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**CASE NUMBER: 35/2014**

**Ex Parte MULTICHOICE (KykNet)**

**In Re**

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

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*Application for condonation of late filing of application for leave to appeal. Ex Parte Multichoice (KykNet)- In Re v Reinhardt's Place and Pretorius v Multichoice (KykNet) Case No: 35/2012 (BCCSA)*

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**JUDGMENT**

**JCW VAN ROOYEN SC**

[1] On 18 August 2014 I handed down a judgment

[2] **The Applicant's 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 programme complained of showed an actor mimicking a person who has Tourette's Syndrome in the circumstances we describe below.

1.3 The grounds on which MultiChoice sought leave to appeal were 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**.

1.4 A decision on the merits of MultiChoice's application for leave to appeal was not reached by the Chairperson. That was so because the application for leave to appeal was filed **1 day late**. MultiChoice applied for condonation to be granted for the late filing of MultiChoice's application for leave to appeal. This application was, however, denied by the Chairperson.

1.5 Accordingly MultiChoice now brings this application under clause 4.5 of the BCCSA Procedure. Clause 4.5 provides:

> Where leave to appeal is refused, a party who is aggrieved by such a refusal may, within 5 days, apply to the Chairperson of the Commission or an alternate Chairperson
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> of the Commission or another Commissioner designated by the Commission for leave to appeal – such Chairperson, Alternate Chairperson or Commissioner not having sat in the first Tribunal. Such application is decided on the papers, unless the Chairperson, Alternate Chairperson or other Commissioner requests the parties to address him or her.

1.6 We submit that an application for leave to appeal which is refused on the basis that condonation was not granted for the late filing of the appeal is undoubtedly still a matter which falls within the ambit of clause 4.5.

1.7 That is so for two reasons. First, in essence such an application for leave to appeal has been refused and the basis for that refusal is the decision not to grant condonation for the late filing of the appeal. Whether the Chairperson refuses leave to appeal based on the late filing of the application or on the merits makes no practical difference.

1.8 Second, the Chairperson's decision not to grant MultiChoice condonation is final in effect. It is untenable that an appellant would be permitted a subsequent application for leave to appeal in terms of clause 4.5 where the application for leave to appeal was denied on the basis that it had no prospects of success whatsoever but an application which has very strong prospects of success (which we submit is the case here) could not have the opportunity of a further application for leave to appeal simply because condonation was refused. Such an interpretation of clause 4.5 would be at odds with the interests of justice.

1.9 Accordingly we submit that the matter correctly falls under clause 4.5 of the BCCSA's Procedure.

1.10 Below we set out the detailed grounds upon which we say that leave to appeal should be granted as well as why it was, in the circumstances of the present case, in the interests of justice to grant condonation for the late filing of the application for leave to appeal.

**PART 1: THE SIGNIFICANT IMPACT OF THIS CASE AND WHY CONDONATION SHOULD HAVE BEEN GRANTED**

*The interests of justice test*

1.11 At the outset we submit that the Constitutional Court has made clear that the test to be applied in condonation applications is the interests of justice. In ***Glenister 2*** the Constitutional Court helpfully described this test as follows:

> The test for determining whether condonation should be granted is the interests of justice. Factors that are relevant to this determination include, but are not limited to, the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay or defect, the nature and cause of any other defect in respect of which condonation is sought, the importance of the issue to be decided in the intended appeal and the prospects of success.[1] (Emphasis added.)

1.12 The Chairperson has previously held that fairness and reasonableness underlie the conception of the interests of justice test and "*[w]here rigid application of rules would lead to inequity, the interests of justice is given as a reason for an exception or rectification*".[2]

1.13 It has also been held that it is the interests of justice test which lies at the heart of clause 5.1 of the BCCSA's Procedural Rules, which allows the Chairperson to extend any time period contemplated in the rules "*if satisfied that no injustice will result*".[3]

1.14 The interests of justice test requires due consideration of all of the relevant factors of which the prejudice to the other party and the speed with which the BCCSA delivers judgments are two relevant components. We submit with respect that the Chairperson afforded these two factors far too much weight and did not give

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[1] ***Glenister v President of the Republic of South Africa and Others*** 2011 (3) SA 347 (CC) ("***Glenister 2***") at para 41.

[2] ***Fitch v SABC (3)*** at para 6.

[3] Ibid at para 5.

adequate consideration to two other factors which are also of primary significance in this particular case: the application's overwhelming prospects of success as well as the importance of the issues raised in the intended appeal.

1.15 The Constitutional Court has made clear on a number of occasions that condonation may even be granted in a scenario where the sufficiency of the reasons for the late filing may, when viewed in isolation, not be deemed to be particularly strong (which we say does not apply to our application here in any event), if the merits of the application have strong prospects of success and if the application determines a question of fundamental importance.[4]

1.16 A prime example of this reasoning is ***Glenister 2*** in which the application was filed 62 days late. While the Constitutional Court differed markedly on the merits, it was unanimous in relation to granting condonation. It held:

> **The explanation furnished for the delay is utterly unsatisfactory. Ordinarily, this should lead to the refusal of the application for condonation. However, what weighs heavily in favour of granting condonation is the nature of the constitutional issues sought to be argued in the intended appeal, as well as the prospects of success**. This case concerns the constitutional authority of Parliament to establish an anti-corruption unit, in particular the nature and the scope of its constitutional obligation, if any, to establish an independent anti-corruption unit. These are constitutional issues of considerable importance ….
>
> It is, therefore in the interests of justice to grant condonation.[5] (Emphasis added.)

1.17 We submit that even if the Chairperson found that the reasons in favour of condonation would not have been sufficient if this were an ordinary case, this is an exceptional case in which the prospects of success are overwhelming and the questions being determined are very important (they go to the powers of the BCCSA to unilaterally extend the ambit of the Code and the ambit of freedom of expression in the form of humour) and which affect not only the immediate parties to the dispute but the public in general. In this context the Constitutional Court's decision in ***Minister of Defence and Military Veterans v Motau and Others***[6] is of assistance. The Court held that:

> [i]t would not be in the interests of justice to refuse condonation in this case. This is a matter of great public importance, and we should be slow to refuse argument that might provide assistance on complex issues.[7]

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[4] See for instance ***NUM v Council for Mineral Technology*** [1999] 3 BLLR 209 (LAC).

