



ADJUDICATION NO: 01/A/2022

NAME OF PROGRAMME: JJ TABANE SHOW  
DATE AND TIME OF BROADCAST: 27 OCTOBER 2021 at 20.30  
BROADCASTER: eNCA  
COMPLAINANT: MR TW NXESI, MINISTER OF EMPLOYMENT AND LABOUR

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### COMPLAINT

Complaint that a current affairs programme contained unfair, untrue and disparaging comments that sought to denigrate the Complainant's character.

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### APPLICABLE CLAUSES

The following clauses of the BCCSA Code of Conduct for Subscription Broadcasters:

[1] Clause 28.2

*28.2.1 Licensees may broadcast comment on and criticism of any actions or events of public importance.*

*28.2.2 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.*

[2] Clause 28.3

**28.3.1 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.**

**28.3.2 A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given a right to reply to such criticism on the same programme. If this is impracticable, however, an opportunity for response to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.**

[3] **Clause 28.4**

***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.***

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## **ADJUDICATION**

[1] A complaint was lodged with the BCCSA against a broadcast of eNCA's *Power to Truth* programme on 27 October 2021. The Complainant asserts that the programme contained unfair, untrue and disparaging comments that sought to denigrate his character.

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

**“COMPLAINT ABOUT UNTRUE AND UNFAIR BROADCAST BY ENCA ON DR JJ TABANE SHOW AGAINST MINISTER NXESI”**

Please receive herewith the complaint with regard to the broadcast which was unfair and untrue aired by channel 403 – ENCA.

I believe that the BCCSA is in a position to correct this errant behavior which goes beyond free speech.

**COMPLAINT ON THE UNFAIR, DISPARAGING AND UNTRUE BROADCAST BY JJ TABANE THAT SOUGHT TO DENIGRATE THE CHARACTER OF MINISTER THULAS NXESI**

**Complainant: Mr TW Nxesi Minister: Department of Employment and Labour**

Background: On October 27, ENCA broadcast a segment on the programme Power to Truth which is hosted by Dr JJ Tabane. The programme was repeated on October 28 at 10:34am on ENCA Channel 403 on programme Power to Truth

In the insert that was broadcast during prime time, the programme made a number of disparaging remarks about me. The remarks were made in the context that Cabinet had withdrawn the country's nomination of Mthunzi Mdwaba as their nominee for the position of the International Labour Organisation Director General.

Initially, the country and the department had supported the nomination but Cabinet, in its wisdom, decided to withdraw the support. The Department of Employment and Labour even made funds available for the purpose of supporting Mr Mdwaba's campaign, but had to walk away as a result of the decision of Cabinet. It was in that context that Dr JJ Tabane launched an unfair and untruthful attack on me.

The insert is available at: <https://www.enca.com/shows/power-truth-ji-tabane-2021municipal-elections-27-october-2021>

In the broadcast entitled 'JJs Rant', Dr Tabane launched an attack on me making the following allegations:

**Accusation 1:** The Department of Employment and Labour is responsible for the skills in this country, but is in shambles.

**Fact:** The Department of Employment and Labour is not responsible for skills development. The function was with the Department of Employment and Labour, but now that is the function of the Department of Higher Education, Science and Innovation.

**Accusation 2.** Being responsible for the Nkandla fiasco and going so far as to accuse me of lying about Nkandla including allegations that I coined the term "fire pool", and that I played movies in Parliament. This is not true.

**Fact:** While the Department of Public Works was an implementing agent for the Nkandla project, this happened before I was appointed Minister of Public Works. To attribute the Nkandla debacle to me is neither true nor supported by the facts:

- The Nkandla project was all but completed at the time I was appointed Minister of Public Works;
- As soon as it was clear that there was a problem with the project, I put a stop to any further expenditure on the project;

- As Minister, I initiated the first investigation into the project's compliance with legal procedures. The findings of the investigation into maladministration within the department were acted upon.
- The Public Protector's investigation, findings and recommendations, which came a year later, were acted upon immediately. This is why the Department of Public Works was not cited in the Nkandla Constitutional Court Case in 2016.

**Accusation 3:** Dr Tabane alleged that I wrote a letter to the International Labour Organisation saying the country does not support Prof Mdwaba as the next candidate for ILO DG position because he refused to be an ANC sycophant.

**Fact:** I did not write a letter to the International Labour Organisation. To allege such is not true and I believe that the broadcaster should clarify that fact.

I believe that the broadcast breached the following Code of Conduct for Free to Air Broadcasters (Code) provisions:

3. *Violence and Hate speech*

*Broadcasting service licensees must not broadcast material which, judged within context, broadcasting service licensees must report news truthfully, accurately and fairly.*

11. *News*

*(1) Broadcasting service licensees must report news truthfully, accurately and fairly.*

*(2) News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by:*

*(a) Distortion, exaggeration or misrepresentation. (b) Material omissions; or*

*(c) Summarisation*

*(3) Only that which may reasonably be true, having reasonable regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with reasonable regard to context and importance.*

*(4) Where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate, clearly, that such is the case.*

12. *Comment*

*(1) Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance.*

*(2) 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.*

13. *Controversial Issues of Public Importance*

*(1) 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. (2) A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given the right to reply to such criticism on the same programme. If this is impracticable, reasonable opportunity to respond to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.*

It is my contention that the said broadcast went beyond the remit of free speech and many untrue and unfair things were said. In my view the broadcast transgressed each and all of the above clauses of the Code. There was a self-interested, one sided and inflammatory language which undermined the provisions of the Code. Even if it could be argued to be a "Comment", which in my view is not the case, the commentary was not based on facts truly stated or fairly and referred to as required by the Code. Indicated A Broadcaster has to uphold independence and impartiality at all times.

I request an apology and withdrawal of the things that were said which are untrue as shown above.

### **Background**

- 1 This complaint relates to an insert of a segment of a programme named "Truth to Power", hosted by Dr JJ Tabane (her after referred to as "Dr Tabane"), which was initially broadcast by eNCA on 27 October 2021.
- 2 A repeat of the programme, including the offending insert, was broadcast again by eNCA on October 28 at approximately 10:30am on eNCA Channel 403. The video of the insert was further distributed extensively on social media and viewed by millions of people in and outside the Republic of South Africa.
- 3 The insert, which is the subject of this complaint, is available at:  
  
<https://www.enca.com/shows/power-truth-ij-tabane-2021municipal-elections-27-october-2021>
- 4 In the insert, the programme host, Dr Tabane primarily discussed the South African National Government's Cabinet's withdrawal of its support for the nomination of Professor Mthunzi Mdwaba (hereafter referred to as "Prof Mdwaba") for the position of Director-General of the International Labour Organisation (ILO), although Dr Tabane also digressed during the insert to discuss various other topics as well.
- 5 The matter of the Cabinet's withdrawal of support for the nomination of Prof Mdwaba has been well-reported elsewhere in the media.<sup>1</sup>
- 6 In the insert, Dr Tabane made numerous comments about me. Many of these comments were untrue, unfair and defamatory. I submit that the offending comments constitute a breach of the Broadcasting Complaints Commission of South Africa's ("BCCSA") Code of Conduct.

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<sup>1</sup> See, for example: <https://www.businesslive.co.za/bd/national/2021-10-12-sa-officially-withdraws-support-for-mthunzi-mdwaba-to-lead-global-labour-body>

- 7 The segment was broadcast by the eNCA, a signatory to the BCCSA and its Code of Conduct. I accordingly request that eNCA and Dr Tabane be directed to issue an apology and rectification forthwith, without delay or reservation.
- 8 I will now set out the applicable rules and legal principles, whereafter I will detail the causes of complaint and set out why they constitute unfair and derogatory comment.

