



P.O.Box 412365 • Craighall • Tel (011) 326 3130 • Fax (011) 326 3198 • email: bccsa@nabsa.co.za
Block No 8 • Burnside Island Office Park • 410 Jan Smuts Avenue • Craighall Park • 2196 • www.bccsa.co.za

CASE NUMBER: 02/2016

DATE OF HEARING: 15 FEBRUARY 2016
JUDGMENT RELEASE DATE: 30 MARCH 2016

ISIMANGALISO WETLAND PARK AUTHORITY

COMPLAINANT

vs

ELECTRONIC MEDIA NETWORK (PROPRIETARY) LIMITED

RESPONDENT

TRIBUNAL: MR JUSTICE RATHA MOKGOATLHENG (CHAIRPERSON)
DR LINDA VENTER
MS TANYA BRENNER (CO-OPTED MEMBER)

FOR THE COMPLAINANT: Advocate Steven Budlender, assisted by pupil Stuart Scott instructed by Attorney Mr Steve Raney and accompanied by Ms Terri Castis of the Complainant.

FOR THE RESPONDENT: Dr Dario Milo, Ms Okyerebea Ampofu-Anti and Mr Nelson Maunatlala of Webber Wentzel Attorneys, accompanied by Mr George Mazarakis and Johan Botha of the Respondent

Balance - programme lacked in fairness, accuracy and objectivity, was not impartial, and this included a disregard for the right of reply on all issues raised. The iSimangaliso Wetland Park Authority vs M-Net, Case No: 02/2016(BCCSA)

INTRODUCTION

T BRENNER

- [1] The paramount issue in this case is that of balanced reporting. On 23 August 2015, the Respondent, via its weekly programme “Carte Blanche”, which appears on the M-Net channel, broadcast a twelve-minute insert. The insert pertained to complaints about the way in which the Complainant, the iSimangaliso Wetland Authority, was managing the iSimangaliso Wetland Park, (“the Park”), a world heritage site situated in the north-eastern section of Kwa-Zulu Natal province.
- [2] The insert concentrated in the main on the prejudice which the Authority’s purported mismanagement had caused to residents in the area of Sodwana Bay, which is situated just outside of the Park.
- [3] It focused on the manner in which two of the Authority’s chief protagonists, Mr Andrew Zaloumis, (“Zaloumis”), its Chief Executive Officer, and Ms Terri Castis, (“Castis”), its business director, were managing the Park, and were treating certain residents of Sodwana Bay, whose various livelihoods were dependant on the Park.
- [4] For ease of reference, we will refer to the Complainant as “the Authority” and to the Respondent as “Carte Blanche”.
- [5] On 20 September 2015, the Authority referred a complaint to this Commission about the insert. The complaint was opposed by Carte Blanche, and this culminated in the delivery of the initial complaint, Carte Blanche’s response thereto, the Authority’s reply to same, and Carte Blanche’s further reply.

SUMMARY OF THE INSERT FORMING THE SUBJECT-MATTER OF DISPUTE

- [6] A short summary of the insert merits mention at this juncture. The introduction describes the provenance of the Park, as becoming the first ever world heritage site in South Africa in 1999, with Sodwana Bay, loosely termed as “part of the Park”, being one of the top ten diving destinations on earth and one of the country’s top fishing spots. It goes on to assert that, post 1999, and contrary to expectations that tourism

would boom when heritage status was awarded, something was now “rotten in the state of Denmark”, the clear implication being that something was wrong in Sodwana Bay.

- [7] The viewer’s attention is then directed to a series of “for sale” signs for properties in Sodwana, accompanied by the comment of a resident, Manie Lombard, (“Lombard”), that residents were wanting to relocate and sell their businesses, with the implication that this was a symptom of the “rotten” state of affairs, with the ensuing comment noting: “It seems that the problem lies in how iSimangaliso is managing the area.”
- [8] Mention is made of Sodwana being “a small town with a bad sheriff and deputy”, and, via comments from Lombard and another resident, Grant Smith (“Smith”), the “bad sheriff and deputy” are identified as Zaloumis and Castis. Their management style is described as “dictatorial” in nature, with no accountability. The Authority is described as “an organization.... (which)... is only those two or three people at the top.” The insert records the denial by Castis of any personal vindictiveness towards individuals, with an excerpt from her interview with the Carte Blanche producer, Johann Botha (“Botha” or “the producer”), in which she states that the Authority had “legal review teams that look at our actions”, and in which she speaks of the difficult balancing act in recognizing the interests of “620 000 people, 14 traditional authorities, 14 land claimants, 2 district municipalities, 5 local municipalities, NGO’s, subsistence users, recreational users, be they fishermen, be they scuba-divers, be they birders – all against the bottom line which is maintaining the ecological integrity of the park.”
- [9] The programme proceeds to state that the business owners say that the Authority does not follow any legal process. Examples are given of Smith being denied permission to promote global awareness of sharks in the Park, of another resident, Tokkie Hugo (“Hugo”), being victimized by being banned from the Park, twice, for debatable reasons, and of Smith being prevented from launching a boat full of overseas tourists, for which his launch fee had been paid, and being banned for three months, because he had incorrectly and, according to the Authority, “fraudulently” entered the Park by using an expired concession-holder’s token issued when he was still a concession-holder. The comment by Castis on banning speaks of this as being a measure of last resort, and for serious offences such as fraud and endangerment of life. The insert records her assertion that Smith had failed to pay the launch fee for the day.