[5] ***Glenister 2*** at paras 49 to 50.

[6] [2014] ZACC 18.

[7] At para 24.

*The three critical issues at stake in this case*

1.18 Like the ***Motau*** case, the present case involves the determination of three complex questions.

1.19 The first is whether the ruling of the Tribunal in this matter amounts to a unilateral and impermissible extension of the BCCSA Code, as argued by the applicant, or an extension of the Code in line with the Constitution, as determined by the Tribunal. This is an issue of critical constitutional importance, as we discuss below.

1.20 The second is that the ruling in the present case is, we submit, one of the most far-reaching judgments that has been handed down by the Tribunal and has the unintended effect of potentially banning an entire genre of humour (humour which shocks or offends - also known as off-colour humour). In this regard we submit that, for example, the ability to broadcast programmes like South Park as well as stand- up comedy by Jimmy Carr, which will undoubtedly be offensive to some, would be affected if the Tribunal's decision is left in place. And such programmes are permitted in open and democratic societies. Indeed, far from being banned, Jimmy Carr, for example, has previously been invited to perform for the Queen of England at the Royal Variety Performance. Thus the right to broadcast humour (whether in films, comedy skits or television programmes) which may offend and the public's right to enjoy such humour (though some may find it in poor taste) is also, we submit, at issue in the application for leave to appeal. This is a free speech issue of critical importance in a democracy.

1.21 The third issue is whether, assuming that the Tribunal was correct in developing the Code and finding against the applicant, the Tribunal was entitled to impose a fine against the applicant in circumstances where the ruling extended the Code for the first time, and hence the applicant could not have known it was acting contrary to the Code. This is a clear legality issue.

1.22 We submit that all three of these issues ought to be ventilated in an appeal and that it is not in the interests of justice to deny their ventilation by mere dint of the fact that the application was filed one day late. They are plainly of critical importance to the functioning of the BCCSA and the right to freedom of expression in a democracy.

*Overview of the prospects of success of the main case*

1.23 We deal extensively with the merits of the application for leave to appeal in Part 2 below. Here, we highlight briefly our main argument on each of the three critical issues. We submit that the appeal has overwhelming prospects of success on each one of these three issues.

1.24 In relation to the first issue, our submission is that the Tribunal has no power, *mero motu*, to develop the ambit of clause 28.4 of the Code beyond the context of news or comment programming, which is its clearly delineated ambit. That is because the BCCSA unlike a High Court lacks inherent jurisdiction. As the Supreme Court of Appeal held in ***Special Investigating Unit v Nadasen***[8]

> A tribunal under the Act, like a commission, has to stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly.

1.25 In relation to the second issue, even if clause 28.4 could extend dignity protection beyond news or comment programming, the approach taken by the Tribunal in effect amounts to an absolute ban on humour that shocks or offends, without regard to the context of the humour. Moreover, in its previous dignity cases, BCCSA has held that a dignity claim requires a subjective assessment of how a person from the affected group actually felt in relation to the broadcast that is the subject of the complaint. Notwithstanding that the application might have been brought on behalf of people with Tourette's Syndrome, there was still no evidence led that anyone with Tourette's Syndrome interpreted the skit as offensive in this case.[9] Accordingly the Tribunal's present decision goes against clear decisions it has previously handed down. We do not for one moment suggest that the BCCSA cannot ever depart from previous decisions but, should it intend to do so, that should at least be done after hearing submissions on appeal from MultiChoice in this case.

1.26 In relation to the third issue, even if the BCCSA did have the power to extend the Code, MultiChoice was severely prejudiced in the imposition of a fine in circumstances where it had no way of knowing about the new rule before it was

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[8] [2002] 2 All SA 170 (A).

[9] See para 5 of ***SABC v Blem and Others*** [2012] JOL 28941: [*O]nly two of the four complainants are epileptics themselves. One of the other complainants complains on behalf of his fiancé who is an epileptic sufferer and the other one complains on behalf of all epileptic sufferers in the country. In previous cases* ***BCCSA tribunals found that complaints involving the dignity of a person other than the complainant are difficult to judge since it is unknown what the person's reaction might have been or whether the person is even aware of the broadcast. It would be presumptuous for the Commission to come to a decision without hearing such a person's own view****. The Rules of the Commission do not provide for a procedure where the view of a person other than the complainant and the broadcaster could be introduced in the proceedings. Thus, for the purposes of this adjudication, only the two complaints from epileptic sufferers will be taken into consideration*". See also ***Mackintosh v 94.7 Highveld Stereo* 17/A/2012** at para 7: "*Since the remarks were not directed against an individual woman, and an individual woman*

developed by the Tribunal. The principle of legality demands that a respondent must know what standard they will be held to prior to the imposition of a sanction. Yet in the present case, notwithstanding the extension of the Code for the first time, the BCCSA still imposed a sanction of R30 000. We submit that at the very least (even if the appellate Tribunal were to disagree with everything else MultiChoice might say) on this score MultiChoice must have overwhelming prospects of success.

*Reasons for the non-compliance with the rules and the lateness of 1 day*

1.27 As indicated in the application for condonation, the primary, but not the only, reason for the non-compliance with the time period and the lateness of 1 day was that the mistake was made that the 5 day period for an application for leave to appeal was 5 working days and not 5 calendar days.

1.28 Despite this mistake, the applicant acted expeditiously in filing its application for leave to appeal as indicated below.

1.29 MultiChoice received notification of the Tribunal's decision on **Thursday 24 July 2014.** 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.

