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CASE NUMBER: 01/2018

DATE OF HEARING: 18 JANUARY 2018
JUDGMENT RELEASE DATE: 09 FEBRUARY 2018

MR JACKSON MTHEMBU

COMPLAINANT

vs

MULTIHOICE ANN7 CHANNEL 405

RESPONDENT

TRIBUNAL: PROF HENNING VILJOEN (CHAIRPERSON)
MR BRIAN MAKEKETA
ADV BOITUMELO TLHAKUNG

For the Complainant: Represented by Nicqui Galaktiou Inc: Nicqui Galaktiou Attorney accompanied by Nonceba Mlauli, Spokesperson ANC Parliamentary Caucus, Mongezi Manga, Legal Representative and Lihle Shabalala, Candidate Attorney.

For the Respondent: Bruce Mkhize, Regulatory Compliance Manager, accompanied by Cecilia Russel, Special Projects Editor, Mr Abhinav Sahay, Editor ANN7

Complaint lodged by the Chief Whip of the ANC against the Broadcaster for broadcasting a news report in which the Complainant is defamed – news report is on a purported news conference by six ANC MP's – news conference attended by only one broadcaster (the Respondent) – Tribunal finding that news conference was crafted between the six MP's and the Broadcaster – Tribunal finding that news conference and broadcast thereof were intended to sabotage the Complainant's political career – Complainant not offered the opportunity to reply to allegations – contravention of the Code found – maximum fine imposed and Broadcaster ordered to broadcast apology - Mthembu vs MultiChoice ANN7, Case No:01/2018(BCCSA)

SUMMARY

A complaint was lodged by the Chief Whip of the ANC against the Broadcaster, ANN7, for broadcasting a news report in which the Complainant is defamed. The news programme reported on a purported news conference by six ANC MP's. From circumstantial evidence it appeared that it was no *bona fide* news conference because it was attended by only one broadcaster (the Respondent). The Tribunal found that the news conference was crafted between the six MP's and the Broadcaster and that the news conference and broadcast thereof were intended to sabotage the Complainant's political career. Contravention of the Code was found because the Complainant was not offered the opportunity to reply to allegations (admitted by the Broadcaster), because the clause relating to news was violated and because the dignity of the Complainant was infringed. Despite an apology by the Broadcaster, a maximum fine of R80 000 was imposed and the Broadcaster was ordered to broadcast an apology.

JUDGMENT

HP VILJOEN

[1] The Registrar received a complaint which concerned a news report broadcast on MultiChoice Channel 405/ANN7 on Monday 27th November 2017. The news report was about a purported news conference held by six ANC members of Parliament who made certain allegations against Mr Jackson Mtembu, the Chief Whip of the ANC which the last mentioned regarded as damaging to his reputation and his career. Mr Mthembu was not given the opportunity to react to the allegations. The news report was repeated during the day and also during the next day, 28 November. The news report was also posted on YouTube by the Broadcaster. On 29 November Mr Mthembu lodged a formal complaint against these broadcasts with the BCCSA.

[2] **The complaint reads as follows:**

“The Office of the ANC Chief Whip in Parliament is formally writing to lay a complaint against Africa News Network 7 (ANN7) which airs on Multichoice (DSTV)-Subscription channel 405. ANN7 colluded with some members of parliament to broadcast defamatory remarks against the ANC Chief Whip, Jackson Mthembu.

From Monday, 27 November 2017 till Tuesday 28 November, ANN7 continuously broadcast defaming utterances on the ANC Chief Whip stating that “*The chief whip of the ruling party; Mr Jackson Mthembu has decided to side with the racist Democratic Alliance (DA) on a biased parliamentary debate on state capture. This concession to*

DA is unprecedented and shows that a pro white monopoly capital faction has emerged inside the ANC parliamentary caucus.”

A link of this “press conference” was also posted on their YouTube Channel. See Link – <https://www.youtube.com/watch?v=0YpZJhVhI5o>

ANN7 repeatedly ran this broadcast over two days and published defamatory comments without having afforded the ANC Chief Whip a right of reply to these allegations. They failed to be fair, impartial and objective in this instance.

We also have information which proves that the so called press conference which was held on Monday 27 November, and live broadcasted by ANN7, was in fact staged. ANN7 was strangely the only media present at this Presser. We have further information that those who called the press conference were directly communicating with someone at ANN7 while crafting what ought to go into their statement.

