



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

**CASE NUMBER: 03/2017**

**DATE OF HEARING: 23 FEBRUARY 2017**  
**JUDGMENT RELEASE DATE: 27 MARCH 2017**

**MS. DIALE**

**APPELLANT**

**vs**

**SABC3**

**RESPONDENT**

**TRIBUNAL: PROF HENNING VILJOEN (CHAIRPERSON)**  
**MR. BRIAN MAKEKETA (DEPUTY CHAIRPERSON)**  
**PROF SUNETTE LÖTTER (DEPUTY CHAIRPERSON)**

**APPELLANT: MS. DIALE**

**RESPONDENT: MR NYIKO SHIBAMBO, ACTING MANAGER ACCOMPANIED BY MS REFILWE TIMANA, COMPLIANCE OFFICER OF BROADCASTING COMPLIANCE, POLICY & REGULATORY AFFAIRS**

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*An appeal against BCCSA adjudication No: 01/A/2017 - sanction of a reprimand imposed for a contravention of clause 15(1) on privacy: Daile vs SABC3, Case No: 03/2017(BCCSA)*

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## **SUMMARY**

**Ms. Diale, the appellant in this matter, appealed against a sanction of a reprimand imposed by the adjudicator on the SABC for the contravention of clause 15(1) dealing with privacy. She argued that a reprimand was not proportional to the emotional harm and verbal abuse**

she suffered from some SABC3 fans of *Isidingo* as a result of negligence on the part of the SABC. An agreement was reached to remedy the situation between the SABC and the Complainant. Given the grossness of the act of negligence on the part of the SABC and the impact it had on the privacy of the appellant, the tribunal decided, despite the agreement, to impose a fine on the broadcaster.

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## JUDGMENT

[1] On the 26 January 2017, the Registrar of the BCCSA received an appeal from Ms. Thapelo Diale about the sanction of a reprimand imposed on the SABC for contravening clause 15(1) of the BCCSA Code.

[2] **The Adjudicator's decision was as follows:**

"...The broadcaster does not dispute the matter and offers an apology to the complainant, her family, colleagues and employer for the inconvenience caused. They are investigating the matter and implementing measures to ensure that the situation does not recur.

It is accepted that broadcasting the complainant's number amounted to a *bona fide* error, that there was no malice intended, and that the broadcaster did not deliberately set out to cause harm, but the fact remains that it resulted in the invasion of the privacy of the complainant, and had unprecedented, extraordinary and serious negative consequences. It constituted a breach of her privacy and disrupted her work and that of her colleagues.

In applying the privacy clause, the broadcaster failed both tests mentioned in the clause. Since the soap opera falls in the genre of fiction, there was obviously no public interest involved, which is the first test. The broadcaster also failed the second test, namely reasonableness of the infringement - it was grossly negligent to randomly choose a cell phone number for use in a popular soap opera. Many viewers form personal relationships with actors and therefore may continue to call the number. The scriptwriters and producers should have foreseen that the number could be a real (and private) number belonging to somebody.

An aggravating factor is that the situation is continuing. It is therefore a matter of urgency to remedy the situation. **The contravention of the code entails that an individual's right to privacy was infringed. As sanction the broadcaster is reprimanded and requested to broadcast a correction within three days after receiving this adjudication.**

The correction should be read verbally while displayed on screen. It should read as follows:

**"After a complaint had been lodged with the BCCSA, we have been ordered to broadcast the following correction:**

**We regret that on 25 November 2016 a private mobile phone number was broadcast in the storyline that involves the character of Tyson Mokoena in *Isidingo*. We request viewers to refrain from phoning this number, as it belongs to a private person."**

The broadcaster is required to inform the BCCSA of the date of broadcast of the correction and to supply a copy of the clip as it was broadcast."

[3] **The Appeal reads as follows:**

**“Re: DISRUPTION OF PRIVACY CONSEQUENT TO CELLPHONE NUMBER GIVEN OUT ON THE TELEVISION PROGRAM - ISIDINGO**

Following the communication exchanged between me and the Registrar at the Broadcasting Complaints Commission of South Africa, I would like to bring forth my concerns regarding the solution provided to resolve my complaint.

