Complainant: The Complainant in person accompanied by Ms Tina van der Maas.

Respondent: Mr Fakir Hassen, Manager Broadcast and Compliance, Policy and Regulatory Affairs of the SABC assisted by Will Bernard and Mike Roberts (Executive Producers at SAFM).

Complaint that talk show on HIV and AIDS during which the public was invited to volunteer for vaccine testing, was one-sided – averment that clause 36 of Code requiring balance in programmes in which controversial issues of public importance are discussed, was contravened – balance cannot be assessed with mathematical precision – what is important is that “unjustified opinion should rather be left for the market place of ideas to counter it” – even though talk show has only one guest at a time, the fact that listeners may phone in to air their views, is sufficient to prepare the table for balanced discussion – even though broadcaster has no control over the viewpoints expressed by callers, this does not detract from the principle that the attainment of balance is inherent in this type of programme - broadcaster must ensure that guests with different viewpoints are invited – no contravention found and the complaint is dismissed - A Allen vs SAFM, Case No: 17 /2006.
SUMMARY

A complaint was lodged that the Vuyo Mbuli Talk Show on HIV and AIDS was one-sided. There was one guest on this phone-in programme, representing the National Institute for Communicable Diseases. During this programme the public was invited to volunteer for vaccine testing. Clause 36 of the Code requires that there should be balance in programmes in which controversial issues of public importance are discussed. It is the Tribunal’s view that balance cannot be assessed with mathematical precision. What is important is that “unjustified opinion should rather be left for the market place of ideas to counter it”. A talk show or phone-in programme is such a market place of ideas. Even though a talk show usually has only one guest at a time, the fact that listeners may phone in to air their views, is sufficient to prepare the table for balanced discussion. Although a broadcaster has no control over the viewpoints expressed by callers, this does not detract from the principle that the attainment of balance is inherent in this type of programme. However, the broadcaster must ensure that guests with different viewpoints are invited. No contravention was found in this case and the complaint is dismissed.

JUDGMENT

PROF HP VILJOEN

[1] During the Vuyo Mbuli Talk Show on SAfm at about 10:00 on 23 March 2006 the presenter had as his guest for about one hour Dr Clive Gray who represented the National Institute for Communicable Diseases. This body is a partner in a research programme together with the Centre for HIV/AIDS Vaccine Immunology (CHAVI). As is usual with such talk shows, the telephone lines were opened and listeners were invited to air their views, which a few did. During the discussions the public was invited to volunteer for vaccine testing with which the Centre was involved. The way in which the programme was presented, created the impression with the Complainant that the show was one-sided and she lodged a complaint with the BCCSA. At the hearing it was agreed between all the parties that there is no need for the Tribunal to listen to the programme as it was common cause that Dr Gray was the only guest on the show. It was agreed that the matter of balance in presenting the programme would be argued and that the Tribunal would give judgment on this matter only.
The complaint reads as follows:

**First complaint:** “Complaint against Vuyo Mbuli Show, SABC SAFM 10am-1am – 23 March 2006. I wish to lay a formal complaint against the above radio talk show, regarding the one hour exposure given to the Centre of HIV/AIDS Vaccine Immunology (CHAVI) on the basis that it was one-sided, no attempt was made to present alternate opinion; as a result inaccurate, misleading and false facts including false scientific facts were presented as cast in stone and were left unchallenged by the presenter. I request that the radio station be instructed to present a programme of similar duration representing alternate scientific views.”

**Second complaint:** “Complaint against Vuyo Mbuli Show, SABC SAFM 10am-11am. 23 March 2006.

I wish to append an additional complaint to the one above as follows:

**Complaint against SABC – editor-in-chief for non-compliance with the SABC code in matter pertaining to microbiology.**

There is abundant evident that the editorial board of the SABC is not applying it code. I restrict myself to matters relating to HIV/AIDS. However, the field in which it is embedded – microbiology, impacts so many spheres of our existence that the SABC deficiency in the HIV/AIDS field is merely a symptom of far wider problem.

Unless it is resolved we will meet the challenges facing us not just in microbiology but genetic engineering of all kinds including vaccines; bird flu; pollution; global warming; lions dying in Kruger Park – the list is endless.

Either the SABC has some board which possess judge, jury and adjudicating powers over HIV/AIDS science and microbiology in which it is embedded, or it gives equal time to all views. Had Galileo lived, today, the SABC would have censored him.

In this connection, I wish to bring to your attention that I have previously corresponded with SABC manager: broadcast policy compliance. Faqir Hassen. His e-mail of 2 November 2005, convinced me that it was pointless pursuing this matter, especially as my telephone records will show, Mr Hassen steadfastly refused to answer all my queries left with his secretary.

Mr Hassen claims his organisation is in compliance with the Broadcasting Code of Conduct administered by yourselves. I wish to test that claim and once and for all get a clear ruling on what the code require of programming relating to HIV/AIDS, which allows SABC – sponsored advertisements in which the sacred
{word Love is now jingled to HIV and sex – and no one raises an objection. I await further contact on this matter.”

[3] The SABC responded as follows:

In respect of the above complaint, I enclose a copy of the programme segment on CD. Our comments are as follows.
The complainant is a well known AIDS dissident who, to our understanding, usually challenges the portrayal of any conventional and generally accepted scientific evidence.
The discussion on The Vuyo Mbul! Show was not intended to be a debate on the issues of differing scientific viewpoints regarding HIV/AIDS. It was, rather, a discussion on a joint International Research Initiative that involves as one of the partners in the initiative the Centre for HIV/AIDS Vaccine Immunology (CHAVI).
The guest in the studio, Dr Clive Gray was representing the National Institute for Communicable Diseases, which is also involved in the research initiative.
The suggestion that this was a “one-sided” show with ”no attempt to present alternate opinion” is rejected on the basis that from the outset of the programme the lines were open for listeners to call in and contribute to the discussion. In fact some nine callers were taken on air and they posed questions and made comments.
The facility was clearly there for anyone with a dissenting opinion, including the complainant, to phone in and contribute to the programme with their views.

