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CASE NUMBER: 010/2021

JUDGMENT DATE: 3 MAY 2021
JUDGMENT RELEASE DATE: 05 JULY 20212

ENCA **FIRST APPELLANT**
E-TV **SECOND APPELLANT**

and

MEDIA MONITORING AFRICA **RESPONDENT**

TRIBUNAL: **ADV SUNETTE LÖTTER (CHAIRPERSON)**
DR MOHAMED CHICKTAY(COMMISSIONER)
ADV BOITUMELO TLHAKUNG (COMMISSIONER)

FOR THE APPELLANTS: ADV GILBERT MARCUS, INSTRUCTED BY MR DAN ROSENGARTEN OF ROSENGARTEN & FEINBERG AND MS PHILLIPPA RAFFERTY AND MR OSCAR MACHABA OF eNCA/etv.

FOR THE RESPONDENT: ADV STEPHEN BUDLENDER SC, INSTRUCTED BY TARA DAVIS OF POWER SINGH INC.

Appeal against BCCSA Judgment 09/2020 - Complaint against broadcast of an interview with a certain Mr David Icke whose view is that Covid-19 pandemic is a hoax and "there is no virus"- at issue is limitation of freedom of expression – Appeal Tribunal finding that it was clearly his honest opinion based on facts truly stated – added qualification by first tribunal that comment must be reasonable or justifiable rejected. e.tv and eNCA vs Media Monitoring Africa vs e.tv and eNCA, Case No: 10/2021 (BCCSA).

SUMMARY

This is an appeal against the finding of the First Tribunal that the broadcaster contravened Clause 28.2.2 of the Subscription Broadcasting Code and Clause 13 of the Free-to-Air Broadcasting Code respectively. The appeal was upheld. The comments of the guest, Mr Icke, was his honest opinion based on facts truly stated. The added requirement that comment in terms of Clauses 28(2)(2) and 12(2) should be reasonable and justifiable, is unfounded and rejected.

JUDGMENT

S LÖTTER

[1] The Applicants filed an application for leave to appeal against the finding and the sanction imposed by the First Tribunal in Case No: 9/2020 released on 30 October 2020.

[2] The Chairperson of the Tribunal refused leave to appeal as he was of the opinion that

> *"... the Applicants have not made out a case that the finding of the Tribunal was clearly wrong and I do not think that there is a reasonable possibility that an Appeal Tribunal will find that the finding by the Tribunal was clearly wrong. This applies to the finding of a contravention of the Code and to the sanction imposed. The Applicants are ordered to broadcast the apology at the start of the episode of the programme "So what now?" following directly after receiving this ruling. The Applicants are also ordered to pay the fine of R10 000 (ten thousand Rand) to the Registrar not later than 15 December 2020, by the applicants jointly; the one paying, the other to be absolved."*

[3] After having been refused leave to appeal, the Applicants submitted an application for leave to appeal in terms of Clause 4.4. of the Procedure of the Commission which

was granted based on the view that there is a likelihood that an Appeal Tribunal may reasonably come to a different decision.

[4] This appeal deals with the finding of the First Tribunal that Clause 28.2.2 of the Code of Conduct for Subscription Broadcasting Service Licensees and Clause 12.2 of the Code of Conduct for Free-to-Air licensees were infringed. The wording of these clauses is exactly the same and reads as follows:

> 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.

[5] The crisp issue to be decided is whether the impugned broadcast complied with the requirements regarding comment as set out in Clause 28(2) of the Code of Conduct for Subscription Broadcasting Service Licensees and Clause 12(2) of the Code of Conduct for Free to Air Licensees.

Appellants' Submissions

[6] Counsel for the Appellants, Adv Marcus SC emphasised the importance of freedom of expression with reference to *Handyside v United Kingdom*[1] which has been cited with approval by the Constitutional Court on many occasions. In terms of this decision freedom of expression includes information or ideas that offend, shock or disturb the State or any other sector of society. It can be accepted that sec 16 (1) of the Constitution of South Africa, 1996 does not include the expression of views that are favourable only, but also those that "offend, shock and disturb".

