CASE NUMBER: 02/2025

TRIBUNAL DATE: 6 MARCH 2025
JUDGMENT RELEASE DATE: 15 MAY 2025

THE BUTTERFLY HAVEN (PTY) LTD **1ST APPLICANT**

UBERRIMA PHOENIX (PTY) LTD,
T/A UBERIMMA PHOENIX TRUST MANAGEMENT **2ND APPLICANT**

VS

E.TV **RESPONDENT**

BCCSA TRIBUNAL: **DR SUNETTE LÖTTER**
MR RICHARD CHEMALY
MR EDWIN NAIDU

FOR THE APPELLANT: ADV BEN WINKS INSTRUCTED BY WEBBER WENTZEL.

FOR THE RESPONDENT: ADV ADRIAN FRIEDMAN INSTRUCTED BY ROSENGARTEN & FEINBERG.

Clause 28.3.1- Applicants were given a right to respond within a reasonable time. The appeal is dismissed. The Butterfly Haven (Pty) Ltd and Another vs e.tv, Case 02/2025 (BCCSA).

SUMMARY

The applicants were given leave to appeal the Adjudicator's decision that the respondent did not contravene Clause 28.3.1 of the Code for Subscription licensees. It was accepted that the first episode of the program Medical Negligence: The New RAF lacked balance as it did not include opposing views. To address this, the respondent offered the applicants a right to reply in the second episode, but the applicants declined, opting to answer written questions instead. Despite an extension, the applicants did not meet the deadline for their response to be included in the second episode. Their response was eventually broadcast in the third episode, which the applicants argued was not within a reasonable time. The Tribunal found that the applicants were given a right to respond within a reasonable time and should have been able to meet the

deadline, given their awareness of the allegations and access to necessary information. The appeal is dismissed.

JUDGMENT

S LÖTTER

[1] This is an appeal in terms of Rule 3.14 of the Procedures against the adjudicator's finding in Adjudication No 32/A/2024. The adjudicator found no contravention of Clauses 28.1, 28.2 and 28.3.1 of the Subscription Code for licensees.

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

"**COMPLAINT IN RESPECT OF TELEVISION BROADCASTS BY THE RESPONDENTS ON 26 MAY 2024, 2 JUNE 2024 AND 9 JUNE 2024**

THE PARTIES

1. The first complainant is The Butterfly Haven (Pty) Limited, a company duly incorporated and registered in terms of the company laws of South Africa with registration number 2015/191624/07, and situated at 420 Stallion Road, Ruimsig, Roodepoort, Gauteng. (**"Butterfly Haven**").

2. The second complainant is Uberrima Phoenix (Pty) Ltd t/a Uberimma Phoenix Management Trust with registration number 2005/022275/07, a company duly incorporated and registered in terms of the company laws of South Africa, situated at 420B Stallion Road, Ruimsig, Roodepoort, Gauteng ("**Uptrust**").

3. The first respondent is eTV (Pty) Ltd, the broadcaster of the e.TV, a South African free-to-air television channel which broadcasts across South Africa, situated at 4 Albury road, Dunkeld West, 2196 ("**e.TV**").

4. The second respondent is e.Sat TV (Pty) Ltd, the broadcaster of eNCA, a South African 24-hour digital satellite television news channel which broadcasts across South Africa on DStv, Channel 403, situated at 4 Albury road, Dunkeld West, 2196. ("**eNCA**").

BACKGROUND AND CONTEXT

5. Butterfly Haven operates a respite facility which seeks to assist indigent parents/guardians in caring for mentally and physically disabled children.

6. In early 2020, Bayanda Mbongwe ("**Bayanda**") moved into the first complainant's facility following successful damages claim for medical negligence and personal injury brought on his behalf against the Gauteng Department of Health by Edeling van Niekerk Incorporated ("**EVN**"). Pursuant to the successful claim, the Gauteng High Court ordered EVN to establish a trust for the benefit of Bayanda. As per the court order, EVN formed a trust through the

second complainant in terms of which the damages awarded to Bayanda would be managed to cover his medical expenses. Bayanda remained in the first complainant's facility for approximately four years until his passing on 23 March 2024 at Sunninghill Hospital.

7. On 21 May 2024, Ms Nkepile Mabuse, the presenter of Checkpoint", an investigative programme broadcast by the respondents, telephonically contacted Mr Dirk Du Plessis ("**Mr Du Plessis**") in his capacity as Director of the first complainant requesting an on-camera interview concerning allegations of unethical conduct in relation to the funds held in trust on behalf of Bayanda. Following Mr. Du Plessis's request for her to submit her query in writing, she sent an email later that day. A copy of this email is annexed marked "**A**".

8. In his response dated 24 May 2024, a copy of which is annexed marked "**B**", Mr Du Plessis acknowledged Ms Mabuse's request for an interview and reiterated that she ought rather to pose her questions to him in writing to allow him a fair opportunity to respond. Even so, Mr Du Plessis briefly responded to Ms Mabuse's questions concerning Bayanda's trust money and Ms Mabuse's email of 23 May which referenced allegations against Butterfly Haven.

9. On 24 May 2024, Ms Mabuse, in responding to the above, sent an email to Mr Du Plessis setting out questions covering a range of topics including *inter alia*:

   9.1 the nature of the relationship between the complainants and EVN;

   9.2 the extent to which Bayanda's mother, Khanyisile Mbongwe was allowed appropriate visitation with him during his stay at Butterfly Haven;

   9.3 the extent to which Ms Mbongwe was notified of his movements to and from the hospital during his stay at Butterfly Haven;

   9.4 allegations concerning the deterioration of Bayanda's state of health during this stay at Butterfly Haven; and

   9.5 an alleged conflict of interest emanating from Mr Du Plessis's dual Directorship of the complainants.

10. A copy of these questions is annexed marked "**C**".

11. Mr Du Plessis provided responses to Ms Mabuse's questions both in an email and in a letter dated 30 May 2024. Copies of this correspondence are annexed marked "**D**" and "**E**" respectively.

12. On May 26 May, 2 June and 9 June 2024, the respondents aired three linked segments of the programme "Checkpoint" on e.TV relating to the Complainants. (the "**offending broadcasts**"). The three segments also aired in the same order on eNCA on 5 June and 12 June 2024. The three segments were thereafter made available online. The following BCCSA Codes of conduct are thus applicable herein:

    12.1 The Code of Conduct for Subscription Licensees;

    12.2 The Code of Conduct for Free-to-air Licensees; and

    12.3 The Code of Conduct for Online Content Services for Licensed Broadcasters.

13. The offending broadcasts, presented by Ms Mabuse, contained allegations that the complainants are involved in unethical conduct, namely the mismanagement of trust funds generally and in relation to Bayanda's trust as well as the improper use of their respite facility in relation to Bayanda and other children alike.

14. The offending broadcasts were titled as follows:

    14.1 Medical Negligence, the new RAF – The trustees

    14.2 Medical Negligence, the new RAF – The care home ; and

    14.3 Medical Negligence, the new RAF – The lawyers.

PROVISIONS OF THE BCCSA CODES OF CONDUCT RELEVANT TO THIS COMPLAINT

15. Clause 28 of the Subscription Code of Conduct, relevant to controversial issues of public interest, *inter alia,* provides that:

    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.

16. This is underpinned by clause 13 of the BCCSA's Free-to-air code, which provides as follows:
    13 Controversial Issues of Public Importance –

    13(1) In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.

    13(2) A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given the right to reply to such criticism on the same programme. If this is impracticable, reasonable opportunity to respond to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned

17. The applicable provision of the Online Code in this regard is clause 11 which reads as follows:

    11. Controversial Issues of Public Importance

11.1. In making available Online Content in which a controversial issue of public importance is discussed, a Signatory must make reasonable efforts to fairly present opposing points of view either in the same Online Content or in other, related Online Content.

11.2. A person whose views are to be criticised in Online Content concerning a controversial issue of public importance must be given the right to reply to such criticism in the same or in related Online Content.

18. Of further relevance is clause 28.2 of the Subscription Code, clauses 12(1) and 12(2) of the Free-to-air code and clause 10.1 of the Online Code which set out the following respectively:

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.

12 Comment –

12(1) Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance.

12(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.

10.Comment

10.1. In making available comment on and criticism of any actions or events of public importance in their Online Content, a Signatory must make reasonable efforts to ensure that comment must be an honest expression of opinion and 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.

