CASE NUMBER: 15/2015

DATE OF HEARING: 01 OCTOBER 2015
JUDGMENT RELEASE DATE: 22 OCTOBER 2015

MADIBENG LOCAL MUNICIPALITY

vs

M-NET

TRIBUNAL: PROF HP VILJOEN (DEPUTY CHAIRPERSON)
MS G HARPER
MS Z MBOMBO
ADV T MMUSINYANE
ADV R SEWLAL

FOR THE COMPLAINT: Mr Moeti Kanyane, Director of Gildenhuys Malatji Attorneys.

FOR THE RESPONDENT: Dr Dario Milo: Partner, Okyerebea Ampofo-Anti, Partner, Lisa Lumley, Candidate Attorney, Nelson Maunatlala, Candidate Attorney of Webber Wentzel Attorneys accompanied by George Mazarakis, Executive Producer, Joy Summers, Producer: Carte Blanche, Sasha Schwerstenwein, Journalist, Carte Blanche.

Complaint concerning an episode of Carte Blanche focusing on corruption and mismanagement in the Local Municipality of Madibeng – three instances where comments were allegedly not made honestly or on facts truly stated or fairly indicated and referred to – Tribunal finding that comments were made honestly and that an attempt was made by the programme producer to verify the facts before commenting thereon – no contravention of the Code found in any of the three complaints and complaints not upheld –
SUMMARY

A complaint was lodged against a broadcast of the programme Carte Blanche in which corruption and mismanagement in the Local Municipality of Madibeng were allegedly exposed. The complaint was initially about four instances of contravention of the Code of Conduct, though one complaint was withdrawn before the hearing. In the three remaining instances the complaints were that the comments were not made honestly, nor were they made on facts truly stated or fairly indicated and referred to. The Tribunal found that the comments were made honestly and that the producer of Carte Blanche had made an effort to verify the facts before commenting thereon. In one instance the Tribunal found, following Supreme Court of Appeal authority, that "... errors of fact should be tolerated, provided that statements are published justifiably and reasonably." No contravention of the Code could be found in any of the three complaints and the complaints were not upheld.

JUDGMENT

HP VILJOEN

[1] On 7 June 2015, as part of its regular programme "Carte Blanche", M-Net broadcast an exposé of mismanagement and corruption in the Madibeng Local Municipality, formerly known as Brits. The title of this particular episode was "Dying for water", the emphasis being on mismanagement relating to the supply of water to some of the areas within the jurisdiction of the municipality. The municipality took offence at this programme and in a letter dated 15 June 2015, signed by Monde Juta, the municipal manager, lodged a complaint with the BCCSA against the Respondent. What is significant about this complaint is that the Complainant took issue with only four allegations in the programme. The significance of this will be expounded in the reasons provided below.

[2] The complaint reads as follows:

"Re: Formal Complaint against Carte Blanche: 7th June 2015

The following serves to register a formal complaint against Carte Blanche show dated the 7th of June 2015. The show was amongst others, focusing on Madibeng Local Municipality, making some damaging allegations about the municipality.

Jericho"
When Carte Blanche show went on air, water supply status in Jericho was already improving as a result of the interventions provided by both National and Provincial Government. I can confirm that Jericho comprised of 10 sections and at least 4 sections has water supply compared to the initial two sections. The intervention carried out in Jericho was able to refurbish 4 boreholes which had a significant improvement in water supply of the area. Currently another 2 boreholes are refurbished which will increase to 6 boreholes.

However, the show deliberately ignored these developments and paint a picture as if the situation is still dire, when major interventions has taken place. This kind of reporting goes directly against the Broadcasting Complaints Commission of South Africa Code of Conduct, section 11 (1) which states that the broadcasting service licensees must report news truthfully, accurately and fairly.

The allegations which suggest that the municipality dismantle the entire borehole system in Jericho and build a reservoir is in accurate and disingenuous, and further negates section 11 (2) of the Code of Conduct where the show intentionally and negligently departs from the facts and distorts what actually happened.

The list of this transgressions is endless and was misleading to the viewers

1 billion rand in debt

The show alleges that the municipality is in 1 billion rand debt. This information is also incorrect and misleading to the viewers. Carte Blanche should have accessed the financials of the municipality so they can be able to report accurately on this item. Since, it is public information that the debtor’s book of the municipality amounts to 1 billion rand, the show deliberately twisted the facts and paint a picture which suggest that the municipality owes up to 1 billion to its creditors which is malicious. The debtors’ book is as a result of uncollectable municipal revenue for the services rendered

Unfulfilled Tenders

The show further alleges that the municipality has awarded tenders and they were not fulfilled, making reference to a R20 million tender for a substation. In as far as we know, the tender in question was fulfilled and the said power station is operational, and has been operational for some time. Once again, the show failed to inform its viewers that their report is not based on fact or is founded on opinion and should be presented in such a manner as to indicate, clearly that such is the case.

