CASE NUMBER: 29/2014

DATE OF HEARING: 14 AUGUST 2014
JUDGMENT RELEASE DATE: 25 SEPTEMBER 2014

KWELE COMPLAINANT

vs

SABC RADIO (MOTSWEDING FM) RESPONDENT

TRIBUNAL: PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)
MS G HARPER
PROF HP VILJOEN (DEPUTY CHAIRPERSON)
MR B MAKEKETA (DEPUTY CHAIRPERSON)
ADV B MMUSINYANE

FOR THE COMPLAINANT: The Complainant was invited but was unable to attend.

RESPONDENT: Mr Timothy Magampa, Acting Manager, Broadcasting Compliance, Policy and Regulatory Affairs, accompanied by, Mr Nyiko Shibambo Compliance Officer Broadcasting Compliance and Legal and Regulatory Affairs.

Right of reply - reply, although afforded two days [later] late, considered reasonable - complaint not upheld - Kgwele vs Motsweding FM, Case: 29/2014(BCCSA)

SUMMARY

The Registrar received a complaint concerning a news broadcast by the respondent broadcaster in which it was reported, on the news and current affairs programme, that the complainant had been dismissed by the North West Province Office of the Premier following a disciplinary hearing that found him guilty of 7 [cases] charges of misconduct. The Complainant contended that such reporting was riddled with distortion and misuse of state resources. Also that such a report of him, being unable to participate on the news programme, was due to a certain politically motivated plot to implicate him. He was not given a right of reply as required. The Tribunal held that the complainant was given an opportunity to reply to his dismissal news, on the same news programme, within a
reasonable time acceptable within the Code. Further, the Tribunal held that the complainant’s failure to adequately respond to all the issues that were aired by Motswedeng FM on his dismissal cannot be remedied by the Tribunal, especially when an opportunity was given to him to set the record straight and he failed to do so. No contravention of the Code was found and the complaint was not upheld.

JUDGMENT

B MMUSINYANE

[1] A complaint was received by the Registrar and she referred it to the Chairperson, who appointed a Tribunal to adjudicate the matter.

[2] The complaint reads as follows:

"LODGING OF COMPLAINT AGAINST SABC

I LM Kgwele herewith wish to lodge a complaint against the SABC with the Press Ombudsman for the public broadcaster’s distortion of my statement responding to my widely publicised dismissal from the Office of the Premier.

The SABC first broadcasted the statement issued by the Acting Director General on its Monday 14 July 2014 21:00 newsbulletin on Motswedeng FM and on Tuesday 15 July 2014 morning bulletins without granting me the right to reply or comment.

The Corporation had also in contravention to article 11(2) (a) of the BCCSA Free-To-Air Code of Conduct for Broadcasting Service Licensees 2009 also reported on television and all its stations and posted on its website that I had alleged that politicians are involved in the bigger orchestrated plot to purge and ultimately destroy me (posting from the SABC Website is hereunder attached for ease of reference). Such insensitive distortions and sensationalised reporting not only have the potential to jeopardise my case including the appeal process but are also a violation of my constitutional rights. I would appreciate your adjudication of this matter and feedback at your earliest convenience.

In response to your email acknowledging receipt of my formal complaint lodged against the SABC, kindly receive my response as follow:

1) The specific time for the newsbulletin on 15 July 2014 is 6:00 on Motswedeng FM. I presume that it was also broadcast on all other SABC sister stations as it was also discussed by the presenter on Motswedeng FM's Boresetse current affairs show between 6:00 - 7:00. Hope you find this in order”.

[3] The Broadcaster responded as follows:
In respect of the above-mentioned complain, we submit a copy of a segment electronically.

Please find our comments as follows.

1. The BCCSA has asked us to comment on the complaint in terms of broadcast in terms of clause 10, 12 and 13 of the Code.

2. The basic requirement for news is that it must be broadcast truthfully, accurately and fairly.

3. We submit that the news item in question complied with all these requirements. The story was generated from a media statement issued by the acting Director General at the Office of the Premier, on the 14/07/2014. Please see attached media statement for your consideration.