We view the behaviour of ANN7 in contravention of the code of conduct of the BCCSA. We therefore request that the BCCSA rule on this matter. We are available to provide further information if necessary.”

[3] **The Broadcaster responded as follows:**

“Ann7 regrets not affording the ANC Chief Whip Mr. Jackson Mthembu a right of reply before airing the story of 6 ANC MPs opposing the Parliamentary debate on 'State Capture'.

ANN7, however, would wish to humbly submit that the oversight was not intentional. The network took firm and immediate steps after the matter was brought to its notice.

- 1) The network ran an apology on the scroll for failing to grant the Chief Whip Mr. Jackson Mthembu an opportunity to respond to allegations made by the 6ANC MPs. The station carried the apology for the better part of the day.
- 2) ANN7 throughout the day ran the clarification issued by ANC Chief Whip's office on the allegations made by the 6 ANC MPs in the bulletins
- 3) Channel tirelessly tried all day to contact Mr. Jackson Mthembu and request him to set the record straight either through an on-camera interview or a telephonic one. Finally, at 2 pm Mr. Mthembu's assistant conveyed to us ANC Chief Whip's preference for the BCCSA process to unfold instead of availing the ANN7 offer of the right to reply.
- 4) Efforts were made throughout the 29th of November to express our sincere and deepest apology to Mr. Mthembu by a) The chairman and b) The Editor in Chief. Mr. Mthembu in his social media reply to the chairman's message of regret and promise of remedial measures to assuage the harm appreciated his efforts but later in the day, in a communication with the Editor in Chief politely refused to take up ANN7's offer for a right to reply.
- 5) ANN7 was not lax in either urgency or intent to mitigate any possible harm which could have been caused to Mr. Mthembu's reputation immediately after the matter was brought to its notice on the morning of the 29th of November 2017. The station is of the view that the steps taken mitigated any possible harm caused.

- 6) ANN7 has issued disciplinary warnings to all the employees involved in the lapse in the mandatory process and has revisited the standard operating procedures for reporting.
- 7) ANN7's invitation to Mr. Mthembu still stands irrespective of the outcome of the commission's hearing. However, the channel strongly denies the other averments made by the ANC Chief Whip's office suggesting collusion with ANC MPs in a conspiracy to besmirch Mr. Mthembu's name. The channel responded to the story of the 6 ANC MPs opposing the 'state capture' debate in Parliament purely on the basis of newsworthiness and not from the point of view of any conspiracy.

Lastly, we again express our deep regret for the unfortunate incident.”

[4] The Complainant replied as follows:

“Thank you for your email dated 5 December 2017. We await your attendance to the complaint and the adjudication of the complaint I laid on Wednesday, 29 November 2017.

Below is a detailed response to the letter forwarded from broadcaster Africa News Network 7 (ANN7):

1. I find it very odd that ANN7 claims that there was no malicious intent and that their failure to afford me a right of reply was merely an oversight on their part.
2. The press conference of the six Members of Parliament (MPs) was covered live on Monday 27 November 2017. It was broadcast throughout their news bulletins on Monday and again repeated on Tuesday 28 November 2017. Both clips were posted (since removed) on their YouTube channel.
3. It was only on Wednesday, 29 November 2017 after I had posted about this matter on my Facebook and Twitter accounts that Mr Mzwanele Manyi (the owner of ANN7) made contact with me pleading ignorance. It is inconceivable that something could be broadcast on different platforms over a period of two days without contacting me or my office for comment and then claim that it was merely an oversight.
4. Clearly ANN7 saw nothing wrong in their broadcast of this story because their apology only came as a result of me having raised my dissatisfaction.

Therefore, had I not raised my dissatisfaction, this story would have gone unchallenged.

5. The glowing points ANN7 makes in their submission that they offered me an apology was, two days after myself and Adv. Vanara (Evidence leader in the Parliamentary inquiry by the Portfolio Committee on Public Enterprises into Eskom) were defamed through the ANN7 YouTube rendition that was watched by millions of South Africans in addition to the repeats on their news bulletins.
6. It is very strange that the owner of ANN7 (only) became aware of this defamatory reportage on Wednesday 29 November 2017 after I had posted on my social media accounts about this injustice and failure by ANN7 to observe journalistic and media ethics as entrenched in the broadcasting code.