THE COMPLAINT

19. The offending broadcasts created a narrative that the complainants are engaged in a scheme of unethical and potentially unlawful conduct involving the maltreatment of residents in the first complainant's respite facility and the abuse of trust funds held on residents' behalf. The offending broadcasts also created the impression that Mr Du Plessis' dual directorship of the complainants is linked to their alleged malfeasance. Transcripts of the first two segments of the offending broadcasts are annexed marked as "**F**".

20. The following contents of the offending broadcasts contravened the Codes:

20.1 **Allegations that Bayanda's condition had deteriorated under the care of the first complainant, as implied by his excessive sleeping:**

***Ms Mabuse**: " So tell me what condition your child is in there at Butterfly Haven because my understanding is that he's on oxygen, he's really not active or anything like that"*

***Ms Mbongwe**: "When he went to butterfly, he was not on oxygen. When I left him there, he could breathe on his own. He was a child who smiled a lot now he's on oxygen he's always sleeping, it's as though the medication he's given makes him sleepy"*

***Ms Mabuse**: " Checkpoint went undercover to verify this for ourselves. We indeed found Bayanda sleeping, attached to drips. The PEG that landed Bayanda at Butterfly in the first place was still intact and a nurse arrived to attach his food to it"*

***Ms Mabuse:** "So, he doesn't eat vegetables or anything?"*
***Nurse:** "No, only milk. Till the afternoon, between 12:00 and 4:00 PM. Then there's an hour gap when I clean and drain the PEG. Now I've connected his feeding tube, thereafter I will connect the tube for acids"*

20.1.1 The respondents elected not to air the Mr Du Plessis's written responses to these allegations despite their having had them in their possession almost 3 days ahead of this segment airing.

20.1.2 The respondents' portrayal of Bayanda's allegedly poor health contained inquiries only about his diet and did not address any of the serious concerns related to his medication or use of supplemental oxygen.

20.1.3 Certain of the complainants' responses in this regard were shown at the end of the third episode's broadcast. This does not, however, satisfy the provisions of the Code, which require that a right of reply be given in the same programme unless it is "*impracticable*" – which it clearly was not.

20.1.4 Given that the respondents received the complainants' responses before the second episode's broadcast, there do not appear to be any circumstances justifying the exclusion of the complainants' responses from the same programme.

20.1.5 In these circumstances, the offending broadcasts presented a controversial issue of public importance, failed to 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 timeslot, as envisaged in clauses 28.3 and 13(1)-(2) of the Subscription and Free-to-air Codes respectively.

20.1.6 Furthermore, the offending broadcasts failed to give a right to reply to the persons whose views were criticised on the controversial issue of public importance.

20.1.7 The offending broadcasts therefore violate clauses 28.3.1 and 28.3.2 of the BCCSA Subscription Code, read with clauses 13(1) and (2) of the Free to Air Code and clauses 11.1 and 11.2 of the Online Code.

20.2 **The allegation that Bayanda's mother, Khanyisile Mbongwe was not informed of many of Bayanda's hospital visits and treatments**:

***Ms Mabuse**: " Bayanda was in and out of hospital a lot?"*
***Ms Mbongwe**: "Yes, some of those visits I knew nothing about"*
***Ms Mabuse**: "So they did not tell you at all?"*
***Ms Mbongwe:** "No I had no clue about some"*

20.2.1 The respondents failed to broadcast the complainants' response in respect of this allegation despite having had the complainants' written response thereto in their possession almost 3 days ahead of the segment airing.

20.2.2 Certain of the complainants' responses in this regard were shown at the end of the *third* episode's broadcast. This does not, however, satisfy the provisions of the Code, which require that a right of reply be given in the same programme unless it is "*impracticable*" Given that the respondents received the complainants' responses before the second episode's broadcast, there are no circumstances justifying the exclusion of the complainants' responses from the same programme.

20.2.3 In these circumstances, the offending broadcasts presented a controversial issue of public importance, failed to 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 timeslot, as envisaged in clauses 28.3 and 13(1)-(2) of the Subscription and Free-to-air Codes respectively.

20.2.4 Furthermore, the offending broadcasts failed to give a right to reply to the persons whose views were criticised on the controversial issue of public importance.

20.2.5 The offending broadcasts therefore contravene clauses 28.3.1 and 28.3.2 of the BCCSA Subscription Code, read with clauses 13(1) and 13(2) of the Free to Air Code and clauses 11.1 and 11.2 of the Online BCCSA Code.

20.3 **The allegation that there is a conflict of interest or an otherwise improper relationship between the Complainant's and EVN**:

Ms Mabuse: "*One of our questions related to his conflict of interest as director of Butterfly Haven and also director of the Company appointed to manage the trust. So tight is the relationship between Butterfly Haven and Uberimma that the offices are on the same premises and so tight is the relationship between Butterfly Haven and EVN, the law firm says it was not paying butterfly haven in the four years Bayanda was resident there"*

Ms Mabuse*: "Louw Kruger (of EVN) told is that he is not aware that Dirk Du Plessis and his wife Penelope were directors at Butterfly haven"*

In an interview with the director of the Legal Practice Council, Mr Briel, Ms Mabuse poses her query to him regarding the issue of conflict of interest to which he responds:

Mr Briel: *"My initial feeling is that this could certainly be a conflict of interest. As a trustee of a trust for children like this, you should not have anything that could conflict you. Naturally, if you are also the person receiving the money, it creates a very serious concern".*

20.3.1 The respondents failed to broadcast the complainants right of reply in respect of this allegation despite having had the complainants' written response

thereto in their possession almost 3 days ahead of the broadcast. The respondents added further persuasive value to their uncontroverted views by seeking confirmation thereof from external legal authorities such as the ombudsman and director of the Legal Practice Council.

20.3.2 Certain of the complainants' responses in this regard were shown at the end of the third episode's broadcast. This does not, however, satisfy the provisions of the Code, which require that a right of reply be given in the same programme unless it is "*impracticable*" Given that the respondents received the complainants' responses before the second episode's broadcast, there are no circumstances justifying the exclusion of the complainants' responses from the same programme.

20.3.3 In these circumstances, the offending broadcasts presented a controversial issue of public importance, failed to 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 timeslot, as envisaged in clauses 28.3 and 13(1)-(2) of the Subscription and Free-to-air Codes respectively.

20.3.4 Furthermore, the offending broadcasts failed to give a right to reply to the persons whose views were criticised on the controversial issue of public importance.

20.3.5 The offending broadcasts therefore contravened clauses 28.3.1 and 28.3.2 of the BCCSA Subscription Code, read with clauses 13(1) and 13(2) of the Free to Air Code and clauses 11.1 and 11.2 of the Online BCCSA Code.

20.4 **The allegation that Mr Du Plessis, despite being afforded the opportunity to respond ahead of the airing of the broadcasts, had failed to do so:**

Ms Mabuse:" *A few days later we requested confirmation from both for an on-air interview. Erica responded via email stating:*

"Please note Dirk will be dealing with the matter as per your email 22nd May 2024@ 12:01…"

In his reply Dirk said he never made himself available for an on-camera interview and referred us to Louw Kruger's letter dated 21 May 2024 and requested written questions which we provided, and he never answered"

Ms Mabuse: *"Checkpoint reached out to Karen, the case manager for both Thuliswa and Phetani who responded 5 days later stating that the sole focus of the trustees is on ensuring the well-being and care of the beneficiary of the trust and maintaining confidentiality. Dirk Du Plessis of Uberimma Phoenix kept ignoring our written questions"*

20.4.1 During the last 2 minutes of episode 3, Checkpoint shows Mr Du Plessis' letter dated 30 May and states that "after ignoring" the questions we posed to him, Mr Du Plessis provided a response. Checkpoint proceeds to air the responses from Mr Du Plessis related to the allegations regarding Bayanda's sleeping patterns and the information shared with Ms Mbongwe.

20.4.2 Clause 28.3.2 of the Subscription Code along with clauses 13(1) and 13(2) of the Free-to-air Code, as quoted above, state that a right of reply may be included in a later programme only if it is "*impracticable*" to do so in the same programme. Seeing that the respondents had received Mr Du Plessis's responses before the second episode's broadcast, they were obliged under the code to include them.

