CASE NUMBER: 04/2024

DATE OF HEARING: 29 FEBRUAY 2024
JUDGMENT RELEASE DATE: 17 APRIL 2024

MULTICHOICE CHANNEL 405 **APPELLANT**

VS

SKITI **RESPONDENT**

TRIBUNAL: **DR S LOTTER (CHAIRPERSON)**
DR A CHICKTAY
MR E NAIDU

FOR THE RESPONDENT: THE COMPLAINT IN PERSON

FOR THE RESPONDENTS: ADV BEN WINKS INSTRUCTED BY WEBBER WENTZEL ACCOMPANIED BY DR DARIO MILO, ATTORNEY, WEBBER WENTZEL AND THATO THALAKGALE, CONTENT RIGHTS SPECIALIST, NEWZROOM AFRIKA.

Complaint lodged in terms of Clauses 28.3.1 and 28.3.2 of the Code of Conduct for Subscription Broadcasters – complaint not upheld. Multichoice Channel 405 vs Skiti, Case No: 04/2024 (BCCSA).

SUMMARY

The Appellant appealed an adjudication that the broadcaster contravened Clauses 28.3.1 and 28.3.2 of the Code in that the broadcaster did not achieve balance during a discussion of a controversial issue of public importance and that a right of reply was not offered to the Respondent. The Tribunal found that the broadcaster's efforts to achieve balance was inadequate. The broadcaster repeated its offer to a right of reply (which had previously been declined by the Respondent, during the hearing. Respondent accepted the offer. Appeal against

contravention of Clause 28.3.1 dismissed. Appeal against Clause 22.3.2 upheld.

JUDGMENT

DR S LÖTTER

[1] This is an appeal to the Tribunal of the BCCSA against Adjudication No: 29/A/2023.

A complaint was lodged with the BCCSA by Mr. Sabelo Skiti (hereinafter referred to as the "Respondent") concerning an interview conducted on Newzroom Afrika (channel 405 on Multichoice Dstv) that was aired on November 7, 2023, between the presenter Mr. Xoli Mngambi, and his guest, Mr. Mthunzi Mdwaba.

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

"I wish to submit a complaint about an interview on Newzroom Afrika (channel 405 on Multichoice Dstv) that was aired on November 7, 2023 between presenter Xoli Mngambi and the Mthunzi Mdwaba: https://www.youtube.com/watch?v=AR-irubjb_o

I have attached documents that I wish be admitted as part of the complaint. Please ignore the first part of the documents and pay attention to the documents marked A1 and A2.

The gist of my complaint relates to about 23 minutes and 23 seconds into the interview, where Mdwaba, in the context of the resignation or alleged persecution of Thobile Lamati - the former Director General of the Dept of Labour and Employment - alleges that a number of individuals including myself, Minister Thulas Nxesi, attorney Neville Gawula, and Tebogo Khaas were in the same WhatsApp group that was either set upon Lamati or are part of the R500-million request (The main thrust of the interview was Mdwaba's claim that a group of government Ministers had tried to extort R500-million from him to release the R5-billion contract that was halted after reports of impropriety).

This is obviously denied with the contempt it deserves.

Shockingly, in response Mngambi says: "All of these people that you are mentioning, if there is one part of what seems to be coming out clearly is that you're frustrated. You're very frustrated because these people that you are mentioning, seemingly, are standing in the way of you getting this contract …"
He does not mention that these are untested allegations, nor does he acknowledge that the people mentioned there have not been asked for a right of reply or will be asked for right of reply as required by the BCCSA's code of conduct for subscription services. In fact later in the same thread quoted above, Mgambi says why can it not be taken as Mdwaba "throwing mud just as

they are trying to frustrate you" further insinuating that there was credence to Mdwaba's assertions/claims/allegations.

Instead his reaction, and immediate question to Mdwaba, is to legitimise the allegations by asking him whether he is not in fact engaged in the same actions or conduct as the people he made allegations about.

Then he takes the conversation to another point, without addressing the allegations by either probing Mdwaba further about what he meant, what evidence he has of this, and stating clearly that Mdwaba's allegations were untested. For the record, I wish to reiterate that at no point did the presenter challenge this as allegations or probe further to establish whether Mdwaba has any evidence for his allegations.

Right at the end of the interview he then invites Minister Nxesi and all the other ministers, to an interview, no doubt to draw more viewers to what they treat as a spectacle to generate viewers, but makes no invitation to myself, and the Sunday Times.

Two days after the publication (Nov 9, 2023), the editor of the Sunday Times, S'thembiso Msomi, acting on behalf of the paper and myself, sent a letter of complaint to the channel (attached as A1), asking that the channel issue an apology.

The channel, in an email response (A2, dated Nov 14) from its legal representatives, characterises Mdwaba's utterances as merely being "disagreeable" or "unfavourable" against myself, and refuses to apologise.

This again demonstrates a lack of understanding of the fact that these were allegations of impropriety i.e. conniving in or outside of an actual WhatsApp group to either purge Lamati or extort R500-million from Mdwaba.

In the response the channel offers a right of reply to myself, as mandated by the BCCSA Code of Conduct, for "criticism levelled against him". This offer comes a week after the offending publication, and only after a complaint had been lodged.

What the channel, through the interview and their response to the Sunday Times' complaint, fails to appreciate is that this is not just criticism or allegations.

