BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA

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CASE NUMBER: 15/2020

JUDGMENT DATE: 25 NOVEMBER 2020

ENCA	**FIRST APPLICANT**
E-TV	**SECOND APPLICANT**
and	
MEDIA MONITORING AFRICA	**RESPONDENT**

APPLICATION FOR CONDONATION OF LATE FILING

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[1] The two Applicants have filed an application for leave to appeal against the finding made and the sanction imposed by the Tribunal in Case no 9/2020 released on 30 October 2020. However, the Applicants failed to deliver their application for leave to appeal within the 5 days limit provided for in Rule 4.1 of the Commission's Procedure.

[2] The Applicants were only one day late with their application and gave the following reasons for the lateness:

The reason for this is that the legal team representing eNCA and e.tv were unavailable until Tuesday and needed to prepare the application which also needed to be ratified by representatives of eNCA and e.tv.

I submit that the time of the lateness of the delivery of the application is extremely short, the reasons thereof justifiable and that the respondents have good prospects of succeeding in the appeal for the reasons set out in the application for leave to appeal. Further, no party will be prejudiced by the delivery of the application for leave to appeal less than one day late.

[3] The Respondent in this matter, in response to the application for condonation, informed us that it abides by my decision and that it has no objection that the application for leave to appeal be decided on papers and without the necessity to have a hearing.

[4] After considering this application for condonation of the late filing and taking into account the fact that the application was filed only one day late, and because the subject matter of the judgment against which the applicants want to appeal is of particular importance, I have decided to condone the late filing of the application for leave to appeal and to proceed with my finding on the merits of this application.

APPLICATION FOR LEAVE TO APPEAL

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[1] The Applicants' arguments why leave to appeal should be granted, can be summarized as follows:

1.1 The Applicants persist in their argument, as submitted at the hearing, that the interview with Mr David Icke had as its purpose a discussion on freedom of expression. The finding by the Tribunal was that the overall impression by the viewers would have been that the purpose of the interview was to discuss Mr Icke's views on the COVID-19 pandemic. The argument by the Applicants does not convince me otherwise.

1.2 It is also argued by the Applicants that the statements by Mr Icke were not being presented as information. The question is: "What is information?" In terms of the Oxford Dictionary of Current English, "information" includes knowledge that is provided. The interviewee was introduced as a knowledgeable person who had done 30 years of research. It is not unreasonable to conclude that the interviewee's statement that Covid-19 is a "pandemic hoax" and adding that he has "absolute factual evidence" to support the statement, could probably have been interpreted by the viewers as "information" on the pandemic. This also applies to the other statements made by the interviewee.

1.3 The Applicant's argument that the Tribunal's view on the threat to the health of the public is purely speculative, is not convincing. The basis of the argument is that there was no evidence that even one of the viewers was convinced that there is no virus. The point is that the finding by the Tribunal was that there was a **potential** threat to the health of the public. In this the Tribunal is supported by a finding by the British regulator which published it's finding on a complaint against a broadcast by London Life in Ofcom's Broadcast and *On Demand Bulletin of 20 April 2020* – a finding of which we were not aware at the time when the Tribunal's judgment was published. I was made aware of this finding when reading the Respondent's response to this application. The broadcast was of an interview with the very same Mr Icke. Although the British regulator applied a different rule of its Code which has the protection of the public from harmful and/or offensive material as its object, it is significant that the regulator referred to the unsubstantiated claims by the interviewee and to his statements which were without any scientific or other evidence. Further evidence as to the potentially harmful nature of the broadcast, is supplied by the Respondent in its reference to the fact that Facebook removed the official page of Mr Icke for publishing *"health misinformation that could cause physical harm".*

1.4 The last-mentioned arguments were the same that convinced the Tribunal that the comments of the interviewee were not made on facts truly stated or fairly indicated

and referred to. Statements like: he has *"absolute factual evidence*" that this is a pandemic hoax, without mentioning any evidence; *"there is not a scientific paper on planet earth that has isolated the virus"* while disregarding the evidence of research done in *inter alia* South Africa and Canada, referred to by the respondent; *"the information has come from doctors, virologists and medical specialists"* while not one name is mentioned, are all proof that facts were not truly stated or fairly indicated and referred to.

