



P.O.Box 412365 • Craighall • Tel (011) 326 3130 • Fax (011) 326 3198 • email: bccsa@nabsa.co.za  
Block No 8 • Burnside Island Office Park • 410 Jan Smuts Avenue • Craighall Park • 2196 • www.bccsa.co.za

**CASE NUMBER: 03/2019**

**DATE OF HEARING: 27 FEBRUARY 2019**  
**JUDGMENT RELEASE DATE: 13 MARCH 2019**

**MR & MRS SIBISI**

**APPELLANTS**

**VS**

**MULTICHOICE CHANNEL 157**

**RESPONDENT**

**TRIBUNAL:**           **PROF HP VILJOEN (CHAIRPERSON)**  
                              **MR BRIAN MAKEKETA (DEPUTY CHAIRPERSON)**  
                              **MS NOKUBONGA FAKUDE**

**FOR THE APPELLANT: Ms Jenna Kegan: Legal Representative, DI SIENA Attorneys accompanied by Mr and Mrs Sibisi**

**FOR THE BROADCASTER: Mr Bruce Mkhize, Head: Regulatory and Compliance accompanied by Ms Jacqueline R Setai, Head of Channel, Nxolo Mthethwa, Producer and Percy Mthethwa: Ex Producer of No Excuse: Pay Paggeld.**

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*Appeal against adjudication number 74/A/2018. The Commissioner dismissed the complaint and found that the Broadcaster did not contravene the Code. Tribunal finding a contravention of Clauses 28.3.1, 28.3.2 and 28.4 of the Subscription Code. Appeal Upheld. Sibisi vs Multichoice, Case No: 03/2019 (BCCSA)*

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## **SUMMARY**

**Appeal against a finding by the Commissioner under Adjudication Number: 74/A/2018 that the Broadcaster did not contravene the Code. The complaint was based on a broadcast on the 17<sup>th</sup>**

of November 2018. The broadcast is a show called **No Excuse: Pay Paggeld**. The show deals with allegations of parents who refuse to pay child maintenance. The mode of operation is that the host of the show consults with the aggrieved parent who alleges non-payment of child maintenance and thereafter confronts the parent against whom the allegations are made. The confrontation is random and the confronted parent is not pre-warned about the allegations made against him or the impending confrontation. The Appellant herein was confronted by his ex-wife with the help of the host of the show on allegations of failing to pay child maintenance. Statements were made by the ex-wife and the host of the show about the Appellant's alleged irresponsible behaviour. The Tribunal has found that the Appellant's dignity and privacy were impaired and that the Broadcaster did not comply with Clauses 28.3.1, 28.3.2 and 28.4 of the Code. The appeal is upheld.

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## JUDGMENT

### MS NOKUBONGA FAKUDE

[1] The Registrar of the BCCSA received a complaint from Mr Thamsanqa Sibisi (hereafter referred to as "the Appellant"). The complaint was based on a broadcast of a show called **No Excuse: Pay Paggeld** (hereafter referred to as "the show"). The purpose of the show is to expose parents who allegedly do not pay child maintenance. The episode in question was broadcast on the 17<sup>th</sup> of November 2018. The Appellant averred that his dignity and reputation were injured when the co-parent, who is also his ex-wife (hereafter referred to as "the co-parent"), approached the show and made allegations, among other things, that the Appellant does not pay child maintenance, has neglected his children and is / was promiscuous. The Appellant submitted that the Broadcaster has contravened Clauses 28.3.1, 28.3.2 and 28.4 of the Code. The complaint was initially adjudicated under Adjudication Number: 74/A/2018 and the Commissioner dismissed the complaint and found in favour of the Broadcaster. The Appellant then lodged an appeal against the adjudication and appeared before the Tribunal.

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

"Please be advised that the above said matter about this TV programme has been advertised as to be shown on TV.

The programme is NO EXCUSE PAY PARGELD, on DSTV channel 157.

My name and the names of my wife and stepson are not hidden, that includes our faces and place of residence.

Please note also that I have not defaulted in terms of the Maintenance court order that was instituted. That can be proven.

My name is Thamsanqa Sibisi, my wife is Lerato and my stepson is Keabetswe Makoa (a SAPS investing officer).

