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CASE NUMBER: 27/2019

DATE OF HEARING: 27 NOVEMBER 2019
JUDGMENT RELEASE DATE: 05 DECEMBER 2019

KING EDWARD HIGH SCHOOL

COMPLAINANT

vs

SABC1

RESPONDENT

TRIBUNAL: PROF HP VILJOEN (CHAIRPERSON)
ADV. BOITUMELO THLAKUNG
MS NOKUBONGA FAKUDE

FOR THE COMPLAINANT: Stephen Harrison, Attorney accompanied by Mr Gordon Harrison: Principal of King Edward High School.

FOR THE BROADCASTER: Mr Nyiko Shibambo, Acting Manager, Compliance accompanied by Ms Refilwe Timana, Acting Compliance Officer and Mr Johannes Thugwana and Mr Njabulo Shabangu of SABC TV News.

Complaint about a broadcast on alleged racism in the Complainant's school-complaint upheld - respondent found by majority of the Tribunal to have contravened the Code- King Edward High School vs SABC1, Case No: 27/2019 (BCCSA).

SUMMARY

A complaint was lodged with the BCCSA by King Edward High School against the SABC for a broadcast dated 2 July 2019 at 21:30 on SABC1. The broadcast was a programme

called Cutting Edge. Cutting Edge is an investigative programme that depicts prevailing and current affairs in South Africa. The episode in contention was titled “*Intlungu yobuhlanga*” which means: “The pain caused by racism”. The broadcast was allegedly aimed at exposing racism in South Africa and in King Edward High School, which is situated in Matatiele, Eastern Cape. In the broadcast, interviews were conducted with parent(s) and state officials on allegations of racism in the school. The broadcast included various images and video clips of alleged racist conduct perpetuated by white people against non-white people. These images were not related to the alleged racism in King Edward High School. The majority of the Tribunal found that the respondent contravened Clauses 12, 13(1) and 15(1) & (3) of the Free-To-Air Code of Conduct for broadcasting service licensees. The complaint is accordingly upheld.

MAJORITY JUDGMENT (minority judgment not reported)

MS NOKUBONGA FAKUDE

[1] A complaint was lodged with the BCCSA against the SABC (*hereinafter referred to as the “Respondent”*) for its broadcast of the 2nd of July 2019 at 21:30. The complaint was lodged by King Edward High School, represented by Stephen Harrison Attorney (*hereinafter referred to as the “Complainant”*), alleging that the broadcast was defamatory, false, misleading and unbalanced. The Complainant alleged further that the broadcast harmed the school’s reputation by falsely accusing the school of racism against non-white pupils. Moreover that the dignities of the school principal, Mr. Gordon Harrison (*hereinafter referred to as the “school principal”*) as well as that of the school governing body’s chairperson, Mr. Andrew Duminy (*hereinafter referred to the “SGB chair”*) were impaired. The school principal was present at the Tribunal hearing and the SGB chair was duly represented.

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

“COMPLAINT REGARDING CUTTING EDGE PROGRAMME ON SABC 1

Name of Programme: Cutting Edge, Broadcaster: SABC 1 - a signatory of the BCCSA Date of broadcast: 2 July 2019, Time of broadcast: 21:30.

The School Governing Body of Kind Edward High School wishes to lay a complaint with the BCCSA regarding the above-mentioned programme.

We are greatly offended and seek swift and decisive redress in this matter. Our objections will be in terms of balance, dignity and privacy, and right to reply.

1) Balance

- The programme commenced with a topical and emotive clip, which has nothing to do with the unsubstantiated and false allegations levelled against the principal, SGB Chairperson, and school in general, in the Cutting Edge programme. (These allegations are itemised in the table below). It shows a white man punching a black pastor at a filling station. The purpose, we believe, was a) to incite anger and racially charged feelings as a warm up for the programme. b) to try and bring material filmed on 14 March 2019 and present it almost as breaking news. We are concerned that the publication of "false news" in the programme is inciting racial hatred.
- The broadcast contains a number of false and unfounded allegations against the school, its principal and the chairperson of its governing body and attorneys instructed by the school (Mcleod & Associates) which should have been fact-checked before publication, and to which inadequate opportunity was provided to respond. The table below sets out the allegations made in the broadcast, and our responses which demonstrates the lack of balance of the programme.