7. To prove that this so called apology was insincere, it only came to me as the party who raised their dissatisfaction and not to the other affected party, Adv. Vanara. Therefore, leaving the defamatory remarks against him standing and untested.
8. I submit that the owners and senior managers of ANN7 should have had sight of their own bulletins, at least in the evening of the 27 November 2017 or the whole day of 28 November 2017. I also submit that the owner of ANN7 and senior managers should also have had sight of their defamatory YouTube recordings on the same matter.
9. I further submit that even if the owners and senior manager did not have sight of their own news bulletins for two days, even if they did not have sight of their own YouTube recording on these defamatory remarks of the six MPs, ANN7 still acted in a manner that was not consistent with the broadcasting code. ANN7 was not objective, balanced or fair by failing to approach the other side to air their views; the other side being myself and Adv. Vanara. Even though ANN7 owner and senior managers pulled these defamatory remarks off the air on 29 November 2017, I submit that at that time damage had already been done to the name and standing of myself and Adv. Vanara.
10. The fact that ANN7 was the only media house at that press conference is indicative of collusion between some people at ANN7 and those MPs. In fact, we have it under good authority that no other media house was contacted for this press conference except ANN7. One of the six members was directly on the phone with someone at ANN7 while organising and drafting their presser. The content of their statement was only communicated to ANN7.
11. It is also very strange that whilst ANN7 claims that it was a mistake on their part not to grant me the right to reply, the mere fact that they interacted with these MPs to produce the defamatory reportage, and the fact that they were the only media house that broadcast such, fully illustrates that this was not a mistake by ANN7. It was a well thought matter to undermine and character assassinate my name and that of Adv. Vanara.
12. I also submit that the actual intention of both the ANN7 and the six MPs; whilst being to put a negative spin to the ongoing Eskom inquiry in Parliament and the Democratic Alliance sponsored debate on State Capture on 28 November 2017; was to mobilise discontent around the ANC Chief Whip, Jackson Mthembu with the intention of having me removed from office. The talk of collaboration with the opposition was in fact aimed to sow displeasure on my work as an ANC Chief Whip in Parliament.
13. I also submit that the six MPs and the ANN7 wanted and succeeded to parade Jackson Mthembu, an ANC NEC member and a supporter of ANC Deputy President, Cyril Ramaphosa, as a sell-out and collaborator with the Democratic Alliance. Their political intention clearly being to make Jackson Mthembu unelectable back to the NEC of the ANC by ANC delegates and ANC members who also watched ANN7. These were the political intentions of ANN7 and the MPs that positioned Jackson Mthembu as not only a collaborator and a sell-out Chief Whip to the Democratic Alliance, but also a stooge of what both these MPs and ANN7 have termed 'White Monopoly Capital'. It is these utterances in my view that has more damage to my name, even as it relates to me being elected again as an ANC NEC member at the ANC 54th elective conference in few days' time.
14. I therefore submit, with all the above that the Broadcasting Complaints Commission of South Africa (BCCSA) reject with contempt the claim that the owners and leadership of ANN7 did not know about the defamatory utterances that were aired in their platform over

two days. The BCCSA should also reject with contempt any notion that the airing of these defamatory reports in the ANN7 news bulletins and ANN7 YouTube, viewed by millions of South Africans were a mistake.

15. It is my submission that the defamatory reports, both in ANN7 news bulletins and YouTube were a well-orchestrated political plot by the six MPs working with ANN7 to harm, defame my good name with an intention of having me removed as an ANC Chief Whip; and making me and those that I support not to be electable at the 54th ANC National Conference.
16. It is my submission that ANN7 giving me a right to reply at the time of rolling out this grand plan on the 27 November 2017 and 28 November 2017, would not have conformed to their well-orchestrated political plot. Unfortunately, by not forwarding me a right to reply, they fell foul to the broadcasting code.
17. I finally submit that the BCCSA must find that ANN7 did not adhere to the broadcasting code and not withstanding their after the fact apology; BCCSA must find that their deliberate failure to do so had serious damage and harm to my good name and my political profile, particularly as it relates to my position as ANC Chief Whip and my re-electability as NEC member at the 54th ANC National Conference.
18. It is common cause that collaborators with the enemy forces and political competitors has been necklaced and killed in South Africa. It therefore goes without say that parading me as a collaborator and a stooge to the DA, the six MPs and ANN7 wanted people of South Africa, who support the ANC and ANC members to kill me.”