It is an attempt, by Mdwaba, to delegitimise the work of a journalist to uncover an attempts to siphon money out of the state, and to hold institutions such as the UIF accountable to its own processes when disbursing money that workers in this country contribute in hope that it will be there when they need it.

The channel, through its lack of rigour, unwittingly found itself party to this, as evidenced by the number of engagements I received on this matter on social networks in reaction to the interview. I can make examples of these available should the BCCSA consider it necessary.

Given these circumstances, the channel should not be in a position to dictate to me how my right to reply is exercised ie their offer to interview me post our complaint. I decline the offer for an interview, but demand an apology and clarification, on air and similarly promoted on X, for failing to state that (a) these were untested allegations, and (b) for failing to immediately offer a right to reply.
The channel's conduct is in contravention of the BCCSA's Subscription Code of Conduct and the Online Code of Conduct (the interview is still on the channel's Youtube page), specifically clauses:

- 28.2.2 (Subscription Code of Conduct) - *Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment,* ***and must be made on facts truly stated or fairly indicated and referred to*****.** The presenter failed to ensure that Mdwaba's commentary about myself were true or fair.

- 28.3.2 (Subscription Code of Conduct) - ***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 11 a pre-arranged discussion programme with the prior consent of the person concerned.* The channel failed to ensure right of reply until after the complaint, and subsequently wants to dictate how this is exercised.

It is with this in mind that I request that the channel be directed to apologise and read the short statement I have prepared to put the allegations in proper perspective.

"Last week during an interview on this station, Thuja Holdings Chief Executive Officer Mthunzi Mdwaba made some unfortunate allegations against journalist Sabelo Skiti, and the publication he works for the Sunday Times. The broad nature of the allegations was that Skiti was "in the same WhatsApp group" as Labour Minister Thulas Nxesi, and a number of other individuals. "During the interview we failed to ascertain what the basis of the allegations were, what evidence Mdwaba had, and failed to give Mr Skiti and the Sunday Times an opportunity to state their version. "We also failed to disclose that Skiti and the publication have been investigating Mdwaba and his company's conduct in relation to a R5-billion contract entered into by Mdwaba and the Unemployment Insurance Fund (UIF), including findings that it was done outside of accepted policy."

"We wish to extend an apology to Skiti and the Sunday Times, and reiterate that the media should be allowed to conduct its work without intimidation."

Looking forward to hearing from the Commission."

[3] The Broadcaster responded as follows on the 28th November:

"NEWZROOM AFRIKA'S RESPONSE TO THE COMPLAINT BY MR. SABELO SKITI

INTRODUCTION

1. We refer to the complaint submitted to the Broadcasting Complaints Commission of South Africa (the "Commission") by Mr Sabelo Skiti ("Respondent") dated 14th November 2023 and received by Newzroom Afrika on 15th November 2023.

2. We set out below Newzroom Afrika's response to the Complaint. In addressing the complaint, we shall dealwith the following:

   2.1 the nature and contents of the Broadcast;

   2.2 the relevant provisions of the BCCSA's Code of Conduct for Online Content Services for Licensed Broadcasters ("the Code") to which the complaint relates;

2.3 a summary of the Respondents' complaint and Newzroom Afrika's response.

3. The Commission has requested our comment in terms of the clauses referred to by the Respondent in his complaint which are 28.2.2 and 28.3.2 of the Code.

4. We submit that this response will clearly demonstrate that the complaint is without merit.

5. We further submit that we will not respond to each, and every allegation raised in the respondents email and our failure to do. so should not be construed as an admission or waiver of our rights. Our rights herein remain strictly reserved.

NATURE AND CONTENTS OF THE NEWS REPORT

6. On Thursday 9 November 2023, Newzroom Afrika conducted a live interview with Mr. Mthunzi Mdwaba regarding the R500-million bribery allegations ("Bribery Allegations") against three ministers in connection with a R5-billion UIF job creation deal ("UIF Deal").

7. The interview can be accessed using - https:Uyoutu.be/AR-irubjbo?si=pDpW8wfWQdfFuMph

8. The live interview centred around Mr Mdawba's allegations of bribery against the cabinet ministers in a failed UIF jobs deal. Mr Mdwaba, whose company Thuja Holdings, signed a R5 billion deal with the Department of Labour and Employment ("OLE") which deal had since, and at the time of the interview, been suspended. Mr. Mdwaba alleged that the ministers tried to solicit a bribe through their associates in order to make the deal possible.

9. During the live interview, Mr. Mdwaba discussed various allegations, in respect of the Bribery Allegations and the UIF Deal. The anchor introduced the interview and diligently and consistently presented and challenged the allegations and statements made by Mdwaba as allegations, by clearly stating the following:

> Anchor: *"On to this now former Productivity South Africa chairperson Mthunzi Mdawba has exposed alleged bribery claims against three cabinet ministers in a failed UIF jobs deal."*

10. The anchor then proceeded with the interview and focused immediately on the details of the UIF deal and the timing of the signing of the deal by Thobile Lamatie, the Director General at the OLE, and questioned Mr Mdwaba in depth as to what qualified Thuja Holdings for such a massive project with huge amounts of money. Moreover, consistently questioned whether Mr Mdwaba's involvement as a conflict of interest, double dipping, as it is a special purpose vehicle created by Mr. Mdwawa who is an insider and whether he sees anything wrong with the deal. We have not included the transcript of the entire interview but it can be provided should the Commission so require.

11. During the live interview Mr Mdwaba made the statement about the Respondent which is highlighted below.

Allegations that the Respondent is in a Whatsapp Group with implicated individuals.