Our characters will be violated immensely, and our safety can be at stake if not already so. Please help to stop this from being shown on TV.

The aggravating argument is a Conspiracy to Murder case of 2013, and Protection order of 2012. These were both against my ex-wife (Mbalenhle Sibisi).

The following was said about me and my family on the mentioned TV programme (it is on channel number 157: called No excuse Pay Paggeld).

My family and I are due to be directly violated with malicious intent. Our characters will be violated too. I do not mean for you to be a censorship structure.

But, we are pleading with you to deter or stop this airing because it will violate our characters publicly. I would accept if I was in default of the Maintenance court order.

\*PRE-STATEMENT - we were building a perimeter wall because of a new business that was established neighbouring our yard. I had just driven in from work and happened to park next to a mound of soil that the builders were using. Then a few minutes later after my arrival, one of the builders came into the house to ask me to move my car away from the said soil. I reversed just a little bit for them to be able to access the soil, and mix concrete. Just as I was exiting the car, I happened to see these people who were jumping over the recently dug-up foundation into my yard towards me. I was slightly confused at first, but then one of them approached me saying he was from the above TV show and wanted to hear my side of the story about why I was not paying maintenance for my children.

At this time there were many cameras and TV recording equipment in our yard and I was overwhelmed! I tried to keep my cool and hear what they were here to say. But, in the background, not far from me, I could hear my ex-wife's voice. She was shouting profanities as the show's presenter was trying to ask me questions and engage me.

I tried to answer by asking the presenter if they had done their homework before coming to me with their crew like they did. He clearly responded that they had not done so. No documents were seen from her (my ex-wife) to prove that I was really not maintaining my children. We continued to argue.

I then told them to leave our yard because they had not done their homework first. Mind you there are standing current court orders to that effect which state exactly how much must be paid for which children. That is all three of them even though the eldest has her own court order.

THE FOLLOWING WERE SAID IN (FULL) PUBLIC AGAINST MY WIFE AND I:

1. That I do not pay maintenance at all.
2. I am irresponsible because I do not even visit the children.
3. I continuously resign from work because of irresponsibility.
4. I am an abusive husband.

5. I forced myself on her when she was still a minor under the age of fifteen years.
6. I love sex and had an extra-marital affair.
7. My wife is an old hag with grandchildren the same age as she is.
8. My wife is a husband-snatcher.
9. My wife is a witch who turns people into cockroaches.
10. My wife got into her place of residence without permission.

I find these allegations to be maliciously demeaning to our characters. Worst of all some people have already started calling us by these names, swearing and taunting us. My wife and I are teachers by profession. She teaches in the neighbouring school and I am a deputy principal at my school.

My principal called me to the office to question me about this and also tell me that some parents phoned him about this matter.

We tried communicating with this TV show's producers with an intention to stop it from being broadcast. It failed.

Please attend to this matter act upon it. As mentioned in earlier correspondence with you, the damage has been dragging and affecting us everywhere we go.”

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

“Response to No excuse pay paggeld viewer complaint:

With regard to the above issue, these are viewer complaints:

THE FOLLOWING WERE SAID IN (FULL) PUBLIC AGAINST MY WIFE AND I:

1. That I do not pay maintenance at all.
2. I am irresponsible because I do not even visit the children.
3. I continuously resign from work because of irresponsibility.
4. I am an abusive husband.
5. I forced myself on her when she was still a minor under the age of fifteen years.
6. I love sex and had an extra-marital affair.
7. My wife is an old hag with grandchildren the same age as she is.
8. My wife is a husband-snatcher.
9. My wife is a witch who turns people into cockroaches.
10. My wife got into her place of residence without permission.

The complainant that contacted the show’s main issue is that the viewer doesn’t pay sufficient maintenance for his three children. It’s clearly reported in the show that the R2000 he pays is, according to the complainant, not enough. And that this is the reason why she approached the show. As it states in the BCCSA Act with regard to controversial issues of public importance:

3. Controversial issues of public importance

- 28.3.1 In presenting a programme in which controversial issues of public importance are discussed, a licensee 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 a reasonable period of time of the original broadcast and within substantially the same time slot.