- [10] The next comment speaks of the Authority making Sodwana “very tourist-unfriendly”, leading to a decline in tourist numbers, this according to complaints made. Two examples are given: the Authority had refused use of ablution facilities by disabled people because they did not have an entry permit, and one Sandra Wright, (“Wright”), who presented copies, and not originals, of two permits for her best friend’s two wheelchair bound sons, was denied entry with them. Wright had not received the originals when entry was sought, despite having applied for same on six month’s notice. She was told that copies of the permits were unacceptable. As to the first issue, Castis is recorded as advising that disabled individuals should obtain permits at Oceans and Coast. As to the second issue, there is no reply.
- [11] The next complaint addresses the poor state of the only road through the Park, and the desperate measure taken by some residents to fill in pot-holes at their own expense, only to find the Authority opening them up again, with Castis commenting that these residents had “absolutely no environmental authorization” to do this. Then, following this, the programme interviews civil engineer and “Sodwana regular”, Andre Nel (“Nel”), who opines that the filling material, whatever it was, should not have been removed. There is no reply to Nel’s statement.
- [12] To further elaborate on the tourism issue, the programme comments that, contrary to the Authority’s statement that there was a 900% increase in tourism establishments, Carte Blanche had found a different picture. Mention is made of the closure of five diving companies, six major fishing competitions, and a reduction in concession-holders by two thirds. A resident, one Jabulani Mkhize, (“Mkhize”), comments that a lot of business people are no longer surviving because of all the rules which affect them.
- [13] The voiceover proceeds to state: “For every company that closes down, it means four or five local families who lose their income. And higher unemployment often leads to a higher crime rate.” Lombard speaks of knowing about twelve armed robberies in the past year. Two incidents of robbery are mentioned, via interviews with Nel, who was shot in the leg inside the Park’s campsite, and with Hugo, whose regular guest, Thys Beselaar, was shot at Hugo’s home by a robber and who died a few days later. There is no reply to this segment.

[14] The programme reverts to the management style of Zaloumis and Castis, this time focusing on an interview with lawyer Siva Chetty (“Chetty”), who says that he represents about fifty residents of Sodwana, all of whom had complained about the “capricious and arbitrary way in which” Castis and Zaloumis had been conducting the activities of the Authority. Castis is permitted the comment that her legal team had a different view on the subject. To further support its criticism, the voiceover mentions two incidents of community agitation against the Authority, firstly, when they protested against the building of a new gate, and secondly, when they blocked the road between Hluhluwe and Sodwana. Castis is afforded the opportunity of explaining the gate dispute – an issue between two land claimants – but not of contradicting the road blockage incident.

[15] The programme concludes with a question as to whether Sodwana will survive. The only positive statement emanates from Castis when she informs the interviewer that the Authority had secured the sum of R368 million to invest in the Park, a substantial amount of which would be invested in Sodwana Bay, which she acknowledges as “the goose that lays the golden egg.” Mkhize refers to, presumably, the Authority, (presumably as represented by Zaloumis and Castis), as thinking “they are the god of this area”, while Nel says he will “definitely not visit again”, following the robbery incident, and the final statement records an unsuccessful attempt to interview the Minister of the Environment.

THE CODE

[16] It is not in dispute that the Authority is a public body, that its CEO and business director are public officials, and that the issues raised in the insert pertain to matters of public importance. The following clauses of the BCCSA’s Code of Conduct for Subscription Broadcasting Service Licensees, (hereafter referred to as “the Code”), are germane to the material issues in this case.

[17] The clauses are quoted below for ease of reference:

“28.2 Comment

28.2.1 Licensees may broadcast comment on and criticism of any actions or events of public importance.

28.2.2 Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.

28.3 Controversial issues of public importance

28.3.1 In presenting a programme in which controversial issues of public importance are discussed, a licensee must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.

28.3.2 A person whose views are to be criticized in a broadcasting programme on a controversial issue of public importance must be given a right to reply to such criticism on the same programme. If this is impracticable, however, an opportunity for response to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.”

THE AUTHORITY’S GROUNDS OF COMPLAINT

[18] We turn to the grounds of complaint raised by the Authority. In its initial complaint, the Authority avers that the programme was lacking in fairness, accuracy and objectivity, was not impartial, and this included a disregard for the right of reply on all issues raised, was biased, contained false statements designed to discredit Zaloumis and Castis, and was deliberately selective, and this amounted to “unethical, unprofessional and dishonest journalism”. In its analysis of the issues, as is apparent from both sets of papers filed by it, the Authority goes into molecular detail in assailing every statement made in the insert which is unpalatable to it. Challenges are made to both content and journalistic methodology. Personal attacks are made against the professional integrity of the producer, Botha, and Carte Blanche. In several instances, the Authority’s complaints relate to peripheral issues of no direct relevance.

