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CASE NUMBER: 12/2019

DATE OF HEARING: 10 JULY 2019
JUDGMENT RELEASE DATE: 05 AUGUST 2019

KESWA

COMPLAINANT

vs

**MULTICHOICE NEWZROOM AFRIKA
CHANNEL 405**

RESPONDENT

**TRIBUNAL: MR BRIAN MAKEKETA (DEPUTY CHAIRPERSON)
DR MOHAMED CHICKTAY
MR EDWIN NAIDU
DR LINDA VENTER**

For the Complainant: Adv Tembeka Ngcukaitobi SC, Adv Ben Winks, accompanied by Mr Rupert Candy, Attorney, Rupert Candy Attorneys Inc and Ms Lebohang Keswa

For the Broadcaster: Mr Dan Rosengarten and Ms Busi Nyembe, Attorneys from Rosengarten and Feinberg accompanied Mr Malebo Phage, Executive Head of News and Mr Linda Mnisi, reporter of Newzroom Afrika.

Complaint that news broadcast contained inaccurate information regarding the process followed in the securing and confirmation of the handing over of an RDP house to an elderly lady – complainant argued that story was not presented in correct context, was not verified or rectified after relevant information came to light and was unfairly presented as an escalating confrontation between the elderly lady and the complainant (Government representative) – complainant argued that her dignity was impaired as she was filmed without her consent - Broadcaster argued that a right of reply was repeatedly offered (which was not the subject of the complaint or requested) and also disputed receiving the correct information before the broadcast

– Tribunal upheld complaint - found contravention of clauses 28.1.1, 28.1.2, 28.1.5 and 28.4 - Keswa vs Multichoice Newzroom Afrika Channel 405, Case No: 12/2019 (BCCSA).

SUMMARY

A complaint was lodged with the Registrar of the BCCSA against the Respondent for its news broadcast of 10 May 2019 which contained inaccurate information regarding the process followed in the handing over of an RDP house to an elderly lady. The story was not presented in the correct context as it was presented as an escalating confrontation between the elderly lady and the Government representative.

The Complainant argued

- that the entire story was based on a misunderstanding by the elderly lady, who later (after the house was handed over a few days later) apologised to her;
- that she submitted the correct information to the Broadcaster before the broadcast, but that it failed to verify the information or to rectify the story;
- that her dignity was impaired as she was filmed without her consent and private details were broadcast in the process.

The Broadcaster argued that a right of reply was repeatedly offered and also disputes receiving the correct information before the broadcast.

The Tribunal upheld the complaint and found that the news insert was not presented in the correct context, that it was both untruthful and unfair (by not portraying, for example, that the Complainant was personally responsible for securing a house for the lady within days) and thus contravened clauses 28.1.1 and 28.1.2. Clause 28.1.5 was contravened since the inaccurate information was not rectified immediately when the correct information came to light. Clause 28.4 was contravened since the Complainant's dignity was infringed.

JUDGMENT

DR L VENTER

- [1] The Registrar of the BCCSA received a complaint from Ms Lebohang Keswa against Newzroom Afrika regarding a news story that was broadcast at 22h00 on 10 May 2019. According to Ms Keswa the broadcast did not reflect the true situation and furthermore infringed her privacy and dignity.

The following is a transcription of the verbal content of the insert, as well as a description of the visuals:

BANNER: Battling for a place to call home: Government and Soweto woman in war of words.

Anchor: After a live crossing this morning with a woman who lives in a one room electricity box house, the 64-year-old has come under fire from, under the gun rather of government. Newzroom Afrika interviewed Maria Majoro about services promised to her, which has yet to be delivered, but now the Human Settlements Department is accusing her of being a liar and using a national platform to publish false information. Our reporter, Linda Mnisi, caught this confrontation on camera.

Reporter: Ma, they said they gave you a call. Is that true?

Majoro: They haven't called me. They haven't spoken to me at all. From the 8th I haven't received their call.

Reporter: You say that you hope your leader will deliver services. What is it that you want?

Majoro: I want a house. What I want is a house. I want my own yard that I can share with my children. When they sleep in this room then I sleep in the other room. Even when I have visitors, I will have space to entertain them. Not this cramped up space. It's squashed, you saw for yourself.

Voice over: It was this crossing that pressed the wrong buttons of Human Settlements Department's spokesperson, Lebohang Keswa, who came to confront 64-year-old Maria Majoro on the claims she made.

(Visual of the two women sitting talking, conversation inaudible.)

(An unknown time after the conversation between the two women started, the following could be heard:)

Keswa: So, you're using the TV people to intimidate us.

Majoro: No, I'm not intimidating anyone. What are you doing? Why are you so angry? You wouldn't have come here had they not been here. I would've waited for long now that the elections have passed.

Keswa: So, you think we came here because of the TV people?

Majoro: Yes

(Visual: The reporter and the cameraman are sitting about 2 metres away from the two women, behind Keswa's back.)

Voiceover: A seemingly unimpressed Keswa accuses Majoro of lying and tells her what that could do to them. But shortly after that the confrontation escalates.

While Keswa was speaking to Majoro, the reporter walked over to Keswa, interrupted her and said: No, Lebo, you can't do that, you've come here to confront... (inaudible interjection from Keswa) ...to confront her... interjection ... to confront her about what she's saying.....you're saying you did not confront her? ...

Keswa: No, why doesn't she tell you we were here on Monday (inaudible interjection by reporter) ...because what she told you this morning was a lie...

(Majoro moving away and into her house, busying herself in the kitchenette, which is fitted with cupboards, displaying crockery and a microwave oven.)

Reporter's voice, off camera: What does this look like? What does this look like....

Keswa: We started a process with her... We are engaging with her ... (indistinct) ...you need to know that

Reporter: She has been living here for over 14 years

Keswa: Why is she not telling the truth?

(Indistinct exchange of words, both Keswa and reporter raising their voices. Then Keswa took a call on her cell phone and while talking, walked away.)

Visual: Keswa's car driving off.

Reporter voiceover: Seemingly enraged about the call, she dashes off, leaving Majoro not only disappointed at the prospect that she is not getting a house, but angry too.