### **Rules and Legal Principles**

- 9 The insert in question included comment on controversial issues of public importance. As such, the BCCSA Code of Conduct rules regarding first, comment, and second, controversial issues of public importance, are both applicable.
- 10 The BCCSA's Code of Conduct rules regarding the broadcast of comment are that:<sup>2</sup>

*Licensees may broadcast comment on and criticism of any actions or events of public importance.*

*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.*

- 11 The BCCSA's Code of Conduct rules regarding the broadcast of controversial issues of public importance are that:<sup>3</sup>

*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.*

*A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given the right to reply to such criticism on the same programme. If this is impracticable, reasonable opportunity to respond to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.*

- 12 In addition to breaching various rules of the BCCSA's Code of Conduct, several comments in the insert were defamatory.
  - 12.1 Defamation is the wrongful and intentional publication of a defamatory comment concerning the complainant.<sup>4</sup>
  - 12.2 Publication occurs where the defamatory comment is communicated to at least one other person other than the complainant, and therefore includes

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<sup>2</sup> The BCCSA's Code of Conduct for Subscription Broadcasting Service Licensees, clause 28.

<sup>3</sup> *Ibid*, clause 28.

<sup>4</sup> *Khumalo v Holomisa* 2002 (5) SA 401 (CC).

television broadcast.<sup>5</sup>

12.3 A defamatory comment is a comment which "tends to lower the plaintiff [complainant] in the estimation of right-thinking members of society generally".<sup>6</sup>

12.4 Once the complainant proves that a defamatory comment has been published about them by the respondent, it is presumed that the publication was wrongful and intentional?<sup>7</sup>

12.5 Wrongfulness is excluded in the case of a media respondent where the defamatory comment is reasonably or justifiably made.<sup>8</sup> Whether a defamatory comment by a media respondent is reasonable and justifiable is determined with reference to:<sup>9</sup>

12.5.1 The nature, extent, and tone of the publication;

12.5.2 The nature of the information on which the publication is based and the reliability of its source;

12.5.3 The steps taken to verify the information; and

12.5.4 The opportunity given to the person concerned to respond.

13 I now turn to the particular insert and the unfair and defamatory comments made about me.

#### **The broadcast**

14 Below, I set out the verbatim comments which Dr Tabane made about me and my conduct.<sup>10</sup>

#### ***Regarding the withdrawal of the nomination of Prof Mdwaba***

15 Dr Tabane, in the insert, made the following comments about the withdrawal of the nomination of Prof Mdwaba as the Director-General of the ILO:

*"He [myself] writes a letter to the ILO and says that we do not support a South African, a Professor, Mthunzi Mdwaba, because the guy is not an ANC psychopath. He [myself] writes a forma/letter."*

16 This comment is patently untrue in a number of respects in that:

16.1 it is not based on any facts truly stated or fairly indicated and referred to;

16.2 I was not offered an opportunity to respond nor was any attempt made to attain and

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<sup>5</sup> See, for example: *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C).

<sup>6</sup> *National Union of Distributive workers v Cleghorn & Harris Ltd* 1946 (AD) 984.

<sup>7</sup> See Burchell *Defamation* at 144.

<sup>8</sup> *National Media Ltd. v Bogoshi* 1998 (4) SA 1196 (SCA).

<sup>9</sup> *Ibid*; see further: *Mthembu-Mahanyele v Mail & Guardian Ltd* 2004 3 All SA 511 (SCA).

<sup>10</sup> Only the relevant portions of the statements are quoted in this complaint. Though only portions of the offending statements are quoted here, the link to the full broadcast is provided above which, when viewed, makes evident that the selective quoting here is only for the purpose of brevity and that these statements are not taken out of context or are a distortion in any way

present my perspective on the matter; and

- 16.3 the comment constitutes an unreasonable and unjustifiable defamatory publication about me.
- 16.4 I did not write any such letter to the ILO. The letter was written and signed off by the Cabinet of the South African national government.
- 16.5 the support for the nomination of Prof Mdwaba was not withdrawn because he *"is not an ANC psychopath"*, or indeed because he is not affiliated to or supportive of the ANC. Such an allegation is unfounded and untrue. Dr Tabane is challenged to produce the letter he is referring to bearing such contents;
- 16.6 the nomination was withdrawn by Cabinet after a proper consideration of information that was drawn to Cabinet's attention. I am unable to set out such information as it will be against the Cabinet's protocols. However, should the need arise, I will sort Cabinet's approval to do so.

#### **The allegations or opinion was not objective and constituted conflict of interest**

- 17 It has come to my attention that Dr. Tabane has a relationship or is a friend to Prof Mdwaba as they also serve(d) as Council members of the University of Western Cape. Therefore, his opinion could not have been any objective as it is also clear from his tone during the broadcast.
- 18 Secondly, I would like to bring to the attention of the Commission, the two judgments of the South Gauteng High Court as well as the Western Cape High Court which cast aspersions on Prof Mdwaba and Dr. Tabane's competence. Gamble J specifically found that Prof Mdwaba lacked *"leadership and equanimity"* in the discharge of his functions as the Chairperson of Council of the University of the Western Cape (UWC), and that his ability to serve in a position of governance is doubtful. Given the Honourable Judge's assessment of Prof Mdwaba, which Dr. Tabane should know, that Mdwaba would be an unsuitable candidate for the nominated position.
- 19 Further, it should be noted that Gamble J, in the same judgment, found that Dr Tabane, in his support for Prof Mdwaba during their tenure together as members of the UWC Council, **"lacked the requisite skills"** to serve as member of the Council and through his "opportunism [he] caused the University financial and reputational embarrassment".<sup>11</sup>
- 20 The judge further noted that:  
  
*"In Msimang Kathree-Sebitloane J found in November 2012 that as a director of a large black empowerment company with significant interests in the public sector, Mr Mdwaba had conducted himself with reckless disregard of his duties as a director of the company in question and that such conduct amounted to gross negligence and willful misconduct."*
- 21 The court also scrutinised the conduct of Dr Tabane and found that:

*"similar cancers apply to Mr Tabane, who, although not disqualified under the*

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<sup>11</sup> *Ibid* para 64



*Companies Act, is a long serving member of the Council who has likewise demonstrated through his utterances that he too lacks the requisite skills which the demand of membership of the Council requires. His opportunism has caused the University financial and reputational embarrassment and an enquiry as to the fitness to hold office is justifiable .....contents of this judgment to the attention of the Minister of Higher Education for consideration of the appropriate steps to be taken against these and other members of the Council."*

- 22 It is clear that Dr Tabane knew Prof. Mdwaba and knew about the above-mentioned court judgment wherein both their conducts were seriously scrutinised and damning findings made against both of them. Therefore, he was conflicted and could not have proffered an objective and honest opinion.

### **Regarding various allegations**

- 23 Dr Tabane, in the insert, made the following comments about a variety of different and unrelated issues:

*"Brought us Nkandla" [referring to me]*

*"Showed movies in Parliament in the name of corruption of Jacob Zuma" [referring to me]*

*"Showing America's funniest videos in Parliament" [referring to me]*

- 24 These comments are patently untrue in a number of respects in that they are not based on any facts truly stated or fairly indicated and referred to. I was not offered an opportunity to respond nor was any attempt made to attain and present my perspective on the matter. Furthermore, the comments constitute an unreasonable and unjustifiable defamatory publication about me.
- 25 Firstly, I did not serve as Minister of Public Works at any point during the procurement of services and construction of the Nkandla residence. I was in no way involved in any planning for, or approval of, the construction of the Nkandla residence. Accordingly, it can in no way be said that I *"brought us Nkandla"*, as alleged.
- 26 It is well documented that I as the then Minister of Public Works established a task team to investigate allegations of corruption in relation to the procurement of services during the construction of the then President's private residence in Nkandla. The matter was investigated by the Public Protector, Parliament Ad-hoc Committee and the Special Investigative Unit ("SIU") and none of these institutions found any corruption nor maladministration on my part.
- 27 Secondly, I have not screened any movies at any point in Parliament, and certainly not any movie or clip of *"America's funniest videos"*, or anything of the sort. I do not know to what this allegation refers, and it is blatantly false.
- 28 It is also well documented that the video was played before the parliament's ad hoc committee by the then Minister of Police, Minister Nhleko, which I had nothing to do with it. Therefore, Dr Tabane's allegations are false and he should have verified the veracity thereof before making defamatory statements about me.

