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CASE NUMBER: 15/2011

DATE OF HEARING: 20 APRIL 2011

INKATHA FREEDOM PARTY

COMPLAINANT

vs

e-tv

RESPONDENT

**TRIBUNAL: PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)
 MR B MAKEKETA
 MS M NKWANE
 MR E LININGTON (CO-OPTED COMMISSIONER)**

FOR THE COMPLAINANT: Mr LS de Klerk, Attorney, Ms Liezl van der Merwe, IFP Media and Mr Albert Mncwango MP, IFP National Organiser.

FOR THE RESPONDENT: Mr Mark Rosin, Business and Legal Affairs, Mr Ben Said, Groups News Editor, e-news and Mr Seamus Reynolds, News Editor, e-news Channel.

Elections – duty on journalist to put information provided by source to information officer for the latter's response; further duty to place information provided by source within correct context. IFP v e-tv case 15/2011.

SUMMARY

The Inkatha Freedom Party (“IFP”) is a registered political party that is taking part in the South African municipal elections, which are to be held on 18 May 2011. On

Saturday 2 April 2011, following the launch of IFP's Local Government Manifesto at Lindelani in the Durban area, an *eNews* reporter commented as follows during a two-minute-long coverage of the launch: "The IFP has pulled out all the stops for the launch of its national election manifesto, but it failed to pull the crowd of 20 000 it had planned for. And judging by Buthelezi's address the IFP considers the ruling party to be its biggest rival here in KwaZulu-Natal". A complaint was lodged with the BCCSA by the IFP in terms of clause 11 of the Broadcasting Code that the statement was "erroneous and deprived of any fact. The IFP never publicly stated how many people it was expecting at its launch. By presenting news to its viewers that was factually incorrect, e-tv has failed in its duty of presenting the news truthfully, accurately and in a balanced manner. If the report was based on the opinion of one person, it should have been presented in such manner and it should have been stated clearly, which was not the case. The false statement was presented as fact. The IFP believes that the news report was misleading, biased and created a negative perception of the IFP's launch as a failure, when in fact the opposite was true." E-tv denied that the Code had been contravened. The information had been provided to its journalist by an unnamed, senior official of the IFP. The latter statement was accepted, on behalf of the IFP, by the IFP's legal representative at the hearing of the matter. E-tv argued that the complaint had an air of frivolity to it within the context of the two-minute coverage, in which the IFP's criticism against the ANC, the Independent Election Commission and a breakaway group were, inter alia, covered.

The Tribunal held:

that it did have jurisdiction in the present matter, since the complaint did not concern a matter governed by sections 56, 57 or 58 of the Electronic Communications Act ("ECA"). If the matter had fallen within the scope of any one of these sections, the Complaints and Compliance Committee of the Independent Communications Authority of South Africa would have had jurisdiction during the election period as defined in the ECA. The BCCSA may, however, only apply the Broadcasting Code and not sections of the ECA. The complaint was addressed within the ambit of clause 11 of the Broadcasting Code and did not fall within the scope of any of the three sections of the ECA.

that the complaint was not frivolous. The actual number of people attending a launch when compared with a political party's expectations as to numbers is clearly likely to impact on viewers' perceptions regarding the strength of the support of the party.

that e-tv had contravened clause 11 of the Broadcasting Code in stating as a fact what the expectations of the IFP were, without granting the IFP Media Officer or the IFP National Organiser an opportunity to react to the statement. In any case, e-tv should also have stated the information within the correct context, namely, that a senior official had informed the journalist that the expectation had been that 20 000 people would attend.

that regarding sanction, it would be counter-productive to order e-tv to broadcast a correction. The context would be lost on the viewer, and the repetition of the matter might even be detrimental to the IFP. The IFP would, of course, be free to publish the outcome of this judgment. The Registrar of the BCCSA would also publish this judgment in the ordinary course of events.

that since the journalist had, in the view of the Tribunal, been bona fide in her endeavours to cover the event, it would not be appropriate to impose a sanction against e-tv.