[19] When the matter is argued, however, the Authority crystallises its case into five discrete grounds, all of which constitute breaches of various sections of the Code. (There were six grounds but one was abandoned at the hearing).

[20] It submits that the process before the BCCSA is not comparable to a trial, as borne out by clause 3.10 of the Procedure of the BCCSA, and that substantive merit should trump procedural regularity. Secondly, it argues that editorial autonomy can never be a basis for absolving a broadcaster of violating the Code.

- [21] The remaining five grounds are the following, namely:
- a. interviewing disgruntled people, and this conduct was consistent with a confirmatory bias against the Authority;
 - b. the failure to give a right of reply in relation to the alleged rise in crime;
 - c. the failure to give Mr Zaloumis a right of reply;
 - d. the failure to give a balanced picture of the accountability structures of the Authority;
 - e. the failure to verify allegations even where material was readily available in the public domain.
- [22] We will summarise the legal argument of the Authority on every ground, ad seriatim.
- [23] **Interviewing disgruntled people:** The Authority contends that this is a breach of clause 28.3.1 of the Code, in that Carte Blanche did not make reasonable efforts to fairly present opposing points of view, in the same programme. Instead, so it argues, the producer, Botha, was transparent in demonstrating a confirmation, or confirmatory bias, which is a “tendency to seek out and emphasise evidence that supports our beliefs, while ignoring or discounting potential counterevidence” (quoted by **K Schulz: “Why Journalists Get The Big Things Wrong” Time Magazine, 24 November 2010**).
- [24] In the view of the Authority, the insert had only shown disgruntled members of the public, and this created an imbalanced picture in the viewer’s mind, analogous to what occurred in the case of **Neil Diamond and Others v Electronic Media Network (Pty) Ltd BCCSA case no 17/2014**. In the **Diamond** case, the BCCSA held that Carte Blanche, as the editor of the broadcast, had the right to include or exclude material. But material could not be excluded when the Code required that such material should be included.
- [25] **Failure to give a right of reply in relation to the “rise in crime”:** The Authority argues that affording the party under criticism a right of reply is mandatory under clause 28.3.2 of the Code, yet no right of reply was given. This is common cause.

- [26] **Failure to give Mr Zaloumis a right of reply:** It appears that the Authority relies on a breach of clause 28.3.2 of the Code. The Authority argues that it was the duty of the producer to communicate with Zaloumis to give him the right of reply in regard to matters affecting him personally, and not the duty of the Authority or Castis to do so.
- [27] **Failure to give a balanced picture of the accountability structures of iSimangaliso:** The Authority relies on breaches of clauses 28.3.2 and 28.2.2 of the Code, a proper reply not having been given in the insert to important questions raised in interviews concerning the accountability of Zaloumis and Castis.
- [28] **Failure to verify allegations even where material was readily available in the public domain:** The Authority avers that the inaccuracies in the insert could have been avoided if the producer had taken steps to verify allegations with material in the public domain. This in breach of clauses 28.2.2 and 28.3.1 of the Code.

CARTE BLANCHE'S RESPONSE

- [29] Carte Blanche takes issue with the introduction of res nova in the reply to Carte Blanche's first response, the res nova relating to additional complaints not previously raised, and pertaining to several further omissions to afford the Authority a right of reply. It asks that the additional complaints be dismissed out of hand.
- [30] In its view, the numerous factual disputes should be resolved through the approach adopted in the **Plascon Evans** case (**Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd (1984) 2 All SA 366 (A)**). In this case, the Court determined to decide a case on the basis of those facts adduced by the applicant which are admitted by the respondent, save that inherently improbable allegations could be rejected as such.
- [31] Reliance is placed on the case of **National Media Limited v Bogoshi 1998(4) SA 1196 (SCA)**, in which the Court held that the media are not obliged to observe a standard of absolute accuracy when reporting on public interest stories, provided that the publication was reasonable. Criteria to be considered to determine reasonableness would include, (and the list is not exhaustive): the nature of the defamatory allegations, the source of the information and whether the source is reliable, the

integrity and reliability of documents relied on as a source of information, whether a right of reply was given, and the circumstances of the publication, including timing.

