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**CASE NUMBER: 30/2014**

**DATE OF HEARING: 4 SEPTEMBER 2014**
**JUDGMENT RELEASE DATE: 03 OCTOBER 2014**

**NZIMANDE** **COMPLAINANT**

**vs**

**SABC (SAFM)** **RESPONDENT**

**TRIBUNAL:** **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
**DR L GILFILLAN**
**MS G HARPER**
**MS N MAKAULA-NTSEBEZA**
**MS Z MBOMBO**

**FOR THE COMPLAINANT: Ms Dinesha Deeplal, Attorney: Strauss Daly Attorneys.**

**RESPONDENT: Mr Fakir Hassen, Manager Broadcasting Compliance, Policy and Regulatory Affairs accompanied by Mr Timothy Magampa Acting Broadcasting Compliance, Policy and Regulatory Affairs and Legal, Mr Nyiko Shibambo, Compliance Officer Broadcasting Compliance Regulatory Affairs, Mr DP O'Donnell, SAfm Station Manager.**

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*Defamation – caller referring to Cabinet as entirely corrupt – presenter not adding corrective – defamatory -Nzimande vs SABC (SAFM), Case: 30/2014(BCCSA)*

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## SUMMARY

**On Sunday 10 August 2014 on the SABC SAFM programme, 'Media at SAFM' a caller by the name of 'Sig from Randburg' called into this programme between 9h00 and 9h30. Amongst other things he referred on air to the Cabinet (the Executive Arm of the State)**

**as an "entirely corrupt Cabinet". The presenter did not correct the statement. A complaint was received from a Cabinet Minister arguing that the statement was defamatory and that the presenter should have asked the caller either to prove the statement or to withdraw it.**

**Held that the omission on the part of the SABC amounted to a contravention of the Broadcasting Code in that it permitted a defamatory statement to have reached the public without a correction**

**Complaint upheld. No sanction imposed – the judgment being regarded as a guideline for broadcasters.**

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**JUDGMENT**

**JCW VAN ROOYEN SC**

[1] The Complainant, a Minister in the Cabinet of the Republic of South Africa, filed a complaint with the Registrar. The Registrar decided to entertain the complaint on the basis that it was a complaint which prima facie made out a case that clause 15 of the Broadcasting Code had been contravened in a broadcast of the Respondent. The clause, inter alia, protects dignity and reputation. I referred the matter to a Tribunal.

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

> "On Sunday 10 August 2014 on the SABC SAFM programme, 'Media at SAFM' a caller by the name of 'Sig in Randburg' called into this programme between 9h00 and 9h30. Amongst other things he,on air, referred to Cabinet (the Executive Arm of the State) as an "entirely corrupt Cabinet". The presenter of the show neither called upon Sig to withdraw that remark or to otherwise provide proof on his allegations. Instead the programme presenter immediately praised Sig for raising important matters without challenging this statement by the caller. As far as I am aware the Broadcasting Code is clear that the public broadcaster must be accurate in its reporting. This is a very gross violation of the rights of, if not an insult to, the individual members of the Cabinet, as well as Cabinet as a collective.
>
> I am formally submitting this complaint so that the SABC is called to order for its serious violation of the Broadcasting Code that it is a signatory to. Thanking you in anticipation."

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

> "**BCCSA COMPLAINT: DR BE NZIMANDE - SAFM - MEDIA AT SAFM - 10.8.204 - 9.00. In respect of the above-mentioned complain,please find our comments as follows.**
>
> 1. The segment in question refers to a programme called Media @ SAfm. The topic of the day under discussion was on the coverage of women in the media. The three guests invited to the show were Minnette Nieuwoudt- Researcher at Media Tenor, Katherine V Robinson, Editor & Communications Manager- Gender Links and William Bird - Media Monitoring Africa.

2. After discussing for about 30 minutes the apparent gender inequality in the media, a listener by the name of Sig in Randburg called in about 10 minutes into the show and congratulated female journalists for their heroism in pursuit of their profession. After a while he threw in a comment about the heroism as exemplified by Thuli Madonsela in the face of an entirely corrupt cabinet before wondering whether the nurturing nature of females was really capable of being such "brazen fighters.

3. The presenter of the programme ended the discussion at this point by suggesting that the female nature and the world of media was a subject for another day.

4. At no point did the presenter praise Sig for raising important matters as alleged. Neither can the comments of the caller be construed to be those of either the presenter or the SABC. They were clearly the opinion of the caller and not part of any reporting by the public broadcaster.

We thus conclude that there was no contravention of Code."