12. During the interview, the following statement in relation to the Respondent (23 min: 23sec)
Mr Mdwaba: "...So if you look at Gawula you look at Tebaga Khaas, you look at Sabelo Skiti of the Sunday Times, and you look at Nxesi, one WhatsApp group, one WhatsAspp group."

> Anchor: *"All of these people that you are mentioning if there is one. at least. part of what seems to be*

coming out clearly is *that you are frustrated, you are very frustrated because these people that you are mentioning, seemingly are standing in the way of you getting this contract. Why should South Africans buy your story because you are* also *an interested party, in fact you have a* massive *vested interest here, and* so *why* is *this not you throwing mud just as they are trying to frustrate you?"*

Mr. Mdwaba: *"So South Africans don't have to believe me Xoli. The people who matter do believe* me.."

13. The anchor then closes the interview by clearly inviting the right of reply to the ministers named in the interview and offering to facilitate a debate on the matter as follows:

Anchor: *"Thank you for your time and I am* also *going to invite the Minister of Employment and Labour, Mr Nxesi. If you have been listening to this please come through. Including all of the other Ministers that have been mentioned..."*

Mdwaba: *"Can I have a debate? Can I* also *be there? I want them here, face to face"*

Anchor: *"I will be happy to facilitate, but let's end here."*

14. Given the aforementioned, this matter, including the allegations levelled against the Complaint, are of manifest public interest and Newzroom Afrika's constitutional mandate to report and provide commentary on this matter as it unfolds.

15. We submit that when regard is had to the news programming as a whole, it is clear that Newzroom Afrika acted reasonably and responsibly in the broadcast and was compliant with the provisions of the Code. Newzroom Afrika's programming is, we submit, protected by the Code, as we expand on below.

RELEVANT PROVISIONS OF THE CODE AND RESPONSE TO THE COMPLAINT

16. The Commission has requested Newzroom Afrika's submissions in respect of clause 28 (News and comments on matters of public importance), more specifically clauses 28.2.2 and 28.3.2.

17. The relevant extracts of the applicable clauses are set out below for ease of reference:

News *and comments on matters of public importance*

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

28.2 Comment

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.

28.3 Controversial issues of public importance

*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.*

18. The purpose of section 28 is to ensure that controversial issues of public importance are discussed in a balanced manner and, importantly, when a third party's views are attacked or ridiculed, to either invite the party to put his views across or to invite the party to a subsequent broadcast on the allegation or criticism made.

19. Both the requirements in Clause 28.2 and 28.3 are aimed at providing viewers with sufficient knowledge that will enable them to determine how much weight to attach to the statements. In the case of controversial issues, viewers are provided with opposite viewpoints to assist them in their understanding of controversial issues.

20. We submit that the Broadcast complies with and is protected by the Code for the reasons discussed below.

NEWZROOM AFRIKA'S RESPONSE TO THE COMPLAINT

21. We turn now to consider the complaint in light of clause 28 of the Code in detail. In doing so, we set out the specific allegations made by the Respondent and Newzroom Afrika's responses thereto below. Where we do not address a specific averment in the complaint, this should not be taken to mean we accept the validity of the averment.

Commentary fairly indicated and referred to

22. The Complaint alleges in paragraph 18 of the Complaint that Newzroom Afrika contravened section 28.2.2 of the Code in that:

"The presenter failed to ensure that the Mdwaba's commentary about myself were *[sic] true or fair."*

23. This allegation is entirely baseless and false.

24. Section 28.2.2 does not require Newzroom Afrika to *"ensure"* that Mr Mdwaba's commentary about the Respondent was *"true or fair".* It requires that the commentary must be presented in such a manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to. and to provide robust debate on such commentary.

25. In the first instance, the interview was a live broadcast, where it is impossible to verify the statements made by Mr Mdwaba immediately. Newzroom Afrika could not have foreseen

that Mr Mdwaba would make such a statement about the Respondent, and at the time had no need or obligation to invite the Respondent to participate in the live discussion.

26. The anchor clearly and throughout the interview challenged the statements made by Mr Mdwaba, and in fact specifically questioned Mr Mdwaba, immediately after his statement about the Respondent, as to why South Africans should believe his story. He clearly indicates to viewers that:

    26.1 there is serious doubt as to the veracity of Mr Mdwaba's commentary and allegations;

    26.2. that his frustration is at least one part of the commentary that is coming out clearly from the interview, and that the rest of the commentary in the interview is not clear; and

    26.3. that the frustration may be a result of the people he is mentioning;

    26.4. who are seemingly standing in his way of getting the contract; and

    26.5. are the very same people he is accusing of corruption, with whom it appears he has a vested interest and with whom he still wishes to do business with, despite his allegations of corruption against them.

27. No reasonable viewer would jump to the conclusion that Mr Mdwaba's statements are true. The very meaning of an "allegation" is a claim of fact not yet proven or tested to be true. Similarly the word "seemingly" in the context of the interview and discussion also casts doubt as to whether the statements are true.

28. The commentary we submit was presented and discussed in a fair and balanced manner in the circumstances of a live broadcast and in compliance with the Code.

Right of reply provided to the Respondent

29. The Complaint alleges in paragraph 19 of the Complaint that Newzroom Afrika contravened section 28.3.2 of the Code in that:

    "The channel failed to ensure right of reply until after the complaint, and subsequently wants to dictate how this is exercised".

