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CASE NO: 05/2003

DATE: 21 JANUARY 2003

P ROGERS

COMPLAINANT

VS

SABC

RESPONDENT

**TRIBUNAL: PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)
 DR WILLEM DE KLERK
 PROF HENNING VILJOEN
 PROF RAVI NAYAGAR**

THE COMPLAINANT: IN PERSON

FOR THE SABC: MS DOROTHY VAN TONDER, MANAGER, BROADCAST & COMPLIANCE, POLICY & REGULATORY AFFAIRS

News – obligation to broadcast news of public concern and public importance - duty to broadcast arising when a specific matter of public importance was broadcast by the Respondent and an event of public importance on the same matter arises again within a reasonable time – omission in news to broadcast such an event within a reasonable time after it became known, a contravention of the Code. On facts of present matter, a duty arose but the SABC covered it in the vast majority of its news services within a reasonable time.

General duty to broadcast matters of public importance as a news item does not exist in terms of Broadcasting Code. Broadcaster must decide itself whether event is newsworthy. Rogers vs SABC, Case No: 05/2003

SUMMARY

A complaint was received that the Respondent had not broadcast in its news that the Scorpions, a special division of the South African Police Services, was investigating an allegation that the Deputy President might have been involved in a corrupt dealing in the so-called Arms Deal. This had been reported in a newspaper at the end of November 2002 and it was reported that the Deputy President had denied the allegation as “mischievous”. The Arms Deal had drawn much coverage in the media during the previous 18 months as a result of allegations of corruption and an inquiry into the matter.

The Commission held that:

- (1) the Broadcasting Code only has a bearing on material that has been broadcast and that a complaint as to a mere omission does not amount to a contravention of the Code;
- (2) where a *specific* broadcast lacks balance or where a significant view on a matter of public importance has not been included, such an omission must be rectified;
- (3) the approach should be that a broadcaster, as a result of its independence, should have the right to decide what is newsworthy, and that such independence, in the light of the fundamental right to freedom of expression which includes the right not to publish, may only in exceptional circumstances be interfered with if it is reasonable to do so ;
- (4) that the news clause in the Code requires that a broadcast must be “balanced”. Since balance is often achieved by way of more than one broadcast, reasonably connected in time and subject matter, the Tribunal is entitled to inquire into more than one broadcast to establish whether the broadcast at issue was balanced;
- (5) when a complaint is received that a broadcaster has not covered an event of public importance and the omitted matter of importance falls within the same subject as a subject covered a reasonable time before the alleged omission, the omission might lead to a finding that the omission of the supervening event of public importance amounted to a contravention of the balance requirement in the news clause.

On the facts of this matter, the Tribunal held that the SABC radio services did publish the matter widely within a reasonable time.

SABC TV was justified in holding over the matter until the ANC Congress on the 16th December 2002. It then could publish the reaction of the President, who said that the law would take its course, if necessary. The President thereby confirmed the Constitutional presumption of innocence of a person until proved guilty, a presumption which is often lost sight of by the general public. The manner in which the SABC dealt with this matter was both balanced and reasonable. It was not necessary for it to publish as soon as the matter was published in a newspaper. For

the BCCSA to deduce that the SABC applied censorship in not immediately broadcasting the matter of the Scorpions' investigation, would not be justified.

As to the legal points raised, the complaint is dismissed insofar as it was argued that the mere omission in the news of an event of public importance should be regarded as a contravention of the Broadcasting Code. Otherwise, the legal point is upheld as set out in (4) above.

JUDGMENT

JCW van Rooyen

[1] A complaint was received that the Respondent had not broadcast in its news that the Scorpions, a special division of the South African Police Services, was investigating an allegation that the Deputy President might have been involved in a corrupt dealing in the so-called Arms Deal. This news item was published in a newspaper at the end of November 2002. The newspaper also published that the Deputy President had rejected the allegations as “mischievous”. The Arms Deal had drawn much other coverage in the media during the preceding 18 months as a result of allegations of corruption and an inquiry into the matter.