The show made reasonable efforts to give the viewer an opportunity to state his positions. The presenter states this information clearly. Instead of taking the opportunity, Mr Sibande instead asked the presenter to check the complainant's bank statements first. Please keep in mind that the show was there to represent the complainant in requesting more maintenance, yet Mr and Mrs Sibande chooses to never address this very key and pertinent issue. Then Mr and Mrs Sibande chooses to become physical, with Mr Sibande even picking up a stick and try to attack the complainant. What was difficult for the crew to handle was that all the violence and vitriol was aimed at the complainant, a single mother.

At no point did Mr Sibande ask the crew to leave his property. In fact, his wife who was present spoke and engaged with the show presenter to give her/their side of the story.

The producers did then approach the viewer soon after the recording, to provide him with another chance to give his position. Episode 41, the one in question, was broadcast on 17 November. But on the 16<sup>th</sup> of November 2018 Siyabonga Mdlalose (Content producer for No excuse) called Mr. Thami Sibande who was featured on our episode 41 as the defendant.

The phone was answered by Mr Sibande, Siya introduced himself and informed her about the purpose of the phone call which was to schedule a day where we can film a sit down between the complainant Mr. Sibande's wife and Mr. Sibande as a way of giving them another chance to reply on the events and the allegations that were leveled against the complainant who is the mother of his children and write to the show.

Siya also informed her that the purpose of us doing this was for her to know that our intention as the shows when we arrived at their premises was not to embarrass anyone but to get Mr. Sibande's side of the story, which the show wasn't able to get as Mrs and Mr. Sibande tried to start a physical fight, regardless of pleas from calm from the show presenter and camera crew.

The response was Mr. and Mrs. Sibande won't say anything to the show, as they have decided to decline the opportunity to give their side of the story due to the fact that they have referred the matter to their attorney who will be in touch with the production company as soon as possible.

28.3.2 A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given a right to reply to such criticism on the same programme. If this is impracticable, however, an opportunity for response to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.

Therefore in answer to the above requirement from the Act, it's clear that more than one attempt were made to allow for a right of reply which were turned down.

#### 28.4 Privacy

Insofar as both news and comment are concerned, broadcasting licensees must exercise exceptional care and consideration in matters involving the private lives, private concerns and dignity of individuals, bearing in mind that the rights to privacy and dignity may be overridden by a legitimate public interest.

With regard to the issue of dignity, the complainants who approach the show do so because they cannot get a hold of the person they need maintenance from. The non-payment of child maintenance is a legitimate public interest issue due to the long-term negative effects on families, the economy but specifically on the children.

The show therefore approaches the other party on behalf of the complainant to ask them to address the complainant's issues. The show also makes sure to take the complainant along so they can put their assertions on the table for the other person to engage with.

At the time of the approach, it's made clear to the other party that they are being given an opportunity to answer to these issues. The show has in the past spent hours with people to ensure that the person feels that the correct information is imparted. The show also does follow-up meetings the next day or when it's convenient to allow for a right of reply interview. In this case, instead of asking the crew to leave or arranging for a follow-up meeting, Mr. Sibande instead tried to get violent. We assert that Mr. Sibande damaged his own dignity by his actions."

[4] **The Complainant replied as follows:**

"Our response is:

1. We are still deeply offended and totally desrespected (our dignity is still violated) by Mojalove.
2. Was the stick that I picked up a welcome? Then they must think again.
3. We have emails and our phones can be checked for authentication of facts or lies they state in their response. They never called us or me for a response and permission to appear on TV.
4. It shows me that they never read your correspondence as well because they quote us as Sibande and not Sibisi, plus a few other spelling and listening errors appear in the show.
5. Child maintenance is a private matter, hence ONLY the biological parents are welcomed into the court for discussion as to how the said children will be taken care of.
6. I had the right to ask them to check and do their homework before pouncing on us like thugs who were there for own interests only.
7. They MUST produce proof where I respond before their crew coming to our yard like they did.
8. Who are they that they come to our home and block the gate with their vehicle, the white H1 with no registration plates? I could have easily thought of them as hijackers on the day.
9. They never ever tried to stop the recording after proof was shown to them by my wife, Lerato Sibisi.
10. The trauma that we are still suffering goes beyond their TV show because we had to be referred to our Employee Wellness Programme psychologists for therapy.
11. They CLEARLY show the children's names on the show which is a violation of the Child Act. Children must be protected. Worst of all they are not the law.
12. They never used the gate to enter our home, but jumped over a wall that was being built.
13. We reserve the right to either respond to them or not to. Worst of all our faces, home and vehicles are our privacy to dignity belong to us.

