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CASE NO: 34/2010

REASONS BY CHAIRPERSON OF THE BCCSA

IN RE 2010 COMPLAINT BY PROF LOTZ AGAINST M-NET

IN RE 2010 COMPLAINT BY HUMAN RIGHTS COMMISSION AGAINST M-NET TO PROCURE REDRESS BY THE BCCSA IN FAVOUR OF PROF LOTZ

IN RE 2014 FINDINGS AND RECOMMENDATIONS BY HUMAN RIGHTS COMMISSION ON THE SAME MATTER

SUMMARY OF REASONS BY BCCSA CHAIRPERSON

REASONS FOR DECLINING COMPLAINTS SUBMITTED TO BCCSA BY PROF LOTZ PERSONALLY AND THE HUMAN RIGHTS COMMISSION IN 2010.

This matter has its roots in two complaints that the Registrar of the BCCSA received in 2010 in regard to a broadcast during 2008 by M-NET. One was from Professor Jan Lotz, whose attempt at having his complaint against M-NET resolved by South African Human Rights Commission (HRC) was not successful at the time. Later in 2010, the HRC filed a complaint with the BCCSA, based on the same broadcast, in order to secure redress for Prof Lotz.

The broadcast included a blurred image of the body of the murdered daughter of Prof Lotz and his wife for a few seconds. In both instances, the Registrar of the BCCSA was not prepared to entertain the complaints because an inordinate period had elapsed since the time of the broadcast and the subsequent lodging of the complaint with the BCCSA – in the former case a period of 18 months, and in the

latter case 22 months. No acceptable reason was given for the late filing, apart from the fact that the matter had not been resolved by the HRC. No appeal was lodged with the Chairperson of the BCCSA against the decision of the Registrar. The general rule is that complaints must be filed within 30 days after the broadcast. The Chairperson may, however, grant an exception in cases where it would not be prejudicial to the interests of justice. The 30 day period to file complaints is based on the necessity for broadcasters to have certainty as to their position and also that the viewer should, if a correction is broadcast, have a reasonably clear memory of the broadcast. Exceptions to this rule, up to six months, have been granted by the Chair in cases where the complainant put forward special circumstances. In the present case, no such special circumstances were placed before the Registrar.

The HRC has on at least two occasions filed complaints with the BCCSA and would be aware of the time limits. It also did not apply to the Chairperson for an extension of the time period.

Recognising the understandably distressing nature of the death of their daughter in the case of Prof and Mrs Lotz, and with due respect to the HRC, the explanation of the BCCSA is summed up as follows:

- (a) Prof Lotz should at the outset have filed his complaint with the BCCSA. The HRC is not empowered by law to make a *binding* decision on the matter. At most, it could make a *recommendation* (as it has now done in November 2014), attempt to get the parties to settle the matter, file a complaint with the BCCSA, as it has done in the past or take the matter to a Court in the interests of a Complainant so as to obtain redress. The BCCSA adjudicates complaints against broadcasters under its jurisdiction regarding the content of broadcasts. Its decisions against broadcasters are *binding* on broadcasters under its jurisdiction. M-NET falls under its jurisdiction in terms of section 54(3) of the Electronic Communications Act, and before that section 56(2) of the Independent Broadcasting Authority Act 1993. The IBA approved this jurisdiction in 1995 and it is still valid today.
- (b) Of course, there is also an alternative route to obtain a *binding* decision in contrast to a recommendation: in the case of

defamation, infringements to dignity and privacy, the matter could also be taken to Court. This course was not taken by the SAHRC or Prof Lotz. It should be mentioned that where a broadcaster has not accepted the jurisdiction of the BCCSA to deal with complaints against it – there are community broadcasters which fall within this category – the matter may also be taken to the Complaints and Compliance Committee at ICASA, which is also authorised by the Independent Communications Authority of South Act 13 of 2000 (as amended) to issue an advice to the Council of the Authority to consider an order against broadcasters which contravene the Broadcasting Code.

- (c) At the end of February 2014, however, the BCCSA was informed that the Human Rights Commission had decided that M-NET was in breach of the Subscription Broadcasting Code. It required M-Net to provide it with reasons as to why it should not apologise to Prof and Mrs Lotz, and requested the BCCSA to provide it with best practice guidelines for future protection of the dignity of viewers. The HRC decision was, of course, an interim decision which could be amended or withdrawn, depending on the submission put forward by M-NET.

