

COMPLAINTS AND COMPLIANCE COMMITTEE¹

CASE NUMBER 201/2016

Date of Hearing: 5 August 2016

JANSEN

v

e.tv

PANEL: Prof JCW van Rooyen SC
Councillor Nomvuyiso Batyi
Mr Jacob Medupe
Mr Jack Tlokana
Ms Mapato Ramokgopa

Matter decided on the Papers

Acting Coordinator: Ms Meera Lalla (Attorney)

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] The Complainant in this matter filed a complaint with the Broadcasting Complaints Commission of South Africa (“BCCSA”).²

¹ An Independent Administrative Tribunal at ICASA set up in terms of the Independent Communications Authority Act 13 of 2000. The CCC was recognised as an independent tribunal by the Constitutional Court in 2008. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the compliance division or inspectors at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and only subject to review by a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to sanction against the licensee. Council then considers a sanction in the light of the recommendation by the CCC. Once Council has decided, the final judgment is issued by the Complaints and Compliance Committee’s Coordinator. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council’s imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

Since complaints which relate to elections during the election period (23 May – 3 August 2016)³ are excluded from the jurisdiction of the BCCSA⁴ the Registrar of the BCCSA referred the complaint to the Coordinator of the CCC, who required the Complainant to elaborate on his complaint. Since the Complainant was not available for a hearing before November 2016 and election complaints are regarded as urgent, we arranged that the matter be heard on the papers, without a hearing.

[2] The elaborated version of the Complaint, dated 26 July, reads as follows:

On the 25th of July 2016, at 19h00, ETV news reported on a story about the advertisement of the DA, making use of references to Old President Nelson Mandela.⁵ The report was seemingly about the unveiling of their new posters/banners.

During the news report the ETV news reporter made a comment as part of the report that the DA is using the reference to President Nelson Mandela after he said bad things back in 2003 about the DA. The news report did not say what the bad things were, just made a reference to comments that were made about the DA, by President Nelson Mandela, and they painted the picture that the comments made by President Nelson Mandela were bad things about the DA.

The concern is not what was said by President Mandela back in 2003, or with the references made by the DA. The concern is that ETV news had a clear agenda during this news report to diminish the current standing of the DA. They had no intention in my view to just report on the fact that the DA is making use of President Mandela's visions, the reference made about what President Nelson Mandela had to say about the DA in the past is completely irrelevant and I want to go as far to say unsubstantiated.

² An independent Administrative Tribunal recognised in 1995 by the Independent Broadcasting Authority. The BCCSA has jurisdiction over broadcasters which have agreed to its jurisdiction in so far as their broadcasts do not comply with the BCCSA Code, which is identical to the Code applied by the CCC. All commercial and some community broadcasters have accepted its jurisdiction via the National Association of Broadcasters.

³ As per the Government Gazette Notice of 23 May 2016 signed by the Minister for Cooperative Governance and Traditional Affairs, Mr D van Rooyen MP.

⁴ See the 25 November 1995 recognition of the BCCSA by the Independent Broadcasting Authority (IBA). The IBA was succeeded in 2000 by the Independent Communications Authority of South Africa in terms of the ICASA Act 13 of 2000 and the BMCC, which was the complaints body for broadcasting in terms of the IBA Act was replaced in July 2006 in terms of the ICASA Amendment Act 2005 by the CCC. The CCC has been held by the CCC (Justice De Villiers presiding) not to be a successor of the BMCC – Galbraith v Telkom SA (10/2007).

⁵ I have removed the word “Old” from further references to President Mandela since the Honourable deceased President is presently still referred to as President Mandela or as Nelson Mandela.

Herewith my reasons:

- 1) First of all, even if there might have been hard feelings between the DA and the ANC leadership back in 2003, the DA leadership has since changed. Their focus, vision and mission have since changed! Different leaders with different goals and aspirations for the party, as such the party has also grown and developed and therefore comments made about the party in the past are therefore no longer applicable. Therefore making any comments on what transpired in 2003 is no longer relevant! Therefore any comment made about possible comments of the past is unnecessary and irrelevant.
- 2) Secondly, ETV news only reported in the news report that President Nelson Mandela said bad things about the DA, they did not say where and under what circumstances such comments were made, therefore the context of the circumstances during which such possible comments were made could for all I know have been made out of context here.
- 3) Lastly, regardless of points one and two, what relevance to current news does anything that happened in 2003 have to do with today? Therefore I again feel the comment made was unnecessary. I got the distinct impression that the news report is actually trying to turn voters from the DA to the ANC, although this was not in the news report, that is how the news report was received!

The reason this is offensive for me is, if news is allowed to make such remarks it will most definitely influence voters decisions, and I consider it unfair that a news report can choose sides in an election.