[7] Counsel proceeded to argue that not only can ideas that offend, shock or disturb in terms of sec 16(1) be aired, but if views are found to be offensive, one should distinguish between the mere airing of these views and endorsing them. Counsel

[1] (1976) 1 EHRR 737 at 754.

referred us to *Jersild v Denmark*[2], a decision of the European Court for Human Rights, where the court came to the conclusion that broadcasters cannot be held accountable for merely airing offensive views expressed by persons participating in a programme. While the court cannot be prescriptive on how balanced reporting should be achieved, in this instance, Jersild (the interviewer) achieved balance by not endorsing the offensive views. This case dealt with racial hatred.

[8] Counsel also submitted additional heads of argument in which the whole issue regarding information was extensively argued/

Respondent's submissions

[9] Counsel for the respondent, Adv S Budlender SC, argued that the Appeal Tribunal can only set aside or amend a decision if it is clearly wrong. In his argument, Counsel further stated that the test set out in the Rules of Procedure to determine whether the first Tribunal was clearly wrong, entails whether:

10.1 there was a gross procedural irregularity; and / or
10.2 whether the sanction is clearly inappropriate.

[10] The Appeal Tribunal was referred to *Belter v eTV* [3]where the BCCSA held that the threshold to set aside or amend a decision of the first Tribunal is set high so as to prevent the first Tribunal becoming a mere stepping stone towards a final appeal. An Appeal Court will only intervene where the Court a quo reached its decision as a result of a gross procedural[4] irregularity or where the sentence was clearly inappropriate[5].

[11] Counsel submitted that the first Tribunal was correct in its finding that the appellant contravened Clauses 28(2)(2) 12(2) as it had come to the same conclusion as OFCOM based on similar reasons.

[2] (1994) 19 EHRR 1
[3] CASE 1/2010.
[4] CASE 1/2010 [4].
[5] CASE 1/2010 [

[12] Adv Budlender SC strongly argued against the inclusion of false statements, disinformation and misinformation as protected speech.

Discussion

[13] The BCCSA has referred with approval to the *Jersild*-decision previously and specifically with reference to the factors[6] that the Court took account of to determine whether the interviewer associated himself with the views expressed by the interviewees. The following factors were highlighted:

> *(t)he interview was part of a news programme; the interviewer introduced the interview by making reference to a recent public discussion and press comments on racism in Denmark; the interviewer then announced that the object of the programme was to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background; and the manner in which the interviewer conducted the interview clearly indicated that he did not associate himself with their views.* [7]

[9] Although the impugned interview formed part of a programme, the programme cannot be described as a news programme. The BCSSA has referred to and applied the *Jersild*- principle to complaints relating to news programmes. Furthermore, the first Tribunal found that the broadcaster has contravened Clauses 28(2)(2) and 12(2) which deal with comment.

[10] It is indeed clear that the matter was fully ventilated and that the first Tribunal took all the submissions and previous cases raised into consideration in arriving at its conclusion. Leave to appeal was granted in this instance to determine whether the

[6] The National Commissioner of the South African Police Service, WATERS AND BAUM VS e.tv CASE NO: 05/2010
[7] CASE NO: 05/2010 [20]

first Tribunal was correct to introduce the requirement that comment must be reasonable or justifiable.

[11] The fact that OFCOM reached a similar conclusion as the first Tribunal based on similar reasons when they sanctioned a broadcaster for broadcasting an interview with Mr Icke, does not have any bearing on this matter. The OFCOM judgment was clearly based on the Code of Conduct which its broadcasters sign. The BCCSA applies the Code of Conduct that is signed by the broadcasters and approved by ICASA. Furthermore, the English broadcast lasted eighty minutes and the broadcaster did not introduce or offered any opposing comments. In contrast, the duration of the impugned interview was thirteen minutes and it did not form part of a news programme.

[12] It is indeed correct that Mr Icke's statements contained misinformation, disinformation and even a false statement. However, the question to be determined is whether these statements were presented as Mr Icke's honest opinion made on facts truly stated, or fairly indicated as required in terms of Clauses 28(2)(2) and 12(2).

[13] It is trite that no human right is absolute. The BCCSA therefore strives to find a balance between freedom of expression which includes the right of the viewer/listener to receive information versus the individual's rights of dignity and privacy. The BCCSA's approach in enforcing the Codes of Conduct applicable to broadcasters is underpinned by these constitutional values.