ALLEGATIONS		RESPONSE
Their kids (<i>black children</i>) get victimised when they question processes followed by the school		We refute this generalised and unsubstantiated statement. Our policy and practice is to treat everyone fairly and to love all our learners irrespective of their parents' actions. It is easy to make such a generalised statement -why was the alleger not asked to provide a specific example to which our SGB chair could have responded?
They tend to hold your kids back, they tend to find problems in your kids, they tend to bring your child to tears very often.		Children are promoted purely on academic and Departmentally sanctioned criteria. King Edward High School is ranked first in the District in promotions and Matric results with a track record that is nationally recognised. Very few children repeat a grade. Statistics to verify this are available at the school. All results are moderated and verified by District Departmental officials. It is standard academic procedure to identify learning challenges and to discipline where

		necessary. This is done sensitively and in line with Departmental guidelines. Our SGB Chair was not asked to respond to this at all.
They tell you that ... maybe your child is in Grade 3 or 4 ... they'll tell you your child won't make it to grade 5. He is going to fail grade 5		We keep all our parents informed of the performance of their children and academic challenges and prospects through reports and parent meetings. Copies of documents are at the school. This is standard academic procedure. The SGB Chair was not asked to respond to this at all.
They tell you must put your child on Ritalin...that your child is too active		If we suspect that a child may have ADHD we ask the parents to make an appointment with an educational psychologist or doctor to verify this. We do not prescribe medicine but advise further investigation in the best interests of a child. This is standard academic procedure. The SGB Chair was not asked to respond to this at all.
I (the accuser) have been to the school on numerous occasions		We can recall two occasions when the school invited him to discuss the behaviour of his child. He has not been to the school to make complaints relating to these allegations. The school access register will reflect this. The SGB Chair was not asked to respond to this at all.
If you apply for admission they try to take now at the moment they try to take more black kids, than coloured kids, white kids you don't have to do an application		Our admission records record all admissions. It indicates admissions largely reflecting the demographics of our country, and town as would reasonably be expected. The demographics of the learner population closely resemble that of the country and town. We do admit more African children than Coloured children as there are more African children in the area and therefore more African applications than Coloured ones. All learners complete application forms as required by the Department of Education. They are available for inspection in the learner files. The SGB Chair was asked not to respond to this at all.
White kids just walk into the school		This allegation is utterly false.

		Applications are made by all parents on the appropriate forms and the procedure is the same for all learners, irrespective of race. The SGB Chair was not asked to respond to this at all
I've got a coloured friend, they try to get the child into school and she was told that the school is full, I had a white friend of mine that took is wh.. child there, and the child just walked into the school... no no interview the child is accepted, start tomorrow		Periodically spaces open when children leave the school or repeat grades. A child is admitted if there is a space in that particular grade. There are other considerations such as subject packages, medium of instruction, hostel accommodation, academic performance, waiting lists etc. The principal attempts to interview all children to be admitted to the school, together with their parents. Inevitably this is not always feasible e.g. if the child is applying from Cape Town and is relocating later. There is no discrimination on the basis of race. The SGB Chair was not asked to respond to this at all.
We had an incident where the school actually help white families out by reducing their school fees and they never do it for a non-white family		All parents who believe that they are unable to pay the school fees are able to apply for reduced fees according to Departmental procedures. Children of all races receive subsidies from King Edward High School according to financial need. Records of reductions are available and audited by the Departmental of Education. Race is not a consideration. The SGB Chair was not asked to respond to this at all.
They are very, very racist, you have no idea		This is a false, generalised and unsubstantiated statement. The SGB Chair was not asked to respond to this at all.
We had an incident a couple months back where the school was taken to the newspapers, and they tried so hard to cover it up, and yes they still try, that's all they do is try to cover it up, but racism is very alive in Matatiele		There was a false, defamatory and inaccurate report regarding the school in the <i>Sunday Times</i> . Although presented by the newspaper as a race issue, it was in fact a language issue, faced by many dual medium schools. King Edward

	<p>High School co-operated fully with investigations by the District Office, Provincial Office, NCOP, SAGE and the stakeholders meeting.</p> <p>It complied fully with Departmental recommendations. There was no cover up. Extensive meetings were held with all phases in the school so that full and open discussion of any issues could take place between parents, the governing body and management. No allegations of racism were <i>made</i> by parents at any of these meetings. The allegations in the <i>Sunday Times</i> were rejected by the parent body. The SGB Chair was not asked to respond to allegations of a cover up at all</p>
<p>Learners get punished according to the colour of their skin</p>	<p>This is completely false. The school's code of conduct is applied fairly irrespective of race. Mitigating and aggravating circumstances, together with track record are taken into account in all cases. This is standard procedure for schools. The SGB Chair was not asked to respond to this at all</p>
<p>If kids break the rules at the school, non-white kids get victimised, they get expelled, but the white kids they just carry on as normal, nothing happens to them.</p>	<p>This is false and defamatory. The school has never formally expelled any learner for the past twenty years. In serious cases discussions have been conducted with parents, and children have left the school by mutual agreement. School records are available to show that race is not taken into consideration and there are fair consequences for all children. The SGB Chair was not asked to respond to this at all.</p>
<p>You are told that your kids are doing drugs and that they want to run drugs tests ... I mean legally they not allowed to do things like that but they still do.</p>	<p>If a school reasonably suspects that a learner has been taking drugs it has a right to conduct a drugs test according to law and Departmental procedures. This is standard school practice in many schools. The SGB Chair was not asked to respond to</p>