1.30 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 in that particular week (including Thursday 24 July 2014) and was only able to access his emails on Friday 25 July 2014. While Mr Mkhize confirms that he spoke to the Registrar on Thursday 24 July about the judgment, he confirms that he indicated to the Registrar that he was on sick leave until the end of that week and he wished to ascertain when the judgment would be made public as he was not, as a result of being on sick leave, able to communicate it to his executive team at MultiChoice. It is the accepted practice that in the ordinary course the Tribunal discounts the first day on which the judgment was received. As Mr Mkhize was not well on the Thursday and Friday we submit that the Thursday should be completely ignored and

that the Friday on which Mr Mkhize was still sick but well enough to consider the judgment should be deemed the first day (which is ordinarily excluded). If that method is adopted then the application for leave to appeal was filed on the fifth day, and thus on time.

1.31 As noted, Mr Mkhize was still sick on Friday 25 July. He nevertheless went into the office on Friday 25 July to consider the judgment and to communicate the judgment to his executive team. A decision was taken by the MultiChoice executive team as soon as possible, which was in the afternoon of Friday 25 July, to bring an application for leave to appeal and Webber Wentzel was then instructed that afternoon to file an application for leave to appeal. Webber Wentzel began preparing the application that weekend.

1.32 The complaints and the ruling raise complex legal questions which required detailed research and careful consideration of past BCCSA decisions as well as the jurisprudence of the Constitutional Court. Webber Wentzel worked over the weekend to conduct this research and drafted the detailed 12-page application over the following Monday and Tuesday. The draft was then sent to MultiChoice for finalisation on Wednesday morning.

1.33 As the three drafters of the application are not first-language Afrikaans speakers it was also considered prudent for the complaints and the programme to be translated into English before the draft was finalised on the evening of Tuesday 29 July.

1.34 The various executives at MultiChoice then finalised the application on Wednesday 30 July and it was filed with the Registrar that day, which was technically 1 day late (though not so if one takes into Mr Mkhize's sick leave on Thursday 24 July and thus deem Friday 25 July as the day that MultiChoice effectively received the judgment).

*Reliance on the Highveld Stereo decision*

1.35 In his decision on condonation, the Chairperson relied on the decision of the BCCSA in ***94.7 Highveld Stereo v Stevens***[10] **("the *Highveld Stereo* case")**. In that case, the sole reason for the delay was the misunderstanding of the time period as being 5 business days. This case, however, is entirely distinguishable from the 94.7 case. First, MultiChoice has put up facts to indicate that it acted expeditiously in the filing of the application and even if there had not been a misunderstanding of the time period it still might not have been possible to file the application on time. Second, given the complexity of the case, attorneys were instructed, which was not the case in the ***Highveld Stereo*** case. Thirdly, it was not MultiChoice's mistake that gave rise to the delay. Fourthly, in the ***Highveld Stereo*** case, the Tribunal did not impose a

[10] [2012] JOL 29038 (BCCSA).

fine on the broadcaster but merely issued a reprimand. Fifthly, the present case deals with three fundamental issues that go to the functioning of the BCCSA, and thus with issues of profound importance to the regulation of broadcasters.

1.36 We also note that in other decisions of the BCCSA, condonation has been granted notwithstanding significant delay. In ***Fitch v SABC (3)***[11] the BCCSA granted a complainant condonation for the late filing of a complaint notwithstanding a delay of 4 months. In that case the relevant programme was broadcast on 3 June 2008, and the complaint was filed on 8 October 2008. The Tribunal was satisfied that the complainant had received psychological treatment and was admitted to a treatment facility until 31 July 2008. However there was still a **period of over three months after the complainant had received medical treatment** and very little explanation was given for this three-month period. And it has been commonly accepted by the Constitutional Court that in a condonation application the explanations given must cover the entire period of the delay. But, as correctly indicated by the Chairperson in that case, any delay must be judged in the circumstances of the particular case.

> The fear of setting a precedent becomes non-existent where justice demands the contrary. The very existence of the authority to condone a late filing in the BCCSA rules or, in any case, extend time-frames where no justice will result, requires the Chairperson to exercise his or her discretion judicially. An American judge has said that he would consistently ("until the cows come running home") ignore the precedent he would be setting if the facts before him demand that he decides differently. I fully agree with this approach. This is not a legal rule which I am creating, but amounts to an exercise of my discretion which is demanded by the Rules. In view of the extremely serious nature of the allegations made against Prof Fitch, the fact that Prof Fitch was never prosecutes for the alleged sexual offences, and Prof Fitch's admission to a psychological treatment facility, it is my view that condonation of the late submission of the complaint is justified. Clearly, Prof Fitch could not reasonably have been expected to properly lodge his complaint while he was receiving treatment in the psychological treatment facility. **The delay after his discharge from the treatment facility is not unreasonable in the circumstances of the case**. No injustice will result from the condonation. Quite the opposite – in view of the exceptional circumstances of this case, and the extremely serious nature of the allegations made against Prof Fitch, the condonation will serve the interest of justice. The reasons given by Prof Fitch are also, in my opinion, "good and satisfactory", in the circumstances.[12]

*Prejudice to the complainants*

1.37 The Chairperson indicated that the interests of the complainants counted against condonation. But there is no evidence that a 1-day delay would prejudice the

[11] 24/2008.

[12] At para 10.

complainants. While MultiChoice regrets and apologises for the lateness of 1 day, it contends that there can be, with respect, no prejudice to the complainants' rights and remedies relating to their defence of the application for leave to appeal. This is because they will be fully entitled to oppose the application as they would have had the application been filed a day earlier. And it is not, with respect, correct to regard their prejudice as being constituted by continued dignity violation if the case is to continue - for this presupposes that the appeal has no merit.

*Conclusion on condonation*

1.38 Accordingly, we submit that the application for condonation for the late filing of the appeal should have been granted because the application has very strong prospects of success, the issues that fall to be determined are of fundamental importance, a reasonable explanation was given for the non-compliance with the rules, and the complainants cannot be prejudiced by the delay of 1 day. It is in the interests of justice to permit the application for leave to appeal to be adjudicated upon.

