COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of hearing: 25 October 2007 Case number: 11/2007

FREEDOM OF EXPRESSION INSTITUTE: Complainant

Vs

SOUTH AFRICAN BROADCASTING CORPORATION

Respondent

Complaints and Compliance Committee

K.E. Moloto- Stofile	(Chairperson)
N. Ntanjana	CCC Member
D. Moalosi	CCC Member
J.C.W. Van Rooyen SC	CCC Member[2]

For the Complainant

Executive Director:	Ms. Jane Duncan
Law Clinic Attorney:	Mr. Simon De Laney
Representing Advocate:	Mr. Muzi Shakhane

For the Respondent

SABC Policy and Regulatory Affairs:	Mr. Fakir Hassen
Mabuza Attorneys:	Ms. Tryphina Matsheke
Advocate:	Mr. Azhar Bham
Assistant Advocate:	Mr. Hamilton Maenetjie

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[1] In terms of s 17C of the ICASA Act 13 of 2000 as amended
[2] By virtue of section 17A (1) of the ICASA Act 2000, as amended.

INTERLOCUTORY JUDGMENT

JCW van Rooyen

[1] The background to this interlocutory judgment is that the Freedom of Expression Institute ("FXI") has lodged several complaints with the Complaints and Compliance Committee ("CCC") concerning alleged contraventions by the South African Broadcasting Corporation ("SABC") of its Charter as is to be found in the Broadcasting Act 4 of 1999, as amended. The allegation, broadly, is that the SABC has not demonstrated how it is implementing the recommendation of the Sisulu Commission, more so, that the contents of the report have not been made publicly available, and as a result these recommendations are not known to the CCC.

[2] I shall accept in favour of the FXI that the SABC Board appointed two independent persons ("the external committee") to inquire into allegations of blacklisting of journalists at the SABC, that an inquiry was held and that a report was filed with the SABC Board. The SABC in its response to the complaint made several references to the Report and also stated that the SABC Board had not accepted all the recommendations. In turn, the FXI applied to the CCC in terms of section 4C of the ICASA Act 13 of 2000, as amended, to order the SABC to provide it with a copy of the report. This was contested by the SABC on the basis that:

(i) the report was an internal matter of the SABC; and

(ii) the findings made and evidence led were matters dealt with by the committee which investigated the matter at the request of the SABC Board. Those findings could not now simply be placed before the CCC *Mr. Bham*, for the SABC, argued. The CCC would have to hold its own inquiry and come to its own conclusions.

[3] It is a well-known legal principle that the record of evidence in proceedings in one court is not admissible as evidence in proceedings in another court, unless the parties agree to such an arrangement. See *African Guarantee and Indemnity Co Ltd v Moni* 1916 AD 524 [3]; *Gua v Willock* 1916 EDL 371; *Botha NO v Tunbridge NO* 1933

[3] Where Maasdorp JA sates the following: "Now the learned Judge was not entitled to treat the evidence in the proceedings before the magistrate as evidence in this case. It is true that the records were put in by consent, but there was no consent that the evidence in the lower court should be

EDL 95 *;Hattingh v Le Roux 1939* EDL 217*;Fourie v Morley and Co* 1947(2) SA 218(N) at 222. The same principle would be applicable to two separate inquiries such as that of the external committee and the CCC. The proper use of such a record, in the absence of agreement, is to put discrepancies between former and later statements by witnesses to them in cross-examination at the second trial. See *Rand Cold Storage & Supply Co Ltd v Alligianes* 1968(2) SA 122(T) at 124-125.[4]

[4] *Mr. Shakhane*, for the FXI, argued that hearsay evidence is not always inadmissible and that the CCC should apply the exception to the hearsay rule in section 3 of the Law of Evidence Act 45 of 1988. The section provides as follows:

> (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -
> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
> (c) the Court, having regard to -
> (i) the nature of the proceedings;
> (ii) the nature of the evidence;
> (iii) the purpose for which the evidence is tendered;
> (iv) the probative value of the evidence;
> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
> (vi) any prejudice to a party which the admission of such evidence might entail; and
> (vii) any other factor which should in the opinion of the Court be taken into accounts: is of the opinion that such evidence should be admitted in the interests of justice.
> (2) The provisions of ss (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
> (3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the Court is informed that the person upon whose credibility the probative value of such evidence