		this at all.
The school allegedly forced him to conduct a drug test. This despite his white school-mate being accomplice. He later committed suicide after he was the only one expelled from school		A drugs test was administered in the presence of his father and according to Departmental procedures. The school has no knowledge or record of a white school-mate accomplice. This false allegation appears to be deliberately made to incite racial prejudice and hatred. Full minutes of the formal disciplinary hearing are available at the school. The boy was never expelled. The recommendations of the hearing were still to be put to the full Governing Body for a decision. After that a recommendation was still to be made to the Eastern Cape Head of Department for his decision in the matter. The child's tragic death many years ago were a result of many personal factors which it is not reasonable or fair to discuss publicly. The SGB Chair was not asked to respond to this at all.
I don't have my child because of him		This is untrue. There are many factors which impacted on the life of this young man. Evidence can be led if necessary but is best left confidential. In any event, the principal did not adjudicate the hearing and simply performed his prescribed duties in referring the matter to the disciplinary tribunal which adjudicated the matter and made a recommendation. The SGB Chair was not asked to respond to this at all and refutes this.
Andrew Duminy is the chair for the Governing Body and he also runs Mcleod & Associates. He is the Advocate for Mcleod & Associates. And you didn't pay school fees or somebody or something is in arrears then Mcleod & Associates do an attachment and they sell your property		Andrew Duminy does not run Mcleod and Associates. He is a private Advocate and practises for his own account. He has no interest in Mcleod & Associates, which is a firm of attorneys. Mcleod and Associates act on behalf of King Edward High School in debt collection, according to the law. The SGB Chair was not asked to respond to this at all.
Yes, there has been lots of parents,		This allegation is false and school

cars and properties that had been sold by Mr Duminy		records, and records at Mcleod and Associates, prove this. No immovable property has been sold in execution of any judgment arising out of school fees by Mcleod and Associates. Mr Duminy is not involved in the process of collecting bad debts except insofar as his instruction is required as Chairman of the SGB. The SGB Chair was not asked to respond to this at all.
Mr Andrew Duminy says the EE class is for slow children, children that are special needs he called it in his newspaper article		Mr Duminy stated that the extra class was created so that more children could be taken into the school to address the urgent need for quality education for a greater proportion of our community and for children who were battling in particular with English in the foundation phase. He never used the term "special needs" which has other connotations. The newspaper articles reflect this. The SGB Chair was not asked to respond to this at all.

- The comment "It seems incidents of racism are on the rise ... ", subtly passes judgement on the Management and Governing Body of the school even before the programme commences in earnest.
- The following comment is also an unfair leading thought: Xa sidadela enzulwini ngezityholo zobuhlanga, sityelela isikolo i King Edward ezinze kwidolophu yase Matatiele. [When we get deep into the racism issue, we visit King Edward High School in Matatiele]. The programme unfairly introduces itself as though it has uncovered and made irrefutable findings of racism. This is false and misleading.
- The report on King Edward High School is sandwiched between what would appear to be a racist attack at the petrol station, and another highly charged account of alleged racism in Matatiele, suggesting guilt by association. The agenda appears clear when a well-publicised picture of segregation in a classroom in Schweizer-Reneke is shown twice in the middle of footage of King Edward High School, to make it appear as if it was shot at King Edward High School. This is false. There is no indication or comment that this was not taken at King Edward High school. The association is nevertheless unfairly created by the broadcast.
- The programme was not balanced in terms of time allocated, or the opportunity to present a cogent argument from our side. A simple statement that the allegations are not true and comments on other issues cannot balance extensive footage of allegations. The School Governing Body Chairman was interviewed for over 20 minutes in obtaining footage but was afforded very little time on the programme. Over seven and a half minutes of the broadcast are used to accuse King Edward High School, while only two

minutes are given to our response -which was not to the allegations! The response of our Chairperson was only directed to the Sunday Times article and limited issues relating thereto. He was not asked about the suicide many years ago, the alleged racism of the Headmaster himself, the alleged racism in admissions, the alleged racism in disciplinary processes, the collection process relating to bad debt, the role of Mcleod & Associates Attorneys, the alleged sale of property and numerous other issues reported on. This discrepancy seems extreme and deliberate. Later, when the advert break message promises imminent school's response, a further allegation is made instead and no response is given at that stage. The editing was shoddy and the response from the school could not address the main allegations as they were never put to the SGB chairperson in the first place

- There are several general principles that fall under the News section of the BCCSA Free-To-Air Code of Conduct. The spirit of the Code of Conduct is clear: "Broadcasting service licensees must report news truthfully, accurately and fairly". Section 11(1).

The Code of conduct continues:

"Where there is reason to doubt the correctness of the report and it is practically possible to verify the correctness thereof, it must be verified. Section 11(5).

It was certainly possible to verify the truth for each of the allegations from the Chairman of the School Governing Body or the Department of Education. Statistics and records are available as indicated in the table above. This was not done.

It was never stated in the programme that these are unverified allegations.

2) Privacy and dignity

- Point 15 (1) of the BCCSA Free-To-Air Code of Conduct states: "Broadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals".