### **Regarding my ability and competence as a minister**

29 Dr Tabane, in the insert, made the following comments about my ability and competence as a Minister:

*"He [Minister Nxesi] is one of the most useless Minister[s]"*

*"Thulas Nxesi is bloody useless"*

*"We deploy the most incompetent of people" [referring to me]*

*"There is something wrong to deploy the worst cadres for the job" [referring to me]*

30 These comments are not based on any facts truly stated or fairly indicated and referred to. I was not offered an opportunity to respond nor was any attempt made to attain and present my perspective on the matter and lastly, the comments constitute an unreasonable and unjustifiable defamatory publication about me.

31 Insofar as these comments may be based on the withdrawal of support for the nomination of Prof. Mdwaba, these comments are clearly not based on fact as detailed above. Dr Tabane says I am *"bloody useless and worst cadre to be deployed for the job"* without any basis or factual grounds. This cannot be an objective or honest opinion on my ability and competence as a Minister.

### **Breach of the Code of Conduct and Defamation**

32 The comments made by Dr Tabane in the insert constitute unfair comment as they are not based on any facts truly stated or fairly indicated and referred to. A comment is fair when the facts upon which that comment is based are stated and, of course, those facts are true. Conversely, comment is unfair if either the facts upon which that comment is based are not stated or those 'facts' are actually false.<sup>12</sup>

33 In this instance, though Dr Tabane does state the 'facts' upon which his comment is based, those 'facts' are false. As detailed above, I did not write a letter to the ILO to withdraw support for Prof Mdwaba's nomination, secondly the cabinet's support was not withdrawn because he is not supportive of the ANC, thirdly, I was not involved in the procurement of services and construction of the Nkandla residence, and I did not screen any movie in Parliament, as the only video was played by the then Minister of Police.

34 Furthermore, the actual facts on each of these issues are easily obtainable either through cursory research or by contacting me. Accordingly, Dr Tabane was negligent by failing to state the actual facts and base his comment thereupon.

35 Dr Tabane and eNCA also failed to comply with the rules regarding the broadcasting of controversial issues of public importance. The nomination of a candidate to the principal international labour body is clearly a matter of public importance, not just in South Africa but internationally. This is further borne out by the significant media coverage of the withdrawal of support for the nomination of Prof Mdwaba.

36 In broadcasts on controversial issues of public importance, the broadcaster must make reasonable attempts to present the opposing view, either through a right of reply or by the presenter representing the opposing view themselves.<sup>13</sup>

37 In this instance, neither Dr Tabane nor eNCA offered me a right of reply, nor did they reach out to me or conduct their own research and present the opposing view to

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<sup>12</sup> See, for example: *Rebosis Property Fund Limited and others vs M-Net* 2017 JOL 37912 (BCCSA)

<sup>13</sup> See, for example: *Smuts (Landmark Foundation) vs SABC 2* 2014 JOL 31810 (BCCSA)

that presented by Dr Tabane. This is contravention with the Code of Conduct rules regarding the broadcasting of controversial issues of public importance.

- 38 Several of Dr Tabane's comments also amount to unreasonable and unjustifiable defamation. It is evident that several of Dr Tabane's comments have the effect of lowering my estimation in the minds of right-thinking members of society.
- 39 The comments clearly infringe on my dignity and personality. The comments are unreasonable and unjustifiable as they severely infringe on my dignity and personality, they are not based on any facts, and no attempt was made to either verify the basis of the comments or learn the actual facts which could have been easily done either through cursory research or by contacting me.
- 40 Although I occupy public office and I recognise that my conduct ought to be highly scrutinised, despite this, as the Supreme Court of Appeal held, this

*"Does not mean that there should be a licence to publish untrue statements about politicians. They too have the right to protect their dignity and their reputations."*<sup>14</sup>

- 41 I am advised that several of Dr Tabane's comments about me constitute actionable defamation, I am satisfied, for the time being, to raise my complaint at the BCCSA and not institute defamation proceedings, although I reserve my rights in this regard.

### **Conclusion**

- 42 In the circumstances, I submit that the identified comments made by Dr Tabane in the abovementioned programme, broadcast by eNCA, constitute a breach of the BCCSA's Code of Conduct rules.
- 43 I accordingly request that eNCA and Dr Tabane be directed to issue an apology and rectification forthwith, without delay or reservation.

### **[3] The Broadcaster Responded as follows:**

#### **"RE: ENCA V NXESI- UNTRUE, UNFAIR AND DEFAMATORY COMMENTS"**

- [1] This letter is in response to a complaint by Mr Thulas Nxesi ("the Complainant") regarding a comment made during the broadcast of the program *Power To Truth* ("the program") by eNCA on the 27<sup>th</sup> of October between 20h00 and 21h00 respectively.
- [2] The complainant alleged that unfair and defamatory comments were made by the host of the program, Prof JJ Tabane, regarding:
- 3.1. the withdrawal of support for Prof Mdwaba's International Labour Organisation ("ILO") position nomination;
  - 3.2. the Nkandla swimming pool; and
  - 3.3. His competency as the Minister of Labour

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<sup>14</sup> Mthembi –Mahanyele supra, para 67

[4] We have been requested by the Registrar of the BCCSA to respond in terms of the clauses 28.2, 28.3 and 28.4 of the BCCSA Code of Conduct for Subscription Broadcasting Service Licensees (“the Code”) in different sections of the complaint.

[5] Clause 28.2 of the code provides:

*28.2.1 Licensees may broadcast comment on and criticism of any actions or events of public importance.*

*28.2.2 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.*

[6] Clause 28.3 of the code provides:

*28.3.1 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.*

*28.3.2 A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given a right to reply to such criticism on the same programme. If this is impracticable, however, an opportunity for response to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.*

[7] Clause 28.4 of the code provides:

*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.*

## **Context**

[8] *Power To Truth* is a current affairs program that broadcasts on Mondays and Wednesdays at 20h30 on eNCA news channel.

[9] The aim of the program is to discuss current affairs and hold public servants accountable by discussing and exposing corruption, evaluating service delivery, interviewing relevant parties and representing the voice of South African citizens. Each episode contains three segments:

9.1. *The Music relief*— an opening component to relax the viewers into the rather heartbeat-raising nature of the program.

9.2. *Introduction and JJ’s Rant*— which introduces and build up the matter as the presenter emotionally voice out the frustration of the citizens. This is subtitled “JJ’s Rant.”

9.3. *Interviews*—The last segment contains a panel of relevant parties that are interviewed to address the above frustrations.

[10] Four days before the local government elections, the 27<sup>th</sup> October edition of the program was focussed on how labourers are expected to vote.

[11] There was a music opening by Mandisi Dyanytyis followed by JJ's Rant and thereafter the interviews with a panel composed of the South African Federation of Trade Unions (SAFTU) general Secretary —Zwelinzima Vavi, National Executive Committee Member of the South African Communist Party (SACP) —Jacob Mamabolo , and The Congress of South African Trade Unions (COSATU) president —Zingiswa Losi.

[12] Mandi Dyanty expressed through his music how political leaders are all the same—liars, and that people must realise the power they have, unite and make use of it.

[13] The presenter introduced the program by saying:

*Mandisi Dyanyty is ushering us in as we count down to the 1<sup>st</sup> of November and he says that 'they all but liars. That's what he says, it's not me. They are all liars these leaders we've got and got to take your power. And I hope you take your power on the first of November because otherwise they will continue to lie to you.*

[14] The presenter then entered JJ's Rant voicing out the following:

14.1. False promises— as example, he discussed that there was currently stage 4 blackouts even after the ANC government repeatedly promised an end to energy crisis<sup>15</sup> . Eskom CEO, Andre de Ruyter made a promise to repair infrastructure that will end load shedding within 18 months that has already passed and yet he refused invitation to be interviewed on *Power To Truth* about it.

14.2. Incompetence— The presenter added that the ANC shifts the blame of the blackouts as sabotage and he argues this 'sabotage' is presumably 'incompetence' until de Ruyter comes to account publicly (particularly on programs like *Power To Truth*).

14.3. The vote of labourers—The presenter then redirected the program back to the main topic of the day by emphasising that the program was about how the South African labourers are expected to vote in the coming election. He the introduced the panel.

