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: 01/2019

DATE OF HEARING: 06 FEBRUARY 2019
JUDGMENT RELEASE DATE: 04 MARCH 2019

CHEMVULC **FIRST COMPLAINANT**

BRENDAN VAN NIEKERK **SECOND COMPLAINANT**

and

SABC2 **RESPONDENT**

TRIBUNAL: **PROF HP VILJOEN (CHAIRPERSON)**
MS NOKUBONGA FAKUDE
DR MOHAMED CHICKTAY

Complainant: Mr Brendan van Niekerk, Director, Chemvulc; Adv Dirk Groenewald, Pretoria Bar; Mr JD Claassen, Serfontein Viljoen & Swart Attorneys, Pretoria.

Broadcaster: Mr Nyiko Shibambo, Acting Manager: Compliance, SABC; Ms Refilwe Timana, Acting Compliance Officer, SABC; Ms Annie Mokoena, Executive Producer: Leihlo La Sechaba; Ms Reitumetse Sankolla, Producer: Leihlo La Sechaba.

Complaint that Broadcaster contravened clauses of the Code of Conduct relating to balance, comment and dignity in a programme called "Leihlo La Sechaba" – Complainant refusing to appear on camera until such time as enough particulars of allegations against company are supplied so as to enable Complainant to respond – after application to interdict broadcast failed, programme was flighted – in the programme which lasted about 23 minutes, only 38 seconds

were devoted to 3 shots of a letter by Complainant's attorneys – Tribunal finding that Broadcaster did not fairly present opposing points of view – Broadcaster also did not express an honest opinion when it allowed the employees of the company to make false claims about employer's duties in terms of labour law – Broadcaster impaired dignity of Complainant by broadcasting allegations of sexual harassment without allowing Complainant opportunity to respond to allegations – Broadcaster found to have contravened 3 Clauses of the Code and reprimanded – Broadcaster ordered to broadcast a right to reply programme - Chemvulc vs SABC2, Case No: 01/2019 (BCCSA)

SUMMARY

This is a complaint that the Broadcaster contravened the clauses of the Code of Conduct relating to balance in a programme where controversial issues of public importance are discussed, relating to comment and to dignity in a programme called "Leihlo La Sechaba". The Complainant averred that insufficient particulars of allegations against it were supplied as to make it rationally impossible to respond and the Complainant refused to appear on camera until sufficient particulars were supplied. When informed that the programme will be broadcast, Complainant applied for an interdict to stop the broadcast but failed. When the programme which lasted about 23 minutes was flighted, it appeared that only about 38 seconds of it were devoted to 3 shots of a letter by Complainant's attorneys. The Tribunal found that the Broadcaster did not fairly present opposing points of view. The Broadcaster also did not express an honest opinion when it allowed the employees of the company to make false claims about an employer's duties in terms of labour law. The Tribunal found that the Broadcaster impaired the dignity of the Complainant by broadcasting allegations of sexual harassment without allowing the Complainant the opportunity to respond to the allegations. The Broadcaster was found to have contravened Clauses 12(2), 13 and 15(1) of the Code. The Broadcaster was reprimanded and ordered to broadcast a right to reply programme.

JUDGMENT

PROF HP VILJOEN

[1] The Registrar of the BCCSA received a complaint from the company Chemvulc (Pty) Ltd and its director Mr Brendan van Niekerk against the broadcast of the *programme Leihlo La Sechaba* on SABC2 in which employees and former employees of the company brought allegations against the company of unfair labour practices, sexual harassment, bribery, etcetera.

