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CASE NUMBER: 25/2014

Ex Parte MULTICHOICE (KykNet)

In Re

Reinhardt's Place and Pretorius v Multichoice (KykNet) case number 15/2014(BCCSA)

Application for condonation of late filing of application for leave to appeal. Complainant entitled to certainty as to judgment of BCCSA. Strict compliance required, except where special circumstances are shown. Misunderstanding of the Rules not in itself a ground for condonation. Justice in favour of protection of minority. Ex Parte Multichoice (KykNet)- In Re v Reinhardt's Place and Pretorius v Multichoice (KykNet) Case No: 15/2012 (BCCSA)

JUDGMENT

JCW VAN ROOYEN SC

[1] On 24 July 2014 I handed down a judgment of a BCCSA Tribunal in regard to a complaint that was lodged with the Registrar of the Commission against the Applicant, a broadcaster which falls under the jurisdiction of the BCCSA. The Tribunal held that the Applicant had contravened the Code for Subscription Broadcasters in that KykNet had broadcast an impromptu comedy show in which the Director instructed one of the actors to mimic a person who is afflicted with Tourette's Syndrome. This was indeed performed, to the mirth of the audience. It was held that this conduct amounted to an impairment of the dignity of persons who suffer from Tourette's Syndrome. A fine of R30 000 was consequently imposed.

[2] The Applicant filed an application for leave to appeal the decision of the Tribunal. In terms of Rule 4 of the BCCSA Procedural Rules such an application must be lodged within five days – the day of issue of the judgment not counting towards the number of days and Saturdays, Sundays and public holidays also counting as part of the days.¹ The application reached the Registrar on the sixth day. The Rules provide as follows:

4.1 If any of the parties to a matter which has been decided upon by the Tribunal is aggrieved by the decision, that party may, within 5 days, apply to the Chairperson of the Tribunal in writing for leave to appeal to an Appeal Tribunal of the Commission.

[3] After the Registrar informed the Applicant that the application was filed too late, the following application for condonation was received from the attorneys who had been acting for the Applicant in preparing the application for leave to appeal:

"1. Introduction

1.1 We act for the Respondent, MultiChoice (Pty) Ltd ("MultiChoice"), in seeking leave to appeal against the Tribunal's ruling of 24 July 2014 concerning complaints about a comedy programme on the KykNET channel called "Proesstraat" which was broadcast on 10 February and 10 March 2014 ("the ruling").

1.2 The grounds on which MultiChoice appeals are set out in detail in its application for leave to appeal, which was filed with the Registrar of the BCCSA on Wednesday 30 July 2014.

1.3 MultiChoice received notification of the Tribunal's decision on Thursday 24 July.

Thus, in terms of clause 4.1 of the BCCSA's Procedure, MultiChoice was due to file its application for leave to appeal on Tuesday 29 July 2014.

1.4 The application was, therefore, filed 1 day late. We accordingly apply for condonation to be granted for the late filing of MultiChoice's application for leave to appeal. We set out below the detailed grounds upon which we say that it is in the interests of justice to grant condonation.

2. Condonation

2.1 We humbly submit that condonation should be granted for seven reasons.

2.2 Firstly, our client is not responsible for the filing of the application being 1 day late and has not delayed at any stage of the process. As noted above, MultiChoice received the Tribunal's decision on Thursday 24 July 2014. We note, however, that Mr Bruce Mkhize (the Regulatory Compliance Manager for MultiChoice) and who is responsible for this matter, was away from work on sick leave for three days last week (including Thursday 24 July 2014) and was only able to access his emails on

¹ The so-called civilian method of computation of time periods – see *Justice Alliance of SA v President of the RSA* 2011 (5) SA 388 (CC), footnote (5).

Friday 25 July 2014. Thereafter, after considering the decision closely and following internal decision-making processes, MultiChoice decided on Friday 25 July 2014 to apply to the Chairperson for leave to appeal to an Appeal Tribunal of the Commission. MultiChoice immediately instructed its attorneys, Webber Wentzel, to proceed with preparing the draft application.

- 2.3 Secondly, we submit that the complaints and the ruling raise complex legal questions which required detailed research and careful consideration of passed BCCSA decisions as well as the jurisprudence of the Constitutional Court. We worked over the weekend to conduct this research and were able to draft the application over Monday and Tuesday this week. The draft was then sent to our client for finalisation on Wednesday morning.
- 2.4 Thirdly, as the three drafters of the application are not first-language Afrikaans speakers, it was considered prudent for the complaints and the programme to be translated into English before the draft was finalised.
- 2.5 Fourthly, clause 4.1 of the BCCSA's appeals Procedure provides:

If any of the parties to a matter which has been decided upon by the Tribunal is aggrieved by the decision, that party may, within 5 days, apply to the Chairperson of the Tribunal in writing for leave to appeal to an Appeal Tribunal of the Commission.

- 2.6 We incorrectly interpreted clause 4.1 to mean business days and omitted to take into consideration clause 7 of the BCCSA's Procedure which makes plain that the calculation of days includes weekends and public holidays. Moreover, as the 5 calendar days in the present case included a weekend, the time period for preparing and filing the application for leave to appeal only consisted of 3 business days. We apologise for this error.
- 2.7 Fifthly, we note that even on the incorrect assumption that the application was due on Thursday 31 July 2014 we still endeavoured to submit the application at the earliest possible date after it was finalised and filed it with the Registrar on 30 July 2014.
- 2.8 Sixthly, we submit that there is no prejudice to the complainants or to the Tribunal by the late filing of 1 day.
- 2.9 Lastly, as set out in detail in the application for leave to appeal, we submit that the application has good prospects of success.