This was clearly not the case in the Cutting Edge Programme:

- There were only two complainants on different issues. The one is backlit in an attempt to hide his identity. The programme protects the accuser while exposing the accused to massive financial and political risk, without proper investigation.
- One would logically expect a programme, which states that exposing truth is their primary objective, to investigate thoroughly, before publishing material with potentially massive consequences. This did not happen.
- SABC 1 television is a very public platform and the potential to ruin a principal or other person's reputation, and future job prospects, is clear and obvious, particularly with an accusation as emotive as racism in South Africa.
- The personal and professional privacy of the principal and his staff have been invaded for no just cause.
- The dignity of the principal has been impaired in front of his learners when his employment conditions prevent him from defending himself. Respect for a principal is the cornerstone of discipline within a school.
- It was discussed by the principal with the reporters before they filmed, that

irrespective of guilt and innocence, association with racism has massive implications in South Africa.

- The BCCSA code makes a special provision to protect children. Point 15 (2) states: "In the protection of privacy, dignity and reputation, special weight must be afforded to the privacy, dignity and reputation of children". Their loyalty and pride in their school has been unfairly undermined by unfounded allegations, as indicated in the table above.
- Confidentiality with regard to school attendance is particularly pertinent in the light of child trafficking. In the presence of the Cutting Edge reporter the principal was instructed telephonically by the Communications Officer of the Eastern Cape Department of Education that the Cutting Edge programme could film on the school premises on condition that it did not film the faces of the children, in order to protect their privacy. This was made patently clear to the reporter. The fact that this was clearly understood is reflected in the footage of the children's legs walking, the back view of the assembly and the fact that the faces of the children from another school in Schweizer-Reneke, were censored by their correct original source. While we understood that the rugby scenes and background footage would, of necessity, be uncensored, general close up footage of staff and learners was used as well. Parents and staff have complained about this. The principal and Chairman of the Governing Body were featured very prominently in the footage and no opportunity was afforded them to decide whether or not to hide their identity.
- An affront to the dignity of a school affects the School Governing Body, School management team, staff and learners.

3) Right to reply

- Correct and full right to reply to the allegations tabulated above was not given.
- Section 12(3) of the BCCSA Free-To-Air Code of Conduct states: "Where a person has stated that he or she is not available for comment or such a person could not reasonably be reached, it must be stated in the programme". The principal, as employee of the Department of Education, is not permitted to speak to the media. This was indicated this very clearly to the reporter. No mention of this fact was made in the programme, violating the Code of Conduct.
- Inadequate notice was given to the school by the reporter, who arrived on a difficult day. The Chairperson of the School Governing Body was caught at the side of a rugby field where he was watching sport.
- The full details of the allegations were not revealed to the principal or the SGB Chairperson. The questions posed to him related largely to the Sunday Times article. Specific questions relating to all the allegations of the programme were not put to him for comment. For example, nothing was asked about the boy who committed suicide. In the programme the SGB chairman refuted the incorrect allegations of the Sunday Times article but was not given the right to reply to the specific allegations of the Cutting Edge programme. The school was not aware of all the allegations until they were viewed on the programme.
- Cutting Edge promised to inform us of the viewing time, prior to the screening. This did not happen. We were not given the chance to view the programme in advance.

We submit that Cutting Edge and SABC 1 breached the BCCSA Free-To-Air Code of Conduct in of the above-mentioned respects.

For this reason, we request that the BCCSA makes a ruling against the SABC and Cutting Edge for violation of its Code of Conduct, and affords the school, its governing body and principal appropriate relief. In particular, we submit that the SABC should also publish an apology to the Headmaster, The Chair of the School Governing Body, the School and our community, which unanimously rejected the allegations of racism in the numerous meetings held with parents. The accusers of the school (in particular the gentleman who chose to hide in the shadows in the SABC interview) chose NOT to raise their alleged grievances in the meetings with parents where open and frank discussions took place. Freedom of speech has been abused and the SABC has been swept up by the hate filled agenda of one parent and one ex parent. This has led to shockingly inappropriate reporting of "false news".

[2] The Broadcaster responded as follows:

“BCCSA COMPLAINT - KEHS (KING EDWARD HIGH SCHOOL) - SABC 1 - CUTTING EDGE - 02.07.2019 - 21:30

In respect of the above-mentioned complaint, we submit an electronic copy of the segment. The SABC has noted the concerns raised by the complainants:

1. We opened the programme with a footage of a racism related attack at a petrol station in Roodepoort, Johannesburg. The context was that the incident was related to racism and nowhere did we imply that it happened at King Edward High School. We exercised our editorial discretion to include issues that are related to racism and would amplify the issues of focus in our programme.
2. All the allegations were raised by parents whose children are enrolled at KEHS. Some of the parents asked to speak on condition of anonymity for fear of victimization of their children. The parents are known to us and we can prove that their children are registered at the school.
3. We have afforded the school the right of reply, in a form of the SGB Chairperson, Mr. Duminy who responded to all the allegations made by parents. Mr. Duminy, in the broadcast, mentions the allegations made against the school, proving that they were well aware of those allegations.
4. The Mayor of the local municipality has also corroborated the allegations from some of the parents we spoke to. He indicated that he heard of all these allegations at a parents' meeting held in the area and the SGB chairperson refuted them.
5. The story was balanced and the school had ample time to present the position of the school.