The BCCSA Chair informed the HRC that as an independent Tribunal in its own right, it would be inappropriate for the BCCSA to file submissions on the matter. The Chairperson gave reasons for this approach.

The essence thereof was as follows:¹

- (1) That complaints against broadcasts by M-NET should be dealt with by the BCCSA since M-NET falls under the BCCSA's jurisdiction. In the past the HRC has also recognised this principle and lodged complaints with the BCCSA – in fact in this very matter. Of course such matters may also be taken to Court or, where the broadcaster has not accepted the jurisdiction of the BCCSA a complaint may also be lodged with the Complaints and Compliance Committee at

¹ I have amended the precise content of the original February ruling, in the light of the present recommendations made by the HRC and also to provide more details.

ICASA and ultimately be resolved by the Council of ICASA, by issuing an order, where it deems it appropriate.

- (2) The Registrar of the BCCSA, which is a Tribunal set up by the National Association of Broadcasters to decide on complaints against M-NET in terms of the said Broadcasting Code, decided not to entertain the complaint as submitted in 2010 by the HRC, and prior to that by the Complainant himself that same year, as a result of the inordinate lapse of time since the broadcast of the programme. Sufficient reasons were provided neither by the Complainant himself nor by the HRC as to why the inordinate time lapse should be condoned.
- (3) M-Net is compelled in law to give effect to *orders* as are issued by the BCCSA in regard to contraventions of the Subscription Broadcasting Code. No order on the merits was made by the BCCSA at the time, and neither is the BCCSA permitted in law to do so now. If such a broadcast is repeated and a complaint is lodged in time, the BCCSA will, of course, have jurisdiction to decide the matter either in favour of the Broadcaster or the Complainant.
- (4) As to the proposal of the HRC that the BCCSA should, in consultation with its membership, consider codifying best practice guidelines regarding the content of clause 28.4 (dignity) of the Broadcasting Code, particularly in regard to deceased persons and their relatives, and that the BCCSA should provide the HRC with confirmation thereof, the position is, with respect, as follows:
 - (a) that “best practice guidelines” are not issued by the BCCSA: instead, the BCCSA issues *judgments* on complaints that the Registrar, or the Chairperson on appeal, has decided to entertain, and thereby guidance is provided to broadcasters as to the application of the Code;
 - (b) that in one instance before the BCCSA in 2000 where the dignity of the bereaved was argued to have been impaired, the facts did not support the argument;

- (c) that on the next occasion ICASA or the BCCSA undertakes an inquiry regarding amendment of the Codes for Broadcasters, an opportunity will arise for the HRC and other interested parties to put forward submissions in this regard; and
- (d) that the BCCSA Tribunal is, as always, open to argument as to the interpretation and application of the Code, including the ambit of protection as this relates to the matter of dignity, during hearings before the Tribunal. If and when a similar case arises, the HRC is at liberty to file a complaint with the BCCSA and to argue the matter of dignity, as set out above, before a Tribunal. *There is, in any case, authority that shock, under certain circumstances, may give rise to a claim (and thus a complaint) based on dignity.*

The intention of the above reasoning was to clarify the legal position of the BCCSA in regard to broadcasts by members of the National Association of Broadcasters, which includes M-NET.

POSITION OF THE BCCSA AS TO THE NOVEMBER 2014 RECOMMENDATIONS ISSUED BY THE SAHRC

The BCCSA has, with respect, noted that the Human Rights Commission has now, in November 2014, decided to issue *recommendations*, which includes a recommendation that M-NET apologises to the Lotz family. Recommendations are, of course, not *binding* in law. However, the HRC is not empowered to make *orders*, since its task, as per the Constitution, is to *secure redress* for example in the Courts or at the BCCSA or at ICASA, where a broadcaster does not fall under the jurisdiction of the BCCSA.

Although the broadcaster is free to give effect to this *recommendation*, it needs to be stated that only the BCCSA is legally empowered to *order* that a broadcaster under its jurisdiction *must* broadcast a statement, possibly with an apology, in which a contravention of the Code is published to viewers or listeners.

M-NET falls under the BCCSA's jurisdiction, and the BCCSA's finding stands that the complaints were not filed in time – in fact, far beyond the

stipulated time – and that the BCCSA, accordingly, did not take the matter further. Broadcasters are entitled to have certainty as to their position and complaints which are filed unreasonably late, as was the case here, are not entertained.