14.4. Link between skills and to failure of promises— The presenter expressed that failure of local government to deliver the promises is not due to polices which are excellent but due to lack of skills by the councillors who must implement the polices. He went on to support this by

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<sup>15</sup> <https://www.dailymaverick.co.za/article/2020-07-14-ramaphosa-and-gordhan-fail-on-every-energy-promise-as-load-shedding-grips-sa/>

- 14.4.1. supplying educational levels of the councillors to question how we can expect such unskilled people to run multibillion Rands project.
- 14.4.2. expect such unskilled people to run multibillion Rands project.
- 14.4.3. Mentioning that only 20 (out of 257) municipalities obtained a clean financial audit regularly and the wasteful expenditure is at 40-60 Billion Rands annually according to the Auditor-General's report.
- 14.4.4. Connecting the incompetence of councillors to the incompetence Minister of Employment and Labour:

***So the skills thing is key and that is why one thought that's why we have the minister of Labour called Thulas Nxesi with the department of labour that is in shambles...***

- 14.4.4.1. As examples he used the Parliament Speaker, Maphisa-Nqankula as well as Further elaborating how the incompetency of the Minister of Employment and Labour the previous minister of public works, Mr Thulas Nxesi who justified the extravagant swimming pool as security 'fire pool' built by state funds for the former president, Jacob Zuma, at his Nkandla homestead.
- 14.4.4.2. South African libraries are full of masters and Phd thesis from skilled South Africans with solutions to problems currently faced. However, these people are discriminated and not offered positions because they are not ANC members.
- 12.4.4.3 This form of discrimination was further demonstrated when the complainant wrote the letter<sup>16</sup> that influenced the South African government to withdraw support for Prof. Mdwaba who was nominated to be head of the ILO. Prof Mdwaba is currently competent director of the ILO and has publicly confirmed to have seen the letter himself<sup>17</sup>.

[15] The program moved to the third main segment of interviews with the workers' union leaders panel where the following main discussions were held:-

- 15.1. SAFTU disagreed with the presenter's view by submitting that even if South African municipalities may have the best competent administrators, they would still fail to deliver because the problem is actually not the skills but economic structure of neo liberalism. Therefore as a result, workers may vote for any candidate political party, it would still be futile.

[16] COSATU submitted that they made an assessment and concluded that in support of voting for the ANC due to the previous achievements in favour of the labourers and the

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<sup>16</sup> See the copy of the letter attached

<sup>17</sup> <https://www.businesslive.co.za/bd/national/2021-10-08-mthunzi-mdwaba-implicates-thulas-nxesi-in-withdrawal-of-support-for-ilo-race/>

unemployed regardless of the challenges about the Neo Liberal policies and capitalist structural system as raised by SAFTU.

[17] In their opening, the SACP rejected the presenter's view from JJ's rant saying:

*"...just the points that you raised yourself (The presenter) in your opening— in your opening statements, and of course I must take an issue with you whether there are [..] you can call minist.[..] you can have what you call "useless ministers." I think that's another point we can pick up when [..] at some point. **I do not think it is correct to say that**".*

The ANC-lead alliance has and of course the President of the ANC, Cyril Ramaphosa, has come out very clear that there has been challenges. We acknowledge the difficulties and the challenges that we have and I think in your opening statement I want to flag this point that we must appreciate that point because the leadership of the entire alliance has actually acknowledged that there are difficulties and challenges, and we will improve on those issues.

[18] The presenter requested the SACP to be more specific with an example of these "issues" / "challenges"— in terms of Cadre employment, is there something that the leadership is going to do with the councillors which they did not do with the ones in office now. The SACP answered:

*Let's take further point, the ANC has evolved a policy of interviewing for an example – the mayors. We have seen that policy being implemented [..] the point I am making is: in appreciation of **the challenges that are there—the skills that are required, over and above the investment in training and skilling councillors** but there is a very important thing like for an example the mayor of jo'burg, recently elected has gone through a very important of senior leaders interviewing them **to make sure that the skill set are consistent with the task at hand**. The president of the ANC has clearly said to himself, "we need to look at the leaders that have got a certain level of skill to be able to deal with the challenges"*

[19] SACP added that the ANC councillor candidates are now going to be nominated by the community.

[20] SAFTU rejected SACP's views saying that all the political candidates are the same and liars as the song said at the opening of the program. SAFTU emphasized this by using sarcasm that the ANC is saying "**continue to vote for our friends/ our worst butchers**" so we have worse results than the current Eskom electricity crisis, rising unemployment rate of citizens (at 53%), ( women at 49%), (and youth at 74%) and so that the state of education system that produces these horrible statistics etc may continue.

[19] COSATU affirmed SAFTU and answered the question about what has the ANC being doing wrong which she said "...the issues of corruption which COSATU has always spoken about...internally in the ANC...now when the ANC is coming from NASREC and dealing with **corruption** and putting a step aside, a resolution and implementing it and people are starting to become uneasy it is what is going to help us...

*Comrade Mamabolo also spoke about something that is very very important and **you alluded to this: The young candidate councillors that are highly educated, highly skilled, highly experienced that do not even rely on what government is going to do... these are the kind of cadres that the ANC this time around, having learnt from the mistake of past of cadre deployment and the witnesses that the ANC is bringing...***

- [20] In closing, the panel discussed whether it would be more beneficial if unions united with each other instead of alliance with political parties.
- [21] The third segment took about 72% (33mins) of the entire program (46 mins), while the music and JJ's rant segments took only 6% and 10% respectively.
- [22] It is clear from the context of the program was about evaluating the economic system, alliance of unions with political parties, deliveries by governing political parties and potential resolutions to the challenges. We submit that the discussion was well balanced with the presenter criticising, the two unions (COSATU and SACP) defending and SAFTU being neither for nor against the governing political party.
- [23] The complainant's complaint is based on comments taken from the introduction of the program out of context to claim unfair and defamatory comments about him. We submit that the context of the program was clearly not about the complainant, he was mentioned during the unpacking of the challenges to be addressed by the panel on the main segment. However, we shall address the complainant's submissions.

#### **Defamation and fairness**

- [24] The complainant provided a definition<sup>18</sup> of defamation drawn from a number of court judgments. We agree that defamation has been defined in civil law and normally the BCCSA is guided by the decisions of the Courts in this regard. In an action for damages based on defamation, the plaintiff must prove that the statement was prima facie defamatory of him, and then there is an onus on the broadcaster to show either that it had acted in a reasonable manner or, in the absence thereof, that it has not been negligent.
- [25] The core of the complaint is that the program has damaged the complainant's reputation. Clause 38 of the Broadcasting Code, which protects dignity, has already been quoted above. It has rightly been held that "dignity", which was already a basic right in Roman law, includes reputation and privacy. Our courts have also held that public figures are entitled to less protection, as a result of their having chosen such positions. The prime example would be politicians.
- [26] As correctly stated by the complainant, mere defamation is not wrongful. Justifiable and reasonable defamation statements made by the media are lawful.
- [27] Whether a defamatory comment should be considered reasonable and justifiable will look at a number of factors, including, but not limited to: (a) the nature, extent, and tone of the publication; (b) The nature of the information on which the publication is based and the reliability of its source; (c) The steps taken to verify the information; and (d) The opportunity given to the person concerned to respond.

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<sup>18</sup> Defamation is the wrongful and intentional publication of a defamatory comment concerning the complainant.



- 27.1 The nature of program has been fully defined above and it justifies criticism of public servants to open a discussion around matters public interest.
- 27.2 These sources shall be discussed below in full detail under specific matters raised by the complainant. At this stage we submit that the comments made by the presenter were based on verified reliable sources including the actual copy of letter from the complainant, the auditor general's report, South African Local government Association and well publicised facts which the panel acknowledged.
- 27.3 As evident from the program when the presenter continually invites the people criticised to come to the show; opportunity is provided even to the complainant to come to *Power To Truth*.

[28] As explained above, Clause 28.4 of the Code provides that the rights to privacy and dignity may be overridden by a legitimate public interest. The comments made about the complainant are clearly offensive but the legitimate public interest nature of the discussion justifies and overrides the complainant's rights to dignity. This is even more so in an instance where the complainant is a public servant.

[29] We submit that the statements made by the presenter in the introduction of the program were not unreasonable and unjustified.

