P.O.Box 412365 • Craighall • Tel (011) 325-5755 • Fax (011) 325-5736 • e-mail: bccsa@nabsa.co.za
No 2 Albury Park • Magalieszicht Ave • Dunkeld West • 2196 • www.bccsa.co.za

CASE NUMBER: 34/2014

DATE OF Judgment: 11 November 2014

CLEAN HEAT ENERGY SAVING SOLUTIONS

(PTY) LTD **APPLICANT**

ELECTRONIC MEDIA NETWORK (PTY) LTD **RESPONDENT**

For the Applicant: H. Miller Ackermann and Bronstein

For the Respondent: Webber Wentzel, Johannesburg

Application for condonation for late filing of complaint – insufficient reasons for filing complaint more than three months beyond due date. Application dismissed.

JUDGMENT

JCW VAN ROOYEN SC

[1] On 2 September 2014 the Registrar received a complaint concerning a programme which was broadcast on M-Net's *Carte Blanche* programme on 13 April 2014. The Registrar decided that the requirement that complaints be filed within 30 days after the broadcast of a programme had, substantially, not been complied with, and accordingly refused to entertain the complaint. The Complainant then applied to me, as Chairperson of the Commission, to condone the late filing, since no injustice would, in terms of Rule 5 of the Procedural Rules, result by condoning the late filing. This application was opposed by the broadcaster.

[2] The Registrar decided as follows:

I have considered your application for Condonation in terms of clauses 1.3 and 1.6 of the Procedural Rules which provide as follows

"1.3 Subject to rule 1.6 a complaint shall be made as soon as possible, but not later than thirty days after the date of the broadcast, or the date of any other alleged breach of the Code giving rise to the complaint.

1.6 The registrar may upon reasonable grounds accept late complaints if in his or her opinion there is good and satisfactory explanation for the delay."

The programme was broadcast on the 13th April. The question is whether a sufficient case has been made out to extend the 30-day period for the filing of the complaint.

The BCCSA is widely advertised and the Complainant should have taken steps to complain to the BCCSA much sooner after the broadcast. The BCCSA must, in principle, adhere to its rules and I am of the view that the Complainant should have requested a postponement of the 30-days during that period since they were aware that they were still awaiting a report on the matter. In any case, the complaint was filed substantially out of time. One of the cornerstones of the BCCSA is the introduction of its procedural Rules: " It shall be of the essence of the BCCSA's proceedings: 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)

I have accordingly decided that the complaint is too far out of time for me to entertain.

The Complainant may make representations to the Chairperson of the Commission to exercise his discretion in terms of Procedural Rule 5.1.

The Rule 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;"

[3] In the application, the Complainant referred to previous correspondence concerning condonation, emphasising the following aspects, which I will re-number for purposes of this judgment:

(a) (i) the explanation of the delay

(ii) the prospects of success on the merits

(iii) public interest that the matter be heard and determined.

These factors flow from the Constitutional Court decision in *S v Mercer [2003] ZACC 22; 2004 (2) SA 598 (CC)* which deals with an application for condonation of the late

filing of an appeal. The overarching consideration is the interests of justice *(at para 4)*. The Constitutional Court goes on to state that *"two of the key factors relevant to the interests of justice in a condonation application will be the explanation given by the applicant for his or her delay and the prospects of success on the merits"*. Another important factor will be the question of whether there is a public interest that the matter be heard or determined. *(para 4).*

(b) Clean Heat apologises for the delay in approaching the BroadcastingComplaints Commission of South Africa.

In the complaint letter of 2 September 2014 we explain that the programme being complained about is not an isolated programme but is part of a continuing series of programmes by *Carte Blanche* being broadcast under the rubric of *"The Game of Geysers".* A follow up programme is clearly contemplated by the broadcaster.

(c) In April 2014 the broadcaster informed Clean Heat in the interview of 9 April 2014 that an Eskom Report was in the process of being furnished. The complainant resolved to deal with that report and the complaint against the broadcaster when this report became available. No report has been issued by Eskom and the complainant has been waiting patiently for this report to emerge.

(d) The complainant was not aware of the stringent 30 day time limit within which to lodge its complaint to the BCCSA. Had they been aware of same they would certainly have done so timeously.

(e) It is respectfully submitted that this stringent time limit should be relaxed when the broadcast is part of an ongoing series of programmes. One of the principle reasons for the stringent time limit is that public interest usually wanes quickly in regard to a so called "*once off"* programme and that little purpose is then served by the Commission considering a matter which the public has long since forgotten. Furthermore, in *"once off"* programmes the broadcaster will usually have archived the programme after a period of time and could well face substantial prejudice in having to try and access its archived material and revisit issues that have been filed away. Its sources may also no longer be available. Furthermore, if the complainant were then to be successful in such a *"once off"* programme, there is little benefit in revisiting the matter from the public interest point of view. Hence the requirement for a speedy resolution to the matter whilst it is still fresh in the public's mind.