20.4.3 In addition to the unbalanced broadcast of the allegations above, we note that the respondents also stated that its second request for responses from Mr Du Plessis was "ignored". While we note that Mr Du Plessis's responses were provided after the deadline set by the respondents (sent on 30 May at 20h09 following the 10h00 deadline), the responses were nonetheless received by the respondents almost 3 days ahead of the broadcast of the second episode. It cannot therefore be regarded as reasonable that these responses were not acknowledged despite being sent well in advance of the broadcast.

20.4.4 Further, the repeated allegations that the complainants simply ignored the respondents' questions is factually incorrect, as evidenced by the respondents' own footage in segment three and the confirmation therein that a written response was indeed provided on 30 May 2024. This misrepresentation of fact gives viewers the impression that the complainants were non-compliant and potentially obstructive in respect of an issue of public importance, when in fact there has been consistent engagement between the respondents and complainants and comprehensive written responses were furnished timeously by the complainants. These assertions do not amount to honest expression and are not representative of the facts.

20.4.5 In these circumstances, the offending broadcasts presented comment which was not made on facts truly stated as envisaged in clauses 28.2, 12 and 10.1 of the Subscription, Free-to air and Online Codes respectively.

20.4.6 The offending broadcast presented a controversial issue of public importance, failed to 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 timeslot, as envisaged in clauses 28.3 and 13(1)-(2) of the Subscription and Free-to-air Codes respectively.

20.4.7 Furthermore, the offending broadcasts failed to give a right to reply to the criticism of the persons whose views were criticised on the controversial issue of public importance.

20.4.8 The offending broadcasts therefore contravened clauses 28.2.1, 28.2.2, 28.3.1 and 28.3.2 of the BCCSA Subscription Code, read with clauses 12(1), 12(2), 13(1) and 13(2) of the Free to Air Code and clauses 10.1, 11.1 and 11.2 of the Online Code.

20.5 **Allegations that Butterfly Haven engaged in maltreatment and unethical conduct in relation to two further cases in addition to Bayanda's:**

20.5.1 During the course of the second segment, Ms Mabuse interviewed Ms. Phetani Gama and Ms. Thuliswa Mbedla who each had their children placed in Butterfly Haven by an independent case manager at different times. Both women were represented by Rene Fouche Incorporated in

relation to their respective medical negligence claims against the Gauteng Department of Health. Neither of the complainants were involved in the decision to place the children of Ms Gama and Ms Mbedla into the care of Butterfly Haven and neither was the trust money managed by UpTrust. The recommendation to the care facility was initiated by the children's independent case manager.

20.5.2 At 14 minutes and 57 seconds, the offending broadcast mentions that Ms. Gama and Ms. Mbedla were told, "the mothers were informed that they no longer qualify for a house because it was meant for their children's benefit, and now that their children have a home (Butterfly Haven), they do not need a house." This statement was accompanied by aerial footage of Butterfly Haven's premises.

20.5.3 At 15 minutes and 34 seconds, while showing the same aerial footage of the care home and its premises, Ms Mabuse asked Ms Mbedla if she was ever given a choice regarding her son's placement into Butterfly Haven. Ms Mbedla responded that Butterfly Haven was the only option provided to her. Ms Gama went on, further to state "*my understanding is that he would stay there until he recovers and then they would give him back to me so I can stay with him but they never returned my child…"*

20.5.4 At 16 minutes and 36 seconds, while showing internal footage of the care home, the respondents state that Ms Mbongwe had a similar experience to Ms. Gama regarding the return of her child and that her son died away from her at Butterfly Haven.

20.5.5 At the 17 minute and 19 seconds Checkpoint shows Ms Mbedla stating, "*I asked for my child in December to take with me to the Eastern Cape and they first said that they would give me a car because public transport was not safe for him. Then later they went back on this and did not give me a car*"

20.5.6 At 17 minutes and 30 seconds, Ms Gama, states that she is only permitted to visit her son once a month which is not enough for her. She proceeds to say that all she wants is for it to be the way they had promised and that they would buy a house for all to live together. This is shown alongside imagery of the front steps of the care facility.

20.5.7 Following at the 18 minute and 58 mark, Ms Mbedla states "*when the money is released, everything changes*".

20.5.8 Continuing on from here at 19 mins and 10 seconds, Ms. Gama stated that all she wanted was to live with her child, to bond with him, and for him to know his siblings. She expressed her concerns, saying, *"this is not allowed to happen, so I do not know whether my child has been taken forever."* This statement was accompanied by aerial imagery of the home again.

20.5.9 At 21 minute and 41 second Checkpoint poses a question to Ms Mbedla querying whether her child recognises her anymore and airs footage of the street view of Butterfly haven once more.

20.5.10 The use of the images misconstrues the relationship between the Ms Gama, Ms. Mbedla, Butterfly Haven and Rene Fouche Incorporated, suggesting that somehow Butterfly Haven was implicated in Rene Fouche's alleged unfulfilled promises and alleged mishandling of trust money;

20.5.11 Another link is suggested between the placement of Ms Gama and Ms. Mbedla's children at the care facility and Bayanda's placement in the same facility, implying that Butterfly Haven may be involved in widespread collusion in accommodating patients born from medical negligence claims in a single facility for financial gain; and

20.5.12 That Butterfly Haven appears to unilaterally deny access to Ms Gama and Ms. Mbedla's children, potentially drawing parallels between their situation and that of Ms Mbongwe's and suggesting a pattern of unethical behaviour on the part of Butterfly Haven.

20.5.13 While we note that Mr Du Plessis was made aware of the intended interviews with Ms Gama and Ms Mbedla by the respondents, this was only communicated in an email dated 28 May 2024, leaving Mr Du Plessis with very little meaningful time to address these further allegations. Notwithstanding this, Mr Du Plessis responded to these in his letter of 30 May, annexed marked as **"D**".

20.5.14 In amplification of the above, we note that Mr. Du Plessis has never met with either Ms. Phetani or Ms. Gama, nor has he received independent complaints from them or the children's case manager.

20.5.15 In Mr Du Plessis' letter of 30 May, he confirmed that Ms Gama's son was placed into the respite facility by his own case manager who was appointed independently by the trustees of his trust. Moreover, Mr Du Plessis confirmed that despite Ms Gama's assertions to the contrary, she had never directed correspondence to him regarding any concerns about her son's well-being.

20.5.16 Mr Du Plessis further stated that Ms Mbedla has never been restricted from access to her child and that she has always been entitled to remove him from the respite facility, provided this was signed off and approved by her son's physicians, personnel independent of the respite facility.

20.5.17 It is prudent to point out that Ms Mabuse, despite airing Mr Du Plessis' letter of 30 May in the last part of the third segment, not only failed to show his responses contained therein related to Ms Gama and Ms Phetani but once again misrepresented the facts by stating that "*after ignoring our written questions, the care home finally responded on 31 May"*. Moreover, it bears emphasis that the interviews with Ms Phetani and Ms Gama were reportedly conducted some time in February 2024. The respondents thus had ample time to grant Mr Du Plessis a fuller opportunity to properly respond to their allegations.

20.5.18 Contrary to the narrative portrayed by the respondents, Mr. Du Plessis engaged with the respondents on various occasions exchanging a total of 11 emails between them, showing a clear willingness to cooperate with the investigation and interview process.

20.5.19 In these circumstances, the offending broadcasts presented a controversial issue of public importance, failed to 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 timeslot, as envisaged in clauses 28.3 and 13(1)-(2) of the Subscription and Free- to-air Codes respectively.

Moreover, the offending broadcasts failed to give a right to reply to the person whose views were criticised on the controversial issue of public importance.

The offending broadcasts therefore contravened clauses 28.3.1 and 28.3.2 of the BCCSA Subscription Code, read with clauses 13(1) and 13(2) of the Free to Air Code and clauses 11.1 and 11.2 of the Online BCCSA Code.

CONCLUSION

21. The respondents aired the offending broadcasts in contravention of the Codes of Conduct set out herein.

22. The complainants were not given a right of reply to the criticism aired in the offending broadcasts, despite the respondent having been in possession of the complainants' responses ahead of the airing of the second segment.

23. The offending broadcasts were framed and tailored to suit the narrative of the respondent and the purpose of the offending broadcasts. The offending broadcasts intended to portray the complainants as involved in corrupt and unethical activity for their own benefit and gain.

