COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of Hearing: 11 April 2019 Case Number: 296/2018

DEMOCRATIC ALLIANCE **COMPLAINANT**

v

SOUTH AFRICAN BROADCASTING CORPORATION **RESPONDENT**

PANEL: JCW van Rooyen SC (Chairperson)

Dr Keabetswe Modimoeng (ICASA Councillor)

Mr Peter Hlapolosa

Mr Mzimkulu Malunga

Mr Jacob Medupe

Prof Kasturi Moodaliyar

Mr Jack Tlokana

For the complainant: Advocate Natalie Lange instructed by Attorneys Warren Burne of Meumann White, Durban; and accompanied by Mr Zwakele Mncwango, who drafted the complaint and Ms Philisiwe Sefatsa.

For the Respondent: Mr Nyiko Shibambo, Mr Philly Moilwa and Ms Sbongi Ngcobo.

Assessor to the Coordinator: Ms X Mantshintshi;

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN

[1] An Independent Administrative Tribunal at the Independent Communications Authority of South Africa (ICASA) in terms of Act 13 of 2000 and section 192 of the Constitution of the RSA. It, inter alia, decides disputes referred to it or filed with 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 on complaints from outside ICASA or references from within ICASA which it receives against licensees in terms of the Electronic Communications Act 2005, the Broadcasting Act 1999 or the Postal Services Act 1998 (where registered postal services are included). Where a complaint is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order, if any, against the licensee. Council then considers an order 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.

[1] A complaint was lodged by the Democratic Alliance, a Political Party and the Opposition in Parliament, against the South African Broadcasting Corporation ("SABC"), the public broadcaster in terms of the Broadcasting Act 1999. The complaint, received by the Coordinator of the Complaints and Compliance Committee at ICASA on 27 August 2018, was initially lodged with the Broadcasting Complaints Commission of South Africa, the Registrar of which, informed the Complainant that the BCCSA did not have jurisdiction to hear the matter and that this is a matter for the Complaints and Compliance Committee at ICASA.

[2] The complaint related to a 10 June 2018 broadcast by Ukhozi FM, a radio station under the control of the SABC. It was stated that the slot, which is meant to communicate Government's work in the Province (and was paid for by the Province) was used by the MEC to criticize the Democratic Alliance ("DA") without the SABC granting the DA an opportunity to respond during the programme. During the programme Ukhozi presenter, Siya Mhlongo, posed a question to a Natal MEC pertaining to a political debate in which the question was raised whether she had influenced State contracts, which were granted to her husband – an allegation which she denied. The slot, which was meant to be used to communicate Government's work in the Province of Kwazulu Natal was, according to the complaint, used by the MEC to exonerate herself. Thus, for personal purposes and not as part of the communication to the public as to the work of the Provincial Government.

THE SABC's RESPONSE TO THE COMPLAINT

[3] The SABC argued at the hearing that the content of the broadcast, which was in Zulu, in no way gave rise to a duty to grant the Complainant a right to reply. It was true that the MEC, a member of the ANC Executive in Kwazulu Natal, had been asked during the slot to respond to allegations that she had, in some way, been involved in the granting of government contracts to her husband. Adv. Lange, representing the Democratic Party, argued that it was reasonable to assume that this interview had been planned so as to grant the MEC an opportunity to clean her slate. In effect, she had been misusing the opportunity to inform the listeners as to how Government was operating, to promote her own image. The counter argument by the SABC's Mr Moilwa was that the interview did not overstep the boundaries of what is permissible in such a programme. In fact, the public had a right to be informed by the MEC in regard to these allegations, whether the programme was subsidised or not.

FINDING

[4] The Broadcasting Code, which was issued per ICASA Broadcasting Regulations in 2009, provides as follows:

12. Controversial issues of public importance

(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.

(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 impractical, a 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.