14. They should have considered our right to privacy as well as the children's names are CLEARLY shown in the recorded show.
15. They never ever tried restrain or stop my ex-wife (who came with them) from trying to insight the public when shen she turned and started to talk to the public. If their aim was honest and just, they should have made all effort to stop her and talk about the matter they had come for.
16. My ex-wife insinuates that I fell in love with her when she was under the age of 15 years on national TV. That means that I committed Statutory Rape. Bear in mind that she (Mbali) claims to be a twin whose sister had completed her Matric already when I got involved with her. Her 'twin' sister confirmed the ages as 19, not under 15!
17. We are people of a high moral standard and our work demands that of us. That was violation that will forever continue to follow us in our professional lives and public lives.
18. Mbali had all the information for our place of residence both in Gauteng, Soweto, and in KZN, Newcastle. I have always made it a point that I attend all subpoenas severed to me.
19. The other worst part is that there are standing court orders which we currently comply with. Hence the reason for me asking the presenter, Moss Makwati, if he had checked Mbali's bank statements and verify them with or against her bank statements.
20. We are just private citizens who abide by the laws and constitution of this land.
21. THEY ARE NOT THE COURT OR THE LAW to which we have to comply and respond to. WHO DO THEY THINK THEY ARE?"

[5] **The Adjudicator's decision was as follows:**

“Lack of parental maintenance is a serious and a legitimate public importance topic within our communities which has substantially spiraled out of control to the extent that many households relies on the government social grants, while parents can still afford to maintain their children but have for whatever reason chosen to ignore that responsibility. The South African government allocated R151.6-billion to social grants in its 2017/2018 budget, making it by far the biggest allocation; and still deemed inadequate by the beneficiaries as it cannot even meet their most basic needs. Even with this huge budget allocation, the amounts are not only inadequate but still inaccessible to millions of children who due to the very parental maintenance neglect – compels their primary care givers to seek financial assistance from the government. Even though the complainant is not a public figure, the issue of parental maintenance neglect has spiraled out of control to the detriment of millions of children in South Africa, to the extent that the government felt compelled to introduce the social grants just to alleviate maintenance pressure from the primary care givers; and thus a controversial issue of public importance as per the provisions of clause 28.3.1 of the Code.

As evidenced from the clip the complainant was approached by the presenter at his house and requested to air his opposing point of view in line with the provisions of clause 28.3.1 of the Code. The complainant tried to respond or defend himself by stating his side of the story as expected however the level of hostility [including his attempts to attack his ex-wife live on television] and the violent approach to the allegations totally derailed him from focusing on adequately addressing the issue at hand. Be that as it may the complainant was, in contrast to his complaint, afforded the opportunity to state his opposing view as required by the Code of Conduct.

From the clip, there was a couple of critical allegations against the complainant as highlighted in both the complainant's and broadcaster's statements, the seriousness of which needed a critical understanding from the broadcaster to afford the complainant a right of reply as per the provisions of clause 28.3.2 of the Code. Conceded by the complainant and accordingly confirmed in the broadcaster's response – including affirmations evidenced in the clip, the broadcaster tried on more than one occasion to afford the complainant the right of reply. The complainant was rather hostile and failed on more than one occasion to seize the opportunity to reply to most and or all of the allegations levelled against him. The complainant's wife seized the opportunity and replied to some of the allegations, even though the level of hostility in her response deterred her from effectively dealing with all the allegations as well.

After the ensuing commotion between the show producers and the complainant [including his family members]; further steps were taken by the broadcaster to afford the complainant the space to privately state his side of the story. The turn of events regarding this statement is specifically highlighted in the broadcaster's response set out in paragraph 3 and page 5 of this adjudication. No rebutting documentary proof thereof was ever presented by the complainant except a mere denial stipulated in paragraph 3 and page 6 of the adjudication. Even in this instance the complainant failed to seize the opportunity, but rather communicated to the broadcaster that his attorney will respond on his behalf. The attorney's response was never furnished as promised hence the broadcaster continued with the planned broadcast.