30. This allegation is entirely baseless and false.

31. Clause 28.3.2 does not require Newzroom Afrika to at all times provide a right of reply in the same programme, and more specifically in a live broadcast environment. Clause 28.3.2 must also be read in the context of clause 28.3 as a whole, which requires Newzroom Afrika to:

    31.1. make reasonable efforts to fairly present opposing points of view, which we submit have been made; and

    31.2. provide a right of reply 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.

32. In the first instance, the right of reply was not provided after a complaint, as alleged by the Respondent. It was provided within reasonable time of the original live broadcast and

within a series of broadcasts on the same matter (within 4 broadcasts (4 days) of the show. The show in question is broadcast from Monday to Friday.

33. In the second instance, it remains the Newzroom Afrika's editorial prerogative to determine to whom and when a right of reply is made, in accordance with paragraph 31.2 above, and prioritise its resources and efforts accordingly. The fact that the Respondent was not mentioned or invited for a right of reply on air by the anchor is irrelevant in circumstances. An anchor cannot be expected to remember all details verbatim on air. Providing a right of reply is the requirement.

34. The Respondent immediately after the interview, and prematurely, sought an apology from Newzroom Afrika and did not request a right of reply. Instead he deployed intimidation tactics in a letter dated 9 November 2023, to try and control the narrative, Newzroom Afrika's editorial prerogative and independence, and to legitimise his work for the Sunday Times, who as he claims have yet to *"tell their side of the story"*. This is also evident from the wording of the apology the Respondent demanded in this Complaint.

35. Nowhere in the letter dated 9 November 2023, does the Respondent deny the allegation set out in paragraph 12 above. The letter centres around legitimising his "investigation". He then asserts that the statements made by Mr Mdwaba are defamatory and untested, yet Newzroom Afrika submits that they may very well be true, a matter which in itself is of public importance and requires further investigation.

36. The Complaint then elected to ignore Newzroom Afrika's invitation to a right of reply and instead lodged this Complaint with the BCCSA on 14 November 2023, and astoundingly asserts in the Complaint that he and the Sunday Times have not been granted an opportunity to state their version.

37. Only in his Complaint to the BCCSA does the Respondent deny the allegations set out in paragraph 12, after he had been provided a platform to deny the allegation, by Newzroom Afrika Respectfully, how else would a broadcaster allow the Respondent a platform to respond to the allegation and comply with the Code, but for an interview in accordance with paragraph 28.2 above?

38. On the very same day, 15 November 2023, the Respondent via his X account engaged Mr Mdwaba, in a seemingly unhealthy and personal exchange, challenging him to a public debate. This in response to Mr Mdawaba's claim of biassed reporting on the part of the Respondent (See **Annexure "A").**

39. This leaves Newzroom Afrika terribly puzzled as to what the Complaint's intentions are and that, despite being offered the right to reply in accordance with the Code, chooses to complain that Newzroom Afrika breached the Code.

40. Newzroom Afrika has also provided rolling coverage of this matter since 9 November 2023 during hich a number of responses were provided, including:

    40.1. Thursday, 9 November 2023: ANC SG Fikile Mbalula opens a *crimen injuria* case against Businessman MthunziMtwaba: https://www.youtube.com/watch?v=SyWFsgPbG8A.

    40.2. Friday, 10 November 2023: The Higher Education Minister Blade Nzimande denied the allegations on our platform via his spokesperson Ishmael Mnisi: https://www.youtube.com/watch?v=yM bOBIdT6k

40.3. Friday, 10 November 2023: ANC's National Spokesperson regarding allegations against the 3 Ministers. The party deployed its national spokesperson to respond. https://www.youtube.com/watch?v=RsKczHci6i8.

40.4. Thursday,23 Nov 2023: Minister Thulas Nxesi Nxesi seeks to halt RSbn UIF deal with Thuja Capital https://www.youtube.com/watch?v=opMdGysMb18

41. Mr Mdwaba was and is still welcome to exercise that right as invited by Newzroom Afrika.

CONCLUSION

42. We respectfully submit that there is no basis for this complaint.

43. We submit that the broadcast complied with the Code and request that the complaint be dismissed."

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

"From the outset I would like to clarify an insinuation being made by the respondent that this matter is personal for me, and I am somehow offended by an attack or criticism from Mthunzi Mdwaba.

For context, I have worked as a journalist for nearly two decades now, and in that period I have been subjected to personal attacks, by politicians, physical burglaries where my electronic devices are stolen, as well as interception.

As a result, I have developed a thick skin. Therefore insults or "criticism" from Mdwaba would not move me.

The point the respondent misses quite spectacularly is that Mdwaba did not attack me or the work I did on this investigation.

Mdwaba chose to attack my credibility as a journalist by alleging that I am working with a Minister, a lawyer hired by that Minister's department, and a member of a civic organisation that raised a stink about his company and its agreement with the department. This is an allegation that has quite damaging implications for my professional career, and obviously my ability to earn a living for my family.

The allegations are part of an effort to delegitimise the investigation I worked on, and the Sunday Times, with the obvious goal of then somehow nullifying the very real questions he has to answer about how the R5-billion agreement came about.

He knew he could not mount such an attack on factual grounds, or processes that ultimately led to the publication of the series of articles. He could not fault any assertion or conclusion made in the numerous articles published in the Sunday Times, so he did what he knew was going to dent the story and its impact on his project.

