CASE NUMBER: 23/2024

TRIBUNAL DATE: 12 NOVEMBER 2024
JUDGMENT RELEASE DATE: 3 FEBRUARY 2025

MABASA **COMPLAINANT**

vs

MULTICHOICE CHANNEL 157 **RESPONDENT**

TRIBUNAL: **DR S LOTTER (CHAIRPERSON)**
ADV B TLHAKUNG
DR L VENTER

THE COMPLAINANT REPRESENTED BY HIS SON, NKOSANA MABASA

FOR THE RESPONDENT: MR THABO MOHALE: MOTA AFRICA INC ACCOMPANIED BY MR BRUCE MKHIZE: HEAD: REGULATORY COMPLIANCE, REGULATORY AFFAIRS, MULTICHOICE

SUMMARY

Appeal against a finding of the adjudicator that the complainant's privacy and dignity had not been infringed during the broadcast of Rea Tsotella on 13 May 2024. The complainant was specifically concerned about being questioned about his powers and the innuendos of witchcraft levelled against him. Leave to appeal was only granted against the finding that his dignity had not been infringed. The question whether he has given permission to participate in the programme or for it to be broadcast, falls outside the remit of the BCCSA. The complainant did not attend the hearing but was represented by his son whose submissions relating to

the infringement of his father's dignity cannot be accepted. The appeal has been dismissed.

JUDGMENT

S LÖTTER

[1] This is an appeal to the Tribunal of the BCCSA against Adjudication No: 28/A/2023. The complainant lodged a complaint with the BCCSA against MultiChoice Channel 157 alleging that the complainant's privacy and dignity were infringed during the Mamazala programme that was broadcast on Saturday, 10 August 2024 at 19:30. The adjudicator found that there was no contravention in terms of Clause 28.4 of the Subscription Code of Conduct.

[2] The complaint reads as follows:

"I am writing in reference to the grievance initially raised on the 13th of May 2024 against Moja Love Channel 157 specifically the show called Rea Tsotella.

As per the advice given when the issue was initially raised, we sent multiple letters to both Multichoice and Moja Love via their respective communication channels, as mentioned on their website with no acknowledgment from them.

I am now lodging a formal complaint for BCCSA to intervene,

The airing of this show has now victimized my father and the entire family, clearly and intentionally tarnishing his image, and accusing him of witchcraft which will make it impossible for him to continue to live freely in and around the community.

The presenter was biased and did not address him with any respect and did not exercise any due care for the potential long-term damage that the show would cause, making it clear that the show was meant to embarrass my family to make a spectacle for the viewing pleasure of the country.

Our lives have now been put in danger due to the family being referred to as witches.

As previously mentioned, consent was not given to participate in the show nor for the show to be aired.

Please provide us with guidance on how we should take this matter forward, and possibly appeal with Moja love to stop and subsequent airing of this particular episode.

2.3.2 Details of the Show: Name & Channel: Rea Tsotella, on 157 Moja Love

Season 24, Episode 01,02 (As seen on DSTV Catch up via the mobile app), Date aired: 28 May 2024 at 21:00

I write to formally lodge a complaint concerning a grievous matter involving Moja Love Channel 157 and its program, Rea Tsotella. This complaint follows an unresolved grievance initially raised on the 13th of May 2024.

Despite our concerted efforts, including multiple written communications sent to both Multichoice and Moja Love through their official channels as specified on their respective websites, we have received no acknowledgment or response.

I hereby request the BCCSA's intervention in this matter.

The broadcast of the aforementioned show has egregiously victimized my father and our family. The content of the episode in question has unjustly defamed my father by accusing him of witchcraft, thereby irreparably damaging his reputation and rendering it impossible for him to reside freely within our community.

The presenter exhibited a pronounced bias and failed to address my father with the requisite respect. The presenter's actions demonstrated a blatant disregard for the potential long-term harm such an accusation could cause. The episode appeared to be crafted with the intent to publicly humiliate my family for the sake of entertainment.

The defamatory nature of the broadcast has endangered our family, as we have been subjected to the stigma of being labeled as witches.

Moreover, it is pertinent to note that at no point was consent granted for participation in the show, nor was there any authorization for the broadcast of the episode featuring my father.

We are raising a grievance with the channel for the violation of the following criteria stipulated in the code of conduct:

Privacy, Dignity, and Reputation Clauses 1, 2, & 3

Evidence from Episode 01:

- **Minute 06:28:** The other participant on the show states that Julius (Xirindza) uses muti, and posits that the muti is killing her children and hurting her. This statement creates a stigma in the community that Julius uses muti that kills people, resulting in severe reputational damage.

- **Minute 08:34:** The participant claims that the children of Julius are living well and prospering due to this muti, while her children are suffering. This further damages the reputation of Julius and his children, as it falsely correlates their success with the use of muti.

- **Minute 09:34:** Claims are made by the participant that Julius healed a sick child by touching him, perpetuating the notion of witchcraft and causing additional reputational damage.

- **Minute 11:02:** The presenter asks Julius, "What did you do a long time ago that is now attacking her and her children?" This question invades Julius’s privacy by bringing private family matters into the public domain.

- **Minute 14:00:** The presenter suggests that these things (muti/witchcraft) are now attacking and killing her children, which amounts to an accusation of witchcraft and murder, contravening dignity and causing reputational damage.

- **Minute 15:00:** The presenter acknowledges that this portrayal will cause Julius to be perceived by the community as a murderer and user of witchcraft, further damaging his reputation and stripping him of dignity.

- **Minute 18:28:** The presenter forcefully asks for details to be divulged, constituting an invasion of privacy in contravention of Clause 2.

Evidence from Episode 02:

- **From Minute 02:36:** Another participant on the show makes claims that Julius killed her brother's child and labels him a dangerous killer. This statement severely impacts Julius's dignity and reputation, especially as these claims have never been reported to the police, nor is there any evidence to support them. Additional statements suggest he uses witchcraft.

- The show and the presenter perpetuate hate speech and allow defamatory utterances to be made by the other participants.