[30] With regard to negligence, the BCCSA has previously said that the test for negligence is whether the reasonable broadcaster would have foreseen that a programme was defamatory yet nevertheless proceeded to broadcast.<sup>19</sup> We submit that the statements made by the presenter were not malicious but for a purpose to voice out the frustrations of the public on matters which the panel were to address before an election.

### **Fairness**

[31] In *The Citizen 1978 (Pty) Ltd v McBride (Johnstone, Amici Curiae)* 2011 (4) SA 191 (CC) the approach of the Constitutional Court to a defence of fair comment (or, as the Court proposed, "protected comment") as a defence of defamation is summarised as follows:

*"To establish the defence a defendant had to show: (i) that the statements in question were comment or opinion; (ii) that they were 'fair'; (iii) that the facts the comments were based on were true; and (iv) that the comments related to a matter of public interest<sup>20</sup>.*

[32] We submit that the comments made were opinions fairly based on the true facts provided by reliable sources evidenced in the attachments on matters of public interest.

[33] We shall now turn to discuss specific comments which the complainant claims were defamatory and unfair:

### **The withdrawal of support for Prof Mdwaba's ("ILO") position nomination**

[34] The complainant claims that the following statement made by the presenter, was false and defamatory:

*He writes a letter to the International Labour Organisation and say[s]—" we do not support a South African, a Professor , Mthunzi Mdwaba, because the guy is*

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<sup>19</sup> F v SABC, BCCSA case number 01/2009

<sup>20</sup> Para 80 at 217-E-G

*not an ANC psychopath. We do not support him to be the DG of International Labour Organisation. He writes a formal letter and says "Cabinet said they don't want this person"*

- [35] The complainant claims that he did not write any such letter to the ILO, but rather the letter was written and signed off by the Cabinet of the South African national government.
- [36] I refer the commission to the attached copy of letter which the presenter was referring to. The commission would notice that the letter was written and signed in the name of the complainant as stated by the presenter.
- [37] Prof. Mdwaba himself also publicly attested to this fact when he confessed on Power FM and quoted the excerpts from the letter.<sup>21</sup>
- [38] One of the reasons for not supporting Prof. Mdwaba because he is not affiliated with ANC is discussed below and acknowledged as a fact by the panel.
- [39] We submit that the presenter' statement was fair and was based on the above facts.

### **Nkandla swimming pool and cadre**

- [40] The complainant claims that the phrase that he "brought us Nkandla" is false because he was "not the Minister of Public Works at any point during the procurement of services and construction of the Nkandla residence"; and that he was "in no way involved in any planning for, or approval of, the construction of the Nkandla residence".
- [41] We submit that after a outcry into the R206-million upgrade of then President Jacob Zuma's private homestead in Nkandla, in November 2012, the complainant was the Minister of Public Works who conducted an internal investigation.
- [42] The complainant then concealed the information in a report by classifying it as Top Secret insisting that it contained security sensitive information.
- [43] The complainant later admitted to the court that the report did not contain security sensitive information<sup>22</sup>.
- [44] The video to demonstrate swimming pools at Nkandla as security "fire pools" was indeed performed by the minister of Police, Nhleko<sup>23</sup>.
- [45] We submit that the statement made by the presenter about the swimming pool may be justified in context. As mentioned above, the program was not about discussing the complainant but the statement was made during an introduction where the presenter emotionally expressed the frustrations of challenges that the panel must discuss in the program. These challenges include poor skills and cadre deployment. The presenter introduced this point by saying:

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<sup>21</sup> <https://www.businesslive.co.za/bd/national/2021-10-08-mthunzi-mdwaba-implicates-thulas-nxesi-in-withdrawal-of-support-for-ilo-race/>

<sup>22</sup> Sarah Evans, "Nkandla: Why did Nxesi lie?"

< <https://mg.co.za/article/2014-02-21-nkandla-why-did-nxesi-lie-1/> > accessed December 2021

<sup>23</sup> See <https://www.youtube.com/watch?v=mdR4xL4G1Yc>

So **the skills thing is key** and **that is why one thought that's why we have the minister of Labour called Thulas Nxesi with the department of labour that is in shambles...**  
One of the things that irritate me is : when we take an important portfolio like small business and an important portfolio like labour, **we take the most useless ministers and say 'please can you just go sit there and we'll see how to finish with you'**

**And that's what happened with Thulas Nxesi. This is the chap who brought us Nkandla and called the swimming pool a fire pool and showed us movies in parliament there in the name of corruption of Jacob Zuma. Thulas Nxesi—useless!**

**But you know, I would have ignored him and I said he should have been fired long time ago—he should have been the victim of the next cabinet reshuffle not the fake reshuffle that we saw recently, I'm talking about the real one where incompetent ministers could be fired.**

Thulas Nxesi is bloody useless, but he is part of the symptom of the problem we have in this country where people who are skilled are scorned upon. In fact if you are skilled you are likely not to be promoted, if you are not skilled and you are useless, you are likely to be promoted in this country. Maphisa-Nqankula being the typical example, they try to fire her and the following day promote her to be the third most powerful person in this country, scandals! Terrible!

- [46] The issues of corruption or incompetence of ministers and councillors, and cadre deployment has been admitted by the ANC. As a result the ANC has 'evolved policies' to resolve the issues of poor skills as the SACP mentioned , and the ANC also met at NASREC to resolve corruption as as COSATU mentioned that “... **the ANC this time around, having learnt from the mistake of past of cadre deployment ...”**
- [47] It is undisputed that there was corruption in the ANC government which lead to the Nkandla matters raised in JJ's Rant.
- [48] The Presenter was emotionally caught up in the moment of expressing frustration over incompetent ministers and cadre deployment within the ANC ruling party when he implicated the complainant in the videos shown in parliament.
- [49] The code does not require comments made to be factually true but reasonably and justifiably true. We submit that the statement is justified in context of holding the minister of labour accountable.

### **Competence of the complainant**

- [50] Cadre deployment was admitted to be the problem within the ANC as COSATU mentioned above.
- [51] The attached copy of letter and Prof Mdwaba's own admission on Power FM proves that the complainant did write a letter to influence the cabinet's decision to withdraw support for Prof Mdwaba's nomination to the ILO position.
- [52] The word “incompetence” is defined in the Cambridge English dictionary as, “the lack of ability to do something successfully or as it should be done.”
- [53] The incompetence of councillors which the complainant is responsible for administering is shown in the attached pie chart and was admitted by the panel as discussed.

[54] It is therefore reasonable and fair to criticise the complainant as a “useless” minister because of his inability to control and support deployment of skilled labourers in the above context.

### **Provisions of the code**

[55] We submit that the comments made by the presenter were not personal but an honest expression of opinion presented clearly as comment based on facts fairly indicated and referred to as demonstrated above. Clause 28.2 of the code was therefore not contravened.

[56] The comments made on the JJ's Rand in the second segment to unpack the discussion points, were fairly balanced by discussions in the third segment. SACP clearly opposed that the minister is 'useless' or incompetent<sup>24</sup> and rather based the unfortunate results on challenges that the leadership is resolving.

[57] As demonstrated through an invitation to Andre de Ruyter who was criticised along with Maphisa-Nqankula, the complainant and others in the program; eNCA provides an opportunity for a right to reply for persons criticised. The producers are keen to have the complainant on the program should he decide to take this opportunity. We are therefore of the view that clause 28.3 of the code was not contravened.

[58] The legitimate public interest nature of the program overrides the complainant's right privacy and dignity in term Clause 28.4 of the code.

### **Conclusion**

[59] In light of the above we submit that clauses 28.2, 28.3 and 28.4 of the code were not violated. The presenter's comments were offensive but did not amount to unreasonable and unjustified defamation. We therefore humbly request the commission to dismiss the complaint.”

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

### **Context**

1. On 29 November 2021, I laid a complaint with the Broadcasting Complaints Commission of South Africa ("BCCSA") regarding a segment of a programme ("the broadcast") broadcast by ENCA ("the broadcaster" or "the respondent").
2. The complaint relates to untrue, unfair and defamatory comments about me made during the broadcast ("the comments")
3. On 22 December 2021, the respondent delivered a letter to the BCCSA in response to my complaint.
4. I have been requested by the BCCSA to respond to the respondent's letter, indicating whether or not I agree with and accept the respondent's response, and if not, the reasons for my disagreement, in order to assist the BCCSA determine how to proceed with the

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<sup>24</sup> At timecode 20m37 of the attached copy of broadcast

complaint.