My understanding of the content of the code of conduct of the BCCSA is that news must be fair and unbiased (well at least this is what is advertised every time radio or TV invites us to contact the BCCSA) and the comments made during the report was neither.

Understand that I am not quoting the ETV news, I am simply trying to describe the news report as I remembered it. The wording used by the ETV news report might be different but the understanding from the words used by ETV news and the words used in this complaint is the same.

[3] Clause 11(1)-(3) Of the BCCSA Code, which accords with the Code applied by the CCC in cases where it has jurisdiction over broadcasters in the normal course, provides as follows:

- (1) Broadcasting service Licensees must report news truthfully, accurately and fairly.
- (2) News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by:

- (a) Distortion, exaggeration or misrepresentation.
 - (b) Material omissions; or
 - (c) Summarisation
- (2) Only that which may reasonably be true, having reasonable regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with reasonable regard to context and importance.
- (4) Where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate, clearly that such is the case.

[4] It is true that the Complainant should have based his complaint on section 59 of the Electronic Communications Act (“ECA”), but one could not expect from a member of the public to have known this detail. However, section 59 of the ECA, requires equitable treatment in the same manner as the news clause requires balance in the said Broadcasting Code. Section 59 of the ECA provides as follows:

59. Equitable treatment of political parties by broadcasting service licensees during election period

- (1) If, during an election period, the coverage of any broadcasting service extends to the field of elections, political parties and issues relevant thereto, the broadcasting services licensee concerned must afford reasonable opportunities for the discussion of conflicting views and must treat all political parties equitably.
- (2) In the event of any criticism against a political party being levelled in a particular programme of any broadcasting service -
 - (a) without such party having been afforded an opportunity to respond thereto in such programme; or
 - (b) without the view of such political party having been reflected therein, the broadcasting services licensee concerned must afford such party a reasonable opportunity to respond to the criticism.

We will, accordingly, judge the Complaint in terms of section 59 of the ECA.

[5] The broadcaster responded as follows to the Complaint:

This is in response to a complaint lodged by Simon Jansen concerning a news story broadcast on e.tv on 25 July 2016 during the 18h30 bulletin.

The complaint is being considered in terms of Section 59 of the Electronic Communications Act No. 36 of 2005 ("the Act"). In particular Section 59(1) which provides that:

If, during an election period, the coverage of any broadcasting service extends to the field of elections, political parties and issues relevant thereto, the broadcasting services licensees concerned must afford reasonable opportunities for the discussion of conflicting views and must treat all political parties equitably.

Essentially the complainant objects to a news story which covered the DA unveiling a new election poster. The basis of the complainant's objection is the reference in the news story to comments made by Nelson Mandela in 2003 about the Democratic Alliance. According to the complainant, in doing so, the news report was attempting to influence voters away from the DA to benefit the ANC.

1. e.tv rejects the allegation that its reporting was biased and had a party political agenda. As always, e.tv's only motivation here was to cover a news story fully and accurately so that our audience could be informed.
2. The story was centered on the unveiling of new DA campaign material which invokes the memory of Nelson Mandela. Given Mandela's long relationship with the ANC, the DA election poster is obviously news-worthy. Similarly, the Mandela comments about the DA are plainly relevant to the telling of this story. As Mandela cannot comment himself, the news item referred to his recorded views on the matter which were accurately presented. e.tv submits that the Mandela comments were integral to the story.
3. The complainant mistakenly alleges that the news item does not explain where and under what circumstances the Mandela comments were made, but this is not so. The reporter explicitly says "During the Cosatu rally in Johannesburg...former president Nelson Mandela urged voters not to be misled by Democratic Alliance calling it a party of white and black stooges saying it will always remain a white party".
4. It is also noteworthy that the story took care to include different views on the issue. In particular, the story included the DA response to the criticisms of it. In so doing, we submit the requirements of fairness and equitable coverage were met.
5. In summary, e.tv submits that there was no contravention of Section 59 of the Act.

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EVALUATION

- [6] It will be valuable to commence this evaluation by going back to first constitutional principles. And, although the Constitutional Court has held that when the process of balancing constitutional

rights takes place all the rights initially lie at the same level,⁶ it would not be out of place to commence this evaluation of the broadcast with the value of freedom of expression, which is, to a certain extent, limited by section 59 of the ECA which requires a reasonable opportunity for the discussion of conflicting views and the treatment of political parties equitably during an election period, which commenced on 23 May 2016 and ended on 3 August 2016. The importance of the free flow of information, particularly information in the public interest, has been widely acknowledged by our courts and by this Tribunal.⁷ In this regard the Constitutional Court has held that the right to freedom of expression and freedom of information under section 16 of the Constitution lie at the very heart of our democracy, since individuals in society need to be able to hear, form and express views freely on a wide range of matters.⁸ In *Khumalo and Others v Holomisa*,⁹ the Constitutional Court put it thus:

In a democratic society, then, the mass media play a role of undeniable importance. *They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society...*" (Italics added)

[7] Furthermore our courts have made the following observations:

- (a) The Constitutional Court has held that the very ability of each citizen to be a responsible and effective member of society "depends on the manner in

⁶ *De Reuck v DPP and Another* 2004(1) SA 404(CC) at para [55].