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regarded as evidence in the case before the Court. On the contrary, the consent given by defendant's counsel to the records being put in was expressly given ("subject to any objection"), and it clearly was a valid objection that what the plaintiff said in the resident magistrate's court was not evidence in the trial of this action. That the defendant company's counsel never intended that it should be so used cannot admit of doubt. His whole object was to prove that the plaintiff's evidence before the magistrate was false, and it is inconceivable that he should have consented to its going in as evidence to be weighed by the Judge against that given by his own witnesses. He agreed to the records being put in merely to prove the fact that the plaintiff had sworn that the deceased was not his partner, and with the very object of proving that the statement was false. The records, therefore, were made use of by the learned Judge for a purpose which was never intended, and in a manner which was not justified by the form in which the consent was given. In these circumstances, as the learned Judge in coming to a decision was undoubtedly influenced by evidence which was not legal evidence in the case before him, it is clear that his judgment cannot stand, but that it must be set aside."

[4] In the court below the complete record of the criminal trial, including the judgment of the magistrate acquitting the driver Ngwenya, was handed in by consent as an exhibit. The court does not appear to have attached any significance to what is recorded in it except in so far as discrepancies between former and later statements by witnesses could be put to them in cross-examination at the second trial. This is a proper and correct approach. See *Fourie v Morley and Co.,* 1947 (2) SA 218 (N) at p. 222.*" – per Marais J*

depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of para (a) of ss (1) or is admitted by the Court in terms of para (c) of that subsection.

(4) For the purposes of this section - "hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

"party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution."

[5] Section 4C of the ICASA Act read with section 17C (6) provides as follows (in its altered form for purposes of the CCC):

"The Complaints and Compliance Committee, by notice in writing in the prescribed form under the hand of a committee member, addressed and delivered by an authorised person or a sheriff to any person, may require such person to -

(b) (i) appear before it at the date, time and place specified in such notice;

(ii) make a statement; and

(iii) submit to it all the documents or objects in the possession or custody or under the control of any such person which may be reasonably necessary; and

(c) through the person presiding at such inquiry and after explaining applicable rights under the Constitution and this section, question any person referred to in paragraph (b) in connection with any matter which may be reasonably necessary."

[6] It is clear from the above section that if it is reasonably necessary to subpoena a person to appear before the CCC and to submit to the CCC the documents that are reasonably necessary for the inquiry, the CCC is authorized to do so. Even hearsay evidence may be subpoenaed in this manner if it is reasonably necessary for purposes of the inquiry. It was argued by *Mr.Shakhane* that since the SABC, in its response, stated that the SABC Board had not accepted all the recommendations of the committee, it was reasonably necessary for the FXI to have sight of the report and evidence so as to reply to the SABC.

[7] The main problem with the introduction of the evidence and the report into this inquiry is that it will lead the CCC nowhere: ultimately it remains the evidence of persons whom the CCC did not hear and see itself and the conclusions of a committee based on its opinion of the evidence.

[8] At the core of the complaint against the SABC is that the blacklisting affected the plurality of views which the SABC is obliged to offer to the public. Section 6(4), (5) and (8) of the Broadcasting Act 4 of 1999, as amended, provides as follows:

> 6(4) The Corporation must encourage the development of South African expression by *providing*…a wide range of *programming* that –
> (a) *reflects* South African attitudes, opinions, ideas, values, and artistic creativity;
> (b) *displays* South African talent in education and entertainment programmes;
> (c) *offers* a plurality of views and a variety of news, information and analysis from a South African point of view;
> (d) *advances* the national and public interest."
>
> 6(5)(a) The Board must prepare and submit to the Authority not later than three months after the date of conversion, policies that will ensure *compliance with the Authority's Code of Conduct* as prescribed and with the Corporation's licence conditions and with the objectives contained in this Act, including,
> (i) News editorial policy;
> (ii) programming policy;
> (iii) local content policy;
> (iv) educational policy;
> (v) universal service and access policy;
> (vi) language policy; and
> (vii) religious policy
>
> 6(8) The Corporation must develop a ***Code of Practice*** that ensures that the *services* and the *personnel* comply with-
> (a) the constitutional principle of policy;
> (b) the equitable treatment of all segments of the South African population;
> (c) the constitutional requirement of equitable treatment of all official languages;
> (d) the right of all South Africans to receive and impart information and ideas;
> (e) the mandate to provide for a wide range of audience interests, beliefs and perspectives; and
> (f) a high standard of accuracy, fairness and impartiality in news, and programmes that deal with matters of public interest."

Broadly, the rules differentiate between internal measures which should be taken by the SABC and the external product which must be provided to the public. The SABC has a duty to submit to the Council of ICASA policies that will ensure compliance with the Authority's Code of Conduct, its licence conditions and with the objectives contained in the Broadcasting Act. The Authority has a duty to monitor and enforce compliance with the Charter as contained in section 6. The CCC will have to adjudicate allegations of non-compliance and if it finds that the Charter has been contravened, it will recommend a sanction to the Council of ICASA. What primarily interests the CCC in this matter is "the product offered to the public" by the SABC. I have italicized the words in subsection (4) which emphasise the *programming provided* to the public. There is also reference to the Code of Conduct for Broadcasters as issued by the Authority. Except for a few aspects in the Code, where consulting with senior managers is required, the Code of Conduct for Broadcasters published in March 2003 by ICASA deals with the *product* provided to the public.

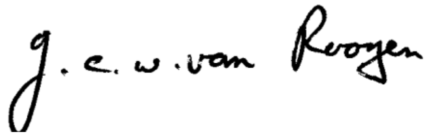
[9] Accordingly, so as to give direction to this inquiry, the CCC requires that the FXI should first provide evidence that the SABC has failed in its news and in its comment programmes in so far as the Code of Conduct is concerned. Once evidence of such failure is placed before the CCC, only then the CCC would be in a position to decide what course the inquiry should follow. It might then admit evidence to be led. In such a case, so as to test the veracity of the evidence, it might permit a comparison with the evidence led at the inquiry before the external committee. However, at this stage, references in the complaint, response and reply to the evidence led before the external committee, the conclusions reached by the external committee and the reaction of the SABC Board is ruled to be impermissible. The evidence would be of no value for the reasons given by our Courts, as referred to above. It would, accordingly, not be reasonably necessary to order that the evidence and report be placed before the CCC by the SABC. No ground in terms of section 3 of the Law of Evidence Act could also be found to admit the evidence and report. The application in terms of section 4C of the ICASA Act is accordingly dismissed.

[10] The next leg of the inquiry would, accordingly, deal with the FXI's having to provide the CCC with evidence as to where any of clauses 34, 35 or 36 of the Code have been contravened in the period within which the alleged blacklisting had taken place. The clauses deal with news, comment and controversial issues of public importance. Of course, if the FXI chooses to include any other clause of the Code, they should be free to do so. The said three clauses, however, would seem to be the most relevant to the present inquiry. Even if a contravention of one or more of the said clauses is found to have taken place, the FXI would also have to show a nexus between blacklisting and the contravention. Once again, the mere fact that the external committee found that blacklisting had taken place would not suffice as evidence of blacklisting before the CCC.

Of course, the FXI could also apply to place other evidence before the CCC, where it believes that the Charter has not been complied with in the programming to the public. Furthermore, it would be permissible for the FXI to apply to lead evidence which deals with other aspects than the product to the public. For now, however, the focus should be on the product offered to the public and its compliance with the Code.

[11] Once the above matters have been addressed, the CCC will, after argument, consider what steps, if any, it still needs to follow to come to a conclusion on the complaint.

Chairperson Ms. Moloto-Stofile, Ms Ntanjana and Mr Moalosi concurred in the above judgment.



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JCW van Rooyen

For: CHAIRPERSON OF THE CCC

15 November 2007.