Majoro (on camera): I'm so annoyed. I even felt like slapping her because she is a child who is a civil servant. These RDP's are the ones that put food on her table. They no longer belong to the people. She tells me that I'm lying, which means she disrespects me.

Reporter: According to Keswa, the 64-year old was not honest about the fact that she was contacted, just not after the elections. But Majoro says she was told she would be contacted shortly after her visit to the department and that she thought it would be on election day.

(Visuals of Majoro washing clothes in a zinc bath.)

Majoro to reporter: After the elections. I was told that they would come and see me, now I see that they are not coming. Now that you are here, I must explain what the situation is like. She must not come here and tell me that I'm lying.

Reporter voiceover: This happened in full view of her children and husband.

Majoro's adult daughter: I'm disappointed because I did not think that this lady would come here to fight. We thought that they would come here to fetch my mom and take her to her RDP house, not to come here and tell her she is lying. And why is she lying. This lady is young, my mom is her elder.

Reporter: While service delivery is one of the pillars of this government, what Maria Majoro did not anticipate, was the reaction she got after following up on a promise that was made by the Human Settlements Department.

[2] The complaint reads as follows:

"I am the Spokesperson of Human Settlements and CoGTA in Gauteng. On Sunday the 4th May 2019 I saw a story on NewzRoomAfrika that is on Channel 405 about a woman who lives in an Eskom Gas House under terrible conditions and had applied for an RDP house about fifteen years ago.

I then alerted the MEC about this story and other team members from Human Settlements also alerted the MEC of the matter. The MEC agreed that the woman must be granted a house and gave a go ahead that we should locate her and start with the process of identifying the house and start with the legal documentation.

We only managed to get hold of the woman, namely Ms Majoro on Monday 6th May 2019 and started the process. Ms Majoro was alerted on Tuesday that a property has been identified for her and she will be given the house in less than two weeks.

On Friday the 10th May 2019 at approximately 10-11am I got a call from the MEC to say I must watch NewzRoomAfrika Channel 405 on DSTV. To my shock and horror Ms Majoro was live interviewed by a Reporter named Linda Mnisi. Ms Majoro was giving very bad and negative feedback about the Department of Human Settlements and how we have not changed her living conditions as the government. Throughout the interview not once did Ms Majoro mention that we were in touch with her, she came to our offices and we have started a process with her and committed to giving her a house in two weeks time. I then called the Head of News from NewzRoomAfrika Mr Malebo Phage and asked for the Reporters contact details. I then told the Reporter telephonically that I am aware of the matter and we have been bending backwards as a Department to assist Ms Majoro as we only found out about her matter just over a week ago. I spoke to the Departments Advocate Ms Sepanya and one of the Project Managers Sharon Peters and was informed Ms Majoro was actually going to be given the house late afternoon on Friday but could not due to the MECs unavailability.

I phoned the Reporter and informed him of everything we have done with Ms Majoro and requested him to change his line of questioning and get verification from Ms Majoro as to whether the information I provided him with was true or false but he never did, he actually continued with the interview projecting the Department of Human Settlements as this monster that did not want to assist Ms Majoro.

Upon the MECs instructions I then went to Ms Majoros house to plead with her to tell the Reporter the truth about the developments of her matter and I showed the Reporter proof of the documentation that her house is been processed. The Reporter, Linda Mnisi, disregarded me and insisted that I must counter what Ms Majoro was saying live and I flatly refused. I told him that the only interview we will do is when the MEC hands over the house as the main objective is to get her a roof over her head and not make unnecessary headlines.

I then confronted Ms Majoro and the Reporter moved away from us for a while. I had made it very clear to him that I don't want this to be on record. As I confronted Ms Majoro and asked her to stop lying and tell the truth about the developments, the Reporter then came back and he confronted me about why I'm confronting Ms Majoro. Fortunately my phone rang and it was Mr Malebo Phage, the Head of News. I then took his call and asked him for his intervention as his Reporter was refusing to change the angle of the story even though valid facts were presented to him.

The next thing I know just after 10pm on Friday I got a call from Dr Olive Shisana from the President's Office enquiring about a clip of me that she just saw on NewzRoomAfrika confronting an elderly lady. Before I knew it the video was trending on social media. This has compromised me in the most unimaginable way and has seriously damaged my reputation.

The Complaint:

1. The Reporter, Linda Mnisi recorded me without my knowledge even after I told him that I don't want to be on record and my purpose of coming to Ms Majoros house was to give him proof of the developments and request Ms Majoro to tell the truth
2. In the video I'm also driving off in my personal car and the car registration was broadcasted by NewzRoomAfrika which I found completely unacceptable as it endangers my safety and life and that of my family and children as this is a family car.

I am therefore pleading with the BCCSA for your intervention as I believe this matter was badly managed and the Reporter has gone against Journalism code of ethics both by recording me without my permission and secondly by recording my car registration and broadcasting it.

Your urgent and prompt response will be highly appreciated."

