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**CASE NUMBER: 07/2017**

**DATE OF JUDGMENT: 24 FEBRUARY 2017**

**IN RE: MR SELWAN BUTLER**

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*Application for condonation for late filing of a complaint. Case No: 07/2017 (BCCSA)*

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## **JUDGMENT**

**HP VILJOEN**

[1] I have read and considered the following documents:

- (1) the decision by the Registrar of the BCCSA wherein she refused to accept the complaint;**

"I acknowledge receipt of your complaint which was delivered to our office today. I have considered your application for Condonation in terms of clauses 1.3 and 1.6 of the Procedural Rules which provide as follows

"1.3 Subject to rule 1.6 a complaint shall be made as soon as possible, but not later than thirty days after the date of the broadcast, or the date of any other alleged breach of the Code giving rise to the complaint.

1.6 The registrar may upon reasonable grounds accept late complaints if in his or her opinion there is good and satisfactory explanation for the delay."

The BCCSA is widely advertised and the Complainant should have taken steps to complain to the BCCSA much sooner after the broadcast. The BCCSA must, in principle, adhere to its rules and I am of the view that the Complainant should have requested a postponement of the 30-days during that period since they were aware that they were still awaiting a report on the matter. In any case, the complaint was filed substantially out of time. One of the cornerstones of the BCCSA is the introduction of its procedural Rules:**It shall be of the essence of the BCCSA's proceedings:** that complaints be considered and adjudicated upon within the *shortest possible time after the broadcast* of the matter giving rise to the complaint; that complaints be considered and adjudicated upon in an informal manner; *and* that whenever possible the adjudicator, Tribunal and

Appeal Tribunal and the parties will strive for a speedy and amicable settlement.  
(emphasis added)

The programme was broadcast on the 13<sup>th</sup> November 2016. The question is whether a sufficient case has been made out to extend the 30-day period for the filing of the complaint.

I would like to clarify that the complaint is 75-days out of time and not 44-days as stated by the Complainant. I am of the view that the Complainant should have contacted or lodged his complaint directly with the BCCSA due to his financial situation. In so far as the December holidays are concerned, the Complainant could have notified the BCCSA of his intentions to lodge a complaint in January. I have accordingly decided that the complaint is too far out of time for me to entertain.

The Complainant may make representations to the Chairperson of the Commission to exercise his discretion in terms of Procedural Rule 5.1.

The Rule provides as follows:

“The Chairperson of the BCCSA may, if satisfied that no injustice will result, and upon such conditions as he or she may impose:

5.1 extend any time period contemplated in these rules;”

These representations must reach the Registrar’s office on or before 3 February 2017. However, if the Complainant is able to provide a rebroadcast date of the programme within 30-calendar days from today’s date, I will accept the complaint.”

**(2) the application for condonation by the Complainant for the late filing of the complaint;**

“**KINDLY TAKE NOTICE** that the above mentioned applicant hereby submits the following representations for consideration by the Chairperson of the Broadcasting Complaints Commission of South Africa (“the Commission”): -

- 1) That for the reasons and on the grounds set out below the time limit of 30 days for lodging of the complaint dated 26 January 2017 be extended to 27 January 2017 alternatively that condonation of the late filing of the complaint be granted;
- 2) Carte Blanche first broadcast the offending news report on 13 November 2016, but has made repeat broadcasts and made the news report video available to view on line on Carte Blanche’s website for some months thereafter. All efforts to obtain a copy of the news report and proof of broadcast dates from Carte Blanche have been\_unsuccessful and will require further legal steps. Carte Blanche is however in possession of this information and can easily provide it;
- 3) The complaint was lodged on 27 January 2017 and dismissed within an hour on the same day. The explanation for lateness and the merits of the complaint were not considered properly, or at all. If it is properly considered, the complaint has a good prospect of being upheld;
- 4) The complainant can demonstrate that the news report is factually inaccurate, misleading and defamatory of him;
- 5) The false Carte Blanche news report has had a domino effect, in that other news reporters and media, accepting the correctness of the Carte Blanche report, have repeated and propagated its material factual errors and misleading conclusions, with devastating consequences which are still developing for the

complainant. Details of one of these “follow-on” reports, an article by Anna Cox of the Star, are given in the complaint. Accordingly, a substantial injustice will result if his complaint is not considered on its merits;