The presenter closes the show by stating that his show has never addressed witchcraft at this level, displaying an intimidation, lack of respect, and a disregard for the potential damage and danger that the family will now face. His agenda was evidently to create a spectacle for the material benefits of the channel.

Other significant considerations include that no prior consent was given to air the show. My father was deceived, ambushed, and coerced into participating in the show without prior preparation and without the opportunity to have his own witnesses or consult with our family. The issues being discussed are deeply private.

We are now living in fear because the community believes we use witchcraft to succeed.

We urgently seek intervention from the BCCSA to bring the channel to account.

Your prompt attention to this matter is crucial."

[3] The Broadcaster responded as follows:

"IN RE: JULIUS XIRINDZA // MOJA LOVE TV (PTY) LTD (IRO REATSOTELLA) EPISODE)

Introduction and background:

1. We refer to the complaint lodged by Mr Nkosana Mabasa ("**Mr Mabasa**") on behalf of Mr Julius Xirindza Mabasas ("**Mr Mabasa Snr**") against Moja Love TV Channels (Pty) Ltd ("**the Channel**") with the BCCSA dated 30 May 2024.

2. The Complaint arises out of a show titled "Reatsotella" ("**The Show**") which was aired on 28 May 2024.

3. The Channel will demonstrate below, that whilst the Complaints relate to a purported violation of the BCCSA Code ("**the Code**") specifically clause 15 of the Code i.e. *'PRIVACY',* the BCCSA ought to dismiss the Complaint as the Show does not infringe on the Code nor violates any other provision of the Code.

4. Moreover, it is the Channel's view that this matter should rather be considered under the auspices of Clause 28.3 of the Code relating to controversial matters of public importance.

5. It is key at this juncture to mention that when the Complaint was received by the Channel through Mr Nkosana Mabasa (**"Mr Mabasa Jnr**"), the Channel pursued a mediatory approach to the dispute in that, it:

    5.1. Called Mr Mabasa Snr to arrange a possible timeslot for a shoot of another broadcast in line with clause 28.3.1 of the Code. Mr Mabasa Snr indicated that he will revert back to the Producer regarding his availability.

    5.2. This is despite, as it will become evident below that Mr Mabasa Snr was in the broadcast, participated freely and was afforded a right of reply to the discussion. See in this regard the consent form Mr Mabasa Snr signed attached and marked as Annexure **"A1"**.

The Merits:

Purpose of the Show

The Show is an intervention Show and has been over the years assisted South Africans to obtain justice and/or reconcile in various disputes that are often referred to it. The Show has a seasoned Presenter and a research team of high calibre and standards.

7. The Show has its core a reconciliatory approach and further ensures that persons who are usually approached for their side of the story, are given a fair chance to respond including dispute any facts that may be presented against them.

The Channel's Response:

8. Ms Rebecca Masango ("Ms Masango"), a 72-year-old blind female, wrote into the show and sought assistance through her family members on a family situation that has plagued the community and her family.

9. The central issue relates to a family dispute between the parties and for the parties to have an open and candid conversation on the difficulties and dangers they have been experiencing for generations due to their respective upbrings and beliefs.

10. According to the research conducted by the Show's research department, the following facts were established:

    10.1. Ms Masango is a 72 (seventy-two) year old mother and is medically certified as being blind.

    10.2. Mr Mabasa Snr is his brother-in-law and they are thus related through marriage.

    10.3. According to the family beliefs, Mr Mabasa Snr as evident in the episode, is the most senior person who understands the family customs and practices.

    10.4. According to her knowledge and having been married in the family for years, the Mabasa family has what is at times called a sacred ritual in the form of a spiritual covenant.

    10.5. This spiritual covenant according to Ms Masango has various powers and according to her years in marriage in the Mabasa household, has super powers and such powers could if unchecked, cause harm or even death.

10.6. It is key to pause at this juncture and state that Ms Masango's beliefs should not be dismissed as unreal, however, they are founded on the constitutionally enshrined right to Culture and belief.

10.7. It was on the above basis that the Producer and the Research Team invited Mr Mabasa Snr to the Show to reconcile the families and understand the underlying issues and differences.

11. The process the Show follows can briefly be summarised as follows:

11.1 The first stage of intervening and considering any matter that the Show receives is to conduct an interview with the person who wrote into the Show in order to get an in-depth understanding of the issue. During this first stage, various considerations take place such as:

11.1.1 analysis is conducted including whether there are any supporting documents;

11.1.2 whether any alternative dispute mechanisms where explored and what outcomes if any were achieved; and

11.1.3 whether the issue can be referred elsewhere or rather falls within the ambit of the Show's scope and reach.

12. The next phase following the above understanding is to obtain and hear the other side of the story, in this case, Mr Mabaso Snr. In this stage, the further considerations are explored:

12.1. Visiting the alleged person whom a complaint has been lodged against and informing him/her that someone has written into the Show and the nature of their Complaint. At the heart of this is that the fact that the Presenter and Crew firstly and foremost introduce themselves, and indicate where they are from.

12.2. By hearing the other of the story, we ensure that the Show is not prejudicial nor favour the other party but rather all facts and options including issues are explored, and a solution is ultimately achieved.

Having set out the above background, it is key to then deal and address Mr Mabasa Jnr's complaint with specific reference to the actual minutes in the episode where he states that there is violation of the Code.

13. <u>At Minute 06:28 of the Episode</u>:

A background and context was set prior to the audience coming on to share their comments. Whilst a statement was said along Mr Mabasa Jnr's contextualisation, it is key to mention that the Channel regards this as part of a controversial issue of public importance which is protected by Clause 28.3 of the Code.

Mr Mabasa Snr was afforded a right of reply to this and no time did he state that he had no knowledge of the issues relating a family long held practice. In fact, Mr Mabasa Snr stated that he is in the process of fixing the underlying issues as such does not sit well with him.