- [32] Reliance is also placed on the SCA judgment in **Mthembi-Mahanyele v Mail and Guardian Ltd and another (2004) 3 All SA 511 (SCA)** in which, referring to the need for latitude to allow for robust and frank comment to keep the public informed about Government activities, the Court said: “Errors of fact should be tolerated, provided that statements are published justifiably and reasonably: that is, with the reasonable belief that the statements are true.”
- [33] Carte Blanche refers to two BCCSA decisions in which the reasonable publication defence enunciated in **Bogoshi** was accepted and affirmed, as being applicable to the Code, namely: **S Magagula v ETv (NEWS) BCCSA 20/2007** and **Madibeng Local Municipality v M-Net BCCSA 15/2015**.
- [34] The next enquiry has regard to sections 28.2 and 28.3 of the Code, to be read in the context of the Constitution and cases such as **The Citizen 1978 (Pty) Ltd and Others v McBride 2011 (4) SA 191 (CC)**, and **Grove v E-TV BCCSA case 29/2004**. In **McBride**, criticism would be protected even where “extreme, unjust, unbalanced, exaggerated and prejudiced,” provided that it “expresses an honestly held opinion, without malice, on a matter of public interest, on facts that are true”. In **Grove**, the BCCSA commented on the corresponding clause 35 of the prior Code, and said: “...only in cases where it is absolutely clear that there was an unfair comment on a matter of public importance would we find against a broadcaster under this clause.”
- [35] The third principle is that of editorial discretion, which, in the view of Carte Blanche, is a complete defence to most of the Authority’s complaints. Carte Blanche relies on three more cases which endorse the importance of this discretion. Mention is made of the case of **SA Dental Association v M-Net BCCSA 2003/37**, in which the Commission held that the objective of fair and balanced comment should be reconciled with the respondent’s right to freedom of speech and “its editorial prerogative to determine what in its view should form the content of the programme...”. We are also referred to **MXit Lifestyle (Pty) Ltd v Electronic Media Network BCCSA 47/2006**, in which it was stated that “Mere difference of opinion as to how the editor should have placed the material is not sufficient to found

a transgression of the Code” and that “There is no duty on a broadcaster to add favourable comments when it has already complied with the basic tenets of the Code.” And finally, it refers to the English case of **Jameel v Wall Street Journal Europe (2006) UKHL 44 (HL)** in which Lord Hoffmann said: “If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting.”

- [36] Carte Blanche submits that the correct approach to assessing the content of the insert is an enquiry into whether it was properly investigated and reasonably reported from a journalistic point of view, bearing in mind the information that was available at the time and having proper regard to the context in which the words were used. It proceeds to deas ad seriatim with every one of the **Bogoshi** criteria, and asserts in the process that the programme complied substantially with same.
- [37] **The nature of the defamatory allegations:** The Authority being a public body and Zaloumis and Castis being public officials, their public duties are matters of public concern.
- [38] **The source of the information and whether the source is reliable:** There were more than twenty-four different sources which in Carte Blanche’s view constituted an acceptable cross-section of the local community. The producer investigated the issues over four weeks, attended social gatherings and a community protest in June 2015, and conducted informal and formal interviews, and in certain cases, with persons who preferred to remain anonymous.
- [39] **The integrity and reliability of the documents relied on as a source of information:** Mention is made of the legal opinion of advocate Flemming which opines that, as a result of the Authority’s conduct, residents are no longer able to manage their businesses effectively. This after Chetty had conducted various interviews with residents on the subject. Carte Blanche also refers to, inter alia,

Hugo's documents relating to his and his son's eviction in 2012, and documents relating to Smith's eviction from the Park in 2013.

[40] **Whether a right of reply was given, regarding Zaloumis and Castis:** Regarding the right of reply to Zaloumis, Carte Blanche considers this to be an afterthought, which should not be entertained. Neither Castis nor Zaloumis had submitted a complaint in their personal capacities. At no stage did Castis indicate that she was not authorized to speak on Zaloumis' behalf. Carte Blanche asserts that the substance of the Authority's response was included in answer to all allegations in the insert. Thirty hours of footage were obtained, with the material being condensed into twelve minutes. The manner in which relevant material was presented constituted the legitimate exercise of editorial discretion.

[41] Before the airing of the programme, the producer had held two meetings with Castis, on 24 May 2015 and on 10 June 2015, during the course of which he mentioned issues of concern. On 19 June 2015, Castis was provided with a written list of issues, and in reply, on 23 June 2015, she sent a detailed list of questions to the issues which, in the view of Carte Blanche, was unreasonable. Moreover, Castis was interviewed for about two hours on 30 June 2015.

[42] **The circumstances of the publication including the timing:** The story was investigated over four weeks, in-depth, with the Authority being given sufficient time to reply.

ISSUES OF BIAS

[43] In argument before the Commission, the Authority's Counsel intimated that he did not persist in complaints relating to bias. He had nevertheless persisted in the breach of the Code, based on an alleged confirmatory bias on the part of the producer.

[44] We assume, therefore, that he meant to abandon allegations of bias relating to a disputed personal relationship between the producer and a resident in Sodwana, Ronelle Nothnagel, ("Nothnagel"), and a disputed allegation that the producer had informed an environmental official that the Authority was "doing bad things...". We will not traverse the issue any further.

