

BEFORE THE COMPLAINTS AND COMPLIANCE COMMITTEE

In the matter between

Case No. 69/2014

The South African Police Service

Complainant

and

The Democratic Alliance

Respondent

Committee

JW Tutani

Chairperson

M Ndhlovu

Councillor

J Tlokana

Member

N Maseti

Member

T Ramuedzisi

Member

For the Complainant:

Adv. William Mokhari SC instructed by Webber Wentzel

For the Respondent:

Adv. Nick Ferreira instructed by J Nicolaou

JUDGMENT

[1] The Complainant in this matter is the South African Police Service which lodged a complaint against the Democratic Alliance (the "DA"), the Respondent herein. The complaint revolved around a political advertisement entitled "Ayisafani" which was being broadcast by the South African Broadcasting Corporation (the "SABC").

[2] The complaint was lodged directly with the Complaints and Compliance Committee (the "CCC") in terms of the Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee of The Independent Communications Authority of South Africa (the "CCC Regulations").

[3] The Complainant alleged that "the advertisement breached Regulations on Party Election Broadcasts, Political Advertisements, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters ("the Regulations") because it was likely "to provoke violence against members of the SAPS" and requested the CCC to make a finding that the advertisement breached the Regulations and to recommend that ICASA direct the SABC to stop broadcasting the advert.¹

[4] The "Ayisafani" advertisement was a political advertisement prepared by the DA as part of its campaign for the 2014 national elections. The advertisement depicted Mr. Maimane, the DA's candidate for election as Gauteng's Premier, delivering a monologue in which he made various statements regarding the African National Congress (the "ANC") and the current government of the country.

¹ Page 2 of letter from Webber Wentzel dated 20 April 2014

[5] One of the statements made by Mr. Maimane was that "we've seen a police force killing our own people." The advertisement simultaneously depicts a police officer shooting at two apparently unarmed people who were cowering away from the police officer.²

[6] The advertisement was initially broadcast by the SABC on 08 and 09 April 2014 but thereafter the SABC decided to stop broadcasting it on the following grounds:

- (a) The content of the advertisement incited violence;
- (b) The advertisement contained false allegations against President Zuma in relation to the funds spent on his home at Nkandla which had not yet been tested in Court;
- (c) The Code of Advertising Practice adopted by the Advertising Standards Authority prohibited advertisements by competitors that attacked other products; and that
- (d) The SABC could not permit political advertisements that contained personal attacks against other political parties and leaders.

[7] In response, the DA lodged a complaint with ICASA and a hearing took place on 16 April 2014. During the course of the hearing, the matter was postponed *sine die* to enable the SABC to prepare adequately. In the meantime, the parties agreed that the SABC would reinstate the advertisement, pending the outcome of the DA's complaint.

² Page 2 of the letter of complaint from Webber Wentzel dated 20 April 2014

[8] On 17 April 2014, SAPS, through their attorneys wrote a letter to the SABC wherein they expressed concern about the advertisement and requested the SABC to stop the broadcast pending the outcome of the complaint they intended to lodge with the CCC.

[9] On 18 April, Complainant's attorneys received a letter from the SABC in which it declined the request on the grounds that it had already made an undertaking to the DA that it would continue broadcasting the advertisement, pending the outcome of the DA's complaint.

[10] In their letter of complaint, Webber Wentzel pointed out that in terms of Regulation 7(1), a complaint concerning a political advertisement must be submitted within 48 hours after such broadcast had occurred. They said the SAPS's complaint was not lodged within the prescribed period and that, accordingly, their client requested condonation for the late filing of the complaint.³

The complaint was filed late for the following reasons:

- (a) The advertisement was broadcast on 08 and 09 April 2014 and thereafter the broadcast was suspended.
- (b) When the advertisement was first broadcast, SAPS was not aware of its existence. They only became aware when the SABC decided to stop broadcasting it, when it was "extensively" reported on in the media. According to Webber Wentzel, at that stage the outcome of the DA's complaint to ICASA was "unclear and it was hoped that ICASA would take a decision not to permit the advert to be broadcast."