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

> "We wish to state from the outset that we did not relinquish our "right of reply" - which was not afforded us for the production of "part one" of Leihlo La Sechaba episode flighting on SABC2 on Monday the 19th of November 2018.
>
> We no longer trust the integrity of the SABC to afford us the same right in the production in "part 2" as we feel our right to dignity will be violated. We have detailed our reasoning below, which we lodge an official complaint with the Broadcasting Complaint Commission of South Africa.
>
> - Of a 23 minute program the only time devoted to giving our side of the story was 38 seconds, towards the end of the program, the SABC only addressed points 3.1 and 3.2 of the allegations levelled against us (I have attached a copy of our legal response to the allegations).
> - The SABC would reason that "part 2" would be our opportunity to give our side of the story. We have no faith in the SABC's impartiality in this regard.
> - We provided details of company contributions to funeral costs of a staff member that died in section 3.12 of the allegations, which SABC's program failed to mention. The money was paid to the family, and was of no concern to the employee(s) that made the allegation. There is no legal obligation under law for an employer to cover funeral costs, so the clip was purely to make defamatory statements about our company.
> - The SABC purposefully omitted in our response to an allegation made by "Kopano" in 3.13 to any positive contributions made by Mr van Niekerk towards the wellbeing of our staff and the university student he is supporting.
> - Very damaging allegations about the MD Mr John van Niekerk, involving sexual harassment or assault, that no attempt was made to verify or corroborate the truth of these allegations is very unprofessional. The statements made by the witness are complete fabrications. Allegation 3.16
> - We were not given the opportunity to respond to specifics of such broad and defamatory statements. See our response to 3.16 or 3.15 Hence our application for urgent relief at the high court. (a copy of our urgent application is attached, court documents are to follow.)
> - This program very cleverly insinuates that we break the law regularly, not paying UIF, worker's compensation, bribing CCMA commissioners. We are an upstanding business that follows all Procedures when relating to the LRA and basic conditions of employment. We believe these references are blatantly defamatory in nature.
> - We have invited the SABC to inspect our records in regards to various allegations in our legal response. We heard nothing further in respect of providing the SABC any of this information.

- We were notified at 3.03pm on Friday 16th of November of Monday's (19th) show. We believe that this was done intentionally, the producers were aware that we close at 3pm on a Friday.
- We will reserve our right to apply again for an urgent interdict to prevent the airing of "part 2". As we believe that many of the claims are highly defamatory to our business and we have no way of knowing that "part 2" will be any different. The SABC legal team gave the Judge the assurance that their "part 1" episode would be fair and balanced when our interdict was dismissed. A copy of the judgement is to follow.
- Our intention is to limit further damage to our business' reputation, and to limit any potential reactive forces from harming our staff or damaging our property.
- Chemvulc will gladly supply any further information to refute the claims made by these (ex) employees both past and present and demonstrate the SABC's blatant disregard for its own code of conduct and the codes of conduct of the BCCSA.
- We are of the opinion the episode was highly defamatory and may result in reputational damage to our company and we will seek legal steps to remedy the situation.
- A copy of the link to the You tube video is available below.
- https://youtu.be/IRsk8ML03-k. Please acknowledge receipt of this complaint. I will wait to hear from you."

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

"BCCSA COMPLAINT: BRENDAN VAN NIEKERK - SABC 2 - LEIHLO LA SECHABA - 19.11.2018 - 20:00

In respect of the above-mentioned complaint, please, find our comments as follows:

1. Leihlo La Sechaba is an investigative programme that probes developmental stories, corruption, crime and other issues of public interest.

2. In September 2018 the SABC received a request from one of the employees of Chemvulc to investigate alleged transgressions of labour laws at the company.

3. The SABC interviewed current and former employees of Chemvulc who made wide-ranging allegations against the company and its operations.

4. The SABC sought a right of reply from Chemvulc who indicated that they are not willing to respond on camera but willing to so via email. Segments of their email were broadcast.

5. The SABC has nothing to do with allegations that Lindi Kubeka was promised a bribe in order to rubbish Chemvulc. For this reason, the SABC cannot comment on those allegations.

We submit that there has been no contravention of the Code."

EVALUATION

[4] We first have to discuss the principles applicable to this case. The point of departure, normally, is the freedom of expression of the Broadcaster, including the editorial freedom that broadcasters enjoy in editing their programmes, including the decision to include or

exclude certain material. This is a freedom guaranteed by the Constitution of South Africa. However, the Broadcaster's right to freedom of expression is not an absolute right but is limited in certain aspects by the rights of others. We must weigh the right to freedom of expression of broadcasters against the rights of viewers and listeners to their privacy, dignity, their right not to be offended, etcetera. This is what the Code of Conduct for Broadcasting Services Licensees is about. Although it guarantees the freedom of expression of broadcasters, it prohibits the broadcasting of hate speech, of material that is harmful to children, of material that glamorises violence or unlawful conduct, of programmes on controversial issues of public importance that are unbalanced in the sense that only one point of view is broadcast, etcetera.

[5] The facts of this case, briefly, are that the Complainant company received an e-mail from the producers of the broadcast complained about wherein some questions were put to the Complainant regarding certain allegations made by employees and former employees of the company. Some of the questions were so vague and unspecific that the Complainant states that he could not rationally answer these questions unless more detail was provided. The Complainant responded through its attorneys and undertook to engage with the producers of the programme in order to get more clarity on the allegations. The Respondent then sent more questions to the Complainant, inter alia about paid maternity leave, to which the Complainant's attorneys responded that they denied the allegations against their client. The director of the company refused to appear on camera until such time as more detail about the allegations was provided to the Complainant.