- 6) The false news report deals with a current topic of considerable public interest – the fraudulent and corrupt de-valuations of properties and the loss of revenue of Rands to the City of Johannesburg Metropolitan Municipality amounting to hundreds of millions. One of the suspects, a former employee of the City of Johannesburg, Mbali complainant was associated with or is carrying on exactly the same criminal activity as Mbali Maclare;
- 7) The legal representative of the complainant, attorney P O'Donovan, explained in his letter requesting that late filing be condoned, why he was unable to give his proper attention to this matter before 15 January 2017. It is submitted that the explanation is reasonable and should be accepted. It was only after 15 Jan 2017 that his attorney studied the Code of the Commission and found out about the requirement that complaints be filed within 30 days of the first broadcast. Until then, neither the complainant, nor his attorney, were in fact aware of such time limit. Whilst it might be true, as mentioned by the Registrar in his decision to refuse the complaint, that the Commission is “*widely advertised*”, the time limit is not. It is submitted that the time limit is not advertised and it is not well-known.
- 8) There will be no harm to Carte Blanche if condonation for late filing is granted. If the complaint lacks merit it will simply be dismissed;
- 9) On the other hand, if condonation is not granted the complainant will suffer real harm in that his complaint will not be considered at all and he will have little prospect of a quick and just outcome. For the complainant, a salary earner of limited resources, to obtain relief he will be compelled to institute lengthy and expensive legal proceedings against Carte Blanche, a large media concern with relatively vast resources and an army of lawyers to represent it. The interests of justice and the *raison d’etre* of the Commission would be best served to allow the complainant’s complaint to be considered on its merits; and
- 10) I beg leave to supplement these representations if necessary or appropriate;
- 11) Further or alternative relief.

**KINDLY TAKE NOTICE FURTHER** that the complaint; the letter of O'Donovan dated 26

January 2017 and the refusal of the complaint by the Registrar dated 27 Jan 2017 are attached and delivered herewith.”

and

### **(3) the response by the Broadcaster to the application for condonation:**

#### **1. Introduction**

- 1.1 We have been requested to respond to an application for condonation for the late filing of a complaint made by Mr Salwen Butler (“Mr Butler”).
- 1.2 The complaint relates to an insert that was aired on Carte Blanche on 13 November 2016 (“the insert”).
- 1.3 The insert dealt with various allegations regarding misconduct and fraud by employees of the property valuations unit in the City of Johannesburg (“**the City**”).

- 1.4 The complaint was lodged on 26 January 2017, more than two months (81 days) after the story was aired.
- 1.5 M-Net submits that the request for condonation should be declined.

## **2. The content of the insert**

- 2.1 The insert relates to allegations of misconduct by employees who work in the City's property valuations unit. There are two case studies that are included in the insert. The first case study relates to Ms Mbali Maclare who is alleged to have performed fraudulent alterations of the valuations on several commercial properties. The second case study relates to Mr Butler.
- 2.2 The specific allegations that are made about Mr Butler in the insert are as follows:
  - 2.2.1 Mr Butler is a deputy director of valuations in the City. He also runs his own private property valuation company;
  - 2.2.2 A confidential source from the City is shown on camera and states that Mr Butler is a senior employee and as such he should not be conducting private valuations because it amounts to a conflict of interest;
  - 2.2.3 Mr Butler was invited by a representative of Carte Blanche (posing as a member of the public) to conduct a valuation of a house. Mr Butler agreed to conduct the valuation during normal business hours;
  - 2.2.4 Mr Butler obtained the information for the house that he had been asked to evaluate straight from the City's internal system;
  - 2.2.5 Mr Butler was confronted by Carte Blanche presenter, Devi Sankaree Govender. Ms Govender asked Mr Butler whether he was permitted to conduct private valuations for his private company during business hours. Mr Butler responded that it was not really allowed but he had asked for permission;
  - 2.2.6 The insert contains a statement that Carte Blanche has established that Mr Butler has indeed declared his private business to Ms Sihle More, the head of the City's valuations department, but that his conduct still amounts to a conflict of interest.
  - 2.2.7 Ms Govender asked Mr Butler whether his conduct set the right example given his senior position as a deputy director. Mr Butler responded that his conduct did not set the right example;
  - 2.2.8 Mr Butler further stated that "I don't blame my superiors, I don't blame the municipality, this is totally my fault."
- 2.3 The exchange between Ms Govender and Mr Butler as well as the preceding communications in which he was invited to conduct the private valuation was recorded.