This tactic is not new for myself, and many other investigative journalists. We see it everyday on various social media platforms. But it is one of the few times where they are made on a news

platform, and presented as fair comment, and which unanswered has the potential to to be believed by many.

Also, this complaint is not to say Newzroom Afrika should have been able to preempt Mdwaba's words and have me on standby or stop him. My contention is that as a platform, the respondent should have interrogated his assertions to ensure that his comment is based on "facts truly stated or fairly indicated or referred to". The anchor/presenter/interviewer had a duty to do this and then offer a right to reply afterwards.

Again, the contention is not that they should have only offered the right to reply at the end of the interview, they could have made an effort to reach out to the Sunday Times to arrange

for such. But, as they contend in paragraph 33, it was their prerogative to determine who they offer right of reply to, and obviously they saw no need for this until the Sunday Times took issue with their broadcast.

It is not for me, or the Sunday Times, or the respondent's imagined narrative. It is for journalism and the principles espoused in the BCCSA, particularly clause 28.2.2 of the subscription code of conduct.

Now to the paragraphs I deem necessary to respond to:

Paragraph 26

The respondent is quite correct that the wording of the clause says nothing about ensuring that Mdwaba's commentary about me is true or fair. The wording is that commentary must be made on "facts truly stated or fairly indicated and referred to", and even on that standard the respondent failed dismally. There were no "facts truly stated or fairly indicated and referred to" to justify Mdwaba's commentary about me, and the presenter did not ask for them, or challenge Mdwaba.

To the rational person, simply asking Mdwaba why he should be believed does not amount to a push back or challenge, even if you preface it with the possibility of him being frustrated.

Pushing back or challenging would have surely required him to substantiate or retract. After all, the requirement in the clause is not for the licensee to try and justify why the commentary is being made, but that it is made on "facts truly stated or fairly indicated and referred to".

In fact it would make perfect sense to be very frustrated if people were conspiring against you.

Also nothing about the anchor's response (quoted in par 12 of the respondent's papers) suggests a clear indication for the viewer of any "serious doubt" as to the veracity of Mdwaba's commentary. The reference to Mdwaba wanting to do business refers to the Ministers and not me, and my complaint.

Paragraph 27

This would have been relevant if the anchor had actually used the word "allegation" in his immediate response to Mdwaba's claims about me.

Paragraph 31

I think the point I am making is that I am unwilling to appear on Newzroom Afrika, whether live or pre-recorded, as I have my own beliefs about their ultimate motives, and I do not wish to participate. And there is nothing in the code of conduct that says the right to reply is only available through an interview on their station.

My ask is that the station read a statement which reflects that (i) acknowledge that Mdwaba's commentary was not made on facts truly stated or fairly indicated and referred as required in the code, (ii) I strongly refute his claims as untrue and without basis, and (iii) apologise to me for letting his commentary stand (after the fact) despite it not meeting the requirements of the code.

I also hope that as journalists - those that are journalists - they would want to assure their readers that they believe that journalists have a right to do their work without being intimidated.

Paragraph 32

This is simply not true. The offer for right of reply came in their response to a letter written by the editor of the Sunday Times' requesting an apology. The right of reply made during the interview was to three ministers, and no one else. Arguing that anyone else should have also considered this an offer to them is simply ludicrous.

Paragraph 33

This statement reveals the callous and cavalier attitude with which the respondent approaches this matter, and their duty of care to those affected by their poor internal editorial policies. Yes, it is true that the respondent does have editorial prerogative to make a determination for a need for right of reply, and when and how it is made. But that does not mean that this prerogative takes precedence over the rights of those who feel aggrieved, defamed, or affected by those who appear on their platform.

It is very concerning that the respondent is actually saying their anchor cannot be expected to be engaged enough to remember - by the time the interview is over - details such as people who were accused of impropriety on his show. It actually leaves one with no doubt in mind that the real intent behind their show is purely entertainment and drive viewership with little regard for any sort ot ethics.

The reality is that, as the respondent says, there was no intention to offer a reply to anyone else other than the three ministers. **I** was not offered at the end of the interview, two days after the publication, and it only came as a result of a complaint and demand fo apology. The follow up interviews and inserts referenced in paragraphs 40 all focus on the ministers, and the ANC SG, and their reactions to the claims.

Paragraph 34

This is a bizarre assertion from the respondent because the letter from the Sunday Times - **not me-** was two days after the interview and not "immediately". It is worth noting that in those two days no offer was made for the right of reply to me. The offer only came after the letter from Sunday Times Editor Sthembiso Msomi (see attachments).

It is also quite nonsensical to try and argue that it is premature to seek an apology instead of a right to reply. These are two separate requests or demands, flowing from two separate acts: The first being an acknowledgement - even after the fact- that Mdwaba's commentary did not meet the requirements, and was not called out as such. The second stems from the principle of offering a right of reply to balance that which happened and they had no control over.

Further in the paragraph the respondent claims intimidation tactics were deployed "to try and control the narrative" and "legitimise his work for the Sunday Times".

This again shows how Newzroom Afrika has reduced this issue being about narratives, a display of how poor or shallow their understanding of this situation is. Mdwaba did not attack the legitimacy of the work done by me (for the Sunday Times) on this story. He attacked my integrity and credibility in order to nullify the facts, and legitimate work, that were presented in the article, and he could not attack.

Paragraph 35

It seems that the respondent here is giving us a glimpse into the reason the anchor/presenter did not ask Mdwaba to substantiate or provide evidence for his claims: They actually believe the claims may very well be true, and therefore of public importance and require further investigation. They are free to make that determination, and to even act on it. I also submit that the standard should not be my denial, but rather "facts truly stated or fairly indicated and referred to".