## EVALUATION

[4] The programme was broadcast live and callers were invited to phone in. The presenter, we were informed by Mr Hassen on behalf of the SABC, was a stand-in who was substituting for the usual presenter who was unable to present the programme on that day. Mr Hassen conceded that the stand-in was an inexperienced presenter, according to him. Although we accept, as stated unconditionally by the SABC, that the caller's view is not the view of the SABC, the SABC has to take responsibility for the content of its broadcasts – including this one. An omission to correct or comment may, in certain circumstances, also amount to a contravention of the Code. There is no reason to deviate from a long line of cases in the law of delict which have made it clear that an *omission* may also amount to a delict in circumstances where it was reasonable to have *acted*.[1]

[5] The question before us is, accordingly, whether there were circumstances which placed a duty on the presenter to act by stating that the caller had overstated his case. It was, in fact, stated at the hearing that what was said by the caller was not the view of the SABC. This is understandable, since no reasonable person, including a broadcaster of any repute, would support a statement such as the one made by the caller, without convincing evidence that it was in fact true. Evidence would, on a balance of probabilities, have to show that what was said by the caller was true and in the public interest or was reasonable or was, for example, said in jest and understood to be such – all typical defences on an allegation of what was *prima facie* defamatory.

[1] *Regal v African Superslate (Pty) Ltd* 1963(1) SA 102 (A).

And, if these defences are not raised successfully, the complaint of defamation must be upheld. In the process, it is of course accepted that politicians should tolerate a higher level of criticism than private citizens.[2] The defamation was, of course, by the caller and not by the SABC.

[6] **Clause 15(1) of the Code provides as follows:**

> 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.
>
> Public interest will, of course, not be a defence on its own. In the case of defamation, for example, the defence is public interest *and* truth.

[7] Two of the relevant meanings of "corrupt" in the *Oxford English Dictionary* read as follows: "Debased character; depraved; perverted. Influenced by bribery or the like." I am convinced that the view of the caller, in the present matter, amounted to saying that each member of the Cabinet was, in a dishonest manner, involved in the Nkandla matter. It might be argued that listeners would have realised that what had been said by the caller was an overstatement with a political motive. That would, for example, be acceptable within a political debate, where a contrary view would have been a likely ingredient of that debate. But the programme did not amount to a political debate and the caller clearly misused the opportunity to implicate every cabinet member in crime.

[8] In *The Citizen 1978 (Pty) Ltd v McBride (Johnstone, Amici Curiae)* 2011 (4) SA 191 (CC) the approach of the Constitutional Court to a defence of fair comment (or, as

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[2] In *Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) the court held that:'Although conscious of the fact that I am venturing on what may be new ground I think that the Courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if the speakers were to use the tones, terms and expressions that one could expect from a lecturer at a meeting of the ladies' agricultural union on the subject of pruning roses! Some support for this view is to be found in a passage in Gatley on *Libel and Slander*, 3rd ed. P. 468. It reads: "In cases of comment on a matter of public interest the limits of comment are very wide indeed. This is especially so in the case of public men. Those who fill public positions must not be too thin-skinned in reference to comments made upon them." Also see *Mthembi-Mahanyele v Mail and Guardian Ltd and Another* 2004(6) SA 329 (SCA) where a mistake, within this sphere, was regarded as reasonable by two Judges, one Judge having found that the minister was over-sensitive, and two Judges having found that the untrue statement was defamatory of the Minister. The claim was, accordingly, dismissed by way of a majority vote.

the Court proposed, "protected comment") as a defence of defamation is summarised as follows in the head note:

> "To establish the defence a defendant had to show: (i) that the statements in question were comment or opinion; (ii) that they were 'fair'; (iii) *that the facts the comments were based on were true;* and (iv) that the comments related to a matter of public interest. (Paragraph [80] at 217E-G.) [italicised for emphasis]
>
> As to the requirement that the comment be 'fair', this meant that the defendant had to hold the opinion honestly and without malice. It did not mean that the comment itself had to be fair or just – indeed it could be just the opposite. (Paragraphs [81], [83], [103] and fns 126-127 at 218A-C, 219B-C, 225B-E and 226F-J.)
>
> With regard to the requirement that the facts be truly stated, this meant it had to be clear to a reader what the facts underlying the comment were. This did not mean the facts necessarily had to be set out in full: where the facts were so well known as to be notorious, they did not need to be recited. In the case of a newspaper defendant, whether this requirement had been met had to be assessed by considering the newspaper's coverage as a whole. (Paragraphs [88]-[89] and [95]-[96] at 221C-G and 223A-D.)
>
> The court also considered the source of the protection of comment on matters of public interest. This was the norms and values of the Constitution, especially the right to freedom of expression in s 16. These sometimes required that public comments be protected, even where they were unreasonable or prejudiced, because it was valuable for divergent views to be aired and subjected to scrutiny and debate. The boundaries of the permissible ambit of public discussion were set by the constitutional protection of freedom of expression, balanced against individuals' dignity and reputation. (Paragraphs [82]-[86] and [100] at 218C-221A and 224B-D.)
>
> For these reasons, it might be clearer, and helpful in understanding the law, if the defence were known as 'protected comment'. (Paragraphs [82]-[84] at 218C-220B.)"