We submit that there has been no contravention of the Code.”

[3] The Complainant replied as follows:

“COMPLAINT REGARDING CUTTING EDGE PROGRAMME ON SABC 1 – SGB RESPONSE TO SABC'S RESPONSE DATED 13 SEPTEMBER 2019

The School Governing Body of Kind Edward High School wishes to state that we are not at all satisfied with the response from the SABC. It is clear that they have not adequately applied their minds to the matters we raised, but simply attempted to fob us off. This adds insult to injury.

We remain deeply offended and rely on the BCCSA to ensure justice is effected with swift and decisive redress in this matter. All our objections remain, as the SABC's response has not adequately answered any of them.

Addressing the specifics mentioned by the SABC:

- 1) The response that they portrayed the unrelated racist attack to "amplify the issues of focus" is precisely our objection as it indicates a deliberate attempt to inflame and not present a balanced report according to the facts of the case.
- 2) The anonymous people who made the allegations may well have children in the school but they represent a minute fraction of the parent body. There are many possible motivating factors why they may have a personal gripe or vendetta e.g. Legal action in the collection of school fees, disciplinary action, racism towards the school management etc.
- 3) There are two distinct sets of allegations one made by parents to the Sunday Times and one made to the Cutting Edge team. One of the points we are making at great length is that Advocate Duminy was asked by the Cutting Edge team to respond to the allegations raised with the Sunday Times. He was not afforded the right to reply to the specific allegations made in the Cutting Edge programme as they were never put to him. Had they been put to him, they would have been very easily refuted with concrete proof, as they are devoid of truth. Cutting Edge would then have known there is no story and would not have defamed the Principal and school and we would have been spared a great injustice.
- 4) In a similar vein, the Mayor was commenting on the allegations made to the Sunday Times, which were discussed in a public meeting months prior to the Cutting Edge filming.
- 5) The story is clearly not at all balanced and the school was not afforded the opportunity to counter the specific false allegations made in the Cutting Edge programme.

We wish to reiterate **all** our grievances with regard to balance, dignity and privacy, and right to reply. As none of our complaints have been adequately considered, we simply restate them and insist that the SABC and the BCCSA address these issues.

Complainant repeated the contents of paragraphs one to three in their reply to the SABC's Response.

....

We believe that our school is a model of what a school can achieve in racial diversity and harmony. The chair of our SGB asked your reporter to report on the wonderful progress that our school has made in racial harmony and reconciliation. The chief reporter herself commented to our chairperson that the school was a wonderful example of racial harmony and that she herself would be delighted if her child could attend such a school. She even enquired as to whether or not the school had a boarding establishment since she might move her child to King Edward if accepted. These comments were made in full sincerity and it is astounding that the "news" programme reflected a totally different perspective and view.

We finally note that our Chairperson had asked another member of the SGB, Mrs Sissie Matela, to be interviewed in his place when approached by the SABC. Mrs Matela had indicated that she would only be interviewed if the interview was live since she did not trust the SABC to properly and fairly edit and broadcast any pre-recorded interview. The SABC staff indicated that the interview would not be "live" and Mrs Matela refused to be interviewed. In hindsight Mrs Matela was correct in refusing to be interviewed. The editing by the SABC and selective reporting is shockingly unfair and defamatory of the Headmaster, the SGB Chairperson, the SGB, Mcleod and Associates Attorneys and the School itself. It is clear that only a live broadcast could have addressed the allegations properly.

Our school and community is united against the divisive, defamatory and unfair racist agenda of individuals who have abused the SABC to air their false allegations. We stand behind our Headmaster who has a proven personal and professional track-record of fighting racism for many years at all levels of society. He has served selflessly in many capacities to assist underprivileged children and uplifting those in need. He has devoted himself to educating the diverse children of our community and has achieved outstanding results. Countless children from underprivileged communities owe their tertiary education and professional success to the foundations laid by Mr Harrison. The SABC has played into the hands of a racist and polarising agenda and has defamed a man whose reputation is beyond refute.

We request the BCCSA to kindly proceed with their judgement in this matter and to afford the Principal and School the relief it deserves."

[4] The SABC responded as follows on the 09 October:

"Kindly note that Cutting Edge feels that they have sufficiently responded to the complaint and have no further comment to make. Feel free to proceed with the matter, using the submitted info."