JUDGMENT

JCW van Rooyen SC

- [1] The Inkatha Freedom Party (“IFP”) is a registered political party that is taking part in the South African municipal elections, which are to be held on 18 May 2011. On Saturday 2 April 2011, following the launch of the IFP’s Local Government Manifesto at Lindelani in the Durban area, an *eNews*¹ reporter commented as follows during a two-minute-long coverage of the launch: “The IFP has pulled out all the stops for the launch of its national election manifesto, but it failed to pull the crowd of 20 000 it had planned for. And judging by Buthelezi’s address, the IFP considers the ruling party to be its biggest rival here in KwaZulu-Natal”.²
- [2] A complaint was lodged with the BCCSA by the IFP that the statement was “erroneous and deprived of any fact. The IFP never publicly stated how many people it was expecting at its launch. By presenting news to its viewers that was factually incorrect, e-tv has failed in its duty of presenting the news truthfully, accurately and in a balanced manner. If the report was based on the opinion of one person, it should have been presented in such manner and it should have been stated clearly, which was not the case. The false statement was presented as fact. The IFP believes that the news report was misleading, biased and created a negative perception of the IFP’s launch as a failure, when in fact the opposite was true.”
- [3] Mr Rosin, who appeared on behalf of e-tv, argued that the complaint had an air of frivolity to it. The balance of the insert also gave full coverage to the main criticisms of the ANC and other entities which were made by the IFP. This underlined the fact,

¹ *eNews* is broadcast only via the subscription broadcaster DSTV. E-tv, otherwise a free-to-air broadcaster, however takes responsibility for eNews in matters before the BCCSA Tribunal.

² Prince Mangosuthu Buthelezi (born August 27, 1928) founded the Inkatha Freedom Party (IFP) in 1975 and continues to lead the party today. He is also a Member of Parliament.

according to Mr Rosin, that the complaint should be rejected on the basis that the law does not concern itself with trivialities.³ Mr Rosin also pointed out that the reporter had indeed sourced the information about the expected 20 000 attendees from an unnamed senior IFP official. This was accepted by the IFP at the hearing of the matter.

[4] *In limine*, the question was discussed whether the BCCSA indeed had jurisdiction in this matter, since broadcasts related to the election are governed by sections 56, 57 and 58 of the Electronic Communications Act 2005. Moreover, only the Complaints and Compliance Committee of ICASA has jurisdiction to hear complaints concerning the election during the election period, which commenced on 18 March 2011. The answer to the above question is that the first two sections (56 and 57) deal with the SABC's allocation of time to political parties, and also with advertisements paid for by political parties as broadcast by any broadcaster. Section 58 relates to the equitable allocation of on-air time to political parties during the election period. In all other matters the BCCSA has jurisdiction to hear a complaint in terms of the Broadcasting Code. The present matter falls into the latter category and does not fall within the ambit of any of the three relevant sections of the ECA. The BCCSA, accordingly, has jurisdiction to adjudicate the present matter.

[5] Mr Rosin argued further that I should have waited for etv's response before I decided to refer the matter to a Tribunal. However, once a complaint is entertained by the Registrar, it is referred to the Chairperson of the BCCSA. The Chairperson then has adiscretion in terms of Procedural Rule 2.2 read with Rule 5 to refer the matter directly to a Tribunal. And this is what I did in my capacity as Chairperson in the present case. The usual practice is that the Registrar obtains the response from the broadcaster before sending the complaint to the Chairman. In this case, such a response only reached the Registrar on the afternoon before this hearing took place. This does not affect the validity of the proceedings before the Tribunal. It is sufficient that a complaint be sent to the Chairperson to trigger his authority to refer a matter either to an Adjudicator or a Tribunal.

³ "*de minimis non curat lex*" – Voet *Pandectas* 4.1.11; see, inter alia, *Bothwell v Union Government* 1917 AD 262 at 275.