[9] I have no doubt that the words used by the caller were *prima facie* defamatory. Not one of the usual defences were applicable: the words were not true and in the public interest to broadcast; there is no basis for finding that the words used were based on a reasonable error – they were uttered by the caller with enthusiasm and conviction and, although this is not necessary for a finding of defamation, with clear evidence of malice; there is no room for a defence of jest – the words were uttered in all seriousness; the words cannot be regarded as part of an academic discussion, where harsh words are, at times, used in answering a provocative question or responding thereto. They were also not uttered as part of an election campaign or political debate where more tolerance would, in the ordinary course, apply.

[10] I have also considered whether the words did not amount to fair comment as discussed by the Constitutional Court in the *Citizen* matter (above) and by the South Gauteng High Court this year in *African National Congress v Democratic Alliance and*

*Another* 2014 (3) SA 608 (GJ). In the first judgment it was held that it was permissible to refer to a person who had been convicted of murder as a "murderer", in spite of the fact that he had been granted amnesty by the Truth and Reconciliation Commission. The relevant legislation, the Court held, did not remove the original finding of murder by a Court, but provided for a reduction or cancellation of a sentence imposed. In the second judgment it was held that it was not defamatory for the Democratic Alliance to state the following in an SMS to a part of the electorate five weeks before the 2014 General Election: "the Nkandla report shows how Zuma stole your money to build his R246m home. VOTE DA on 7 May to beat corruption. Together for change". The South Gauteng High Court held that, since the Public Protector's Report found that the Nkandla project amounted to a "licence-to-loot", the use of the word "stole" remained within the permissible realm of fair comment. Hellens AJ concluded as follows:

> "When one takes the core findings of the Nkandla report into account — particularly in the context of the robust political debate which lies both at the centre of freedom of expression and at the centre of not stifling proper political debate — I ask myself the question whether the message contained in the SMS ('the Nkandla report shows how Zuma stole your money to build his R246m home') is an opinion that a fair person, perhaps in extreme form, might honestly hold. I ask myself whether the comment, objectively speaking, could qualify as an honest, genuine expression of opinion relevant to facts upon which it was based, and not disclosing malice. I ask myself the question whether, in particular in the political environment, the SMS of the DA is 'fair', in the sense that I have referred to above, in order to ensure that divergent views are aired in public and subjected to scrutiny and debate. I find the answer to those questions to be in the affirmative."

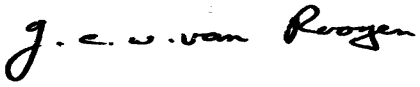
[11] In the present broadcast, before uttering the words complained of, the caller praised the Public Protector, as a woman, for the stand that she was taking (the role of women being the general topic under discussion). However, the Democratic Alliance's SMS differed from the words used by the caller in the present matter in that he drew in the "entire cabinet", thereby including the Complainant. Such inclusion cannot be regarded as falling within the parameters of the finding in the so-called "Nkandla Report". The caller was also not using the word "corrupt" within the parameters of a political debate or a political campaign, as was the case in the *ANC* case, referred to above. In the *Citizen* matter the Constitutional Court also required the comment to be based on facts that were true. There are, however, no facts that support the words of the caller. The caller clearly abused the opportunity granted to him in order to broadcast his unfounded view. Ultimately, the words used were clearly defamatory and no interpretation can be attached to them other than that *each* member of the cabinet is corrupt in the sense of at least being susceptible to bribery or as having been

bribed or, in the sense of being dishonest in some way. There is nothing in the Madonsela Report which would support such a view or could, even within the parameters of the 2014 South Gauteng *ANC* judgment, support such a view.[3]

[12] The question that remains is whether the SABC, by way of its presenter, had a duty to react. Was it, in terms of the Appellate Division's judgment in *Regal v African Superslate*,[4] unreasonable for the SABC to have failed to react? My view is that the caller's words, which were so clearly defamatory, were in need of some form of qualification by the SABC's presenter. She, however, said nothing to counter them. I should add that I do not believe that there was any evidence of malice on her part. It was a difficult situation to address, and clearly required extensive broadcasting experience.

[13] We do not regard it necessary to impose a sanction on the SABC for this omission. The omission was bona fide and the judgment should be seen as a guideline for future training.

**The Complaint is, accordingly, upheld. No sanction is imposed.**



**JCW VAN ROOYEN SC**
**CHAIRPERSON**

***Commissioners Harper, Makaula-Ntsebeza and Mbombo concurred with the judgment of the Chairperson; Commissioner Gilfillan contended that the caller's reference to corruption was a typically hyperbolic statement which the average listener would not have taken literally.***

[3] By referring to the ruling on the DA SMS I am not expressing a view as to whether that judgment was correct on the facts. The election circumstances in the DA case, however, differ substantially from the circumstances in the present broadcast.

[4] See note 1 above.