**For immediate release
28 November 2017**

CLARITY ON DA SUBJECT FOR DEBATE

The Office of the ANC Chief Whip has noted the unfortunate public utterances by five ANC MPs accusing the ANC Chief Whip, comrade Jackson Mthembu of having colluded with the Democratic Alliance (DA) to table today's subject for discussion in the National Assembly. Through its conventions and practices, Parliament has overtime established a rotational basis within which political parties introduce motions for debate in the National Assembly. Today is the DA's turn for such a motion for debate. The DA's Subject for Discussion for today's sitting is – “The Scourge of State Capture: Parliament's duty to investigate and hold the Executive to account.”

The insinuation that the majority party in parliament can direct the opposition what their motions for debate ought to be, and vice versa; is not only malicious, but also very dangerous to the functioning of a healthy multi-party democratic parliament.

The ANC Chief Whip has escalated the unfortunate and defamatory utterances of these MPs to the ANC.

Issued by the Office of the ANC Chief Whip.”

EVALUATION

- [5] The facts concerning this complaint appear from the correspondence that the BCCSA received and which is published above. The gist of the complaint is specifically against the following statement by one of the six ANC MP's, Adv Loyiso Mpumlwana:

“The Chief Whip of the ruling party, Mr Jackson Mthembu, has decided to side with the racist Democratic Alliance ... on a biased Parliamentary debate on State capture. This concession to DA is unprecedented and shows that a pro-white monopoly capital faction has emerged inside the ANC Parliamentary caucus.”

Ms Nicqui Galaktiou who represented the Complainant, set out the reasons why she wanted this Tribunal to conclude that the “news conference” was staged and that there was collusion between the six ANC MP's and the Broadcaster, with the clear intention to defame the Complainant and to derail his political career. “News conference” is written here between inverted commas because, as explained by the representative, this was not a news conference as normally understood under the term for the reason that there was only one broadcaster present during this so-called news conference and that was ANN7. Also, no questions were asked at the conference as normally happens.

- [6] Big prominence was given by the Broadcaster to this news conference during its news broadcast. While the allegations against the Complainant by the MP's were being broadcast, the scroll at the top of the screen claimed: “Mthembu, being factional, must go.” To depict the Complainant as a politician who colluded with the DA opposition and associated himself with White monopoly capital, amounted to political sabotage of a person who spent his life fighting for democracy, according to the representative. She also referred us to the disastrous effect this broadcast could have on the Complainant's political future, with the ANC's National Conference scheduled to take place in about two week's time after the broadcast, and where the election of the National Executive Committee

(the NEC) of the ANC would take place. The Complainant was expecting to be re-elected to the NEC at this Conference and the broadcast would jeopardize his chances of being re-elected. She asked us to conclude that the so-called news conference was broadcast with the intention to defame the Complainant and to damage his political career.

- [7] Another reason which made the timing of this so-called news conference and the broadcast thereof suspect, according to the representative, was that the Parliamentary inquiry by the Portfolio Committee on Public Enterprises into Eskom was at hand and that Adv Vanara, who is the evidence leader in the inquiry, was also implicated in the broadcast. It is a known fact that the Complainant is a supporter of the inquiry. It is public knowledge that the Eskom inquiry has everything to do with the so-called state capture by the Gupta brothers. For clarity sake we should mention that Adv Vanara did not lodge a complaint with the BCCSA and we can thus make no finding as far as his reputation is concerned.
- [8] Another consequence of this broadcast is spelled out in the reply by the Complainant to the Broadcaster's response to the complaint. In the final paragraph he refers to the fact that collaborators with enemy forces and political competitors have been necklaced and killed in this country. The Complainant foresaw that he could be branded as a collaborator and a stooge of the ANC and that his life would be in danger.
- [9] The representative also drew our attention to the public's reaction on YouTube to the broadcast, as contained in her bundle of documents. In one of the posts an old South African flag is shown with the words:

“Jackson is on a mission. This is his vision.”

Her argument is that this is further proof that the broadcast brought the Complainant into contempt.