Mayors Birthday Cake

The birthday cake issue was blown out of proportion and overly exaggerated by the show. We can put on record that the alleged chocolate cake cost was way below the alleged amount and it was even below a thousand rand. This as well, if the show wanted to present the story in a correct context and a fair manner, the producers could have verified this allegation before the show was flighted."

[3] The Broadcaster responded as follows:

1. Introduction

1.1. This is a response to a complaint lodged on 15 June 2015 with the Broadcasting Complaints Commission of South Africa ("the BCCSA") by Monde Juta ("Juta" or "the complainant") in his representative capacity as municipal manager of the Madibeng Local Municipality ("Madibeng").

1.2. The complaint relates to an insert in the current affairs programme, Carte Blanche, which was broadcast by M-Net on 7 June 2015, in relation to the
mismanagement and corruption in Madibeng and the water shortage supply within its jurisdiction ("the insert").

1.3 The complaint in summary, appears to be the following: [For consideration of space, this summary has been edited out]

2. Background

2.1. The insert is primarily a story about mismanagement, corruption and water supply problems in the Madibeng Municipality. It is important to note that the serious allegations made by Carte Blanche relating to the general corruption and mismanagement in Madibeng have not been denied or challenged by the complainant. We submit that the allegations which have not been included in the complaint must be accepted as accurate and fair by virtue of the fact that these allegations were not raised in the complaint.

2.2. Moreover, it is clear that the insert concerned a matter of public interest about a public body. Such expression is given heightened protection in our democracy, as is supported by the jurisprudence of our courts and the BCCSA.

2.3. A copy of the script for the insert is attached and marked as Annexe "A".

3. Jericho

3.1. We submit that the insert dealt with the issues regarding the water supply in Jericho in a fair and balanced manner.

3.2. The producer, Ms Joy Summers ("Summers" or "the producer"), was provided with information about the water supply issues in Jericho by Victor Molefe ("Molefe"), a community member in Jericho who founded Makarapa, a grass roots organization established to address the water supply problems in Jericho.

3.3. The producer attended a community meeting at which community members discussed the water supply problems in Jericho. Numerous community members who were present at the meeting stated that Madibeng was not providing them with water. The producer of the insert made four trips to Jericho. The first journey was for research purposes. Thereafter, the producer returned to Jericho to film the insert. The producer also visited Jericho on a third occasion with one of the Carte Blanche presenters. Three weeks prior to the broadcast of the insert, the producer visited Jericho for the fourth time to finalise the story by filming further visual images of the difficulties experienced by the community in getting access to water. These images are attached and marked as Annexe "B". The images illustrate that the water situation in Jericho was still problematic at that stage. During this visit the producer also spoke to many community members who were desperate to find a solution to the on-going water shortages and the producer as well as her crew personally witnessed the lack of water in Jericho.

3.4. Prior to broadcasting the insert Carte Blanche requested an interview with Madibeng and was informed that Supra Mahumapelo, the Premier of the North West Province ("the Premier") would speak on Madibeng's behalf because he had been briefed on the issues that Carte Blanche wished to discuss. A copy of the relevant correspondence is attached as Annexe "C".

3.5. The insert included a statement by the Premier that:

"As we speak now we have just made an intervention through section 139 on water and sanitation. We think they are turning the corner. In the next 18 months or so they should be on the right path to being one of the best municipalities."
3.6. The insert accordingly informed viewers that steps were being taken to rectify the water and sanitation situation in Madibeng.

3.7. During the Premier’s interview, the Premier did not mention that six boreholes had been refurbished or that four sections of Jericho had been provided with water. He referred to the section 139 intervention and the fact that steps were being taken to improve the situation, which was included in the insert.

3.8. In light of the complaint filed by Madibeng, the producer sought further clarification from the community in Jericho on 1 July 2015 and was informed that they still do not have water. With respect to the availability of water in the ten different sections of Jericho, the producer was informed of the following:

3.8.1. There is still no water in 6 of the sections, namely: Rasengwati, Vuka, Stateng, Lehwiling, Malateng and Boalakobo;

3.8.2. In both Morolong and Morokwaneng there is currently only water in one street;

3.8.3. In Selosesha there is a pipeline from one borehole passing through the section supplying about 5% of the houses with water;

3.8.4. Lasty, in Mmamotsisi water is supplied to 40% of the houses: however, the water is not supplied by Madibeng. It is supplied by infrastructure that was made available as a result of Makarapa’s initiative.

3.9. In light of the above, the allegations reported in the insert were reasonable and correct at the time of the broadcast and there is still a severe water supply shortage in Jericho, which has been ongoing since at least 2010. Even if improvements have been made to the water supply, the community is currently being deprived of water and thus the situation does in fact remain dire and it was fair for the situation to be reported in this manner. Carte Blanche sought to introduce balance in the story by including the Premier’s statement that improvements were being made.

3.10. Molefe has undertaken to provide a confirmatory affidavit, which will be submitted to the BCCSA as soon as it becomes available.