EVALUATION

PRELIMINARY

[45] We are mindful of the fact that these proceedings are not run as a trial, and we prefer to adopt a robust approach, with the emphasis of substance over form, where warranted. Moreover, we consider the need to deal with material disputes of fact to be without merit, since we have more than enough uncontested evidence at our disposal to make our determination, without having to make credibility findings which, in any event, fall within the domain of a trial court.

[46] In our view, this case is best decided on a general, all-embracing enquiry relating to the insert as a whole. A conspectus of the programme in its entirety leaves the viewer with the abiding impression that matters are going seriously awry at the Park and that this is attributable to poor management on the part of Zaloumis and Castis.

[47] The reasoning runs through the insert like a golden thread, along the following lines: Zaloumis and Castis are arrogant and autocratic and arbitrary in the way they manage the affairs of the Authority, and are not paying attention to important issues such as keeping the Park tourist-friendly, being more accommodating towards concession-holders, and non-concession-holders, local residents, visitors and tourists, attending to necessary road maintenance, and the like. In the result, so it is suggested, residents are selling their homes and moving out, businesses in the area are closing down, or relocating from the area, and there are fewer tourists. This in turn has led to increased unemployment, which in turn has led to an increase in crime in the area. The insert does not state emphatically or directly that the management of the Authority by Zaloumis and Castis is the cause of sales of properties, closure or relocation of businesses, a drop in tourism, unemployment and crime. But it does not have to. The innuendos are irresistible and are enough to create the causal link in the mind of a reasonable right-thinking member of the audience.

[48] In our respectful view, the **Bogoshi** judgment does not help Carte Blanche. The insert as a whole did not comply with the reasonable publication requirement. Certain of the indicia for reasonableness were not honoured, and these include the questionable

probative value of anecdotal evidence, the lack of integrity and reliability of the evidence gathered, and the failure to afford a right of reply. In the **Diamond** case, the BCCSA relies on the **McBride** case as authority for the principle that protected comment, while it does not need to be fair or just at all, and can be unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly held opinion, without malice, on a matter of public interest, on facts that are true. In the view of the BCCSA in **Diamond**, the insert on him was “not based on the facts provided to it (Carte Blanche) by Mr Diamond.”

[49] In **Diamond**, the right to editorial discretion was trumped by the duty entrenched in the Code to comment on facts truly stated or fairly indicated and referred to. The conclusion was drawn that the inclusion of material given to Carte Blanche by Mr Diamond was likely to have cast him in a light different from the negative impression created, as a person of questionable integrity.

[50] In this case, there was both the omission to properly research the facts and the failure to include replies where these should have been included. There are points of comparison with the facts in **Diamond**.

[51] Our three-fold enquiry involves the following:

- a. Did the comment on and criticism of the actions of the Authority, being actions of public importance, constitute an honest expression of opinion, which is clearly comment, made on facts truly stated or fairly indicated and referred to? (clause 28.2.2 of the Code);
- b. In a programme involving controversial issues of public importance, did Carte Blanche make reasonable efforts to fairly present opposing points of view? (clause 28.3.1 of the Code);
- c. In a programme involving controversial issues of public importance, was the person whose views are to be criticized given a right of reply? (clause 28.3.2 of the Code).

CLAUSE 28.2.2 OF THE CODE

- [52] Was the comment an honest expression of opinion based on facts truly stated or fairly indicated? We need to have regard to the probative value of the evidence produced and placed in the insert, to establish whether the comment was based on facts truly stated or fairly indicated.
- [53] The evidence obtained by Botha was primarily anecdotal in nature, in that it contained accounts of experiences as told by various individuals. Such evidence must be approached with caution, and cannot be considered as satisfactory substantiation of a generalized claim. We accept that the anecdotal evidence criticizing the conduct of Zaloumis and Castis is corroborated by numerous people, and that it is compelling. If the accompanying innuendos were absent from the insert, then this criticism may have arguably constituted fair comment.
- [54] But the insert goes further than simply venting this criticism. It seeks instead to draw sweeping conclusions of a material nature from anecdotal evidence alone, and this is where it enters dangerous territory. This because the anecdotal evidence simpliciter cannot provide sufficient probative support for the comments, via innuendo, about increased sales of properties, closure or relocation of businesses, a drop in tourism, and rises in unemployment and crime, all being attributable to the Authority's conduct.
- [55] A reasonable, responsible producer would have taken steps to independently establish and examine reliable alternative sources, such as statistics, available in the public domain, concerning sales of properties, closure or relocation of businesses, a drop in tourism, unemployment and crime in Sodwana Bay. This the producer failed to do. Save for obtaining corroboration for anecdotal evidence, the producer did not guard against inaccuracies via verification with other sources.
- [56] The insert has fallen foul of the use of false logic, in the form of "post hoc ergo propter hoc", which is the tendency to assume that if one event occurs after another, then the first event must be the cause of the second, as also the availability heuristic, which provides that, where a cause may be linked to an effect, tenuously or otherwise, one may overestimate the likelihood of the cause having that effect.

