BCCSA
BROADCASTING COMPLAINTS
COMMISSION OF SOUTH AFRICA

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CASE NUMBER: 17/2001

HEARING DATE: 1 June 2001

In the matter between:

DYAMBU OPERATIONS (PTY) LTD **FIRST COMPLAINANT**

and

M-NET (CARTE BLANCHE) **RESPONDENT**

TRIBUNAL: **PROF KOBUS VAN ROOYEN S.C. (CHAIRPERSON)**

REV DANIE DU TOIT

PROF HENNING VILJOEN

On behalf of the Complainants: ADV LJ MORISON instructed by Goldman Judin Maisels Inc (Ms Lize Maartens)

For the Respondent: MR G PENFOLD of Webber Wentzel, Johannesburg

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SUMMARY

Procedure - enforcement of orders by BCCSA

Original order of Tribunal not strictly adhered to by the respondent. On an interpretation of the BCCSA's Constitution, the Tribunal is of the view that it has inherent power to enforce its own orders and directives. As a settlement had been reached by the parties which is acceptable to the Tribunal, no need to make a supplementary order.

JUDGMENT

The BCCSA delivered a judgment in the matter of Dyambu Operations (Pty) Ltd / M-Net (Carte Blanche) which was released for publication on 20 May 2001. The last part of the judgment reads as follows:

> "We shall prepare a statement in which we will direct M-Net to broadcast, at the commencement of the first *Carte Blanche* programme in May 2001, a written statement read by way of voice- over, of the conclusions reached by this Tribunal."

After consultation with the parties and other Commissioners involved, a statement was then prepared by the Chairman of the BCCSA, Prof Kobus van Rooyen, which reads as follows:

> "The Broadcasting Complaints Commission of South Africa recently handed down judgement in regard to complaints received about a Carte Blanche insert on the Lindela Repatriation Centre for Illegal Immigrants.
>
> It was held that Carte Blanche should have afforded Dyambu Operations (Pty) Ltd, which manages the housing facilities, an opportunity to have responded to Carte Blanche statements which were very critical of the facilities. It was unfair not to have allowed a representative of the facilities an opportunity to inform viewers of steps taken to ensure that the facilities conform to standards required for such facilities.
>
> Carte Blanche was reprimanded for the Contravention of the Code.
>
> Other complaints against the insert were not upheld.
>
> The Commission found that the Carte Blanche allegations of irregularity surrounding the 1996 award of the tender for Lindela were unfounded, but

> made in good faith. Bona fide errors in the information made available to the producer contributed to the error."

It was agreed between all the parties that the statement would be broadcast at the **commencement** of the Carte Blanche programme on 20 May 2001. On that date the statement was read, but at the **end** of the programme. Furthermore, M-Net, of its own accord, added the word "seven" to the number of other complaints that were not upheld by the Tribunal.

A complaint was lodged by Dyambu Operations (Pty)Ltd against M-Net for this patent disregard of the BCCSA's directive. The complaint was heard on an urgent basis by the present Tribunal on 1 June 2001. The matter that has firstly to be decided, is whether the BCCSA can enforce its own rulings and orders.

In order to resolve this matter, one would have to look at the history of the BCCSA and to study its constitution. The National Association of Broadcasters of South and Southern Africa (NAB) established the Broadcasting Complaints Commission of South Africa (BCCSA) by way of contract between its members. At the same time the NAB adopted a Code and Procedure for the BCCSA which form part of the Constitution of the BCCSA. Clause 3 of the Constitution provides, *inter alia*, as follows:

> " …the members, who sign the Constitution ("the signatories"), undertake not only to maintain the Code of Procedure but also **to abide by the rulings of the Adjudication Committee** (referred to in clause 10)" (our emphasis)

It should be pointed out in passing that the Adjudication Committee is also known as the Tribunal of the BCCSA.

Of importance for this decision is clause 14 of the Constitution which, in sub clauses 3 and 7, provides:

> "…the Adjudication Committee may:
>
> 14.3 direct that a correction and/or a summary of the findings of the Adjudication Committee be broadcast by the respondent in such manner as may be determined by the Committee;
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> 14.7 make any supplementary or ancillary orders or directions (this should probably read 'directives') that it may consider necessary for carrying into effect orders of (this should probably read 'or') directives made in terms of this clause and, more particularly, give directions as to the broadcasting of its findings."

