BROADCASTING COMPLAINTS
COMMISSION OF SOUTH AFRICA

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CASE NUMBER: 18/1998

DATE OF HEARING: 23 JANUARY 2008

S VAN ZYL **COMPLAINANT**

vs

SABC **RESPONDENT**

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
PROF CAROLINE WHITE
MR CAREL VAN DER MERWE

COMPLAINANT: MR P DU PLESSIS OF DAVID H BOTHA, DU PLESSSIS & KRUGER, JOHANNESBURG

FOR THE RESPONDENT: MR MALAN OTTO (GENERAL MANAGER, CENTRAL COMPLAINTS OFFICE, SABC) WITH HIM THE HEAD OF THE LEGAL DEPARTMENT SABC, MR RONNIE BRACKS

SUMMARY

Klaer het beswaar gemaak teen 'n nuusitem waarin vermeld is dat hy betrokke is by die opleiding van bendes. Aangesien hierdie klagte moontlik sou kon lei to 'n siviele saak teen die SAUK, het die SAUK *in Limine* versoek dat daar uitsluitsel gegee word oor die vraag of Klaer bereid sou wees om afstand te doen van sy regte om dieselfde aangeleentheid in 'n siviele hof aan te gee. Die Voorsitter moes beslis of dit billik sou wees om dit van die Klaer te eis. Klaer het geargumenteer dat hy as lid van die publiek geregtig was om 'n klagte in te dien en dat 'n afstanddoening van regte gevolglik nie op hom van toepassing is nie. Tweedens het Klaer geargumenteer dat dit in elk geval onbillik teenoor hom sou wees indien hy nou moes afstand doen van sy regte om 'n

siviele hof te nader. Daar is geargumenteer dat dit op hierdie stadium onmoontlik sou wees vir Klaer om te bepaal watter omvang sy skade sou aanneem as gevolg van die stellings in die program.

Die Voorsitter van die Kommissie het beslis dat aangesien die klagte wesentlik die elemente bevat van 'n eis gebaseer op laster, dit onbillik sou wees om die Respondent te onderwerp aan so 'n verhoor voor die Uitsaaiklagtekommissie. Dit sou beteken dat die Klaer vir 'n tweede keer onderwerp sou kon word aan dieselfde klagte. Gevolglik is die versoek van die Respondent dat daar 'n afstanddoening geteken moet word, gehandhaaf.

Klaer het toe aangedui dat hy nie kans sien om met die verhoor voort te gaan nie en die aangeleentheid is *sine die* uitgestel.

JUDGMENT

JW van Rooyen

Complainant, the Managing Director of a Company which gives training in the handling of weapons and similar matters, complained about a news item on the SABC wherein he was implicated as having given training to gangs in the Western Cape. For purposes of this judgment it is unnecessary to go into further details of this complaint and the response of the SABC. This is so since the Respondent applied to the Chair to decide *in limine* whether it would not be fair to require Complainant to sign a waiver to take this same matter to the civil courts. Complainant indicated that it was not prepared to sign such a waiver: firstly it was argued that as a member of the public he was entitled to complain about incorrect news broadcasts and that a waiver was accordingly not relevant. Secondly it was argued that since it was argued that since it was impossible at this stage to quantify his damages, it was unreasonable to expect of him to waive his claim against the SABC.

Section 3.9 of the Procedural rules of this Commission provides that the Chairperson may require a Complainant to sign a waiver to further legal recourse when he is of the opinion that

The next question is whether it would be fair to require Complainants to waive their rights to further civil action. Clause 3.9 of the Procedural Rules of this Commission provides as follows:

> "When at any stage of the proceedings, the Chairperson is of the opinion that it is in

> the interest of fairness that a complainant must waive his or her rights to further legal recourse, the Chairperson shall require the complainant to waive such rights before the adjudication continues".

Although no evidence has been led or argument heard on the merits at this stage, the complaint in itself provides sufficient material for me to be able to decide whether it is in the interest of fairness that Complainant should be required to waive his rights to further civil recourse. Mr Du Plessis argued that it was unfair to Complainant to expect of him to waive his rights at this stage. He argued that the full extend of the damage done to his company would only be quantifiable at a much later stage. At this stage, so the argument ran, the Complainant was merely acting as a member of the public and complaining against an erroneous news item.

For purposes of this case it would seem appropriate to decide upon the question of fairness with reference to the similarity between the present complaint and a cause of action in our courts. Such a cause of action would seem to be one for defamation of the Complainant and/or his company which entail certain losses in regard to his clientele.

In *Pakendorf & Andere v De Flamingh* 1982(3) SA 146(A) it was held that where a defendant is the owner, editor and/or printer of a newspaper, the presumption of intention to defame is irrebuttable. That is, he or she is strictly liable. The fact that a statement is not true is an element in an action for defamation. Clause 2.1 of this Commission's Code of Conduct provides that the electronic media shall be obliged to report news truthfully, accurately and with due impartiality. The absence of truth is therefore relevant for both defamation and the Code of Conduct. In both the absence of intention is not a defence.

Although the finer details of a defence against an action for defamation and a complaint based on the alleged contravention of clauses 2 and 3 of the Code of Conduct, would or could differ, a defence of fair comment or truth would be substantially the same, if the issues are not, in any case, identical.

It is true that the matter of onus does not arise in an inquiry such as the present. The test before the Commission is whether having considered all the facts as well as argument, the Commission is convinced that a broadcaster has acted in conflict with the Code. In the interest of freedom of expression and clarity, this Commission would only find against a broadcaster where the contravention was clear and unequivocal. The practical difficulties which a broadcaster has in preparing its news bulletins - often under difficult circumstances and often with speed - would also be taken into consideration. A court of law would also take note of these circumstances in its evaluation of the matter.

I have, accordingly, come to the conclusion that the present matter is so similar to an action for defamation in courts, that it would be unfair to a broadcaster to be put through a similar procedure twice. It is a well-known rule of our law that a claim cannot be instituted twice on the same cause: *ne bis in idem.* Since the defence of *res judicata* would not be open to a broadcaster in a court case, this Commission being an administrative tribunal, I believe that it would only be fair to expect the Complainant in the present matter to waive his rights to take further action in the civil courts once a decision has been reached before this tribunal. Obviously a waiver would not exclude his right to take this Commission on review to the High Court.

I accordingly hold that it would be in the interest of fairness that Complainant be required to waive his rights to further legal recourse in the civil courts.

Since Complainant has indicated that it is not prepared to sign the waiver, I adjourned the matter *sine die*.

JCW VAN ROOYEN S.C.
CHAIRPERSON