As mentioned earlier, a Court is, where a matter concerning dignity is filed with it, of course also empowered to make an *order*. The same principle applies to ICASA, where it has jurisdiction over the content of broadcasts which do not fall under the BCCSA’s jurisdiction.

Once again: had the BCCSA inquired into the matter, its Code protects dignity and, depending on argument, a case could have been made out that the dignity of the father, who saw a blurred image of the body of his murdered daughter on the *Carte Blanche* programme for a few seconds, had been impaired. **The Code of the BCCSA need, accordingly, not be amended as recommended by the Human Rights Commission. There is authority that shock of a viewer is, in certain circumstances, protected by the dignity fundamental right.**

We note that the HRC in its November 2014 decision has informed M-NET that it may appeal its decision. No opinion is, accordingly, expressed about the merits of such an appeal.

*For purposes of the present matter, it is not necessary for the BCCSA to question the authority of the HRC to issue **recommendations in the field of broadcasting content**. This issue might be raised by M-NET were it to appeal the matter, as provided for in the Resolution by the HRC. A view on this matter is, accordingly, not appropriate.*

Reasons by the BCCSA Chairman

JCW VAN ROOYEN SC

- [1] In the light of a letter that I received from the Human Rights Commission (HRC), signed by the Manager: Gauteng Province, dated 24 February 2014, I decided to make the position of this Commission clear in regard to a broadcast by M-NET in its “Carte Blanche” programme of 14 September 2008. M-NET falls under the exclusive jurisdiction of this Commission in terms of section 54(3) of the Electronic

Communications Act 36 of 2005 in so far as complaints relating to its broadcasts are concerned.² Of course, the Courts would also have jurisdiction were the matter to have been taken there on the basis of impairment of dignity. If M-Net did not fall under our jurisdiction, the Complaints and Compliance Committee of ICASA and its Council would have had jurisdiction as to the Complaint.

- [2] The history around the present matter is a particularly distressing one. The daughter of Professor and Mrs Lotz was murdered on 16 March 2005. The accused, who had been a friend of their daughter, was found not guilty of the murder on the basis that the State had not proved that he had been involved in the murder. The judgment of the Court was dated 29 November 2007, with Judge Deon van Zyl presiding. On 14 September 2008, M-NET, in its *Carte Blanche* programme, included an overview of this murder, which had at that stage not yet been resolved (and indeed remains unresolved). The Complainant, Prof Lotz, who was at the time unaware that the insert relating to his daughter would be broadcast, was suddenly confronted for a few seconds with a blurred image of the body of his daughter while he was in a room where the television set happened to be switched on. Thereafter, he filed a complaint with the HRC. *With respect, he should have filed a complaint with the BCCSA, which is widely advertised on radio and television.*
- [3] On 6 April 2010, Prof Lotz approached the BCCSA with his complaint. Attempts at settling the matter with the broadcaster, with the aid of the HRC, had failed. Since the complaint was submitted 18 months after the broadcast, the Registrar of the BCCSA was not prepared to condone the late filing. No appeal against her decision was filed with me. Complaints must be filed, at the very latest, 30 days after a broadcast, unless a good and satisfactory explanation is put forward. On 1 August 2010, the HRC (via Ms Nair) also approached the BCCSA to ascertain whether the Registrar might still be willing to accept the complaint, which, at that stage, would have been 22 months subsequent to the broadcast. The Registrar informed the HRC that she had already decided not to entertain the complaint, and stated furthermore that she had informed Prof Lotz that the

² The BCCSA was set up in 1993 by the National Association of Broadcasters (NAB) and was recognised by the Independent Broadcasting Authority (now ICASA) as the sole adjudicating body on complaints concerning broadcasts by the NAB members, including the Association of Christian Broadcasters, in November 1995. Its members include the SABC, all commercial broadcasters as well as all subscription broadcasters. Other broadcasters, mainly community broadcasters, who are not members of the NAB, fall under the jurisdiction of the Complaints and Compliance Committee of ICASA as to the contents of their broadcasts.

submission of the complaint was far too late. No good and satisfactory explanation, as the Rules require, was provided as to why the BCCSA had not been approached earlier. Where such reasons are provided, the Registrar or the Chairperson would be willing to condone a late filing.³ As mentioned earlier, I was not approached to set aside the decision of the Registrar.