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

“COMPLAINT BY LEBOHANG KESWA REGARDING PROGRAMME A NEWS REPORT ON NEWZROOM AFRIKA CHANNEL

1. We refer to a complaint from Lebohang Keswa regarding a news broadcast on Newzroom Afrika channel on 10 May 2019.
2. As we understand the complaint, it relates to only two issues, namely;
 - 2.1 That the reporter, Linda Mnisi, recorded the complainant without her knowledge even after she had told him that him that she didn't want to be on record and that her purpose of coming to Ms Majora's house was to give the reporter proof of the developments and to request Ms Majora to tell the truth; and
 - 2.2 That her car registration number was broadcast by Newzroom Afrika which she found completely unacceptable as it endangers her safety and life and that of her family and children as this is a family car.
3. We have been requested by the office of the Registrar to respond to the complaint taking into account provisions of the Code dealing with dignity and privacy which is clause 28.4.
4. We have requested a response from the channel and below is its detailed response:
 - 4.1 *Firstly, we point out that the complaint has nothing to do with the correctness or otherwise of the report or Newzroom Afrika's offering complainant a right of reply but rather the allegation that the complainant was recorded without her knowledge and that her personal car details were shown (i.e. an invasion of privacy in respect of which see the response below).*
 - 4.2 *Although it is not the subject of the complaint, it is important for context to state that the issue contained in the broadcast and subsequent broadcast relating to the matter was a controversial issue of public importance in that it dealt with the question of government's promises regarding the delivery of housing.*
 - 4.3 *While the complainant may not have been approached at the time the footage was shot, it is undisputed that she was offered a right of reply on numerous occasions so that Newzroom Afrika could present opposing views.*
 - 4.4 *We are in possession of correspondence exchanged between our attorneys and complainant's attorneys confirming this. Newzroom Afrika wanted to broadcast this view in a subsequent programme. The original right of reply was offered to the complainant on the same day as the news broadcast and was repeatedly offered to her subsequent to the broadcast. The last offer was made by our attorneys to complainant's attorneys in a Jetter dated 27 May 2019, which attached as Annexure A". In this regard, we refer you to paragraph 4.2 which confirms that the complainant or another representative of the Department) were repeatedly offered a right of reply. As appears from paragraph 4.2 of the Jetter, the complaint or a representative of the Department were invited to be interviewed at a time to be agreed with Newzroom Afrika.*
 - 4.5 *With respect to allegations of invasion of privacy, we wish to state that:*

- 4.5.1 *The footage which was broadcast involving the complainant was taken in a public place.*
- 4.5.2 *When she arrived at Ms Majoro's premises she was aware of the presence of Linda Mnisi as well as the cameraman. Linda Mnisi and the cameraman remained present throughout the discussion between the complainant and Ms Majoro. Accordingly, the complainant was at all times aware, or reasonably ought to have been aware that she was being filmed in a public place.*
- 4.5.3 *While the story presented Ms Majoro's allegations against the Department (and no allegations were made personally against the complainant, in any way,) the footage clearly shows that the complainant disputed the claims made against the Department as she is shown calling Ms Majoro a liar thereby disputing her version of events.*
- 4.5.4 *We therefore submit that the allegations of invasion of complainant's privacy are unsubstantiated.*
- 4.6 *Newzroom Afrika suspects that the complaint stems from the fact that the complainant was embarrassed by her conduct.*
- 4.7 *Insofar as the Newzroom Afrika broadcast identified the car registration of complainant is concerned, Newzroom Afrika's response is as follows:*
 - 4.7.1 *Immediately after she complained about this, to prevent any further disputes or issues arising, Newzroom Afrika blurred out the number plate in further broadcasts;*
 - 4.7.2 *The number plate was shown fleetingly and could only be ascertained by freezing the frame on which it appeared and enlarging it*
 - 4.7.3. *The circumstances in which the number plate was shown differs markedly from circumstances in which a number plate is shown resulting in the otherwise anonymous driver being identified. The complainant is a public figure and was in a public place for all to see and was conducting official business. All those present, could clearly see her number plate and identify that the car belonged to her. Newzroom Afrika could not have known that the vehicle was not an official government vehicle; and*
 - 4.7.4 *Given that the complainant is a public figure and her position is well-known to the public and has a broad social media presence, the allegation that the identification of the number plate endangered her safety and that of her family is ill-founded. As the complainant is a public figure who works for the Department, her place of work is well-known. Additionally, a cursory search of the internet identified complainant's mobile number. A trace using a tracing agent could easily identify her address from this information.*
- 4.8 *Moreover, to show that we acted fairly, we subsequently broadcast the handing over of the house to Ms Majoro. Additionally, the MEG subsequently apologised to Ms Majoro for the delay in handing over the house to her.*
5. *We submit that it is clear from the channel's response that there was no contravention of clause 28.4 of the Code."*

[4] **The Complainant's advocate replied as follows:**

- “1. We act for Ms. Lebogang Keswa ('our client').
2. At the outset, we advise that we were first instructed by our client on 13 May 2019; the date on which she submitted the complaint to the Broadcast Complaints Commission of South Africa ('the Commission'). Our client copied the writer herein on her complaint; however, we record that the complaint was submitted to the Commission, prior to us formally consulting with our client. We do not wish to boost our client's complaint, after the fact. What we seek to do is to give the Commission background on our client's attempts to resolve the matter, whilst the matter was processed and considered by the Commission. We confirm that the dispute between our client and the Respondent centres on the Respondent's breach of clause 28.4 of the Commission's Code of Conduct ('the Code'), but it also centres on breaches of clauses 28.1.1, 28.1.2 and 28.1.5 of the Code.
3. Our client has perused and considered the Respondent's reply. Included in that reply is a document, marked Annexure 'A'. This is a letter to us from the Respondent's attorneys, indicating that it was sent on 29 May 2019. This letter was in fact sent by the Respondent's attorneys, via email, on 16 May 2019. It appears to be automated, as it also reflects today's date when we print same. We attach it hereto as Annexure 'LK1'.
4. During the week in which that complaint was lodged, we were instructed to write to the Respondent, which we did, on 14 May 2019. We laid out our client's concerns and demands, and, that should they comply, our client would withdraw the complaint that she had lodged with the Commission, on 13 May 2019. We further indicated that this would save time, and resources, for all parties. A copy of this letter is annexed hereto as Annexure 'LK2'.
5. On 15 May 2019, the Respondent's attorneys replied to our email, in which they recorded, amongst others, that we provide them with an indulgence to file a reply, and further, it appeared to record the Respondent's preliminary views, prior to a more detailed reply being delivered. A copy of this e-mail is marked hereto as Annexure 'LK3'.
6. On the same evening, we replied to the Respondent's attorney's e-mail by delivering a letter in which we reiterated our client's desire to resolve this dispute soonest. We also stated, amongst others; that:
 - a. Our client is indeed a public official. However, this does not mean that our client does not have personality rights in her personal capacity. In this regard, we referred to the Supreme Court of Appeal's decision in the Mthembi-Mahanyele vs Mail & Guardian case;
 - b. The MEC had apologised to Ms. Majoro. However, we specifically pointed out that this had nothing to do with our client's demands. Notably, our client is concerned about the fact that the registration plate of her private vehicle was displayed by the Respondent on Channel 405, as well as on its online media platforms.
 - c. Our client had recently received death threats, for anti-corruption writing that she does on a freelance basis, and that broadcasting the registration plate of her private motor vehicle could pose a danger to her.