4. Upon receipt of the media statement, Mr Lesiba Kgwele was approached for comment by our Current Affairs Morning Show to respond on the 15/07/2014 as this was a matter of public interest; he agreed but later declined the opportunity citing that this will tarnish his political reputation in the province. However, we have reasonably and unintentionally omitted to mention in our show that the complainant declined to comment on the matter.

5. We wish to emphasize that it was mentioned in the news that Mr Lekgwele has a right to challenge the allegations against him.

6. We did not have any intention to cause any harm to the complainant whatsoever, but to broadcast this matter of huge public interest, more so as the station is based in and serves largely in the region where complainant is based.

7. We have taken note of the omission as a principal concern and consider this in future broadcasts.

8. Although, we respectfully submit that there has been no contravention of the Code.

MEDIA STATEMENT ON THE DISMISSAL OF MR LESIBA KGWELE

This serves to confirm that Mr Lesiba Kgwele, Chief Director Communication in the Office of the Premier, North West Province is dismissed with effect from 11 July 2014 following disciplinary hearing findings.

The investigation into the allegations of misconduct of Mr Lesiba Kgwele was initiated by his supervisor who was also the Accounting Officer of the Office of the Premier on 18 March 2013.

The investigation report as well as the charge sheet was approved on 22 July 2013.

Mr Kgwele was charged among others with gross insubordination and failure to carry out lawful orders and routine instructions without reasonable cause.

Normal processes of misconduct were followed in terms of the SMS Handbook and the Disciplinary Code and Procedures for the Public Service.

The disciplinary hearing was chaired by Adv. Afzaal Mosam who is a practising advocate in Sandton.

Following the disciplinary processes, Mr Kgwele was found guilty on 7 out of 9 charges on 19 March 2014 and a sanction of dismissal was issued by the Chairperson on 21 May 2014.

In line with the Ministerial Directive: Disciplinary Code and Procedures for member of Senior Management Service dated 23 March 2003, the Accounting Officer is obliged to implement the sanction. In terms of the same Directive, Mr Kgwele has the right of appeal.
The Complainant replied as follows:


In response to the SABC’s response dated 31 July 2014, kindly find my response and dissatisfaction as follows:

The SABC has conveniently not responded to the complaint that it broadcasted the story in its 21:00 news bulletins on Monday 14 July 2014 and has deliberately misrepresented that it had approached me to participate in its current affairs programme on Motsweding FM after it had repeated the story on its 6:00 news bulletins on Tuesday 15 July 2014 without granting me the right to comment and or reply.

I was only invited to participate in the current affairs of Wednesday 16 July 2014 and not that of 15 July 2014 as alleged. This was after I had issued the media statement at 1:03pm on Tuesday 15 July 2014 copied hereunder for ease of reference.

I had not declined to participate in the current affairs of Wednesday 16 July 2014 for the reason cited by the SABC but because it would jeopardise my case as I still have an appeal to lodge with the provincial administration.

The report by the SABC that I had alleged that senior politicians are involved in the bigger orchestrated plot to purge and ultimately destroy me was an insensitive distortions and sensationalised reporting that not only has the potential to jeopardise my case including the appeal process but are also a violation of my constitutional rights.

The broadcast of the story on SABC Radio Stations new bulletins, posting of distorted information on the SABC website and broadcast of the distorted information on the current affairs programme on Motsweding FM without my comment and the distortion that I had alleged that politicians are involved in a plot against me constitute violation of the code.

The admission that my response was not mentioned in the current affairs is indicative of the determination of the corporation or someone within the corporation to deepen the crisis and jeopardise my case with far reaching consequences on my person and career.

I am not a politician but a public servant and take serious exception that the corporation suggests that there were political considerations in my decision not to participate in the current affairs programme."

EVALUATION

The BCCSA Tribunal always appreciates it when complainants are in attendance at the hearings since most issues are then emphasized, clarified and even strengthened. Thereby an opportunity is also granted for debate between the parties, which then places the Tribunal in a better position to adjudicate a matter. However the inability of any party to attend the Tribunal hearing does not in any way jeopardize the absent
party’s case, since the Tribunal also asks questions, and weighs the arguments of the two sides, whether oral or written, against each other before coming to a conclusion.