(f) The above however is not the case in this instance. This complaint is part of an ongoing series of programmes and a follow up programme is contemplated by the broadcaster. Hence no problem in respect of archived material and sources will be of application. The matter certainly has not waned from the public interest point of view as the matter is part of an ongoing series or programmes broadcast under the banner of *"The Game of Geysers"* by the broadcaster. We would further point out that the broadcast ends by stating that *"the public protector confirms she is investigating the Game of Geysers at City Power"*. Clearly public interest in this matter is very high and has certainly not waned or disappeared. As a follow-up programme is being contemplated any alleged injustices found by the Board to have been committed by the broadcaster can very easily be remedied in the follow-up programme which will benefit all parties involved.

(g) The complainant is cognisant of the Commission's need to deal with matters effectively and expeditiously. On the other hand we would request the Chairman to consider the fact that it is a heavy penalty for the complainant to forfeit its right to be heard because of lateness. Little if any prejudice will be suffered by the broadcaster if the complaint is heard whilst substantial prejudice will be suffered by the complainant if its right to be heard is denied.

(h) The broadcaster has an obligation to respect and adhere to the Code and the BCCSA is the only forum which can hold the broadcaster to that commitment. It is respectfully submitted that it is particularly harsh for condonation to be refused in this

instance particularly as the complainant has a good prospect of success on the merits and there is a substantial public interest in the matter being properly determined.

(i) As to the prospects of success the complainant has furnished a detailed account of the nature of its complaint in the letter of complaint dated 2 September 2014. It is submitted that the complainant has a good case on the merits. We respectfully opine that should the BCCSA compare the unedited video record of the complainant's interview with Carte Blanche on 9 April 2014 with the actual broadcast itself of 13 April 2014, they will be persuaded that the broadcast complained of violates the Code.

(j) It is submitted that there is a compelling public interest that this matter is properly heard and determined. This aspect is dealt with in our letter of 2 September 2014 as well as above. Broadcasters, and Carte Blanche in particular wield enormous power in society. They frame public opinion. It is strongly in the interests of justice that alleged transgressions of the Code are investigated and acted upon by the regulator. It is also very important that individuals and companies who feel they are specifically disparaged by a broadcaster in violation of the Code are given recourse. The broadcaster continues to make programmes and it is important that they adhere to the parameters of the code.

(k) In totality of the above we respectfully submit that for the reasons stated herein and in our letter of 2 September 2014 this is a matter where no injustice will result if the complaint is heard by the Commission and we respectfully request the Chairman to favourably exercise his discretion and extend the time period contemplated and allow the complaint to be adjudicated upon by the Commission.

[4] Predictably, the Broadcaster opposed this application on the basis that it was far too late – in fact three and a half months late – given the fact that the complaint should, according to the Procedural Rules, have been filed by 15 May. Indeed, as appears above, the complaint was only filed on 2 September. It was argued that the Complainant, which was legally represented in an urgent application to a Court before the broadcast complained of, could at least have set out a short summary of its complaint before the end of the 30-day period. Moreover, it was argued, the Applicant was wrong in its assumption that the programme would lead to further broadcasts on the same subject and that a decision of the BCCSA would, accordingly, assist in giving a fair picture in the said future programmes. The Applicant, as appears from its grounds quoted above, argued that it was unaware that complaints must be filed within 30 days of the broadcast of the programme, and that the 30-day period is not readily increased.

[5] I quote the closing reply of the broadcaster's attorneys on the matter:

"The respondent stands by the submissions it has already made in relation to Clean Heat's application for condonation. While the respondent joins issue with all of the factual allegations made in the complainant's reply, our client does not, however, wish to distract from the key issues by seeking again to reply to each and every disputed allegation. Instead we merely wish to emphasise four points:

Firstly, at paragraph 3.3.11 the complainant provides that "the only outstanding issue can be the question of legal costs". We record that this is the first time that the complainant has made the claim that the only issue which falls to be determined is the issue of costs.

Secondly, at paragraph 3.4 the complainant states:
"The rationale for the position in South African law that orders of prior restraint are difficult to obtain is that freedom of the press needs to be protected. The critical issue here is that litigants have remedies that they can use after the broadcast. That makes the blocking of an accessible, expeditious and effective remedy particularly harsh." (Emphasis added).

With respect, the BCCSA procedure was indeed open to the complainant "after the broadcast". But this does not mean that a complainant does not need to follow the procedural requirements for a particular forum. Indeed, on its own version the complainant merely elected to wait 142 days before filing the complaint in the hope of ascertaining more evidence against the broadcaster (in the form of the Eskom report).

Thirdly, we submit that the complainant is trapped on the horns of a dilemma. It was either unnecessary to wait for the Eskom report in which case the excuse proffered for the late filing of the complaint should be rejected. Alternatively, it was essential to wait for the Eskom report in which event it follows that the allegations in the present complaint are deficient as they are still not supported by the Eskom report.

But there is a primary point which we submit that the complainant must meet and is simply unable to meet. If it were true that the complainant always intended to file a complaint with the BCCSA but wished to wait for the Eskom report, then there would have been nothing preventing the complainant from notifying the Registrar of the BCCSA of this intention and seeking further directions from the Chairperson on the best way forward (or requesting leave to supplement its complaint if and when the Eskom report was released).