24. The offending broadcasts contravened clause 28.2.1, 28.2.2, 28.3.1 and 28.3.2 of the BCCSA Subscription Code, clauses 12(1), 12(2), 13(1) and 13(2) of the BCCSA Free-to-air code and clauses 10.1, 11.1 and 11.2 of the BCCSA Online Code by:

    24.1 failing to include the complainants' written responses in the second segment, despite having had them in their possession;

    24.2 having no reasonable grounds for this exclusion; and

    24.3 having broadcasted allegations that the complainants ignored or otherwise failed to comply with requests for comment despite these remarks having no basis in fact.

    25. The complainants request a ruling from the BCCSA that the offending broadcasts violate the aforementioned clauses. Moreover, they also seek an apology from the respondents for their failure to provide them with a right to reply. Additionally, they request that eTV and eNCA be compelled to broadcast a written response in order to correct the false narrative that was perpetrated by the respondents during the offending broadcasts."

[3] The Broadcaster responded as follows:

"RE: COMPLAINT IN RESPECT OF TELEVISION BROADCASTS BY THE RESPONDENTS ON 26 MAY 2024, 2 JUNE 2024 AND 9 JUNE 2024

[1] This letter is in response to a complaint from The Butterfly Haven (Pty) Ltd and Uberrima Phoenix (Pty) Ltd ("**the Complainants**") lodged on the 9th of July 2024 regarding the broadcast of the current affairs show, *Checkpoint* episodes 504, 505 and 506 titled— "Medical Negligence, the New RAF" ("**the Episodes**").

[2] The Episodes premiered on a Sunday on the evenings of the 26th May, 2nd June and 9th June 2024 on the etv channel at 19h30.

[3] A viewing of the programmes together makes it abundantly clear that the three episodes must be viewed as one programme rather than three separate programmes. This is made clear by Ms Mabuse during each episode. At the end of episode 1 she describes what will happen in "part 2". At the start of episode 2 she summarises what happened in "part 1". At the end of "part 2" she describes what will happen in "part 3". At the start of episode 3 she escribes what happened in both "part 1" and "part 2".

[4] The repeats were aired the following Thursday via both etv and eNCA channel 403 on DStv. The Episodes were also uploaded onto eNCA website after they were broadcast on eNCA.

[5] The Complainants claim that we have contravened clauses 28.2 and 28.3 of the BCCSA Code of Conduct for Subscription Broadcasting Service Licensees ("the Code") and their corresponding parallel clauses in the Free-To-Air Code of Conduct and the Code of Conduct for Online Content Services for Licensed. Clause 28 (and its corresponding FTA and online provision) deal with "Controversial issues of public importance" as well as comment on any actions of public importance.

[6] Clause 28.2 of the Code provides as follows:

> 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.

[7] Clause 28.3 of the Code provides:

> 28.3.1 In presenting a programme in which controversial issues of public importance are discussed, a licensee must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot (our emphasis).
>
> 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.

Background

[8] Checkpoint first contacted Dirk du Plessis regarding Uberrima Trust on May 21st 2024 and Operations Manager Erica Thompson regarding Butterfly Haven on the same day. Phone calls to both were recorded.

[9] On 21 May we questioned du Plessis over the phone about the absence of funds in the Bayanda Mbongwe Trust Fund. We also requested an on-camera interview with him.

[10] Following the phone call, we immediately sent Mr du Plessis an email requesting an interview. Mr du Plessis acknowledged receipt of our email the following day.

[11] We also called Operations manager at Butterfly Haven, Erica Thomson. The part of the phone call that was recorded and broadcast is of Ms Thomson saying “What I’d like to do is get authority from the lawyers if I can do the interview.”

[12] On the same day (21 May) we sent an email to Butterfly Haven requesting an interview. Ms Thompson also responded acknowledging our call and email and indicated that Mr du Plessis would be handling all enquiries regarding Butterfly Haven. Mr du Plessis was copied in these emails.

[13] On 23 May we sent a follow up email to both Mr du Plessis and Ms Thompson letting them know that our deadline was Friday, 24 May and we urgently needed confirmation that they would make themselves available for an on-camera interview.

[14] On 24 May Mr du Plessis responded to our email saying that he had never promised an on-camera interview and requesting written questions.

[15] The same day, 24 May, we sent Mr du Plessis questions regarding Uberrima Trust and Butterfly Haven.

[16] On 28 May, Checkpoint had not received responses to such questions. In a follow up email to Mr du Plessis and Ms Thompson we again requested responses.

[17] Mr du Plessis finally sent his answers at 20:09 on 30 May 2024.

Clause 28.3 – Balance

[18] In in paragraphs 20.1 to 20.5, the Complainants list five allegations of contravention of clause 28.3. These five allegations amount to one complaint alleging breaches of clauses 28.3.1 and 28.3.2.

[19] At the outset it is important to highlight that it is not in dispute that the Complainants were offered a right of reply, which was broadcast on *Checkpoint*.

[20] The nub of the complaint appears to be that these replies were not broadcast when the complainants thought they should have been, but only in part 3. The argument suggests that this was impermissible as the replies should have been broadcast when the comments or criticisms were made and not in subsequent programmes. The codes recognise that this not need always be so and that there are circumstances where this need not happen. In this regard, as stated above, the comments were broadcast in one programme constituting three parts. Each part concluded by making it clear that the programme was continuing and that the episode was only part of a longer programme. This essentially brings and end to the complaint.

[21] Further, as set out below, the complainants cannot dictate when their replies should be broadcast. Not only is this an impermissible interference with the respondents editorial control, but would amount on an infringement of Section 16 of the Constitution dealing with freedom of expression. It is akin to the complainants wanting their positions set out in the first segment of a programme rather than in the last segment. So, if the programme was an hour long, so the analogy goes, the complainants would be aggrieved if their reply was in the last 20 minutes of the programme rather than in the first or second 20 minute segment.

[22] In summary, at least in part, the Complainants case is that their right of reply was aired in parts 2 and 3, and not in part 1 and that this violates clause 28.3 because “it was not impracticable" to air these replies on the second episode.

22.1. The complainants state the following-

> The respondents elected not to air the Mr Du Plessis's written responses to these allegations despite their having had them in their possession almost 3 days ahead of this segment airing…
>
> Certain of the complainants' responses in this regard were shown at the end of the third episode's broadcast. This does not, however, satisfy the provisions of the Code, which require that a right of reply be given in the same programme unless it is "impracticable" – which it clearly was not.
>
> …
>
> Certain of the complainants' responses in this regard were shown at the end of the third episode's broadcast. This does not, however, satisfy the provisions of the Code, which require that a right of reply be given in the same programme unless it is "impracticable" Given that the respondents received the complainants' responses before the second episode's broadcast, there are no circumstances justifying the exclusion of the complainants' responses from the same programme.
>
> …
>
> Clause 28.3.2 of the Subscription Code along with clauses 13(1) and 13(2) of the Free-to-air Code, as quoted above, state that a right of reply may be included in a later programme only if it is "impracticable" to do so in the same programme. Seeing that the respondents had received Mr Du Plessis's responses before the second episode's broadcast, they were obliged under the code to include them.
>
> …
>
> It is prudent to point out that Ms Mabuse, despite airing Mr Du Plessis' letter of 30 May in the last part of the third segment, not only failed to show his responses contained therein related to Ms Gama and Ms Phetani but once again misrepresented the facts by stating that "after ignoring our written questions, the care home finally responded on 31 May". Moreover, it bears emphasis that the interviews with Ms Phetani and Ms Gama were reportedly conducted some time in February 2024. The respondents thus had ample time to grant Mr Du Plessis a fuller opportunity to properly respond to their allegations.

[23] Clause 28.3 of the Code does not give the Complainant the right to dictate to a Broadcasters how it must broadcast a right of reply even where it is not practicable to do so in a single programme (which is not the case here as more fully explained above),

[24] On the contrary, we submit that clause 28.3 affords broadcasters the flexibility to broadcast a right of replyor opposing views in a subsequent programmes within reasonable period of time.

[25] The use of the words "…in the same programme **OR** in a subsequent programme…" in the provision clearly leaves the discretion to broadcasters to choose when to air an opposing view.

[26] It is essential to highlight the importance of editorial control, and the freedom to choose the packaging of a program which have been emphasized in a number of BCCSA decisions.

[27] The Commission has held that a mere difference in opinion as to how the editor should have placed the material is not sufficient to found a transgression of the Code.[1] In addition, a broadcaster has a right to freedom of speech, including its editorial prerogative to determine what in its view should form the content of the programme it broadcasts[2].