[6] The SABC was requested to provide its response in terms of clauses 11, 12 and 13 of the BCCSA Free-to-air Code of Conduct for Broadcasting Service Licensees 2011. The relevant clauses to this matter are:

Clause 11. News
(1) Broadcasting service Licensees must report news truthfully, accurately and fairly.

(2) News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by:

(a) Distortion, exaggeration or misrepresentation.

(b) Material omissions; or

(c) Summarisation

(3) 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.

(4) Where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate, clearly that such is the case.

Clause 12. Comment
(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.

(3) Where a person has stated that he or she is not available for comment or such a person could not reasonably be reached, it must be stated in the programme

Clause 13. Controversial Issues of Public Importance
(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 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 provide where appropriate, for examples in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.
The Tribunal has read the submissions made by both parties and also had an opportunity to listen to the three related recorded clips which are critical to this matter. The three news broadcasts on the same issue were on 14th July and 15th July at 06h00 news, and at 18h00, on Tseleletsele news programme and lastly on 16th July that was subsequently accompanied by the complainant’s reply to his alleged dismissal.

On 16th July at 18h00 the complainant responded on Tseleletsele news, which is a current affairs programme, that the news broadcast of his dismissal before he exercised his right of appeal, amounts to a violation of his rights and that such a broadcast was likely to compromise his case. Further, that for all purposes he considered himself to still be a public servant and the news as depicted had trampled on his right and image as a public servant. Subsequent to his response (reply) the presenters continued to report that the complainant had indicated that there is an alleged political plot by some party officials, within the Province, to purge him and that they were allegedly using state resources. That is how the news on this matter ended.

There are two main issues to be decided before the Tribunal namely:

(a) Whether or not his reply in terms of the right afforded to the complainant on 16 July 2014, by Motsweding FM, can be found to have been done within a reasonable time and if such a reply constituted an adequate reply to issues raised.

(b) Further, whether or not failure by the complainant to challenge, as part of his reply, the whole story reported during his reply opportunity, may subsequently be remedied by the BCCSA Tribunal.

In regard to the first main issue in paragraph 9 (a) above, it is clear that Motsweding FM admitted not to have contacted the complainant on 14 and 15 July. On these days news was aired that the complainant had been dismissed as the Chief Director Communication within the Office of the Premier of North West. At the same time, Motsweding FM failed to mention any endeavours made to contact the complainant as required, despite having allegedly done so. However, it is clear that the said news was
generated from a Media Statement as issued by the Acting Director General within the Office of the Premier.

[11] The complainant hereby challenges the failure by Motsweding FM to give him a right of reply on the 14th to 15th July 2014 and also challenges the station’s allegations that he refused to be interviewed on air on the basis that he feared that there was a political plot to implicate and destroy him. However in his reply on 16 July 2014, from the records before us, he did not respond much to the second matter while he challenged his dismissal claims.

[12] It needs to be noted that with a right of reply having been offered two days later on the same programme, the complainant already knew all the issues reported concerning his dismissal case. Essentially a right of reply is an opportunity given to the complainant to refute any statements reported that she/he believes are untrue concerning him and at the same time setting the record straight. This entails that once a right of reply has been granted and used, one cannot subsequently complain that it was inadequate, unless the broadcaster removed a part of it.

[13] Motsweding FM admitted not to have contacted the complainant when they first reported the news of his dismissal during the 14th and 15th July. The station nevertheless managed to get hold of the complainant on the 16th July and afforded him an opportunity to reply to what was said on the same programme two days earlier. Although Motsweding FM on two occasions failed to indicate that the complainant was contacted for comment on the said news, in terms of clause 12 of the Code, that should not be looked at in isolation. Consideration should, however, be given to all the relevant circumstances as a whole in determining if reasonable time was made available by the Broadcaster to remedy the omission to have afforded him a right to reply.