[2] The legal question that arose was whether a mere omission was a sufficient ground upon which to base a contravention of the Broadcasting Code. It was argued by Mr. Rogers, who is a prominent broadcasting personality, that, given government interference during the past dispensation in decisions of the Respondent, i.e. the public broadcaster, this Commission should, in the interests of freedom of speech (which is declared in the preamble to the Broadcasting Code to be a fundamental principle in the application thereof, and which should, in any case, apply as a fundamental Constitutional right), ensure that this does not happen again. It was categorically stated by Mrs. van Tonder, who had indeed also been employed at the SABC under the previous dispensation, that such interference does not take place within the present dispensation. Mr. Rogers contended that this Commission should apply its sanctions when there is any evidence of censorship, whether internally or from external sources. This

argument was based on the premise that the Respondent remains open to government interference or censorship from the Respondent's CEO and the Board, which is appointed by the President on advice of the National Assembly. Mrs. van Tonder vehemently denied that any such intervention currently took place. It was, according to her, a matter of policy that not even the CEO was permitted to interfere with decisions taken in the newsroom. Mr. Rogers, who had been a presenter at the SABC during the Apartheid years, argued that this was simply too good to be true; he contended that omitting to report on the Scorpions' investigation of the Deputy President is clear evidence that the old system of censorship was still alive and well at the SABC. Mrs. van Tonder referred us to the fact that the *Mail & Guardian* story was placed on the website of the SABC soon after it was published, but that the newsroom had informed her that they did not simply publish a story which appears in a newspaper, without first investigating the matter themselves and before having duly obtained the view of the person involved. The Deputy President was not in South Africa at the time, and therefore neither an interview with him, nor a response from him, nor an official response was readily available. Mr. Rogers went on to argue, however, that the newsroom could have phoned the Deputy President and obtained his view. Mrs van Tonder argued that the newsroom should be free to decide on how it would deal with the matter and that it did, in any case, publish widely on radio and TV within a reasonable time – as from the 12th December to the 16th December 2002.

- [3] As a creature of a legal instrument by the National Association of Broadcasters, this Commission is bound by the content of that instrument and its Code. The Code and Constitution were approved by the Independent Communications Authority of South Africa (at that time, the Independent Broadcasting Authority) in terms of the Independent Broadcasting Authority Act 153 of 1993, in 1995.
- [4] The Procedure and Code of the Commission clearly pertain to material broadcast. A person has to lodge a complaint against a broadcast and has to indicate what the

reasons for his or her complaint are. Clause 2 of the Code has a bearing on news. It provides, inter alia, that news must be balanced. Balance is a relative concept, and can often only be attained where two or more related programmes, which are broadcast within a reasonable period of one another, are compared with one another. The general rule is that, where it is reasonably possible, such balance must be attained within a single programme. This is especially true of news that addresses prominent issues of the day, and where balance should be attained within the parameters of news items, which are, for obvious reasons, not lengthy. While a particular news item might seem balanced at any one time, it is, nevertheless, necessary to ensure, as events develop, that balance is maintained. We have, for example, held that it is unacceptable to broadcast that a particular individual has been charged with an offence, or that an inquiry has been held into his or her conduct, and then not publish the result, especially if the person has not been convicted or disciplined. See BCCSA judgment *Cooper vs SABC, Case No: 03/97*.