## **3. The condonation application should be rejected**

- 3.1 M-Net submit that the condonation application should be rejected for the following reasons:
  - 3.1.1 Whilst M-Net does not wish to respond to the merits of the complaint at this stage, we submit that the complaint has little prospects of success.

The essence of Mr Butler's complaint appears to be that he has been linked with fraudulent valuations. The insert does not contain any allegation that Mr Butler is involved in fraudulent valuations. The insert consists of two aspects. Firstly it deals with the forensic report and fraudulent valuations made by Ms Maclare. The insert then moves on to the allegations against Mr Butler which essentially relate to a conflict of interest because he runs his own private valuations company. The portion of the insert that relates to Mr Butler does not make any reference to fraudulent valuations and Mr Butler is not mentioned at all in the section of the insert that relates to the forensic report and fraudulent valuations. Carte Blanche frequently deals with more than one issue in its inserts. In this case the issues are different but are linked by the common fact that both Ms Maclare and Mr Butler are employees of the City who have engaged in inappropriate conduct vis-a-vis the valuation of properties.

- 3.1.2 Carte Blanche cannot be held responsible for the subsequent inaccurate reportage about its story such as the article in The Star newspaper that is cited in the complaint. The fact that Mr Butler has been suspended and that his reputation has been tarnished is a direct result of his own conduct in conducting a private business that directly conflicts with his official duties as an employee of the City. The Carte Blanche report accurately conveys the fact that he obtained permission for his business and declared it to the head of the department. However, the fact that the head of the department saw fit to permit Mr Butler to conduct a business that conflicts with his official duties does not change the questionable ethics of the situation, which the public was entitled to be informed of. Furthermore, it is not unreasonable for members of the public to be alarmed by Mr Butler's conduct and concerned that the clear conflict of interest could give rise to inappropriate conduct vis-à-vis the valuations, despite the fact that the insert does not contain any such allegations. The ethical rules against conflict of interest exist precisely to avoid the kind of situation that Mr Butler now finds himself in, where he is suspected of acting in a manner that is untoward vis-à-vis the private valuations that he conducted. The harm suffered by Mr Butler in this regard cannot be attributed to Carte Blanche's conduct;
- 3.1.3 The 30 day time limit for submitting complaints is a reasonable one. The purpose of the time limit is to ensure that broadcasters are made aware of any complaints concerning the content that they have broadcast as soon as possible so that they are not prejudiced in their ability to respond to the complaint. The time limit is also indicative of the fact that the BCCSA is a forum for speedy resolution of disputes with a view to ensuring that inaccurate reports are corrected as soon as possible. Broadcasters will be prejudiced if the BCCSA adopts the approach that complaints can be lodged after significant periods of time have elapsed. In this case the delay is substantial as the complaint has been lodged more than one a half months late;
- 3.1.4 We submit that the explanation provided for the delay is insufficient to warrant a departure from the ordinary approach that complaints that are as late as this complaint are generally not accepted by the BCCSA. The complainant's inability to hire an attorney should not have served as a bar to him submitting a complaint. Indeed the BCCSA is designed to be an informal forum that can be utilised by members of the public acting without any legal assistance. The BCCSA frequently receives complaints from members of the public acting on their own. The BCCSA's Code of Conduct for Subscription Service Licensees is available on its website, as is the complaints procedure. Both are written in language which is easy for a lay person to understand. The

complainant, with respect, is a not an unsophisticated individual. He is a deputy director of a municipal department. Had the complainant availed himself of the information that is freely available online he would have been in a position to submit a complaint without legal assistance and would have realised that there is a time limit for submitting complaints;

3.1.5 The complainant seems to suggest that he was somehow hamstrung in compiling his complaint because he does not have a copy of the insert and Carte Blanche refused to provide it. Firstly, Carte Blanche is not required to provide the complainant with a copy of the insert. In any event the fact that the complainant has been able to formulate a complaint without a copy of the insert is indicative of the fact that a copy of the insert was not necessary to prepare the complaint. Secondly, the insert was made available on Carte Blanche's website on 14 November 2016, the day after it aired, and kept online for a period of one month before being deleted. The complainant accordingly had ample opportunity to view the insert again in order to formulate a complaint. It is clear from the allegations in the complaint that the complainant was aware that the insert was available to be viewed online;