[14] It is evident that a right of reply was given to him. However what needs to be determined is if it was given within a reasonable time. An effort has been made to define “reasonable time” and among those is the Legal Dictionary that states:

In the absence of an express or fixed time established by the parties to an agreement or contract……., any time this is not manifestly unreasonable under
the circumstances. For example, if a contract does not fix a specific time for performance, the law will infer (and impose) a reasonable time for such performance. This is defined as that amount of time which is fairly necessary, conveniently, to do what the contract requires to be done, as soon as circumstances permit.¹

[15] It is evident that Motswedeng FM has carried the dismissal of the complainant as its news for a period of two days consecutively without expressly indicating if the complainant was refusing their interview invitation. From the records it appeared that the complainant accepted the station’s invitation on its current affairs news on 16 July 2014 to reply to the news of his dismissal after he had issued a press statement.

[16] As a result, the Tribunal needs to determine whether or not the 16th July reply can be interpreted as having been granted within a reasonable time; thereby remedying the 14th and 15th July omissions. In deciding a similar point in another matter, this Tribunal held in the Club Leisure Management v SABC¹ case that:

The question is whether the follow-up programme remedied the omissions which were evident in the first programme. This Tribunal has, on occasion, held that a remedy may appear in a follow-up programme. In fact, clause 13 supports this approach. It has also been held that, even where a mistake is made and a speedy invitation is sent to the party that has been subjected to serious criticism, and this invitation is not accepted, the complaint was not justified. An invitation to reply, if sent within a reasonable time, should be accepted, otherwise there is no remedy in terms of clause 13.²

[17] It is clear that the complainant was afforded an opportunity to reply to his dismissal news broadcast and his response indeed challenged the manner in which his dismissal was handled, both by the employer and Motsweding FM. As a result Motsweding FM carried his dismissal as its news broadcast for a period of two days consecutively and managed to afford the complainant an opportunity to reply to the said issue within the same news programme.

² Club Leisure Management v SABC ¹, Case Number: 52/2012.
³ Club Leisure Management v SABC ¹ at Para 7.
The Tribunal hereby accepts that the time period taken by Motsweding FM to offer him a right of reply was reasonable in accordance with clause 13 of the Code and the *Club Leisure Management v SABC 1* case.

The second issue to be decided relates to whether or not the complainant’s failure to adequately respond during his opportunity to reply about the alleged political plot to implicate and destroy him, provides him with a further remedy. The manner in which the complainant has exercised his right of reply cannot be remedied by this Tribunal. If he had an adequate opportunity to respond, he cannot, afterwards, attempt to reword his reply.

The Complainant’s adequacy or sufficiency of reply concern can be seen to be similar to what was found in *J Kaler v M-Net* dealing with a Gaza War question of striking a balance between what the broadcaster aired and whether or not the response given was sufficient. The Tribunal found that it is not the amount of time but the essence of what is said that counts.

Consequently the complainant’s failure to state his response fully cannot be regarded as a contravention of clause 13, when in fact an adequate opportunity was given to reply and not fully used by him. The complainant already heard for two days what was broadcast on Motsweding FM news. He was afforded an opportunity to reply to the said reporting and therefore there is no reason to conclude otherwise than that an adequate opportunity had been granted by the broadcaster. If he did not, in his view, utilize it adequately, the fault does not lie with the broadcaster.

Lastly, although this matter was not in issue, it is clear that the news broadcast aired was based on a media statement as issued and circulated by the Acting Director General in the Office of the Premier on 14 July 2014, which stated in full why the

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4 [2009] JOL 23569 (BCCSA)
5 *J Kaler v M-Net Case* at para 8.
complainant was dismissed. As a result Motsweding FM could not be blamed to have reported news as publicly made available to them.

[23] Accordingly, the Tribunal found that there is no contravention of clauses 11, 12 and 13 of the Code by the Broadcaster. A right of reply was afforded to the complainant within a reasonable time. The fact that he may have not stated fully his side of the story and/or challenged certain parts of it in his reply opportunity, cannot be seen as an act to be remedied by the Tribunal, and thus cannot be a contravention of the Code. The alleged political plot should have been challenged during the same response he made.

The Complaint is, accordingly dismissed.

ADV BOITUMELO MMUSINYANE
COMMISSIONER

The Chairperson Prof Van Rooyen and Commissioners Harper, Makeketa and Viljoen concurred with the judgment of Adv Mmusinyane.