All factors considered, it is apparent from the sequence of events that exceptional care and consideration in privately handling the complainants' private life, private concerns and dignity as required by the provisions of clause 28.4 of the Code was cautiously dealt with by the broadcaster. In carrying on their stipulated mandate which is to advocate for millions of South Africans on this controversial issue of public importance, specifically children facing parental maintenance neglect, the broadcaster, consistently persevered to privately and fairly present the two sides of the story, something that the complainant refused to be part. The South African Constitution have made children's rights a priority and have stated that the best interests of a child are the overriding concern when it comes to any matter affecting them; thus the complainant's rights to privacy and dignity are in this instance overridden by this legitimate public interest. Further affirmation is stated in *Global Visas vs Mnet*<sup>1</sup>, in cases where the nature of the information which was exposed could be detrimental to the public, 'the Tribunal found there was balance in the presentation and that the Complainant's rights to privacy and dignity were overridden by a legitimate public interest', and thus no contravention of the provisions of clause 28.4 of the Code.

*In toto* the broadcaster complied with the provisions of Code of Conduct and cautiously dealt with this matter as required by all the clauses highlighted above, **thus no contravention of the Code was found and the complaint is dismissed.**"

[6] **The Complainant lodged the following application for leave to appeal:**

**“RE: APPLICATION FOR LEAVE TO APPEAL**

1. We represent Mr. Sibisi in respect of the abovementioned complaint.
2. Our client's complaint in terms of clauses 28.3.1, 28.3.2 and 28.4 of the Code of Conduct for Subscription Broadcasting Service Licensees, was dismissed by the Commissioner of the BCCSA in his adjudication received by our client on 16 January 2019 ("the Adjudication").

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<sup>1</sup> Case No. 41/201

3. Our client has instructed us to appeal the Adjudication in terms of Rule 2.5 of the Procedure of the Commission, as set out in the BCCSA Constitution.
4. In summary, the Commissioner found that the Broadcaster complied with the provisions of the Code of Conduct, on the basis that "exceptional care and consideration in privately handling the complainant's private life, private concerns and dignity as required by the provisions of clause 28.4 of the Code was cautiously dealt with by the broadcaster" and that "*.. the broadcaster consistently persevered to privately and fairly present two sides of the story, something that the complainant refused to be part. Furthermore, it was found that .. the complainant's right to privacy and dignity are in this instance overridden by this legitimate public interest.*"
5. Our client wishes to appeal the decision that the Broadcaster did not infringe the aforesaid clauses, in particular, clause 28.4 of the code, which states that:

*"Insofar as both news and comment are concerned, broadcasting licensees must exercise exceptional care and consideration in matters involving private lives, private concerns and dignity of individuals, bearing in mind that the rights to privacy and dignity may be overridden by a legitimate public interest."*
6. The grounds on which our clients wishes to appeal the Adjudication are as follows:
  - 6.1 Mr. Sibisi was previously married to Mbalenhle Sibisi ("Mbali"), the complainant, who contacted the show, No Excuses: Pay Paggeld" ("the Show"). There are three children born from the marriage, namely Benzile Sibisi (currently 16 years old), Zimele Sibisi (currently 18 years old) and Attiya Sibisi (currently 22 years old). The marriage was dissolved during March 2014.
  - 6.2 On 9 September 2016, our client and Mbali entered into a Consent and Maintenance Order in terms of Section 17 read with Section 16 of the Maintenance Act in terms of which it was agreed and ordered that our client would pay maintenance in respect of the then two minor children (Benzile and Zimele) in the amount of R1150.00 per month. A Consent and Maintenance Order was also entered into between our client and Attiya on 31 March 2017 in terms of which it was agreed and ordered that our client would pay cash maintenance to Attiya in the amount of R1500.00 per month and make payment for her tuition fees at Rosebank College.
  - 6.3 There is no dispute that our client has at all times complied with the terms of the aforesaid maintenance orders, which we reiterate were orders arrived at **by agreement between the parties**.
  - 6.4 During the first half of 2018, Mbali approached the Protea Maintenance Court to apply for an increase in the maintenance payable by our client for the two children. Our client appeared at court on each and every hearing date without fail. During July 2018, Mbali's application for an increase in maintenance was dismissed by the court as she was unable to substantiate her claim for an increase in maintenance. In other words, there was no evidence to show that our client was not sufficiently maintaining his children.
  - 6.5 Nevertheless, Mbali approached the Show under the false pretence that our client is not paying sufficient maintenance for the children.
  - 6.6 In the Broadcaster's response to our client's complaint, it stated, *inter alia*, that "*with regard to the issue of dignity, the complainants who approach the show do so because they cannot get a hold of the person they need maintenance from.*" This was

