



CASE NUMBER: 02/2023

DATE OF HEARING: 24 MAY 2023
JUDGMENT RELEASE DATE: 08 JUNE 2023

MULTICHOICE

APPELLANT

VS

NXUMALO AND OTHERS

RESPONDENTS

TRIBUNAL: MR BRIAN MAKEKETA (CHAIRPERSON OF THE TRIBUNAL)
MR RICHARD CHEMALY
DR LINDA VENTER

FOR THE APPELLANT: MR BRUCE MKHIZE, HEAD: REGULATORY COMPLIANCE, REGULATORY AFFAIRS OF MULTICHOICE ACCOMPANIED BY MR THABO MOHALE: SENIOR ASSOCIATE, MOTA AFRICA, MS PRECIOUS MOTHOA: CANDIDATE ATTORNEY, MOTA AFRICA, MR TUMI SOLE, LEGAL ADVISOR, MOJA LOVE CHANNEL.

FOR THE RESPONDENTS: MS K NXUMALO. ALL THE COMPLAINANTS WERE INVITED BUT DID NOT ATTEND.

*No contravention of the Code - the broadcast did not fulfil both criteria stipulated in Clause 10. The original finding and sanction of Adjudication No: 06/A/2023 were overturned. **Multichoice vs Nxumalo & Others, Case No: 02/2023 (BCCSA).***

SUMMARY

The Appellant was granted leave to appeal against the finding of the Commissioner in Adjudication No: 06/A/2023. The initial complaints pertained to an episode of the Isencane Lengane programme on the Moja Love Channel 157

that was broadcast on 22 January at 21.00. The Respondents alleged that the Appellant condoned gender-based violence as portrayed without airing any criticism. After considering all submissions from the Appellant and the Respondents, the Tribunal concluded that there was no contravention of Clause 10 of the Code since there was no incitement of imminent violence or advocacy of gender-based hatred.

The original finding and sanction of Adjudication No: 06/A/2023 were overturned.

JUDGMENT

DR LINDA VENTER

[1] This is an appeal to the Tribunal of the BCCSA against Adjudication No: 06/A/2023.

The BCCSA received over 50 complaints [*hereinafter referred to as 'the Respondents'*] against MultiChoice [*hereinafter referred to as 'the Appellant'*] concerning the broadcast of an episode of the *Isencane Lengane* programme [*hereinafter referred to as 'the episode'*], on Moja Love (Channel 157) broadcast on 22 January 2023 at 21:00. The Respondents alleged that *Isencane Lengane* promoted Gender-based Violence (GBV), and that the Appellant condones it by continuing to broadcast the reality series without any criticism.

[2] **The complaints read as follows:**

Nxumalo: “I would like to lay a complaint against *Isencane Lengane*, the episode which aired Sunday 22 January 2023 on Moja Love. I am not sure how domestic violence is promoted in this nature, this guy is clearly abusive and we are being made to watch when he breaks her phone. He admits he hits her as though he is proud of it, what should we expect next? to see him kill her? Please control this. The show aired at 21h00 on Sunday 22 Jan 2023.”

Sobudula: “On 22 January 2023, Moja Love Channel broadcast an episode of *Isencane Lengane* at 9pm. In this episode, there is a depiction of a violent act which constitutes Gender Based Violence where there is a conversation about Siyacela hitting Thando in front of their child

further breaks her phone (while being recorded). It is evident the channel knew beforehand (as this was advertised) of the violence and continued to air harmful content. In addition, the channel crew was present when the violent act took place, there are no measures to demonstrate that the victim involved (a woman with a child) was assisted to report the case or protected in any way from the perpetrator. The channel failed to take viewers into confidence about what's steps were further taken by them to address this situation. This giving the impression that such content is an acceptable norm. Instead the channel, further gave the perpetrator a diary session where he relayed (did not deny) that the abuse is none of anyone's business. South Africa faces a source of GBV, Femicide and violence against children, the public broadcast the expense of victims should be condemned in all ways possible. I look forward to your response on the issue."

Mabuza: "Kindly be informed that the show Isencane Lengane aired 22/01/2023 9pm reality show is promoting violence against women and children. SOUTH AFRICA is faced with many cases of women who died because of man they thought were in love with them due to the physical abuse. For Siyacela to confess on national TV that if his not happy with Thando's action (wife) he punishes her physical and Thando confirmed also that it's not for the first time sometimes the guy uses the figure belt, also breaking the phone on the show because his angry was very disturbing. What did the producer of this episode think about before broadcasting? This show is not teaching good morals to man but promoting violence."

Mlangeni: "I would like to lay a formal complaint as a viewer of the show Isencane Lengane which plays on MojaLove TV which is available on the Dstv platform on channel 157 on Sundays at 9pm. The show follows a young married couple as they go through their day to day lives, in an episode that aired on January 22nd at 9pm on Channel 157 on the Dstv platform, the young woman Thando states that her husband Siyacela beats her regularly and as she continues telling the viewers this he takes her phone and smashes it to the ground, in a country as South Africa which is riddled with Gender Based Violence, we as South Africans cannot sit by and watch this show continue to showcase violence and the mistreatment of this young woman as entertainment in our homes, these people need professional help and not a platform to normalize this. Please hold the guilty parties accountable."

Makhaye: "I would like to lodge a complaint against the TV show Isencane Lengane, which airs on MojaLove Channel 157 on Sundays at 21h00. The episode in question aired Sunday 22 January 2023

It follows a young couple who got married as teenagers, think 15 and 16. We have watched the girl's life deteriorate as we watched, but last Sunday was the worst. Thando told the whole world her husband, Siyacela just hit her... WHILE SHE WAS CARRYING THEIR CHILD.

The channel did not air the actual abuse but on his diary sessions or whatever, where they speak their minds in between the show, Siyacela BOASTED about hitting her and told us HE WAS DISCIPLINING HIS WIFE, "IF YOU HAVE A PROBLEM GO TELL YOUR OWN MAN". He went on and on about how she's not allowed to have friends, except his family. He also admitted to breaking a couple of her phones because she had numbers he did not recognize. He also broke one phone AS WE WATCHED.

He is such a narcissistic and is manipulative, even "cried" when she said she was leaving him. This show does not deserve airtime. This man does all these disgusting things to look cool or whatever, from the way he was boasting and not apologetic after the abuse. We do not need that as a country, we are already the Femicide capital. Too many women have lost their lives at the hands of men. WE CAN NOT BE GLORIFYING GBV WITH AIR TIME. Please look into it. Thank you."

Kabini: “This e-mail serves to lay a complaint about an episode of Isencane Lengane aired on the 22nd January 2023 at 21H00 on Moja Love.

The channel aired a scene whereby Thando explains how Siyacela beats her up. They even showed us when He threw her phone down and broke it. In a country whereby women lose their lives due to Gender Based Violence it is unacceptable to be watching such scenes or even hear the violence being narrated to us viewers. Irrespective of the disclaimer by the channel that they will provide counselling we were not supposed to be shown such. Therefore I request that an action be taken towards the channel. Your taking of this complaint into consideration will be highly appreciated.”

Zwane: “I have a complaint about a programme named Isencane Lengane that aired on Dstv channel 157 at 21:00 tonight 22/01/2023. I watched this episode and I'm disgusted, dismayed and very upset that a TV program can air showing such abuse in a country where gender based violence is rife. My grievance is that the show broadcast a woman being subjected to domestic abuse.

The husband of the young lady admitted to hitting her and sees nothing with it even says that's how he disciplines her. The wife confessed that it was not the first time that he physically assaulted her.

He even said 'She is mine' as if she is his possession. She also said he once beat her with a belt. He has isolated from family and controls every aspect of her life, he even says she is only allowed to have friends that he has vetted. This recent abuse happened in front of their infant. We cannot have shows that showcase gender based violence as if they are promoting it. They even filmed him smashing her phone to the ground. This is unacceptable the producers do not seem to be putting the wife and child's safety and well-being first.”

Modise: “In season 5, episode 3 of the reality show Isencane Lengane there is repeated vocalisation by the young wife, Thando, that her husband had physically abused her. The husband, Siyacela, brags an admission that he did hit her. This episode in my view contributes to normalisation of a significant issue the country is fighting against. The MojaLove production team is further complicit as there is no attempt to add a message during or after the episode, that communicates their contempt against gender based violence.

