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CASE NUMBER: 10/2016

DATE OF HEARING: 22 JULY 2016
JUDGMENT RELEASE DATE: 29 SEPTEMBER 2016

DAMARAH **COMPLAINANT**

vs

SABC2 AND CHANNEL 404 **RESPONDENT**

TRIBUNAL: **JUSTICE RATHA MOKGOATLHENG (CHAIRPERSON)**
PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)
DR LINDA VENTER

THE COMPLAINANTS: Mr AC Damarah assisted by Mr L Theunissen.

RESPONDENT: Mr Nyiko Shibambo, Acting Manager: Broadcasting Compliance, Regulatory Affairs SABC.

Reporting of news regarding the affairs of the Riemvasmaak Gemeenskap Ontwikkelingstrust - reference to two former administrators of the Trust who were convicted of theft – the truth being that their conviction had been set aside by the High Court - reference to the Trust being under administration - the truth being that the Trust was not under administration - contravention of clause 11(1) of the Code found - Damarah vs SABC2 and Channel 404, Case: 10/2016(BCCSA)

SUMMARY

The Broadcaster broadcast a news bulletin regarding the affairs of the Riemvasmaak Gemeenskap Ontwikkelingstrust. In the bulletin, reference was made to two former

administrators of the Trust who were convicted of theft. From the evidence before the Tribunal it appeared that the conviction of the two had been set aside by the High Court. Reference was also made in the broadcast to the Trust being under administration. From the evidence by the chairman of the Trust before the Tribunal it is clear that the Trust was not under administration. The Tribunal found a contravention of clause 11(1) of the Code and the complaint was upheld. The Tribunal agreed that a correction and an apology should be broadcast.

JUDGMENT

HP VILJOEN

[1] On 30 May 2016 the Respondent (SABC) broadcast a news report on the affairs of the Riemvasmaak Gemeenskap Ontwikkelingstrust (hereafter referred to as the Trust). The news broadcast threw a fairly negative light on the Trust and some of its trustees. The news item was broadcast in English, on Channel 404 at 15:00, and in Afrikaans, on SABC2 at 19:00. It is important to note that the Respondent produced only the broadcast in English to this Tribunal and admitted that the Afrikaans broadcast was not available. We mention this fact because it is well known that Afrikaans is the lingua franca of the people of that community and we think it is important that we should have listened to both broadcasts. We were also informed by the Complainant that the two versions of the news broadcasts did not match in all respects. This was not denied by the Broadcaster. The two trustees of the Trust who appeared before us averred that the news broadcasts contained what they regarded as two incorrect statements with serious consequences for the Trust and for some of the trustees. Mr AC Damarah, who informed us that he is the chairman of the Trust, lodged a complaint with the Registrar of the BCCSA.

[2] **The complaint reads as follows:**

"COMPLAINT AGAINST THE SABC FOR INACCURATE INFORMATION ABOUT THE RIEMVASMAAK GEMEENSKAP ONTWIKKELINGSTRUST

1. On Monday 30 May 2016 news clip about Riemvasmaak in the Nothern Cape was shown on the English and Afrikaans news bulletins of the SABC (15h00 on its news channel (404 DSTv) and 19h00 on SABC2).

2. In the news clip the SABC alleged that:
   · two administrators were convicted in 2013;

· the Trust is currently under administration;

3. Under the Broad Complaints Commission of South Africa's (BCCSA) Code the SABC committed itself to amongst other giving comment that is fair and news that is accurate. The Riemvasmaak Gemeenskap Ontwikkelingstrust (the Trust) is of the firm view that the SABC contravened this Code in that the allegations made by the SABC as mentioned in paragraph 2 above were neither fair nor accurate.

4. The true position is as follows:

4.1 In 2009 the Master of the High Court, Northern Cape appointed Messrs. R. Matthews and L. Theunissen as Trustees of the Trust after R650 000,00 disappeared under the auspices of the then former Trustees (before Theunissen and Matthews). They were appointed to investigate the affairs of the Trusts prior to their appointment and to administer and manage Trust and report their findings to the Master of the High Court.