[28] We therefore submit that it was an exercise of freedom of expression to choose to broadcast the views of the Complainant in the second and third segments.

[29] Furthermore, the Code affords broadcasters the flexibility to broadcast a right of reply in a subsequent program on condition that: the subsequent program is broadcast within a reasonable period from the original program where criticisms were made and in the same slot.

[30] Checkpoint is one of our oldest and most prominent current affairs show produced by experienced journalists. The show is produced weekly and premieres every Sunday. This requires production and postproduction on a limited time-period.

[31] Normally one episode of Checkpoint is broadcast in a half-hour time slot. This allows for 23-24 minutes per episode.

[32] From the time of planning the RAF story in question, given the amount of content needed to be covered in a limited broadcast time, it was not possible to do only one episode on the topic of medical negligence, a new form of RAF. As such, it was decided upfront that at least three episodes were needed to do justice to the content and ensure that it covered all the various stakeholders involved. The Episodes were then packaged according to our editorial discretion.

[33] Given the nature of the investigation and the number of issues it raised, a decision was made that the programme would be made up of three continuous parts. As we knew we would not be able to include the full right of reply within the first episode, a decision was made to broadcast further replies in parts 2 and 3 of the programme. The three separate parts were:

33.1. Part I – broadcast on 26 May 2924, focus on the trustees;
33.2. Part II – broadcast on 2 June 2024, focus on the lawyers; and
33.3. Part III - broadcast on 9 June 2024, focus on the care home.

[34] In order to clarify this for our audience, we specifically use the voice over at the end of Part I (at 22.55) to introduce what would be coming in Part II of the series highlighting for viewers that the views of the lawyers (Edeling van Niekerk Inc), the care home (Butterfly Haven) and its managers and the legal ombud would still be dealt with in Part II.

[35] At the start of Part II, the Episode starts with the words, “previously on Medical Negligence the New RAF…” and recaps for the viewer what occurred in Part I. We submit that any reasonable viewer would have understood that the show was made up of three parts and the right of replies were broadcast subsequently in the second and third segments at the same time in each subsequent each week.

[36] The complainants go to great lengths to complain that we had their written response in our possession “*almost 3 days ahead of the broadcast*” and failed to include it. In terms of our workflow, the show has to be approved by our legal and compliance department before it goes to final mix. It then goes through another QC process in Cape Town before being scheduled on Friday for a Sunday broadcast. It is important to highlight that once a show has been sent

[1] MXIT Lifestyle v M-Net Case No 47/2006
[2] SA Dental Association v M-Net Case No 37/2003

to final mix it is not possible to edit it. The final mix suite is booked ahead of time. For this series we had to make a special request to do final mix on Thursday specifically because of the various rights of reply we had anticipated receiving.

[37] Mr du Plessis finally responded to our questions, after 20:00m on 30 May 2024 – essentially the response was received and could only be dealt with on 31 May 2024. By that stage, Part I of the series had already aired and Part II had already been submitted for final mix. As such, it was not "practical" as alleged by the complainants to include the right of replies exactly as they may have wished. This is why we deny the Complainants allegation that the broadcasts were "*framed and tailored*" to suit our own narrative. A broadcaster's editorial discretion is important and allows it to determine the best and most suitable way of including the content into a show or series.

[38] In light of the above, we submit that clause 28.3 was not violated.

[39] We also would like to further highlight that the use of the words "segment" by the Complainants further indicates their own understanding that the series is to be viewed as a whole and it does not matter in which segment the right of reply is broadcast.

Clause 28.2 – Comment

[40] The complainants wrote the following concerning clause 28.2:
Further, the repeated allegations that the complainants simply ignored the respondents' questions is factually incorrect, as evidenced by the respondents' own footage in segment three and the confirmation therein that a written response was indeed provided on 30 May 2024. This misrepresentation of fact gives viewers the impression that the complainants were non-compliant and potentially obstructive in respect of an issue of public importance, when in fact there has been consistent engagement between the respondents and complainants and comprehensive written responses were furnished timeously by the complainants. These assertions do not amount to honest expression and are not representative of the facts.

In these circumstances, the offending broadcasts presented comment which was not made on facts truly stated as envisaged in clauses 28.2, 12 and 10.1 of the Subscription, Free-to air and Online Codes respectively[3].

[41] The Commission has established that clause 28.2 requires that comments made must be (1) an honest expressions of opinion, and (2) must be presented in such manner that they appear clearly to be comments, and (3) be based on facts truly stated or fairly indicated and referred to.

[42] We are of the view that the Code requires "honest expression" which is a *bona fide* comment based on facts alluded to by the person making the comment.

[43] It is not in dispute that the Complainants refused an on-camera interview and then did not send their responses by the requested deadline. The Complainant's themselves acknowledge they did not meet the deadline[4]. Further, although a response was sent after hours on 30 May 2024, as stated, by that stage part 2 of the programme could not be altered. The comment was accordingly based on facts available at that time. Further, the responses were broadcast in part three of the programme. Moreover, Mr Du Plessis was well aware of the deadline – imposed due to the timing of the respondents' processes for part 2 to be broadcast on 2 June 2024.

[3] Subparagraph 20.4.4-20.4.5
[44] See Para 20.4.3 of the Complaint.

[44] We therefore, submit that, to the extent that the portions complained of constitute comment (which is not admitted), the comments in question were an honest expression based on the above-mentioned facts that were fairly displayed and referred to in the broadcast.

Conclusion

[45] In light of the above, we submit that clauses 28.2 and 28.3 and 28.4 of the Code were not contravened and we request the Commission to dismiss the case."

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

"[5] I watched the inserts and perused the arguments of the Complainants and the responses of the Broadcaster. Given that the clauses 28.2.1, 28.2.2 and 28.3.1 of the BCCSA Subscription Code read the same as those of the BCCSA Free to Air Code and the Online Code, the relevant subscription code sub-clauses of Clause 28 will be applied in respect of the complaint.

[6] Clauses 28.2.2 obliges the Broadcaster when commenting to broadcast its segments in such a manner that it must *be an honest expression of opinion, presented in such manner that it appears clearly to be comment, including that the latter comment must be made on facts truly stated or fairly indicated and referred to.* There are therefore three requirements which the Broadcaster must adhere to meet the provisions of clause 28.2.2 of the Code:

4.1 **Comment must be an honest expression of opinion.**
The Broadcaster did broadcast a segment regarding allegations by the mothers of mentally and physically disabled children against the complainants concerning the mismanagement of the trust funds which should assist indigent parents/guardians in caring for these children. In the inserts, the mothers explain to the Broadcaster what happened to their children health, how they managed to secure funds for them, what allegedly happened to the secured funds and what steps they took to retrieve the secured funds.

In **eNCA v Strydom**[5], the BCCSA Tribunal reiterated that, *'[c]lause 28.2 does not prevent a broadcaster from putting forward an opinion or freely express itself, in fact the Code echoes this right.* The presenter expressed her opinion to the Complainant about this matter based on what she saw and heard from these children's mothers. The Broadcaster's comments were an honest opinion.

4.2 **Comment must be presented in such a manner that it appears to be a comment.**

The inclusion of the inserts depicted the affected mothers' experiences and the direct impact on the children were specifically highlighted as it was imperative that their subjective experiences and the impact this issue had on the lives of their children be broadcast.

In **Philip v Talk Radio 702**[6] the BCCSA Tribunal held that: *'[A] presenter may express his or her own opinion on a matter being broadcast, as long as it is a genuinely held opinion on facts fairly indicated and referred to'.* The provision of the clause requires that comment must be presented in such a way that it appears to be a comment. The presenter's comments may be seen by some people as being arrogant, however in my opinion her interview style is different I therefore hold that her comments are within this requirement of the provision.

4.3 **Comment must be made on facts truly stated or fairly indicated and referred to.**

[5] BCCSA Tribunal Case Number 14/2009
[6] BCCSA Tribunal Case Number

The inserts, depict several statements and comments by both the Complainants and children's mothers. They all appeared to act in the children's interest, these interactions were professional and confirmed that their children stayed in the establishments managed by Complainants.

[7] **Clause 28.3.2 of the BCCSA Code** further states that *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.* Thus clause 28.3.2 places an obligation that a person whose views are to be criticized 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.