1.5 The Applicants argue that the Tribunal added an additional requirement to those determined in Clause 28.2.2 (and Clause 12, respectively), namely that comment must be reasonable or justifiable and that the Tribunal is not competent to do so. In *Magagula v e-tv*[1] the Tribunal found that while reasonableness is a defence against a claim for defamation, there is no reason why reasonableness could not be applied to a complaint of contravention of the Broadcasting Code. Just as the *"reasonableness"* defence worked in favour of the Broadcaster in that case, the "reasonableness" requirement works in favour of the Complainant in this case. In *Worldwide Foundation CC t/a Rhino Force v SABC 2*[2] it was stated that the right to freedom of expression must be exercised in a reasonable manner and that in that case the programme itself was neither reasonable nor justified.

1.6 In response to the Applicants' argument that the Tribunal conflated the test for news coverage with that for comment, the following should be kept in mind. It is true that the requirement for news broadcasts is that only that which may be reasonably true may be presented as fact, and it is also true that (one of) the tests for comment is that it must be honestly held. The Applicants, in paragraph 12 of their application, analyse the Code's requirements for comment which may be broadcast as follows:

1.6.1 there must be an honest expression of opinion;

1.6.2 it must be presented as an opinion rather as fact; and

[1] Case 20/2007.
[2] Case 03/2014

1.6.3 the comment must be made on facts truly stated or fairly indicated and referred to.

What the Applicants do not say is that these requirements are conjunctive, in other words they are all applicable to the broadcast of an opinion. Should a broadcaster fail on one of these requirements, the broadcast is in violation of the Code. The applicants state that *" ... the key point is that the viewer is provided with enough information about the factual basis (or lack thereof) for Mr Icke's opinions – to assess the value of that opinion for themselves."* That is precisely the point: the lack of a factual basis is so complete that the comments are not legally protected. I have already stated that the Tribunal found that the comment was not made on facts truly stated or fairly indicated and referred to and that decision stands. Even if the Tribunal erred in finding that the opinion of the interviewee was not honestly held, the broadcast failed to comply with the requirement mentioned under 1.6.3 above and thus the broadcast was in contravention of the Code.

1.7 Rule 4.9 of the Commission's Procedure determines:

An Appeal Tribunal shall not set aside or amend a decision of the first Tribunal unless it is clearly wrong.

The applicants have not convinced me that the decision of the first Tribunal was clearly wrong.

[2] There remains only the application for leave to appeal against the sanction imposed by the Tribunal. The Applicants state that they have been unable to find any precedent for the imposition of multiple sanctions like the Tribunal has done. However, the Respondent has, in its submission, referred to three decisions of the Tribunal where multiple sanctions were imposed on each broadcaster. They are *Loonat v Radio Islam*[3], *Hubbard and Warburton v MultiChoice*[4] and *Mthembu v MultiChoice ANN7*[5]. In all

[3] Case 03/2008.
[4] Case 21/2011.

three cases the broadcasters were ordered to broadcast an apology as well as to pay a fine. The purpose with broadcasting an apology is to inform the public that a contravention of the Broadcasting Code of Conduct has been committed and to make the public aware that the BCCSA is protecting the rights of broadcasters and the viewing and listening public alike.

The purpose of a fine is to demonstrate the displeasure of the Tribunal with the degree of contravention of the Code and to serve as a warning to the broadcaster that future similar contraventions will lead to heavier sanctions. There is thus sufficient precedent for imposing multiple sanctions.

For information: all findings of contraventions of the Code are reported annually to ICASA which is the licensing authority of all broadcasters. Multiple convictions of a broadcaster over time have consequences for broadcasters.

As for the wording of the apology, Clause 14.7 of the Constitution of the BCCSA authorizes the Tribunal to give directives as to the broadcasting of its findings. This includes the authority to *"dictate the precise wording of the apology to be broadcast"* which the Applicants deny. However, if the Applicants have any serious problems with the wording of the apology as prescribed in the judgment, they are welcome to approach the Registrar, submitting reasons for changing the wording. This will be considered by the Tribunal.

[3] In the result, I find 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

[5] Case 01/2018.

than 15 December 2020, by the applicants jointly; the one paying, the other to be absolved.

PROF HP VILJOEN
CHAIRPERSON: BCCSA