3.11. The allegation made by Carte Blanche that Madibeng dismantled the borehole system in Jericho and built a reservoir is fair and reasonable. This information was obtained from primary witnesses, one of which is Molefe, who informed Carte Blanche that Madibeng stopped the flow of water by closing down the community pipeline to the original two steel reservoirs and building its own pipeline to the cement reservoir, which never worked. Additionally, contractors hired by Madibeng to perform another task destroyed the community’s water pipes.

3.12. The residents of Jericho subsequently collected old pipes in an attempt to refurbish the old borehole system but their efforts were inhibited by Madibeng. We note that Madibeng has not denied that the cement reservoir that was shown in the insert, which was built by Madibeng never worked. Moreover, Madibeng has not denied that the community has not had a proper water supply for the past fifteen years or that it inhibited the community’s attempts to re-establish a water supply on its own.

3.13. Carte Blanche’s reliance on this information was reasonable due to the fact that it emanated inter alia from Molefe, an individual who lives in the community and has personally witnessed and been integrally involved in all the events surrounding the water shortage problems.
3.14. It is not clear from the complaint which sections of the Code are relied upon in relation to the reportage on the Jericho water shortage. Reference is made to reporting news truthfully accurately and fairly and negligent or intentional departure from the facts, which emanate from clause 28.1.1 and 28.1.2 of the Code. However, the complainant has cited clause 28.3 of the Code, which does not refer to these issues and clause "20.3.1" which does not exist and must have been referred to in error.

3.15. To the extent that the complainant seeks to rely on clause 28.1 of the Code, such reliance is misplaced as this tribunal has consistently and correctly held that clause 28.1 relates to news reports and not to investigative programmes such as Carte Blanche because Carte Blanche does not report "news" in the sense regulated by sub-clause 28.1:

3.15.1. In *Mxit Lifestyle (Pty) Ltd v Electronic Media Network*, this tribunal held that Carte Blanche was not a news programme "as traditionally conceived and perceived" and was therefore not subject to the clauses in the Code regulating the reportage of "news".

3.15.2. This was also confirmed in *IMM Graduate School of Marketing v M-Net*. That matter concerned an insert targeting companies that allegedly provide courses for which they are not registered. The IMM Graduate School of Marketing alleged the broadcast had unjustifiably implicated it. Making reference to its previous decisions in *Shoot & Others v e-tv, Dinur and others v M-Net, and Mxit Lifestyle (Pty) Ltd v Electronic Media Network* the tribunal held that the "Respondent is correct in its submission that the news clause does not apply to the broadcast complained of. There are several judgments of this Commission which support this approach."

3.16. To the extent that the complainant seeks to rely on clause 28.3 of the Code, M-Net submits that it has not breached clause 28.3 because opposing points of view were presented in the insert and an adequate right of reply was provided to Madibeng.

4. Debt 1 of billion

4.1. The allegation that Madibeng is R1 billion in debt was conveyed to the producer by Leon Basson ("Basson"). Mr Basson is currently a member of Parliament and the Democratic Alliance ("DA") Shadow Deputy Minister for Water and Sanitation. Prior to taking up this post he was the leader of the DA in Madibeng and served as municipal councillor in Madibeng for eighteen years, including a five year term as a member of the Executive Committee. He also served on the Municipal Public Accounts Committee ("MPAC") in Madibeng from 2011 to 2014. He is certainly qualified to express a view on Madibeng's debt.

4.2 Basson was interviewed in the insert and stated that "they [Madibeng] are R1 billion in debt." Carte Blanche had no reason to doubt or query this information due to Basson's previous position as a member of Madibeng's local government, his current position in Parliament and his access to the relevant financial reports and documentation, which indicated that he was clearly speaking with personal knowledge of the facts.

4.3 We note that Juta states that Carte Blanche should have accessed the financials of the municipality in order to ascertain the veracity of this allegation. We attach hereto as Annex A "D", an extract from the annual financial statements of Madibeng for the year ending 30 June 2014, where the total liabilities of Madibeng are clearly reflected in the statement of financial position as R1 168 883 043 (i.e. over R1 billion). This document was contained in a pack
prepared for a Council meeting that took place on 15 March 2015 and was given to the producer by an anonymous source who had access to the document.

4.4 In view of the above, it is submitted that the allegation that Madibeng has a debt of R1 billion, which was made by Basson, was properly substantiated.

4.5 The allegation that Madibeng is R1 billion in debt in any event does not consist of comment by Carte Blanche. The comment was made by Basson in his initial interview with Carte Blanche. However, to the extent that the tribunal finds that this constitutes comment by Carte Blanche, such comment is based on facts truly stated or fairly indicated. It is clearly backed up by the relevant financials. Accordingly, Carte Blanche has not breached clause 28.2.2 of the Code.

5. **Unfulfilled Tenders**

5.1. The allegations in the insert which relate to tenders are made in the context of the allegations against the previous municipal manager, Phileenon Mapulane, to the effect that he spent a considerable amount of money on tenders. The insert states the following in relation to the substation tender:

"...the Brits substation where R20 million was paid to a contractor who never did the work."

5.2. The complainant’s objection is misconceived as Carte Blanche did not allege that the work was incomplete or that the substation was not operational. The insert explicitly stated that R20 million was paid to a contractor who did not do the work.