[6] Hereafter the Complainant's attorneys received an e-mail from the Respondent wherein they were informed that the programme would be broadcast on 19 November 2018. The Complainant's attorneys applied to the High Court for an urgent interdict to stop the Respondent from broadcasting the programme, but this was not granted, due *inter alia* to the fact that the Respondent gave an undertaking that the broadcast would be fair and balanced.

[7] At the hearing we watched the programme which was broadcast under the title of *"Leihlo La Sechaba"*. In the programme, which lasted about 23 minutes, interviews with various employees and former employees of the Complainant were conducted, interspersed with comment by the commentator of the programme. Some of the allegations made against the Complainant company were that no payments were made for maternity leave, that employees returning from maternity leave were threatened not to get pregnant again, that no compensation was paid for long service at the company, that the company did not pay for injuries on duty, that no funeral expenses of deceased employees were paid by the company, that an employee was dismissed for failing a polygraph (lie detector) test, that the company bribed a commissioner of the CCMA to force employees to accept (inadequate) amounts of compensation, and that the manager of the company forced a female employee to show her breasts to him. These allegations went unchallenged in the programme. Towards the end of the programme the Broadcaster showed three shots of parts of a letter received from the Complainant's attorneys. In the first two shots the pictures of the letter were partly out of focus and one could not read the contents. The last shot was clearer but only showed the part where the attorneys said they would respond after receiving more particulars of the allegations. This was the only effort by the broadcaster to present the Complainant's point of view relating to the allegations against it. The Complainant's representative said that the three shots lasted 38 seconds. This was not challenged by the Broadcaster.

[8] The Complainant's representative referred to the nature of the programme "*Leihlo La Sechaba"*. The Respondent describes it as "an investigative programme that probes development stories, corruption, crime and other issues of public interest." Although the Complainant casts doubt on the public nature of the issues tackled in this programme, we will accept that the treatment of employees in the workplace is of public interest. The first point we have to consider, according to the Complainant, is whether the Broadcaster complied with the requirements set by Clause 13 of the Free-to-Air Code of Conduct for Broadcasting Service Licensees, which reads:

> (1) In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster 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.
>
> (2) A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given the right to reply to such criticism on the same programme. If this is impracticable, reasonable opportunity to respond 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.

[9] The Complainant argues that a right to reply can only be exercised when the person who is offered the right knows what to reply to, in other words, when sufficient information has been supplied. The Complaint's case is that it was not supplied with the particular information it needed in order to prepare for a rational response to the allegations. The point was stressed that the legal representatives of the Complainant were willing to engage with the Respondent, provided they received the particulars of the allegations which they requested. This was not forth-coming and the Respondent proceeded to broadcast the programme. Although an offer was made to the Complainant to broadcast a second programme with a right to reply, this offer was withdrawn by the Respondent when the Complainant lodged a complaint with the Broadcasting Complaints Commission. The Complainant argues that a reasonable period, as required by the Code, has already lapsed, so as to make this offer of a right to reply programme ineffective.

[10] The Complainant denies that the Respondent presented opposing points of view in this programme on a controversial issue of public importance. It stressed the point that affording only 38 seconds of a 23 minutes programme to present the Complainant's case, did not constitute compliance with Clause 13(1) of the Code.

[11] The Complainant also based its complaint on Clause 12 of the Code which determines the following:

> (1) Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance.
>
> (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.

Although it is clear that the Broadcaster, when it commented on the state of affairs at the Complainant's business, based its comments on facts truly stated or fairly indicated and referred to, the Complainant mentioned an important argument relating to the facts, namely that the Broadcaster had some of its facts wrong relating to labour legislation. We will come back to this point.

[12] The last argument of the Complainant was based on the provisions of Clause 15(1) of the Code. This reads:

> (1) Broadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest.

The argument is that the allegations of sexual harassment and racism in the workplace seriously damaged the reputation of the director of the company and that the particulars of these allegations were never provided to the Complainant to allow him the opportunity to fairly put his side of the case.