³ Page 6 of the letter from Webber Wentzel dated 20 April 2014

- (c) However, when the advertisement was reinstated by the SABC and the DA's complaint was postponed indefinitely, SAPS decided to launch the application. Webber Wentzel submitted that their client did not delay deliberately.

[11] It only when the advertisement was reinstated by the SABC and the DA's complaint was postponed indefinitely that SAPS decided to complain to the CCC.

[12] Lastly, Complainant requested that the complaint be heard urgently in light of the damaging nature of the advertisement. Complainant said if a decision was not rendered soon, the damage complained of might occur with the resultant loss of life or injury to members of SAPS.

[13] The DA opposed SAPS' application for condonation as it was "hopelessly out of time." Some of the Respondent's reasons for opposing the application were as follows:

- (a) Regulation 7(1) required a complaint to be lodged within 48 hours of the broadcast occurring;
- (b) The advert was first broadcast by the SABC on 08 April 2014 and the Complainant was, therefore required to lodge its complaint by 10 April 2014;
- (c) On its version, the SAPS became aware of the existence of the advertisement "when the SABC decided to stop broadcasting it and the matter was extensively reported on in the media";

- (d) The SABC stopped broadcasting the advertisement on 10 April 2014. The SABC's rejection of the advertisement "received extensive media coverage from 11 April 2014";
- (e) On its own version, the SAPS had known about the existence of the advertisement since, at the latest, 11 April 2014;
- (f) In addition, the SAPS elected not to file the complaint within 48 hours stipulated by the Regulations, notwithstanding the fact that it knew that the "Authority" was to determine a dispute between the SABC and the DA about the advertisement on the 15th and 16th April; and
- (g) The SAPS filed its complaint only on 20 April, some 9 days after the advertisement came to its attention.

[14] In addition to the above reasons the DA, said the application was untenable. According to the DA, it was not clear whether the CCC had the power to grant condonation in respect of the period set out in the Regulations for the lodgment of a complaint.

[15] Further, the SAPS had provided "no proper explanation" for its failure to comply with the 48-hour time limit provided for by the Regulations. The DA submitted that, on this ground alone, the complaint "falls to be dismissed".

[16] Regulation 7(1) envisaged a situation where a complaint was lodged with the Authority and not with the CCC. Complainant's attorneys filed the complaint on an urgent basis on 20 April 2014, **directly with the CCC** (our emphasis) and this is permissible under Regulation 6(1) of the CCC Regulations.

[17] The Chairperson was of the opinion that this matter was urgent and decided to treat it as provided in 6(2) of the CCC Regulations.

[18] CCC Regulation 6(2) provides as follows:

Upon receipt by the **CCC** (our emphasis) of a complaint or dispute in which the Complainant requests that it be dealt with on an urgent basis, the Chairperson must provide the licensee against whom the complaint is made or the party against whom the dispute is declared an opportunity to respond in writing to the request that the matter be dealt with on an urgent basis: provided that the Chairperson may require that affidavits be filed to substantiate or deny allegations of urgency.

[19] In terms of CCC Regulation 6(4), the Chairperson of the CCC advised the parties of the procedure and time periods to be followed and none of the parties objected.

[20] It is our view that Regulation 7(1) of the Regulations becomes applicable when a complaint is referred to the Authority. Regulation 7(2) provides that any complaint lodged with the Authority in terms of Regulation 7(1), shall be addressed by the Authority in accordance with Regulation 6 of the CCC Regulations. Here I pause to reiterate that this complaint was not referred to the Authority but directly to the CCC.

[21] The parties complied with the timelines as given by the Chairperson in terms of the powers vested in him by the CCC Regulations.

[22] In light of the foregoing, we came to the conclusion that the complaint was not filed out of time and that the application for condonation was not necessary. Because of this finding, we are not going to make a pronouncement on whether or not the CCC has the power to condone failure to comply with the Regulations.