A copy of our letter referred to herein is annexed hereto as Annexure 'LK4'.

7. As per paragraph 3 above, on 16 May 2019, the Respondent submitted its reply to us.

8. We therefore request that the Commission, when reaching a decision, has regard to all the correspondence exchanged between the parties.
9. We do not choose to regurgitate all the content already exchanged in the correspondence between the parties, as to do so would result in unnecessary prolixity. However, we are of the view that it is important to, firstly, touch on the breach of our client's right to privacy and dignity by the Respondent, in displaying the registration plate of her private motor vehicle:
 - a. Much is made by the Respondent about our client being a public official. Indeed, it is so, but our client is an individual, official member of government, who has a right to assert her personality rights under law.
 - b. In its letter of 16 May 2019 (Annexure A to the Respondent's reply to your office, dated 29 May 2019) the Respondent argues that our client has a social media presence; her cell phone number is on the internet; her place of employment is known, and that a tracing agent can determine her location. This was in response to us placing on record that the broadcast of our client's registration details of her motor vehicle, posed a risk to our client. Even if it did not pose a risk to our client, we submit that the broadcast was unwarranted under section 28.4 of the Code, which requires that a broadcaster 'must exercise exceptional care and consideration in matters involving the private lives, private concerns and dignity of individuals, bearing in mind that the rights to privacy and dignity may be overridden by a legitimate public interest.'
 - c. Our client denies that displaying her registration plate was done with exceptional care. The Respondent ought to have taken reasonable steps to at least 'blur' the details of the registration plate. As pointed out already to the Respondent, in our client's view, this was done to contrast her wealth, with Ms. Majoro's poverty. The vehicle that our client was driving (a Jaguar) is not an ordinary, simple, vehicle that one would associate an employee of a provincial department to be using. If it was a live broadcast, we submit that the Respondent ought to have rather erred on the side of caution, and not broadcast our client leaving the scene. Our client's right to dignity trumps the Respondent's right to broadcast details of her personal vehicle, whether or not the Respondent knew, or did not know, that the vehicle belonged to our client, and not to the provincial government.
 - d. We note that under section 28.4 of the Code, privacy and dignity may be overridden by a legitimate public interest. However, the Respondent appears to miss the point. The provision of housing to poverty-stricken individuals and families in our country, is undoubtedly a legitimate public interest. Furthermore, we accept that our client's conduct when addressing Ms. Majoro could have been handled better. However, this is beside the point, and the Commission is called upon to express a view solely on the Respondent's conduct in breaching her right to privacy and dignity under section 28.4 of the Code. Our client's reaction to Ms. Majoro does not detract from the fact that the Respondent breached our client's right to privacy and dignity. Our client respectfully submits that that is what Commission ought to be focusing on.
 - e. In any event, as indicated to the Respondent in our letter of 15 May 2019 (Annexure 'LK4') Ms. Majoro has already extended an apology to our client, for amongst others, a 'misunderstanding'. This was the day after the handover of the house by the MEC. As pointed out to the Respondent, Ms. Majoro appeared to have eventually realised that it was our client, and only our client, who was directly responsible for bringing her plight to the attention of the MEC, which resulted in the handover of the house within less than two (2) weeks.
 - f. The Constitution of the Republic of South Africa, Act 108 of 1996 ('the Constitution') is the supreme law of our country. All law and conduct inconsistent with it is invalid (see

section 2 of the Constitution). The Bill of Rights is the cornerstone of democracy in our country (see Chapter 2, section 7(1) of the Constitution). Section 10 of the Constitution states that everyone has 'inherent dignity and the right to have their dignity respected and protected.' Human Dignity is the only right in the Bill of Rights that cannot be limited.

- g. Therefore, the Respondent ought to treat our client's concerns with the seriousness that it deserves.
 - h. You will also note from the Respondent's reply, that it has already removed, or "blurred" images of the registration plate of our client's personal vehicle. The Respondent advises that this was done to appease our client. However, this is an unsatisfactory reply. The Respondent cannot on the one hand state that the broadcast of our client's personal details was protected under the Code, and/or other law, and on the other, accede to one request and not simultaneously the other. Such conduct is in our view irrational.
 - i. As already pointed out to the Respondent, our client is of the view that the Respondent is hesitant to deliver an on-air apology, as it does not want to dent its reputation as a brand-new entrant in the market. An unconditional, on-air apology would take approximately ten (10) seconds to deliver, if not less. If that is done, then this entire saga would end, and then we could all close our respective files and return to other work that needs to be done in our respective offices. This is once again indicative of the Respondent's irrational, and unreasonable, conduct.
10. Therefore, our client stands by her assertion that the broadcast of the personal details of her private motor-vehicle, was unwarranted, and/or unprotected, under the Code, and/or other law. Our client thus persists with a request that the Respondent deliver an unconditional, on-air apology.
 11. Secondly, in respect of our client's assertions that the Respondent has breached clauses 28.1.1, 28.1.2 and 28.1.5 of the Code, our client submits as follows:
 - a. The reporter failed to report the correct facts once our client had alerted him to them;
 - b. The reporter sought to portray our client as a villain, amongst others, by secretly filming her interaction with Ms. Majoro and then broadcasting it without prior consent, or opportunity to comment. This is a violation of the Code, which cannot be retrospectively cured by offering a right of reply, no matter how many times. In this regard, the Respondent has not put up any clear defence.
 12. Kindly contact us, should you require any further information.
 13. All our client's rights remain reserved."