4.2 Neither Mr. R. Matthews nor Mr. L. Theunissen were ever convicted in respect of their administration of the Trust or any other offence. The news clip specifically mentioned that two former administrators were convicted. This is a serious allegation and portrays the aforementioned gentlemen in a negative light directly infringing on their dignity as respected members of their espective professions, communities in which they live and work as well as their relatives.

4.3 Their appointment resulted in the successful prosecution of two former Trustees (appointed prior to Matthews and Theunissen), to wit Mrs. Imelda Claassen and Mr. Willem Damarah in the Regional Court in Kakamas in connection with the R650 000 alluded to above. This conviction was however later set aside after the two successfully appealed to the Northern Cape High Court. This means that no Trustee or Administrator has ever been convicted in respect of Riemvasmaak's affairs. Hence we are of the opinion that even if the intention of the SABC was to refer to Claassen and Damarah, their allegations are void of the truth, unfair, inaccurate and vexatious. It has further impaired the dignity of the two aforementioned persons.

4.4 The trial of one former Trustee, Mr. Ambrose Thomas, (also appointed prior to Theunissen and Matthews) is still on going in the Regional Court, Kakamas.

4.5 The Trust is at present run by Trustees appointed by the Master of the High Court in April 2015. There are at present 7 (seven) trustees serving on the Board including Messrs. Theunissen and Matthews.

5. In our opinion the SABC failed to report accurately and fairly on the abovementioned issues. The Trust accordingly, and as it is hereby doing, lodges a formal complaint against the SABC and request the BCCSA to investigate whether the SABC reported fairly and accurately when it broadcasted its news clip as mentioned.

6. The Trust look forward to your fair investigation and adjudication of our complaint.
7. Kindly do not hesitate to contact me on the abovementioned number if you require any further information or clarity on any of the issues raised above."

[3] **The Broadcaster responded as follows:**

"BCCSA COMPLAINT: AC DAMARAH - SABC 2 - NEWS - 30.05.2016 - 19:00

In respect of the above-mentioned complaint, please find our comments as follows:

1. The Agriculture and Land Reform MEC, Norman Shushu, is on record as having said that the Trust is under administration.

2. The conviction of the former administrators as well as the status of the current administrators was discussed with the complainant in a pre-interview that lasted about 30 minutes and at no point did he object to the facts at hand.

3. The people convicted in the Kakamas Regional Court are known to the community therefore improbable that the community would be under the impression that the persons referred to in the broadcast are Messrs Mathews and Theunissen. We believe that it is the complainant's own interpretation.

4. A right of reply was extended to Mr. Mathews, who later withdrew and offered the complainant as his replacement.

5. It is therefore our submission that given the information at hand and the interviews held with all the interested parties, we stand by our story. If there is any new credible information to the contrary, we are more than willing to share, if made available to us.

We submit that there was no contravention of the Code."

[4] **The Complainant replied as follows:**

"RESPONSE TO THE SABC'S LETTER DATED 10 JUNE 2016 IN RE COMPLAINT BY THE RIEMVASMAAK TRUST THE SABC FOR INACCURATE INFORMATION ABOUT THE RIEMVASMAAK GEMEENSKAP ONTWIKKELINGSTRUST

1. Kindly note that the Trust Chairperson could not respond before your deadline of 17 June 2016 as he was in Riemvasmaak where there is insufficient network coverage and could only consult when he had network coverage on his return from Riemvasmaak.

2. In response to the SABC's letter the Trust would like to respond as follows:

   2.1 AD PARAGRAPH 1:

   We still maintain that the news was not accurate. The Riemvasmaak Trust is a legal entity and is not accountable to the MEC concerned. In terms of the Trust Property Control Act 57 of 1988 only the Master of the High Court, Kimberley could place the Trust under administration. In order for this segment of the news to be accurate, the SABC ought to have consulted and verified the information with the said Master and not with the MEC. Accordingly the Trust is of the view that the failure by the SABC to consult with the Master of the High Court, Kimberley to verify whether the Trust is indeed under administration, constituted a violation of the Code in that the news so displayed was neither accurate nor fair.