EVALUATION

- [5] The Complainant submitted that it believes that the broadcast was informed by a newspaper article that was published on the 13th of January 2019. The article accused the Complainant of separating its classes and pupils based on race. The Complainant drew the Tribunal's attention to the Complainant's media statement in response to the article; holding that the Complainant's policy of separating classes and therefore creating an "EE" class was based on an inherent requirement to integrate pupils who had not been exposed to early learning and therefore had difficulty with English proficiency and numeracy skills. The division was indicated to be fair discrimination, which also plays a role in the Complainant's consistent 100% matric pass rate. The Complainant submitted further that the school consists of about 90% non-white learners and again around 75%-95% of the learners who matriculate gain university bachelor's degree admission. The

Complainant in essence did not dispute the existence of discrimination in the school but submitted that such discrimination amounts to fair discrimination and not unfair discrimination based on race. Furthermore, that the statistics presented by the Complainant, show that all learners, despite their race, equally benefit from the education offered by the Complainant. The Complainant indicated that it is unfortunate that pupils who make up the “EE” class happen to be non-white. The Respondent did not dispute these averments and statistics, and as such the Tribunal is justified in treating these submissions in terms of the Plascon-Evans rule,¹ and thus hold these submissions to be correct; more so because past education systems, such as the South African “bantu education”, were designed to bastardize non-white persons to a thorough level of incompetency and hereditary poverty and dependence. This, consequently, in absence of evidence to the contrary, makes the Complainant’s version more probable; being that the Complainants’ “EE” class consists mostly on non-white pupils.

[6] Members of the Tribunal watched the broadcast in question together with the Complainant and the Respondent. The Respondent submitted that the broadcast was a general depiction of racist conduct against non-white persons in South Africa and was not especially dedicated to the Complainant. The programme however consisted of more segments of the alleged racism by the Complainant than the rest of its features, which on its own, could lead the reasonable viewer to believing that the programme was an expose of racism by the Complainant. The initial segment of the broadcast showed a father who spoke about the death of his son, which he alleged was caused by the Complainant. The father further alleged that his son committed suicide after he was singled out and expelled by the Complainant, while his white counterparts continued with their schooling. The broadcast in question was aired on the 2nd of July 2019 and the Complainant submitted that the alleged suicide took place 5 years ago and was not related to or caused by the Complainant. The Complainant did not give details of the cause of the pupil’s death,

¹ Derived from the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (pty) Ltd 1984 (3) SA 623 (A)*: The rule holds that; sometimes a bare denial by the respondent of a fact alleged by the applicant does not raise a genuine, *bona fide* dispute of fact. If the court is satisfied with the inherent credibility of the applicant’s averments, the court may decide the disputed fact in favour of the applicant without hearing oral evidence.

adding that the death was not related to the Complainant and the details thereof are of a sensitive nature and not for this Tribunal to adjudicate on. The Respondent did not dispute this nor provide any evidence to the contrary. However, the broadcast was presented in such a manner that it gave the public the impression that the Complainant caused the death of the pupil in question.

- [7] It is common cause that the broadcast was about a matter of public importance. Clause 12(2) of the Code provides that:

Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment and must be made on facts truly stated or fairly indicated and referred to.

The problem with the first segment of the broadcast is that it broadcast an allegation that the Complainant was the cause of the death of a pupil who committed suicide as a result of racial discrimination by the Complainant. Taking into consideration the Complainant's submissions, the death of the pupil was not related to the Complainant or to the alleged racism by the Complainant. The Respondent did not present any evidence to justify this allegation but worked on the information it was provided by the parent. This has the result that this allegation and its subsequent broadcast was not based on facts truly stated. Facts go beyond a mere depiction or expression of events and opinion; it requires reasonable proof of the information that is being disseminated. In this case, no such proof was provided by the Respondent and the Complainant confirmed the inaccuracy of this allegation and that the Complainant is in fact in possession of proof that it was not involved in the alleged suicide. The Respondent thus expressed an opinion that was not based on facts truly stated or fairly indicated and referred to. It does not make a difference that the allegation was made by the parent in the broadcast, because the allegation was aired by the Respondent, without the Respondent applying its mind; bearing in mind the severity of the allegation on a powerful platform such as a televised broadcast. The Respondent thus contravened Clause 12 (2) of the Code.

[8] The Complainant addressed members of the Tribunal on the structure of the broadcast, submitting that it rendered the Complainant guilty of racism by association. To substantiate this, the Complainant indicated that the department of education is also aware of the allegations of racism and so far has not made a pronouncement on its findings as investigations are still ongoing. The Complainant argued that the Respondent, in its broadcast, cut back and forth between images of racist conduct (*which were not related to the Complainant*) and images of the Complainant. This inevitably, led the reasonable viewer to believing that the unrelated images were linked to the allegations of racism by the Complainant. In its defence, the Respondent indicated that the structure of the broadcast and how the images were presented amounted to editorial discretion. Editorial discretion is closely linked to the right of freedom of expression. It allows a broadcaster to freely choose the content and structure of its programmes. In the current matter, it is not the Respondent's editorial discretion *per se* that is in dispute, but the accuracy of the information that was broadcast, and in a manner that created a link between various racist acts in South Africa to the Complainant, when in fact such acts were in no way perpetuated by or related to the Complainant.