It's irresponsible journalism to allow every Tom, Dick, and Harry to cast aspersions against individuals, under the guise of free speech, public interest, and in hopes that you will get a secondary interview for right of reply. It is an abuse of the fact that at times live tv can be dynamic.

Paragraph 36

This summary is baffling to me as the complaint clearly states that I am not refusing their right of reply. I am merely asserting that I will not be part of their endeavours to increase their ratings by going on their platform. They should not be allowed to be party to an attack on my character for eyeballs, and then still dictate to me on how they remedy something that happened due to their own editorial lapses.

Paragraph 37

I believe the response to this paragraph is covered by responses to paragraph 34 and paragraph 36.

Paragraph 38

Not sure what the significance of the date is here, but it's clear now that editorial rigour is something unfamiliar to the respondent. So much so that attempts to reiterate, and publicly show, that Mdwaba is running from having a factual debate about Thuja, are labelled as "seemingly unhealthy and personal".

It's not personal, or unhealthy. It's what journalists do -be open and transparent in public, challenge those who attempt to run from accountability while spreading lies to air their views, and have them tested with facts - and in some cases arch leverage files of documents.

It is not simply asking someone why they should be believed.

We are doing journalism in a "post truth" era, where ad hominem attacks are a constant feature, and we have an obligation to constantly interrogate statements/claims/assertions made by those that speak into our microphones or recording devices. Allowing them to distort history, overlook or downplay important context, or (as in this case) make outrageous claims about people and institutions (because we think it makes for great debate or pushes Youtube views) will in the long run erode the credibility the public allows us to have.

Paragraph 39

I think I was and still am pretty clear about what my intentions are.

Paragraph 40

Although I do have opinions on the "rolling coverage" of this particular story, they are of no relevance to my particular complaint."

EVALUATION

[5] The Respondent lodged a complaint with the Broadcaster within two days after the impugned broadcast on the 9th of November 2023. The Broadcaster offered a right to reply on the 14th November 2023 which he declined. He then lodged a complaint with the BCCSA. The matter was referred for adjudication and the adjudicator found a contravention of Clauses 28.3.1 and 28.3.2. The Broadcaster appealed the finding. Leave to appeal the decision was granted which led to this Tribunal.

[6] The complaint concerns an interview that was broadcast by the Appellant on 7 November 2023. The guest on the programme, Mr Mdwaba was invited to talk about the controversial UIF job creation project and the allegations of bribery against three Ministers who were involved with the project. Mr Mdwaba was naming and shaming all parties involved in the project. The presenter referred to his statements as "allegations'' and asked Mr Mdwaba why viewers should believe his allegations in an attempt to achieve balance. Despite these attempts, Mr Mdwaba continued with his allegations never truly stating or fairly indicating the facts on which his allegations which apparently represented his honest opinion, were based.

[7] The Respondent's concern relates to a brief statement by Mr Mdwaba towards the end of the interview. Mr Mdwaba alleged that the Respondent was on a WhatsApp group with three persons who are involved in this project. Mr Mdwaba identified the Respondent (who is an investigative journalist) as well as the newspaper that employs him in this statement. At the end of the interview the presenter announced that the Ministers named will be contacted for their response to the allegations but did not indicate that the Respondent will be contacted for his response.

[8] Clause 28.3.1 provides the following: *In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.*

[9] The question can be asked why the Broadcaster did not deem it necessary to invite the Respondent to participate in the programme as he is the journalist who had investigated the circumstances surrounding the allegations of bribery against the UIF job creation project. Our understanding is that Mr Mdwaba was invited on the show because the tender for the project was awarded to him but then put on hold as a result of the Respondent's article. Although the interview was triggered by the Respondent's published article, the article was not the focus of the discussion. It appears that Mr Mdwaba was invited to "dig up" more "'dirt" on the Ministers involved. There was therefore no need to invite the Respondent to participate in the interview. However, this clause requires *reasonable efforts from the broadcaster to <u>fairly present opposing points of</u> view either in the same programme or in a subsequent programme forming part of the same series.* The opposing views could have been provided by any person or, in the absence such

guest, the presenter could have achieved balance by putting opposing views to Mr Mdwaba which did not happen (own emphasis).

[10] When Mr Mdwaba included the Respondent in his allegations by stating that he was on the same WhatsApp group as three of the persons who were allegedly involved in the debacle, namely the Minister, a lawyer hired by that Minister's department, and a member of a civic organisation, Clause 28.2.3. became relevant.

Clause 28.3.2 provides that

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 11 a pre-arranged discussion programme with the prior consent of the person concerned.

[11] The Appellant offered the Respondent a right to reply but he was not satisfied that the right was only offered on the 14th of November and only after he and his employer had lodged a complaint with the Broadcaster. He was of the view that he should have been invited to participate in the discussion or alternatively that the right to reply should have been offered before the 14th. He refused the offer of a right to reply on the 14th of November because, according to him, the topic had run its course as the follow up broadcasts focused on various stakeholders' replies to Mr Mdwaba's claims. The Respondent therefore insisted that the Appellant should broadcast an apology. The Broadcaster refused. The Respondent then lodged a complaint with the BCCSA.