- [5] The Code also has a bearing on an omission insofar as a news item, in terms of clause 2, is not balanced or is distorted by way of summary or a programme on an issue of public importance is not balanced and fair in terms of clause 3 of the Code or a significant point of view on a controversial matter of public importance is not broadcast in terms of clause 7.2.1 or, in terms of clause 7.2.2, a person is criticized for his or her view on a controversial issue of public importance, and is not afforded a reasonable opportunity to reply, and requests such an opportunity.
- [6] The following problem, however, remains: what should happen if a matter of public importance takes place, especially if it is also controversial, and the SABC ignores this event? Section 3 of the Broadcasting Act 4 of 1999 makes clear that South African Broadcasters have comprehensive duties with regard to programming and related services. There is, however, no provision for an institution to apply sanctions if the aims set out are not met. Of course, if these aims are included in the conditions of broadcasters by the Independent

Communications Authority of South Africa (ICASA), they may be enforced by the Broadcasting Monitoring and Complaints Committee (BMCC) and the Council of the ICASA in terms of sections 63-66 of the IBA Act of 1993. Essentially, however, the section pertains to programming, and programming does not fall within our jurisdiction, since it is not included in the Code which we apply.

- [7] Section 6 of the Broadcasting Act deals with the SABC. Section 6(2) provides that the Corporation will, in pursuit of its objectives and in the exercise of its powers, enjoy freedom of expression as well as journalistic, creative and programming independence as enshrined in the Constitution. The ICASA is authorized to monitor and enforce compliance with the Charter by the SABC. Once again, these rights pertain especially to programming and the protected rights of the SABC in regard to the creation thereof. Insofar as the Broadcasting Code is concerned, the BMCC applies it, and where a broadcaster is a member of a body such as the National Association of Broadcasters, which has its own disciplinary mechanism as well as a Code applied by that mechanism, that mechanism applies the Code. The BCCSA is such a mechanism. The Broadcasting Act, however, binds the BCCSA insofar as it emphasizes in section 6 the right of the SABC to enjoy journalistic, creative and programming independence. That independence must be respected by the BCCSA, and it is only where there is a contravention of the Broadcasting Code that it is empowered to intervene.
- [8] The decision as to what is newsworthy lies with the SABC. The BCCSA has no authority to intervene. Accordingly, if a person complains about the omission of an event on the news, even if the event is of paramount importance, that is a matter for the SABC, and not this Commission, to decide upon. We are not authorized to extend our jurisdiction. Any such attempt will be in conflict with the rule of law, which is a foundational value in our Constitution. In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the*

Republic of South Africa and Others 2000(2) SA 674(CC) at par [17] Chaskalson P (now CJ) states that the exercise of public power is regulated by the Constitution: “One of the constitutional controls referred to is that flowing from the doctrine of legality.”¹ Although this Commission is a common law legal persona and not an organ of state, it is bound by the Constitution, since it not only acts as a forum where justiciable rights of the public are decided upon in terms of section 34 of the Constitution, but also interprets its powers in the light of section 39 of the Constitution. Legality also lies at the core of our own BCCSA Constitution, and legality is also required from this Commission by the Constitution of the Republic. There is no way, we believe, in which we can widen our powers in conflict with an Act of Parliament, *in casu* section 6(2) of the Broadcasting Act.

- [9] It was argued by Mr. Rogers that we have an obligation in terms of our Preamble to interpret our powers within the ideals of freedom of speech *and* the right to information of the public, and that we are, accordingly, in effect empowered to exercise the control applied for. However, not even an interpretation in terms of section 39 of the Constitution allows that. Of course, the Constitution moulds the manner in which we apply the Code and our procedure, but to *extend* our powers in conflict with the rule of law would be unacceptable. That is why the Constitutional Court was at pains to show in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)*² that government was empowered and duty bound in terms of section 26 of the Constitution to come to the aid of a community that had been subjected to extensive flooding. Government had set up shelter for flood victims on government owned land, in spite of the complaints from the residents in the

¹ Also see *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999(1) SA 374(CC) and *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) at par [148] where it was held that the holder of public power must act in good faith and not misconstrue its powers.

² 2000(3) SA 1151(CC) paras 34 to 64.

neighbourhood. Such government action was held to have been authorized by the Constitution.