- [57] A ground of complaint raised by the Authority falls under this rubric, namely, the failure to verify allegations even where material was readily available in the public domain. It mentions examples of material which the producer could have accessed such as the World Heritage Convention Act and the Government Gazette, to clarify the existence of accountability structures. He could have established the number of concession-holders, tourism statistics and performance in the area from the Authority's website.
- [58] The comment was not made on facts truly stated or fairly indicated, and this constitutes a breach of clause 28.2.2 of the Code.

CLAUSE 28.3.1 OF THE CODE

- [59] Did Carte Blanche make reasonable efforts to fairly present opposing points of view? The insert centres on the management of the Authority. A balanced, fair and reasonable report would not have confined itself to the grievances raised about capriciousness and arbitrariness on the part of Castis and Zaloumis. It should have dealt with other, opposing facts casting a positive light on their management, such as those articulated in the interviews with Castis.
- [60] Castis informed the producer of several matters which could have been mentioned: the fact that there had been a clean audit since inception of the Authority in 2002, that 8% of its income was given to communities, that there had been an 84% increase in establishments, that it was responsible for 11 300 tourism-related jobs, had sent 67 students to University, had created 54 000 temporary jobs, and had managed to fence most of the Park.
- [61] Our examination of two of the grounds of complaint identified by the Authority will assist in answering the question. The grounds being: interviewing disgruntled people, and the failure to give a balanced picture of the accountability structures of the Authority.
- [62] Objectively speaking, the producer showed confirmatory bias by interviewing only disgruntled people, to fortify his stated stance on the Authority, and by failing to procure information from other reliable sources, his efforts not being reasonable, and

instead, tantamount to an act of schadenfreude. This conduct precluded the fair presentation of opposing views.

[63] An sms exchange between the producer and Castis on 15 June 2015, (punctuation supplied), and the transcript of a meeting between them, are revealing of the producer's state of mind at the inception of his enquiry:

"Castis There are some people I would like you to meet and talk to. Trust you are amenable to that.

Producer Hello Terri, could I ask who the people are you'd like me to meet and talk to on Monday? I'm running on a very tight timeline and I need to know what they would be able to contribute before I can make a call. Thank you.

Castis Sure. They are all local community people related to Sodwana who are participating in iSimangaliso programmes. I thought I would make it easy for you and have them in one place so you can talk to them.

Producer: Can't I meet them in Sodwana if they're from here?

Producer: I must explain something to you: I am making a ten minute insert on issues people in the Sodwana area are having with iSimangaliso. I'm not saying that Isi hasn't done anything positive. I'm just focusing for this insert on some issues that exist – giving people who are unhappy a voice and giving you a chance to respond. To fit that alone into 10 mins is already a tough ask, and I don't want to waste anyone's time with interviews I won't be able to use.

Castis: I hear you. Is that a no then – you have no use for these interviews?

Producer: Don't know yet. I'm working on script and structure now. Will let you know today still.

[64] What follows is a request by Botha to line up the people offered by Castis for interviews, over a weekend, but this proved unsuitable, being at short notice. No further attempts are made by Botha to see them.

[65] The transcript of the meeting:

"Castis: ...I arranged interviews with people with a different point of view and you didn't reach out to them, so you also perhaps need to consider that in your story.

Producer: Okay and I'm not going into that now, but it's not part of my angle."

[66] The foregoing reveals a mindset in which the producer appears to want to vent only grievances in the programme. In the insert, the only person who is given the chance to say anything positive about the Authority is Castis herself. In the absence of any other

positive comment, Castis' statements would be regarded by the viewer with a modicum of circumspection.

- [67] Reasonable efforts were not made to fairly present opposing points of view, and this was a breach of clause 28.3.1 of the Code.
- [68] We refer to the Authority's complaint pertaining to the failure to give a balanced picture on accountability structures of the Authority. In its heads of argument, the Authority outlines the entities to which Messrs Zaloumis and Castis are accountable as being: the Board, the National Treasury, the Auditor-General, the national department of environmental affairs, and the United Nations Educational, Scientific and Cultural Organisation ("UNESCO"). They are further subject to the Public Finance Management Act and the Promotion of Administrative Justice Act.
- [69] The Authority avers that the above was made plain, in part, in the interview with Castis, in which she informed Botha that she and Zaloumis were "accountable for everything, from our board to UNESCO..."
- [70] In keeping with this alleged failure, it complains about a photograph of Zaloumis and Castis standing together with four other Board members being cropped so as to show only Zaloumis and Castis. Moreover, as the Authority argues, Carte Blanche had omitted to inform the audience of the fact that the Authority had received a clean audit for the past fourteen years.
- [71] We find nothing sinister in the cropping of the photograph, since the programme focused on Zaloumis and Castis, because the complaints amongst members of the Sodwana community were made against them, and the cropping assisted in easier identification. The omission to mention the clean audit for the past fourteen years was indeed germane to the subject-matter of the insert, that is, their management of the Authority.
- [72] In the view of the Authority, the insert gave the misleading impression that Zaloumis and Castis ran the Authority as a "dictatorship", with no accountability at the top. In the view of Carte Blanche, the comment was fair because of the perception in the area that, de facto, Zaloumis and Castis were in charge, and there was enough evidence to support this. The existence of a perception, if established, is a fact itself. We need to

ask whether the insert made it plain that this was not a fact but rather a perception amongst the community. This does not appear to be the case.