Furthermore, The only warning to viewers on this episode is language (L), and makes no reference to the violence theme of the episode. The wife also physically attacks the husband openly on camera, and this is broadcasted.

I am writing this complaint in strong objection of the criminal elements of this episode which have been freely aired. It is an insult to the message and daily efforts by South Africa to fight the scourge of gender based violence. Kindly intervene.”

Sambo: “Gender based violence on Moja Love Isencane Lengane - It is disturbing to see Siyacela beating Thando and boasting that she belongs to her and nobody can tell him anything. The channel should be made to account for such acts of violence that they allow and not do anything to stop it, because what Siyacela is doing is a crime in South Africa, it cannot be made entertainment at all. I request that this issue be taken with the seriousness it deserves. The show I have a complaint about is Isencane Lengane on Moja Love channel 157 on DSTV, and it aired on Sunday 22 January 2023 at 21:30.”

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

“IN RE: VARIOUS COMPLAINTS ABOUT THE EPISODE ON GBV IN ISENCANE LENGANE // MOJA LOVE

Introduction and background:

1. We refer to the numerous Complaints (“the Complaints”) lodged by various persons against Moja TV Channels (Pty) Ltd (“the Channel”) with the BCCSA. The Complaints emanate from a recent broadcast of a show called “*Isecane Lengane*” (hereinafter referred to as the “Show”) on Sunday, 22 January 2023.
2. Given the numerous Complaints, the Channel requests the BCCSA to exercise its discretion and adjudicate these Complaints all at once for the following reasons:
 - 2.1. The Complaints raise similar if not related issues; and
 - 2.2. The Complaints are with regards to a Show broadcast on Sunday, 22 January 2023 by the Channel and not any other Channel; and
 - 2.3. It would be in the interest of justice, effective dispute resolution and expediency for the Complaints to be adjudicated together as the alleged contravention (s) are in essence relating to alleged promotion of Gender Based Violence (“GBV”) by the Channel.
3. The Channel will demonstrate below, that whilst the Complaints relate to a purported violation of the BCCSA Code of Conduct for Subscription Broadcasters (“the Code”), the BCCSA ought to dismiss the Complaints in their entirety for reasons that will be advanced in these submissions in detail below.
4. For ease of reference, it is important to briefly provide a high-level synopsis of the Show, and in the Channel’s view why it exists:
 - 4.1. The Show, which is in Season 5 (five) already, is a reality television show that is a continuation of the story of Thando and Siyacela (“the Couple”) who married as teenagers under the customs of the communities where they live and with the permission of their parents.
 - 4.2. The Show does not only highlight the Couple’s story, but it is intended to educate and encourage a dialogue and/or conversation amongst the South African Public (“the Public”) on issues and realities faced by persons in their shoes and/or similar background (including persons in general, regardless of their social standing). It does this by, amongst other things:
 - 4.2.1. showcasing the Couple’s challenges as they navigate life; and
 - 4.2.2. understanding the trauma associated with the loss of parents; and
 - 4.2.3. seeing the impact of alcohol on the Couple and the family unit; and
 - 4.2.4. more importantly, the successes that often come with navigating such harsh environments especially by Thando, Siyacela’s wife.
 - 4.3. It is the Channel’s submission that whilst most of the issues that are tackled on the reality show may, as stated in the Complaints and denied by the Channel, appear offensive, insensitive, and/or encourage GBV, these issues are a necessary part of the

discourse on GBV and social ills including fostering debates/discussion to curb the scourge of GBV.

- 4.4. The Channel demonstrates in detail that the Show broadcast on Sunday, 22 January 2023 did not breach any of the provisions of the Code.

The essence of the Complaints summarized:

5. Having read through the various Complaints lodged with the BCCSA, the Channel is of the view that the issues raised in the Complaints could be themed in 4 (four) parts as follows:
 - 5.1. The show violated Clause 9.5 of the Code by broadcasting “the explicit infliction of or explicit effects of extreme violence which constitutes incitement to cause harm.”
 - 5.2. The Show violated Clause 10.2 of the Code by broadcasting material, judged within context, incites imminent violence; and
 - 5.3. The Show violated Clause 10.3 of the Code by broadcasting material, judged within context, advocates for hatred based on race, ethnicity, gender or religion which constitutes incitement to cause harm; and
 - 5.4. The Show glorifies, promotes and thereby perpetuates GBV and essentially has done nothing to protect Thando from Siyacela.
 - 5.5. The Channel sets out in detail its response to the Complaints and will refer to the provisions of the Code to demonstrate that there is no breach of the Code in any way.

The Law

- 6.1 Before we proceed to deal with the Code, it is necessary to place the Code within its proper constitutional and legislative context.

- 6.2 The Constitution

- 6.2.1 Section 16 of the Constitution of the Republic of South Africa¹ (“the Constitution”), which guarantees the freedom of expression, including the freedom of the press and other media, provide as follows:

“16. Freedom of expression

- (1) *Everyone has the right to freedom of expression, which includes—*
 - (a) *freedom of the press and other media;*
 - (b) *freedom to receive or impart information or ideas;*
 - (c) *freedom of artistic creativity; and*
 - (d) *academic freedom and freedom of scientific research.*
- (2) *The right in subsection (1) does not extend to—*
 - (a) *propaganda for war;*

¹ Act 108 of 1996

- (b) *incitement of imminent violence; or*
- (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”*

The Code

6.3 Clauses 9 to 11 the Code set out what content may not be broadcast by licensees. The relevant parts read as follows:

“Content which may not be broadcast

Child pornography, bestiality, incest, rape, sexual conduct and violence

9 *A subscription broadcasting service licensee may not knowingly broadcast material which, judged within context, contains a scene or scenes, simulated or real, of any of the following –*

...

9.5 *the explicit infliction of or explicit effects of extreme violence which constitutes incitement to cause harm.*

Advocating war, violence or hatred

10 *A subscription broadcasting service licensee may not knowingly broadcast material which, judged within context –*

...

10.2 *incites imminent violence; or*

10.3 *advocates hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm.*

6.3.1 Therefore, in summary, content will contravene clauses 9 and 10 of the Code where such content:

6.3.1.1 depicts the explicit infliction of or explicit effects of extreme violence which constitutes incitement to cause harm;

6.3.1.2 incites imminent violence; or

6.3.1.3 advocates hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm;

6.3.4 It is clear from the language of the Code that a broadcast scene will contravene the Code where only one (and not necessarily all three) of the above content type is broadcast.

Analysis

7.1 As is apparent from the above, clauses 10 of the Code is, *mutatis mutandis*, identical to section 16 of the Constitution.

7.2 It is indeed a generally accepted fact that section 10 of the Code is indeed based on section 16 of the Constitution.

- 7.3 The issues raised by the Complaints, therefore, heavily implicate the right to freedom of expression, in particular the right to freedom of the press and other media.
- 7.4 Simply put, the issue or determination by the BCCSA is whether, in broadcasting the impugned episode, the Channel exceeded the boundaries of its right to freedom of expression as contained in section 16 of the Constitution and as codified in the Code.
- 7.5 The Constitutional Court has, in the context of freedom of expression, previously held that:

“. . . freedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) . . . The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial".²

- 7.6 In *S v Mamabolo (ETV, Business Day and the Freedom of Expression Institute Intervening)* the following was said by the Constitutional Court:

"Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression the free and open exchange of ideas is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open marketplace of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore, we should be particularly astute to outlaw any form of thought control, however respectably dressed."³

- 7.7 Like all other constitutional rights, the right to freedom of expression is not absolute. It is subject to the limitations set out in section 16(2) of the Constitution. Such limitations however, do not include taking offence, disgust and similar emotions.
- 7.8 In this regard, the BCCSA has previously held in *Maree v Multichoice (KykNet)*⁴ that:

"Lastly, it should be mentioned that the Complainant's apparent disgust at the film being shown in these times when apartheid has been outlawed by the Constitution, is of course a permissible personal reaction. However, the views underpinning this reaction are not accommodated by the Code, which permits broadcasters to broadcast material of their choice, as long as the material does not infringe upon the rules laid down in the Code. Films portraying the evils of the past are not forbidden – in fact, history cannot and should not be ignored, even if it reminds one of a terrible past."

² *South African National Defence Union v Minister of Defence and another* 1999 (6) BCLR 615 (CC); 1999 (4) SA 469 (CC) para 8.

³ 2001 (5) BCLR 449 (CC); 2001 (3) SA 409(CC) para 37.