14. <u>At Minute 08:34 and Minute 09:24 of the Episode</u>:

It is key to mention that this aspect was not shared by an ordinary audience member but rather a relative of Mr Mabasa Snr who has intimate knowledge of the current living conditions of the respective families.

Once again, the said person gives specific examples and instances of what she is attesting to. Moreover, Mr Mabasa Snr does not deny this other than as you watch the episode, show an appreciation of the impact of a long standing family covenant on the extended family members.

15. At Minute 11:02 and Minute 14:00 of the Episode:

By Mr Mabasa's Jnr's own admission the matter relates to a private family matter. The issue that he is taking is the fact that such an issue should have not been brought to the public domain.

Once again, this is a controversial issue that should be considered in terms of clause 28.3 of the Code. It is a matter that sparks debate and Moreso,

Furthermore, and in compliance with Clause 28.3, Mr Mabasa Snr was engaged, afforded a right of reply and partook without any duress.

16. Minute 15:00 and Minute 18:28 of the Episode:

It is important to mention that the Presenter's role is to be impartial whilst ensuring the viewer is empowered and informed. What Mr Mabasa Jnr has stated in these specific minutes of the Episode are his subjective views of how he interprets the Presenter's role should be or ought to be.

If one has regard to the Episode, the BCCSA will note that Mr Mabasa Snr in fact paused, had a moment of reflection and stated that he is actually in the process of returning the spiritual covenant back to his country of birth being Mozambique.

In fact, the Presenter even offered financial assistance to assist Mr Mabasa Snr to speed up the process of transporting the spiritual covenant back to Mozambique.

Interestingly, it was Mr Mabasa's own version that he had tried on 2 (two) occasions to send the spiritual covenant back to Mozambique and at times he would not succeed.

In conclusion, the Channel submits that the BCCSA should dismiss the complaint and find that the Channel did not breach any of the provisions of the BCCSA code.

Should the BCCSA find that the Channel breached the provisions of the Code, the Channel submits that the BCCSA should and is empowered to direct the Channel to invoke clause 28.3 and offer the Mabasa's a broadcast on the same slot and a further right of reply.

Conclusion:

17. Having stated the above and contextualised episode, it is the Channel's view that the BCCSA should find as follows:

14.1 The Complaint by Mr Mabasa Jnr is dismissed.

14.2 The Channel did not violate any provisions of the Code."

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

"IN RE: JULIUS XIRINDZA // MOJA LOVE TV (PTY) LTD (IRO REA TSOTELLA EPISODE)

I write in response to the response provided by Moja Love (Pty) Ltd concerning the complaint lodged by Mr. Nkosana Mabasa on behalf of Mr. Julius Xirindza Mabasa. Upon review, we vehemently disagree with the contents of Moja Love's response, which we find to be fundamentally dishonest and lacking in accountability for the severe repercussions of their actions. Below, we address each point raised by Moja Love and present our counterarguments.

1. Lack of Attached Consent Form:

Firstly, Moja Love claims to have obtained consent from Mr. Mabasa; however, no signed consent form was attached to their response. Even if such a form existed, Moja Love must demonstrate that the contents were explained to Mr. Mabasa in a language he comprehends and prior to the filming of the show. Without this, the validity of the consent is highly questionable.

2. Incorrect Representation of Communication Efforts:

In paragraph 5.1, Moja Love states they contacted Mr. Mabasa to arrange another broadcast and are awaiting his availability. This is factually incorrect. Mr. Jacob from Moja Love, whose official capacity remains undisclosed, called Mr. Mabasa Snr on June 13, 2024, requesting his availability for a shoot on June 14, 2024, at 14:00. This was unreasonably short notice and impractical, and Mr. Mabasa Snr, through family, communicated that this timing was not feasible due to prior commitments. We requested sufficient notice to ensure adequate representation. We therefore, await an alternative date from Moja Love's, contrary to their assertion.

3. False Claims of Voluntary Participation:

Moja Love's assertion in paragraph 5.2 that Mr. Mabasa Snr participated freely and was afforded a right of reply is false. As evidenced in the broadcast, Mr. Mabasa was coerced into responding amidst a hostile environment and under intimidation from the presenter. Mr. Mabasa Snr had no prior knowledge of the broadcast's content and was not informed of his right to decline participation. This is corroborated by filed statements with the police indicating he was unaware of the true nature of the filming and was essentially ambushed.

4. Exploitation of Vulnerability:

Moja Love cannot produce evidence showing Mr. Mabasa Snr was advised of his right not to respond. Mr. Mabasa, an elder with no formal education and limited awareness of his rights, was exploited by Moja Love for dramatic effect, preying on his vulnerability.

5. Misleading Representations of the Show's Merits:

a. Alleged High-Caliber Research Team:

In paragraph 6, Moja Love claims their research team is of high caliber. This is a gross overestimation. The team failed to foresee the danger and public safety concerns associated with broadcasting allegations of witchcraft. The failure to anticipate the community's reaction either demonstrates incompetence or a deliberate neglect of their duty for sensationalism.

b. Claim of a Reconciliatory Approach:

Paragraph 7 asserts a reconciliatory approach, yet Mr. Mabasa Snr was ambushed without representation or prior notice of the show's contentious subject matter. The show clearly favored the complainant who had representation and witnesses, leaving

Mr. Mabasa defenseless in a hostile environment and faced a biased presenter, as evident in the broadcast.

6. Reckless and Irresponsible Handling of Sensitive Matters:

a. Misrepresentation of Beliefs:

In paragraphs 10.5 and 10.6, Moja Love failed to consider the severe implications of airing Ms.Masango's beliefs. They did not anticipate the stigmatization and reputational damage Mr. Mabasa would suffer. The subsequent threats and arson of our rural home underscore the dangerous consequences of Moja Love's reckless actions.

b. False Claims of Prior Notification and Visitation:

Paragraph 12.1 falsely asserts a visitation to inform Mr. Mabasa of the show's nature. No such visit occurred. Moja Love must provide evidence of this alleged visit, including dates, addresses, attendees, and outcomes.

c. Misleading Representation of Fair Process:

Paragraph 12.2 claims fairness in allowing both parties to present their side. The broadcast shows Mr. Mabasa alone, without representation, facing an aggressive and biased presenter.