- [6] Let me first deal with the argument that the complaint has an air of frivolity about it, as argued by Mr Rosin. It is true that the coverage allowed reasonable time for the IFP to put forward its point of view about the election. Bold criticism by Dr Buthelezi of the NFP breakaway group, as well as criticism of the ANC and the Independent Electoral Commission, was broadcast by e-tv. Accusations of corruption within government ranks was also broadcast. We do not agree that the complaint was frivolous within this broader context. The *actual* number of people arriving at a launch when contrasted with *expectations* as to numbers is clearly likely to impact on viewers' perceptions regarding the strength of the support of the party. Thus, the perception of the viewers of e-News, which is only broadcast on the subscription broadcaster DSTV, would also be affected. These viewers would tend to evaluate the implications of such attendance figures within the broader spectrum of South African politics, and would thus be likely to conclude that support for the IFP is dwindling.
- [7] It was conceded by Mr de Klerk that fewer than 20 000 people arrived at the launch. He put the figure at 15 000. Judging by the background to the spot where the journalist was standing when she commented on the number that the party expected to attend, a fairly substantial crowd was present. Moreover, Mr de Klerk did not contest e-tv's claim at the hearing that a senior official of the IFP had told the journalist of the failed expectations. In my view, it would have been unacceptable from an ethical and legal perspective if the journalist had not stated what she had heard from the official; she would have suppressed information at her disposal, and the public's Constitutional right to be informed would have been violated. However, the question is whether she approached the matter in a manner that conforms with the requirements of the Broadcasting Code by merely stating that the IFP's expectations were not met by the turnout.
- [8] The question of expectations and actual turnout figures is, in my opinion, so crucial that the journalist should have taken steps to confirm the official's view at least with the IFP Media Officer, who was present at the launch. The IFP National Organiser was also present at the launch. Indeed, clause 11 of the Broadcasting Code places a special duty on a broadcaster and its journalists in regard to what may be presented as fact. Clauses 11(3) and (4) provide as follows:

- (3) Only that which may reasonably be true, having reasonable regard to the source of the news, may be *presented as fact*, and such fact must be broadcast *fairly with reasonable regard to context and importance*.
- (4) Where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate, clearly that such is the case. (emphasis added)

Clause 11(1) also provides that news must be reported truthfully, accurately and *fairly*.⁴

- [9] I have, accordingly, come to the conclusion that e-tv has contravened the fairness requirement in clause 11 of the Broadcasting Code in stating what the expectations of the IFP were, without confirming this with the IFP Media Officer or the IFP National Organiser. It was unfair to have based this critical item solely on the information of the source. The e-News journalist should also have stated the information within the correct context, namely, that a senior official had informed her that expectations were that 20 000 people would attend. The public has the Constitutional right not only to be informed truthfully, but also to be informed fairly, and it has the right for information to be placed within the correct context, i.e. the actual circumstances at the time. Of course, it cannot be expected of e-News that it should give a full overview of the facts during a newscast, which by its very nature must be succinct and informative. However, a brief reference to the context and the view of the IFP Media Officer or the IFP National Organiser would have contributed to the viewers' perspective on the matter. If there was insufficient time to reach the IFP Media Officer or the IFP National Organiser, the journalist should have stated this.

The complaint is upheld.

- [10] As to sanction it would, in our opinion, be counter-productive to order e-tv to broadcast a correction on eNews. The context would be lost on the viewer and the repetition of the matter might even be detrimental to the IFP.⁵ The IFP would, of course, be free to publish the outcome of this complaint. The Registrar of the BCCSA

⁴ See *Mail & Guardian and Another v SABC* (Case 5 /2011) on our website at bccsa.co.za

⁵ See *Coca Cola v SABC* (case 27/2001)

will also publish this judgment in the normal course of events. Since it is clear that the journalist had acted *bona fide*, we do not deem it necessary to impose any sanction.

The complaint is upheld. No sanction is imposed.

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

4 May 2011

Commissioners Makeketa, Nkwane and Linington concurred with the judgment of the Chairperson