⁴ Case 31/2014 BCCSA

7.9 In the *Van Wyk and Others v SABC* 3⁵ matter, the BCCSA held as follows:

Freedom of speech and expression are hard worn rights in our democracy and should not be easily limited. Although we realise that many viewers of the episodes of Isidingo which are the subject of these Complaints, were upset and offended by what they saw, that was not sufficient to find the broadcast amounted to hate speech. The broadcaster has, in terms of its license, the duty, inter alia, to educate and to entertain. We are informed that with these episodes the broadcaster intended to promote democracy by setting up a debate about racial relations and the struggle for land. We have no authority to find that the broadcaster exceeded its license conditions. That duty would be for ICASA to decide. Our duty is to judge whether the content of the programme exceeded the boundaries of the freedom of expression as determined in the Code of Conduct.”

Has there been a contravention of the Code?

8.1 Having placed the provisions of sections 9 and 10 of the Code in their proper constitutional context, we now opine on whether the impugned episode has contravened those sections

8.2 Incitement to cause harm. (Clauses 9.5 and 10.3 of the Code)

8.2.1 It is important to note that, both in respect of clauses 9.5 and 10.3 of the Code, the impugned conduct must constitute incitement to cause harm in order for there to be a contravention.

8.2.2 Put differently, whether or not there has been a contravention of clause 9.5 and 10.3 of the Code is, in each case, a two-stage inquiry.

8.2.3 In the case of clause 9.5, there must, in the first instance, be “*the explicit infliction of or explicit effects of extreme violence*”. Similarly, in the case of clause 10.3 of the Code, there must, in the first instance, be an advocacy of hatred based on the prohibited grounds as listed in the clause.

8.2.4 In the second instance, in the case of both clause 9.5 and 10.3 of the Code, there must be incitement to cause harm.

8.2.5 Therefore, where incitement to cause harm cannot be established, a contravention of clauses 9.5 and 10.3 of the Code, *a priori* cannot be established, even where the first leg of the inquiry is satisfied.

8.3 Incitement to cause harm (Clauses 9.5 and 10.3 of the Code)

8.3.1 Incitement

8.3.1.1 As already discussed above, the presence of the incitement to cause harm is a *sine quo non* to the contravention of clauses 9.5 and 10.3. That is to say, there cannot be a contravention of these clauses without the presence of an incitement to cause harm.

⁵ [2017] vol 55329 (BCCSA)

- 8.3.1.2 The word "incitement" is derived from the word "incite". The South African Concise Oxford Dictionary⁶ and Black's Law Dictionary⁷ define "incite" and "incitement" respectively as follows: "encourage or stir up (violent or unlawful behaviour) ; urge or persuade to act in a violent or unlawful way".
- 8.3.2.2 Having reviewed the impugned episode, we could not identify any aspect of the broadcast which constitutes incitement to cause harm within the meaning set out above.
- 8.3.2.3 This is because, amongst other things, the episode does not encourage, stir-up, urge or persuade the viewer to do anything, let alone cause harm. It merely tells the story of the wife. No reasonable viewer, having watched the episode, can be reasonably incited to cause harm. In fact, it is quite the opposite. The episode clearly portrays the damaging and hurtful effects of domestic violence, in this case, on the wife.
- 8.3.2.4 It is only the most callous viewer that can walk away from the episode having been incited to do harm.
- 8.3.2.5 It also cannot be said that there was an intention on the part of the Channel to influence the mind of the viewers to commit a crime, in this case GBV, in the sense in which it is meant in the EFF matter.
- 8.3.2.6 In the result, in our submission, an incitement to cause harm cannot be established.

8.4 Incitement of imminent violence (Clause.10.2 and of the Code)

- 8.4.1 Clause 10.2 of the Code prohibits the broadcast of material that when judged within context, amounts to "incitement of imminent violence".
- 8.4.2 In this regard, the wording makes it clear that there are two elements that a broadcast must meet in order to fall within the ambit of this clause, namely that there has to be "incitement" and the violence has to be "imminent".
 - 8.4.2.1 Incitement
 - 8.4.2.1.1 We have already dealt with the ordinary meaning of incitement in para 8.3.1 above.
 - 8.4.2.2 Imminent
 - 8.4.2.2.1 Again, the South African Concise Oxford Dictionary⁸ defines the word imminent as "about to happen and archaic overhanging". Black's Law dictionary⁹ in the context of imminent danger and the definition reads "an

⁶ Oxford University Press Southern Africa, Cape Town, (2002).

⁷ Black's Law Dictionary, West Group, St Paul, Minn (1999).

⁸ Oxford University Press Southern Africa, Cape Town (2002).

⁹ Black's Law Dictionary, West Group, St Paul, Minn, (1999).

immediate, real threat to one's safety that justifies the use of force in self-defence. Criminal Law describes the word imminent "as the danger resulting from an immediate threatened injury sufficient to cause a reasonable person to defend himself or herself".

- 8.4.2.2.2 From the definitions of the words incitement and imminent, the BCCSA jurisprudence has over the years interpreted this clause to mean if the conduct is to fall within the prohibitions of clause 10.2 of the Code, it should have encouraged or stirred up or urged on or provoked violence. In addition, the conduct should not have just ended at incitement of violence, but the violence incited should have been real in the sense that it should have been immediate and/or should have been about to happen at the time of the incitement.
- 8.4.2.2.3 No incitement to cause imminent violence within this meaning is present in the impugned episode.
- 8.4.2.2.4 Therefore, the impugned episode did not in any way urge or provoke or stir up violence and it's broadcast was not likely to result in any immediate violence to anyone.
- 8.4.2.2.5 Consequently, it is our submission that the impugned episode did not contravene the provisions of clause 10.2 of the Code.

8.5 Advocacy of hatred. (Clause 10.3 of the Code)

8.5.1 As already indicated in para 7.3 above, having found that the episode does not infringe paragraphs 10.3 and 9.5 in that it does not constitute incitement to cause harm, it is not necessary to consider whether or not the second leg is fulfilled i.e. in the case of clause 10.3 whether the episode advocates hatred which is based on race, ethnicity, gender or religion.

8.5.2 However, we do so below only for purposes of completeness.

8.5.3 Advocacy

8.5.3.1 The word "advocacy" is a derivative from the word advocate and the South African Concise Oxford Dictionary¹⁰ and Black's Law Dictionary¹¹ respectively define advocacy and advocate as follows: "a person who publicly supports or recommends a particular cause or policy; a person who pleads a case on someone's behalf" and "advocacy" as "the work or profession of an advocate; the act of pleading for or actively supporting a cause or proposal". Again, the BCCSA's jurisprudence has over the years maintained that for there to have been advocacy by/from the comment in question, the

¹⁰ Oxford University Press Southern Africa, Cape Town (2002).

¹¹ Black's Law Dictionary, West Group, St Paul, Minn, (1999).

comments ought to have publicly strongly supported or pleaded for any action against people based on their race, ethnicity, gender or religion. In the context of the comments in question, there was no advocacy of any cause against any one person based on any of the four grounds.

8.5.3.2 It is, therefore our submission that the comments in question did not in any way strongly support or recommend or plead for any action based on any of the four grounds mentioned in the clause.

8.5.4 Hatred

8.5.4.1 The *South African Concise Oxford Dictionary*¹² defines hatred as "intense dislike", while *Black's Law Dictionary*¹³ defines hate speech as "Speech that carries no meaning other than the expression of hatred for some group, esp. in circumstances where the communication is likely to provoke violence". Cory JA¹⁴ defined hatred thus: "Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill will and malevolence in another. Clearly an expression must go a long way before it qualifies. . .".

8.5.4.2 Again, the BCCSA's jurisprudence has over the years insisted that, for there to be a contravention of the Code, the comment complained of must instil or promote or provoke or urge any detestation or ill will or violence against anyone based on such a person's race or gender.

8.5.4.3 We submit that the impugned episode in question did not/does not rise to the standard which must be met in order for it to qualify as hate speech based on race, ethnicity, gender or religion.

8.6 Explicit infliction or explicit effects of extreme violence (clause 9.5 of the Code)

8.6.1 Similarly, we deal with the first leg of the inquiry under clause 9.5 only for the sake of completeness, given our conclusion that there is no incitement to cause harm.

8.6.2 As already stated above, the violence perpetrated by the husband against the wife is not broadcast in the episode. We are only told by the wife that she has been the victim of such violence. For the purpose of this response, we accept that as true.