7. Unjust Exposure and Defamation:

a. Violation of Privacy and Reputation:

In paragraph 13, Moja Love acknowledges the private nature of the matter but failed to protect Mr. Mabasa's identity. If the intention was to address the issue responsibly, Mr. Mabasa Snr's identity should have been concealed to protect his dignity and privacy. This exposure has led to severe defamation and community ostracism, resulting in irreparable damage to his dignity, privacy, and reputation.

b. Intimidation by the Presenter:

Paragraph 16 falsely asserts impartiality from the presenter. The broadcast clearly shows intimidation tactics used to extract responses from Mr. Mabasa. The presenter's closing remarks, emphasizing the show's unprecedented focus on witchcraft, reveal a deliberate agenda to sensationalize the matter for viewership gains.

The claim that financial assistance was offered is completely false. If true, Moja Love should provide evidence of such offers.

8. Conclusion and Demands:

The broadcast has caused irreparable harm to our family's dignity, privacy, and reputation. We now live in fear, facing threats and social ostracization. Our livelihood has been severely impacted.

In light of the aforementioned points, we respectfully submit that the BCCSA should:

1. **Dismiss Moja Love's response as lacking in merit and factual accuracy.**
2. **Mandate a follow-up broadcast:** As proposed by the channel, to clear our family name and mitigate the danger and threats we now face.
3. **Issue an official apology:** From the channel and the show to Mr. Mabasa Snr and his family.
4. **Remove defamatory episodes:** Immediate removal of the episodes from all platforms.

5. **Compensation:** For the damages caused by the broadcast, including the loss of business, community standing, and personal safety. We submit that Moja Love deliberately neglected their duty of care for financial gain, hence a financial sanction should be imposed.
6. **Conduct a review of practices:** An investigation into Moja Love's practices to prevent future occurrences of such negligent and harmful broadcasting.

We urgently seek the BCCSA's intervention to hold Moja Love accountable for their actions and ensure justice for Mr. Mabasa Snr and his family."

[5] **The grounds for appeal raised the following grounds:**

"Appeal for Mabasa vs Multichoice Channel 157 Adjudication

We respectfully submit this appeal regarding the dismissal of our complaint concerning the broadcast of *Rea Tsotella* on Multichoice Channel 157, aired on 28 May 2024.

Grounds for Appeal:

1. Consent:

The adjudication concluded that Mr. Mabasa participated willingly in the broadcast. However, we maintain that Mr. Mabasa was ambushed into participating without full knowledge of the broadcast's nature or his right to refuse. Given his limited education, Mr. Mabasa was unaware of his rights. Moja Love's failure to provide the consent form during adjudication or to demonstrate that the terms were explained to him in a comprehensible manner casts doubt on any purported consent.

Paragraph [5] asserts that "Ms. Masango voluntarily placed her family's issues in a public forum, effectively diminishing any expectation of confidentiality." While this may be true, it disregards Mr. Mabasa's right to privacy and confidentiality, as he did not initiate the public airing of these issues. Moreover, the responsibility for anticipating the repercussions should not solely rest on Ms. Masango; the broadcaster also had a duty to consider the potential harm. Why was the channel not held accountable for this duty?

Additionally, Paragraph [6] claims that Mr. Mabasa had the option to express dissatisfaction, yet chose to remain. However, as an elderly individual with limited education, he was unaware of his right to refuse participation. The channel did not inform him of his rights, nor was he briefed on the topics to be discussed. Mr. Mabasa was ambushed, and given the hostile setting, he felt compelled to respond.

Furthermore, the claim that "his participation in the second episode affirms his willingness" is factually incorrect. The show was shot in one session, with the broadcast split into two episodes. This is evidenced by the participants' and presenter's identical clothing in both episodes.

2. Bias in Presentation:

The presenter of *Rea Tsotella* exhibited clear bias throughout the episode, portraying Mr. Mabasa in a negative light. This bias not only disrespected him but also sensationalized personal family matters, causing severe reputational damage. The aggressive and leading questions posed to Mr. Mabasa, as outlined in the original complaint, highlight this lack of neutrality.

3. Reputation and Privacy:

The adjudication failed to adequately address the invasion of Mr. Mabasa's privacy and the irreparable damage to his reputation. The accusations of witchcraft aired on the show have endangered his family, leading to ostracization and threats. While the adjudication dismissed these concerns under the public interest clause, we contend that the violation of Mr. Mabasa's dignity far outweighs any public interest.

4.Misrepresentation of Participation:

The broadcaster claimed that the show followed a reconciliatory approach, but this is inaccurate.

Mr. Mabasa was ambushed and not given the opportunity for preparation or representation. The environment was hostile and confrontational, making it impossible for him to defend himself fairly.

Paragraph [7] states, "No parties left, which enforces the inference that they were consenting to participate." This participation was not the result of free will, but rather intimidation and the hostility of the environment. Furthermore, while Paragraph [9] claims the consent form issue falls outside the BCCSA's scope, it should not be ignored when considering the full context of the case. The absence of a valid consent form substantiates that Mr. Mabasa's participation was not voluntary.
5. Failure to Address Consequences:

Since the episode aired, Mr. Mabasa and his family have faced significant harm, including threats to their safety, defamation, and community ostracization. The adjudication failed to address the severity of these consequences and the long-term impact on the family's dignity, reputation, and livelihood.

We urge the BCCSA to review the dismissal of our complaint. The harm caused to our family is immense, and we seek justice for the violation of Mr. Mabasa's dignity, privacy, and safety."

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

"IN RE: JULIUS XIRINDZA // MOJA LOVE TV (PTY) LTD (IRO REATSOTELLA) LEAVE TO APPEAL)

Introduction and background:

1. We refer to the complaint lodged by Mr Nkosana Mabasa ("**Mr Mabasa**") on behalf of Mr Julius Xirindza Mabasas ("**Mr Mabasa Snr**") against Moja Love TV Channels (Pty) Ltd ("**the Channel**") with the BCCSA dated 30 May 2024.