- [10] The Broadcasting Code permits the Commission to find against a broadcaster in the event of omissions in a programme broadcast where the requirements of clauses 2.2, 3 and 7.2 are not abided by. Mere omission is no ground for a finding of a contravention. However, where a Complainant is able to show that the Respondent has, within a period preceding the alleged omission, been broadcasting prominent facts about a specific event of public importance, and has omitted to cover a related incident of public importance in a news bulletin, it might amount to a contravention. Such contravention will then be based on the effect which this omission has on the balance of preceding related news items that are, insofar as their timing is concerned, also reasonably connected to the alleged omission. A Complainant will have the duty to convince the Tribunal that the preceding set of facts were broadcast, and that an event had occurred which was of at least equal public importance, and also why it was unreasonable not to have published this event. Only then will the Respondent be required to show whether it had reasonable grounds not to maintain the balance in related (in terms of subject and time frame) news items, which is required by clause 2.2 of the Code.
- [11] It is within these parameters that the Commission must inquire into a complaint based on an omission. All the facts must be considered to determine whether it would have been reasonable to broadcast an item that was not broadcast. If the broadcaster, for example, explains that the truth of the event was not sufficiently verifiable or that the reporting of the event could, reasonably, have led to defamation or criminal charges against the broadcaster, the Code would not have been contravened.
- [12] On the facts before us, the *Mail & Guardian* reported as follows on its front page in its 29 November – 5 December 2002 issue:

“Investigations into South Africa’s multi-billion rand arms deal are reaching into the presidency....The Scorpions are investigating Deputy President Jacob Zuma for an alleged attempt to secure a bribe of R500,000 a year from French defence giant Thomson-CSF. The alleged bribe was to be paid in return for Zuma’s protection and support of the company.”

The Deputy President rejected the allegations as mischievous, according to an item on page three of the newspaper.

[13] The complaint was that the SABC news did not, soon thereafter, give air time to this investigation. The SABC responded that the Deputy President was not available in South Africa at that stage, and that before broadcasting on the matter, it would have wished to interview the Deputy President. Mr. Rogers replied that a phone call would have solved the problem. The SABC, however, replied that the mere fact that a newspaper publishes a story is not sufficient grounds for the SABC to publish. They would, in accordance with their policy, first investigate the matter themselves and consider how they should reasonably deal with the matter. That is why they only commenced broadcasting on this event by the 12th on radio, and again on the 16th, after the ANC Conference. This was done on all radio services and on the SABC TV news.

[14] An important question in media law is at what stage a newspaper or broadcaster is entitled to publish. Are mere rumours sufficient? Is it sufficient if a charge was filed at a charge office? Is it sufficient if detectives have commenced an investigation? Must one wait until a person is arrested? Must one wait until it is decided to prosecute? In practice, the media has at times been particularly quick in pouncing upon a person, even when there are only rumours of an offence. We have held that the statement on SABC news that a particular person is an “alleged suspected thief”, was unacceptable.³ In another case we held that, where allegations of nepotism by a chairperson of an organ of state were said to have been “confirmed”, whilst they had in fact merely been re-stated, the broadcaster

³ See Case No: 17/98

had contravened the Code.⁴ There is also authority for the proposition that a mere charge, which is made at the charge office, is not sufficient for a newspaper to rush into print with, unless it is in the public interest⁵. Stephenson LJ stated as follows in *Blackshaw v Lord and Another*⁶:

“But where damaging allegations or charges have been made and are still under investigation...or have been authoritatively refuted...there can be no duty to report them to the public.”

We support the judgment of the European Court of Human Rights in *Thorgeir Thorgeirson v Iceland*⁷ insofar as rumours against an organ of state (in casu the Police) are concerned. The Court stated as follows:

“In the present case, the applicant expressed his views by having them published in a newspaper. Regard must therefore be had to the pre-eminent role of the press in a State governed by the rule of law ... Whilst the press must not overstep the bounds set, inter alia, for the ‘protection of the reputation of others’, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise the press would be unable to play its vital role of ‘public watchdog’”.⁸

It should be borne in mind that the judgment protects the reputation of persons involved against slander and that we also support this view.