- [4] Let me now deal with the legal position. It was clear that the HRC had acted within its Constitutional duties (“taking steps to secure redress” – see section 184(2) of the Constitution of the RSA) by filing a complaint with the BCCSA for the benefit of the Complainant in 2010. It indicated that the Commission had not been successful in reconciling the parties and that, in any case, M-NET was not prepared to concede that it had made an error in terms of the Broadcasting Code for Subscription Broadcasters, which protects dignity.
- [5] On two previous occasions, the HRC had filed a complaint with the BCCSA. Compare *Human Rights Commission v SABC*⁴ and *Human Rights Commission v SABC and etv*.⁵ On both these occasions the HRC representatives made it clear to the BCCSA that, since broadcasting is excluded from its sphere of operation by section 192 of the Constitution, the HRC is not mandated in law to arrive at a finding against a broadcaster **and** order redress. This view is, of course, correct. Section 192 of the Constitution of the Republic of South Africa provides that broadcasting must be regulated by an independent authority. That body turned out to be the Independent Broadcasting Authority (IBA) in terms of the Independent Broadcasting Authority Act 1993. The Independent Broadcasting Authority commenced its operations in 1994. According to an arrangement with the BCCSA, which had already been constituted in August 1993, the BCCSA would, de facto, deal with complaints against members of the National Association of Broadcasters until such time as the IBA formally issued such authority. In November 1995 the BCCSA was formally recognised by the IBA, in terms of section 56(2) of the IBA Act, as the body which would decide upon complaints against broadcasts by broadcasters that are members of the National Association of Broadcasters. This legal recognition remained valid in spite of the change of name of the IBA to the Independent

³ *Fitch v SABC 1* [2009] Judgments Online 22981 (BCCSA).

⁴ *Human Rights Commission v SABC 2003(1)* Butterworth Constitutional Law Reports 92(BCCSA).

⁵ *Human Rights Commission v SABC and etv* (case 24/2003).

Communications Authority of South Africa (ICASA) in 2000.⁶ The Monitoring Unit of ICASA also files complaints with the BCCSA where broadcasters under the BCCSA jurisdiction are involved.⁷ M-Net was, by consent, subject to the jurisdiction of the BCCSA since August 1993 and has, since then, been subject to the BCCSA jurisdiction in so far as complaints as to content are concerned.

- [6] The HRC informed me in a letter dated 24 February 2014, by way of its Manager (Gauteng Province), that it had acted upon its vision “to transform society and restore dignity”, as well as its constitutional mandate to promote respect for human rights and “provide redress where appropriate”. The latter should, with respect, read “to take steps to *secure* appropriate redress where human rights have been violated” – as provided in the Constitution of the Republic of South Africa. The latter phrase demonstrates the valuable role that the HRC has played in the Courts, the BCCSA, as well as other bodies, **in securing appropriate redress by such bodies.**
- [7] The HRC (in its preliminary report in February 2014 and its final report in November 2014) then turns to clause 28.4 of the Code for Subscription Broadcasters and finds that this sub-clause, which protects privacy and dignity, had been contravened by M-NET in the 2008 broadcast complained about. The rights of dignity of the Complainant and his wife were violated, according to the HRC. It also found that the images were not justified by the public interest defence, which is included in the relevant clause as a defence. The HRC also found that prior notification should have taken place so as to mitigate the impact of the programme, or to enable viewers to avoid watching the programme.
- [8] The HRC then made the following *recommendations*, which were, in essence, repeated in its final November 2014 resolution.
- (1) That M-NET should tender an unconditional apology, via the HRC, to Prof and Mrs Lotz. The terms of the apology are to be settled by the Commission and Respondent within four weeks;

⁶ See section 54(3) of the Electronic Communications Act

⁷ See *MCU of ICASA & Others v SABC 1 2004* Judgments Online 13236 (BCTSA) (Case 39/04).

- (2) That M-NET puts in place measures to ensure that all future matters of a similar nature are dealt with in a manner that gives maximum regard to the level of care required in terms of clause 28.4 of the Code, i.e. that next of kin are provided with reasonable prior notification of any broadcast of images which have the potential to cause trauma or emotional stress. The Respondent is to provide the HRC with written confirmation that such steps will be implemented; and
- (3) That the BCCSA considers codifying and providing best practice guidelines, in consultation with its membership,⁸ with regard to the extent of clause 28.4 of the Code, particularly in regard to deceased persons; and that the BCCSA should provide the HRC with confirmation of such an undertaking within four weeks of the date of receipt of the HRC's report.