[12] The Appellant argued that the requirement in terms of Clause 28.3.2 that the right to reply must be offered "within a reasonable time" has been complied with. Although the broadcaster only responded to the Respondent on the 14th it would have been possible to broadcast a follow-up interview within that week. It is difficult to give a precise indication of what exactly is meant by "'a reasonable time". In our view, factors that could be considered (not to the exclusion of others) are the nature of the programme, the nature of the comment and the stage at which the right of reply was offered. A reasonable period relating to a lifestyle programme which, for example is broadcast every second week, will not be the same as that for a news programme.

[13] The Appellant also submitted that the duration of the statement was less than a minute during an interview that lasted twenty-eight minutes. The duration of the impugned statement was therefore so brief that it could hardly have had any impact. While the statement is quite brief, the impact thereof is serious. The Respondent is an established investigative journalist which means that viewers would have realised that Mr Mdwaba referred to the Respondent (and not anyone else), especially when the newspaper was also mentioned. Mr Mdwaba was aware that the Respondent was the author of the article because he was also interviewed by the respondent with regard to the UIF project. The impugned statement although brief, could be interpreted as casting aspersions on the integrity of the report. The statement did not go as far as to cast aspirations on the Respondent's integrity or the veracity of the report but because it was unchallenged, it could have detracted from the reliability of the report.

[14] During the Tribunal hearing, the Appellant repeated its offer of a right to apply. The Respondent refused but was asked by the Tribunal to reconsider the offer. The Respondent sent his response to the Registrar on the same day:

"Sabelo Skiti here. I hope this is not inappropriate, but I've thought about a question from the panel on whether I would not be willing to do a right of reply interview on the issue. I initially said I would need to think, and I now have. I am now amenable to a discussion on this. "

[15] In view of the acceptance of the Respondent of the offer to a right of reply linked to the fact that the Appellant has offered a right of reply previously, we find no contravention of Clause 28.3.3 The Appeal against this contravention is upheld and the finding and sanction set out in the Adjudication is set aside.

[16] The fact that the presenter did not succeed in achieving balance during the interview with Mr Mdwaba (in the absence of participants to the discussion with opposing views), constitutes a contravention of Clause 28.3.2. The appeal against the contravention of this clause is dismissed for the reasons set out in the judgment.

[17] Parties are afforded an opportunity to file their submissions on the appropriate sanction to the Registrar:

The Appellant: "We refer to your email below and the draft judgment delivered on 26 March 2024.

In respect of the Tribunal finding that our client contravened Clause 28.3.2 of the BCCSA Code, and in light of the fact that Mr Skiti has now agreed to have an on-air discussion and give his opposing views, our client's submission on the appropriate sanction would be that the Presenter on Newzroom Afrika (Mr Xoli Mngambi) read out the below statement, live on-air, before the discussion with Mr Skiti takes place

"On the 7th of November 2023, during an interview I had with Mr. Mthunzi Mdwaba, Mr Mdwaba made an allegation that Mr Sabelo Skiti was "in the same WhatsApp group" as government officials and others who had cancelled a R5 billion contract his company had with the UIF and the Department of Labour.

A BCCSA ruling found that we did not provide opposing points of view during the interview.
Mr. Skiti joins us in studio today, to give us his side of the story and provide his point of view in relation to the allegation made against him."

Our client is of the view that the above statement adequately captures the basis of the complaint and acknowledges the finding of the Tribunal.

Our client will reach out to Mr Skiti to ascertain his availability for a live or pre-recorded interview. Our client will notify the Registrar of the date and time on which the interview will take place, as well as send a copy of the broadcast to the Registrar. We look forward to hearing from you.

Respondent: "Thank you for the opportunity. Please find my proposed sanction below.

Since the findings highlight a failure to achieve balance during the interview, but dismisses the complaint related to right of reply, I recommend a sanction that includes:

(i) *reprimand for the infringement of the Code;*

(ii) *direct that a summary of the findings recording the failure to achieve balance/probe the allegations and a correction be broadcast. This must include the fact that Mdwaba was the subject of several critical reports from the complainant and the Sunday Times, and the untested allegations could have detracted from the reliability of the report.*

(iii) *Given the fact that the interview was broadcast, uploaded on You tube, and promoted on X (formerly Twitter), the reprimand must receive the same treatment. This is not punitive, but rather restorative (given the amount of engagement I received from people who shared the link with me), and also geared towards transparency and fairness in the accountability process. Newzroom Afrika has the privilege to criticise those who need it, and should be willing to accept the same criticism when warranted.*

Though the complaint about right of reply is now dismissed, I think is only fair that my response/view on Mdwaba's allegations be recorded - whether through interview or as part of the wording of the reprimand. My view remains thus: **"I consider Mdwaba's unfounded allegations a feeble attempt to divert attention from legitimate questions about his alleged involvement in defrauding the Unemployment Insurance Fund. It is an act of attempted intimidation aiming to silence journalists, something the entire fraternity must stand up against."**

[18] REPLY TO THE APPELLANT'S SUBMISSION ON SANCTION

"While I appreciate the proposal by Newzroom, including the interview, I wish to just make two additions.

In terms of sanction, I request that the BCCSA, which sees the Code violation/transgression as serious, reprimand the station, and that the wording proposed the station reflect this. I feel this is important transparency, as well as accountability.

So, here's an edited version of their proposed script/text(underlined):

On the 7th of November 2023, during an interview I had with Mr. Mthunzi Mdwaba, Mr Mdwaba made an allegation that Mr Sabelo Skiti, a journalist with the Sunday Times, was "in the same WhatsApp group" as government ministers, and others, following the termination of a R5 billion contract his company had with the UIF and the Department of Labour Skiti had exposed alleged deficiencies, and malfeasance, on the process to award the contract.