3. Conclusion

- 3.1 As the facts set out above make clear, MultiChoice was not remiss in the late filing of its application for leave to appeal. And in view of the considerable reach of the precedent set down by the ruling, the good prospects of leave to appeal being granted and the absence of any prejudice by the late filing of 1 day, we submit that it is in the interests of justice for condonation to be granted.
- 3.2 We therefore request that condonation be granted for the reasons set out above."

[4] The question before me is whether a sufficient case has been made out to extend the five-day period for the filing of an application for leave to appeal, thereby condoning

the late filing of the application in terms of clause 5 of the Procedural Rules of the BCCSA.

Clause 5.1 provides as follows:

“The Chairperson of the BCCSA may, if satisfied that no injustice will result, and upon such conditions as he or she may impose:

5.1 extend any time period contemplated in these rules;”

- [5] The Procedural Rules of the BCCSA must be read within the context of the following aim of the BCCSA, as set out in its Constitution:

“The objects of the BCCSA are to ensure the adherence to high standards in broadcasting and to achieve a *speedy* and cost effective settlement of complaints against full members of the NAB who have submitted themselves to the jurisdiction of the BCCSA and its Code and, where a settlement cannot be attained, to adjudicate upon a complaint and take appropriate steps in accordance with clause 14 of this Constitution.” (emphasis added)

The Preamble to the Procedural Rules reads as follows:

“That complaints be considered and adjudicated upon within the *shortest* possible time after the broadcast of the matter giving rise to the complaint; that complaints be considered and adjudicated upon in an informal manner; and that whenever possible the adjudicator, Tribunal and Appeal Tribunal and the parties will strive for a speedy and amicable settlement.” (emphasis added)

- [6] In the present matter the Applicant, through its attorneys who had lodged the late application for leave to appeal, states that it misunderstood the Rule, believing that Saturdays and Sundays do not form part of the computation of the time period. There were also certain managerial problems, which the Applicant’s attorneys refer to in the above grounds.

In *Highveld Stereo v Stevens*² the following was stated:

Given the necessity for the speedy adjudication and finalisation of complaints, I do not believe that a case has been made out on the basis that “no injustice will result”. The complainants and broadcasters before the BCCSA are entitled to have matters finalised as speedily as possible. A mere misunderstanding or ignorance of the Rules is insufficient to justify a departure from the 5-day limit based on a finding that “no injustice will result”. This is well illustrated in the *Mahamed* matter, where even a Complainant who might be assumed not to be as conversant with the Rules as a Broadcaster is, was not successful in his application for condonation. See also *e.tv v IFP*.³ In another judgment it was similarly held

¹ Case 37(2)/2012; [2012] JOL 29261 (BCCSA).

³ Case 24/2011; [2011] JOL 28440 (BCCSA).

that a strict approach be followed where a Complainant had lodged his appeal against an adjudication outside the time limits set for such an appeal.⁴

[7] At the core of the present matter lies an error as to the time frame within which an application for leave to appeal must be lodged with the Registrar. The persons suffering from Tourette's Syndrome and affected by the broadcast are entitled to certainty in so far as the outcome of this matter is concerned. The Complainants received the judgment which had gone in their favour on the same day as the Applicant received it. In fact, the representative of Multichoice in this matter phoned the Registrar on the first day, which did not count as part of the five days, so as to determine when the judgment would be published to the Press. The core of the matter is that the Rules were not understood to include Saturdays and Sundays. The Applicant has explained this to me and also mentioned other circumstances which made it difficult to prepare the application in time. I have understanding for the pressure under which lawyers often work. However, as exemplary as I have consistently found the attorneys and the representative of Multichoice to be in matters concerning the BCCSA, it would be unfair to the persons in whose interest this case was brought for me to take that into consideration. Speed is central to BCCSA procedure – a matter which was also part of the discussions which the BCCSA had with the National Association of Broadcasters when the rule was amended to include Saturdays, Sundays and public holidays. The National Association of Broadcasters gave its support to the amendment and the motivation for it. It should be borne in mind that the introduction of an appeal in 2004 already affected the policy for speed in these procedures. The time period for an application for leave to appeal had, accordingly, to be short – a measure which would equally apply against a complainant.

[8] I have also considered the argument as to the merits of the application for leave to appeal. However, to my mind, priority should, in the exercise of my discretion, be given to the matter of the necessity for speed in this procedure. A party to a procedure before the BCCSA Tribunal should generally be entitled to peace of mind after the five-day period has elapsed. This should not be understood to mean that the merits of the application will always be of lesser weight. However, given the interests of the

⁴ See *In Re Zuma* Case 7/2012.

afflicted minority which are at play in this matter, the argued merits must take second place. I accordingly find that the grounds put forward by the Applicant do not justify an extension. It would amount to an injustice to the minority involved were their rights to be placed in jeopardy once again, as a result of a misunderstanding of the rules by the applicant. I have also considered the sick leave of the representative as detailed above and the little time which the attorneys had. Once again, in balancing the relevant interests against each other, I am unable to find that a condonation will not amount to an injustice to the minority in whose interest the Complainants acted in terms of section 38(c) of the Constitution of the Republic of South Africa. Finally, I should add that, in exercising my discretion, I was acutely aware of the words of Sir Henry James Sumner Maine (1822-1888) regarding “the doubtful virtue of consistency”. I am, however, satisfied that I have exercised my discretion, with less regard to consistency than the interests of the minority affected by the broadcast.

The application for extension of the five-day period is, accordingly, dismissed.



**JCW VAN ROOYEN SC
CHAIRPERSON**