- [10] In response to the arguments by the Complainant's representative, Mr Mkhize for the Broadcaster admitted that the Broadcaster committed a contravention of clause 28.3.2 of the Code of Conduct for Subscription Broadcasting Service Licensees by not affording the Complainant a right to reply to the allegations made against him in the broadcast. He admitted that this was an oversight by the Broadcaster. He referred to the apology in this regard which was broadcast on 29th November and which was done in the form of a written scroll at the bottom of the TV screen while a full screen broadcast (of something else) was simultaneously shown. Mr Mkhize admitted that this apology was not sufficient and that there should have been an audio apology on TV.
- [11] However, Mr Mkhize submitted that there was no collusion between the six ANC MP's and the Broadcaster and he denied that the so-called news conference was crafted between the six MP's and the Broadcaster. He stated that there was no evidence before us in support of this. He also argued that any finding by this Tribunal of an intention to defame the Complainant, would not affect the merits of this complaint. At most it would affect the extenuation or aggravation of sanction in the end. He nevertheless argued that we should not find that there was any intention by the Broadcaster to defame the Complainant with the broadcast.
- [12] The Broadcaster's explanation of how the broadcast came about, is that it received a lead, or a tip-off as it is called, of a press conference to be held in the TAJ Hotel. The responsible person at the Broadcaster considered the topic of the conference as newsworthy and a team was sent to cover the news conference. According to the Broadcaster this was considered to be a "scoop" in journalistic terms. The fact that there were no other broadcasters or news media present at the news conference was not relevant, according to the Broadcaster. When the Broadcaster was asked for evidence of the invitation to the Broadcaster to attend

the press conference, we were informed that the representatives did not have such an invitation, but they undertook to submit such. After the hearing, the following proof of invitation was received by the Registrar of the BCCSA:

It is couched in the form of an e-mail to Mr Mkhize, the representative of the Broadcaster and it reads as follows:

"I trust this email finds you well. Please find below my statement regarding the matter mentioned above:

I Phuti Mosomane, ANN7 Assignment Editor confirm that the following transpired in afternoon of 27 November 2017. I was informed by an ANC MP Adv. Loyiso Mpumulwana regarding what he said was "an important press conference" to be held by several ANC Members of Parliament regarding issues of national importance in Parliament. As standard procedure in the newsrooms, I then informed ANN7 crew in Cape Town to go to Parliament as soon as possible.

This is clearly not a general invitation to a press conference. It is a statement by Mr Mosomane explaining how a team from ANN7 happened to be present where the six ANC MP's held their diatribe against the Complainant. It is in any case in conflict with the evidence submitted to the Tribunal, namely that the so-called conference was held at the TAJ Hotel in Cape Town, not at Parliament.

[13] The Broadcaster has admitted that it had contravened the Code by broadcasting a news programme in which a person was criticised without affording him the opportunity to put his side of the case, popularly known as the right of reply. For this the Broadcaster apologised by running a scroll at the bottom of the TV screen while a full screen broadcast (of something else) was shown. It is debatable how many people notice and read and understand words on a running scroll at the bottom while watching another broadcast on the full screen. The Broadcaster also admitted that this was not sufficient and there should have been at least an audio apology, as stated in paragraph 10 above.

[14] Mr Sahay on behalf of the Broadcaster, also addressed us and he emphasised that they attended the so-called news conference because of the news worthiness thereof. Because of time constraints in the media world and the limited shelf life

of news, they edited the programme and then broadcast it. Then he made the statement that nobody at the Broadcaster realised that there was a problem! This does not reflect well on the standards of broadcasting at the Respondent.

[15] What concerns us most, is the argument by the representative of the Broadcaster that the broadcast of the news programme in which the Complainant was criticised and defamed without giving him a right of reply, was an oversight, a mistake. The Broadcaster admitted that the news programme was a recorded one, that it was broadcast more than once on 27th November and repeated the next day, the 28th. The right of a person to reply or to defend him/herself when criticised in a broadcast is a basic right originating from our Roman Law heritage and expressed as *audi alteram partem*. It is unthinkable that the staff of the Broadcaster who produced, edited and broadcast this programme on their TV channel was ignorant of this right and/or was not aware that their broadcast was in violation of this right and in contravention of the Code of Conduct. The fact that they repeated this pre-recorded programme the next day aggravates this contravention. The same can be said of the fact that they posted this programme on You Tube. It seems as if they were intent on causing maximum damage to the Complainant. It was only when the Complainant posted a comment on this broadcast on his Facebook and Twitter accounts on 29 November that the broadcasts were discontinued.