[9] *Recognising the understandably distressing nature of the death of their daughter in the case of Prof and Mrs Lotz, and with due respect to the HRC, the explanation of the BCCSA is summed up as follows:*

- (a) Prof Lotz should at the outset have filed his complaint with the BCCSA. The HRC is not empowered by law to make a *binding* decision on the matter. At most, it could make a *recommendation* (as it has now done in November 2014), attempt to get the parties to settle the matter, file a complaint with the BCCSA, as it has done in the past or take the matter to a Court in the interests of a Complainant so as to obtain redress. The BCCSA adjudicates complaints against broadcasters under its jurisdiction regarding the content of broadcasts. Its decisions against broadcasters are *binding* on broadcasters under its jurisdiction. M-NET falls under its jurisdiction in terms of section 54(3) of the Electronic Communications Act, and before that section 56(2) of the Independent Broadcasting Authority Act 1993. The IBA approved this jurisdiction in 1995 and it is still valid today.
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⁸ Of course, broadcasters under the jurisdiction of the BCCSA are not its members, but members of the National Association of Broadcasters or the Association of Christian Broadcasters.

SAHRC or Prof Lotz. It should be mentioned that where a broadcaster has not accepted the jurisdiction of the BCCSA to deal with complaints against it – there are community broadcasters which fall within this category – the matter may also be taken to the Complaints and Compliance Committee at ICASA, which is also authorised by the Independent Communications Authority of South Act 13 of 2000 (as amended) to issue an advice to the Council of the Authority to consider an order against broadcasters which contravene the Broadcasting Code.

- (c) At the end of February 2014, however, the BCCSA was informed that the Human Rights Commission had decided that M-NET was in breach of the Subscription Broadcasting Code. It required M-Net to provide it with reasons as to why it should not apologise to Prof and Mrs Lotz, and requested the BCCSA to provide it with best practice guidelines for future protection of the dignity of viewers. The HRC decision was, of course, an interim decision which could be amended or withdrawn, depending on the submission put forward by M-NET.

The BCCSA Chair, with due respect to the HRC, informed the HRC that as an independent Tribunal in its own right, it would be inappropriate for the BCCSA to file submissions on the matter. The Chairperson gave reasons for this approach.

The essence thereof was as follows:⁹

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ICASA and ultimately be resolved by the Council of ICASA, by issuing an order, where it deems it appropriate.

- (2) The Registrar of the BCCSA, which is a Tribunal set up by the National Association of Broadcasters to decide on complaints against M-NET in terms of the said Broadcasting Code, decided not to entertain the complaint as submitted in 2010 by the HRC, and prior to that by the Complainant himself that same year, as a result of the inordinate lapse of time since the broadcast of the programme. Sufficient reasons were provided neither by the Complainant himself nor by the HRC as to why the inordinate time lapse should be condoned.
- (3) M-Net is compelled in law to give effect to *orders* as are issued by the BCCSA in regard to contraventions of the Subscription Broadcasting Code. No order on the merits was made by the BCCSA at the time, and neither is the BCCSA permitted in law to do so now. If such a broadcast is repeated and a complaint is lodged in time, the BCCSA will, of course, have jurisdiction to decide the matter either in favour of the Broadcaster or the Complainant.
- (4) As to the proposal of the HRC that the BCCSA should, in consultation with its membership, consider codifying best practice guidelines regarding the content of clause 28.4 (dignity) of the Broadcasting Code, particularly in regard to deceased persons and their relatives, and that the BCCSA should provide the HRC with confirmation thereof, the position is, with respect, as follows:
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POSITION OF THE BCCSA AS TO THE NOVEMBER 2014 RECOMMENDATIONS OF THE SAHRC

[10] The BCCSA has, with respect, noted that the Human Rights Commission has now, in November 2014, decided to issue *recommendations*, which includes a recommendation that M-NET apologises to the Lotz family. Recommendations are, of course, not *binding* in law. However, the HRC is not empowered to make orders, since its task, as per the Constitution, is to secure redress, for example in the Courts or at the BCCSA or at ICASA, where a broadcaster does not fall under the jurisdiction of the BCCSA.

Although the broadcaster is free to give effect to this *recommendation*, it needs to be stated that *only* the BCCSA is legally empowered to *order* that a broadcaster under its jurisdiction must broadcast a statement, possibly with an apology, in which a contravention of the Code is published to viewers or listeners.

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We note that the HRC in its November 2014 decision has informed M-NET that it may appeal its decision. No opinion is, accordingly, expressed about the merits of such an appeal.

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**PROF JCW VAN ROOYEN SC
CHAIRPERSON**

20 November 2014

