast.

The said two complaints were, accordingly, upheld.

JUDGMENT

JCW VAN ROOYEN SC

[1] A complaint was received regarding a programme *Leihlo La Sechaba* which was broadcast on SABC2 in September 2014. As a result of an application for a postponement by the attorney who appeared for the Complainants, as well as the intervening recess, we were only in a position to hear this matter in March 2015. The first Complainant is a farmer and the second Complainant is his wife who, in the normal course, is involved in assisting him with running the farm. The third Complainant is the company under which they operate.

[2] The complaint, which comprises several pages, is too lengthy to quote verbatim in this judgment. In essence, the complaint is that the programme referred to above

defamed Mr and Mrs Nel and omitted to broadcast their view on a situation relating to a deceased employee's widow, Mrs Emily Motshegoa, who had taken part in the programme. Her view, as broadcast, was that she was being threatened by the Complainants to leave the farm, now that her husband has passed away. She also accused Mr and Mrs Nel of having neglected the now-deceased father of Mr Nel during his latter years. The father and his wife had been the victims of a brutal panga attack on the farm that resulted in the father being seriously injured and his wife being killed. Both accusations (the threat that Mrs Motshegoa must leave the farm and the neglect of the father of Mr Nel) are strenuously denied by Mr and Mrs Nel. In fact, Mrs Nel is said to be well-known for her upliftment work in regard to farm workers in the area. The Complainants argue moreover that, contrary to Mrs Motshegoa's allegations, Mrs Nel has also been at pains to assist Mrs Motshegoa since the death of her husband. The Complainants attribute Mrs Motshegoa's attitude to certain events which had taken place on the farm. I will quote the background to the dispute, as set out by Mr Greeff, appearing for the Complainants, in a footnote.¹ Although the complaint relates to two parts of the programme, it concentrates on the second part. It is not necessary to deal with the first part in the light of the conclusion which we have

¹ The farm was owned by the First Complainant's parents when Mrs. Motshegoa and her husband, Sakkie, started living on the farm. Sakkie was recommended by the First Complainant to work for his mother as a gardener. In October 1994, the First Complainant's mother was brutally murdered on the farm with a panga. His father (now deceased) was tied up, assaulted and left for dead in the field. Despite this terrible ordeal, which shocked the family immensely, his father insisted on staying at the farm. Mrs. Motshegoa and Sakkie did in fact assist in taking care of him, whilst the First Complainant (who lived on the neighbouring farm) visited him on a daily basis. Due to his condition, it was later decided that he should rather move in with the First Complainant on his farm before he was booked into a home for the elderly. Mrs. Motshegoa makes allegations in the report that the whole family of the First Complainant's late father neglected him, which is most certainly untrue and hurtful. The First- and Second Claimant inherited the farm 1996 and started living on the farm during 2002. In August 2013, Sakkie informed the Second Complainant that he was feeling very ill. She noticed that he was not in good shape and immediately drove him to the doctor, who was in Vaalwater 50km away. He tragically passed away in her car on the way to the doctor. Following a post mortem it was presumed that he died of a heart attack. This was a traumatic experience for all involved. Sakkie felt like a family member to the First- and Second Complainants and their whole family mourned his passing. When the Second Complainant visited Sakkie's family to convey her condolences, she was stormed by Mrs. Motshegoa's son, called "Bags". He screamed at her saying that he knows what she had done, which lead to some of the farm workers restraining him before she could return home. A few minutes after her return to her home, Bags turned up with rocks in his hands threatening to kill her and the Second Complainant. They had to lock themselves in the house until the police arrived to remove him. Due to the serious physical threat he posed to the First- and Second Complainant, Bags was subsequently asked not to return and to go and live in his RDP house with his family in Modimolle. Despite the aforesaid, Bags returned to the farm at a later date. He was again asked to leave the farm, which lead to a breakdown of communication between Mrs. Motshegoa and the First- and Second Complainants. Due to circumstances, it was decided to rather keep out of Mrs. Motshegoa's way and to let her be, in order to avoid any confrontations. In the meantime, Mrs. Motshegoa told the Second Complainant and her housekeepers Letta Mosethlana and Ruth Moatsi and other people living on the farm that the Second Complainant had a hand in the death of her husband, Sakkie, ("toor" was the word she used) and that the Second Claimant wanted to chase her off the farm. Mrs. Motshegoa, through her actions, has also caused problems amongst other farm workers' wives which had led to some of them threatening to leave because of her. Despite all this, the First- and Second Respondent had decided to ignore these absurd allegations and have never asked her to leave or attempted to evict her from the farm.