- [23] We have taken note of various cases cited by Mr. Ferreira, more specifically the Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd⁴. What was before the Court was the issue of condonation of a failure to comply with the peremptory requirement in applications for a fishing licence. What happened in that case was that the applicant, a subsistence fisherman had applied for a fishing licence. The regulations required the application fee to be paid in advance and, in a *bona fide error*, the bookkeeper had accidentally post-dated the cheque that went in with the application and that meant that the application fee was not paid in time for the application.
- [24] The question to be decided by the Court was whether the administrative authority had the power or discretion to condone that *bona fide* error. The Court held that “as a general principle, an administrative authority has no inherent power to condone failure to comply with the peremptory requirement. It only has such power if it has been afforded the discretion to do so.....” The fisherman’s application was refused on the grounds that the administrator lacked the express discretion by the regulations to condone the failure.
- [25] Mr. Ferreira then argued that the CCC was a creature of statute and had only those powers expressly conferred on it by the CCC Regulations and the Political Regulations.⁵
- [26] We are not at all at odds with the legal position as enunciated by the Supreme Court of Appeals in the matter of the Minister v Pepper Bay Fishing save to say that that case is distinguishable from the one under consideration. In the instant case, the complaint was not lodged out of time and therefore the question of condonation did not arise. While Mr. Ferreira’s argument was sound in law, it was irrelevant to the matter under consideration.

⁴ 2004(1)SA 308 (SCA) paragraphs 31-35

⁵ Page 24 of the Transcript

[27] Mr. Mokhari made an application for condonation, giving reasons as to why the complaint was lodged out of time. As pointed out above, we came to the conclusion that the complaint was filed timeously and, consequently, we did not deal with the merits of the application.

[28] We now come to the crux of the matter, that is, whether the advertisement was in contravention of Regulation 6(9)(b) as alleged by the Complainant.

[29] Regulation 6(9) provides that:

A party that submits a PA to a broadcasting service licensee for broadcast must ensure that the advertisement does not:

(a) Contravene the provisions of the Electoral Code, the Electoral Act, the Constitution, the Act and the Broadcasting Act; or

(b) Contain any material that is calculated, or that in the ordinary course is likely to provoke or incite any unlawful, illegal or criminal act, or that may be perceived as condoning or lending support to any such act.

[30] Mr. Mokhari submitted upfront that the SAPS was an independent constitutional institution which had no interest in what political parties were saying in their advertisements in the course of electioneering for purposes of upcoming elections. Its constitutional obligation was to maintain peace, stability, public order and execute that function without interference. He argued that the SAPS should not be drawn into political "skirmishes" for purposes of electioneering.

[31] He submitted that the test to be applied to determine whether the advertisement was in contravention of Regulation 6(9) of the Regulations was "whether the advertisement contained any material that was calculated or that in the ordinary

course was likely” and then said “there was a juxtaposition here in the sense that either it contained the material that is calculated or likely, so, the likelihood of it to provoke or incite any unlawful or illegal activity or criminal acts.” He argued that in order for the CCC to find that an advertisement contravened Regulation 6(9)(b) it did not have to find as a matter of fact, that it provoked or incited unlawful, illegal or criminal activity. It was sufficient if the CCC found the likelihood to do so and, that was the test.

[32] He submitted that the statement; “We have seen a police force killing our own people” was attributed to the police as an institution and that the police as an institution was a killing machine of “our people.” This led an ordinary reader to read that the police force which was required by the Constitution to maintain law and order was, in fact, the killers of the people. This made the public to disobey the police and refuse to carry out their instructions because there was no reason to obey instructions from killers.

[33] Mr. Ferreira, on the other hand, argued that the advertisement did not encourage viewers to disobey the police. He submitted that it did not encourage them to respond with violence when they encountered the police. He said when you viewed the advertisement from start to the end, “it is plain that what the advertisement encourages those who see it to do is to vote for the Democratic Alliance in the up-coming elections”.⁶

[34] He said the overall tenor of the advertisement was a criticism of the existing government which was raised as a reason why the person who viewed the advertisement during the elections should vote for the DA.