[14] It has been the belief of the BCCSA since its inception that broadcasters should provide enough information about the content of a programme so as to enable the viewer/listener to make an informed decision whether to watch the programme or not. Hence, warnings about age restriction and content are prescribed in the Codes. The function of the BCCSA is not to decide what is acceptable to viewers but rather what is unacceptable content in terms of the Code of Conduct.

[15] In terms of Clauses 28(2)(2) and 12(2) the broadcaster is expected to ensure that any comment expressed on a programme is supported by facts truly stated or fairly indicated. This is a further refinement of the general approach set out above. The second leg of the test is required so as to inform the viewer on which facts the comment is based. Once the viewer is aware of these facts, he/she can decide how much weight to attach to the veracity thereof. If this requirement is not complied with, a comment, even if it is an expression of an honest opinion, may easily result in the dissemination of false information.

[16] The requirement does not refer to the veracity of the facts, but to the fact that, the facts must be truly stated or fairly referred to. A comment would for example fall foul of this clause if the facts were stated but twisted to support the comment or if the reference does not support the opinion because it is not fairly stated.

[17] If the requirements of these two clauses are applied to the impugned interview it is clear that Mr Icke's outrageous comments were backed up with facts truly stated. He referred the presenter to books that he authored; although no titles were mentioned. He was also not able to advance any scientific research paper in support his opinion. In his interview he stated that:

> '*Someone like me comes along, having done 30 years of research and predicted all this stuff that is going on now in my books decades ago by the way, and says they're lying to you*.

The fact of the matter is that Covid-19 had only been identified with the recent (at the time of the broadcast) outbreak of the pandemic which means that he could not have predicted the virus. When confronted with the fact that he had done no research on his statements about the pandemic, he retaliated and stated that he is not a doctor but he has done thirty years of research on information that comes from doctors, virologists and medical practitioners who will never get on any mainstream programme.

[18] The question is what value can be attached to research regarding the existence of Covid-19 when it was done by only one person without any qualifications in the field of virology and related fields of medicine. Mr Icke explains that although he is not a doctor, his research is based on views of doctors, medical practitioners and virologists. These scientists are never identified. According to him they are unknown because they will not be granted opportunities to explain their views on "mainstream" programmes.

[19] Mr Icke's comments should not only be judged on the facts set out above. The viewer is also guided by the information provided by the presenter. He introduced Mr Icke as a former footballer and a BBC sports commentator, banned from social media and also from being interviewed on TV internationally and lastly as the world's most famous conspiracy theorist. Based on this introduction and the facts Mr Icke stated to support his claim that the corona pandemic is a hoax, it is clear that the reasonable viewer would have realised that the real hoax was Mr Icke and not the pandemic.

[20] The second leg of the test set out above, only comes into play once it has been established that the comment had been an honest opinion. In this instance it is clear that Mr Icke expressed his honest opinion however unacceptable. To him the pandemic serves as further proof of his general theory and consistent belief over thirty years that governments control citizens by scaring them with false information. Time has proven Mr Icke wrong but then, the facts upon which the comment are based need not be true, only truly stated. The court explained the difference between a comment and a statement of fact as follows:

In *Pearce v Argus Printing & Publishing Co Ltd*[8] Davis J said:

> *'What differentiates a comment from a statement of fact? I venture to think that the test may be thus stated. If the statement is such that a reasonable*

[8] 1943 CPD 137 at 144

hearer or reader will perceive it to be an opinion or inference drawn from the facts stated, then it is a comment. An opinion may be wrong or unjustified but it cannot be said to be false.'

[21] Was this interview offensive? Yes. Was it in bad taste? Yes. Was it insensitive? Yes. However, the crucial question is whether it was a contravention of Çlause 28(2)(2) and Clause 12(2). Cameron J referred to unacceptable views and freedom of expression as follows:

"The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values. [9]

[22] Having considered the broadcast, the comprehensive heads of argument submitted by both counsel as well as argument on the day of the hearing, we find that the appellants did not contravene Clause 28.2.2 of the Code of Conduct for Subscription Broadcasting Service Licensees and Clause 12.2 of the Code of Conduct for Free-to-Air licensees. **The appeal is upheld.**

ADV S LÖTTER
CHAIRPERSON OF THE BCCSA APPEAL TRIBUNAL
Commissioners Chicktay and Tlhakung concurred with the judgment

[9] *Democratic Alliance v African National Congress and Anot*her 2015 (2) SA 232 (CC) [122].