[15] We believe that it is impossible to lay down hard and fast rules here. On the one hand a person’s dignity and reputation are at stake, and on the other hand the media has a duty to inform the public. It is easy to quote the lofty ideals of

⁴ See Case No 27/99

⁵ See the authorities collected by the Appellate Division in *Neethling v Du Preez 1994(1) SA 708(A)*.

⁶ [1985] 2 All ER 311(CA) at 327.

⁷ 14 European Human Rights Reports 843 (1991).

freedom of speech and the right to impart and receive information in terms of section 16 of the Constitution. Yet, once an allegation has been published, the general public is inclined to believe that the person is probably guilty - for why would he or she have been arrested, or his or her conduct been investigated in the first place? Possibly this naïve view of the law stems from a time when many members of the governing white minority in the Apartheid era rejected fundamental rights: equality, for them, was a despicable or unacceptable human right and, accordingly, all human rights were rejected as a liberal “American” doctrine, which threatened the very basis on which Apartheid was built. In spite of the fact that it was a typical feature of our common law that a person is deemed to be innocent until proved to be guilty beyond a reasonable doubt, Parliament did not at the time fully respect the rule. This is illustrated by the significant number of statutes that explicitly or implicitly placed a reverse onus on an accused to prove on a balance of probabilities⁹ that he or she was not guilty. That meant that a person could be imprisoned even if there was a reasonable doubt in his or her favour. Fortunately, our Constitutional Court has held that a reverse onus in criminal prosecutions is constitutionally invalid.¹⁰

[16] In deciding whether it was reasonable for a broadcaster not to broadcast in the circumstances set out above, it should be borne in mind that after a plaintiff in an action for damages has proved that the statement was defamatory, there is an onus on a broadcaster to show on a balance of probabilities that the publication was reasonable, and in the absence of this, that its publication was not negligent.¹¹ The onus to prove that the publication was true and in the public interest also rests on the broadcaster.¹²

⁸ At p 865.

⁹ There were, astonishingly, even instances where a person had to prove that he was not guilty beyond a reasonable doubt – see section 12A(1) of the Sexual Offences Act 1957, as amended. This provision would no longer be applicable in the light of the Constitutional Court’s rejection of the reverse onus in several cases. See note 11 hereunder.

¹⁰ *S v Prinsloo; S v Mbatha* 1996(2)SA 464(CC); *S v Bhulwana*; *S v Gwadiso* 1996(1) SA 388(CC); *S v Manamela (Director –General of Justice Intervening)* 2000(3) SA 1(CC).

¹¹ See *National Media Ltd and Others v Bogoshi* 1998(4) SA 1196 (SCA)

¹² See *Khumalo and Others v Holomisa* 2002(5) SA 401(CC)

[17] Furthermore, publication should be in the public interest. We support the following dictum of Stephenson LJ in *Blackshaw v Lord and Another*¹³:

“There must be a duty to publish to the public at large and an interest in the public at large to receive the publication; and a section of the public is not enough.”

In deciding whether such a duty exists, the dignity of the persons involved must be weighed with special care. Dignity is a most important Constitutional right, which is easily invaded upon by frivolous conjecture; the indignity suffered is seldom restored after the person is acquitted by a Court of Law or charges are withdrawn or a Commission of Inquiry absolves the person. So often, nothing follows upon an investigation and a question mark, unjustifiably, tends to hang above the head of the person involved. These are factors which should be weighed with great sensitivity. Freedom of the media does not include the right to slander.

[18] The Broadcasting Code places a duty on a broadcaster to obtain the view of a person accused of or investigated for a possible crime. In fact such a person has a right to reply. See Clause 7.2.1 and 2 of the Code. At a certain stage, of course, the sub judice rule might limit certain forms of comment. Although the Press Code requires balance, it is less stringent than the Broadcasting Code. News broadcasts of the SABC draw millions of listeners and viewers and stricter rules are, accordingly, not only understandable but justifiable in law.