[73] There are several omissions of pertinent information given to the producer in an interview with Castis. This information would have served to give the audience a more balanced view of the position occupied by Zaloumis and Castis. The following omissions merit mention, in the context of the complaints by Smith and Hugo:

“Producer: Who decides what penalty to dish out?

Castis: There’s a very clear system, Johan, and there’s a set of laws and regulations and tools that are enacted and passed down to us, and it’s not a random thing and it’s not an individual, it’s a consultative process, we go to legal review. It’s a very complex and technical process that we have to take.”

And later on:

“Producer: So can you explain the disciplinary process to entries, how does it work? How do you know when someone breaks the rules from taking, walk me through it, from the point where someone breaks the.....

Castis:Johan you know we can speak in specifics and we can speak in generalities. We rely on information or we have people on site to bring it for us. We assess it, we investigate it. We will take a look at what the particular incident is. Does it pose a threat to life for example,how serious is it? How many times has the person been warned for the same transgression, so there is an entire framework which enforces decision making. There’s an internal discussion, there is a legal review and then the decisions are made.”

[74] Reasonable efforts were not made to fairly present opposing points of view, in breach of clause 28.3.1 of the Code.

CLAUSE 28.3.2 OF THE CODE

CRIME

[75] Was the person whose views are to be criticized given a right of reply? Two of the remaining grounds of complaint made by the Authority fall under this enquiry and will serve to answer the question. They are: the failure to give the Authority a right of reply in respect of the alleged rise in crime and the failure to give Zaloumis a right of reply.

[76] The alleged rise in crime was a pivotal part of the insert, and needless to add, the very mention of it could cause substantial harm to the Authority, and the Sodwana Bay community as a whole.

[77] The duty to afford the party under criticism a right of reply is peremptory under the Code. The producer, Botha, had informed Castis in advance that he intended to canvass crime in the relevant area with her, the issue being a significant feature of the insert. The issue was, however, not substantively addressed, whether in email correspondence or in their informal interviews of 24 May 2015, and 10 June 2015, or the camera interview of 30 June 2015.

[78] Carte Blanche admits that the producer said he would contact Castis about allegations concerning crime, and admits that no right of reply was given. In the view of Carte Blanche, this right was not accorded to Castis because the allegation was that the Authority was the indirect and not direct cause of crime.

[79] The insert is couched in a misleading manner which suggests that the Authority is primarily responsible for the increase in crime, and this amounts to a breach of clauses 28.2.2, 28.3.1 and 28.3.2 of the Code.

ZALOUMIS

[80] The Authority avers that the personal attack on Zaloumis was indeed contemplated in the initial complaint, by reference to the Shakespeare quote and the “bad sheriff and deputy” quote causing Zaloumis’ and Castis’ good names and reputations to be lowered in the estimation of right-thinking members of the audience. It contends that Carte Blanche’s attempt to have this complaint dismissed because it was not addressed properly in the first complaint is a technical, procedural point which should be subordinated to the substance of the complaint.

[81] The Authority contends that the producer was aware of the distinction between the Authority, on the one hand, and Messrs Zaloumis and Castis, on the other. An email dated 25 June 2015 from Botha to Castis mentions the following:

“.....I will accept that you have chosen to waive your right of reply both in your personal capacity, and also as spokesperson for Isimangaliso on this matter.”

[82] It argues that it was the duty of the producer to communicate with Zaloumis to give him the right of reply in regard to matters affecting him personally, and not the duty of the Authority or Castis to do so.

- [83] Neither Zaloumis nor Castis is a complainant before this Commission in his or her personal capacity. They had the right to join themselves to the proceedings in their personal capacities, but failed to do so. This despite their allegations in the initial complaint of alleged defamation of their good names and reputations. There is no complaint before us under section 28.4, the privacy section of the Code.
- [84] The insert addresses the management of the Authority by Zaloumis and Castis in their official capacities as representatives of the Authority. In every allegation raised in the insert, Zaloumis and Castis are lumped together, described as a “sheriff and deputy”, and cast in the same light, with, in the main, the same allegations being levelled against them, jointly.
- [85] Because the focal issue has to do with alleged mismanagement of the Authority, allegations against Castis and Zaloumis are ineluctably the same as those levelled against the Authority which they represent.
- [86] There can be no doubt about the authority of Castis to represent the Authority. In an email dated 25 June 2015, sent by Castis to the producer, Castis says: “I will be the spokesperson for iSimangaliso.”
- [87] Based on the facts before us, it is safe to infer that Castis was authorized by the Board of the Authority, and this includes Zaloumis, to act on behalf of the Authority in regard to information given in the meetings and interviews between Castis and Botha, and indeed thereafter, in these proceedings. We can therefore infer that Zaloumis agreed, (via the authority given to Castis by the Authority), to associate himself with the information given by her to Botha and the statements made in these proceedings.
- [88] But neither the Authority nor any corporate entity can carry out its functions without the engagement of people. By personally naming and identifying Zaloumis and Castis as officials of the Authority, Carte Blanche’s allegations about the victimization of people, capriciousness and arbitrariness regarding banning and the like, and general mismanagement, are levelled against Zaloumis and Castis both personally and in their capacities as representatives of the Authority.