The matter was initially submitted to ICASA, and in a telephone communication with Ms Mashapha I was told that an apology was the best they could get for me. I responded to say that an apology was insufficient, and the matter was forwarded to the BCCSA for adjudication; the outcome of which was an instruction to ISIDINGO to broadcast a statement requesting viewers to stop calling my number.

I have since responded to the registrar at the BCCSA, stating that I did hope that the above-mentioned instruction really worked and that I would give it a couple of weeks and inform if the calls and text messages had stopped. I also enquired if there was going to be any penalty to ISIDINGO for contravening the broadcasting policies as stated on the **Adjudication No:01/A/2017** response letter sent to me from the BCCSA Commissioner. It was after this enquiry that I was requested to submit an appeal as follows:

Firstly, I would like to state that I do not perceive the Adjudication as “wrong”, I stated in an e-mail prior to this response that I feel that the “judgement is not proportional to the offence”.

I am not familiar with the SABC policy with regards to **Handling and Resolution of Customer Complaints**, I therefore will refer to the requirements of **ISO 9001**, to which I have learnt that the SABC is certified. Clauses of the standard are in black and I have also added my comments in colour-which include extracts from the letter received from SABC, so as not to prolong the letter.

**Clause 10.2** of this standard mandates that *when a nonconformity occurs, including any arising complaints, the organization shall:*

- a) React to the nonconformity and as applicable: [the matter was reacted to via apology letter]
  1. Take action to control and correct it [this (action) was since stopped pending my appeal to adjudication]
  2. Deal with the consequences [ I have no objective evidence that this was done, in this case I am the one that is suffering the consequences of their action]
- b) Evaluate the need for action to eliminate the cause(s) of the nonconformity, in order that it does not recur or occur elsewhere, by
  1. Reviewing and analyzing the nonconformity [**GAU4039/16 ICASA: 0096987** 2. After receiving the complaint, the production team launched an urgent investigation into the matter. This took us a bit of time as the episode that was broadcast had been produced 7 weeks prior (October 2016) and we were also disrupted by the December holidays].
  2. Determining the causes of the nonconformity [**GAU4039/16 ICASA: 0096987**].

3. In our investigation we found that the actor who plays Tyson Mokoena was requested by the Director in the scene to write down a cell phone number for another character as per the script. The script did not have a cell number for the character to use at the time when the scene was being shot. The number that the actor wrote down happened to be that of the complainant]
4. Determining if similar nonconformities exist or could potentially occur [I have no objective evidence that this was done]
- c) Implement any action needed [to broadcast an instruction to viewers to stop calling the number-as per adjudication; however, this was since withheld pending my appeal]
- d) Review the effectiveness of any corrective action taken [could only be done after the broadcast, to see if the calls and text messages have stopped]
- e) Update risks and opportunities determined during planning, if necessary [I have no objective evidence that this was done]
- f) Make changes to the QMS if necessary [**GAU4039/16 ICASA: 0096987** 5. “Efforts are being implemented, after taking lessons from this incident, to ensure that we interrogate such requests from scripts and that actors/directors ensure that the cell phone numbers are not real”]

**Corrective action shall be appropriate to the effects of the nonconformities encountered.**

With these requirements above in mind, especially the line in bold, I responded to the registrar as follows: *I am aware that the fine is payable to the BCCSA and not to me. I feel that they (ISIDINGO) seem to be getting away with just a slap on the wrist whereas we don't even know if the apology will actually stop the consequence of their negligence; not forgetting the irreparable dent to my employment record by way of a Warning Letter. It needs to hit them in the pocket so as to appreciate the magnitude of the inconvenience caused. We can't quantify it to the satisfaction of both parties, so the Tribunal is my last hope for getting me a bit of justice since we can't guarantee that an apology will put a stop to the problem.*

The broadcast and the fine could still be imposed concurrently, in my opinion; and that is my request to the tribunal. I have forwarded the apology letter to my employer, but have no idea if this would restore my HR record. Considering the fact that I had to keep pushing back at the solutions provided; it is apparent that there is no intention of reparation for the distress that my family and I experienced, and I am coming to terms with the state of affairs. My only hope is that at least my request for both broadcast and penalty/fine to ISIDINGO be granted. Thank you.”