"Following a complaint by Skiti, the BCCSA ruling found that we failed to provide opposing points of view during the interview. (and has reprimanded us for this.)

"Mr. Skiti joins us in studio today, to give us his side of the story and provide his point of view in relation to the allegation made against him."

Of course added to this is the request that the station put the clip of the interview on YouTube, and also promote the interview on Twiter as it had done before with the interview. "

APPELLANT'S REPLY TO THE ABOVE REPLY:

In respect of Mr Skiti's submissions on the proposed sanction, please see our counter-submissions:

"Since the findings highlight a failure to achieve balance during the interview, but dismisses the complaint related to right of reply, I recommend a sanction that includes:

(i) *reprimand for the infringement of the Code;*

Our client does not have an objection to the inclusion of this sanction.

(ii) *direct that a summary of the findings recording the failure to achieve balance/probe the allegations and a correction be broadcast. This must include the fact that Mdwaba was the subject of several critical reports from the complainant and the Sunday Times, and the untested allegations could have detracted from the reliability of the report.*

Our client has already submitted that the presenter on the show would make a statement (as set out below – with edits to Mr Skiti's additions), prior to the interview with Mr Skiti taking place, in which a brief summary of the BCCSA findings will be mentioned, as well as an acknowledgement of the contravention. In respect of the underlined portion above, our client objects to the inclusion of this as it was not the subject of the original interview, nor part of the complaint before the BCCSA. The inclusion of this information is not relevant and the statement being made by the Newzroom Afrika presenter should not be used as a platform to voice the opinion of Mr Skiti. He will be able to do so during the course of the interview.

(iii) *Given the fact that the interview was broadcast, uploaded on You tube, and promoted on X (formerly Twitter), the reprimand must receive the same treatment. This is not punitive, but rather restorative (given the amount of engagement I received from people who shared the link with me), and also geared towards transparency and fairness in the accountability process. Newzroom Afrika has the privilege to criticise those who need it, and should be willing to accept the same criticism when warranted.*

Our client is comfortable with uploading the interview with Mr Skiti onto YouTube, as with the original interview with Mr Mdwaba, including the opening statement, and our client will also upload the links onto any/all other platforms where it was published. However, our client does not agree with including any recordals / statement other than the statement made before the interview.

Though the complaint about right of reply is now dismissed, I think is only fair that my response/view on Mdwaba's allegations be recorded - whether through interview or as part of the wording of the reprimand. My view remains thus: **"I consider Mdwaba's unfounded allegations a feeble attempt to divert attention from legitimate questions about his alleged involvement in defrauding the Unemployment Insurance Fund. It is an act of attempted intimidation aiming to silence journalists, something the entire fraternity must stand up against."**

In respect of the above, since the BCCSA dismissed the complaint concerning the right of reply issue, our client is of the view that it would not be appropriate to include a sanction flowing from that complaint, meaning that the BCCSA should not impose the above sanction directing our client to make the above recordals. Should Mr Skiti wish to make these views during the interview, he is more than welcome to.

In respect of the wording of the statement, we submit that the wording of the statement should be as follows (Mr Skiti's edits are in underlined, and our client's edits are in ***bold italics*** – for ease of reference):

"On the 7th of November 2023, during an interview I had with Mr. Mthunzi Mdwaba, Mr Mdwaba made an allegation that Mr Sabelo Skiti, a journalist with the Sunday Times, was "in the same WhatsApp group" as government ministers, and others, following the termination of a R5 billion contract his company had with the UIF and the Department of Labour ~~Skiti had exposed alleged deficiencies, and malfeasance, on the process to award the contract~~. ***[This goes beyond the scope of the complaint and the issues between the parties – as stated above. This context is not necessary or relevant as it was not also brought up during the original interview]***

"~~Following a complaint by Skiti,~~ ***Mr Skiti filed a complaint alleging that Newzroom Afrika did not offer him a right of reply and that I failed to provide opposing points of view during the interview. The BCCSA dismissed the complaint regarding the right of reply, however****, the BCCSA found that we failed to provide opposing points of view during the interview.*

"Mr. Skiti joins us in studio today, to give us his side of the story and provide his point of view in relation to the allegation made against him."

RESPONDENT: "Thank you. Something for the panel to consider, the part of the edit Newzroom Afrika deems to be my opinion is literally a verbatim lift from the panel's wording in the findings."

TRIBUNAL'S SANCTION

[19] The Appellant's appeal against the contravention of Clause 28.3.1 was dismissed. The requirement that the Broadcaster must make reasonable efforts to fairly present opposing points of view in the same programme was not met and balance was not achieved. Balance could have been achieved in different ways. In this instance, as there was no other participant in the discussion, the presenter should have provided the required balance which he did not do. The Tribunal is of the view that a reprimand is an appropriate sanction.

[20] The Appellant offered the Respondent a right of reply during the hearing which he accepted shortly afterwards as set out in paragraph [14] above. The Appellant's appeal against the contravention of Clause 28.3.2. was therefore upheld. The Respondent's right to reply must be effected within 48 hours of the release date of the judgment. A copy of the broadcast must be forwarded to the Registrar.

DR S LÖTTER
CHAIRPERSON: BCCSA
Commissioners Chicktay and Naidu concurred with the above judgment