2. We further refer to the decision rendered by the Commissioner in favour of the Channel, which effectively found that the Channel did not breach any provisions of the BCCSA Code.

3. These submissions are not intended to repeat the Channel's initial responses nor substitute same, but rather illustrate that no other tribunal could come to a different conclusion.

4. The appeal does not raise any new issues.

5. It is trite, the test in an application to leave to appeal is that, would another court/tribunal come to a different conclusion.

6. Based on the facts and having regard to the above test that is encapsulated in various judgments, the Channel submits as follows:

6.1.1. There was no breach of consent. Mr Mabasa as it is evident on the episode, is under no duress nor any suggestion can be made that he was participating unwillingly.

6.1.2. As it is evident in the episode, he embarks on an explanation regarding the issue the family is facing and offers, voluntarily an amicable solution to the issue and that he will ensure that the necessary traditional process is undertaken.

6.1.3. Insofar as it is alleged that there was bias presentation, this cannot be proved nor a case has been made by the Complainant. This aspect was dealt with extensively in the Channel's response to the Complaint and the Channel requests that those submissions thereto be incorporated herein.

6.1.4. In relation to the issues relating to reputation and privacy, this has been dealt with in the initial submissions and in the Commissioner's decision. The Channel thus submits that the decision is in a reasonable decision and no other decision maker could come to a different conclusion.

6.1.5. The episode has been removed on all platforms and the harm referred thereto has been mitigated and thus cannot be said to be continuing.

7. Finally, it is the Channel's view that the appeal has no prospects of success and thus should be dismissed.

Conclusion:

8. Having stated the above and contextualised episode including the finding by the Commissioner, it is the Channel's view that the BCCSA should dismiss the application for leave to appeal as no forum and/or tribunal will come to a different conclusion."

[7] **The Respondent's Heads of Arguments read as follows:**

"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 the adjudicator dismissed various complaints brought against the broadcast of two episodes of a reality show under the name and style of "Rea Tsotella" broadcast by the Second Respondent on its channel 157 Season 24 Episode 1 and 2 **("Show")**.

3. The Show is intended to educate, encourage a dialogue and illicit commentary amongst the South African public on issues and realities faced by people from various South African communities and backgrounds.

4. The adjudicator dismissed all complaints. However, in the decision of the leave for appeal, the commission found that there are reasonable prospects of success on 4 November 2024.

GROUND OF APPEAL

5. The only issue on appeal is whether the Broadcasts contravene clause 28.4 of the Code.

THE ISSUES IN THE APPEAL

6. The issues before this Tribunal, as identified above insofar as clause 28.4 is applicable in this matter, are the following:

6.1. Was there an infringement of privacy and/or dignity?;

6.2. Was there a nexus between the broadcast and the alleged impairment of such privacy and or dignity?;

6.3. The role and impact of the right to freedom of expression in this matter; and

6.4. The applicability of the clause 28.4 exception.

7. We answer these questions below in turn.

RIGHT TO PRIVACY AND DIGNITY

Introduction

8. The rights to privacy and dignity are fundamental human rights enshrined in the Constitution of the Republic of South Africa. These rights are essential for the protection of individuals' personal autonomy and self-worth. In this section, I explore the legal framework surrounding these rights, examine the alleged infringements of same within the context of the broadcast, and assess the interplay between privacy, dignity, and freedom of expression. Through this analysis, we demonstrate that the Broadcast does not violate these rights and, if it does, then such violations are justified under the law.

9. Section 14 of the Constitution, which guarantees the right to privacy, provide as follows:

"14. Privacy.-Everyone has the right to privacy, which includes the right not to have-

(a) their person or home searched;
(6) their property searched;
(c) their possessions seized; or
(4 the privacy of their communications infringed."

10. Section 10 of the Constitution of the Republic of South Africa ("the Constitution"), which guarantees the right to dignity, provide as follows:

"10. Human dignity.-Everyone has inherent dignity and the right to have their dignity respected and protected."

Causation – Does the broadcast cause the alleged infringement of privacy and dignity
Privacy

11. The essence of this defense is that the broadcast does not infringe upon anyone's privacy because, at the time of the recording, the allegations against Mr. Mabasa were already public knowledge, they were not a secret, and it is as a result of his own conduct of practicing what is essentially witchcraft that has caused the impairment of his dignity and not the broadcast. These views are expanded upon further below beginning with an analysis of the *Makau* decision.

12. The relatively recent decision of the Supreme Court of Appeal in *Smuts v Botha*[1] provides a useful guide to assessing the Complainant's case in the current matter. In that case cyclist came across a commercial farm and discovered animal traps with dead animals inside of them. The cyclists took pictures and published these pictures together with a Google location and pictures of the owner of the farm and his 6 month old daughter to the internet. Mr Botha brought an interdict against the publication of the pictures claiming that the cyclist violated his right to privacy.

13. The Supreme Court of Appeal dismissed Mr Botha's claims and in doing so, explained it's evaluation of Mr Botha's (the complainant) conduct:

> *"[19] The issue resolves itself thus, following the formulation of the right to privacy in Bernstein v Bester NO: can it be said that Mr Botha has the subjective expectation of privacy that society recognises as objectively reasonable? Objectively speaking, the answer is in the negative. Violations of privacy are fact-specific. The right to privacy must be approached from a people-centred perspective. It is abundantly clear, as correctly found by the High Court, that society cannot countenance the use of traps which expose the animals to cruelty and vile treatment. Doubtless Mr Botha considered that there were particulars of the posts that offended his expectation of privacy. But would society concur that his expectation is objectively reasonable? And, more particularly, do the posts reference the truly personal realm of Mr Botha's life, where the expectation of privacy is more likely to be considered reasonable?*
>
> *[20] Where does the personal information concerning Mr Botha lie on the continuum of private interests? In this case, the identity of Mr Botha and his farm are matters that he permitted to be placed in the public domain. So too are his practices of animal trapping; he openly admitted his use of animal traps. No effort was made by him to keep this information or his activities private. His discomfort that these practices formed the subject of Mr Smuts' critical posts did not render the information he had made public, now private. The commercial farming activities of Mr Botha and the practices used by him to carry out these activities carry a very modest expectation of privacy, from the perspective of what society would consider reasonable."* (emphasis added)