[16] From the evidence before us, it appears that Mr Manyi, the owner of ANN7, contacted the Complainant to apologise for the broadcast. He pleaded his ignorance of the programme. The Complainant refused the offer of a right to reply after the fact and insisted that the BCCSA adjudicate his complaint. It is his right to do so.

[17] The Broadcaster denies that it colluded with the six MP's and that it intentionally denied the Complainant a right of reply when it broadcast the news programme. This was a broadcast of a so-called press conference. The Oxford Dictionary of

Current English defines a press conference as “a meeting with journalists in order to make an announcement or answer questions.” Note the plural of “journalist”. All the other definitions that we could find on the Internet refer to journalists or the media. It is clear to us that the idea behind a press conference is to disseminate information to as large a number of people as possible. The Broadcaster admitted that it was the only member of the media present at this so-called press conference. It explained its presence at the conference by stating that it got the lead of a press conference to be held by the six ANC MP’s and, because of the newsworthiness thereof, it ordered its journalists in Cape Town to attend. Mr Mkhize made the bold statement that the fact that there were no other journalists or members of the media present is not relevant. We think that if other members of the media were invited, they would surely have attended because of the newsworthiness of the conference. Based on the circumstantial evidence and on a balance of probabilities, we conclude that other members of the media were not invited. By no stretch of the imagination could this then be regarded as a news conference. The corollary of this conclusion is that we are not dealing here with a *bona fide* press conference, but rather with a private meeting set up between the six MP’s and the Broadcaster. The outcome of this meeting was then broadcast, purporting to be a news broadcast about a press conference.

- [18] The next question to be decided is whether the failure by the Broadcaster to grant to the Complainant a right to reply was intentional or whether it was a mere oversight or a mistake, as stated by the Broadcaster. It follows logically from our finding above, namely that this was no *bona fide* press conference, that it was intended to put the Complainant in a bad light. Despite the Broadcaster’s denial that there was any intention to defame the Complainant with the so-called news conference and the broadcasting thereof, we find, on a balance of probabilities, that the broadcaster and the six MP’s colluded in setting up a meeting and staging a press conference, the outcome of which was broadcast in the guise of a news broadcast. The purpose of this broadcast was clearly to defame the Complainant and to jeopardise his political career. We can therefore not accept that the

Broadcaster's failure to grant a right to reply to the Complainant was an oversight or a mere mistake. This was clearly all part of the Broadcaster's intention to defame the Complainant.

[19] With this broadcast it is clear that the Code of Conduct for Subscription Broadcasting Service Licensees was contravened. First of all, the Broadcaster admitted that it contravened clause 28.3.2. Although this clause applies, strictly speaking, to discussion programmes in which controversial issues of public importance are discussed, the dividing lines between such programmes and news programmes have faded over the years. In this instance we are dealing with a news programme in which not only pure news is broadcast, but where a long tirade is broadcast as part of a broadcast of a so-called news conference. In the tirade, quite a few minutes of broadcasting time is spent on defaming the Complainant. The programme then takes on the character of the type of broadcast referred to in clause 28.3.2. We therefore agree with the Broadcaster that clause 28.3.2 has been contravened.

[20] Secondly, we have to consider clause 28.1.2 which states that "*News must be presented in the correct context and in a fair manner ...*" As for the context of this broadcast, we have found that the so-called press conference was no press conference at all. By purporting to broadcast a press conference, the Broadcaster was broadcasting something out of context, thus misleading the viewing public. It was also not done in a fair manner because we have found that the so-called press conference was actually a meeting set up between the Broadcaster and the six MP's and it was unfair to pretend that it was a *bona fide* press conference. Clause 28.1.3, which also deals with news broadcasts, states:

Only that which may reasonably be true, having reasonable regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with reasonable regard to context and importance.

We have concluded above that there was no *bona fide* press conference. How could the Broadcaster broadcast the news about a so-called press conference if

they knew that this was no more than a pre-arranged meeting between the six MP's and the Broadcaster? We find that the Broadcaster also contravened clause 28.1.3.