[19] On the facts of the present case we find that publication of the investigation by the Scorpions was in the public interest. The Deputy President is a public figure, and one of the consequences of taking public office is that a person’s dignity is less protected. The person voluntarily assumes high public office and has to live with criticism, often in vehement form. Nevertheless, a careful weighing process must be followed. Dignity must still be weighed against publicity. Allegation must be stated to be allegation. Mere suspicion of an alleged crime by a person does not justify publication. Even the mere laying of a charge should be considered

¹³ [1985] 2 All ER 311 (CA) at 327.

carefully, for charges are known to be vexatious or scurrilous at times. When the police investigate a public official, there must, once again, be a careful weighing of interests before publication takes place. It must, furthermore, be ensured that the person has an opportunity to respond in the same item. That is the primary rule. Only in exceptional circumstances would publication without such an opportunity be allowed. But then an opportunity to reply must be afforded in a supervening broadcast.

[20] We find that, given the circumstances, the SABC was justified in not broadcasting immediately after the *Mail & Guardian* published. It has no obligation to broadcast what has been published by another member of the media. It is entitled to decide for itself what constitutes a balance of interests. Television and radio are mighty media, and reach millions of listeners and viewers. When reporting, the balancing process that takes place in television and radio differs substantially from that which occurs in newspapers, with their more limited readership. Even if it is said to be a fact that the Scorpions are investigating, the duty to broadcast does not arise automatically. The SABC TV was justified in holding the matter over until the matter was aired at the ANC Congress. It then could publish the reaction of the President, who said that the law would take its course, if necessary. It thereby confirmed the Constitutional presumption of innocence of a person until proved guilty. The manner in which the SABC dealt with this matter was both balanced and reasonable. It was not necessary for it to broadcast as soon as the matter was published in a newspaper. For us to deduce that the SABC applied censorship in not immediately broadcasting the matter of the Scorpions' investigation, is not justified. All the SABC radio news bulletins, in any case, broadcast this matter by the 12th of December. Given the importance of the matter, they had acted reasonably in not simply broadcasting once the matter was raised by the newspaper.

[21] **In the result the legal matters raised are answered as follows:**

- (1) The mere omission by the SABC to broadcast an event of public importance does not amount to a contravention of the Broadcasting Code.
- (2) The omission by SABC News to broadcast an event of public importance where it forms part of a matter which has been aired previously, may be a contravention of the balance requirement in the news clause, depending on the facts of the particular case and whether a reasonable time has not lapsed since the previous broadcast on that subject.
- (3) For a contravention to be found, the procedure set out in par. 10 will be followed. It needs to be stressed that only in such circumstances where the Tribunal is convinced that publication should have taken place, in the light of the balancing process referred to, would a contravention be found. As always, in the interests of freedom of expression, which includes the right not to broadcast, the Tribunal will only find against a broadcaster in an unequivocal case.

[22] As to the alleged omission in the present case, we find that the SABC has acted in a reasonable manner. It justifiably held the matter over until a comment could be obtained on an appropriate occasion from Mr. Zuma or the President. The President's response re-affirmed the right of a person to be presumed innocent until proven guilty, a right that is, sadly, often lost sight of. A deduction that censorship (either internally or externally) has occurred, is not justified on the facts. Coverage was given within a reasonable time by all the news services of the SABC and millions of listeners and viewers were reached.

The complaint is, accordingly, dismissed on the facts.

As to the legal questions raised: the main question is answered in the negative, and the second question is answered as defined above in par. [21](2) and (3).

JCW VAN ROOYEN SC
CHAIRPERSON

28 FEBRUARY 2003

Commissioners De Klerk, Viljoen & Nayagar concurred in the above judgment of the Chairperson.