14. The Supreme Court of Appeal continued that *"[f]or the test of privacy to succeed, the facts must be excluded from the knowledge of outsiders; such information must be private and having been kept from outsiders by the individual concerned. The right to privacy is most simply the right of a person to be left alone, . . . to live without unwarranted interference by the public in matters with which the public is not necessarily concerned*."[2] [emphasis added]

15. It is evident from the broadcast that, prior to the airing of the broadcast, Mr Mabasa's practice in witchcraft was known by others. At the time of the recording of the episodes, Mr Mabasa publicly confirmed that he had practiced witchcraft for many years. It was

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[1] *Smuts and Another v Botha* 2022 (2) SA 425 (SCA).

[2] *Smuts and Another v Botha* 2022 (2) SA 425 (SCA).

therefore well known, before the broadcast, that Mr Mabasa practiced witchcraft. Therefore, the test for infringement of privacy has not been met under the circumstances.

16. Therefore, the broadcast merely mirrored the *status qou*, rather than creating it.

Dignity

17. In the case of *Delange v Costa*[3] the Appellate Division indubitably laid out the test for the impairment of dignity. The Court held that the test consists of two elements:

17.1 Firstly, the plaintiff's self-esteem must have been impaired (subjective test);

And

17.2 Secondly, whether a person of ordinary sensibility would have regarded the conduct as offensive (objective test). The objective test requires application of the reasonable person test.

18 Any allegation of the impairment of Mr Mabasa's dignity must fail on the first leg. Mr Mabasa could not have practised witchcraft for so many years, even to the extent of alienating his family, and then claim that subjectively, his self- esteem has been impaired by the broadcast. If anything, the converse is probably true, he felt some sought of power and superiority over other people for the super-natural powers he possessed and exercised over them. The broadcast could not have impaired his self-esteem, but instead, only accentuated the pride and power his practices bring, as evidence by his indifferent attitude during the broadcast.

19 On the second leg, a person of ordinary sensibility would regard witchcraft as reprehensible and would refrain from engaging in same. Mr Mabasa nonetheless engaged in that reprehensible conduct for many years, which only goes to show that his self-esteem could not have been impaired in terms of the first leg.

20 It is clear in this matter that any impairment of dignity suffered by Mr Mabasa in this matter, was not as a result of the broadcast, but rather as a result of Mr Mabasa choice to practice witchcraft. The broadcast merely reflected what was, a man engaged in undignified practices, the show did not create that indignity.

21 Therefore, if there was any infringement of Mr Mabasa's privacy or dignity, which I submit was not the case, then such infringement predates the broadcast and was as a direct result of Mr Mabasa's conduct.

22 To the extent that the Tribunal may find that the broadcast infringed the rights, then defences of public interest and consent apply.

Public interest

23 For the media, the primary defense against an invasion of privacy claim is the truth for the public benefit or public interest. Since the publication of private facts typically involves truthful information, the defense often hinges on whether the disclosure serves the public benefit or interest.

[3] 1989 (2) SA 857 A

24 The justification for public interest can arise either because the private facts pertain to a public figure or because their disclosure is deemed beneficial or necessary for the public.

Consent

25 An individual may consent to the disclosure of private facts either explicitly or implicitly. Implied consent can occur, for instance, when a person is photographed at a public event.

26 The adjudicator erred in refusing to consider the issue of consent. Whilst he is correct that he could not go outside of the broadcast, the broadcast is clear that Mr Mabasa had given his consent. He publicly admitted, knowing he was being recorded, that he practices witchcraft. No reasonable viewer of the episodes could come a different conclusion other than that Mr Mabasa gave his consent to being recorded and for that recording to be broadcast.

27 In any event, the rights to privacy and dignity must be balanced against other rights, particularly the right to freedom of expression.

BALANCING OF RIGHTS - RIGHT TO FREEDOM OF EXPRESSION

28 Any analysis of media law in South Africa must take due regard of Section 16 of the Constitution of the Republic of South Africa, 1996. The section reads as follows:
(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;
(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to –
(a) propaganda for war;
(b) incitement of imminent violence;
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

29 Mr Mabasa's rights to privacy and dignity must be balanced against the rights to freedom of expression as held by i) Ms Masango, ii) Mr Mabasa, iii) the broadcaster, and iv) the public.

30 Ms Masango had the right to blow the whistle on witchcraft.

31 Mr Mabasa had the right to confirm the allegations against him, as he did.

32 The broadcaster's right to broadcast the interaction between Ms Masango and Mr Mabasa is enshrined in section 16(1)(a)(b).

33 The public's right to be informed is protected in section 16(1)(b).

34 The interplay between these rights is discussed below.

35 It was true, reasonable and comment on the issue of witchcraft as perpetrated by Mr. Mabasa. There can therefore be no reason to trample over the Show's right to broadcast the episodes.

36 It cannot be that because the broadcast exposes the practice of witchcraft, and that practice brings shame and an impairment of dignity, making it in the interest of the perpetrator to keep it

secret, then the broadcast amounts to a violation of privacy and dignity as envisioned in clause 28.4.

37 Insofar as Ms Masango and Mr Mabasa rights to express themselves on the broadcast, the Constitutional Court has confirmed that the protection in South African society of all kinds of speech, from hard-hitting investigative exposés uncovering corruption, to celebrity gossip, pornography and advertising.[4] The Court held:

> "*Whether expression lies at the right's core or margins, be it of renown or notoriety, however essential or inconsequential it may be to democracy, the right cognises an elemental truth that it is human to communicate, and to that fact the law's support is o wed ".*[5] [Emphasis added]

38 Indeed it is human to communicate. Why should people be prohibited from discussing issues that impact their communities, such as witchcraft, because it might hurt the perpetrator's dignity? That is bordering on the absurd. If the perpetrator does not wish to be discussed in a bad light, then it is simple, they must refrain from involving themselves in conduct that naturally brings shame, and if they do, they can have no right to privacy because the community's freedom of expression will trump that right.