reached. In the second part of the programme, interviews are held with the widow, Mrs Emily Motshegoa (a widow and resident of the farm), Mr Vasco Mabunda from Nkunzi Development Association and a Miss Vuyo, who appears to represent the Department of Rural Development and Land Reform. All the interviews are based on the rights of farm workers and the alleged neglect of farmers to abide by the law in protecting the rights of the workers – in this case, the threat to Mrs Motshegoa that she should leave the farm now that her husband has passed away.

- [3] Although the complaint was also based on the News clause in the Broadcasting Code, I pointed out to Mr Greeff at the hearing of this matter that the said clause does not apply to the programme at issue. The programme did not amount to what is generally regarded as news; however, it did amount to a discussion on a matter of public importance. We will accordingly not deal with the matter in terms of the News clause, and instead the matter will be decided exclusively in terms of clauses 13 and 15, which respectively deal with the right to reply and defamation.
- [4] Although we will accept in favour of the Respondent that there had been a plan or an attempt to include the Complainants in the programme, the programme as broadcast did not include their view. The result was that only the view of Mrs Motshegoa and supporting views, inter alia that of a Mr Mabunda, that the eviction was illegal, were broadcast. The Complainants categorically deny that they ever communicated with Mr Mabunda on any topic whatsoever. Mr Greeff argued that Mr Mabunda, in the programme, claimed to have first-hand knowledge of the eviction, stating (or at the very least, implying) that he was informed of it by the First Complainant himself. Mr Greeff argued further that had there been any doubt as to whether a reasonable viewer would regard the allegations concerning the eviction as fact, the interview with Mr Mabunda had firmly put any such doubts to rest. Mr Mabunda also goes on to state, in the programme, the following regarding farm workers: “In addition to their low levels of literacy, their geographic location makes it very easy for land owners to abuse their rights knowing there will be no consequences.” It was argued by Mr Greeff that this claim was presented as a fact and that, in its context, it referred indirectly to the Complainants. The reporter thereafter stated that “A farm-worker based human rights organisation, Nkunzi, was assisting the Motshegoa

family with their case. They say farmworker exploitation still takes place. A programme reporter goes on to state that “Mr Mabunda says there are many cases similar to the Motshegoa case in most farms.” Here, it was argued, it is not only implied but stated as fact that the Complainants are exploiting Mrs Motshegoa. Mr Greeff argued that these statements were not substantiated at any time during the report, and, furthermore, it was wholly untrue that the Complainants had exploited Mrs Motshegoa in any way. Other aspects (e.g. the alleged eviction of the Motshegoa children from the farm) are also contested by Mr Greeff, but it is not necessary to deal with them.

[5] The SABC responded as follows:

1. *Leihlo la Sechaba* is a current affairs programme that deals with various issues of public interest.
2. The episode in question was about Mrs Emily Motshegoa who lives in Melkrivier farms and was our case study. We were alerted of her plight by a reputable NGO called Nkuzi Development Association that advocates for the rights of farm workers and dwellers.
3. Mrs Motshegoa indeed outlined her frustrations as a result of behaviour meted by the farm owner since her husband’s sickness and subsequent passing. Amongst other things she mentioned was that she and her husband were ill-treated by the farm owners and threatened with eviction. After having an interview with Ms Motshegoa, the producer met the farm owner at the gate of his farm with an intention to solicit a right of reply to the allegations. However the farm owner declined.
4. On the morning of 12 September 2014, a day after the broadcast of the show, the executive producer received a call from a lady who introduced herself as Mrs Nel, the wife of the farm owner, Mr Nel. She insisted that what we had broadcast was not the whole truth, hence she requested an opportunity to state her side of the story and we agreed. Mrs Nel however changed her mind and said that she does not want to appear on TV herself, but will recommend either her daughter or son-in-law to appear on TV.
5. The following week, on 17 September 2014, their son-in-law Mr Gert Buitendach phoned the office and repeated their concerns. We both agreed that we should give them the right of reply, but it was put to him that the producer who originally covered the story was out on another assignment and another one would come and get their response. An SMS, of which a copy has been attached, was sent by the producer informing Mr Gert Buitendach that we were on our way to get their side of the story. All preparations for this journey to Limpopo were at an advanced stage as we had submitted a story proposal, camera booking and budget for the trip. The camera booking form is attached.
6. The intention was to cover their response on Monday or Tuesday at their farm Melkrivier and come back to Johannesburg because the producer who had initially done the story was also booked to go out with the Labour Inspectors who were going to do inspections on different business premises; Before the producer could leave on Monday, 29th September 2014, the producer phoned Mr Gert Buitendach to let him know that they were on their way. Mr Buitendach said that they should not come because the family has decided to take the matter to the BCCSA.

7. It is our conviction that all practical efforts have been exercised in trying to solicit a right of reply from the complainant's side. We also tried to get the side of the farmers' organisation, which declined to comment, as mentioned in the programme.
8. Although we accept that during the airing of the show, no mention was made that the respondent had declined our initial offer of a right of reply, attempts were indeed made to get this and our bona fides were shown by the agreement with both Mrs Nel and Mr Buitendach to afford them this opportunity, which they then again declined. We have always been prepared to afford them that right and are still committed to it."

As you are aware, we had been awaiting for the waiver before responding to the letter from the complainant's attorneys.

"The essence of the letter is twofold:

1. The complainants deny having met the production team as the latter claim to have and unfortunately this is a matter of hearsay on both sides with a lack of any evidence. We will therefore retract this portion of our earlier submission.
2. The SABC failed to abide by the BCCSA Code requirements by ensuring a mention on the programme that the complainants were not available to or did not want to comment on the matter. We have already conceded that this was indeed the case and have made attempts to remedy this even before the complaint was lodged at the BCCSA, but the complainants declined to do so by participating in a further programme close to the one that was broadcast. We showed our good intent ensure fairness by making all the arrangements for the interview with the complainants, which they then refused. We remain keen to do so.

We believe that no detailed response to the content of the letter is required in view of the above. We do however, still request, as we have previously, what precisely is meant by the statement in the closing paragraph of the letter, particularly what is required in terms of dealing with the complaint "in a sufficient, precise and detailed manner."

EVALUATION

[6] It is not necessary to provide details of the reply of the Complainants. The core of the matter is that even if we accept in favour of the SABC that attempts had been made during production to meet with the Complainants, the programme itself did not refer to any attempt to meet with the Complainants during production. This fact, which was conceded by the SABC, is a determining factor in this dispute. We will accept in favour of the SABC that attempts were made *after* the broadcast to obtain a reply. However, that is not relevant in deciding the dispute before us.

[7] The right to reply is a crucial right in broadcasting law. It does not exist in every case, but in the present case we have no doubt that clause 13(2) of the Broadcasting Code was contravened. Sub clause (2) provides as follows:

A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given the right to reply to such criticism on the same programme. If this is impracticable, reasonable opportunity to respond to the programme

should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.

The core of the SABC's case is that it attempted to obtain a reply in regard to the accusation of the widow concerning the threatened eviction from the farm by the first two Complainants. This is denied by the Complainants. There is, accordingly, a dispute as to whether such an attempt was made during the production phase of the programme. However, even if such an attempt had been made, the programme itself contained no reference to any such an attempt – as, in fact, is conceded by the SABC. It was also not argued that it was impracticable to obtain the view of the Complainants during production. It is not disputed that the subject matter was of public importance. With this we are in full agreement. Our conclusion is, accordingly, that the accusation by the widow led to a duty by the SABC to include the response of at least one of the first two Complainants. However, the programme as broadcast did not contain any such reply.