[9] The Respondent broadcast different images of racist conduct, and while these images were being portrayed, the narrator as well as the subtitles were as if these images were that of the Complainant. Included in these images was a picture of pupils in a classroom, where a group of black kids were seen seated in what looked like the corner of the classroom and were separated from a larger group of white kids in the same classroom. This image, coupled with the voice-over and the subtitles was presented as if it was the Complainant being portrayed, when in fact it was a picture of a classroom in Schweizer-Reineke School, which was publicized around January of this year. Moreover, it was only upon scrutiny of the broadcast that it became clear that the broadcast was not entirely about the Complainant but about racism in general. The reasonable viewer however does not have the advantage of scrutinizing a broadcast such as this one so as to be able to form an opinion and discern the various images from the alleged racism by Complainant. In as much as the Respondent rightly retains its editorial discretion, the broadcast undoubtedly

created the Complainant's guilt by association. More so because none of the "evidence" and "racist images" that were broadcast proved the allegations of racism against Complainant, including the "testimony" that was allegedly given by the mayor of Matatiele.

- [10] The right to freedom of expression is an important one and which ensures that the media's right to its editorial discretion as well as its right against censorship is protected. This right must be properly exercised especially because broadcasters hold a very powerful tool in influencing the public. In fact, the public depends on the media for the dissemination of information. In the case of *City of Cape Town v South African National Roads Authority Limited and Others*² the Court stated the following (emphasis provided):

The right to freedom of expression lies at the heart of democracy and is one of a 'web of mutually supporting rights' that hold up the fabric of the constitutional order. Section 32(1) of the Constitution guarantees everyone the 'right of access to information held by the state'. **Citizens and public interest groupings rely on this right to uncover wrongdoing on the part of public officials or for accessing information to report on matters of public importance. The Constitutional Court has noted that the media has a duty to report accurately, because the 'consequences of inaccurate reporting may be devastating.** It goes without saying that to report accurately the media must be able to access information. Access to information is 'crucial to accurate reporting and thus to imparting information to the public.' Whilst s 32 of the Constitution guarantees the right of persons to access relevant information, s 16 entitles them to distribute that information to others. Section 16(1)(b) of the Constitution provides: 'Everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas'. **Importantly, therefore, the right to freedom of expression is not limited to the right to speak, but also to receive or impart information and ideas.** The media hold a key position in society. Courts have long recognised that an untrammelled press is a vital source of public information..... Grosjean recognised that 'since informed public

² 2015 (2) All SA 517 (SCA) at par 20.

opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern'. In this country the media are not only protected by the right to freedom of expression, but are also the 'key facilitator and guarantor' of the right. The media's right to freedom of expression is thus not just (or even primarily) for the benefit of the media: it is for the benefit of the public."

[11] As confirmed by the Court above, in exercising the right to freedom of expression, the Respondent had the burden to observe that this right also includes the right of the public to access **accurate** information and to receive and impart ideas. The Court rightly stated that the consequences of inaccurate reporting can have devastating consequences. The Complainant submitted to members of the Tribunal that it has suffered significant harm to its reputation as a result of the broadcast and the allegations of racism in general. The quantum of this harm is not for this Tribunal to consider. This is one example of the consequences of inaccurate reporting. Furthermore, broadcasting inaccurate information particularly on an issue of racism is even more treacherous. This Tribunal does not deny the existence of racism and various other forms of prejudices. At times, racism is committed by non-white persons against white people, whether consciously or otherwise. It is thus against the public's right to freedom of expression (*to receive and impart information and ideas*) to broadcast misleading information, this not only keeps the public confined to rigid, uninformed and untested notions but may also amount to propaganda. Each case ought to be treated on its own merits, and on this matter, the merits show that the Respondent had no evidence of the alleged racism by the Complainant.

[12] The broadcast also showed a video of a white man assaulting a black man at a filling station in Roodepoort, Johannesburg. This video was not linked to the Complainant but was broadcast in a manner that created an impression that it was. The Respondent submitted to members of the Tribunal that the use of unrelated racist images and the way these images were structured amounted to editorial discretion in the form of a "teaser".

The teaser was said to be aimed at setting the tone for the programme. As already indicated above, the Respondent's editorial discretion is not disputed. However, the issue of racism is one that society is very sensitive to and any inaccurate reporting thereof cannot be cured by a "teaser". There were various serious allegations of racism made against the Complainant and the school principal in the broadcast, these were detailed and specific but were not presented to the Complainant to respond to. The Respondent instead indicated that it broadcast a "general" response from the Complainant which was along the lines of "*the school denies all the allegations*". The Complainant however indicated that if it knew the details of the allegations at the time when it was interviewed, these could have been easily refuted and evidence thereof provided. Clause 13(1) of the Code provides the following:

In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster 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.