39 That point is made by the SCA in the *Botha*[6]case above. The right to freedom of expression trumps the rights of those engaged in nefarious activities.

40 The nefarious nature of witchcraft evokes the public's right to receive a free flow of information on issues of public interest. In ***South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others***[7]**,** the court held that:

> *"This case, then, is not essentially about the rights of the SABC. Rather it concerns the right of South Africans to know and understand the manner in which one of the three arms of government functions, namely, the judiciary."*[8]

41 In other words, the public has a right to know in matters of public interest. The Appellant in his papers admits the importance of the issue of witchcraft in South Africa. It is beyond question that this matter concerns an issue of public importance that the public has a right to know about.

42 Further, in order to further contextualise this right within Code, it is worth quoting at length from the judgement of *Khumalo and Others v Holomisa*[9] 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*

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[4] in *Print Media South Africa and Another v Minister of Home Affairs* 2012 (12) BCLR 1346 (CC).
[5] Ibid at para 53.
[6] Footnote 1 above.
[7] 2007 (2) BCLR 167 (CC).
[8] Ibid at paras 28–29.
[9] 2002 (8) BCLR 771
(CC) ("***Holomisa"***) at paras 22–24.

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]

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

44 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*,[10] that freedom of expression extends to information or ideas 'that offend, shock or disturb . . . Such are the demands of . . . pluralism, tolerance and broadmindedness'.[11]

45 More recently, in *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies*[12] 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 . ...'[13]

46 Therefore, that some people, particularly those within Mr Mabasa's family, may be offended, shocked or disturbed by the broadcast of Mr Mabasa conduct, that does not present a stumbling block for the broadcast.

47 In the circumstances, the broadcast does not offend against the Code since there was no infringement of the rights to privacy or the right to dignity. Even if there was such infringement, then it was justified given that there was consent, and the broadcast was of issues of public interest and was justifiable under the right to freedom of expression. Accordingly, if it found that there a contravention of privacy or dignity, such contravention is protected by the exception in terms of clause 28.4.

MITIGATING FACTORS

48 Should the Tribunal find against the broadcaster, we respectfully submit the following mitigating factors for consideration:

48.1 The information regarding Mr. Mabasa's practice of witchcraft was already in the public domain prior to the broadcast. This significantly reduces the impact of the broadcast on his privacy and dignity, as the broadcast did not reveal any new or previously unknown information.

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[10] (1976) 1 EHRR 737 754.
[11] Confirmed by the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC) at para 26.
[12] [2019] 1 All SA 608 (SCA), 2019 (2) SA 194 (SCA)
[13] *Ibid.*

48.2 Mr. Mabasa implicitly consented to the recording and broadcast by publicly admitting his practices during the recording, knowing he was being filmed. This consent should mitigate any perceived infringement of his rights.

48.3 The broadcast serves a significant public interest by informing the community about practices that are of concern to them. The public has a right to be informed about such matters, and the media has a duty to report on issues that affect the community.

48.4 The right to freedom of expression, as enshrined in Section 16 of the Constitution, is a fundamental right that must be balanced against the rights to privacy and dignity. The broadcast falls within the scope of protected speech, aimed at informing the public and fostering open discussion on important societal issues.

48.5 The broadcast was not made with any malicious intent to harm Mr. Mabasa. The purpose was to inform the public about a matter of public interest, not to defame or unduly harm Mr. Mabasa's reputation.

48.6 The broadcast provided a balanced view by including Mr. Mabasa's own admissions and perspectives. This context is crucial in understanding the nature of the broadcast and its intent to inform rather than to sensationalize.

48.7 The broadcast has educational value, raising awareness about the practice of witchcraft and its implications. This can lead to informed public discourse and potentially beneficial societal outcomes.

48.8 The legal framework and precedents, such as the decisions in Smuts v Botha and Delange v Costa, support the view that the broadcast did not infringe upon Mr. Mabasa's rights in a manner that would warrant significant penalties.

49 We respectfully request that these mitigating factors be taken into account in the Tribunal's deliberations and any potential sanctions be proportionate to the circumstances of the case.

CONCLUSION

50 In conclusion, the primary issue on appeal is whether the broadcasts contravene clause 28.4 of the Code. The Tribunal must consider whether there was an infringement of privacy and/or dignity, the connection between the broadcast and any alleged impairment, the role of freedom of expression, and the applicability of the clause 28.4 exception.

51 Our analysis demonstrates that the broadcast did not infringe upon Mr. Mabasa's privacy or dignity. The information regarding Mr. Mabasa's practice of witchcraft was already public knowledge prior to the broadcast, and his own actions contributed to any perceived impairment of dignity. Furthermore, the broadcast merely reflected the existing situation rather than creating it.

52 Even if there were any infringement, it would be justified under the law due to the public interest and Mr. Mabasa's implied consent. The right to freedom of expression, as guaranteed by Section 16 of the Constitution, must be balanced against the rights to privacy and dignity. In this case, the broadcast serves the public interest by informing the community about matters of public interest.

53 The media plays a crucial role in upholding freedom of expression and ensuring that the public is informed about issues of public interest. This includes the right to report on matters that may be offensive or disturbing, as long as they serve the public interest. The courts have

consistently upheld the importance of freedom of expression, even when the information disclosed may be controversial or hurtful.

54 Therefore, I submit that the broadcasts do not violate clause 28.4 of the Code, and any alleged infringements are either non-existent or legally justified. The public's right to be informed and the media's role in facilitating this right must be upheld."