EVALUATION

- [5] Both the Complainant's and the Broadcaster's representatives lodged comprehensive heads of argument and bundles of documents containing, inter alia, an exchange of letters between their respective offices in which both sides expanded on their own points of view. The gist of the complaint is that the broadcast allegedly infringed the complainant's

rights to privacy and dignity and additionally that the Broadcaster failed to report news in the correct context, truthfully, accurately and fairly. For the sake of clarity, the background, context and sequence of the broadcasts that are referred to, is as follows:

- The initial interview with 64-year-old Ms Majoro (who had still not received an RDP house after her application fourteen years ago) was broadcast on 4 May 2019.
- The Complainant (spokesperson of the Gauteng Department of Human Settlements – hereafter the Department) saw this interview and set out to ensure that Ms Majoro receives a house as soon as possible. By 6 May 2019, she secured an RDP house for her and assisted her with the completion of the required documentation at the Department. On 7 May 2019 (one day before the national and provincial elections), Ms Majoro was informed that a house had been identified and that she would receive it within two weeks.
- On 10 May 2019 at 10h00 a follow-up interview with Ms Majoro was broadcast wherein she alleged that the Department had still done nothing to provide her with a house. (This allegation was not verified by the Broadcaster.)
- While this broadcast was on air, the Member of the Executive Council (MEC) responsible for Human Settlements alerted the Complainant of the broadcast and instructed her to set the record straight. The Complainant immediately called the Head of News, Newzroom Afrika and fully informed him. The latter then gave the Complainant the phone number of the reporter (Mr Mnisi), upon which the Complainant telephonically informed him of the steps taken that week and requested him to verify this with Ms Majoro. (He could also have verified it with the Department.) The reporter neglected to do this and continued with the live interview without questioning Ms Majoro's claim that the Department was still doing nothing to provide her with a house.
- On the MEC's instruction, the Complainant then went to Ms Majoro's house where the interview was being conducted throughout the day. She showed hard copies of

the relevant documentation to the reporter (confirmation that Ms Majoro will receive a house within a few days; the steps that had been taken to this end; and that the Complainant personally facilitated this). The reporter refused to adjust his reportage and said that the Complainant can say what she wants to say live on air. She refused and told him that they will do an interview when the MEC hands over the house and that she did not want to make unnecessary headlines. She then requested to speak to Ms Majoro privately off record, without being filmed. It seemed that the reporter accepted this and moved away, but since he and his cameraman were sitting about two metres behind her, she could not see that she was still being filmed. While she was speaking to Ms Majoro, the reporter walked over to them, interrupted her and started to argue with her (refer to the transcription). After receiving a phone call from the Head of News (whom she requested to intervene), the Complainant left the scene and drove off in her car.

- That evening (10 May) just after 22h00, the Complainant was phoned by Prof Shisana from the Office of the Presidency, enquiring about the news segment that was being broadcast at that time. This is the broadcast complained about (refer to transcription). The complaint relates to the fact that the reporter's cameraman did film the conversation between the Complainant, Ms Majoro and later the reporter, which created the overall impression that she went there to confront and bully Ms Majoro for having criticised the Department on television. Additionally, when the complainant drove off in her private car, the car was shown, as well as its rear number plate.

[6] The relevant arguments at the Tribunal by the representative of the Complainant, adv Ngcukaitobi (also referred to as the Complainant), and by the Broadcaster's attorney, Mr Rosengarten (also referred to as the Broadcaster), will now be addressed.

[7] The Broadcaster was adamant that clauses 28.1.1 and 28.1.2 (relating to news that must be presented in the correct context, truthfully and in a fair manner) should not be considered by the Tribunal since these clauses were not identified by the Complainant in

her original complaint where she specifically refers to an infringement of her privacy because she was filmed without her knowledge and her private car and its registration plate was shown. It should be noted that in this original complaint, the Complainant personally (not her legal representative) voiced all her grievances and it could not be expected of her to identify the relevant clauses of the Code. Clearly, she felt that the news was not presented truthfully and fairly and additionally that her privacy and dignity had been infringed. She lodged her complaint with the BCCSA on 13 May without consulting her representative, whom she only copied with the complaint. As soon as he was briefed, on 14 May, he informed the Broadcaster's attorney that he intends to apply clauses 28.1.1 and 28.1.2 as well. At the hearing, the members of the Tribunal agreed that the following sub-clauses of clause 28 are indeed relevant since there is no doubt that the provision of housing to poverty-stricken individuals and families in our country, is a matter of public importance and public interest.

Clause 28. News and comments on matters of public importance

If a subscription broadcasting service licensee includes in its service news or comment on matters of public importance that it has produced or commissioned, then the following provisions apply to that licensee –

Clause 28.1 News

28.1.1 Licensees must report news truthfully, accurately and fairly.

28.1.2 News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by-

28.1.2.1 distortion, exaggeration or misrepresentation;

28.1.2.3 summarisation;

28.1.5 If it subsequently appears that a broadcast report was incorrect in a material respect, it must be immediately rectified and without reservation. The rectification must be presented with such a degree of prominence and timing as in the circumstances may be adequate and fair so as to readily attract attention.

[8] The Tribunal is of the opinion that the reporter failed to include the relevant information about the situation that he was aware of well before the broadcast at 22h00. One of the basic principles of good journalism is that information provided in news stories should be

verified. This the reporter, or the news team, failed to do. The reporter also failed to portray that the Complainant was personally responsible for securing a house for Ms Majoro. The broadcast was therefore not fair. A BCCSA Tribunal¹ describes the test for fair reporting as follows:

Fairness is determined by the overall impression that the programme conveys, by context and by the tenor of voice and demeanour of the presenter..... The danger is that the producer and/or presenter can get overenthusiastic with what is perceived to be a scoop and fall into the trap of not presenting evidence that may favour the other side.... Fairness implies that one is able to see both sides of a case and to objectively give credit where credit is due.

The Tribunal concluded that the news insert was not presented in the correct context, that it was both untruthful and unfair and therefore contravened clauses 28.1.1 and 28.1.2. It also contravened 28.1.5 since the inaccurate information was not rectified immediately when the correct information came to light, which was much earlier than the 22h00 news broadcast.

- [9] The Broadcaster argued that both sides of the story were provided as the broadcast presented the Department's version when it broadcast the interaction between the Complainant and Ms Majoro. With this view we cannot agree (refer to transcription). The Broadcaster further argued that the Complainant was afforded a right of reply and opportunity to be interviewed on the same day (after she contacted the reporter) and on various subsequent occasions. The contention was thus that the Broadcaster therefore complied with clause 28.3.1 that states that:

In presenting a programme in which controversial issues of public importance are discussed, a licensee must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.