5.3. Carte Blanche received information from Basson that R20 million was initially paid by Madibeng to Inplan Africa (Proprietary) Limited ("the initial contractor") to construct the substation. After Madibeng was placed under administration, a special committee was established (which Basson served on) to investigate this tender. The committee cancelled the contract with the initial contractor due to lack of progress on the project and appointed a new contractor to complete the project. The committee initiated legal action to recover the R20 million from the original contractor but payment has not been recovered to date.

5.4. This information was confirmed by Eddie Barlow, a DA councillor who was also on the investigation committee.

5.5. In this regard, please see attached and marked as Annexe "E", minutes from the Steering Committee meeting for the Munic Sub-Station project ("Steering Committee minutes") dated 17 September 2010, where the members discussed that although a substantial amount of money was paid to the initial contractors, there had been little or no site establishment done. Furthermore, discussions had taken place about cancelling the contract and obtaining new investigations.

5.6. Furthermore, please see attached and marked Annexe "F", Steering Committee minutes dated 29 October 2010, which reveals that the contract with the initial contractor had been cancelled and that a law firm in Pretoria had been consulted and was tasked with recovering the money.

5.7. It is apparent that the complaint is misconceived and that there has been no breach of clause 28.2.2 of the Code as the facts that were conveyed were accurate.
6. **Mayor's Birthday Cake** [This part of the Respondent's argument has been edited out because when this matter was heard by the Tribunal, this complaint had been withdrawn by the Complainant.]

7. **Conclusion**

7.1. Clause 28.2 of the Code authorises broadcasters to broadcast comment and criticism of any actions or events of public importance provided that such comment is an honest expression of opinion which appears clearly to be comment and is based on facts truly stated or fairly indicated.

7.2. Clause 28.3 provides that when presenting a programme in which controversial issues of public importance are discussed, a broadcaster must make reasonable efforts to present opposing points of view and to ensure that persons whose views are criticised are given a right of reply.

7.3. The content of the insert was fairly, accurately and truthfully reported. Facts were responsibly conveyed and supported by a reasonable evaluation of the evidence at hand.

7.4. The allegations conveyed in the insert are based on facts which were reasonably true:

7.4.1. The interview with Basson, who was a reliable and knowledgeable source, as well as the financial statements and the minutes of meetings corroborate the contents of the insert in relation to the R1 billion debt and money paid to a contractor who did not complete the substation project;

7.4.2. The allegations relating to Jericho were based on information provided by a reliable community leader as well the producer's own visits to Jericho and interviews with community members; and

7.4.3. The allegation relating to the chocolate cake was also based on information obtained from a reliable source.

7.5. It was reasonable for the story to be broadcast based on this information and the relevant facts were at all times conveyed to the public in a responsible and balanced manner. This is also against the background of an insert which is plainly in the public interest, and where Madibeng does not complain about the vast majority of the very serious allegations made in the insert.

7.6. Carte Blanche also provided the municipality with a right or reply, which the municipality chose to exercise via the Premier's office. The information provided by the Premier, insofar as was relevant, was incorporated in the insert to give it balance.

7.7. Accordingly, M-Net has not breached clauses 28.3 and 28.2.2 of the Code.

7.8. The BCCSA held in *Grove v E-TV* that the comment clause of the Code protects freedom of expression and as such it will only rule that the Code has been violated in relation to comments where it is clear that the comments were unfair. We submit that this is clearly not such a case as the insert was fair and balanced. Consequently, M-Net has not breached clause 28.2 or 28.3 of the Code and requests that the complaint be dismissed."

[Hereafter the Complainant replied to the response by the Respondent and the Respondent in turn filed a response to the Complainant's reply. Both parties also filed extensive notes for argument at the hearing. These arguments will be dealt with in the judgment.]
EVALUATION

[4] As stated in paragraph [1] above, the Municipality lodged only four points of complaint, whilst, after watching the broadcast and reading the Final Script, we identified some 27 allegations of mismanagement, corruption and other reprehensible acts by the municipality; some are so serious that we think they warrant investigation and further action by the police and the national prosecution authority. Some of the allegations might even be regarded as defamatory. Of the four points of complaint, the Municipality withdrew, before the hearing, the complaint regarding the disbursement of R6 000 for a chocolate cake for the mayor; at the hearing, the Municipality's representative did not present oral argument regarding the complaints about Jericho and the R1 billion debt, but abided by the written arguments. This created the impression that the Municipality was of the view that it did not have a strong case to put forward.

[5] The Respondent, in its argument in limine objected to the Complainant adding further complaints and arguments in its reply to the Respondent's response. The Complainant's representative convincingly argued that the initial complaint was drafted by laypersons and was not as elegantly expressed as it might have been, had the script of the broadcast been available at the time the complaint was lodged. We found that the additional complaints and arguments were not substantive, were not detrimental to the Respondent's case, and were in any case dealt with by the Respondent in its written argument. We allowed the Complainant to argue its case before us, based on all its written arguments.