   2.1. AD PARAGRAPH 2:

   This contents of this paragraph is denied in as far as it is in conflict with the position in our previous letter. At no point during the interview with the SABC did the Chairperson of the Trust indicate that two former administrators had been convicted. The interview focussed, amongst others, on the involvement of Messrs. Matthews and Theunissen in the Trust, the financial records of the Trust, and the financial status of the Trust.

   2.3 AD PARAGRAPH 3:

   The Trust maintains its allegations of inaccuracy as contained in paragraph 4 of its letter.

3. The Trust is henceforth still of the opinion that the SABC failed to report accurately and fairly.

4. The Trust looks forward to your fair investigation and adjudication of our complaint.

5. Kindly do not hesitate to contact me on the abovementioned number if you require any further information or clarity on any of the issues raised above."

[5] **The Broadcaster responded as follows:**

"**BCCSA COMPLAINT: AC DAMARAH - SABC 2 - NEWS - 30.05.2016 - 19:00 – additional response.**

In respect of the above-mentioned complaint, please find our comments as follows:

1. Nowhere in our initial response did we say that the organisation is accountable to the MEC. We were merely quoting on what was said on record.

2. We stand by our initial response as the complainant has dismally failed to produce new facts to counter our submission. "

EVALUATION

[6] The gist of this complaint is that the Broadcaster, in both its broadcasts (in Afrikaans and in English) on 30 May 2016 contravened clause 11(1) of the Free-to-Air Code of Conduct for Broadcasting Service Licensees. This sub-clause provides as follows: *Broadcasting service licensees must report news truthfully, accurately and fairly.*

[7] The complaint is that in the Afrikaans and in the English broadcasts certain statements were made to the effect, firstly, that two former administrators of the Trust had been convicted on a charge of theft. What was not stated in the broadcast, we were informed by the Complainant, was that two trustees of the Trust, Ms Imelda Claasen and Mr Willem Damarah, were found guilty of theft in 2013 in the Regional Court, but that they appealed to the High Court, Kimberley, against this conviction and that both were successful in their appeals. The conviction and sentence of both were set aside. The written judgment of the High Court in case CA & R 50/2014 was handed to us. There seems to be some confusion regarding the appellation of these two persons because they are referred to in the broadcast as administrators while in the complaint and in the High Court judgment they are referred to as trustees. We assume that the persons referred to in the broadcast as administrators are in fact trustees.

[8] The Broadcaster stated in its response to the complaint that the Complainant did not object to the "facts at hand" during a pre-interview. The Complainant stated that these facts, mentioned above, were not raised with him. He further stated that his version was not even broadcast in the Afrikaans news bulletin. We could not ascertain the veracity of this because the Afrikaans broadcast was not made available to us during the hearing. Under these circumstances we have to give the Complainant the benefit of the doubt and find that the facts were not raised with him and that his version of the facts was not broadcast in the Afrikaans bulletin.

[9] The fact that two former trustees were implicated in criminal activity by the broadcasts, had certain negative consequences for the trustees. Although the two trustees were not mentioned, the Broadcaster argued that because the people in the community knew who the convicted persons were, it is improbable that they would confuse them with Messrs Matthews and Theunissen who were appointed as trustees after the amount of R650 000 went missing from the trust. We think that this argument is rather speculative as to what the community would think. People might easily come to their own conclusions and this could result in the dignity of Messrs Matthews and Theunissen being impaired. This could be reason for a complaint of impairment of dignity being brought against the Broadcaster in terms of clause 15(1) of the Code. However, no such charge has been brought before us and we cannot make a finding in this regard. What we can find, however, and indeed do find, is that the setting aside of the convictions and sentences of Ms Claassen and Mr Willem Damarah is an important and material fact that should have been part of the news broadcast. Because this was not mentioned in the news bulletin, the wrong impression was created about the two mentioned persons. We find that as far as this point is concerned, the news was not reported truthfully, accurately and fairly.