8.6.3 Given that, the violence in question has not been broadcast:

8.6.3.1 It is, by definition, impossible for one to argue that there has been a broadcast of the "infliction of the violence" (whether explicit or otherwise) or indeed to argue that there has been a broadcast

¹² Oxford University Press Southern Africa, Cape Town (2002).

¹³ Black's Law Dictionary, West Group, St Paul, Minn, (1999).

¹⁴ R v Andrews, Supreme Court judgment [1990] 3 S.C.R. 870 case number 21034.

and the effects of the violence (whether extreme or otherwise). This determination can only be made if the violence had been broadcast.

8.6.3.2 In the result, it is our submission that the second leg of the enquiry under clause 9.5 of the Code has not been fulfilled and, therefore, there has not been a contravention of clause 9.5 of the Code.

9. It is, additionally, the Channel's submission that the broadcast of the Show did not breach any of the provisions of the Code for the following reasons:
 - 9.1. The Show is a narrative which reflects the reality of the conflict between traditional norms and practices, against modern westernised society, values, and attitudes. It documents the realities of society, in this instance, GBV. At no point did Siyacela actively incite violence and/or encourage Men to assault their wives and/or partners. Read and watched in context, the Show and the complained conduct arose out of an account where Siyacela was stating that he had assaulted his wife, Thando and sought to provide background/ context to the abuse.¹⁵
 - 9.2. The Channel believes in producing content that reflects the reality in our society, including its social ills, and as such could not conceal the GBV incident between the Couple especially in a country that has a high rate of femicide and GBV. It is thus the Channel's view that it had the responsibility to broadcast the episode with a hope of creating awareness and dialogue on GBV. This aspect cannot be said to fall within the definition of "*advocating hatred on the basis of gender*" as defined in the Code.
 - 9.3 The Channel did not broadcast any extreme violence, but rather broadcast Complaints by Thando that Siyacela is physically abusive toward her, and a scene where Siyacela smashes Thando's phone on the ground. Those, by any standard cannot constitute extreme violence and they do not constitute an incitement to commit violence in the context of Clause 9.5.
10. Although the complaints relate to a specific episode, the storyline is continuous and therefore the channel did broadcast corrective measures in the following episode where the couple attend counselling session with a social worker. Those episodes have been shared with the Commission.

Additional submissions

11. As demonstrated above, the Channel did not contravene any provisions of the Code.
12. However, we deem it necessary to demonstrate that the Complaint "the Channel did nothing to protect Thando" and/or "glorifies" gender-based violence is misconceived and without merit for the following reasons:
 - 12.1. The Complaints are premised on a single episode which forms part of a 13 (thirteen) part storyline. In subsequent episodes, Thando and Siyacela are offered, and currently attend, ongoing support, in the form of counselling.

¹⁵ The Channel would like to make it clear that violence of any kind, regardless of context cannot be justified. It is for this case that the broadcast was necessary to contextualize the issues in dispute and the background.

- 12.2. Further, it must be stressed that the Channel consults with, and respects the wishes of the persons who feature on its shows. The Channel takes particular care not to violate the privacy of such persons and has continually provided pre- and post-counselling support to the couple, which typically is not broadcast due to the sensitivity and confidentiality of the situation. The Channel takes such responsibility seriously.
- 12.3. It must be further noted that the Channel took proactive steps when the assault occurred by:
 - 12.3.1. Production Crew stepped-in and restrained Siyacela; and
 - 12.3.2. The Production Crew called the police but could not record the police intervention;

and

 - 12.3.3. Thando was advised to open a criminal case of assault against Siyacela, but she chose not to exercise this right and instead, the Channel moved Thando, to a different location away from Siyacela.
 - 12.3.4. Furthermore, remedial content was broadcast on Sunday, 29th January 2023. The special broadcast was a conversational dialogue between men regarding GBV, its causes and suggestions on how men can collaborate in an effort to end this epidemic. Siyacela himself will take part in the conversation.

Further submissions

13. Should the BCCSA find that the Channel breached the Code, despite the above submissions, it is the Channel's submissions that the Exceptions set out in the Code are a defence to the offending provisions and the Channel for the following reasons:
 - 13.1. The Code at Clause 11 of the Code provide as follows:

“Clauses 9 and 10 (Channel's underlined emphasis) do not apply to :
...
11.3.
broadcasts which amount to a bona fide discussion, argument or opinion on a matter of public interest.” (Channel's underlined emphasis).
14. GBV, Femicide and general crime statistics against Women and Children in this country are shockingly high. It is through well-resourced policing, an efficient justice system, political will and conversations that such crimes could be addressed, if not reduced.
15. It is the Channel's view that it would not be in the interest of justice to sweep under the carpet, Siyacela's conduct including the discussion on GBV by not broadcasting the conversation post the assault on the basis that this encourages and/or perpetuates GBV.
16. What is clear from the Complaints is that a concerted effort is required to address and combat the scourge of GBV in this country, and it cannot not be left to law enforcement. Hence, broadcast of such an episode squarely falls within the ambit of public

interest as defined in the Exceptions provisions of the Code. It is in the interest of justice to broadcast content and/or material that are *bona fide* matters of public interest.

Conclusion:

17. Having stated the above and contextualised the episode, it is the Channel's view that the BCCSA should find as follows:
 - 17.1. All the Complaints are dismissed; and
 - 17.2. The Broadcaster did not breach Clause 10 of the Code; and
 - 17.3. It was in the interest of justice for the episode to be broadcast as it contained *bona fide* discussions or opinions on matters of public interest.
18. The Channel remains available to assist further and/or supplement its submissions should the BCCSA so request."

[4] The Adjudicator's ruling was as follows:

- [1] Having noted the 50+ complaints, the Broadcaster's responses and all the supplementary written submissions – I want to bring the following to the attention of all parties concerned:
 - 1.1 The episode that was broadcast on the 22nd of January 2023 will be the only broadcast that will be considered in relation to this complaint.
 - 1.2 It is trite that the Broadcaster did supplement its submissions with the two videos post the episode. The latter will not form part of this adjudication as the complaints were lodged in respect of the programme that was broadcast on 22 January 2023.
- [2] The BCCSA Code Clause 10 states that:
 - 10 *A subscription broadcasting service licensee may not knowingly broadcast material which, judged within context –*
 - 10.2 *incites imminent violence; or*
 - 10.3 *advocates hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm.*and in essence precludes its licensees from knowingly broadcasting content which advocates violence or hatred.

SUMMARY OF FACTS:

The episode in question is part of Season 5 of the programme and is a pre-recorded reality broadcast of the two young adults [18 and 19 years respectively] who are the main characters in the programme and who entered into marriage when they were very young.

The couple seem to be at their wits end with marital challenges, and do not understand nor know, what entails healthy marital dispute resolution process[es].

In the impugned episode, the couple is having a conversation where they are reliving the previous day's events when the husband had assaulted his wife. The wife is evidently unhappy because she was assaulted and tries to understand the husband's reasons for the assault as she is still a bit confused. According to her the fact that she received a phone call from her girlfriend who had seemingly organized some men for her, angered her husband. She continues to complain about

her husband's reaction and further alleges that had it been a man who had called her, the assault would have probably been worse. The husband does not show any emotion while sitting next to her and listening to her telling the story. He later states his reasons why he assaulted her in a rather condescending tone. The interview switches back to the scene where the husband takes his wife's cellphone and smashes it on the floor.

[3] **APPLICATION OF PROVISIONS OF CLAUSE 10 TO THE FACTS:**

3.1 **NATURE OF THE EPISODE**

'knowingly broadcast'

Isencane Lengane is a pre-recorded reality programme about the marital lives of a young couple within the outskirts of Kwa-Zulu Natal. It can be assumed therefore that the episodes go through various forms of editing before there can be a final broadcast. The promotional advertisements about new episodes are broadcast in advance to keep the viewers interested. These promotional advertisements would display scenes from the next episode in the series. The producers are therefore well aware of the content of the programme and of the possibility that if it is going to be broadcast as is, it runs the risk of being perceived as condonation of gender-based violence.

3.2 ***'incites imminent violence'***

The actual identification of violence¹⁶ is often a subjective evaluation of events by viewers who interpret the scenes portrayed, based on their own experience and understanding of the violence portrayed. No scenes of actual violence perpetrated against the wife are portrayed during the impugned episode (only discussed and referred to), but the scene where her husband snatched her new phone from her and throws it on the ground, is a very powerful act of aggression.