- 5 I neither agree with nor accept the respondent's response for reasons which I will set out more fully below.
- 6 I do not intend to respond to each and every point made by the respondent. Where I do not respond to a particular point, such point is denied to the extent that it is inconsistent, or in conflict, with either my complaint or this response.

### **Legal Framework**

- 7 As correctly stated by the respondent, the applicable legal provisions and principles in question are those contained in clauses 28.2, 28.3 and 28.4 of the BCCSA Code of Conduct for Subscription Broadcasting Service Licensees ("the Code"), as well as common law defamation.<sup>25</sup>
- 8 Accordingly, this complaint turns on the interpretation and application of the above provisions and principles. Therefore, I submit that the broadcast is in contravention of the Code and constitutes actionable defamation as:
  - 8.1 The comments were unfair as they were not based on facts truly stated or fairly indicated and referred to;<sup>26</sup> and
  - 8.2 No reasonable efforts to fairly present the opposing view in respect of the comments were made, nor was I afforded a right to reply to the comments.

### **Response**

- 9 I will first respond to the respondent's assertions regarding the fairness of the comments, whereafter I respond to the respondent's assertions regarding the presentation of opposing views and the right of reply.

#### *Fairness*

- 10 As delineated in clause 28.2 of the Code, and further expounded upon by the courts, for comment to be fair it must be based on facts which are truly stated or otherwise indicated or referred to.<sup>27</sup>
- 11 In the broadcast, it was stated that:

*"He [myself] writes a letter to the ILO [withdrawing the nomination of Prof Mdwaba]..."*

  - 11.1 My complaint regarding this comment is that I did not write such a letter to the International Labour Organisation (ILO).
  - 11.2 The respondent attaches a copy of a letter to its response ("the letter").<sup>28</sup>
  - 11.3 At certain points in its response, the respondent asserts that the letter is that referred to in the broadcast which I allegedly wrote to the ILO.<sup>29</sup> At other points in

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<sup>25</sup> Respondent's response (22 December 2021), paras 2 – 5, 24

<sup>26</sup> See: *The Citizen v McBride* 2011 4 SA 191 (CC)

<sup>27</sup> *Ibid*

<sup>28</sup> Respondent's response (22 December 2021), paras 36, 51.

<sup>29</sup> Respondent's response (22 December 2021), para 36.

its response, the respondent asserts that the letter is one which I wrote to Cabinet to influence its withdrawal of the nomination of Prof Mdwaba.<sup>30</sup>

11.4 I attach a copy of the letter actually delivered to the ILO by Cabinet hereto, marked as annexure "A" ("the letter to the ILO"). It is apparent from the letter to the ILO that I did not write it.

11.5 As is furthermore apparent from the letter attached by the respondent, the letter I wrote was to the Director-General of the Department of Employment and Labour where I was communicating the Cabinet's decision regarding the nomination of Prof Mdwaba.

This is a far departure from the allegation made during the broadcast or that in the respondent's response.

11.6 In the broadcast, it was stated that I wrote a letter "to the ILO". This is untrue, and not based on facts truly stated or referred to. It is noted that the letter attached by the respondent was not even presented during the broadcast as a fact from which the comment may have been derived.

11.7 Accordingly, the comment during the broadcast that I wrote a letter to the ILO regarding the nomination of Prof Mdwaba was untrue and unfair.

12 In the broadcast, it was stated that the reason for the withdrawal of Prof Mdwaba's nomination is because:

"[Prof Mdwaba] *is not an ANC psychopath.*"

12.1 Interpreting the insulting and insensitive language unfortunately employed by the presenter, the contention is that the nomination of Prof Mdwaba was withdrawn because he is not affiliated to the African National Congress (ANC).

12.2 In its response, it does not appear that the respondent alleges that this comment was true or based on any facts. On the most generous of readings, the respondent perhaps suggests that this comment was based on "well publicised facts which the panel acknowledged"<sup>31</sup>

What these facts are and how they specifically relate to the withdrawal of the nomination of Prof Mdwaba is not elucidated by the respondent.

12.3 As set out in the complaint, the reason for the withdrawal of the nomination of Prof Mdwaba was because Cabinet was made aware that the High Court previously had cast aspersions on the suitability of Prof Mdwaba to hold office, particularly in any executive position.<sup>32</sup>

In fact Prof Mdwaba has been declared delinquent by a court of law. It is noted that the respondent does not respond to this point in its response.

12.4 This comment is thus untrue. Furthermore, it was not based on any facts, nor

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<sup>30</sup> Respondent's response (22 December 2021), para 12.4.4.3.

<sup>31</sup> Respondent's response (22 December 2021), para 27.2.

<sup>32</sup> *Msimang NOv Katiliiba* [2013]1 All SA 580 (GSJ); *Williams v University of the Western Cape* (24537/2015) [2016] ZAWCHC 198 (15 November 2016).

were any facts stated or referred to for the purpose of making this comment. Therefore, this comment was unfair.

13 In the broadcast, it was stated that: "[I] brought us Nkandla".

13.1 To 'bring Nkandla' implies that one was involved in the planning, approval, services and/or construction of the Nkandla residence.

13.2 The respondent, in its response, concedes that I was not involved in the planning, approval, services or construction of the Nkandla residence, and that my only involvement was after the fact in the form of an internal investigation.<sup>33</sup>

13.3 Accordingly, on the respondent's own version, as well as mine, it is now common cause that it is untrue that I "brought us Nkandla".

13.4 As such, this comment is untrue. It is also not based on facts, nor were any facts stated or referred to in order to make the comment. The comment is thus unfair.

14 In the broadcast, it was stated that:

"[I] showed movies in Parliament in the name of corruption of Jacob Zuma"; and

"[I] show[ed] America's funniest videos in Parliament.

14.1 In its response, the respondent concedes that I did not show any movie in Parliament, but rather that the referred to movie was projected and screened in Parliament by another Minister.<sup>34</sup>

14.2 As such, on the respondent's own version, as well as mine, this comment was unfair as it was untrue and was not based on any stated or referred to facts.

14.3 The respondent, however, ostensibly seeks to create a new legal defence against defamatory and unfair comment. In its response, the respondent seeks to justify and excuse the unfair and defamatory comment on the basis that, first, the comment was made during a broadcast which primarily dealt with other issues, and secondly, the presenter was emotional and frustrated when making the comment.<sup>35</sup> Neither grounds stated above constitute a valid defence.

14.4 It is, of course, untenable and absurd that an unfair, false and defamatory comment is acceptable if it is not the main subject of the broadcast. It is equally untenable and absurd that a respondent be absolved from the consequences of making an unfair, false and defamatory comment if the comment was made while emotional and frustrated.

14.5 Both of the respondent's manufactured defences must fail.

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<sup>33</sup> Respondent's response (22 December 2021), paras 40 – 43.

<sup>34</sup> Respondent's response (22 December 2021), para 44

<sup>35</sup> Respondent's response (22 December 2021), paras 21 – 23, 45, 48-49, 54

15 Finally, in the broadcast, it was stated that:

*"Thulas Nxesi is bloody useless".*

15.1 Various other comments to the same effect were also made in the broadcast. I do not list them all here for the sake of brevity, but they are all listed in the complaint.

15.2 The respondent loosely asserts that I influenced Cabinet to withdraw the nomination of Prof Mdwaba because of "cadre deployment", and as a result the comments impugning my competence are reasonable and fair.<sup>36</sup>

15.3 As set out above and in the complaint, the withdrawal of Prof Mdwaba's nomination and my role therein was motivated by the High Court's findings on Prof Mdwaba and not "cadre deployment". It is noted that the respondent, in its response, did not reply to this point.

15.4 Accordingly, these comments are untrue. No facts were stated, referred to or relied upon in the broadcast to make these comments about my competence. Therefore, these comments were also unfair. This has been perpetuated by the respondent in its response.