[21] One last observation: The Complainant, in paragraph 17 of his reply to the Broadcaster's response, refers to the "serious damage and harm to (his) good name and (his) political profile". This brings us to clause 28.4 of the Code which determines that broadcasters must exercise exceptional care and consideration, in matters involving (*inter alia*) the dignity of individuals. In a case decided by this Tribunal¹ it was stated:

"Mere infringement of dignity or reputation by the media does not amount to a contravention of the Code. It is only an intentional or negligent infringement by the media which is actionable in our civil law and we, understandably, apply the same principle when adjudicating in terms of the Broadcasting Code."

We have found that the setting up of the so-called news conference and the broadcasting thereof was intended to defame the Complainant. We therefore find that the dignity or reputation of the Complainant was intentionally infringed, thereby constituting a contravention clause 28.4 of the Code.

SANCTION

[22] At the close of argument by the parties, we requested their arguments on sanction. The Complainant's representative asked for a maximum fine to be imposed and to be donated to charity. We do not have the authority to donate fines to charity. All the proceeds of fines imposed by the BCCSA go into a special fund dedicated to education and the development of commissioners' skills. The representative

¹ Case 44/2014, Ngcobo vs e.tv (eNCA)

also suggested that an apology of some kind be broadcast for two days – the period during which the offending material was broadcast.

[23] The Broadcaster’s representative, on the other hand, pleaded for extenuating circumstances to be taken into consideration. This included the fact that the offending broadcast was discontinued on 29 November, and the interaction between the Complainant and Mr Manyi in which the latter expressed the Broadcaster’s sincere apology. The representative was also willing to co-operate with the composition of an apology to be broadcast. However, he did not agree with a maximum fine to be imposed and suggested a fine of R20 000 instead.

[24] The commissioners have discussed the sanction to be imposed. We agreed that this was one of the most serious contraventions that we have had to decide on. The fact that this pre-recorded news broadcast was repeated during the day of 27th November and the following day, aggravates this contravention. The Broadcaster was not forthcoming when dealing with the serious allegations against it. Although it admitted a contravention by not granting the Complainant a right of reply, it persisted in its denial of a sham with the so-called press conference. The fact that the “press conference” and the broadcasting thereof was done in bad faith, are aggravating circumstances, justifying a maximum fine of R80 000. We have also decided that the contraventions of the Code warrant an order for the broadcasting of an apology to the Complainant.

The parties reached consensus as to the content of the apology:

On 27 and 28 November 2017, the ANN7, broadcast a video clip wherein six Members of Parliament, preceding a parliamentary debate on state capture, made comments, which the Tribunal of the BCCSA has found to be highly defamatory, insulting and were false allegations against ANC Chief Whip and member of the National Executive Committee of the ANC, Mr Jackson Mthembu. During the two days of ongoing broadcasting of this video clip, ANN7 also uploaded it onto their YouTube channel.

The ANN7 apologises for the repeated broadcast of the offensive video clip and contraventions of the Broadcasting Complaints Commission Code of Conduct including failing to afford the ANC Chief Whip a right of reply, in particular, where controversial criticism has been made. It is imperative that the ANC Chief Whip should have, at the very least, been afforded this right. Our failure to do so and to continue broadcasting repetitively the video clip was a serious transgression which has had a serious impact on the ANC Chief Whip's reputation and integrity.

ANN7 apologises profusely for our disregard of the ANC Chief Whip's rights and the broadcast of the Members of Parliament's defamatory comments thereby exacerbating the damage by repeating the broadcast of the video clip for two days.

The BCCSA has, in response to the ANC Chief Whip's complaint, handed down a judgement sanctioning Multichoice and ANN7 for their serious transgressions of the Code of Conduct and has criticised us and imposed a severe sanction.

We unreservedly apologise to the ANC Chief Whip and those close to him for the damage caused by our conduct.

The apology must be broadcast for two consecutive days during times that correspond with the times on which the offending broadcasts were flighted. Thereafter the Broadcaster must send clips of the broadcast of the apology to the Registrar of the BCCSA.

[25] In the result we find that the Broadcaster contravened clauses 28.1.2, 28.1.3, 28.3.2 and 28.4 of the Code of Conduct for Subscription Broadcasting Service Licensees. The sanction which we impose is a fine of R80 000, to be paid by the Broadcaster within 14 days from date hereof to the Registrar of the BCCSA. The Broadcaster is also ordered to broadcast an apology to the Complainant for two consecutive days.



**PROF HP VILJOEN
CHAIRPERSON**

Commissioners Makeketa and Tlhakung concurred in the above judgment.