[8] The result of all this is the following:

(a) Firstly, the broadcast was *prima facie* defamatory of the first two Complainants. It was not, in terms of defamation law, shown by the Respondent that the broadcast amounted to the truth, and nor was it shown that it was reasonable² in the circumstances to have broadcast the accusations of Mrs Motshegoa in so far as the poor treatment of the father of the first Complainant was concerned, without having broadcast the reply of the Complainants or having indicated in the programme that they were not willing to reply, or indeed that a genuine attempt had been made to obtain a reply. The reference to the poor treatment of the now-deceased father is, accordingly, regarded as defamatory of the first two Complainants.

(b) Secondly, clause 13(2) of the Broadcasting Code was contravened by not

² *Mthembi-Mahanyele v Mail & Guardian Ltd & Another* 2004(6) SA 329 (SCA) where a mistake was made in a newspaper in regard to facts pertaining to the evaluation of a Minister by a newspaper, the facts having been *prima facie* defamatory. The mistake was regarded as reasonable by two Judges of Appeal, one Judge of Appeal having found that the minister had been over-sensitive in filing for defamation as a public figure and two Judges of Appeal having found that the untrue statement had been defamatory of the Minister. The claim was, accordingly, dismissed by way of a majority vote.

having broadcast a reply by the first two Complainants. There was no evidence that it was impracticable to obtain such a reply and there is also no circumstantial evidence that this was indeed the case.

[9] SANCTION

The following must be broadcast by the SABC during the introduction of the same programme in the language in which the programme was broadcast, together with English sub-titles, ***before 31 May 2015***:

(It would be appreciated if the SABC could have this translated into the language in which the programme was broadcast, with English sub-titles at the bottom of the broadcast)

“In our programme of 11 September 2014, dealing with problems concerning the rights of a widow of a farm worker, a Mrs Motshegoa, to continue staying on the farm after the death of her long-serving farm-worker husband, we omitted to mention that we had attempted to contact the farm owners who had employed the late Mr Motshegoa but were unsuccessful in indeed contacting him and his wife. We, however, did not state this in the programme.

After the programme was broadcast the following emerged:

- (1) The employer, Mr Nel, denies that he or his wife had ever instructed Mrs Motshegoa to leave the farm after the death of her husband.
- (2) Mr Nel also denies that he and his wife failed to take proper care of their deceased father, as alleged by Mrs Motshegoa. Mr Nel claims that the programme defamed him and his wife by allowing Mrs Motshegoa to make this allegation without obtaining their reply. Mr Nel's father had survived a brutal panga attack on their farm, though his mother did not. Mr Nel and his wife attended to his father to the best of their ability until he passed away, and both deny Mrs Motshegoa's allegations to the contrary.
- (3) Mr Nel also denies that the adult children of the widow are not entitled to live on the farm, since they are not employees. Despite the fact that her children

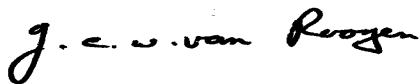
are not entitled to live on the farm, he has never evicted her children as claimed in any event.

Though one of them had been an employee, he voluntarily gave up his job and currently works on a neighbouring farm.

- (4) Mr Nel also pointed out that his wife has, for many years, on an organised basis addressed the plight of farm workers on many levels and not only by providing food and clothes. The work she does conflicts with Mrs Motshegoa's allegation that Mrs Nel has told her to leave the farm ever since her husband's death. Mr Nel states that the opposite is in fact the case: Mrs Motshegoa is welcome to live on his farm, as she is entitled to.

The SABC apologises for not having obtained the view of Mr and Mrs Nel, and for failing to include their reply in the programme."

[The apology in the last sentence is a matter for the SABC to decide on, since the BCCSA is not authorized to order an apology].



**JCW VAN ROOYEN SC
CHAIRPERSON**

Commissioners Gilfillan, Melville and Sewlal concurred with the judgment of the Chairperson.