2. **PART 2: MERITS ON WHICH WE APPEAL**

2.1 In its decision on the merits, the Tribunal held that the mimicry amounted to a serious impairment of the dignity of persons who suffer from Tourette's Syndrome, and that the comedic nature of the episode exacerbated the harm to dignity. The Tribunal also imposed a fine of R30 000.00.

3. This part of the application will be structured as follows:

3.1 firstly, we provide a general background on the complaint and the ruling held by the Tribunal;

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[12] At para 10.

3.2 secondly, we set out the three principal grounds of appeal to the application, being the interpretation of clause 28.4; the ruling that dignity in this context trumps free speech; and the sanction.

3.3 thirdly, we discuss each ground of appeal in turn in detail.

## 4. Background to this application

4.1 MultiChoice broadcasts a comedy show on the KykNET channel called "Proesstraat" ("**the programme**"), which is based on the German improvisational comedy show Schilerstrasse. The programme is a dramatic work in the form of a play which is recorded in front of a live audience. The play features a number of characters who are not provided with a script and are requested to react to certain instructions provided by a director. This results in the characters mimicking the instructions to the live audience as the plot is improvised. The audience is privy to the content of the instructions. In the programme in question, an actress in the group was instructed by the director to mimic a person with Tourette's Syndrome. This resulted in the complaints.

4.2 It is **common cause** that the programme is **neither news nor comment**.

4.3 The Office of the Registrar requested MultiChoice to respond to the complaint on the basis of clause 28.4 of the BCCSA Code. This is the clause that deals with news and comment and that requires licensees to exercise exceptional care in those contexts in matters involving privacy and dignity.

4.4 MultiChoice responded that **clause 28.4 was not applicable** because the programme was a comedy where participants act on the impromptu instruction from the director, and **not a programme dealing with news and comment**.

4.5 In its ruling, the Tribunal, while confirming that clause 28.4 applies solely to news and comment, relied on section 39(2) of the Constitution to broaden the clause to protect privacy, dignity and reputation in all broadcasts (i.e. not only news and comment).

4.6 The Tribunal also held that although the right to freedom of expression and the right to dignity have both been described as important, in the present matter the dignity of those who suffer from Tourette's Syndrome is of substantially greater importance than the right to artistic freedom. The fact that the programme was a comedy skit

that drew a substantial amount of laughs from the live audience was held to aggravate the impairment of dignity of the relevant group.

5. **Grounds of appeal**

5.1 **Ground 1: Interpretation of clause 28.4 of the Code**

5.1.1 The Tribunal, with respect, erred in its interpretation of clause 28.4 by misapplying section 39(2) of the Constitution to impermissibly broaden the scope of clause 28.4 beyond news and comment. On this basis alone the Appeal Tribunal is likely to uphold the appeal and accordingly leave should be granted.

5.2 **Ground 2: The comedic context of the programme**

5.2.1 The Tribunal, with respect, erred in not having appropriate regard to the context of the speech, thus effectively banning all comedy, regardless of context, concerning medical conditions. Such an absolutist principle is, we submit, at odds with our Constitution and our free speech jurisprudence.

5.3 **Ground 3: The sanction**

5.3.1 The Tribunal, with respect, erred in ordering the sanction that it did. If the Tribunal is correct in broadening the scope of clause 28.4 (which we contest), then the broadcaster could not have known in advance that it would be breaching this clause; as the Tribunal itself notes, this is the first case where such a broadening has taken place. Accordingly, at most a reprimand ought to have been issued. It was not, with respect, a case where a punitive fine was justified. Indeed this was precisely the approach taken by the Tribunal in the ***Highveld Stereo*** case in which "*[t]he Tribunal held that 94.7 Highveld Stereo had contravened the Broadcasting Code. However, given the fact that the matter decided by the Commission was a novel one, the Respondent was merely reprimanded*." (Emphasis added.)

5.3.2 We need say no more in this regard, and proceed to discuss the first two grounds of appeal in greater detail.

6. **First ground of appeal: interpretation of clause 28.4 of the Code**

6.1 Clause 28.4 of the Code provides as follows:

> "28 if a subscription broadcasting service licensee includes in its service news or comment on matter of public importance that it has produced or commissioned, then the following provisions apply to that licensee -
>
> 28.4 Privacy
>
> Insofar as both news and comment are concerned, broadcasting licensees must exercise exception care and consideration in matters involving the private lives, private concerns and dignity of individuals bearing in mind that the rights to privacy and dignity may be overridden by a legitimate public interest."

6.2 We submit that clause 28.4 is clear. It expressly applies only to news and comment. This is clear from the wording of clause 28.4, and this is accepted by the Tribunal. It accordingly does not apply to broadcasts which are entertainment but not news and commentary (for example, movies, reality television shows, or comedic skits).

6.3 As the Tribunal unequivocally accepts, the programme does not constitute news or comment. The mimicry portrayed in the programme was not in any manner a conventional news bulletin concerning Tourette's Syndrome nor did it intend to deal with this medical condition to put forward a viewpoint. The programme was instead intended to entertain the audience and provide a test as to how the characters can improvise and act on the instructions provided by the director. It allows for a comedic escape by means of laughter and humour.

6.4 Notwithstanding this, however, the Tribunal found that the provisions of clause 28.4 still apply to the programme. In this regard the Tribunal stated:

> this was the first time that the Commission had held that the dignity clause is also applicable to material other than news and comment in the Subscription Code.[13] (Emphasis added.)

6.5 This was said to be justified on an expanded interpretation of clause 28.4 guided by section 39(2) of the Constitution.

6.6 MultiChoice submits that this broadening was incorrect for two main reasons. The first is that the Tribunal incorrectly applied section 39(2) of the Constitution. The BCCSA is not *mero motu* empowered to develop the Code even in instances in which such development may seem desirable from a normative or policy perspective. Secondly, the extension of the ambit of the clause violates the principle of *pacta sunt servanda*. Accordingly, with respect, the decision is at odds with significant general principles of our law, and with the decisions of the Constitutional

[13] Page 9 of the Ruling.