[8] In trying to meet this obligation, the Broadcaster made numerous efforts in the form of emails and phone calls requesting the Complainants for an interview. A chain of emails from the broadcaster to the Applicants inviting them to an interview, serves as proof that attempts were made by the Broadcaster to offer the applicants a right of reply. This is validated and reinforced by the Applicant's response to the broadcaster asking that it be furnished with questions for the interview. The broadcaster acceded to the request and the applicant responded to the questions and finally sent someone to take the interview. In all fairness, one can only conclude that the broadcaster went out of its way to obtain the Applicant's viewpoint about the subject discussed.

[9] In **Busch vs Mnet Cart Blanche[7],** after the Complainant had alleged that the Broadcaster did not make reasonable efforts to fairly present opposing points of view and failed to provide him with the opportunity to respond to the allegations against him, the Tribunal held that *from the correspondence between the Broadcaster and the Complainant it appeared that the Complainant refused to appear on camera and this caused him to miss the opportunity to present his side of the case. He was thus the author of his own misfortune. The Tribunal found that the Broadcaster made reasonable effort to fairly present Complainant's version of the facts even though he refused to appear on camera.'*

[10] As far as the allegations that the Broadcaster did not flight all the emails correspondence between itself and the Complainants, and that little time was given to the Complainants views, the BCCSA holds the opinion within broadcast media practice, editorial decisions are always left to the editor's discretion. In **Jacobs' v MNet, Carte Blanche[8],** the Tribunal clarified the notion that it can regulate the broadcaster's editorial independence, by stating that: *'[t]he Tribunal is not authorized to consider the merits or demerits of viewpoints, but has the sole task of deciding whether a reasonable effort had been made by the producer to present opposing points of view on a controversial issue of public importance. This should be judged in the context of the freedom of expression of the Broadcaster which includes a free discretion to edit a programme.'* Not only does the BCCSA not interfere with editor's discretion, in exercising its jurisdiction, the BCCSA is limited to the content of programme as it is broadcast and viewed by the audience.

[11 The Complainants' view that the broadcast was offensive cannot be entertained. The notion that something is offensive and that therefore it should not be allowed cannot be entertained as it is contrary to the principle of freedom of speech and expression based on the fact that "offence" is experienced subjectively and influenced by many variables.

[12] After having considered all the evidence before me, my conclusions are as follows: There is:

[7] BCCSA Tribunal Case Number 01/2017
[8] BCCSA Tribunal Case Number 11/2008

- No contravention of Clause 28.2.1 since broadcasters may comment on and criticize any actions or events of public importance.
- No contravention of Clause 28.2.2 since all comments were honest expressions of opinion based on facts that had been truly stated and/or fairly indicated and referred to.
- No contravention of Clause 28.3.1 since numerous attempts were made by the Broadcaster to set up a face-to-face interview with the Complainants, to the extent of even sending interview questions to the Complainants. As to the fact that the broadcaster did not flight all the email responses, the BCCSA has held in the past that it respects the Broadcaster right to exercise its editorial independence.

In the end, I conclude that the right to reply was therefore offered to the Complainant to put its views. **The complaint is therefore not upheld."**

[5] The Appellant in its grounds for appeal raised the following grounds:

"1. **Introduction**

1.1 The Butterfly Haven (Pty) Limited and Uberrima Phoenix (Pty) Ltd t/a Uberimma Phoenix Management Trust, ("**Butterfly Haven**" for convenience), seek leave to appeal the adjudication, dated 3 November 2024, of their complaint, lodged on 9 July 2024, concerning an investigative programme broadcast by eTV and e.Sat TV (the "**respondents**") titled "Checkpoint". The programme was broadcast in three linked segments on 26 May, 2 June and 9 June 2024. (the "**offending broadcasts**").

1.2 Butterfly Haven therefore makes application to the Registrar of the BCCSA for permission to appeal against the decision of the Commissioner, Mr Makeketa, pursuant to clauses 4.1 and 4.2 of the Procedure of the BCCSA.

1.3 Butterfly Haven submits that, should the right to appeal, be granted, an Appeals Tribunal is likely to arrive at a conclusion different to that of the Commissioner based on the grounds set out below. Butterfly Haven submits on this basis that an appeal should be granted.

1.4 This appeal is structured as follows:

1.4.1 first, we provide a high-level summary of the issues raised in the complaint;

1.4.2 second, we set out the grounds of appeal, being the interpretation and application of clause 28.2.2 and 28.3.1 of the Subscription Code ("**the Code**") (read with the parallel clauses of the Free-to-air and Online Codes) and discuss them in turn.

1.5 To give one example that reveals that the Commissioner's decision cannot stand: Butterfly Haven responded in writing to the allegations made, by 30 May 2024. This meant that for purposes of the second episode, aired on 2 June 2024, Checkpoint had the complete responses in their possession for three days ahead of the segment airing. Yet the insert contained **no** reference **at all** to these responses. Instead, the insert states "*In his reply Dirk said he never made himself available for an on-camera interview and referred us to Louw Kruger's letter dated 21 May 2024 and requested written questions which we provided, and he never answered"* The Code, however, makes it mandatory – as an aspect of natural justice – that a criticised party should have the right to respond in the **same** programme. The only exception to that is where a response is not practicable – and it is common cause that this is not relied on by eTV. The breach of clause 28.3 is

therefore patent and with respect, the adjudicator's decision is clearly wrong. This failure to take account of Butterfly Haven's written response infected the entire programme. And when the response was eventually referred to in later broadcasts (which is too little, too late), it in any event did not adequately and fairly reflect Butterfly Haven's responses.

2. **Background**

2.1 In summary, the complaint raised the following issues:

2.1.1 Checkpoint did not broadcast the written responses provided by Butterfly Haven in the first episode of the programme, despite having received them almost **three days** before it aired. Instead, Checkpoint included select portions of these responses at the end of the **third** episode (three weeks later), considering this sufficient to satisfy the right of reply. We contend that this obviously does not comply with the BCCSA's code, which requires a right of reply to be provided within the same episode unless doing so is "*impracticable*". Our complaint also highlighted that Checkpoint did not offer any explanation for this omission. It must be accepted that it was not impracticable on the evidence for Checkpoint to do so during the **first** episode.

2.1.2 Secondly, the repeated allegation that Checkpoint's requests for comment were "*ignored*" by Butterfly Haven does not amount to comment on facts truly stated. It is plainly incorrect.

2.1.3 Lastly, Checkpoint failed in any event – even during the third episode, when it eventually decided to consider Butterfly Haven's response, to include the written responses provided on behalf of Butterfly Haven in respect of the additional cases mentioned (those not pertaining specifically to Bayanda's case).

3. **Grounds of appeal**

3.1 Butterfly Haven contends that the Commissioner, with respect, erred in several material respects in reaching his decision on the merits. Broadly, it is contended that that these errors on the facts and on the application of the Code to the facts have the result that the Commissioner plainly erred in finding that there was no contravention of clauses 28.2.2 and 28.3.1 of the Code.

3.2 Additionally, it is contended that the Commissioner omitted to address material aspects of the complaint, thus arriving at a conclusion which failed to address the issues in dispute.

First ground of appeal – No contravention of Clause 28.3.1 – Right of Reply

3.3 Clauses 28.3.1, 28.3.2 of the BCCSA Subscription Code being relevant to controversial issues of public interest, *inter alia,* provide that:

> *28.3.1 In presenting a programme in which controversial issues of public importance are discussed, a licensee must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.*

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

3.3.1 The above is read with clauses 13(1), 13(2), 13 of the Free to Air Code and clauses 11.1 and 11.2 of the Online BCCSA.

3.4 We submit that the Commissioner incorrectly concluded that the respondents had not breached the above provisions.

3.5 In **paragraph 7** of the adjudication, the Commissioner states that *"… clause 28.3.2 imposes an obligation that a person whose views are criticised in a broadcasting programme on a controversial issue of public importance must be given a right of reply to such criticism within the same programme*". While the Commissioner appears to have acknowledged the nature and significance of the right of reply, he failed to address the issue of "*impracticability*", which is the portion of the Code forming the basis of the complaint. The Commissioner did not consider or address Checkpoint's failure to include any of Butterfly Haven's replies in the first segment or the lack of a reasonable explanation therefor.

3.6 In **paragraph 8** of the adjudication, the Commissioner states that due to the email exchanges between Checkpoint and Butterfly Haven, Checkpoint satisfied its right of reply obligations in that it made every effort to include Butterfly Haven's views by offering both an on-camera interview and the option of written responses. The complaint does not dispute that such attempts were made but this reasoning neglected to consider the key issue in dispute, namely whether it was "*impracticable*" to include these responses in the first episode.