[6] The programme "Carte Blanche" is described on its website as the longest running investigative journalism programme (in South Africa, we assume). True to the nature of this kind of investigative journalism, it is common practice to deal with controversial matters of public importance. This programme regularly broadcasts exposes of corruption, mismanagement and crime. In a democracy the media (the "fourth estate"), plays a crucial role in keeping a check on the functioning of the various arms of government. Whilst not itself wielding political power, the media has the duty to ensure that those who exercise power do so in a proper and constitutional manner. In so doing, it has to inform the public of instances of abuse of power, of
mismanagement, corruption, nepotism, etc. by the powers that be. See for example *The Citizen 1978 (Pty) Ltd & Others v McBride*¹, quoting O'Regan J in *Khumalo v Holomisa*²:

> As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. (The McBride case was referred to by the representatives of both parties)

Accordingly, “Carte Blanche” has an important task which it must exercise with responsibility. In this process it comments on and expresses its opinion on a variety of matters. It is now necessary to consider the three remaining complaints, referred to above, and to test them against the provisions of clause 28.2.2 (see paragraph 15 below).

**THE COMPLAINTS**

[7] **Jericho**

This complaint concerns the allegation or comment that previously the inhabitants of Jericho, a settlement or township under the jurisdiction of the Complainant, had running water in their homes but that the municipality dismantled the water system and for the past 15 years the inhabitants have been forced to use containers to carry water from a nearby river and from water trucks to their homes. What makes this comment more serious is that at the start of the programme it was stated that four people were shot dead by police because they had protested about a lack of water. A further disturbing comment is that the water is transported in trucks, costing the Municipality R15 million a year, a mode of water transport which the World Health Organisation has declared unsafe. To add to the dismal picture it was stated that water meters had been installed which cost each household R150 per month, but the meters were faulty and the water supply was often deliberately sabotaged so that the water trucks can profit from the situation. Nothing was stated in the complaint about

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¹ 2011(4) SA 191 (CC); 2011 (8) BCLR 816 (CC).
² 2002(5) SA 401 (CC) at paragraph 24.
people having been shot dead, or the unsafe practice of transporting water in trucks, or that people had to pay for meters that do not work. In the Complainant's reply (in paragraph 8 thereof) to the Respondent's response to the complaint, the Complainant included a catch-all excuse as follows:

*We do not specifically deal with each and every allegation or contention in the broadcaster's response. Madibeng must be taken to have denied such allegations and contentions as are incompatible with what is said in reply below.*

The Complainant hereby places the onus on the Respondent, and on the Tribunal, to check each allegation and contention in the broadcast and to decide whether they are incompatible with what is stated in the reply. We refuse to accept this onus, however, and we will accept that the Municipality believed it had reason to complain only in four specific instances, one of which was withdrawn, as mentioned above.

The thrust of the Municipality's complaint is that the broadcast was not correct on this issue as the work that was done on the water system in Jericho was aimed at improving the efficacy of the borehole system, and not to dismantle it, as alleged in the broadcast. The Complainant's representative did not elaborate on this point during the Tribunal hearing.

When invited for an interview with the producer of the programme to explain the apparent failures in the administration of the Municipality, the “Carte Blanche” team was, somewhat bewilderingly, referred to Mr Supra Mahumapela, the Premier of the North West Province because, the Municipality stated, “all the necessary information in terms of the items raised has been made available to the office of the Premier”. One would expect that the municipal manager, or a senior manager in the Municipality who was involved in the daily administration of municipal affairs, would be the obvious choice to attend to an interview with the team.

The Respondent argued that its comments were based on facts provided by some of the residents of the township and by certain public officials, and also on what the team personally observed during four visits to the area. Blame for the failure by the Premier of the province to provide the necessary information on certain issues could
not be laid at the door of the Respondent, it was argued. It pointed out that the dismantling of the borehole system occurred 15 years ago and that this had been stated in the insert.

[10] R1 billion debt
In commentary five of the Final Script it is stated that Madibeng is bankrupt. The complaint is that this statement is not based on facts truly stated or fairly indicated and referred to. This complaint is substantiated, although this was not argued by the Complainant at the hearing, by means of reference to the financial statements of the Municipality which indicate that the total assets amount to over R4.5 billion, whereas the total liabilities are just over R1 billion. The conclusion, according to the Municipality, is that it is not bankrupt.

[11] The Respondent argued that insolvency (being bankrupt) could be understood in two ways:
• factual insolvency, where an entity's liabilities exceed its assets; and
• commercial insolvency, where an entity is in such a state of illiquidity that it is unable to pay its debts as they fall due, even though its assets may exceed its liabilities.

The information gleaned by the Respondent in this regard indicated that the Municipality had serious cash flow problems and that it indeed had liabilities in excess of R1 billion. Almost all of its assets consist of non-current assets such as fixed property, equipment and heritage assets; these are assets that cannot be sold to pay its debts. To argue, as the Municipality does, that almost R687 million of its liabilities is a debt to the Public Investment Corporation (PIC) which is in dispute and is therefore only a contingent liability which reduces its liabilities to way below R1 billion, is clutching at a straw. For, what if a court finds tomorrow that the Municipality owes the PIC that amount plus interest?