The broadcast cannot be seen to have "fairly" presented opposing points of view. In the broadcast, a farmer who was accused of racism was seen providing his version on allegations of racism. This however did not address the numerous and serious allegations that were specifically made against the Complainant. The allegations against the Complainant were so detailed and grave that a mere: "*the school denies the allegations*" was not enough to satisfy the requirement in this clause, that **reasonable effort** must be made to **fairly** present opposing views. The Respondent has thus contravened Clause 13 (1) of the Code.

- [13] The Complainant submitted that the school principal was approached by the Respondent for him to give his comments on the allegations, however the school principal is not allowed by his terms of service / employment with the Department of Education to speak to the media. The Respondent was informed of this, but this was not indicated in the broadcast. The Respondent stated that it did not mention the principal's failure to respond

or the reasons given by him for not being able to respond because someone from the school was available to speak on behalf of the principal. Clause 12 (3) of the Code provides that:

Where a person has stated that he or she is not available for comment or such a person could not reasonably be reached, it must be stated in the programme.

The clause makes it obligatory that a broadcaster indicates such unavailability to comment, this is seen from the use of the word “must”. The purpose of this is so as not to create the impression in the minds of viewers that such person who is unable to comment, does so in order to avoid some sort of responsibility or has something sinister to hide. The Respondent failed to indicate that the school principal could not comment nor did the Respondent indicate the reasons furnished to it by the school principal for such unavailability. As such, the Respondent has contravened Clause 12 (3) of the Code.

[14] The Complainant indicated that the dignity of the school principal was impaired by allegations that he is racist, and he caused the death of a learner. Clause 15 (1) of the Code provides that:

Broadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest.

The Code intentionally places a stringent burden on broadcasters to exercise “exceptional” care where the dignity and reputation of persons is concerned. This is because a reputation that might have been built over a long period of time (*the school principal has been an educator for over 30 years and a principal for 21 years*) can easily be tarnished in a single broadcast. This is why broadcasters are regarded to hold extraordinary power when it comes to influencing the public. Therefore, the Respondent did not exercise exceptional care in broadcasting serious allegations against the school principal and not indicating the reasons given by the principal of why he could not take part in the broadcast, this amounted to misrepresentation by omission. The school

principal's representative was not presented with these allegations in order to respond accordingly, and where possible, in consultation with the school principal. Similarly, the SGB chair, who is said to be a pastor of a church, was accused of being racist and party to the numerous racist allegations. The specific allegations were not put to him and were also not proven. Dignity herein cannot be said to have been overridden by legitimate public interest because legitimacy cannot be found in unjustified and misleading allegations. The Respondent has thus contravened clause 15 (1) of the Code.

[15] Clause 15 (3) of the Code provides that:

In the protection of privacy, dignity and reputation special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled.

The Complainant addressed the Tribunal on the fact that the Respondent displayed the faces of the school children in the broadcast. This was, according to the Complainant without the school's or the children's consent. The protection of children is held in high regard by this Tribunal. A full display of the faces of children, in a programme that was a negative depiction of the Complainant, has the possibility of compromising the security of the children and thus the broadcast could victimise the same children it sought to protect. The Respondent has consequently contravened Clause 15 (3) of the Code.

[16] **After considering all the facts, I find that the Respondent has contravened the Code. The complaint is accordingly upheld.**

SANCTION

[17] The Complainant and Respondent were each afforded an opportunity to address the Tribunal on a sanction if a contravention was found. The Complainant did not accede to the possibility of a re-broadcast, where those allegations that were initially not put to the Complainant, would be addressed in a subsequent broadcast. The Complainant stated that a re-broadcast and a resurrection of the allegations will put the Complainant

through additional agony after it has already gone through a period of scrutiny and unfounded allegations. The Complainant submitted that the broadcast of an apology would be an appropriate sanction.

- [18] During the Tribunal hearing and after all parties had made their submissions, the Respondent indicated the possibility of airing an apology. After the Respondent was granted leave to consult with its stakeholders, it acceded to airing an apology. The proposed apology was furnished to members of the Tribunal and has been considered.

In view of the reasons provided in the judgment in upholding the complaint, the Respondent must accordingly air the following apology.

“Cutting Edge would like to apologise to the management of the King Edward High School for a broadcast that was aired on the 2nd of July 2019. The broadcast entailed serious and misleading allegations of racism committed by King Edward High School, its school principal and its SGB chair against non-white persons. Some parents made serious allegations against the school and these allegations were not put to the SGB representative to respond to, thereby creating the impression in the mind of viewers that those allegations were true. We therefore apologise to all affected parties for that error”

*This apology is to be aired as soon as reasonably practicable after the release date of the judgment and the Broadcaster shall inform the BCCSA in advance of the **date and time of when the apology will be broadcast** and shall submit the broadcast to the Registrar of the **BCCSA**.*



MS NOKUBONGA FAKUDE

COMMISSIONER: BROADCASTING COMPLAINTS COMMISSION

Chairperson Viljoen concurred in the above judgment and Commissioner Tlhakung dissented but opted not to write a dissenting judgment.