⁶ Page 102 of the Transcript

- [35] In his reply Mr. Mokhari pointed out that it was inappropriate to include the SAPS in that kind of criticism because the SAPS was an independent institution which was not “folded” into the current governing party. Mr. Ferreira countered this argument by referring to section 206 of the Constitution which places political responsibility with the Minister of Police who controlled the police and determined policy for them. He also referred to section 207 of the Constitution which provided that it was the President who was controlling the police and appointed the National Commissioner.⁷
- [36] Mr. Ferreira took the CCC through Annexure 1 (BBC News) which dealt with the Marikana massacre where it reads “Thirty four people were killed after police opened fire on striking miners at a South African mine on Thursday....” It goes on to say police had been forced to shoot after **armed protesters charged them** (our emphasis)⁸.
- [37] According to Annexure 1, some of the strikers’ wives gathered near the mine, chanting anti-police songs. Women carried a banner which read “Police, stop shooting our husbands and sons.” Violence had already killed 10 people, including two police officers since the strike began.⁹
- [38] Counsel for the Respondent took the CCC through a number of annexures which show police brutality and abuse of power. We did not challenge the veracity of the contents of these annexures Annexure 1 also showed that people saw the police as killers who kill their husbands and sons. Armed protesters charged at the police and the police were forced to shoot in self-defence.

⁷ Page 103 of the Transcript

⁸ Page 70 of the paginated Bundle

⁹ Page 70 of the paginated Bundle

- [39] We did not condone the killings by the police and from Annexure 1, it was obvious that people were angry with the police. The DA's advertisement was making worse an already difficult situation. This kind of advertisement actually encouraged people to act against the police and to disobey them. Two policemen were killed at Marikana and, by broadcasting an advertisement which portrayed them as "killers of our people" was to encourage anti-police sentiments, thereby frustrating polices' efforts to combat crime.
- [40] The statement "we've seen a police force killing our own people" which simultaneously depicted a police officer shooting two unarmed people who were cowering away clearly, in our view, portrayed the police as the enemy of the people who must not only be disobeyed but must be killed. As pointed out above, policemen were killed at Marikana and the CCC also took judicial notice of the police being killed in SA and in the Western Cape, in particular. If police were being disobeyed (because they were seen as the enemy), there would be anarchy in the country and that was a situation which could be tolerated in a constitutional democracy.
- [41] SAPS were objecting to the advertisement with the voiceover with the words "we have seen a police force killing our own people " and these words were juxtaposed with an image of SAPS members seemingly about to assault or harm two individuals with their backs to a wall. We had the privilege of watching the audiovisual, thanks to Mr. Ferreira, showing the above and our view was that it put the police in a very bad light and that it was highly provocative. The advertisement as shown in the audiovisual focused its attack on the police and not on the government which allegedly allowed the police to be brutal.
- [42] In response to a question from the CCC regarding the photograph with the voiceover attacking the police, Mr. Ferreira said he did not know whether the two people in the photograph were killed by the police officer who was also in the

photograph. He also did not know whether the police officer was actually protecting those two people. He also knew nothing about the photograph but the voiceover said "see, the police were killing our people" and the public was shown the police officer whom the DA did not know what he was doing, whether he was protecting the two people or whether he was actually killing them. What was paramount to the DA was the portrayal of the police as the "killers of our people". Again responding to a question from the CCC, Mr Ferreira was adamant that the police officer was firing rubber bullets from a shotgun at a citizen who was cowering in the corner.

[43] Mr. Mokhari submitted that the image contained in the advertisement was inaccurate in that the individuals depicted in the image were not killed by the police and no live ammunition was used. He said the advertisement falsely sought to portray the image as an example of SAPS members killing members of the public.¹⁰

[44] We knew that the election period was very sensitive as political parties jostled for power. Mr. Mokhari argued that the advertisement placed the allegations against the SAPS in the context of broader (untested) allegations of corruption and lack of delivery against the government. Placed within this context, members of the public were encouraged to view the SAPS as serving the interests of the ANC, instead of serving the public as a whole.