#### *Presentation of Opposing Views and the Right of Reply*

16 In terms of the Code and the *Bogoshi* defence to defamation,<sup>37</sup> the respondent ought to have presented the opposing view to the comments made in the broadcast, and afforded me a right of reply during the broadcast to the comments about me.

17 I also note that the respondent does not explain what steps were taken to ensure the reliability and accuracy of the comments as required.

18 In its response, the respondent suggests that the opposing view to the comments was presented during the panel discussion segment of the broadcast.<sup>38</sup>

18.1 In this regard, the respondent quotes statements by the South African Communist Party (SACP) made during the broadcast.

18.2 The SACP's statements relate broadly to the competence of public officials. The SACP did not respond to any of the specific comments made about me during the broadcast.

18.3 As such, it is incorrect and misleading to suggest that the SACP's statements during the broadcast in any way constitutes a presentation of the opposing views to the comments made about me.

19 The respondent asserts that I am afforded a right of reply as the presenter of the broadcast "continually invites the people criticised to come to the show",<sup>39</sup> and that the respondent is "keen to have [me] on the programme".<sup>40</sup>

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<sup>36</sup> Respondent's response (22 December 2021), paras 50 -54

<sup>37</sup> See *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA)

<sup>38</sup> Respondent's response (22 December 2021), paras 15 -17

<sup>39</sup> Respondent's response (22 December 2021), para 27.3

<sup>40</sup> Respondent's response (22 December 2021), paras 57



19.1 I would have welcomed the opportunity to reply to the comments made about me if such opportunity was properly afforded to me. It is incredulous that the respondent relies on an ambiguous and passing invitation as the contemplated right of reply.

19.2 To date, I have received no formal invitation from the respondent to reply to the comments. How I was, or am I, supposed to exercise this alleged right of reply is vague and unclear.

19.3 It was incumbent on the respondent to afford me the opportunity to reply during the same broadcast. The respondent has not demonstrated why this was not possible.

## Conclusion

20 I recognise and appreciate that the discussion in which the comments made about me is in the public interest, and I note that the comments about me only constituted a small part of a larger broadcast. I also note the respondent's assertion that the comments were stirred by emotion and frustration, although, as alluded to in the complaint, that emotion and frustration was roused and influenced by the presenter's close relationship with Prof Mdwaba<sup>41</sup>. Regardless, none of the above justifies untrue, unfair and defamatory comments. It also does not justify presenting a one-sided view or not affording a right of reply.

21 I submit that the broadcast, and the comments identified in particular, are in breach of the Code and constitute actionable defamation. I therefore persist in the relief that the respondent and presenter of the broadcast be directed to issue an apology and rectification forthwith, without delay or reservation, and publicly withdraw all untrue comments made about me.

22 I do believe that there are grounds for the BCCSA to impose a fine as well, but I understand that such sanction is within the BCCSA's discretion, which I leave to its judicious exercise. I also believe that there are grounds to sue the respondent for defamation, my rights to which are strictly reserved."

## EVALUATION

[5] In evaluating a complaint of this nature, it is essential that the context of the programme as well as the broader context be considered. As explained by the Respondent (hereafter referred to as the Broadcaster), *Power To Truth* is a current affairs programme with the aim to hold government accountable by focussing *inter alia* on corruption and poor service delivery, and additionally, to present the South African citizens' voice. The format of the programme

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<sup>41</sup> See: *Williams v University of the Western Cape* (24537/2015) [2016] ZAWCHC 198 (15 November 2016) paras 54-64.

includes a relevant opening song, usually followed by an emotional, opinionated introduction and rant by the presenter (calculated to evoke a robust debate), and lastly a panel discussion by relevant parties.

[6] The programme on 27 October 2021 focused on the local government elections and how members of trade unions were expected to vote a few days later, on 1 November 2021. Mandisi Dyanytyis' song emphasised that all political leaders are liars and appealed to people to unite and to take back their own power. (This segment comprised 6% of the programme.) The presenter pointed out that it was Mandisi that said all political leaders are liars, not him. He continued with his rant (which comprised 10% of the programme). His opinion of the Complainant (hereinafter also referred to as the Minister) served as introduction for the unpacking of the challenges to be addressed by the panel in the main segment of the programme. The panel consisted of three trade union representatives (from SAFTU, SACP<sup>42</sup> and COSATU) and as stated above, the focus was on the positioning of organised labour for party support in the upcoming election. (The panel discussion comprised 72% of the programme.) The remainder of the programme is made up by advertisements.

[7] The Complainant is aggrieved that he did not receive a formal invitation from the Broadcaster to respond to the comments made by the presenter. The programme was broadcast on 27 October 2021. If the Complainant wanted to respond to the presenter's comments in a subsequent programme in the same series, it is puzzling why he or his office did not approach the Broadcaster in this regard. The Broadcaster indicated that it would have been keen to have the Complainant on such a programme. The complaints received by the BCCSA from the Complainant were dated 26 and 29 November respectively, a full month after the broadcast. This does not create the impression that, if the Complainant was aware of the broadcast, he was eager to reply on air to the "accusations" made against him.

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<sup>42</sup> Although SACP is not a trade union, it represented the working class.

- [8] The complaint regarding the letter to ILO will now be addressed. Protocol requires that the agenda of a Cabinet meeting be determined by submissions from ministers, therefore it was a logical assumption by the presenter that the Minister of Employment and Labour (the Complainant) was involved in some sort of submission or letter to influence the Cabinet regarding the withdrawal of the Government's original support of Prof Mdwaba, who was a candidate for the position of Director-General of the ILO. The withdrawal decision was taken at a Cabinet meeting held on 29 September 2021. The outcome of this meeting was communicated on 2 October 2021 by the Minister of Employment and Labour (the Complainant) to his Director-General with the directive to further disseminate the information. Protocol requires the Minister of Foreign Affairs to inform the relevant ambassador accordingly and this was done on 6 October 2021. Therefore, although it seems that technically the Complainant himself did not write a letter to the ILO, it was not an unreasonable assumption by the presenter and therefore not unfair. According to the the Broadcaster, Prof Mdwaba is currently a competent director of the ILO and has publicly confirmed to have seen the letter himself<sup>43</sup>.
- [9] The Complainant is further aggrieved about the presenter's comment that the withdrawal of the nomination is because Prof Mdwaba is not an ANC 'psychopath'. However, both the Complainant and the Broadcaster did not hear this word correctly, with the result that there were various references to 'psychopath', while the actual word used by the presenter was *sycophant*, which means a person who praises important or powerful people too much and in a way that is not sincere, especially in order to get something from them<sup>44</sup>.

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<sup>43</sup> <https://www.businesslive.co.za/bd/national/2021-10-08-mthunzi-mdwaba-implicates-thulas-nxesi-in-withdrawal-of-support-for-ilo-race/>

<sup>44</sup> Oxford Advanced Learner's Dictionary, 2015.

[10] The presenter referred to cadre deployment and the lack of skills which are responsible for the poor performance of inter alia Eskom and numerous municipalities. The policy of cadre deployment by the Government is a well-publicised fact<sup>45</sup>. Issues involving corruption or incompetence of ministers and councillors, and cadre deployment have been admitted by the ANC and during the panel discussion section of the programme the representative of the SACP mentioned that it was decided that in future rigorous interviews will be conducted with aspirant leaders to ensure that they have the level of skills to enable them to deal with challenges.

The Complainant argues that the presenter linked the low level of education of councillors with the alleged incompetence of the Complainant himself, by saying that the Department of Labour is in shambles, that the Minister of Labour is useless and that he is an example of cadre deployment. When the presenter made the comments, he was clearly carried away by emotion, something a presenter should strive to steer clear of. The Broadcaster argues that some balance was achieved during the panel discussion by the opposing view of the representative of SACP, who opposed the statement that ministers are 'useless' or incompetent and rather blamed the unfortunate state of affairs on the challenges that leadership are experiencing. He said: "*I must take an issue with what you call 'useless ministers, I do not think it is correct to say that'*".