3.7 The reason that the Code requires that a response by a criticised party must be in the same programme is obvious: one cannot assume that viewers who watch the first episode will also watch the second and the third episode. The only escape for a broadcaster is to put up facts that show that incorporating a reply in the same programme is impracticable. eTV put no such facts up. It clearly cannot be that just because a broadcaster thinks it best to leave a response to the last episode, that means it is "impracticable". This would entirely undermine the rights of a criticised party.

3.8 At **paragraph 6**, the Commissioner considered the programme's portrayal of the subjects' alleged experiences under the guise of "*comment*" and concluded that, while the presenter's style could be viewed as "*arrogant*", it did not violate the BCCSA's provisions. This conclusion similarly fails to address the issue in dispute as this portion of the programme complained about on the basis that it contravenes the provisions on "right of reply" rather than "comment". So, with respect, the Commissioner misunderstood the relevance of the point – which went to right of reply, and not comment.

3.9 We also submit that the Commissioner's finding regarding Checkpoint's "*editorial discretion*" as it relates to right of reply is with respect problematic and unprecedented. The Commissioner determined that the complainant's criticism regarding the respondents' failure to include all responses amounted to an unreasonable challenge to the broadcaster's exercise of editorial discretion. The Commissioner also seemed to imply that the jurisdiction of the adjudicator is confined to assessing only the content that was aired, without consideration of the material that was excluded.

3.10 We submit that this is incorrect for the following reasons:

3.10.1 Fair reporting is assessed based on the overall impression, with broadcasters having a duty to avoid misleading the public by selectively presenting information. As assessment of whether this information has been fairly represented can only be considered in light of that which was excluded.

3.10.2 Right of reply is intrinsically linked to the concept of balance. An assessment of whether information has been conveyed to the viewer in a balanced manner similarly requires a consideration as to what information was selected.

3.10.3 It is therefore submitted that the Commissioner paid undue deference to editorial discretion. While this concept applies – for example – to what case studies a broadcaster chooses for discussion, it cannot excuse a broadcaster from the basic obligations of incorporating a right of reply.

Second ground of appeal - No contravention of Clause 28.2.2 – Comment

3.11 Of relevance to the second ground of appeal is clause 28.2 of the Subscription Code, which provides that:

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.

3.12 The above is read with clauses 12(1) and 12(2) of the Free-to-air code and clause 10.1 of the Online Code.

3.13 In **paragraph 12** of the adjudication, the Commissioner concludes that no contravention of Clause 28.2.2 occurred, asserting that all comments were honest expressions of opinion based on facts that were truthfully stated and/or fairly indicated and referred to.

3.14 As discussed above, this conclusion is reached in respect of a portion of the programme containing interviews with certain aggrieved subjects notwithstanding that this portion of the programme had been complained about on the basis of the right of reply provisions of the Code. The complaint raised on the issue of comment, ie. concerning the broadcast's repeated and unsubstantiated claims that the respondents' request for comment were "*ignored*" by the complainant, was not addressed by the Commissioner It is this point which breaches clause 28.2.2 of the Code, as there is no factual basis for the comment made.

Conclusion

3.15 For the reasons set forth above we respectfully submit that the Commissioner erred in his conclusions on these issues of comment and right of reply. In the interests of ensuring a fair and proper process, we respectfully submit that this matter should be reconsidered by the Appeals Tribunal."

[6] The Respondent responded as follows:

"[1] We refer to the application for leave to appeal dated 7 November 2024 that was filed by Butterfly Haven (Pty) Limited and Uberrima Phoenix (Pty) Ltd t/a Uberimma Phoenix

Management Trust ("**the Appellants**") against the decision of the Commissioner of the BCCSA in adjudication number 32/A/2024 that was issued on 3 November 2024.

[2] The Appellants contend that the Commissioner erred in finding that we did not contravene both subclauses 28.2.2. and 28.3.1 of the BCCSA's Code of Conduct for Subscription Broadcasting Services ("**the Code**"). They have also have also titled the two subclauses as their two grounds of appeal.

[3] On the outset, we would like to point out that original complaint lodged focussed on the Appellants' right of reply and the allegation that it was not broadcast as expected by the Appellants in Part 2 of the series program. However, it is not in dispute that we broadcast the Appellant's right of reply on 12 June 2024 during Part 3 of the program series.

[4] The Appellants therefore have no substantive basis for a complaint about right of reply. We are of the view that this application falls to be dismissed at the outset as there is evidently no prospect to success in a different adjudicator coming to a different decision in this regard.

[5] Below we address the arguments from the Appellants and will highlight the baseless claims and vexatious nature of this Appeal.

First ground of appeal – No contravention of Clause 28.3.1 – Right of Reply

Impracticable

[6] The Appellants repeat the same argument from their original complaint: that it was not "impracticable" to broadcast their right of reply response on the second segment broadcast of the 2nd of June in terms of subclause 28.3.1.

[7] The Appellants do not define the meaning of "impracticable" nor supply any legal opinion, technical, or operational basis for their argument.

[8] Rather, the Appellants merely repeat their argument from the original complaint and insist that because they sent their response on the 30th of June it was 'practical' for etv to broadcast their response on the second segment (part 2) of the series program.

[9] The Appellants' view displays an ignorance and lack of understanding of the broadcasting operations. We shall therefore furnish the technical and operational details to demonstrate that it was, in fact, impracticable for the right of reply to be broadcast in the second segment (part 2) of the series program.

[10] Firstly, our *Checkpoint* producers decided to broadcast the 90 minutes program of public interest program over three 30 minute segments (parts) over 3 weeks on the 26th of May, 2nd and 3rd of June 2024.

[11] *Checkpoint* is current affairs program that broadcast weekly over the 30 minutes slots on etv and reruns on eNCA and etv channels.

[12] This means that within a week (7 days), etv' s operational workflow must pass through all of the following major operational divisions to be finally broadcast on air: preproduction, production, postproduction, processing and On-Air.

12.1. Preproduction involves operations such as research, planning, scheduling and coordination to gather information, relevant parties and material required for the whole production.

12.2. Production includes script writing for hosts, plot, setting and sequencing, recording interviews with relevant parties' studio recording of voicer overs

12.3. Postproduction includes editing in Johannesburg, obtaining copyrights for images, videos, music and all third-party content, Legal and Compliance review in Johannesburg, Editors' review in Johannesburg, Final Mix media and Promotional material production.

12.4. Media Processing includes assigning of Classification (Age restriction and advice) to Final Media, Media quality checks, Transfer and ingest of Final Media into Broadcasting system in Cape Town, Final schedule with adverts and,

12.5. On-Air include Logs downloading with warning boards, age restrictions, adverts, and other graphics outside of the Media and Transmission ("broadcast").

[13] etv is pressed to timeously deliver all of the above processes that involved many hours and many staff members over many departments to broadcast a 30 minutes program generally within a week for current affairs.

[14] General processing times are as follows:

14.1. The preproduction generally occurs on Tuesday (e.g., 21 May) for the program that is to air on Sunday (2 June) of the following week.

14.2. Production occurs between Thursdays (23 May) and Monday (27 May)
14.3. Post production between Monday (27 May) and Tuesday (28 May)

14.4. Media processing between Tuesday and Thursday (30 May).

14.5. Then the premier transmission occurs on Sundays (2 June).

[15] The Appellants were contacted from 21 May and they missed the deadline of 27 May to submit their right of reply.

[16] Our producers extended the deadline to the Appellants and other parties to submit their responses or comments by the 28th of May urgently.

[17] On the 28th of May, our producers sent a follow up email and yet the Appellants did not meet the deadline.

[18] It was only on 30 May, and after working hours, did Mr du Plessis finally respond on behalf of the Appellants. As the response was only sent at 20h12, it was only properly considered the following working day, 31 May.

[19] By this time the final mix media of the program had already been approved, ingested, final schedule released, and logs downloaded and processed. The only outstanding process was broadcast which was scheduled to occur 2 days later.

[20] Practically, for etv to include the Appellants' response in Part 2 would require four normal working days (from 31 May **to 6 June**[9]) not only for reprocessing the new media version from editing to the downloading of logs stages, but to also to "reverse-process" the non-transmittable media version from our broadcasting system with its ripple effect on the rest of programs, channels, and operational work flow.