3.1.6 It is not correct that if the complaint is not considered the complainant will suffer real harm and will have little prospect of a quick and just outcome. The complainant does not have a right to resolution of his complaint through the BCCSA. The BCCSA is available as an option for resolution of a complaint. However, should a complainant fail to follow the rules of the BCCSA, as this complainant has done, then he forfeits the opportunity to use this forum. This does not mean that the complainant will be left without remedy. The complainant can institute legal action through the courts and indeed has threatened to do so.

#### 4. Conclusion

4.1 M-Net submits that the complainant has not made out a case for condonation for the reasons set out above.

4.2 We note that the complainant has reserved his right to supplement his submission. We submit that no such supplementary submissions are warranted and that there is sufficient information available for the chairperson to make a final ruling on this matter. “

[2] The BCCSA has been in existence since 1993 and has published a website which has been online for many years. On the website there is information, *inter alia*, concerning the Codes of Conduct which we apply and the manner in which complaints should be lodged. Nowhere is it suggested on our website that complainants should obtain legal advice before lodging complaints. We do not even expect of complainants to quote the clause of the Code concerned which they allege has been contravened.

[3] Should a complaint be referred to a tribunal hearing, and the complainant, for whatever reason, does not appear before the tribunal, the tribunal will nevertheless consider the complaint, apply its mind to the facts before it and give judgment.

- [4] As a senior official in the Johannesburg Metropolitan Municipality, one would expect of the Complainant to have access to the Internet and to have taken steps to lodge his complaint, especially because his attorney did not seem to have the time for it. It is surely common knowledge that adjudicating bodies, like courts of law, have rules which provide for time limits. Although many of these rules provide for application for condonation when the rules have not been followed, the onus is on the applicant for condonation to convince the body that there were compelling reasons for not complying with the rules.
- [5] The explanation by the attorney for the Complainant for the lateness of the complaint is not convincing. It is actually contradicting to state that from 15 November 2016 to 15 January 2017 the attorney did not have time to attend to this complaint, but on 4 January 2017 he had to step into the breach to help his client. Although he states that this was for the defence in the disciplinary hearing, there is no reason why he could not formulate a complaint and file it with the BCCSA. As stated above, it is not necessary to even mention the clause of the Code which was allegedly contravened. He could merely state that he lodges a complaint because the allegations in the programme against his client are based on the wrong facts. As by far the majority of complaints are submitted to the BCCSA by e-mail, the whole process of lodging a complaint could have been completed within an hour. The fact that the complaint was only lodged on 27 January 2017, is unacceptable.
- [6] As for the chances of success at a hearing on the merits, should condonation be granted, I have considered the Complainant's and the Broadcaster's arguments. I am not convinced that the Complainant has an good chance of success on the merits.
- [7] The Complainant has argued that should the application for condonation not succeed, it would be devastating to his career. As part of this argument, his attorney alleges that the programme complained about was loaded onto the Carte Blanche website and was accessible "until recently". By implication this would be fatal to the Complainant's career. The Broadcaster, on the other hand, states that the programme was on the website for one month, after which it was taken off. This means that the "news" has for practical purposes faded from the public eye during the last more than two months.

[8] If condonation is not granted, that would not necessarily be the end of the Complainant's career. We are informed that the Complainant has been charged by his employer in a disciplinary hearing for misconduct. That would be the ideal opportunity to prove his innocence and to clear his name, should he be found not guilty. The result would be that the allegations by the Broadcaster would be disproved and the follow-up reports in the newspapers would lose their credibility. Although disciplinary hearings are normally confidential, nothing would stop the Complainant to inform the news media that he was found not guilty in the disciplinary hearing.

My conclusion is that it would not be a travesty of justice to refuse condonation. Other avenues, as explained above, even the courts of law, are open to the Complainant, for justice to prevail.

**In the result, condonation is refused.**

A handwritten signature in black ink, appearing to read 'HP Viljoen', with a long horizontal stroke extending to the right.

**PROF HP VILJOEN  
CHAIRPERSON**