The Respondent obtained the information regarding the Municipality's finances from one Leon Basson who was a municipal councillor in Madibeng for 18 years and is now a member of Parliament; by attending a community meeting where the financial
position of the Municipality was discussed; and also from undisputed information published in a local newspaper, the Cormorant.

In light of all this, it seems feeble to argue that the Municipality is not in serious financial trouble. This is the point that the Respondent makes in its broadcast.

[12] **Unfulfilled tenders**

This was the only complaint that was expanded on during argument by the Complainant at the hearing. The insert complained of is a one-liner in commentary twenty-five of the Final Script, which reads: "Or the Brits substation where R20 million was paid to a contractor who never did the work." The Municipality complained that this insert was not based on fact and that the broadcaster had failed to clearly present such reportage as an opinion. The argument was that a contract was awarded to a company called Ingplan Africa (Pty) Ltd to act as consulting engineer for the upgrading of the Brits Municipal Substation. In the process an amount of R4.7 million was paid to Ingplan to obtain switchgear from another company. Apparently this amount was never paid over by Ingplan. The Municipality therefore had to pay the same amount to the other company, and thereafter it cancelled its contract with Ingplan. A subsequent contractor did some calculations and concluded that the whole exercise boiled down to fruitless expenditure to the tune of R7 396 998. The Municipality instructed its attorneys to claim this amount plus interest, amounting to R10.6 million in total, from Ingplan. The Municipality further asserted that the substation had been completed and was now operational.

[13] The Respondent contended that it had obtained its information from the aforementioned Leon Basson and from another Madibeng councillor, Eddie Barlow. They also had access to minutes of a meeting of the Steering Committee. According to their information, two years after the contract with Ingplan was concluded, the work had still not been done, and there was evidence of unlawful activity to the extent that the Hawks (Directory for Priority Crime Investigation) were investigating Ingplan. The Respondent argued that it was reasonable for it to report that R20 million had been paid to a contractor who had not done the work. We will return to this matter, as well as other arguments, in the paragraphs below.
THE LEGAL POSITION

In their arguments before us the legal representatives of the parties, Mr Kanyane for the Complainant on the one hand, and Dr Milo and Ms Ampofo-Anti for the Respondent on the other hand, in their notes for argument referred us to legal authority regarding the manner in which this complaint should be approached. This was contained in extensive notes for argument by both sides, for which we thank them.

The representative for the Complainant based his argument on the fact, firstly, that the Respondent did not present its comments in such manner that they appeared clearly to be comment – instead, they were presented as fact. Secondly, the comments were not made on facts truly stated or fairly indicated and referred to. The representatives for the Respondent denied both grounds and argued that the Respondent presented its comments in such a manner that they appeared clearly to be comment, and that they were made on facts truly stated or fairly indicated and referred to. Both sides drew a comparison with the law of defamation, and both referred the Tribunal to the cases of National Media Ltd & Others v Bogoshi and Mthembi-Mahanyele v Mail & Guardian Ltd & Another. From these cases it appears that defamatory material may be published if publication complies with the requirement of reasonableness. Factors to be considered when investigating the reasonableness of the publication are: there must be reasonable grounds for believing that the imputation was true; the publisher (broadcaster in this case) should have taken proper steps to verify the accuracy of the material; the source must be reliable; a response should have been sought from the person defamed (criticised, etc.) and such response should have been published; it should have been reasonable to publish the facts in the particular manner and at the particular time. We should hasten to add that in Magagula v e-tv this Tribunal decided that the principles of the law of defamation, as expounded in the two cases mentioned above, are also applicable to the Broadcasting Code. It should also be noted that the Municipality was given the opportunity to respond to the allegations,

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3 1998(4) SA 1196 (SCA).
4 [2004] 3 All SA 511 (SCA); 2004(6) SA 329 (SCA)
5 BCCSA case 20/2007
which they preferred to do through the Premier of the province, and this response was broadcast.

[15] The first complaint of the Municipality was based on clause 28.3 of the Code of Conduct for Subscription Broadcasting Service Licensees, which is the wrong clause since it deals with news. This was not the nature of the programme complained about. Once the Municipality had instructed a lawyer, this mistake was set right and we allowed the Complainant's representative to continue his argument on clause 28.2.2 of the Code of Conduct which reads:

*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.*

[16] In previous complaints against the present Respondent and also against other broadcasters, this Tribunal has had the opportunity to express itself on the scope and effect of clause 28.2.2. An example is to be found in this Tribunal's decision in *City of Tshwane v M-Net* where the following was said:

Clause 35 of the Code (this reference is to the old Code. The comparative clause in the new Code is 28.2.2) requires of a broadcaster, when broadcasting comment on and criticism of any actions or events of public importance, to do so honestly and to do so on facts truly stated or fairly indicated and referred to. This relates to the principle of freedom of expression that is protected in section 16 of the Constitution of South Africa. The freedom of the press, expressly mentioned in section 16(i)(a), is one of the pillars of the democratic state. Without this freedom, there cannot be a democracy. Yet, as with other rights and freedoms enshrined in our Constitution, this freedom, cannot be unlimited. For this reason, section 36 of the Constitution provides for limitations to these rights and freedoms, on condition that such limitation