[4] **The SABC responded as follows:**

**“SABC'S RESPONSE TO AN APPEAL BY MS DIALE**

The SABC has noted that Ms Diale is not satisfied with the BCCSA decision regarding the matter involving her and Isidingo. Please find our comments as follows:

1. The complainant indicated in her letter of appeal that when the matter was initially referred to ICASA, an employee there informed her that, *“an apology was the best they could get for me.”* That to us as the SABC is a confirmation that an apology as pronounced by the BCCSA is the correct sanction given the type of the contravention made.

2. The complainant writes, *"Firstly, I would like to state that I do not perceive the Adjudication as "wrong," I stated in an email prior to this response that I feel that the "judgement is not proportional to the offence"*. The SABC does not deny that the error impacted negatively on the complainant's wellbeing; however feels that our sincerity is in our offer to apologise.
3. The complainant has not hinted in any way that the calls and messages that she was receiving from strangers as a result, are still continuing.
4. The SABC has accepted responsibility for the error and apologises to the complainant for the inconvenience caused and is still prepared to broadcast the apology.
5. The SABC believes that the BCCSA ruling is consistent with the transgression. It should be noted that compounding this matter will set a wrong precedence hence we believe that an apology is an appropriate sanction as pronounced by the BCCSA.
6. Human beings drive the SABC and mistakes like these are bound to happen at some point. It was not the SABC's intention to contravene the Code.
7. Given the time that has since elapsed since the incident took place, broadcasting an apology shows that the SABC is a caring and responsive broadcaster.
8. This unfortunate incident has taught us critical lessons about handling matters about invasion of privacy and that it has since been included in the SABC's compliance manual for the training of staff, to avoid a recurrence.

It is therefore our submission that the appeal not be granted."

## EVALUATION

[6] Firstly, it is very important to reiterate the fact that this is not an appeal against the Adjudication No.01/A/2017 as penned down by Commissioner Venter, but an appeal against the sanction of a reprimand as imposed in the adjudication. As a result of this, the tribunal did not go into the merits of the case but only concentrated on the sanction of a reprimand as imposed.

[7] Ms Diale eloquently argued that she strongly felt that a reprimand was not proportional to the emotional harm and verbal abuse she suffered, from some SABC 3 fans of Isidingo, as a result of negligence on the part of the SABC. She argued that a fine against the SABC would be proportional to the contravention of the Code.

[9] In its response, the SABC initially insisted that it felt that the sanction of a reprimand was sufficient. Later on during the hearing, the SABC offered to broadcast an apology and invite the appellant to the Isidingo recording set, where she could meet the actors and in

particular, the actor who gave out a mobile number during the soapie, which happened to be that of the Complainant's.

[10] In the end, the appellant and the SABC agreed that:

10.1 The SABC should not broadcast an apology about the incident, as the fear is that this well-intended act, may encourage more callers to start calling the appellant's number again.

10.2 The SABC's lawyers should, as a matter of urgency, write a letter to Gibela Rail Transport Consortium RF (Pty) Ltd, the employer of the appellant, wherein they should explain the sequence of events and how this affected the work life of the appellant.

10.3 The letter should also request, on behalf of the appellant, the employer to rescind the warning letter which was given to and signed for by the appellant, on 01 December 2016.

10.4 The SABC should ensure that the appellant's mobile number is also removed from all Isidingo and You Tube soapie trailers of the episode in question.

[11] We take the severity of the contravention of the clause 15(1) of the BCCSA Code on privacy very seriously. In this matter, the SABC failed to demonstrate that it took exceptional care and consideration before calling out a mobile number live on TV, without first checking out if it belongs to anyone. This act, in our view is tantamount to gross negligence on the part of the broadcaster.

[12] In the result, we make the agreement as stipulated in paragraph 10 an order of this Tribunal and we impose a fine of R10 000.00 on the SABC, to be paid to the BCCSA on or before 20 April 2017.

A handwritten signature in black ink, appearing to read 'B. Makeketa'.

**BRIAN MAKEKETA**  
**BCCSA COMMISSIONER**

*Commissioners Viljoen and Lotter concurred with the above judgment of Mr. Makeketa.*