Although most Complainants were concerned about the latter and pointed towards the abuse of the wife, the wife in the same impugned episode, slaps her husband when he approaches her to apologize for his actions. As pointed out and discussed above, Complainants evaluated the violence based on their perception of violence which is informed by the historical¹⁷ and current violent pandemic against women and children within the broader South African perspective, namely GBV murders that are daily reported and the perceived inability of government to curb violence against women.

3.3 ***advocates hatred that is based on ..., gender or ...and which constitutes incitement to cause harm***

The slap from the wife is a perfect example of how violent conduct can incite people to act violently. Women who are repetitively subjected to these types of violent behavior may eventually turn to violence themselves. The husband's actions towards the wife may create a submerged hatred which constitutes incitement to cause harm. The fact that both the husband and his wife's violent conduct was not immediately addressed, sends a message of acceptance and / or tolerance of violent conduct by the Broadcaster.

The comments made by the husband during the in-between interviews where he states that his wife knows that he does not want her to have any friends, be it men or women

¹⁶ 'abusive behavior in any personal relationship that allows one partner to intimidate, or to gain power and control over the other'

¹⁷ **Femicide in South Africa: Why men kill women** | 29 May 2018 - 06:00 | BY KGAUGELO MASWENENG | Times Live **Lawlessness**, access to guns, **an inferiority complex** and other factors can be reasons why intimate partners kill their loved ones at such a shocking rate, say experts. Recently, South Africans have been inundated with stories about women falling victim to femicide.

give the impression that he thinks violence against women can be justified. The fact that this impression is not immediately corrected or criticized by the Broadcaster is problematic. It has been accepted in the past that problematic content in an episode of a soapie or series can be tolerated if it clearly forms part of a specific storyline where further episodes will address and rectify the impugned content. However, in this instance there is no storyline and no context as it is a reality programme. Viewers are left with the impression that this is how people like themselves (and not actors) address problems in everyday life. In view of the violence perpetrated, the fact that it is a reality programme and most importantly, that the violence was not immediately denounced and identified as criminal conduct constitute a contravention of all the provisions of Clause 10.2 and 10.3 of the Code of Conduct.

From the editorial independence perspective, it is important for the Complainants to note that the BCCSA does not pre-censor material, and it is not empowered to order Broadcasters to remove programmes from air. It can only react to complaints about the content of a programme that has been broadcast.

[4] **All factors considered the BCCSA upholds the complaints *in toto*.**

[5] The Broadcaster was invited to submit mitigating statements to the Registrar of the BCCSA which reads as follows:

“RE: MITIGATING FACTORS: MULTICHOICE SOUTH AFRICA (PTY) LTD // “ISENCANE LENGANE” BCCSA COMPLAINTS REVIEW.

1. INTRODUCTION

- 1.1. The Broadcasting Complaints Commission of South Africa (“**the Commission**”) has found that Multichoice has contravened clause 10 of the BCCSA Code (“**Code**”).
- 1.2. Consequently, MultiChoice and Moja Love Channel (“**the Channel**”) have been invited to submit arguments in mitigation. We do so in the following paragraphs below.

2. ARGUMENTS IN MITIGATION

- 2.1. We submit that the sanction should take into account the nature of the programme, in particular that it is (i) a reality tv programme and (ii) it is a continuous and developing story which has its own regular and loyal viewers.
- 2.2. The viewers who watched the episode in question would have had been following the programme for a while and familiar with the personalities of the participants. Importantly, although the corrective measures were not immediately implemented in the same episode, the viewers of the programme would naturally wait for the next episode to find out about the interventions, if any, from the Channel to address the problems identified in the episode in question.
- 2.3. Further, the programme being a reality television series and therefore a mirror of the society, the Channel laboured under the *bona fide* view that GBV had to be portrayed as it occurs in the real world. The intention was to fully expose GBV and its effects on the victims so as to spur society into dialogue and positive action against the scourge of GBV. The Channel was more of a messenger in this case than an instigator.

- 2.4. Given that the depiction of violence was intended to inform society of the plight of many people subjected to GBV in South Africa, it was broadcast with the *bona fide* view that no viewer would feel enticed to themselves go commit violence. It was never the intention of the Channel to incite imminent harm, but rather, to bring it to light and eradicate it.
- 2.5. In line with the stance by the Channel against GBV, the following onscreen and offscreen corrective measures were implemented by the Channel and some of these were shared with the viewers:
 - 2.5.1. though off camera, the Channel's crew immediately restrained and reprimanded Siyacela for violence perpetrated by him on his wife;
 - 2.5.2. the crew further sought assistance the police who in fact intervened. Thando, the victim, does refer to this intervention in the next episode.
 - 2.5.3. Thando was advised by the Channel to open a criminal case of assault against Siyacela, which advise she declined; The Channel moved Thando to a different venue away from Siyacela so as to ensure her safety;
 - 2.5.4. The Channel has provided, and continues to provide, counselling to both Thando and Siyacela;
 - 2.5.5. On 29 January 2023, the Channel aired a special broadcast of a conversation among men regarding the scourge of GBV in the country, which Siyacela was a part off.
3. Viewed wholistically, it is apparent that the Channel does not endorse GBV. The Channel's immediate and continued efforts to stop GBV are clear evidence for the view that the Channel does not in fact, support or promote GBV.
4. The remedial steps taken by the Channel were also forward looking in the sense that both Thando and Siyacela, during the counselling, were, and still are encouraged to deal with conflict without inflicting or accepting/tolerating abuse. Further, the special broadcast was aimed at allowing men to talk to men about eradicating GBV.

5. CONCLUSION

We are of the opinion that in view of the corrective measures taken by the Channel referred to above and also taking into account the nature and context of the programme, a reprimand is a suitable sanction."

[6] SANCTION

Having noted the Broadcaster's mitigation factors, it is imperative that its attention is drawn to the provisions of Clause 10 specifically, the 'knowingly broadcast' of the GBV related episode – and neglecting to proactively rectify the violent content.

As conceded in their submissions, this series has been in broadcast for years now and even though the BCCSA received a multitude of complaints regarding this specific episode it appears from the complaints – that there has been a growing discontent about the programme's objective for a while now. The compelling difference this time around was the escalation from emotional abuse to the actual physical violence including the justification thereof without any corrective from the Broadcaster.

The Broadcaster did not indicate that a pro-active corrective approach broadcast will be flighted in future at any stage during the impugned programme, as a sign that the Broadcaster acknowledged the toxicity of the programme and accordingly invited the viewers to watch the latter at a specified date. What we witnessed in this matter through the received

videos, was a rather reactive approach by the Broadcaster post the deluge of the complaints received by the BCCSA.

While the internal steps that the Broadcaster implemented are a step in the right direction, the BCCSA cannot take cognizance thereof as our jurisdiction is limited to the content of the broadcast.

That being the case, a fine of R50 000 is imposed against the Broadcaster which is payable within fifteen [15] working days of the receipt hereof."

[5] **Heads of Arguments**

"INTRODUCTION

1. Terms defined in the parties' submissions filed with the Broadcasting Complaints Commission of South Africa ("**Commission**") shall have the same meaning in these heads.
2. This is an appeal against the decision of the adjudicator of the Commission ("**Adjudicator**") in which it upheld various complaints brought against the broadcast of an episode of a reality show under the name and style of "Isencane Lengane" broadcast by the Appellant on its channel 157 on 22 January 2023 ("**Show**").
3. In essence, the complaints are that the Show glorifies, promotes and thereby perpetuates GBV and essentially has done nothing to protect Thando from Siyacela.
4. The Show, which is already in its season 5 (five), is a reality television show that is a continuation of the story of Thando and Siyacela ("**the Couple**") who married as teenagers under the customs of the communities where they live.
5. The Show not only highlights the Couple's story, but it is intended to educate and encourage a dialogue and/or conversation amongst the South African public ("on issues and realities faced by persons in their shoes and/or similar background as couples in general, regardless of their social standing and background. It does this by, amongst other things, highlighting:
 - 5.1. the Couple's challenges as they navigate life;
 - 5.2. the trauma associated with the loss of parents;
 - 5.3. the impact of alcohol on the Couple and the family unit; and
 - 5.4. most importantly, the successes that often come with navigating such harsh environments especially by Thando, Siyacela's wife.
6. It is the Appellant's submission that whilst the impugned episode may have come across as offensive and insensitive, the issues raised by the show are a necessary part of the discourse on gender-based violence ("**GBV**").