However, the Complainant's advocate pointed out that the offers to reply related to the broadcast at 10h00 and not to the 22h00 broadcast (which is the broadcast complained about) which was presented as a so-called 'war of words' (see banner). It was argued that the 22h00 broadcast portrayed the Complainant "*(personally) as a vindictive bully to*

¹ M-Net v CT International Finance, BCCSA Appeal Tribunal, Case No. 42/2012, at para 9 and 18.

a poor, elderly and vulnerable woman” and “that offering an opportunity to reply cannot cure unfair or unbalanced reporting”. The Complainant quoted a recent BCCSA Appeal Tribunal² where it was held that a right of reply was used to camouflage the damage that was already done and then placed the burden on the Appellant to rectify the situation in the guise of affording the right to reply. A further quote from the same case³ reads as follows:

This [information provided to the Broadcaster by the Appellant] however was not mentioned in the show; the host also confirmed during the broadcast that no prior verifications were made before attempting to confront the Appellant. It is a cardinal principle of our law that “he who alleges must prove”. It is however clear that the Broadcaster left it to the Appellant to disprove allegations that were made by the co-parent with the help of the host of the show. The co-parent’s version was taken religiously and the Broadcaster attempted to veil this by proclaiming that the Appellant was given the right to reply.

The Tribunal is in agreement with the above, also noting that the complaint does not concern the right of reply.

[9] Regarding the complaint about privacy and dignity, Clause 28.4 of the Code reads as follows:

Insofar as both news and comment are concerned, broadcasting licensees must exercise exceptional care and consideration in matters involving the private lives, private concerns and dignity of individuals, bearing in mind that the rights to privacy and dignity may be overridden by a legitimate public interest.

The Complainant’s advocate asserted that the Complainant was profoundly embarrassed by the broadcast on channel 405 and its electronic platforms, especially as it prompted Prof. Shisana from the President’s office to ask her to explain herself. The news segment also went viral on the social media, which made the Complainant the object of wide public disgust and scorn, as she was not only portrayed as being unsympathetic to a poor elderly woman, but also as being actively aggressive towards the woman. He argued that her reputation as a spokesperson and her dignity were damaged and that even if she is a public figure, she still has a right to personal dignity. That dignity is a core Constitutional

² Sibisi v Multichoice Channel 157, BCCSA Tribunal, Case No. 03/2019, at pp 17-18.

³ Ibid, at p 16-17.

value has been emphasised by our Courts. In *Khumalo and Others vs Holomisa*⁴, O'Regan J stated the following:

The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution.

Furthermore, the Complainant's advocate drew the attention of the Tribunal to BCCSA case number 03/2019⁵, where it was stated that in the case of *Delange v Costa* [1989 (2) SA 857 (A)], the Appellate Division clearly laid out the test for the impairment of dignity. The court held that the test consists of two elements: firstly, the plaintiff's self-esteem must have been impaired (subjective test) and secondly, whether a person of ordinary sensibilities would have regarded the conduct as offensive (objective test). The objective test requires application of the reasonable person test. We agree with the Complainant's advocate that both the subjective and objective tests for impairment of dignity were fulfilled in this case, where the Complainant was portrayed as bullying a poor, elderly and vulnerable woman, while in reality she went out of her way to help her. Not even the public interest in this case can override the Complainant's right to dignity and privacy.

[10] From the video, the Tribunal noted that the Complainant and Ms Majoro were sitting facing each other, talking fairly calmly, until the reporter intervened and confronted the Complainant, after which the situation escalated. The Complainant's advocate conceded

⁴ 2002 (5) SA 401 (CC).

⁵ *Sibisi v Multichoice Channel 157*, case no 03/2019.

that the Complainant's conduct when addressing Ms Majoro could have been handled better, but it is understandable that the Complainant found it hard to comprehend why Ms Majoro maintained that she was not contacted by the Department at all, since a few days earlier she was assisted at the Department with the completion of the required forms and the following day she was informed that a house had been allocated to her. It later became clearer that Ms Majoro meant that she was not contacted by the Department after the 8th (election day) to hand over the house and thus her statement that they have not called her. The Tribunal is of the view that it is reasonable to assume that it is quite possible that this misunderstanding (for which Ms Majoro later apologised to the Complainant) could have been cleared up in an amicable way had the reporter not intervened in what was supposed to be a private meeting between the two women. The news story had all the potential to have been presented as a good news story where at least one elderly woman was helped by the personal efforts of a government official.

- [11] The Complainant's advocate also elaborated on what is meant by clause 28.4, which states that exceptional care must be taken with the dignity and privacy of individuals. He emphasised that exceptional care implies that more than a typical level of caution must be employed by broadcasters. He contended that the broadcast violated the Complainant's privacy, firstly by covertly filming her private meeting with Ms Majora, and secondly by broadcasting visuals of her private car (and zooming in on its number plate) on a national news channel, as well as on its electronic platforms. The Broadcaster argued that the live broadcast took place in a public place and was justified because of the legitimate public interest in the story and the fact that the Complainant is a public figure. The Broadcaster further asserted that the Complainant's reaction (as broadcast live), was factually correct and that showing someone in a bad light is not prohibited.
- [12] Regarding the Complainant's request not to be televised, the Broadcaster referred to a judgment by Bertelsmann J in the case of *MEC for Health of Mpumalanga v M-Net*⁶, where *Carte Balance* obtained some information by means of a secret camera dealing with malpractices at hospitals/the public sector. Bertelsmann J referred to section 16 of

⁶ MEC for Health of Mpumalanga v M-Net and another (2002) JOL 10199 (T), at para 20, p.8

the Constitution that grants freedom to the media to receive or impart information. He (Bertelsmann) further argued that –

“the ability to form an opinion, particularly an opinion about the manner and fashion in which the authorities are performing their public duties or giving content to the obligation to deliver social services as demanded by the Constitution is, of course, dependent in a very large measure upon the media’s ability to provide accurate information on the way in which politicians and functionaries are fulfilling their mandate”.