The complainant merely sat on its hands for 5 months and does not make any statement about why it did not simply send the Registrar an email notifying the Registrar of its intention to file a complaint.

Lastly, we submit that the complaint is simply too far out of time for the BCCSA to grant condonation. As the BCCSA has previously held:

"[t]he BCCSA is widely advertised and the appellant should have taken steps to complain to the BCCSA much sooner after the broadcast. It is unfair to the broadcaster for the Registrar to entertain a complaint that is filed substantially later than the time limit of 30 days after the broadcast. A broadcaster must have certainty as to its planning, and it would be unfair to entertain the complaint at this late stage. The reasons put forward by the appellant are not of such a nature that they can be regarded as compelling."

We submit that this is particularly so in the present case because the complainant was not a lay person without legal representation and even prior to the broadcast it was represented by lawyers. Moreover, in the context of the BCCSA system, a complaint that is 5 months late ought only to be condoned in the rarest of cases not merely where a complainant seeks to gather more evidence. We submit that granting condonation in the present case would be a seismic shift in the BCCSA's approach to condonation - a shift that would cause broadcasters to be peppered with uncertainty as complaints could be lodged nearly half a year after a programme was broadcast.

In the circumstances we submit that the explanation proffered for the delay is manifestly inadequate and the complaint falls to be dismissed.

[6] I have been at pains to arrive at a conclusion on this application, realising how important it is for the Applicant to have its case decided by the BCCSA, rather than having to file a claim for damages, which is a cumbersome and lengthy process. I watched the programme more than once. I also watched the unedited interview provided to me by the Applicant. The programme does cover the main dispute: whether the *management* of Clean Heat was involved. The accusation from the side of Carte Blanche is that they were involved and judged on the whole, that is what one reasonably gleans from the programme. However, management adamantly denied this on air, blaming a contractor. It is understandable that the Applicant approached the High Court in the first place since the BCCSA does not have jurisdiction to decide on future broadcasts. Two aspects of the programme were ordered to be removed. Ultimately, the dispute is whether the management was involved or not and whether it was fair for Carte Blanche, judged on the whole, to put forward the view that management *was* involved. This is a matter on which the BCCSA will be required to come to a conclusion. Accordingly, there is a dispute which would fall to be decided by the BCCSA. I will, accordingly, accept in favour of the Applicant, that there is a prima facie case against the Respondent.

[7] The next question is whether "no injustice will result" in terms of Rule 5 of the Commission's Procedural Rules.[1] The Applicant's view is that no such injustice will result. The Applicant, however, concedes that a broadcaster should not be brought to book a substantial time after a broadcast has taken place: not only would a correcting broadcast be lost on most viewers, but it might also be unfair to expect the broadcaster still to be in possession of all the evidence it had when the programme was made. However, the Applicant argues that the subject matter under discussion is part of an ongoing series and that it would, accordingly, be most relevant to decide this dispute. This is denied by the broadcaster, who states that it presently has no such plan.

[8] Although I have sympathy with the Applicant, whose only other recourse will be a claim for damages and a prolonged court case with appeals etc, I cannot ignore the fact that the programme was broadcast as far back as 13 April and that the complaint

[1] As to the meaning of these words see *F v SABC* (BCCSA case 24/2008); [2009] *Judgments Online* 22891(BCCSA).

was only lodged on 2 September. The Applicant does not aver that it was unaware of the existence of the BCCSA. It does, however, argue that it was unaware of the 30-day time limit for complaints. The BCCSA is widely advertised, and the applicant, which is legally represented, should have taken steps to establish what the time limits are. It is unfair to the broadcaster for the BCCSA to entertain a complaint that is filed substantially later than the time limit of 30 days after a broadcast. A broadcaster must have certainty as to its planning, and it is true that the viewing public would find it difficult to contextualise a rectifying broadcast after many months have elapsed. In *F v SABC*[2] the Complainant was under treatment abroad partly as a result of the accusations broadcast against him. He was also unaware of the existence of the BCCSA. In spite of the fact that the Director of Public Prosecutions in the Cape had decided that there was insufficient evidence to prosecute the Complainant, the broadcaster nevertheless implied in two programmes that the Complainant was guilty of molesting teenagers. The reasons put forward by the Applicant in the present matter are, in contrast to the *F* case, not of such a nature that they might be regarded as compelling. In the present case the Applicant has been assisted by lawyers from before the urgent application to Court to stop the broadcast and it is not denied that they were aware of the existence of the BCCSA. The contrast with the *F* matter is clear. I, accordingly, find that it would amount to an injustice to the broadcaster to entertain a complaint which was filed inordinately late. There are no special reasons – as were present in *F*'s case – to condone this late filing.

The application is dismissed.

JCW VAN ROOYEN SC
CHAIRPERSON

11 November 2014

[2] See previous note.It should, to be fair, be mentioned that F's complaints were upheld .