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7 In paragraph [17] and [18] of the judgment.
8 One could add here that "other media" is also mentioned in s 16(1)(a).
9 See, *inter alia*, *South African National Defence Union v Minister of Defence and Another* 1999(4) SA 469 (CC) and *S v Mamabolo* 2001(3) SA 409 (CC).
is reasonable and justifiable in an open and democratic society. The Broadcasting Code of Conduct has, accordingly, been agreed upon by role players in the broadcast industry. In effect, this Code puts some limitation on the broadcasters, who are signatories to the Code. Clause 35 (clause 28.2.2 of the new Code) of the Code is such an example. The effect of this clause is that signatories to the Code do not have an unfettered right to broadcast anything and everything, including comment on matters of public importance.

In applying the limitations to the fundamental right to freedom of expression as determined by clause 35, we are guided by the judgments of our courts. A good example of judicial interpretation of this freedom, as it relates to the printed media, is to be found in the case of Mthembi-Mahanyele v Mail & Guardian10. In this decision by our Supreme Court of Appeal, we read the following which is particularly relevant to this case11:

Freedom of expression in political discourse is necessary to hold members of government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably: that is with the reasonable belief that the statements made are true. Accountability is of the essence of a democratic state: It is one of the founding values expressed in section 1(d) of our Constitution.

and in the following paragraph of the judgment:

The State, and its representatives, by virtue of the duties imposed upon them by the Constitution, are accountable to the public. The public has the right to know what the officials of the State do in discharge of their duties. And the public is entitled to call on such officials, or members of government, to explain their conduct. When they fail to do so, without justification, they must bear the criticism and comment that their conduct attracts, provided of course that it is warranted in the circumstances and not actuated by malice.

It is clear from these passages that the “messengers” (the media) have a duty to inform the public what the politicians and the bureaucrats are doing in the discharge of their functions and duties. They (the politicians and the bureaucrats) are, after all, in the service of the public and are expending their (the public’s) tax money on the services that they are committed to provide. The “messengers”, on the other hand, have the duty to publish and broadcast their statements “justifiably and reasonably”, as stated by the Supreme Court of Appeal.

10 2004 (6) SA 329 (SCA)
11 At paras 65-6
FINDING

[17] It is clear to us that the “Carte Blanche” team properly investigated the allegations that came to their knowledge concerning corruption and mismanagement in the Madibeng Local Municipality. We were informed that the team visited the area on four occasions. From the broadcast, it is clear that the team made an effort to talk to as many people as was necessary to get to the truth. They also tried to speak to the municipal manager, who was the obvious person to speak to in these circumstances, but they were redirected to the Premier of the province. The latter was obviously not fully informed about the situation in Madibeng, which casts doubt on the wisdom of the Municipality in sending the team to the Premier's office.

[18] We return now to the specific complaints in the order in which they were discussed above, starting with the complaint about the lack of clean, running water in Jericho. This complaint was not argued before us by the representative of the Complainant. It is clear that the Respondent did what was expected of it in investigating the allegations of a dysfunctional water supply system in Jericho. They made personal observations about the system and talked to some of the inhabitants who are suffering because of lack of running water in their homes, an amenity that they had enjoyed 15 years before. The excuse that the Municipality relies on to counter the bad publicity is that 6 of the boreholes have been refurbished and that, according to the Premier, within the next 18 months "they should be on the right path." This excuse pales in the face of allegations that some people were shot dead when they protested about a lack of water, that they must pay for water meters that do not work, that they have to drink filthy water while the municipality pays R15 million per year to transport water in unsafe trucks which are described as the "hated symbol of the corruption of Madibeng", and that tenderpreneurs are "hitting the big time" while people are suffering. It is important to note that not one of these allegations is specifically complained about by the Municipality. We accept therefore that they are true, and have been properly substantiated. If this is so, we find that on the whole, the comments on corruption and mismanagement regarding the water system in Jericho were made on facts truly stated or fairly indicated and referred to, that they were "justified and reasonable", and the complaint about Jericho is therefore not upheld.
The next complaint is that the allegation regarding Madibeng’s bankruptcy on the basis of financial statements showing it had debts of R1 billion, is not correct. The Complainant's representative did not argue this point before us and we therefore have to adjudicate this point on the papers before us. The Complainant endeavoured to justify this debt by stating that R687 million of this amount was owing to the Public Investment Corporation. The Complainant argued that this liability is disputed and it can therefore not be said that it owes this amount.

The financial statements of the Municipality are not in dispute, however. What is in dispute is the interpretation of these statements. According to the Complainant, until a court finds that it must pay this debt, its liabilities do not exceed its assets. According to the Respondent, until a court absolves the Municipality from paying this debt, its liabilities exceed its assets and technically it is bankrupt.