[10] The second statement which forms the basis of this complaint is that in the broadcast it was stated that the Trust "is currently under administration". According to the Broadcaster the Member of the Executive Council for Agriculture and Land Reform (of the Northern Cape, we assume) is on record as having said that the Trust is under administration. The Complainant denies that the Trust is or was, at the time of the broadcast, under administration. We find it strange that the journalist employed by the Broadcaster deemed it necessary to enquire from the MEC for Agriculture and

Land Reform about the status of a trust. Anyone with some knowledge of state administration should know that the Masters of the High Court of South Africa are the authorities that are responsible for the registration of and supervision over trusts. Why the radio journalist went to the MEC to obtain this information was not explained by the Broadcaster. The Complainant denies that the Trust is under administration. As the chairman of the Trust, he is obviously the best informed as to whether the Trust is under administration or not, and we accept his evidence. We also find in this instance that the news was not reported truthfully, accurately and fairly.

[11] An example of a news broadcast which constituted a contravention of the Code on similar grounds, is to be found in case 10/1997 M Oelschig v SABC where a news item dealt with allegations of Third Force activities before the Truth and Reconciliation Commission. During the news report the camera focussed on a document randomly chosen by the cameraman but which clearly displayed the name of the complainant. The document was unrelated to the news item but caused the complainant considerable embarrassment as the visuals suggested his engagement in Third Force activities. The Tribunal found a contravention of the Code, reprimanded the broadcaster and directed it to broadcast the outcome of the hearing. This inaccuracy in the news reporting had the same effect as the failure by the broadcaster to refer to the overturning by the High Court of the trustees' convictions and sentences.

[12] The requirement that news should be truthful and accurate is part of our Code for obvious reasons. Likewise, the press Council of South Africa has a *Code of ethics and conduct for South African print and online media* which also requires that the reporting of news should be done truthfully, accurately and fairly. One cannot even imagine the chaos and anarchy that would result, were the media allowed to distort, exaggerate or misrepresent the facts or omit material facts when reporting news. For this reason we regard the fact that it was reported that people had been convicted of theft while their conviction had been set aside by the High Court and that the Trust that handled assets on behalf of the community was under administration while it was not, in a serious light.

[13] **In the result we find that clause 11(1) of the Code had been contravened and the complaint is upheld. The Complainant and the Broadcaster are hereby requested to submit arguments in writing to the Registrar of the BCCSA, within 14 days from date of receipt of this judgment (15 August 2016), in aggravation and in mitigation, respectively, of sanction.**

SANCTION

[1] Arguments, both in mitigation and in aggravation of sanction, were received from the respective parties. The Broadcaster offered to broadcast a correction of the facts as well as an apology to the respective parties who were offended by the broadcast concerned. The Broadcaster also informed us that it had rganized a workshop on the verification of information before a broadcast, to ensure that this type of mistake does not occur in future.

[2] The Complainant, whose arguments were received more than three weeks after due date, explained what damage the incorrect broadcast had done and how two big contracts pertaining to farms that the Trust owns almost fell through. He also sketched the social impact that the broadcast had on human relations in their community. This is regretful. The Complainant suggests the following sanctions:

- a fine of R70 000,
- the broadcast of a correction,
- a written apology to the Complainant and the other persons implicated,
- payment of the Complainant's costs.

[3] Firstly, it should be explained that the BCCSA has no power to make a cost award in finding a contravention of the Code. Secondly, a fine of R70 000 is only R10 000 short of the maximum fine that we can impose. We do not think this contravention deserves a fine, especially not such a big fine.

[4] The parties seem to agree that a correction and an apology should be broadcast. We think that this would be the best way to contain the damage caused by the broadcast concerned. We have decided that the following sanction be imposed:

That the Broadcaster be severely reprimanded for contravening the Code in the way it did with this particular broadcast,

That the Broadcaster broadcast, on the same channels that the original broadcast was carried and in more or less the same time slot, a correction of the facts relating to the two trustees' criminal convictions which were set aside and the fact that the Trust was not under administration. This broadcast should also include an apology to the offended parties as appears from this judgment.

As for the wording of the correction and the apology, the Broadcaster must draft the wording and send it to the Complainant and to the Registrar of the BCCSA. Only after the Broadcaster, the Complainant and ourselves have agreed on the wording may it be broadcast. We suggest that the date and time of the broadcast be made known to the community beforehand so that the maximum number of listeners can be informed of the correct situation.

HP VILJOEN
DEPUTY CHAIRPERSON

The Chairperson Justice Mokgoatlheng and Commissioner Venter concurred with the judgment of the Deputy Chairperson.