[89] Stricto sensu, therefore, and because the allegations centred on the conduct of two named people, Carte Blanche breached section 28.3.2 of the Code by not complying with its peremptory obligation to give Zaloumis a right of reply, in his personal capacity. There was no duty on Castis or the Authority to draw the producer's attention to this omission, the duty being squarely that of the producer. This point was only raised in the Authority's second set of papers, but we have preferred substance over form, the point being compelling.

[90] The above constitutes a breach of clause 28.3.2 of the Code.

[91] The correction which we have directed below will cater for the grievances of the Authority and Zaloumis and Castis, personally, and qua officials of the Authority.

CONCLUSION

[92] Carte Blanche has been found to have breached clause 28.2.2, 28.3.1 and 28.3.2 of the Code in the respects and for the reasons adumbrated above.

SANCTION

[93] In the opinion of the Authority, the appropriate sanction would be a reprimand for breaching clauses 28.2 and 28.3 of the Code, coupled with the broadcast of an apology in the form of a letter, to be published on the website of Carte Blanche and to be broadcast, the wording to be along the lines of the correction directed in the **Diamond** case.

[94] Carte Blanche asks for the Commission to mark its disapproval of the conduct of the Authority in the way it had litigated the matter, as also for the dismissal of the complaint, in its entirety.

[95] It cites four reasons for asking for a mark of disapproval, namely: the "unwarranted and scurrilous attacks on the integrity of the producer", the raising of irrelevant disputes and red herrings, the allegation that Carte Blanche colluded with certain residents of

Sodwana to raise money to sue the Authority, and finally, for the overburdening of the papers in this case, unreasonably so.

[96] The conduct of the Authority in these proceedings was not irreproachable. There was a level of gratuitous vexatiousness on its part. It initially raised a variety of issues. Certain of these cast aspersions on the integrity of Carte Blanche and Botha, and there was no warrant for this, as they were no more than collateral to the real substance of the case. Many of its complaints were abandoned at the hearing, and the Authority was well advised to do so. The rather peremptory manner in which Castis sought to dictate terms for interviews with Botha is consistent with the fair comment amongst several Sodwana community members of an attitudinal problem on her part.

[97] The conduct of Carte Blanche, while serious, did not fall within the realm of reprehensible. Nor did we perceive any modicum of mala fides. There is no legal basis for the imposition of an apology. The sanction which we will impose takes cognizance of the above, is sufficient redress for the parties involved, and is appropriate to the circumstances.

[98] **The sanction is the following:**

- a. After entertaining written submissions from both parties regarding the sanction. The BCCSA notes that the Complainant abandoned the majority of the complaints at the hearing and persisted with the prosecution of only five of the original complaints. The BCCSA upheld all the remaining complaints against the Respondent.
- b. The Respondent is reprimanded for breaching clauses 28.2.2, 28.3.1 and 28.3.2 of the Code of Conduct for Subscription Broadcasting Service Licensees;
- c. The Respondent shall, without comment and at the start of the first or second programme after the date of issue of this order, broadcast the following correction:

“On 23 August 2015, Carte Blanche broadcast a programme concerning the iSimangaliso Wetland Park Authority, and its officials, Terri Castis and Andrew Zaloumis. The broadcast related to allegations of mismanagement of the iSimangaliso Wetland Park by Ms Castis and Mr Zaloumis, and the consequences of this on the adjacent Sodwana Bay area. Following a complaint lodged by the Authority with the Broadcasting Complaints Commission, the Commission has ruled that Carte Blanche contravened the applicable Code in several respects. The Commission held that, judged as a whole, the broadcast unjustifiably portrayed Ms Castis and Mr Zaloumis, and the Authority, as failing to properly manage the Park, and that, in doing so, businesses had closed down, tourism had waned and unemployment and crime had increased. This unjustifiable portrayal was attributable to certain comment not being based on reliable facts, reasonable efforts not having been made to fairly present opposing points of view, and the failure to afford a right of reply where this was warranted”;

- d. A copy of the above broadcast is to be delivered to the Registrar within 48 hours of the broadcast.

The Chairperson Mokgoatheng and Commissioner Venter concurred in the above judgment.