We are not auditors and we cannot expect of the average viewer of this programme to distinguish between these interpretations. The Respondent relied on the information supplied to it by Leon Basson who was a councillor of the Municipality for 18 years and is currently a member of Parliament. The Respondent also attended a community meeting where these issues were discussed and it relied on undisputed comments in the Cormorant newspaper which serves the Madibeng community. Taking all these facts into consideration, it is clear to us that this insert was justified and reasonable. The comments were made on facts truly stated and the complaint cannot be upheld.

The last complaint, and the only one that was argued before us, is the one concerning unfulfilled tenders. An allegation was made in the broadcast that R20 million was paid to an unnamed contractor "who never did the work". The Respondent obtained this information from Leon Basson, a previous councillor and presently an MP, and from Eddie Barlow, a councillor, and also from minutes of a meeting of the Steering Committee. However, from the evidence before us, it appears that the amount of R20 million was not paid to the contractor. We were informed that the contract for the construction of a substation was awarded to Ingplan Africa (Pty) Ltd. An amount of R4.7 million was paid to Ingplan which in turn had to pay this amount to Actom Investment Holdings (Pty) Ltd for switchgear. This amount was never paid by Ingplan to Actom and the Municipality was therefore obliged to pay this amount to
Actom. After 2 years, the work for which Ingplan had tendered had still not been done, and because of this and other suggested unlawful activity by Ingplan, their contract was cancelled. As a consequence, the work was completed by Boswel & Genote Civil and Structural Consulting Engineers who calculated that the Municipality had incurred almost R7.4 million in fruitless expenditure by appointing Ingplan. The point was stressed that this amount was not paid to Ingplan. We were informed that Madibeng had instructed attorneys to recover the amount of R7.4 million plus interest, totalling R10.6 million, from Ingplan. It is not clear, however, how the amount can be claimed from Ingplan if it was not paid to them by the Municipality or if they were not directly responsible for the fruitless expenditure.

[21] We now have to decide whether the Respondent contravened the Code by broadcasting facts that were not true, alternatively comments that were not made on facts truly stated or fairly indicated and referred to. The statement about the Brits substation was addressed, almost as a question, to Philemon Mapelane, known as “Mr Cash”, who, in the programme insert, is described as the person who is responsible for Madibeng’s mess, who receives kickbacks, who determines who gets what tender and who gets hired and fired in Madikeng, and who controls all the big positions. As an aside we must observe that these defamatory statements which were broadcast about a person who, according to the evidence before us, is a member of the National Executive Committee of the ANC and a member of Parliament, have not been challenged either by the Municipality or by Mapelane, and no complaint was lodged in this regard. Mr Mapelane’s response was that the project was still running at the time he was suspended (as municipal manager), and he did not know how it was handled from then on. Given this unhelpful response, the Respondent was forced to rely on its sources referred to in the previous paragraph, which the Respondent obviously regarded as trustworthy. The dispute seems to revolve around the amount of R20 million and a contractor “who never did the work”. It is clear that the amount of R20 million was not paid to Ingplan. In the end the Municipality calculated that an amount of R10.6 million was wasted by Ingplan, and that they plan to claim this amount from them. Some might argue that this is a difference of almost 50% and is proof that the information provided by the Respondent is false. However, we view this in the broad context of a broadcast that exposed a municipality where corruption is rife and mismanagement seems to be the norm. In commentary 10 of the Final
Script, the Municipality is even referred to as "a mafia style operation rather than a municipality". This allegation was also not challenged. In this context we would again like to refer to the following quotation from the Appeal Court decision of Mthembi-Mahanyele v Mail & Guardian:  

And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably: that is with the reasonable belief that the statements made are true.

The difference in amounts allegedly paid to Ingplan seems to be insignificant in light of all the unchallenged allegations of corruption and mismanagement, and we think that this is indeed a case where "errors of fact should be tolerated". The contract with Ingplan smacks of corruption, and this is the point that the Respondent wanted to make. Furthermore, concerning the dispute about the work that was done by Ingplan, the allegation that the work was not done could be interpreted as referring to the completion of the work. The work had to be completed by another contractor because of the money that was obviously spent in a corrupt manner and because of other "suggested unlawful activity". This is clearly also an instance where errors of fact should be tolerated, if this was ever an error. In the result this complaint is not upheld.

Finally, we are satisfied that the Respondent, as far as all three complaints are concerned, "had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue." We are also satisfied that is was reasonable for the Respondent to publish the particular facts.

The Municipality's four complaints, one of which was withdrawn, seem to be a fairly feeble attempt to bring the Respondent to book, as it were, in light of some 27

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12 Supra at paras. 65-66.
13 Quoted in National Media Ltd & Others v Bogoshi 1998(4) SA 1196 (SCA) at p1211F-G.
allegations in the programme, some being of so serious a nature as to warrant criminal prosecution.

In the result no contravention of the Code could be found and the complaint is accordingly not upheld.

HP VILJOEN
ACTING CHAIRPERSON

Commissioners Harper, Mbombo, Mmusinyane and Sewlal concurred with the judgment of the Acting Chairperson.