GROUND OF APPEAL

7. The Appellant brings this appeal on four grounds, namely that the Adjudicator should have found that the impugned broadcast:

- 7.1. does not incite imminent violence within the meaning of clause 10.2 of the Code;
- 7.2. does not meet the jurisdictional requirements for hate speech within the context of clause 10.3 of the Code;
- 7.3. does not rise to that which is contemplated in clauses 10.2 and 10.3 of the Code; and
- 7.4. in any event falls within the protection afforded in clause 11 of the Code.

THE ISSUES IN THE APPEAL

8. The issue before this Tribunal, as it was before the Adjudicator, is whether the Appellant breached BCCSA Code of Conduct for Subscription Broadcasters ("**Code**"), and in particular, clauses 10.2 and 10.3.

9. APPALLENT'S PRINCIPAL SUBMISSIONS

The applicable legal framework

10. Clause 10 of the Code is a mirror image of section 16 of the Constitution.¹⁸
11. In order to further contextualise clause 10 of the Code and the concomitant rights, it is worth quoting at length from the judgement of *Khumalo and Others v Holomisa*¹⁹ which held:

"The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate . . . The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of right and bearers of constitutional obligations in relation to freedom of expression.

Furthermore, the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require . . . In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture . . . [T]hey have a constitutional duty to act with vigour, courage, integrity and responsibility.

The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society." [Emphasis added]

12. It is clear then that the media plays an important role in our society and its freedom of speech should not be readily curtailed.

¹⁸ Appellant's submission to the adjudicator

¹⁹ 2002 (8) BCLR 771 (CC) ("**Holomisa**") at paras 22–24.

First ground - Clause 10.2 “Incites imminent violence”

13. The adjudicator erred in failing to consider whether the airing of violence, or any other aspect of the broadcast, equates to incitement of violence.
14. With respect, the adjudicator went to some length to highlight the violence depicted in the broadcast, and inexplicably ended her enquiry without considering whether there was incitement to violence.
15. Respectably, it would appear the adjudicator conflated the concepts of “broadcasting violence” and “inciting violence”.
16. That the adjudicator failed to draw this distinction or consider the rich jurisprudence on the meaning of ‘incite imminent violence’ amounts to a gross irregularity and a clear indication that the adjudicator misconstrued the nature of the enquiry.
17. The adjudicator ought to have found that one cannot contravene clause 10.2 without, among other things, inciting others to imminent violence. That the adjudicator failed to consider this aspect amounts to a fatal error in law and has the unavoidable result that her decision is clearly wrong.
18. ‘Incitement’ is defined as “actually encouraging or pressuring others to commit a violent act, where in all the circumstances the violent act actually occurred or was likely to occur.”²⁰ No such incitement has been established on the facts.
19. Further, it is accepted that the protection afforded by the right to freedom of speech extends to offensive information and ideas. Our courts, and in line with international trends, have endorsed the dictum of the European Court of Human Rights in *Handyside v The United Kingdom*,²¹ that freedom of expression extends to information or ideas ‘that offend, shock or disturb . . . Such are the demands of . . . pluralism, tolerance and broadmindedness’.²²
20. More recently, in *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies*²³ the SCA expressed the view that ‘[t]he fact that particular expression may be hurtful of people’s feelings, or wounding distasteful political inflammatory or downright offensive, does not exclude it from protection . . . The bounds of constitutional protection are only overstepped when the speech involves propaganda for war; incitement of imminent violence; or the advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.’²⁴
21. On this basis, the adjudicator ought to have found that nothing that the Appellant had broadcast crossed these boundaries, however distasteful or hurtful it may have been to the complainants.

²⁰ see Milo D, Penfold G and Stein A, ‘Freedom of Expression’ in Woolman S, Roux T and Bishop, M, (eds), Constitutional Law of South Africa (2008) at 42-72.

²¹ (1976) 1 EHRR 737 754.

²² Confirmed by the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC) at para 26.

²³ [2019] 1 All SA 608 (SCA), 2019 (2) SA 194 (SCA)

²⁴ *Ibid.*

22. In the circumstances, the broadcast does not offend against the Code since there was no incitement to imminent violence.

Second ground - Clause 10.3 - “advocates hatred that is based on ..., gender or ...and which constitutes incitement to cause harm”

23. Clause 10.3 of the Code is the so called “hate speech” provision that imitates section 16(2)(c) of the Constitution, which states that the constitutional right to freedom of expression does not extend to the “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”.
24. The adjudicator found that there was submerged hatred in the wife.
25. The adjudicator’s reasoning is, with respect, bad in law for several reasons, as discussed below.

What is Hate Speech?

26. Section 16(2)(c) of the Constitution describes hate speech as the ‘advocacy of hatred based on race, ethnicity, gender or religion and that constitutes incitement to cause harm’.
27. Therefore, for a statement or broadcast to constitute hate speech, all of the below discussed criteria must be met.

The speech/broadcast must advocate hatred

28. The adjudicator ought to have found that the submerged hatred she alluded to was not caused by the airing of the show, but was rather, caused by the husband’s abusive conduct.
29. Even if the show had caused that alleged submerged hatred, the Code, astutely, does not concern itself with the ‘causing’ of hatred, but rather, the ‘advocacy’ of hatred.
30. Advocating hatred means, in context, ‘actively promote hatred or attempt to instil hatred in others’.²⁵
31. The Canadian Supreme Court explained that the term ‘hatred’ ‘connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation’.²⁶
32. Nothing in the broadcast actively calls on anyone to hate anyone. The majority of the complaints identify the violent nature of the husband against the wife, and the rest of the complaints, which particularly captured the adjudicator’s attention, turn on the allegation that the wife slapped the husband when she was trying to impress upon him not to touch her during an altercation.
33. The context of the broadcast is therefore one of depicting the personal, albeit tumultuous, relationship between a couple, who share a common problem with many other relationships in South Africa, namely, GBV.

²⁵ ⁸ See Currie I and De Waal J, The Bill of Rights Handbook (5th ed 2005) at 375. See also *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) where it was held that ‘calling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred unless the context clearly indicates otherwise’.

²⁶ *R v Keegstra* [1990] 3 SCR 697 at 777.

34. In *Hotz and Others v UCT*,²⁷ Wallis JA sought to balance freedom of expression with the hate speech restrictions by noting that ‘A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has the overtones of race or ethnicity’.
35. That the wife slapped the husband, or that the husband slammed her phone on the ground and boasted about his abusive behaviour should not be construed as hate speech.
36. It cannot be that the depiction of that tumultuous personal relationship advocates for hatred, especially not on grounds of race, ethnicity, gender, or religion. Instead the broadcast, viewed in context, clearly seeks to expose GBV as a scourge in our society by depicting the realities of a typical relationship in South Africa.
37. Furthermore, Milo²⁸ correctly points out that the advocacy of hatred cannot “simply advocate hatred of a specific person” but must instead advocate hatred based on “group characteristics”. Indeed laws governing hate speech cannot concern themselves with personal conflict between individuals, but seek to protect the interests of groups of people.
38. Therefore, the broadcast of the supposed submerged hatred of the wife against the husband cannot amount to hate speech or the violation of section 10.3 of the Code. The adjudicator misdirected herself in that regard.

‘exposing’ v ‘advocating’

39. Further, the adjudicator, with respect, ought to have distinguished and/or herself appreciated the distinction between ‘exposing’ and ‘advocating’ for something. Instead, she conflated the two.
40. The necessity of this distinction was illustrated in the famous hate speech case involving former president of the African National Congress Youth League, Julius Malema, who chanted the words ‘Dubula ibhunu’ (‘shoot the boer’) at various public meetings.
41. While the Equality Court found Malema to have published hate speech, and banned him from singing the song,²⁹ it could not be said that the media who broadcast Malema’s hate speech were also guilty of advocating hate speech or incitement of imminent violence, since the media aims simply to either to report facts or comment upon such facts.
42. This principle is further illustrated in the decision of the European Court of Human Rights, in *Jersild v Denmark*,³⁰ where a Danish journalist interviewed three members of the so called “Green Jackets”, a racist organisation, in a documentary where the racists made abusive and derogatory remarks about immigrants and ethnic groups in Denmark. The journalist was convicted by the *court a quo* for aiding and abetting the spreading of racist speech in terms of Danish hate speech criminal laws. This was overturned by the European Court of Human Rights, which held:

²⁷ 2016 ZASCA 159

²⁸ Milo D, Penfold G and Stein, A, ‘Freedom of Expression’ in Woolman S, Roux T and Bishop M (eds), *Constitutional Law of South Africa* (2008) (referred to hereafter as Milo et al) at 42–80 to 42–81.