[4] I shall start with the Complainant’s second complaint, the one headed “Complaint against SABC –editor-in-chief for non-compliance with the SABC code in matter pertaining to microbiology”. It is not within the jurisdiction of the BCCSA to adjudicate on complaints like non-compliance with the SABC code. We do not apply the SABC code, only the Code of Conduct signed by the majority of broadcasters in South Africa, including the SABC. The complaint apparently flowed out of the first one, which is a complaint against a specific programme. This falls within our jurisdiction and I shall deal with it next.

[5] The clause in the Code of Conduct, applicable to the facts of this case, is 36 which determines the following:

In presenting a programme in which controversial issues of public importance are discussed, a licensee shall make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable
period of time of the original broadcast and within substantially the same time slot.

There is no doubt that the whole matter of HIV and AIDS is a controversial issue of public importance. There is still debate on whether AIDS is caused by the HIV virus and what the best treatment for the syndrome is. There are various opposing views, politically, scientifically, socio-economically, etc. on this matter that have resulted in acrimonious debate and even litigation. There is definitely no agreement in our society on the most effective and efficient way in which the disease should be treated.

The programme complained of is not the first and will surely not be the final one on which this topic is discussed. The Respondent has presented this topic on different kinds of programmes too. The present one is labeled a talk show. Mostly, in this type of programme, one guest is invited to the studio. The guest is allowed to put forward his or her viewpoints and then the opportunity is given to the listening public to phone in and to agree or disagree with the guest and give their own viewpoints. In programmes like this one, the Tribunal of the BCCSA has in the past made its conviction very clear. One example is the judgment in the case of N Dinur, D Mankowitz and EMTSA v MNet, Case No: 11/2002 where the Tribunal said:

“Our reaction is, accordingly, to tread with utter care when opinion is expressed - even opinion which is based on erroneous assumption or error. The well-known approach of Holmes J in Abrams v The United States 250 US 616(1919) that unjustified opinion should rather be left for the market place of ideas to counter it, also carries special weight in the opinion of the Commission.

... the nature of freedom of expression is that we should not, and cannot, stop people from disseminating their ideas, how unacceptable it may be. Let it be tested in the market place of ideas and let the listeners decide for themselves. There are limits to the freedom of expression where the expression amounts to propaganda for war, advocacy of hatred based on
race, religion, etcetera, but the limits to this freedom have not been transgressed in this instance.” (See section 16(3) of the Constitution of the Republic of South Africa).

The same can be said of the programme in question. The applicability of section 16 of the Constitution was not debated because the Complainant did not aver that what was said on the programme amounted to hate speech, and rightly so.

[7] It is conceded that the “market place of ideas” consists, inter alia, of radio and television. This is where the debate should rage. The Respondent says it does; the Complainant says, as far as HIV and AIDS are concerned, not enough and not in a balanced way. The Complainant, in one of her communications to the representative of the Respondent dated 8 September 2005, says:

*It was one of the no more than 10 occasions where a person skeptical of the HIV causes AIDS paradigm has been accorded time at the SABC since October 1999 when Thabo Mbeki first raised his concerns.*

It has often been said in this Tribunal that it is not possible to determine with mathematical precision how many times for and how many times against a viewpoint the broadcaster should allow participants to air their views.

[8] Many of the broadcasters have talk shows or phone-in programmes. The usual format is to invite a guest to present one perspective. A discussion follows and then the listeners are invited to phone in and to engage in debate with the guest. This is an excellent opportunity to get down to the gist of things and also an example where “unjustified opinion” is left for “the market place of ideas” to counter it.

[9] We realise that, due to the nature of talk shows or phone-in programmes and the time constraints on these programmes, it is not always possible for broadcasters to have two guests with opposing views on the same programme. I think there is
inherent balance in the programme due to the fact that the listening public can phone in. This is part of the “market place of ideas”. Anyone is free to phone in and to challenge what the guest or another listener has said. We were assured at the hearing that the Respondent does not keep a list of “banned listeners” whose calls are blocked on such occasions, as was averred. The problem, of course, is that the broadcaster has no control over the viewpoints of those listeners who do phone in. If all callers agree with the guest’s opinion, one can easily come to the conclusion that there was no balance. This, in our view, is not the answer to the question whether clause 36 has been contravened. The overriding principle is that a “market place of ideas” has been created by the broadcaster where everyone is free to air his or her opinion. If, in a particular programme of this nature, it appears that balance was not obtained because of the reaction, or lack thereof, of the callers, the principle of the “market place of ideas” still remains and the broadcaster cannot be censured for this.

[10] We have been assured by the representative of the Respondent that the broadcaster has invited people of different viewpoints on HIV and AIDS to air their views on this and other programmes in the past. We have no reason not to believe him. This, coupled with the fact that talk shows or phone-in programmes are inherently programmes where balance could be obtained, brings us to the conclusion that the Respondent did not contravene clause 36 of the Code.

The complaint is therefore not upheld.

PROF HP VILJOEN

Commissioner Nayagar and co-opted member Mokoena-Msiza concurred