[45] We agree with Mr. Mokhari and, lumping the SAPS with the ANC as the advertisement had done, was to tell the public that the SAPS was partisan, was there to serve the interests of the ANC and was not independent. This was dangerous, especially during the election time.

¹⁰ Paragraph 3.5 Complaint's Written Submissions

- [46] Mr. Ferreira referred the CCC to a graph which indicated that there was an increase of 313% in brutality cases recorded against the police in the 10 years from 2001 or 2002 to 2011 to 2012.¹¹ We do not quarrel with Mr. Ferreira's submission herein but, it was no justification for the DA to broadcast an advertisement which was designed to inflame public sentiments against the Police.
- [47] Significantly, Mr. Ferreira made a concession regarding the difficult situations in which the police were working. In his submission he said, "Now I want to make absolutely clear that I appreciate that the police service has an extraordinarily difficult task in dealing with violent service delivery protests. It has an extraordinarily difficult task in responding with the appropriate level of force when attempting to restore public order in these situations and the DA does not attempt to treat lightly the difficulties that the SAPS faces in dealing with these difficult situations in a **volatile political** (our emphasis) country where the causes for discontent are many and the SAPS is called upon **to do a very difficult job under trying circumstances.**" (our emphasis).¹²
- [48] Mr. Ferreira submitted that there was widespread public knowledge of an increase in police violence and brutality. He said people knew about these things before the DA broadcast its political advertisement and that being the case, it could not be said that the advertisement was going to cause them to commit violence in a way that they would not have been provoked before.¹³ It might be true that the public knew about an increase in police violence from print media, radio, TV and so on and the annexures to the DA's affidavit bore testimony in this regard. However, the fact that the public knew about police brutality did not entitle the DA to create advertisements which were likely to make the situation worse than

¹¹ Page 152 of the paginate Bundle

¹² Page 155 of the paginated Bundle

¹³ Page 157 of the paginated Bundle

it was. As a result of these brutalities and acts of violence by the police, the public was fertile soil which was likely to act violently and even kill, when provoked. Election time was not ordinary or normal time. It was a very sensitive period with tempers running high and political parties should, therefore, guard against provocative statements in their advertisements.

[49] Mr. Mokhari submitted that it was impossible to conceive how the police could be expected to, during the election period leading to the elections or during the elections themselves and following the elections to discharge their public trust when the Democratic Alliance called on the public to consider them as an instrument that killed our own people.¹⁴

[50] Mr. Ferreira contended that there was no basis for the SAPS' complaint, saying that were it to be upheld, there would be severe, irreparable infringement of the right of freedom of expression and political freedom. He submitted that no adequate case had been made out to justify such an infringement. Excising that part of the advertisement (which SAPS said was offensive), would amount to a limitation of the DA's right that went to the heart of their right to freedom of expression and political speech. We do not agree.

[51] The right to freedom of expression is not absolute. The test to be applied in this complaint is contained in Regulation 6(9)(b) quoted above, but briefly it says a broadcasting service licensee must ensure that the political advertisement does not contain any material that is calculated or is likely to provoke or incite any unlawful, illegal or criminal act or that may be perceived as condoning or lending support to any such act.

¹⁴ Paragraph 21 of the Complainant's Written Submissions

[52] He submitted that in order to find that an advertisement contravened Regulation 6(9)(b), the CCC did not have to find as a matter of fact, that it provoked or incited unlawful, illegal or criminal activity. It was enough if the CCC found that there was a likelihood to do so.