Court.

**Section 39(2) and the limits to the powers of the Tribunal**

6.7 At para 4 of the Ruling the Tribunal held:

> The first matter which we have to decide is whether the protection of dignity in clause 28 of the Subscription Code is limited to news and comment. In examining the wording of the clause, as quoted above, it appears as if this rule does indeed apply solely to news and comment. However, this is a case where the Code needs to be interpreted in the light of section 39 of the Constitution of the Republic of South Africa 1996. Section 39(2) of the Constitution provides that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

6.8 Our primary submission is that the interpretive exercise conducted by the Tribunal using section 39(2) was, with respect, flawed. Under section 39(2), the Code must be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights.

6.9 However, the Constitutional Court has made plain on numerous occasions that the limit to section 39(2) is what the language of the provision is reasonably capable of, and that an interpretation may not be unduly strained.[14] Where the language is not so reasonably capable, then the court needs to make a declaration that the provision is constitutionally invalid (and the remedy of reading-in may follow), but the court cannot merely read the provision down ignoring the clear language, in order to give it a constitutional interpretation).

6.10 Indeed, the Tribunal accepted that there are limits to the duty under section 39(2) and quoted the following paragraphs from ***Director of Public Prosecutions, Cape of Good Hope v Robinson*** 2005 (4) SA 1 (CC) in its ruling, where Justice Yacoob stated the following in relation to section 39(2):

> Fourthly, the High Court misconceived the extent of its power to construe a legislative provision consistently with the Constitution. A Court's power to do so is not unqualified; a Court cannot give a meaning to the provision which it regards as consistent with the Constitution without more. The provision concerned must be reasonably capable of the preferred construction without undue strain to the language of the provision. The words 'liable to be surrendered', in their context, are incapable of bearing the meaning contended for.

6.11 And the BCCSA has rightly adopted this approach in an analogous case, ***Chetty v M-Net*** (Case No 41/2012, decided on 14 September 2012), concerning the Masterchef reality television series. In that case, the Tribunal accepted that section 39(2) of the Constitution did not permit it to excise the words "*actions or*

[14] See, for instance, ***Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Distributors (Pty) Ltd v Smit NO and Others*** 2001 (1) SA 545 (CC) at para 24..

*events of public importance*" in clause 28.2 of the Code. The Tribunal accepted that excising these words "*would amount to a fundamental change to a clause which obviously does not deal with mundane matters such as the results of a reality show*" (at para 12); and "*within a Constitutional Democracy there is, fortunately, no power for … the BCCSA Tribunal, to fill in gaps in the Law or Code which it applies*" (at para 13). These dicta of the Tribunal apply with equal force to the present case.

6.12 The decision to extend the ambit of clause 28.4 to *all broadcasts* and not only those concerning *news and comment* is therefore a policy one, which can only be reflected in an amendment to the clause pursuant to the Constitution of the BCCSA. It cannot, with respect, be amended by the Tribunal itself in its rulings. It is also instructive that amendments to the Code are rightly carefully regulated.[15]

6.13 The Tribunal also erred, with respect, when it sought impermissibly to interpret the Subscription Broadcasting Code by relying on the terms of the Code for Free-to-Air Broadcasters:

> In the 2011 Code for free-to-air broadcasters it is explicitly stated in clause 15(3) that "in the protection of privacy, dignity and reputation special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled."[16]

6.14 Thereafter, it found that:

> The Code for Free-To-Air Broadcasters protects dignity, privacy and reputation in all broadcasts. It would indeed be extraordinary if a broadcaster such as KykNET, which is primarily a South African subscription broadcaster, were to fall under a different domain in so far as the protection of dignity is concerned.

6.15 With respect, the two Codes do not deal with the same domain and each must be interpreted on its own terms (otherwise there would only be one Code to regulate all broadcasters). Viewing the contents of one of the Codes may, of course, highlight gaps or terms which might in due course need to be formally amended in the other. But, we submit, it is not permissible merely to use certain provisions of the one Code in order to interpret the other. We note that the reliance on clause 15(3) of the Free-to-Air Code was, in any event, misplaced since it amounts to a suggestion that Tourette's Syndrome is a physical or mental disability rather than a medical condition. In ***Hoffmann v South African Airways***[17] the friend of the court (*amicus curiae*) vigorously opposed the classification of HIV as a disability under section 9(3)

[15] An amendment is made possible under clause 11 of the BCCSA Constitution. Significantly, the Code may not be easily amended. Rather, there are numerous, quite onerous, steps which need to be followed in order for an amendment to be valid, including that the proposed amendment must be approved by a two-thirds majority of all the members of the BCCSA, and no amendment shall be effective unless at least 21 days' written notice of the proposed amendment was given to the BCCSA Commissioners.

[16] Page 9 of the Ruling.

[17] 2001 (1) SA 1.

and the Constitutional Court accordingly decided not to pronounce as such. We submit that the same considerations ought to apply as regards Tourette's Syndrome.

6.16 Ultimately, therefore, even if it were the case that the Code in its present form is undesirable from a normative perspective, and the Code ought to be amended, this does not empower the BCCSA to invoke section 39(2) in a manner that is plainly at odds with the jurisprudence of the Constitutional Court (because it is also at odds with the plain language of the clause, which the Tribunal accepts to be the case in its ruling).

6.17 Yet another reason that the development of the clause should not be countenanced is the absence of any defences for dramatic or artistic works if clause 28.4 were to be expanded.

6.18 On this score it is imperative to emphasise that exceptions under the Code have been crafted in two different ways. The first is by having a general, inclusive restriction and then expressly carving out the particular exemptions to the prohibited expression (for example, the hate speech clause under clause 10 of the Code prohibits hate speech but clause 11 details particular kinds of expression that will not amount to hate speech, including *bona fide* artistic or dramatic expression).