[13] We now turn to the Respondent's arguments. The salient point made by the Respondent is that the Complainant was not willing to appear on camera, as is normally the case on this type of programme, but replied to the allegations by correspondence through its attorneys. The Respondent states that segments of the attorneys' e-mails were then broadcast with a voice-over stating that the company replied to the allegations. In this way, according to the Broadcaster, they complied with Clause 13 of the Code.

[14] The Respondent's justification for this programme is that after the broadcast thereof, things changed at the company in the sense that employees were offered permanent contracts, which they were denied before. The Respondent stated that the employees had to fend for themselves and the programme showed that the company is not compassionate. In response to this, we emphasise that it is not the task of this Tribunal to judge the programme and ask whether it achieved its object to investigate an issue of public importance. We must decide whether or not the Broadcaster contravened the Code

by, *inter alia*, not fairly presenting opposing points of view in a programme on controversial issues of public importance, broadcasting comment which was not an honest expression of opinion and not exercising exceptional care and consideration in matters involving the reputation of an individual.

[15] The first point which we have to decide is whether the Broadcaster made reasonable efforts to fairly present opposing points of view with this broadcast. The salient points are that the Respondent avers that it presented an opposing point of view to that of the employees by showing shots of the Complainant's attorney's letter and by offering an on-camera interview with the director. The broadcaster also offered a right to reply broadcast to the Complainant, but this offer was withdrawn when the Complainant referred this matter to the BCCSA. The Complainant's point is that not enough detail of the allegations by the employees was given it to respond rationally. The Complainant also avers it did not trust that the Respondent would treat it fairly in any right to reply programme.

[16] This Tribunal has on more than one occasion given its interpretation of Clause 13, on the duty on the Broadcaster to present opposing points of view. We have stated that the rationale behind this clause is to create balance in a programme on a controversial issue of public importance so that the viewers/listeners in the end could form an objective, informed opinion about the issue under discussion[1]. We have in all the cases of this nature desisted from prescribing the percentage of time to be allotted to the parties in a broadcast. This is part of the editorial prerogative of the broadcaster. The test is that balance must be obtained.

[17] Another test is that opposing points of view must be *fairly* presented, as required by clause 13. A general test for fairness is that opposing parties must be treated equally. This means that one party must not have a noticeably better chance of convincing people of its case above the other, through the action of the Broadcaster. In this instance, although the director of the Complainant company jeopardised its case by refusing to

[1] See for instance *Jacobz v M-Net*, case 11/2018.

appear on camera and putting the case of the company, its argument was that an offer to respond on camera to the allegations was not a valid offer if the Complainant did not have sufficient detail to respond to. An allegation (put in the form of a question to the Complainant) that "you and your company are racist", cannot be answered rationally unless details of racism incidents are given. The same accounts for an allegation (also made in the form of a question) that "you are exploiting and ill-treating your workers", and not paying decent salaries. The presentation of the employees' case in a programme lasting about 23 minutes and then presenting the Complainant's case for only 38 seconds with 3 shots of an attorney's letter, of which 2 are not in focus, cannot be regarded as fair. We find that the Broadcaster did not fairly present opposing points of view, and thus contravened Clause 13(1) of the Code.

[18] The second complaint was that the comment which was broadcast was not an honest expression of opinion. Although the Broadcaster commented on facts truly stated, in the sense that the comments were based on the facts which the employees of the Complainant company stated, the Broadcaster knew or should have known that some of the facts were not true. For example, the employees stated that the company did not pay maternity leave to its female employees, that it did not pay any compensation when employees retired after working for the company for many years, that it did not pay compensation to employees who were injured on duty, that it did not contribute to funeral costs of its employees, etcetera. When investigating the case of the disgruntled employees of Chemvulc (Pty) Ltd, the producers of the programme knew full well that they were delving into complaints of a labour law nature. The Labour Relations Act and the Basic Conditions of Employment Act have both been in operation for more than 20 years and the contents of both are well-known. Even if the producers of the programme do not know the rights of employees vis-à-vis their employers, they could have consulted any labour practitioner or labour lawyer to advise them on the basic facts. In terms of the law, an employer is not legally obliged to pay remuneration for maternity leave (this should be claimed from the Unemployment Insurance Fund), or compensation for injuries on duty (this should be claimed from the Compensation Commissioner who has to start paying 3 months after the injury), or for retirement (unless it is a retrenchment) or for

funeral expenses. We think that the average viewer at the end of this programme was convinced that an employer is obliged by law to pay for the events and circumstances mentioned in the programme and that the employer in this instance failed to do so. This was not an honest expression of opinion and thus was a contravention of Clause 12(2). This was also in contravention of the requirement for balance. In this regard, it is important to note what this Tribunal said in the case of South African *Veterinary Council and Lester v M-Net*[2] about balance, namely:

" ... absolute balance is an almost unattainable ideal. On the other hand, the public's right to be informed .... in a balanced manner as far as comment is concerned, is a right that may be said to be of equal importance to that of the broadcaster's" (that is the right to freedom of expression).