[53] Mr. Ferreira referred the CCC to the leading case on the meaning of incitement where the Appeal Division held as follows:

It seems to me proper to hold that, in criminal law, an inciter is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity.¹⁵

[54] Flowing from the above judgment, we hastened to define some of the key words that were used in the Nkosiyané case. "Influence" means "have an effect on".¹⁶ There is little doubt that the advertisement sought to have an effect on the public and this was where the risk lay. As a result of this advertisement, people could be influenced against the "killers" (the police) and this could lead to violence.

[55] Proposal is also mentioned in the judgment and defined as a "plan or suggestion put forward for consideration"¹⁷. It is also defined as the action of proposing "something". Considering that the election period is volatile, the suggestion put forward by the advertisement was that the public should do "something" and this is dangerous. This "something" could be violence or any criminal act against the police since they have been painted as the machine that was "killing our people".

¹⁵ S v Nkosiyané and Another 1966(4) SA 655(A)

¹⁶ Compact Oxford English Dictionary, page 519

¹⁷ Compact Oxford English Dictionary page 20

- [56] Mr. Ferreira conceded that the SAPS did not have “to wait for somebody to go and commit violence before coming, but what they have to show is that the risk of harm is not speculative” and that there was a real and substantial risk as a result of these two seconds being broadcast in an advertisement that violence would be provoked. In our view, the risk of harm was not speculative. It was real.
- [57] In February 2014, the community of Bronkhortspruit burnt a satellite police station. On 7 April 2014, two police officers were attacked and injured by mobs in Bloemhof while policing a community protest. On 7 and 8 April 2014, the homes of five policemen were attacked and burnt with petrol bombs by community members in Bloemhof.¹⁸ The election period was a very sensitive time where political parties attacked one another and political parties had to be extra careful in what they said and did. Viewed against the back-round of police being killed by angry mobs and the police station being burnt down, it would be irresponsible of the CCC to say there was no real risk. It was to be noted that these events took place close to the elections.
- [58] Accordingly, we order that that part of the advertisement which said, “We have seen the police force killing our own people” juxtaposed with the image of a police officer with a gun must be excised. In our view, that part of the advertisement was in contravention of Regulation 6(9)(b) of the Regulations.
- [59] We took note of Mr. Ferreira’s submission where he quoted the Human Rights Watch where it said about South Africa “serious concerns remain about the ongoing conduct and capacity of the SAPS, both in terms of the use of force in general as well as the ability to deal with riots in a rights respecting manner.”¹⁹ We did not quarrel at all with this statement nor did we challenge its veracity

¹⁸ Page 5 of the letter from Webber Wentzel dated 20 April 2014

¹⁹ Paragraph 54 of the DA’s affidavit

but, we could not, because of the police's "ongoing conduct, allow a climate, especially during the election period, in which the SAPS were hated or feared by members of the public. The police force was a critical part of the machinery that assisted in ensuring free and fair elections. They ensure that the elections were free and fair. They also ensure that there was order and stability when elections took place but, if they were portrayed as "killers who kill our people" how were they supposed to do their job and ensured that the Independent Electoral Commission was able to deliver free and fair elections?

[60] Mr. Ferreira contended that what the SAPS wanted, amounted to prior restraint. We did not agree. When the SAPS filed their complaint with the CCC, the advertisement was being flighted by the SABC. Further, the SAPS restricted their complaint to that part of the advertisement which made reference to the police and not to the entire advertisement as submitted by Mr. Ferreira. The statement in the DA's affidavit which said "moreover, SAPS seeks to prevent its broadcast in its entirety, in advance"²⁰ is not correct. SAPS' focus was on that part which made reference to them.

Recommendation

[61] In our interim judgment we recommended that Council approve the interim judgment in which we ruled that the offending part must be removed from the advertisement and, this Council approved. We are now forwarding the comprehensive judgment for Council to scrutinise and to close the complaint if Council agrees with the full judgment.

Dated at Bryanston on this 08th day of July 2014.

²⁰ Page 12 of the DA's affidavit



JW Tutani

Chairperson

**Miki Ndhlovu, Jack Tlokana, Nomfundo Maseti and Tumeka Ramuedzisi
concurred with the above judgment.**