²⁹ *Afriforum and Another v Malema and Another* (Vereniging van Regslui vir Afrikaans as Amicus Curiae) 2011 (12) BCLR 1289 (EqC).

³⁰ (1995) 19 EHRR 1.

“Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought – by means of an interview – to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.”³¹

43. Similarly, a broadcast exposing GBV, cannot be equated to advocating for GBV.

The advocacy must relate either to race, ethnicity, gender or religion

44. Even if the adjudicator is correct that the submerged hatred in the wife amounts to advocating hatred, which the Appellant denies, as pointed out above, the advocacy of hatred must relate to one of the grounds listed in section 16(2)(c) and section 10.3 of the Code, namely race, ethnicity, gender or religion.
45. That the husband and wife display violent conduct towards each other, however, distasteful as that may be, is not in itself a jurisdictional requirement for hate speech.
46. Further, the broadcast must have incited imminent violence.

What is incitement?

47. Milo et al contend that the meaning of ‘incitement’ is ‘to instigate or actively persuade others to cause harm’.³²
48. In *R v Andrews*,³³ Cory JA described incitement to cause harm thus:

“When an expression does instil detestation it does incalculable damage to the Canadian community and lays the foundations for the mistreatment of members of the victimised group. I would have thought it sufficient to look back at the quintessence of evil manifested in the Third Reich and its hate propaganda to realise the destructive effects of the promotion of hatred.”

49. With respect, the adjudicator ought to have found that there is nothing in the broadcast that expressly and actively seeks to instigate or persuade others to imminent violence against any group of persons.
50. The adjudicator, in that regard, takes issue with the lack of immediate denouncement of the violence in the show as the basis for her findings. We deal with this aspect next.

Third ground – denouncement of violence

51. The adjudicator appears to have moved from the premise that it is possible to incite imminent violence by omission.
52. This is not aligned with the definition of incitement as discussed above, and with the jurisprudence.

³¹ at para 33.

³²Milo et al at 42–80.

³³ (1989) 39 CRR 36 at 56.

53. In *Economic Freedom Fighters and another v Minister of Justice and Correctional Services and Another*³⁴ in examining the common law crime of incitement, Majiedt J correctly noted that incitement is not committed negligently. Intention, must be proved. Furthermore, as Majiedt held, the presence of an *actus reus* requires positive conduct. That entails there must be a positive communication that constitutes incitement which reaches and influences the mind of the incitee to commit an offence.
54. Incitement through an omission, or the lack of immediate denouncement, does not form part of our law.
55. For instance, in *Steenkamp v Talk Radio 702*, the BCCSA had to consider a complaint of hate speech lodged against Talk Radio 702 that talk-show host, Tim Modise, had allegedly facilitated hate speech during his show when he permitted a caller to express the view that farm murders were caused by racist factors. The BCCSA grappled with the question as to whether Modise should have responded to the caller's view more critically. It was held that an anchor is required to at least question controversial views expressed by callers, and that in the circumstances Modise had met this requirement, by asking the caller to expand on his view. Nothing more was required.
56. In *Darne v SAFM*,³⁵ a distinction was drawn between the use of the words 'shoot the Boer' in a song broadcast as part of a news item, and the words being broadcast directly to the public independently. The Appeals Tribunal held that 'everything depends on context' and that the use of the song in the news item did not amount to the advocacy of hatred as the station was merely informing listeners.
57. In all these cases, even where it was found that hate speech was broadcast, it was never a requirement that the broadcast must immediately denounce the hate speech in order for the broadcast to enjoy protection.
58. Therefore, the adjudicator erred in placing much weight and emphasis on the broadcast's lack of immediate denouncement.

Fourth ground - Clause 11 - Exceptions to clauses 10.2 and 10.3

59. The adjudicator failed to consider clause 11 exceptions. This is a fatal error in law.
60. Though the adjudicator found, albeit erroneously as demonstrated above, that the broadcast meets the requirements for hate speech, the BCCSA has held that it is permissible for a programme that contains a discussion about hate speech to contain a verbatim quotation of the hate speech for purposes of informing the public and eliciting discussion and debate.
61. The context of the impugned broadcast makes it clear that the purpose of the broadcast is to facilitate debate, inform, educate and entertain.
62. In *SAHRC v SABC*,³⁶ the South African Human Rights Commission filed a complaint against the SABC for the broadcast of Mbongeni Ngema's song 'AmaNdiya' on the grounds that the broadcast amounted to hate speech in terms of the Broadcasting Code.

³⁴ 2021 (2) BCLR 118 (CC).

³⁵ Case no 06/2010 (BCCSA) 29 April 2010.

³⁶ Case no 31/2002 (BCCSA) 13 June 2002

The song, comments on the relationship between black people and Indians in KwaZulu-Natal and casts such relationship in a bad light where Indians are said to be oppressive, disrespectful and hateful against black people. The BCCSA held that the song amounts to hate speech as it advocates hatred against Indian people. Notwithstanding that ruling, the BCCSA concluded that the broadcast did not contravene the Broadcasting Code as the broadcast of the song 'was part of a bona fide current affairs programme and informed debate' and was not an attempt to broadcast hate speech under the guise of a current affairs programme.

63. It is thus clear that clause 11 of the Code may not be ignored when a broadcast has been found to contravene clause 10 provisions.
64. Given that the broadcast was a *bona fide* attempt to expose GBV and illicit debate with the hope of eradicating such violence, which is clearly a matter of public importance, the adjudicator committed a gross irregularity in failing to consider clause 11.

THE SANCTION IS INAPPROPRIATE

65. Having found the appellant guilty of contravening the Code, the adjudicator issued a sanction of a R50,000 fine.
66. The adjudicator ought to have found that the appropriate sanction was a reprimand given, among other things, the following mitigating factors:
 - 66.1. The broadcaster was bona fide in broadcasting the episode, in an attempt to educate and encourage discourse in the public considering that GBV is a matter of public importance.
 - 66.2. Though the tribunal stated that it will only take the episode complained of into consideration, it is important to take note that the episode is part of a series in the 5th season, meaning that each episode is a continuation of the previous one. As such it is important and to consider the episode after the one complaint of.
 - 66.3. In the following episode broadcast was a conversational dialogue between men regarding GBV, its causes and suggestions on how men can collaborate in an effort to end this epidemic.
 - 66.4. It is clear that the broadcaster has taken steps to acknowledge and correct any misunderstandings that it endorses GBV, and apologise for the action and taken steps to avoid a recurrence.
 - 66.5. In the case of *Neethling vs MultiChoice, Case No:17/2009 (BCTSA)* The Tribunal accepting the broadcaster's *bona fides* and the fact that MultiChoice's acknowledgment of an incorrect classification, apology and actions taken to avoid a recurrence, the Tribunal concluded that although the Code was contravened, a reprimand would suffice.
 - 66.6. Further in the case of *Shepherd v SABC Case No: 15/2008 (BCCSA)*, the Tribunal found that the broadcaster's initiative to prevent further contravention of Code to be mitigating and issued a sanction of reprimand.
 - 66.7. The adjudicator ought to have found that, in light of the strong mitigating factors and the appellant's bona fides in broadcasting the show, a sanction of reprimand was appropriate.

CONCLUSION

67. From the facts and arguments set out above, we submit that the adjudicator failed to consider the law regarding the jurisdictional requirements necessary for the contravention of clauses 10.2 and 10.3 of the Code.
68. Consequently, and with respect, the adjudicator effectively failed to fully and properly adjudicate the matter before her and arrived at a decision that is clearly wrong.
69. For all the above reasons, the adjudicator's decision falls to be set aside and replaced with an award to the effect that the broadcast does not breach any provisions of the code, alternative, if it does, then the broadcast still enjoys protection under clause 11 of the Code."