[5] The CCC came to the conclusion that it could not, reasonably, be concluded that the interview had overstepped the boundaries of what is permissible in Law. The focus of the programme was on the work of the local government and it would have been remiss of the SABC, not to have asked the MEC about the public debate which related to the business of her husband. In fact, this was a necessary ingredient of the programme to inform the public as to the workings of Government in the Province. To have included the view of the DA, would have gone outside the parameters of such an information programme. Viewers would have wanted to know what the MEC's response is to the criticism against her. The intention of the programme was to provide information and not to provide for a debate. The programme was intended to inform the public of what was happening in Government and it was not unreasonable to have included the interview, even if the intention of the programme was to explain the activities of Provincial Government in Natal. Of course, the complaint was not only that the interview was included, but that the DA was not granted an opportunity to reply to what was said by the MEC on a matter which had become a political issue. Such a reply would presumably have questioned the reasoning of the MEC. The electronic copy of the broadcast also demonstrates that the MEC's response contained a plain rebuttal of the allegations and nothing more.

[6] The right to reply, according to the ICASA Broadcasting Regulations, depends on public importance – which is identical to the "public interest" test as applied by our Courts. It is important to note that our Courts have held that "public

interest" is not to be understood as that which is "interesting to the public" but is limited to instances where a higher value would be promoted.[2] Although it could be argued that such a higher value could have resulted in including a response by the DA, the benefit of doubt must go to the SABC. Its freedom of speech is guaranteed by section 16 of the Constitution of the Republic of South Africa and this Constitutional right is generally only limited where section 16 of the Constitution of the Republic (a) excludes hate speech; (b) where the matter is of "public importance" according to the ICASA Code for Broadcasters (2009) and requires an answer and (c) where it amounts to defamation, is injurious of a person or amounts to invasion of privacy. Although the debate as such would have been of interest to the public, the CCC is of the view that a response by the DA within this programme was not called for by the "public importance" test. The programme was directed at information and not at providing different views – political in this case. The question to the MEC was also important, since it related to the integrity of the service in the Province. The reasonable listener would have known that there could be different opinions on what the MEC said – in fact, that it was *her* explanation. The core of the programme was information as to government in Kwazulu Natal and it was not, for purposes of an information slot on Radio, required by the ICASA Broadcasting Regulations (2009) to have also included an opposing view. It was not in the public interest – as defined by our Highest Court at the time[3] – to include it in *this* programme.

[7] The Complainant left it to the Coordinator's Office to add any other relevant complaint. This is not, with respect, the task of the Coordinator and it would also not have been legally permissible for the CCC to have added a second complaint. It is true that the CCC is granted an investigative function by section 17B of the ICASA Act, but the Constitutional Court has held that this authority may not be

[2] See *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) Corbett CJ said in delivering the majority judgment (at 464C-D): "(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known . . .(2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest..." Quoted with approval by Hoexter JA in *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A) at 779 and Hefer JA in *National Media Ltd v Bogoshi & Others 1998(4) SA 1196(SCA) at 1212* where reference is made to Asser *Handleiding tot de Beoefening van het Needelands Burgerlijk Recht (9th Ed vol III at 224 para 238 which, translated, reads as follows:*

[3] See previous footnote

used unfairly.[4] The CCC is, in any case, not permitted, according to the Supreme Court of Appeal, to add a complaint itself.[5]

Thus, although the SABC conceded that it had not, as required by the relevant Regulations,[6] stated that the programme was a sponsored programme at the beginning and end of the broadcast, it would be impermissible in law for the CCC to add a complaint, even if conceded by the SABC. This was the task of the Complainant, which limited its complaint to one matter.

RESULT

The Complaint is dismissed. No order is, accordingly, advised to Council.

The Members agreed with the above Judgment

[4] *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC).

[5] The principle is well illustrated by the judgment of the Supreme Court of Appeal in *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA).

[6] *Regulations Relating to the Definition of Advertising and the Regulation of Infomercials and Programme Sponsorship in Respect of Broadcasting Activities*.