- [13] The Broadcaster argued that even if there was an invasion of privacy (by filming the Complainant without her knowledge), the Broadcaster was providing information in respect of which a government department was fulfilling its mandate, and thus it was of public interest. He further referred to the case of *Bernstein v Bester*⁷ where it was held that as one increasingly moves into the public sphere and engages in public activities, the scope of personal space and privacy shrinks accordingly. It was argued that because of the public interest in the delays in providing RDP housing, the intrusion (which was denied) was justified and the Complainant had no right to privacy in this instance. As stated in paragraph [9], the public interest in this case cannot override the Complainant’s right to dignity and privacy.

Regarding the Bertelsmann J quote above, it should also be noted that it states explicitly that the media can only fulfil their mandate to assist the public to form valid/knowledgeable opinions by providing **accurate** information on the manner in which politicians and functionaries are fulfilling their mandate. The Tribunal members are of the opinion that in this case accurate information was not provided - what was provided was a so-called battle of words that ensued as a result of inaccurate information, and which infringed the Complainant’s dignity. In our view the public interest lies in the poor service delivery of the Government, and not in a war of words based on a misunderstanding. Broadcasts such as this can perpetuate existing stereotypes - in this

⁷ *Bernstein and Others v Bester NO & Others* 1996 (4) BCLR 449 (CC)

case the impression that the Department is at war with citizens by describing the private meeting between the Complainant and Ms Majoro as a “war of words” and an “escalating confrontation” and further that the Complainant was “enraged” with Ms Majoro.

- [14] Insofar as the visual of the Complainant’s car and its registration plate is concerned, at the hearing, the Complainant’s advocate contended that the Complainant recently received death threats, for anti-corruption writing that she does on a freelance basis, and that broadcasting the registration plate of her private vehicle could pose a danger to her and her family. The Broadcaster’s defence was that the car was parked in a public place, that the shot was very fleeting and that the details on the registration plate could only be identified by freezing the frame and enlarging the image. The Tribunal is in agreement with this view, taking in account that the alleged death threats were in connection with the Complainant’s activities on a freelance basis and that no proof of death threats that could be traced back to the news broadcast (now more than two months ago) was provided. In our opinion, it was in the first place totally unnecessary to include any visuals of the Complainant leaving in her car, as she was obviously walking away from the scene. The Broadcaster contended that number plates are not private on a public road as number plates and details of owners with their relevant addresses are kept in a public database that is available to the public. The Tribunal is not convinced that this is the case. Upon enquiries it came to light that municipalities will only provide the addresses of motor vehicle owners (by submission of a number plate) to the police or the court. The eNaTiS (Electronic National Traffic Information System), only provides personal details to companies doing recalls for defective motor parts or to dealers for tracing previous owners of a vehicle about to be sold (both subject to strict terms and conditions). Not even eNaTiS officials can access such information without entering private passwords and all officials are required to sign confidentiality declarations. Since privacy and dignity are closely linked in our Constitution, and as the Tribunal already concluded that the Complainant’s dignity was infringed, the issue of displaying the number plate of her car does not require further consideration.

[15] We do not find it necessary to make a finding about, or comment on the Complainant's accusation that her expensive car was shown in order to contrast her wealth with the poverty of Ms Majoro, as this is only a supposition.

[16] **In the result, we find that the news insert was not presented in the correct context, it was both untruthful and unfair and therefore contravened clauses 28.1.1 and 28.1.2. It also contravened clause 28.1.5 since the inaccurate information was not rectified immediately when the correct information came to light. Furthermore, clause 28.4 was contravened since the Complainant's dignity was infringed.**

[17] In a letter (dated 15 May 2019)⁸ to the Broadcaster's legal representative, the Complainant's legal representative wrote as follows:

(Y)our client's co-CEO, Mr. Thokozani Nkosi, has already indicated in a WhatsApp message to our client (a screenshot of which we have in our possession) that your client would be willing to offer 'an apology ... on air with all the requisite retractions' should your client be 'found wanting in this instance'.

The Broadcaster's reply on 16 May 2019⁹ was as follows:

Your suggestion that Mr Nkosi indicated that our client would be willing to offer an apology is misplaced. The message quoted by you in your letter clearly indicated that such an apology would be offered should our client be "found wanting in this instance". For the reasons set out in this letter, our client believes that it is not "found wanting" and that there is no need for it to apologise.

[18] **The Broadcaster's final submission regarding sanction is as follows:**

1. We refer to the draft judgment delivered in the above matter together with the invitation to make submissions relating to sanction.
2. We set out below Newzroom Africa's submissions which are made without it making any concession regarding the correctness of the judgment and with a full reservation of rights relating to a possible appeal once the final judgment is delivered.
3. For reasons more fully set out herein, Newzroom Afrika submits that the sanction should, at most, be restricted to providing the complainant with an opportunity to appear on the channel at a mutually agreeable time to present her side of the story relating to what transpired. It is a

⁸ Complainant's bundle of documents submitted at Tribunal, p.13.

⁹ Ibid, p.17

matter of record that this opportunity has been offered but declined on numerous previous occasions dating back to the day when the initial story was broadcast.