EVALUATION

[8] The respondent describes the nature of the impugned show and the purpose thereof as

> The Show is an intervention Show and has been over the years assisted South Africans to obtain justice and/or reconcile in various disputes that are often referred to it. The Show has a seasoned Presenter and a research team of high calibre and standards.
>
> The Show has its core a reconciliatory approach and further ensures that persons who are usually approached for their side of the story, are given a fair chance to respond including dispute any facts that may be presented against them.

[9] The respondent also spells out the procedure followed in producing the Show. Once the decision is made that the issue should be addressed on the show, the following preparation is done:

> The first stage of intervening and considering any matter that the Show receives is to conduct an interview with the person who wrote into the Show in order to get an in- depth understanding of the issue. During this first stage, various considerations take place such as:
>
> > analysis is conducted including whether there are any supporting documents;
> >
> > whether any alternative dispute mechanisms where explored and what outcomes if any were achieved; and
> >
> > whether the issue can be referred elsewhere or rather falls within the ambit of the Show's scope and reach.
>
> The next phase following the above understanding is to obtain and hear the other side of the story, in this case, Mr Mabaso Snr. In this stage, the further considerations are explored:
>
> Visiting the alleged person whom a complaint has been lodged against and informing him/her that someone has written into the Show and the nature of their Complaint. At the heart of this is that the fact that the Presenter and Crew firstly and foremost introduce themselves and indicate where they are from.

[10] These processes are obviously aimed at a just deliberation and a fair outcome. It can be accepted that the “injured” party who approaches the respondent for assistance is aware that for the issue to be addressed, aspects of his/her private life will become public during the broadcast. However, the “wrongdoer”, is not necessarily aware of the extent to which his/her privacy or dignity may be infringed when he/she is without warning, confronted by the presenter and the crew and told that there is a complaint lodged against him/her. It can be accepted that the initial reaction of a person if confronted would be to defend him/herself against the allegations and consequently to agree to participate in the Show. However, in this instance, the complainant withdrew his consent afterwards because he was not satisfied with the manner in which the Show was conducted. The BCCSA has stated on numerous occasions that the legality of consent given for the filming of the programme or the retraction thereof before it is broadcast, falls outside its remit and must be taken up with the broadcaster.

[11] The task of the BCCSA in complaints where an impairment of dignity is alleged, is to determine whether the broadcaster complied with the provisions of Clause 28.4. In other words, whether the broadcaster exercised exceptional care and consideration in matters involving the private lives, private concerns and dignity of parties insofar as comments and news are concerned. It is important to note that this duty applies to all parties participating in the impugned Show.

[12] The conduct of the complainant after having been confronted by the presenter and crew, supports an inference that he did not have concerns about the invasion of his privacy. He did not indicate at any stage that he no longer wanted to participate in the discussion and also did not leave during the various interactions with his “accuser” and the other parties.

[13] The question is whether the respondent exercised exceptional care and consideration in so far as the complainant’s dignity is concerned. In an article published in 2016, **The core meaning of human dignity. *Potchefstroom***

***Electronic Law Journal (PELJ)*, *19*(1), 1-32**[14], Rinie Steinmann interrogates the meaning of dignity. She refers to the philosopher Schachter whose views are summarised as "respect for the intrinsic worth of a person requires that the person is entitled to have his or her own beliefs, attitudes, ideas and feelings". This view is shared by Justice Chaskalson who stated in **Human Dignity** that in a broad and general sense, respect for dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner. Kant's claim that human beings should never be used as a means to achieve an end is underpinned by his view that everyone has equal human dignity which has to be recognised and protected in a legal context.

[14] The question as to whether a person's dignity has been impaired comprises an objective and a subjective element. In *De Lange v Costa*[15] *the* Appellate Division authoritatively laid down the general test for determining dignity. In terms of the subjective test, the plaintiff's self-esteem must have been actually impaired and secondly, a person of ordinary sensibilities would have regarded the conduct as offensive. It is therefore possible to find that a person of ordinary sensibilities may have regarded the comments as offensive, but because of the personal nature of dignity, the complainant must connect this to his personal experiences. It is generally accepted that an individual's self-respect is intimately connected with his particular station in life and his moral values.[16]

[15] The complainant chose not to attend the Tribunal hearing and asked his son to attend on his behalf. While complainants may be represented by third parties in terms of the Procedure, the nature of the complaint, namely the impairment of dignity, implies a personal experience that can only be described by the person alleging the impairment. Members of the Tribunal do not know which specific

[14] Steinmann, Rinie. (2016). The core meaning of human dignity. *Potchefstroom Electronic Law Journal (PELJ)*, *19*(1), 1-32. https://doi.org/10.17159/1727-3781/2016/v19i0a1244
[15] 1989 (2) SA 857 (A) at 862.
[16] Snyman, CR Criminal law (2002) 467.

aspects of the show had offended the complainant and the objective test to determine the impairment of dignity requires an evaluation by the Tribunal of the impugned statements within the context of the broadcast. Furthermore, the personal nature of dignity requires the person to state why his self-esteem has been impaired. There is no onus on the complainant to attend a Tribunal hearing in terms of the procedure, but as a result of his decision not to attend, the Tribunal had no way of knowing which allegations offended the complainant's dignity. The Tribunal can only decide within the context of the broadcast whether the broadcaster exercised exceptional care towards the complainant's dignity if the complainant identifies the utterances that he alleges impaired his self-esteem.

[16] We are unable to evaluate whether a person with ordinary sensibilities will be offended by the programme as we do not know which aspects of the Show or which statements or allegations the complainant experienced as an impairment of his dignity. In the absence of any submissions by the complainant to clarify the statements, utterances or allegations that had impaired his dignity, the Tribunal cannot make a finding that any person of normal sensibilities would have been offended, let alone the complainant.

[17] No contravention of clause 28.4 of the Code for Subscription licensees is found.

DR SUNETTE LÖTTER
CHAIRPERSON: BROADCASTING COMPLAINTS COMMISSION

COMMISSIONERS ADV B THLAKUNG AND DR L VENTER CONCURRED WITH THE JUDGMENT.