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CASE NUMBER: 24/2009

DATE OF HEARING: 27 August 2009

SABC3 **APPELLANT**

vs.

F **RESPONDENT**

TRIBUNAL: **Prof Sunette Lötter (Appeal Tribunal Chairperson)**
Mr Brian Makeketa
Mr Ed Linington
Prof Fanie van Jaarsveld
Adv Soraya Hassim

For the Appellant: Mr Fakir Hassen: Acting General Manager, Special Projects, Ms Veronica Barnard : Compliance Officer of the Policy and Regulatory Affairs, accompanied by Mr Johann Abrahams, Executive Producer, Special Assignment, Ms Hazel Friedman: Producer, Special Assignment and Ms Khadija Bradlow: Story Editor, Special Assignment.

The Respondent did not attend.

Appeal against sanctions imposed – although one complaint, there were two broadcasts which amounted to two contraventions. Second fine of R50 000 reduced to R30 000 and first fine of R30 000 confirmed. SABC3 vs F, Case No. 24/2009(BCTSA).

SUMMARY

Appeal against fines that were imposed on SABC3 in *F vs SABC3* on 9 April 2009 for contraventions of clause 38 of the Code. News programmes on SABC airing investigation as to whether person had sexually molested children found to

be defamatory. R30 000 fine imposed for first contravention, R50 000 imposed for second contravention. Held that there had been two contraventions. However, second fine reduced to R30 000.

JUDGMENT

S LÖTTER

[1] The Appellant was found by the Tribunal of this Commission to have been in contravention of Clause 38 of the Code on two occasions in that it broadcast two "investigative" programmes that dealt with allegations and claims that the Respondent had engaged in acts of sexual molestation of children. Appellant was fined R30 000 on the first contravention and R50 000 on the second contravention. Appellant then applied for leave to appeal.

[2] Leave to appeal was granted by the Chairperson of the Tribunal against the second fine of R50 000. On a further application, which was limited to the matter of sanction, the SABC argued that the imposition of *two* fines had been *ultra vires* the powers of the Tribunal since there had been, in its view, only *one* complaint about the two programmes. I granted leave to appeal against both sanctions; thereby leaving it open to the SABC to argue that the sanctions could, at the most, amount to R50 000 since the Respondent had, essentially, addressed the broadcasts as one contravention.

[3] The SABC's Appeal reads as follows: "I refer to the ruling of the Chairperson in respect of our application for leave to appeal the judgment. We accept the decision that we may not proceed with the appeal in terms of the judgment, but also welcome the ruling that we may appeal the fine imposed for the second broadcast. In regard to the latter, we submit the following:

1. The SABC still maintains that both broadcasts of the programme were done in good faith, despite the ruling in the matter, without any intent to deliberately flout the prescriptions of the BCCSA Code of Conduct.

As a signatory to the Code, the SABC has an obligation to respect all its clauses and every attempt is constantly made to ensure compliance.

2. It is now common cause that the complaint was lodged long after not only the first broadcast, but even the second. Despite initial objection to this not complying with the requirements of the BCCSA that complaints be lodged within 30 days of broadcast, the SABC accepted the decision by the Chairperson to allow the matter to proceed in the interests of fairness to the complainant.

3. The second broadcast of the programme therefore took place even before the complaint was lodged and before the SABC became aware that there was a possible infringement of the BCCSA Code of Conduct.

4. There was no substantively significant change to the second broadcast of the programme. Such repeat broadcasts are a matter of standard procedure with programmes considered to be of sufficient public interest and in conformance with scheduling practices, which allow audiences options to watch programmes that they might have missed at a scheduled time or by broadcasting it again in a different timeslot to allow, for example, shift workers an opportunity to see them. The two broadcasts of the programme were also considered as a single matter during the Tribunal hearing.

5. Our argument therefore is that there should only be a single sanction in respect of the broadcast of the programme and its subsequent rebroadcast, particularly since there had not been any indication at the time of rebroadcast that there was a possible transgression.

6. To further substantiate our view that there should only be a single sanction for a single matter, as was the case here, we believe that the relevant sanction clause of the Code as quoted below does not permit a fine exceeding R50 000 for a single matter.

"*14.5 Following any investigation of an alleged infringement of the Code by a signatory, an Adjudicator or, as the case may be, a Tribunal may impose a fine not exceeding R50,000 on any respondent adjudged to have infringed the Code (R40 000 where the broadcast was before 1 January 2006), whereupon the fine so imposed shall be a debt due to the BCCSA and recoverable as such;*"

7. The two programmes were heard as one matter, and not at two separate hearings, when the possibility of a maximum of R50 000 in each case would have certainly applied. We submit that in view of the above that the fine of R30 000 imposed for the first programme suffices to also cover the sanction for the second programme."

[4] Mr Hassen argued strongly that only one and not two infringements of the Code had occurred and that one fine should have been imposed. As, according to him, only one contravention was committed, the First Tribunal exceeded the provision that a fine of not more than R50 000 for an infringement should be imposed.

[5] The second argument proffered was that the complainant only lodged a complaint (long) after the second programme had been broadcast, which resulted in the fact that the SABC was not made aware that there had been a possible infringement of the Code. The first broadcast could therefore not amount to an infringement.

[6] The fact that the complaint was only lodged after the second programme, does not exonerate the SABC. We were informed by the SABC that advice was sought from the in-house legal division as to the contents of the first programme. While the SABC may not have realized that the broadcast of the two programmes could result in an infringement of the Code, the First Tribunal found that they should have foreseen that it could have been an infringement and had, therefore, acted negligently. The fact that the

complainant only complained after the second programme had been broadcast, offers the Appellant no relief.

[7] In the *Submissions in Opposition to Appeal* it is stated that the Respondent's lawyers did protest against the flighting of the first broadcast and, furthermore, that the two broadcasts were treated as separate infringements during the Tribunal hearing. Accordingly, it could not be said that the SABC was unaware that there could have been an infringement of the Code when the first programme was broadcast.

[8] The fact of the matter is that the SABC was found to have contravened the Code on two separate occasions. Although the appeal was only allowed by the Chairperson of the Tribunal in respect of the second sanction, it was necessary to revisit the reasons given by the Tribunal for imposing two fines, as this formed the crux of the second application for leave to appeal, as allowed by me. The justifiability of the first sanction was then also brought within the parameters of this appeal.

[9] The second contravention was not, to our minds, more serious than the first contravention. In this respect we do not agree with the First Tribunal and regard the difference of opinion as sufficient to reduce the second fine to R30 000. In so far as the first fine is concerned, we regard the R30 000 as being in accord with the seriousness of the contravention. We need to send out a message to broadcasters that "trials" by the media should be conducted with great caution, especially where the dignity and privacy of individuals are concerned.

[10] In the result the appeal succeeds to the extent that the second fine is reduced to R30 000. The first fine of R30 000 is confirmed. The R60 000 must be paid to the Registrar on or before 30 October 2009.

S LOTTER

Chairperson of the Appeal Tribunal

Commissioner Makeketa and three co-opted Commissioners, Mr Ed Linnigton, Prof Fanie van Jaarsveld and adv Soraya Hassim concurred.