The Complainant emphasises that the Department of Employment and Labour is no longer responsible for skills development and that it is now the function of the Department of Higher Education, Science and Innovation. Therefore, the facts upon which the presenter based his link to the Complainant were not clearly stated.

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<sup>45</sup> Koos Malan, Professor of Public Law at Pretoria University. RSG Programme *Praat Saam*, 17 Jan 2022.

[11] According to Clause 28.2, the presenter was entitled to comment on and criticise actions or events of public importance. Clearly the presenter's remarks represented his personal opinions, they were honest expressions of opinion and clearly identifiable as comments. As stated above, the topic of discussion was how trade unions were going to align themselves with political parties. Since the focus of the programme was on the upcoming elections and not on the Complainant, the question is why he was referred to at all. In my opinion the presenter referred to the Complainant because he, as Minister of Labour, represents the Government, and also because the representatives of three trade unions were invited to participate.

[12] The Complainant is also aggrieved that the presenter referred to him as the "*the chap who brought us Nkandla and called the swimming pool a fire pool and showed us movies in parliament there in the name of corruption of Jacob Zuma*". Although the Complainant was not the Minister of Public Works during the construction of the Nkandla residence and was not involved in the planning for, or approval of the construction thereof, he was the Minister of Public Works who conducted the internal investigation after the public outcry. It is common cause that after the report came out, he classified it as Top Secret and only revealed the contents thereof following court pressure.<sup>46</sup> The gist of the internal investigation's findings was eventually overturned by the Public Protector's report that found that former President Zuma was liable for certain personal beneficial improvements at Nkandla. Because of the public perception of this entire saga, the opinionated remark of the presenter was not unreasonable.

[13] Regarding the presenter's comment that the Complainant "*showed us movies in parliament ...*", the Broadcaster conceded that the film about fire pools that was shown in Parliament was not shown by the Complainant, but by the

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<sup>46</sup> Mail & Guardian 2014-02-21. Available on the Internet at <https://mg.co.za/article/2014-02-21-nkandla-why-did-nxesi-lie-1/> Accessed on 14.1.2022

Minister of Police. Clause 28.2.2 holds that comment must be made on facts truly stated or fairly indicated and referred to. The requirement is not for facts to be true and justifiable, but rather for facts to be truly stated or fairly indicated and referred to. It is possible that the presenter's view was based on what he genuinely believed to be a fact, although it was incorrect. In the case of *Madibeng Local Municipality v M-Net*<sup>47</sup> the BCCSA refers to the case of *Mthembu-Mahanyele v Mail & Guardian*<sup>48</sup> which indicated that the facts on which a comment is based, need not be proven to be true:

*"Freedom of expression in political discourse is necessary to hold members of government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably: that is with the reasonable belief that the statements made are true. Accountability is of the essence of a democratic state: It is one of the founding values expressed in section 1(d) of our Constitution".*

The Code does not require comments made to be factually true, as long as the facts are clearly stated or fairly indicated. Therefore, the presenter's comment about the film is justified in the context of linking the Complainant with the Nkandla saga. As mentioned above, facts should, in this context, be regarded as facts as genuinely perceived by the person who made them. The presenter was entitled in terms of Clause 28 to express a view on what he sincerely perceived the facts to be.

[14] In the case of *South African Veterinary Council & Lester v M-Net*<sup>49</sup>, a previous chairperson of the BCCSA, Prof Van Rooyen, said that "... *any inquiry by the BCCSA must commence with freedom of expression as a basic premise. One does not commence with a negative view in regard to a broadcast, but with*

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<sup>47</sup> *Case 15/2015.*

<sup>48</sup> *2004 (6) SA 329 (SCA).*

<sup>49</sup> BCCSA Case no. 42 of 2014.

*what may be termed an open-minded, freedom-oriented approach to the material ....*” In deciding whether a broadcast was unfair and whether the Code was contravened, the BCCSA’s departing point is thus the right to freedom of expression which every person in this country has in terms of section 16 of the Constitution, also broadcasters. It is clear from the interpretation of this right by the Constitutional Court that this is a very important right – one could say one of the pillars on which democracy rests. The following was said about freedom of speech and freedom of expression by Langa DCJ in the Constitutional Court decision in *Islamic Unity Convention v The Independent Broadcasting Authority and Others*<sup>50</sup>

*“Notwithstanding the fact that the right to freedom of expression and speech has always been recognized in the South African common law, we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa’s present commitment to a society based on a ‘constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours’”.*

[15] The Complainant is aggrieved that the comments made in the programme were defamatory and that the video of the programme was distributed extensively on the social media and viewed by millions of people in and outside South Africa. It must be noted that the BCCSA has no jurisdiction over the social media. It must further be noted that the Code does not mention defamation as a ground for contravention of the Code, however the dignity and privacy of persons are protected in the Code under certain

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<sup>50</sup> 2002(4) SA 294(CC) at paragraph 27.

conditions. Regarding alleged defamation, I will thus apply Clause 28.4 that holds that:

*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.** (Own emphasis)*

[16] Although the privacy, dignity and reputation of individuals are protected in Clause 28.4, there is a rider to this protection, namely that these rights may be overridden by a legitimate public interest. How trade unions were going to align themselves with political parties in the previous local government election was certainly in the public interest. As far as references to the Complainant are concerned, many of the 'accusations' against the Complainant were already in the public domain prior to the broadcast of the programme in question. It was in the public interest that these matters be exposed, and this trumped the rights of the Complainant.

Regarding impairment of dignity, *Le Roux v Dey*<sup>51</sup> stated the following:

*“Where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied.” (Own emphasis)*

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<sup>51</sup> 1 2011 (3) SA 274 (CC) at 89.



The result of the above *dictum* by the court is that where a comment is alleged to infringe a person's dignity, its ordinary meaning must first be determined, thereafter the context within which it was said must be considered. After that, an objective test must be applied to determine whether the statement was indeed infringing the person's dignity. An objective approach requires a reasonable person test, which in this case does not entail the meaning which the presenter intended nor the meaning which the Complainant against whom the comments were made, assigns to it, since both of these are subjective. The test is an objective one which considers what the reasonable viewer with ordinary sensibilities would construe the comments to be.

[17] Therefore, the test was to determine whether the reasonable viewer of the programme would, upon hearing the comments and after considering them in context, conclude that they were impairing the Complainant's dignity. The presenter sailed very close to the wind during his emotional rants. However, the broader context against which the offending comments must be seen, includes the current desensitization of audiences regarding reports of corruption and cadre deployment cases, which are daily coming to light, *inter alia* through the Zondo Commission. Additionally, during the programme in question, the audience's attention would have been on the election. Clearly the reasonable viewer in this case was the *Power to Truth* audience member and not the Complainant, who was offended by the comments, but offence does not amount to the impairment of dignity.

[18] The right to dignity and reputation is always balanced against the right to freedom of expression and the context is always of the utmost importance in any inquiry in terms of the Broadcasting Code. In this case the public interest does not mean 'interesting to view' but indicates that a higher value must be served - there is a difference between what is interesting to the public and what is in the public's interest. The latter often refers to topics that address alleged evils which should be brought to the public's attention - which is similar to issues of public importance that have been defined by the BCCSA as

issues which are of public importance within the South African context. The right to broadcast comments on controversial issues of public importance forms part of the media's guaranteed right to freedom of expression and the public's right to be informed<sup>52</sup>.

[19] **I concluded that as far as Clause 28.4 is concerned, the Complainant's right to privacy and dignity is overridden by the legitimate public interest of the topic. Furthermore, since the Complainant is a public figure, his actions are open to scrutiny. Regarding the right to reply (Clause 28.3), to now afford the Complainant the opportunity to take part in a follow-up programme will serve no purpose since too much time (both in terms of the comments made, as well as the historic election) has passed. In accordance with Clause 28.2 and judged in context, I conclude that although the presenter's comments and opinions were genuinely held and were obviously his personal opinions, all of them were not based on facts fairly indicated and referred to.**

**Thus, no contravention of Clauses 28.3 or 28.4 could be found and the complaints regarding these are not upheld. Clause 28.2 was partly contravened and a reprimand will suffice as sanction.**



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

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<sup>52</sup>Section 16 of the Constitution of the Republic of South Africa 1996