6.19 The second method is precisely the manner in which clause 28.4 is formulated, by narrowly crafting the restriction in the first place. Put simply, the hate speech clause has a host of exceptions for *bona fide* artistic and dramatic works, but clause 28.4 does not. The reason is plain. Clause 28.4 already tacitly includes an exemption for *bona fide* artistic and dramatic works for they clearly do not amount to news or comment.

6.20 It follows that by expanding the Code to traverse forms of expression beyond news and comment, the Tribunal has also implicitly removed the tacit protection for bona fide artistic and dramatic works under clause 28.4.

6.21 Accordingly, leave should be granted on this basis alone.

***Pacta sunt servanda***

6.22 The second reason that the decision to broaden clause 28.2 is incorrect as a matter of law is that the BCCSA is an industry self-regulatory body and the Subscription Broadcasting Code is akin to a treaty or a contract (according to which the signatories have agreed to be bound by particular, certain terms) rather than the common law which may be developed on an ad hoc basis.

6.23 Put differently, the BCCSA has no power, *mero motu*, to develop the Code or to apply clauses in contexts in which they do not apply. To do so would infringe the important principle of *pacta sunt servanda.*

6.24 Deep at the heart of *pacta sunt servanda* is a recognition of the principle of legality and holding people bound to terms that can be known (and agreed to) beforehand so that they may behave accordingly. In ***President of the Republic of South Africa and Another v Hugo***, Mokgoro J emphasised (albeit in the context of law):

> [t]he need for accessibility, precision and general application [of the law] flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law.[18]

6.25 The same holds true for the Code. Broadcasters cannot be bound by expanded interpretations of clauses which unduly strain the language of the Code, and which will effectively then apply retrospectively.

6.26 It follows that clause 28.4 is plainly inapplicable to the programme, cannot be broadened on the basis of section 39(2) of the Constitution, and the Appeal Tribunal is likely to grant the appeal on this basis alone. We therefore submit that leave to appeal should be granted.

6.27 **The second ground of appeal : The comedic context of the programme**

6.28 The Tribunal concluded that "*the dignity of people who suffer from Tourette's Syndrome is of substantially greater importance than the right to artistic freedom*." Although the Tribunal was careful to state that this was so in "*the present case*", we submit that inevitably, the effect of the ruling is that comedy or jokes about medical conditions will always be trumped by the dignity of the person with the medical condition. Even then assuming that clause 28.4 can be legitimately extended to cover all broadcasts, which we contest in the first ground of appeal, there ought to be an exception for *bona fide* dramatic and comedic expression.

6.29 This is because it is not necessarily the case, as we argue below, that all speech which pokes fun at those with medical conditions is automatically to be regarded as an abuse of free speech.

6.30 The starting point is that famously stated by the European Commission for Human Rights in ***Handyside v The United Kingdom***,[19] freedom of expression extends "*not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive*

[18] At para 102.

[19] (1974) 1 EHRR 737 at 754.

*or as a matter of indifference, but also to those that offend, shock or disturb.*" This proposition was accepted in South African jurisprudence by the Constitutional Court in ***Islamic Unity Convention v Independent Broadcasting Authority and Others***.[20]

6.31 Two further trite principles of free speech law are potentially implicated on the facts of the present matter: that speech must be interpreted in context; and that humour and satire should be protected.

6.32 In regard to context, it has been famously stated that "*in law context is everything*".[21] In ***De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others***,[22] for instance, the Constitutional Court held that it is not possible to determine whether an image amounted to child pornography without having regard to the context.[23]

6.33 This is equally so in relation to determining whether humour that offends has breached any provision of the Code.

6.34 A particularly apt example (in the context of the Free-to-Air Code) is the matter of ***SABC v Blem and Others***[24] in which Gareth Cliff, the former 5FM DJ, made a remark concerning persons suffering from epilepsy. He stated that he had been to a function and played "dub-step" music and no one on the dance floor could dance to it. He stated on air: "*they looked like a bunch of epileptics*".

6.35 The Tribunal held that "*as with all complaints, dignity complaints are always considered according to the context in which the material was used.*" The Tribunal found that "*the presenter did not target epileptic people, it was a single reference and he did not mention them again*". And the Tribunal ultimately found as follows:

> The complainants state that they were offended and disgusted by the rude remark. However, in considering dignity complaints the current contemporary mores of society, and more specifically, the mores of the target audience of a particular programme, are taken into consideration. 5FM's target market is young, trendy and mature adults residing in the metropolitan areas. Contrary to what the complainants argue, in my opinion the remark did not go beyond the contemporary South African standard of tolerance. Regular listeners to Gareth Cliff's programme would have understood the

[20] 2002 (4) SA 294 at paras 26 and 27.

[21] ***R v Secretary of State for the Home Department, ex parte Daly*** [2001] UKHL 26; [2001] 3 All ER 433 (HL) 433 at para 28. This proposition was cited with approval (albeit in a different context) at para 63 of the Constitutional Court's judgment in ***First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance*** 2002 (4) SA 768.

[22] 2004 (1) SA 406 (CC).

[23] At para 33

[24] [2012] JOL 28941

> bantering in the correct context, that it was a remark that slipped out, that it should not be taken seriously and that it was not intended to hurt or offend any section of the community. In considering dignity complaints, the right to dignity should be balanced against the right to freedom of expression. One of the demands of living in a democratic society is that one should be tolerant to material that offends, shocks, or disturbs. Indeed, the Constitution guarantees freedom of expression to broadcasters and this freedom include the right to offend within reasonable limits. In this case, the remark was within reasonable limits.

We submit that the facts of the present matter are plainly in line with the ***Blem*** decision and equally ought to be held not to have infringed the Code, even assuming that clause 28.4 could be broadened to regulate all broadcasts.