4. The reasons for Newzroom Afrika's making this submission concerning sanction is based on the following:
 - 4.1 Notwithstanding what is set out in the draft award, as a matter of fact as presented at the hearing, the reporter did not have access to any information from the complainant relating to the matter before the broadcast of 22h00. It is a matter of record that the documents relied on were only sent to the CEO of Newzroom Afrika after the broadcast. At that stage, the reporter had already given the complainant the opportunity to appear on television to present her/the Department's version of events. This quite clearly could not have related to the broadcast at 10h00 as the complainant only arrived at Ms Majoro's house after having viewed this footage. The opportunity to comment on what had transpired and to present the complainant/Department's version of events was in relation to any follow-up story. It is a matter of record that the complainant elected not to avail herself of this opportunity stating that any comment would be made when the house was handed over to Ms Majoro. When the house was handed over to Ms Majoro, the MEC was given every opportunity to deal with the matter including the previous broadcast. That he elected not to do so cannot be laid at the foot of Newzroom Afrika.
 - 4.2 Given the above sequence of events, the fact that the reporter disputes that he was made aware of the complainants or Departments position prior to the broadcast and the fact that the complainant was given a contemporaneous opportunity to deal with the truth, accuracy or otherwise of the story, this should mitigate against any sanction other than granting the complainant an opportunity to appear on air to discuss the matter.
 - 4.3 Moreover, insofar as the Rule 28.1.5 of the Code is concerned, any rectification required the input of the complainant. Having been offered this possibility and having declined it, no rectification could be forthcoming. In this regard, Newzroom Afrika is of the view that receipt of the documents on their own without any further explanation does not assist in reporting what transpired. All that the documents show is that Ms Majoro completed an affidavit together with various further documents regarding her application. The documents do not indicate why and when the documents were sent, any contact or conversations which may have been had between the Department/the complainant and Ms Majoro, when any such conversations took place, what promises (if any) were made to Ms Majoro and generally issues regarding to the correctness or otherwise of the statements broadcast by Ms Majoro. They certainly do not deal with the question of whether or not the Department had been in touch with Ms Majoro after the date of 8 May 2019, which is the date from which Ms Majoro states that the Department did not contact her. This too needs to be taken into account in determining what sanction would be appropriate. For this reason, even if the documents were in the possession of the reporter prior to 22h00, they did nothing to explain what the position was in relation to Ms Majoro. However, as stated, the documents were only sent on 11 May 2019 after the broadcast had taken place.
 - 4.4 Moreover, as set out in the letters exchanged between the parties' respective attorneys of record, the offer for the complainant to appear on air and present her and the Department's version of events was repeatedly declined. The first such offer was made when the complainant arrived unannounced at Ms Majoro's premises. By rejecting these offers, the complainant contributed to the fact that the matter was not dealt with in a timely manner, her and the Department's version of events were not placed on record.
 - 4.5 Had the complainant availed herself of the many opportunities offered to her, she would have been able to explain if any misrepresentation or distortion had taken place.

- 4.6 Insofar as dignity and privacy (which are interlinked) are concerned, due recognition must be had to the fact that not only was this a matter of public interest, but the complainant was a public figure of some prominence, being spokesperson for the Department. The fact that the bar is substantially higher for public figures needs to be taken into account in relation to any sanction imposed on Newzroom Africa.
- 4.7 Any issues relating to showing the complainant leaving in her car, even if in bad taste (which is denied) does not constitute a breach of any clause of the relevant Code and ought not to be taken into account when considering sanction.
5. In view of what is set out above, the repeated offer for the complainant to appear on air made from the date when the story was broadcast, it is submitted that the sanction should be nothing more than a finding of a transgression be accompanied with an offer for the complainant to appear on air as set out above and in the various letters exchanged between the parties' legal representatives."

[19] The Complainant's final submission regarding sanction is as follows:

- "a. We do not wish to respond to each and every allegation made in the Broadcaster's letter of 29 July 2019, save to state our client reserves the right to do so, as and when necessary, should the need arise, and in the appropriate forum;
- b. The draft judgment and sanction of an on-air apology is accepted. Of course, this is what our client has consistently requested;
- c. The Broadcaster at paragraph 5 of its letter is content with accepting a ruling of a transgression of the Code yet repeats its offer of a right of reply. We have already made submissions, both in previous correspondence, as well as at the hearing on 10 July 2019, in respect of why the offer of a right of reply is misplaced. It is therefore unnecessary for us to repeat ourselves.
- d. The Broadcaster is simply regurgitating previous submissions that have already been dealt with, and the BCCSA should not countenance such tactics.
- e. The fact of the matter is that the Code has been transgressed by the Broadcaster. The only outstanding issue is what sanction ought to apply.
- f. Our client could easily have requested at the hearing that the sanction ought to be a monetary fine, however, it has never been about the money for our client. A simple, and genuine, on-air apology is all our client ever wanted. The fact that the Broadcaster still digs its heels in is rather unfortunate, and our client is disappointed with its attitude.
- g. The Broadcaster's attitude is particularly disappointing in light of its previous concession, in correspondence with us, that, if it is "found wanting", an apology would be appropriate. The BCCSA notes this too at paragraph 17 of the draft judgment. The Broadcaster has now been found wanting, but still refuses to apologise.
- h. We point out that, in the practice of disciplinary bodies in other industries, a lack of remorse, or a stubborn refusal to accept the correctness of an adverse finding on the merits, is generally regarded as an aggravating factor for sanction. Regardless, our client still seeks nothing more than an appropriate on-air apology.
- i. Lastly, our client advises that the BCCSA ought not to be intimidated by the exuberant threat of an appeal, stipulated at paragraph 2 of the Broadcaster's letter.

We therefore confirm that our client is satisfied with the draft judgment, in its entirety, and requests that the BCCSA urgently makes same final.”

[20] The above submissions from the Broadcaster and the Complainant were noted. Since a contravention of the Code has already been found, the only purpose of the requested submissions was to afford an opportunity for raising arguments for mitigation or aggravation of sanction. The Broadcaster repeated the offer of a right of reply, however, the Complainant repeatedly indicated that she did not want a right of reply. The members of the Tribunal are of the opinion that the remedy of a right of reply will, in any case, serve no purpose three months after the original broadcast complained about. It may even exacerbate the situation by reinforcing negative opinions formed after the original broadcasts on 10 May. Without an apology, it may humiliate the Complainant further.

[21] The appropriate sanction in this instance will thus be to broadcast the following during the same time slot and programme:

“The Broadcasting Complaints Commission of South Africa has found that Newzroom Afrika contravened the Broadcasting Code of Conduct by broadcasting a news story at 22h00 on 10 May which contained inaccurate information regarding the handing over of an RDP house to an elderly lady. The story was presented as an escalating confrontation between the elderly lady and the Government representative and was not presented in the correct context. The Broadcaster failed to verify the information and to rectify the story when the correct information came to light. In the process, the Complainant’s dignity was infringed. Newzroom Afrika wishes to apologise to the Complainant”.

The Broadcaster must advise the BCCSA of the time and date of the broadcast so that the Complainant can be informed. Copies of this broadcast must also be furnished to the BCCSA.



**DR LINDA VENTER
COMMISSIONER: BROADCASTING COMPLAINTS COMMISSION**

Deputy Chairperson Makeketa and Commissioners Chicktay and Naidu concurred in the above judgment.