EVALUATION

- [6] Before the hearing commenced, the impugned episode was watched by all present.
- [7] During the hearing Ms Nxumalo, the only Respondent who attended the Tribunal, asserted that the episode should not have been broadcast in the first place since it clearly portrayed abusive behaviour towards women.
- [8] The first question to be addressed is what the possible influence of the interaction between the two participants could be on gender relations. The ultimate question to be addressed is whether the broadcast in question, judged in context, exceeded the Appellant's freedom of expression.
- [9] In our diverse and complex South African society, the BCCSA's role is to maintain a balance between media freedom and public protection. The purpose of the BCCSA Broadcasting Code is thus not to sanitise the airwaves, but rather to ensure a balance between the rights of broadcasters (freedom of expression) on the one hand and the rights of audiences (to be properly informed; to have freedom of choice; not to be harmed) on the other hand. These rights will be addressed later in this judgment.

[10] Clause 10 reads that a subscription broadcaster *may not knowingly broadcast material which, judged within context, incites imminent violence; or advocates hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm.*

[11] During the hearing, the Appellant argued that Clause 10 was not fully considered in the adjudication. He argued that the mere broadcast of violence does not equate to the incitement of violence. The Tribunal members agree with this statement. To incite violence means to promote, encourage, urge, provoke or stir up violence - none of which was present in the impugned episode. In fact, the intention behind broadcasting the episode was quite the opposite. It was to raise awareness regarding GBV, which is endemic in South Africa and a matter of great public concern. There was no advocating or inciting of imminent violence or any action whatsoever in the sense that viewers were incited to behave in the same way as the participants or to cause harm to each other. It was not intended to provoke gender discrimination, but to expand on an issue that was already of considerable public interest. Were it that the episode's effect was opposite to that intended and that it empowered men to abuse women, such incitement may be present, but the Tribunal members do not find that to be the case in this instance.

The only intention was to create more societal awareness, to bring to light, to stimulate, provoke debate and create introspection regarding the adverse effects of GBV, in the hope that this might lead to positive behavioural changes. The Appellant complied with the requirements of the Code in that it circumspectly dealt with this sensitive matter. No scenes of actual violence against the wife were portrayed during the episode in question. The episode mainly consisted of a discussion between the husband and wife concerning the abuse that took place off-screen the previous day. Discussions of this nature may assist viewers to better understand the feelings and emotions of an abused wife and can demonstrate the negative effects of GBV even better. The only scene in the

episode that indicated anger or irritation was when the husband grabbed his wife's new phone from her and threw it on the ground.

[12] As far as the “*not knowingly*” specification of Clause 10 is concerned, it is clear from the preceding paragraph that the impugned episode did not contain any actions that could cause incitement of imminent/immediate violence. The episode forms part of a reality programme with the aim of focusing on the challenges imbedded in the two main participants' relationship and it would have been unrealistic to edit out all references to the abuse that seriously affected the relationship. On a question posed by a Tribunal member, the Appellant assured the Tribunal that, in the event of an unacceptable level of violence occurring, it will be edited out prior to the broadcast.

[13] With reference to advocating of hatred that is based on gender and which constitutes incitement to cause harm, it is clear from the discussion in paragraph [11] above that neither of the two criteria that are required for finding a contravention is satisfied, namely: (i) advocacy of hatred based on gender, and (ii) incitement to cause harm. There was no advocacy of any action in the episode. The test in this case is whether a reasonable viewer would be encouraged to commit GBV after watching the episode. The members of the Tribunal are of the opinion that a reasonable viewer will not be incited to behave in the same way and will rather become more aware of the physical and emotional effects of GBV. The word *hatred* indicates intense dislike, aversion, abhorrence, detestation, enmity, ill will and malevolence. The episode neither advocated nor promoted hatred based on gender, nor did it incite anyone to cause harm to any other person.

[14] As mentioned above, the impugned episode forms part of a continuing reality show. Reality programmes are excellent examples of the media being a mirror of society. It is highly probable that the viewers (especially the regular viewers) of

this reality show would be familiar with the participants/characters' daily lives and their struggle to make their relationships work. They would understand that a problem that arises in one episode would probably be addressed in a following episode.

[15] The Adjudicator conceded that it has been accepted in the past that problematic content in an episode of a soap opera or series can be tolerated if it clearly forms part of a specific storyline where further episodes will address and rectify the impugned content. However, in this instance, the Adjudicator's view was that since the episode was part of a reality programme, there was no storyline and no context. The members of the Tribunal are of the view that even reality programmes have storylines because they address specific areas of life. For example, the *Survivor* series focused on the participants' behaviour in managing challenging physical circumstances. In this case, the focus is on the relationship challenges faced by the two young participants in a country where GBV, inter alia, is endemic. This is the context within which the episode should be viewed.

[16] An on-screen warning/advisory was provided before commencement of the episode, which reads as follows:

The following programme contains scenes that allude to violence that may disturb sensitive viewers. MOJA LOVE will provide counselling for the participants in the programme. MOJA LOVE does not condone violence of any form, including gender-based violence and further indemnifies itself from any associated claims thereto. The Channel urges anyone subject to domestic violence to seek urgent assistance. Please see the contact numbers at the end of the programme.

Although there was no immediate on-screen denouncement of the violence in the episode, as argued above, regular viewers would expect corrective measures to be introduced in later episodes. In addition, it is mitigating that the following (off-screen) corrective measures were indeed implemented:

- The production crew immediately restrained and reprimanded Siyacela for the violence perpetrated by him on his wife. Even as the couple walked away, one of the producers worriedly asked Thando if she was okay on which she replied that she was.
- After being summoned by the production crew, the police intervened;
- Thando was moved to a different venue away from her husband;
- She was advised by the Channel to open a criminal assault case against her husband, which she did not want to do;
- In a special edition the host quoted the statistics regarding GBV cases in South Africa and repeatedly emphasised that the Channel does not condone GBV. This episode entailed a discussion between men (including an elderly guest) about ways to eradicate GBV. In the episode following the impugned episode, the couple attended a counselling session with a social worker. It came to light that Siyacela grew up in an abusive environment in his parents' home and that his anger had driven him to the abuse of his wife, which he conceded was wrong and which he undertook not to repeat.
- Ongoing counselling is provided to the couple.

As mentioned in paragraph [12] above, the Appellant also assured the Tribunal that if an unacceptable level of violence should occur, it will be edited out before being broadcast.

[15] When the couple met later in the episode, Siyacela repeatedly apologised for the abuse and promised Thando that it will not happen again. Thando then (feebly) slapped him in his face, which was more of a gesture than a slap, to communicate to him that she was emotionally hurt. There was no advocating or inciting present since the gesture followed the apology from Siyacela. It was a depiction of the couple's personal relationship, not caused by a directly preceding action and to label it as "submerged hatred" would be conjecture.

- [16] One of the Respondents is of the view that the episode glamorised GBV. There was no romanticising of Siyacela's actions, on the contrary, the negative effects of GBV were prominent.
- [17] Broadcasters are granted freedom of expression by the Constitution. The importance of freedom of expression is dealt with extensively in point 7 of the Appellant's original response to the complaints. Quotations from previous judgments were also elaborated on during the hearing. It is a vital function of the media to make information about all aspects of public, political, social and economic activities available to the public and thus to contribute to the formation of public opinion. The public has a right to be informed about what is happening in society. A further applicable right is freedom of choice for adults which is also guaranteed by the Constitution. In order to exercise freedom of choice, sufficient information about programmes should be available to audiences. In this regard, apart from the fact that it is well-known that the programme is a reality show, the Appellant also provided the necessary advisory before the commencement of the episode. The fact that the programme is broadcast after the watershed, should further alert viewers that it could contain adult material. Clearly the Respondents were shocked and dismayed after being exposed to the impugned episode. However, what is considered as offensive by one person, is not necessarily offensive to another and the Constitutional Court has held that freedom of expression includes the right to air offensive material within reasonable limits. Judging the broadcast in context and in accordance with the Code of Conduct, we cannot find it to extend beyond the contemporary South African standard of tolerance or the Appellant's right to freedom of expression.
- [18] **Having considered the broadcast in context, and after studying the comprehensive heads of argument submitted by the Appellant, as well as considering argument on the day of the hearing, we find no contravention**

of the Code as the broadcast did not fulfil both criteria stipulated in Clause 10, which is required to find a contravention.

The appeal is upheld and the finding and sanction are overturned.



**DR LINDA VENTER
COMMISSIONER OF THE BCCSA**

Chairperson Makeketa and Commissioner Chemaly concurred with judgment.