6.36 Also compelling is ***Engelbrecht v 5FM***[25] in which the respondent's station featured a stand-up comic making jokes about gay people, in a promotion of a television programme featuring gay people. The Tribunal noted that "*[s]tereotyping of (groups of) people is a well-known tool of creative humour. In jokes and comedies, groups of people like Jews, Afrikaners, [black people], politicians and lawyers etc., are often on the receiving end of sharp humour*." (para 5). The Tribunal went on to find that there was no contravention of the Code and held:

> [s]ince our new constitutional dispensation commenced in 1994, unfair discrimination against homosexual people has been outlawed and they have come out in the open, as it were. Poking fun at them has become acceptable as with any other group of people. (Emphasis added.)

6.37 Yet the effect of the ruling in the present case may have the perverse and unintended effect that a drama or comedic series where a character is hateful or mocking towards another character who has a medical condition, will now not be permitted (even if the point of the drama or comedy is to criticise this behaviour). The Oscar-winning movie, *The King's Speech*, which was about King George VI overcoming his stammer, comes to mind. The same could apply to a racist or homophobic character in a movie that is broadcast – for instance the critically acclaimed Quintin Tarantino movie, *Django Unchained*. It could never be suggested that this is what the Code intends.

6.38 In relation to laughter, in dealing with humour in the context of freedom of expression, Sachs J in ***Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International and Another*** ("***Laugh it Off***")[6] stated that:

> We are not called upon to be arbiters of the taste displayed or judges of the humour offered. Nor are we required to say how successful Laugh It Off has been in hitting its parodic mark. Whatever our individual sensibilities or personal opinions about the T-shirts might be, we are obliged to interpret the law in a manner which protects the right of

[25] (2004) JOL 13326 (BCTSA para

> bodies such as Laugh It Off to advance subversive humour. The protection must be there whether the humour is expressed by mimicry in drag, or cartooning in the press, or the production of lampoons on T-shirts. (emphasis added).
>
> This protection also militates against a conclusion that dignity trumps artistic expression in this programme.

6.39 We accordingly submit that in any event, even if clause 28.4 were to be extended to cover broadcasts other than news and comment, the programme would still not have fallen foul of the clause because it constituted legitimate dramatic and artistic speech.

7. **Conclusion**

7.1 Clause 28.4 deals with news and comment, which the Tribunal concedes the programme was not. Clause 28.4 cannot be developed in such a way as to broaden its express narrow scope such that it should now cover all broadcasts, whether in the form of a movie or a comedic skit for example. The Tribunal erred in seeking to develop clause 28.4 in this way.

7.2 In any event, even assuming clause 28.4 could be broadened, the Tribunal effectively adopted a position that the dignity of those who are afflicted with a certain medical condition trumps artistic freedom. But this takes no account of the important free speech principles that (i) offensive speech is protected; (ii) context is important; and (iii) laughter has an important place in our democracy.

7.3 Finally, **even if the appeal on the merits fails, the Tribunal ought not to have ordered MultiChoice to pay a fine**, because this is the first case in which clause 28.4's ambit has been broadened (assuming it could be broadened). To impose a fine on MultiChoice would be to apply the new jurisdiction retrospectively, which is patently unfair.

7.4 We request that leave to appeal be granted for the reasons set out above.

7.5 In addition we request that, should leave be granted, the Chairperson or other Commissioner which has granted leave suspend the sanction imposed by the Tribunal pending the outcome of the appeal in terms of clause 4.6 of the Procedure of the BCCSA."

[3] The Respondents responded as follows:

**Pretorius:** "**S SAAKNOMMER 15/2014 MULTICHOICE/KYKNET-**APPEL TOT VERLENGING

Geliewe asseblief kennis te neem van die volgende:

Die weiering van die verlenging van die vyf dae periode is volgens my heeltemal geregverdig vir die volgende redes:

1. Tyd is van die uiterste belang en as ek as Klaer moes tyd inruim om my bydra te moes lewer binne die voorgeskrewe tydperk van die Uitsaaiklagte Kommissie van SA is dit ook van toepassing op ALLE ander partye.
2. Die feit dat Mnr Bruce Mhkize, ongesteld was, nie ‘n geldige verskoning is nie aangesien hy ‘n hoogs aangeskrewe pos beklee en gepaardgaande daarmee, kom ook die magte van delegasie.
3. Dat vir twee instansies soos Multichoice en Webber Wenzel,(een van die land se grootste verskaffers aan die publiek en‘n uiters en hoogs professionele en welgerekende regsfirma) breedvoerige en doelgerigte pogings op hierdie laat stadium te loods vir ‘n verlenging en dan “misverstaan” van ‘n 5 dae sperdatum is regtig kommerwekend om die minste daarvan te se.
4. Die feit dat daar so sterk klem geplaas word op die feit dat die kode nie van toepassing is op drama nie is net so onaanvaarbaar gegewe dat:
   a) In drama kan jy maar die spot dryf met enige gebrek, hetsy fisiese of geestelike gestremdheid! Lees die tweede laaste paragraaf van Harald Richter se e-pos aan my. ONAANVAARBAAR!
   b) Let weereens daarop dat aangeheg tot hierdie skrywe, ‘n persoonlike e-pos aan my gestuur was waarin die vervaardiger self, Harald Richter, verskoning aanteken vir die te nakoming van gestremde mense in 10 Februarie 2014 se uitsending van Proestraat
   c) Laaste paragraaf lees dit as volg:”ONS SAL DEFINITIEF MET TOEKOMSTIGE OPNAMES BAIE MEER LET OP SULKE OPDRAGTE AAN DIE AKTEURS. DIT WAS ONSENSITIEF VAN MY AS VERVAARDIGER WAT DIT DEURGELAAT HET”
   d) HIERDIE IS ‘N DIREKTE SKULDERKENNING! EN NIKS ANDERS NIE. Enige lid van die publiek sal tot hierdie gevolgtrekking kom.
   e) Regte van Vryheid van Spraak van die media..... daar is ook menseregte wat MY as lid van die publiek en TS lyers beskerm. Die media is NIE onaantasbaar soos wat hulle graag te kenne gee in hulle vertoee nie.
   f) Presies op dag en datum, een maand later, word daar weer presies dieselfde opdrag oor TS gegee. Waar is die media-etiek? Valse en lee beloftes vanaf die vervaardiger homself. Geloofwaardig?? NEE, wie is ons, die publiek, julle sal vir ons wys hoe groot en magtig is julle is, julle SAL dit weer doen en net miskien sal die publiek moeg word en dit net daar los.