Also of importance in determining this matter, is the wording of clause 5.1 of the Procedure of the BCCSA in the Mediation and Adjudication of Complaints (Appendix 1 to the Constitution). It reads:

> "The Chairperson shall cause any findings, reasons for a finding and/or requirements of the Adjudication Committee to be sent to the complainant and to **the respondent who shall carry out the Committee's directions and shall put into effect any decision which the Committee may have taken in terms of clause 14 of the constitution**." (our emphasis)

Clause 14 of the Constitution clearly conveys upon the BCCSA the power to impose sanctions for transgressions of its Code. The heading to clause 14 reads: "Sanctions of the Adjudication Committee". It is clear that the Adjudication Committee could direct M-Net to broadcast the statement which was sent to them by the Registrar. It is

common cause that M-Net complied with this directive but it is also common cause that it did not follow the directive to the letter. The Tribunal can now follow a lenient approach to this disregard of its directive and simply let the matter rest by dismissing the complaint. On the other hand, the Tribunal can be pedantic about the matter and insist on strict compliance with its order, thereby upholding the complaint.

Mr Morison, for the complainant, argued that if a respondent were allowed to amend the order of the Tribunal to its own liking, there will be no end to what respondents might do with the Tribunal's orders. We are in agreement with this argument. The Tribunal is of the view that it cannot, as a matter of principle, allow respondents to amend its orders, even to the slightest degree. If we were to allow this, it would be very difficult to draw the line in order to impose limits on such freedom. The argument, by Mr Penfold for the respondent, that no prejudice was suffered by anyone through the disregard by M-Net of the Committee's order, has to be rejected. The reason for this is that a principle has been violated. It is irrelevant whether someone has suffered prejudice or not, or to what degree the order had been amended by the respondent. The Committee therefore finds that the respondent has disregarded its order.

Although the BCCSA has come into existence through contract, it exercises public functions and therefore operates in the realm of public law. Administrative law principles prescribe its actions. Baxter *Administrative law* (1984) at 369 states that "…it is essential for the efficacy of orderly government that public authorities be obeyed and not obstructed. They must be able to ensure that their action is enforced." The Committee is of the opinion that these words also apply to the BCCSA.

The problem is that nowhere in the Constitution of the BCCSA or in any of the Appendices to the Constitution is provision explicitly made for a sanction to remedy the refusal or neglect by a signatory to the Constitution to comply with an order or

directive of the Adjudication Committee. The power to impose such a sanction can only be implied through an interpretation of the Constitution of the BCCSA. The words: "… to abide by the rulings of the Adjudication Committee" in clause 3 of the Constitution lend support, in the opinion of the Tribunal, to the interpretation of such power. This interpretation is further strengthened by the wording of clause 5.1 of the Procedure of the BCCSA (Appendix 1), namely: "… the respondent who shall carry out the Committee's directions and shall put into effect any decision which the Committee may have taken in terms of clause 14 of the constitution". If the Committee did not have the power to impose sanctions for the non-compliance of its orders, the words quoted above would have been worthless and could have been regarded as *pro non scripto*. The respondent, one of the signatories of the Constitution of the BCCSA, is clearly contractually bound to obey the rulings of the BCCSA. In terms of Administrative law, the BCCSA can also enforce its rulings against the signatories. The Committee finds that it has an inherent power to enforce its own rulings.

The next question to be answered, is what if the respondent does not obey a ruling of the BCCSA? As Baxter (*op cit* 369-301) points out, a public authority cannot take the law into its own hands. It may only enforce its acts by specific legal process. Where no specific process has been prescribed, one will again have to interpret the Constitution. The Committee finds support for the interpretation of such a power in the wording of clause 14.7 of the BCCSA's Constitution, namely: "… make any supplementary or ancillary orders or directives that it may consider necessary for carrying into effect orders or directives made in terms of this clause". A supplementary or ancillary order is clearly not an original order and must mean something else. The Tribunal interprets this in the present context as follows: The BCCSA made an order on 20 May 2001. This order was not put into effect by the respondent. The reason for this finding is that it violated the principle of strict

adherence. In terms of clause 14.7 the Committee can now make a supplementary or ancillary order to carry into effect its original order.

Should the respondent fail to obey the supplementary order, the BCCSA can apply to the High Court for an interdict or other legal remedy to ensure compliance with its orders, as stated by Baxter (370).

In the present matter the Tribunal will not make a ruling as we have been informed by the legal representatives of the complainant and the respondent that the parties have reached a settlement. The settlement comprises an undertaking by the respondent to broadcast a statement at the **commencement** of Carte Blanche on 10 June 2001 which corresponds substantially with the original order of the Committee. The statement also includes an apology for the respondent's failure to strictly adhere to the original order.

This settlement is acceptable to the Tribunal. Had it not been, the Tribunal would have proceeded with a supplementary order against the respondent. The reason why it would have done so is that it considers that it has the power to enforce its orders. It could therefore have imposed a sanction against the respondent for having violated the principle of strict adherence to the Committee's orders. As the settlement is acceptable, no ruling is made.

PROF HENNING VILJOEN

6 JUNE 2001

The Chairperson and Commissioner Du Toit concurred in the above judgment