In the examples mentioned above, the viewing public was misled into believing that an employer must pay remuneration for maternity leave, compensation for injuries on duty, compensation for long service, etcetera. In short, the opinion expressed by the Respondent was not an honest one and no balance was obtained insofar comment was concerned in the programme. The Respondent contravened Clause 12(1).

[19] The last argument concerned the dignity and reputation of the director of the complainant company. From an interview, broadcast with an employee of the company, it appears that a female employee (not the interviewee - in other words this was hear-say evidence) was forced by the director to show her breasts to him. According to the Complainant, these facts were never put to him so that he could respond. The allegation by the employee went unchallenged on-air and in the minds of the majority of viewers this was probably true. This, together with the other allegations that were presented unchallenged, would have typified the employer in the minds of the viewers as an unsympathetic, racist man who exploited his employees. This could have severe consequences for the company; in the worst-case scenario that it even had to close down, with dire consequences for employer and employees alike.

[2] Case 42/2014.

[20] In the case of *Keuzenkanp v Highveld Stereo*[3] the Tribunal referred to section 10 of the Bill of Rights in the Constitution which protected the privacy and dignity of everyone. It explained that the test whether the Complainant's dignity had been impaired, was both a subjective and an objective test. Applying the subjective test to the facts of this complaint, the Complainant would have suffered infringement of his self-worth and self-respect, especially for not having had the opportunity to prepare and defend himself against the serious allegation. In an objective evaluation of the facts, the viewers would not have had the advantage of an explanation from the Complainant of what had transpired, from his viewpoint. They would have accepted that the Complainant was a person who sexually exploited his female employees. In this instance it could not be said that the Complainant's right to dignity was overridden by a legitimate public interest, but that it was rather a blatant disregard of the Complainant's right to dignity. It was also not so argued by the Respondent. The Respondent clearly did not exercise exceptional care and consideration in this matter and thus impaired the dignity and reputation of the Complainant. We find a contravention of Clause 15(1).

[21] As for sanction, we asked both parties before us what their argument would be in extenuation and in aggravation, respectively, of sanction in the event of a finding by the Tribunal that there has been a contravention of the Code. The Respondent argued that it had offered the Complainant a right to reply opportunity in a subsequent programme in conformity with Clause 13(2) but had withdrawn the offer after the Complainant had lodged the complaint with the BCCSA. It was now prepared to repeat this offer in order to satisfy the sanction, especially because it intended to broadcast a follow-up on the original programme.

[22] The Complainant's representative dismissed this offer and asked for a sanction payable in money to be imposed by the Tribunal. Its argument was that Clause 13(1) referred to a subsequent programme presented within a reasonable period of time of the original broadcast. Clause 13(2) refers to a reasonable opportunity to respond to the programme. In both instances the Complainant argued that considering the long period that had lapsed

[3] Case 7/1999.

since the broadcast on 19 November 2018, it did not consider it reasonable to be subjected to a second programme dealing with complaints by the employees of Chemvulc.

[23] We can, in terms of Clause 14.4 of our constitution, order the Broadcaster to broadcast a follow-up programme on the complaints by the employees of Chemvulc, despite the time lapse since the broadcast of the first programme. In such a follow-up programme, they would have to comply with the provisions of the Code relating to comment, balance and protection of privacy and dignity. The Complainant will then have to decide whether to participate and to put its opposing views to the viewers, which will then have to be broadcast. Should the Complainant decide not to participate in a follow-up programme, that would be the end of the matter.

In the result, the Broadcaster is found to have contravened Clauses 12(2), 13, and 15(1) of the Code of Conduct and the complaint is upheld. The Broadcaster is reprimanded. The Broadcaster is also ordered, as part of the sanction, to broadcast a right to reply programme as a follow-up on the programme complained about and must inform the Registrar of the BCCSA within 14 days of this judgment when the follow-up programme will be broadcast.

PROF HENNING VILJOEN
CHAIRPERSON

Commissioners Fakude and Chicktay concurred in the above judgment.