5. Die slotsom hiervan is dat aan die einde van die dag dit blyk te wees dat dit vir Multichoice en Webber Wenzel nou slegs om die finansiele aspek gaan en LET WEL: lankal nie meer or TS nie.
6. Dat die vervaardiger nl Harald Richter en die opdraggewer, Elize Cawood in som total vir hieride aksies voor stok gekry moet word en tot verantwoording geroep word
7. Dat daar blykbaar ‘n kommunikasie probleem tussen Multichoice en Webber Wentzel was en nou word die Uitsaaiklagte Kommissie van SA gestoomroller, “geboelie”. Een van die min instansies in hierdie land wat nog hulle werk doen en ‘n sterk sin vir regverdigheid en beskerming van regte handhaaf.
8. Dat ek, Mary-Jane Pretorius, nooit deel wou wees van ‘n regsaksie nie maar slegs ‘n spreekbuis wou wees vir mense wat nie ‘n stem of platvorm gegun word in hierdie lewe nie.”

BESLIS GEEN VERLENGINGS PERIODE TOT APPEL NIE.

**Reinhardt’s Place:** “Re: Case Number 25/2014 – Reinhardt’s Place v Multichoice (KykNet)

> We refer to the ongoing matter above, and most recently the application for condonation filed on behalf of Multichoice (KykNet). In this regard the following:
>
> In our opinion there are 2 issues at play here. Firstly, the application for condonation to be granted for the late filing of Multichoice's leave to appeal, and secondly the actual leave to appeal. Our thoughts on these matters are as such:
>
> The applicant was granted – in keeping with the BCCSA procedures – 5 days to submit their leave to appeal. Claiming that they were unaware that weekends and public holidays are included in the 5 day period is of little consequence. Surely an esteemed law firm such as Weber Wentzel are acquainted with the rule: *ignorantia legis neminem excusat* (ignorance of the law, excuses no one).

But arguing about the law, its rules and merits is not what Reinhardt's Place is about. Its primary concern is not about the late submission of leave to appeal, or condonations to be granted or not granted. And it most certainly is not about us.

What this is really about is the vociferous protection and public denunciation of wrongdoing in the name of comedy, and specifically when the 'subject matter' of said comedy, are unable to speak for themselves.

We are – at best – flummoxed by MultiChoice's most urgent need to appeal against the previously issued judgement, when by his own admission the producer of the show in question (Mr. Harald Richter) openly admitted to wrongdoing. He even went as far as to give a written undertaking that greater care would be taken in the transmission of future broadcasts to ensure that offense would not be caused, again. (ref. communication received 11 February 2014; 09:30 am). And yet, it did again less than a month later, on 10th March 2014.

Mr Richter further stated that he would never make cancer or HIV sufferers the butt of any joke, mostly as he has lost a number of loved ones (including his mother) to cancer. It would appear that Mr. Richter – and by extension – his program's decisions of what is acceptable and what is not acceptable, is based purely on his own feelings and emotions. Does this then mean that any person who suffers any other illness, disease or affliction other than Cancer or HIV, is 'free-game' to Mr. Richter and his comedic prowess? We honestly hope not.

In summation (granted, a very short summation – but still) of the respondent's documentation, the crux of the matter appears to be "what is the big fuss about"? Why are the rights of a minority group of greater consequence that the right to freedom of speech?

The big fuss is about the power of the media, and the fact that it is often relied upon as the sole source of information for a myriad of people, in dealing with subjects they are otherwise uninformed about.

The entertainment industry has a history of depicting those with TS as being social misfits whose only tic is coprolalia (involuntary swearing, or the involuntary utterance of obscene words and socially inappropriate remarks), which has furthered stigmatisation and the general public's misunderstanding of persons with TS.

The symptoms of Tourette syndrome are fodder for talk shows and comedies such as "Proes Straat". Some talk shows (for example, Oprah) have focused on accurate portrayals of people with TS, while others (for example, Dr. Phil) have been accused of furthering stigmatisation,

focusing on rare and sensational aspects of the condition. And this is exactly what Proes Straat is guilty of.

MultiChoice and its lawyers argue that the program does not fall within the scope of clause 28.4 of the BCCSA Code, in that the programme was a comedy, and not a programme dealing with news and comment.

We would argue that even though the original intent of the program is not one of acting as a source of information, it can nonetheless be accepted as such when it is the initial introduction a viewer may have, to a subject he or she is unaware of uninformed of, until viewing the program.

Multichoice further argues that they cannot be financially penalised (by means of a fine) for wrongdoing, when they were unaware that what they were doing, may be regarded as wrong should the scope of clause 28.4 be broadened to include all broadcasts. We argue that Mr. Richter was fully aware of his actions and by his own admission admitted to such.

Finally, the respondent argues that submitting a leave for appeal 1 day late, will not prejudice the complainants in any way. It is important that Messrs Weber Wentzel, their esteemed employees and their client bear in mind, that it is not the right of the complainants that are of importance here, but rather the rights of TS sufferers, their families and loved ones.

If the question “does 1 day make a difference” was asked of them, the answer would be a resounding ‘yes’. If they had 1 single day, to broadcast the cause, effect, emotional agony, stress and heartache suffered by every single person touched by TS, would that make a difference to the perceptions of the audience of Proes Straat and every other show that ridicules this heart-breaking affliction? We know it would.

So in essence, the fuss is about placing the interests of an international corporation – with all its wealth, power and influence – above a minority group, who demand nothing more than what they are entitled to under law, and under God – the basic right to equality, to compassion and to humane treatment. To be treated and regarded as Mr. Richter would his own mother. No more. No less.”

[4]

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**The application for extension of the five-day period is,**

**JCW VAN ROOYEN SC**
**CHAIRPERSON**