[21] This would obviously have consequences of operational costs and is the reason why producers normally provide a deadline within which to respond.

[22] The above operational and technical reasons demonstrate why etv submitted to the Commissioner that it is **impracticable** to include the Appellants' response which was received on 30 May for broadcasting on 2 June 2024.

Editorial discretion

[23] The Appellants are also arguing against the broadcasters' editorial discretion as a part of this ground of appeal.

[24] The Appellants claim that "the Commissioner's finding regarding Checkpoint's 'editorial discretion' as it relates to right of reply is with respect problematic and unprecedented".

[25] The Appellants again did not cite any legal source to support their claim. Rather the appellants made personal opinion-based arguments that are biased in favour of their own interest.

[26] The Commission has established a precedent on editorial discretion which has been well established. Their legal counsel that drafted this response is well aware of this from their previous such as the *South African Veterinary Council & Lester v M-Net* and *eNCA v Mathebula*.

Second ground of appeal - No contravention of Clause 28.2.2 – Comment

[27] We have explained, it is not in dispute that our producers contacted the Appellants for their response on 21 May and followed up until 28 May.

[28] The Appellants responded on the evening of the 30th of May, after the voice over had been finalised during the production phase and after part 2 of the series program was processed by the 29th of May.

[29] The voice over's comment which stipulates that the Appellants ignored our request to urgently send their response, was fairly based on the above-mentioned facts.

[30] The Appellants have not provided any facts or evidence to support their claims or prove otherwise.

[31] In light of the above, we are of the view that the Chairperson of the BCCSA will still find no contravention of subclause 28.2.2.

[9] Media Processing staff in Cape Town only works from Monday to Friday at 17h30.

Conclusion

[32] Appellants clearly have not made any case to show that the Commissioner erred in finding no contravention of the Code and there is no prospect of finding that another adjudicator would come to a different decision. We therefore, ask for this application to be dismissed."

EVALUATION

[7] This is an appeal against an adjudication in which the commissioner found that the respondent did not contravene Clauses 28.2.2 and 28.3.1 of the Code of Conduct for Subscription Licensees. Leave to appeal the adjudicator's decision that Clause 28.3.1 has not been contravened was granted.

[8] **Applicable Clauses**

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 time of the original broadcast and within substantially the same time slot.

The issue

[9] The issue is whether the respondent contravened Clause 28.3.1 of the Code for Broadcasting Licensees by presenting the complainants' opposing views in the third episode instead of the second episode of the Checkpoint programme. The complainants were offered an opportunity to respond after the initial episode, but their response was only included in the third episode two weeks later. The complainants' arguments based on Clause 28.2.2 and 28.3.2 cannot be considered, as leave to appeal the adjudicator's decision on the non-contravention of these two clauses was not granted.

Parties' submissions

[10] The complainants maintained that the respondent did not air their written responses in the second episode of the program, despite receiving the email with

their response almost three days before the episode aired. The respondent only included selected portions of these responses at the end of the third episode, one week later, which they argued goes against the BCCSA's code requiring a right of reply to be provided within the same episode unless it is "impracticable". They also claim that Checkpoint's requests for comment were "ignored" by Butterfly Haven, which is inaccurate and does not constitute a valid comment on the facts. Additionally, when the complainant's response was included in the third program, Checkpoint failed to include the complainants' written responses regarding the additional cases mentioned.

[11] The respondent contended that the complainants do not grasp the intricacies and timeframes associated with producing the impugned program, which is categorised as a "current affairs" programme. Owing to technical and content-related challenges, it was not feasible to offer the right to reply in the subsequent episode. The respondent believes the comment was fair based on the original exchange with the complainants regarding their response. The respondent rejects the claim that editorial discretion does not apply when a contravention of this specific clause is considered.

Tribunal Proceedings

[12] During the hearing, the panel members of the Tribunal, the Appellants, the Respondent, and their legal teams watched all three episodes of the programme without interruption. However, in reality, there was a one-week gap between each episode and audiences viewed the programme in three parts over a period of two weeks.

[13] The BCCSA ensures compliance with the Codes of Conduct signed by the members of the NAB, by finding a balance between the media's right to freedom of expression, the viewers' right to information and the individual's right to dignity and privacy, based on constitutional values.

[14] The purpose of Clause 28.3.1 is to ensure balance when a controversial matter of public importance is discussed. Once it is established that the issue is not only of public importance (when Clause 28.2 will be applicable) but also controversial, it is the broadcaster's responsibility to ensure that balance in the presentation of the programme is achieved. If the broadcaster fails to achieve balance, the omission must be addressed within a reasonable time in a similar programme in the same series at a similar time.

[15] The impugned program addressed a controversial matter of public importance. The title "Medical Negligence: The New RAF" clearly indicates the controversial nature of the topic, as it compares medical negligence with the RAF. Discussions on medical negligence and its legal implications are of public importance. Therefore, the respondent was required to ensure balance by presenting opposing views. The programme was divided into three episodes, broadcast one week apart, within two weeks. The broadcaster failed to achieve balance in the first episode and addressed the lack of balance in the third episode. This raises the question of what would be considered a reasonable time.

The interpretation of words used in documents

[16] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) at 604, the court provided the following guidelines regarding the interpretation of words in documents:

> Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence (own emphasis).

> Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document (own emphasis).
>
> The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[17] According to the SCA, words should be interpreted in the context of the words. Context is established by considering the provision in the context of the entire document and the rationale behind its creation. When compliance with the Codes of Conduct is evaluated, context is considered by balancing the media's right to freedom of expression, the viewers' right to information and the individual's right to dignity and privacy.

[18] In terms of Clause 28.3.1, "*reasonable efforts to fairly present opposing poin*ts of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented *within a reasonable period of time* of the original broadcast and within substantially the same time slot". The broadcaster therefore has to make reasonable efforts to address the "imbalance" within a reasonable time if opposing views are not fairly presented in the initial program.

[19] In this case, the respondent opted to address the absence of opposing views in the initial programme by offering the complainants a right to reply. While this offer had been made within a reasonable time after the broadcast, the response was broadcast in the third episode, which, according to the complainants, was not within a reasonable time.

[20] The term "reasonable" is typically defined within the context in which it is applied. Reasonable may pertain, for example, to an individual, a distance, or the cost of an item. However, the criteria used to assess whether a price is reasonable differ from those used to evaluate whether a person's actions were reasonable. Despite the varying factors considered in determining reasonableness in different situations, "reasonable" usually denotes fairness. The phrase "reasonable time" should, according to the guidelines provided by the SCA, be evaluated objectively, without undermining the apparent purpose of the clause.

[21] The interaction between the respondent and the complainants regarding their response began soon after the initial broadcast. When the complainants were offered the right to reply, they declined the option and requested instead a set of questions, which the respondent provided. However, the complainants failed to meet the given deadline, which had been extended once at their request. The question is then whether the time that the complainant was allowed to respond to the questions was reasonable.

[22] Various circumstances will determine what the appropriate timeline for the response should be, for example, if there is a pressing need to broadcast in the public interest. The complexity of the allegations and the infrastructure available to the complainant to address the allegations should also be taken into consideration.

Application to facts

[23] The complainants were familiar with the aspects of medical negligence discussed in the initial episode. When they confronted the respondent about their alleged mismanagement of medical negligence issues concerning the patients and their families, as reported in the impugned broadcast, they should have realised that any remedial steps would have to be taken sooner rather than later. The seriousness of the allegations should have prompted the complainants to respond within the given timeline, but they did not meet the timeline, even after it had been extended. The respondent made reasonable efforts to present opposing points of view by offering the complainants the opportunity to answer the written questions before the second episode. The complainants were not able to meet the deadline even after it had been extended, resulting in their response being broadcast during the third episode, two weeks later. Based on the considerations set out above, the response was broadcast within a reasonable time.

[24] Editorial independence remains the prerogative of the broadcaster. The true value of editorial independence lies in the values it represents – freedom of expression and freedom to receive information. The BCCSA does not have jurisdiction over how editorial autonomy is exercised. It ensures that the content complies with the Codes of Conduct.

[25] **The appeal against the contravention of Clause 28.3.1 of the Code of Conduct for Subscription Licensees is dismissed.**

DR SUNETTE LÖTTER
CHAIRPERSON: BROADCASTING COMPLAINTS COMMISSION
COMMISSIONERS CHEMALY AND NAIDU CONCURRED