⁷ Cf. *Media Monitoring Project and Others v SABC* case 195/2016; which case was referred to with agreement by the Labour Court in *Solidarity and Others v SABC* (Case no J 1343/16) at para 23 et seq.

⁸ *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) at [7].

⁹ 2002 (5) SA 401 (CC) at paras 22 – 24. See also: *S v Mamabolo* 2001 (3) SA 409 (CC); *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

which the media carry out their constitutional mandate. The media thus rely on freedom of expression and must foster it."¹⁰

- (b) *On the role of a healthy press in the functioning of society the Constitutional Court has stated: "one might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public's right to a healthy unimpeded media."*¹¹
- (c) If the media did not properly keep the public informed of matters of public interest, the public would be severely stilted in making real and informed choices about the governance of our democracy.¹²
- (d) It has further been stated that "[t]he success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed also, if those criticisms are to be effectively voiced, and if they are to be informed with the factual content and critical perspectives that investigative journalism may provide."¹³
- (e) Chief Justice Mogoeng in *Oriani-Ambrosini v Sisulu*¹⁴ captured the transition to democracy thus:

"The need to recognise the inherent value of representative and participatory democracy and dissenting opinions was largely inspired by this nation's evil past and our unwavering commitment to make a decisive break from that dark history. South Africa's shameful history is one marked by authoritarianism, not only of the legal and physical kind, but also of an intellectual, ideological and philosophical nature. The apartheid regime sought to dominate all facets of human life. It was determined to suppress dissenting views, with the aim of imposing hegemonic control over thoughts and conduct, for the preservation of institutionalised injustice."¹⁵

- (f) The rejection of thought control is at the heart of freedom of expression in a constitutional democracy. In *S v Mamabolo*¹⁶ Kriegler J, on behalf of the majority of the Constitutional Court, stated:

"Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the *open market-place of ideas* is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly

¹⁰ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para 24.

¹¹ *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 54.

¹² *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 22; *NM and Others v Smith and Others* 2007 (5) SA 250 (CC) at para 145.

¹³ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 608.

¹⁴ *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC).

¹⁵ At para 49.

¹⁶ *S v Mamabolo* 2001 (3) SA 409 (CC).

astute to outlaw any form of thought-control, however respectably dressed.”¹⁷ (Italics added)

- (g) In closing we should, however, also refer to the 1994 European Court of Human Rights’ judgment in *Jersild v Denmark*.¹⁸ In this matter it was held that a Danish Court had convicted Jersild, a television journalist, in conflict with the European Convention of Human Rights for having broadcast a two minute section of a longer interview with racists. The racists, in the broadcast, used racially derogatory language in regard to immigrants from Africa and bragged about their criminal activities in this regard. The Court stated as follows:

The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (ibid.). Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (ibid.). Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media.

- [8] The upshot of the above principles is that the exceptions to freedom of expression – in this case by the section 59 ECA criteria “reasonable opportunities” and “equitability” must be interpreted narrowly so as not to unreasonably limit freedom of expression. If there is any doubt, it must go in favour of freedom of expression. Although a possible note of scepticism might be detectable in the tone of the introduction to the news item, the leader of the Opposition, Mr Maimane, comes over with strength and overshadows the introduction. Thereafter, the ANC spokesperson compares him to the “black stooges” of apartheid times who supported apartheid. Our conclusion is that within the political spectrum, where hard-hitting language is typical, there was, ultimately at least substantial compliance with the requirement of equitability. A reasonable opportunity was granted to both Parties. Ultimately one must take into consideration the words of Ludorf J in *Pienaar and Another v Argus Printing and Publishing Company* 1956 (4) SA 310 (W) :

“Although conscious of the fact that I am venturing on what may be new ground I think that

¹⁷ At para [37].

¹⁸ Application 15890/89 (23 September 1994)

the Courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if the speakers were to use the tones, terms and expressions that one could expect from a lecturer at a meeting of the ladies' agricultural union on the subject of pruning roses! ”

This statement was quoted with approval during the last General Election by Hellens AJ in *ANC v DA* 2014 (3) SA 608 (GJ).

In the result our finding is that the complaint was not justified in terms of section 59 of the ECA and that it be dismissed. Had we applied the Broadcasting Code, the same result would have followed.



JCW Van Rooyen SC

10 August 2016

The members agreed with the above conclusion.