clearly not the case as Mbali had caused numerous court notices and subpoenas to be served on our client at his place of work on many occasions and our client had in response thereto appeared at court, together with Mbali, on several occasions. It was therefore not that Mbali was forced to approach the show because she was unable to get a hold of our client, but rather because she was not satisfied with the court's decision. It was clearly her intention to merely humiliate and defame our client and his wife on national television.

- 6.7 Our client does not deny that the purpose of the Show is to "*expose people who are not honouring their obligations to pay maintenance*", as set out in paragraph 6 of the Adjudication. However, as is evident from the above facts, our client is in fact honouring his maintenance obligations. There is no justification for our client and his wife being ambushed at their home and being charged with false, unsubstantiated and malicious accusations and being forced to defend themselves on national television to set the record straight.
- 6.8 The Broadcaster ought to be held to a higher standard to ensure that the privacy and dignity of individuals, who are in fact strictly complying with their maintenance obligations, are protected.
- 6.9 Although our client agrees that "*lack of parental maintenance is a serious and a legitimate public importance topic within our communities*", this does not give the Broadcaster a broad authority to confront, on television, parents who are maliciously and falsely accused of not paying enough maintenance for their children. There ought to be a duty of care on the Show and the Broadcaster to perform a reasonable amount of fact checking to ensure that there are sufficient grounds to believe that a parent is failing to sufficiently maintain his or her child/ren, as opposed to taking a complainant's accusation at face value. In this case, the Broadcaster was aware that our client was complying with a court order and should have been aware (if they were not aware) that the complainant's application to court for an increase in maintenance was dismissed. If a court of law determines that a parent is sufficiently maintaining his children, then the Broadcaster has no right to take it upon itself to try to "expose" that parent on national television for failing to adequately maintain his child.
- 6.10 The Broadcaster and the Commissioner in his Adjudication, appears to condone the Broadcaster's conduct on the basis that our client was given multiple opportunities to tell his side of the story but refused to do so. However, in these circumstances, our client should not be forced to tell his side of the story on national television in order to defend himself against malicious, false and unsubstantiated accusations.
- 6.11 Prior to the airing of the episode, our client pleaded with the Broadcaster and the Show not to broadcast the episode, however he was at all times advised that the episode would be broadcast whether he gave them an interview with his side of the story or not. Furthermore, extracts of the episode were broadcast from 10 November 2017 until 17 November 2018 and after the episode was broadcast for the first time on 17 November 2018, it continued to be broadcasted for one whole week thereafter, 3 to 4 times each day.
- 6.12 Our client and his wife are both teachers by profession and our client is the Deputy Principal at the school where he teaches. They therefore declined to comment as he did not wish to defend himself against vexatious and malicious accusations on national television and demanded that their right to privacy be respected.

- 6.13 The Show appears to have free reign to Broadcast defamatory content that infringes the privacy and dignity of individuals, who are accused (whether substantiated or not) of failing to adequately maintain their children, as long as the 'accused' is given an opportunity to give his side of the story, on television. The fact that lack of child maintenance is an issue of public interest cannot give the Broadcaster free reign to confront people who are clearly maintaining their children, as long as the accused is provided with an opportunity to respond.
- 6.14 Furthermore, the Commissioner fails to deal with the fact that our client was not only accused of failing to sufficiently maintain his children, but also that:
- 6.14.1 Our client is irresponsible as he does not visit the children and hates them;
  - 6.14.2 Our client chooses to resign from his employment to avoid his responsibilities;
  - 6.14.3 that our client is an abusive husband;
  - 6.14.4 that our client forced himself on Mbali when she was still a minor under the age of 15 years (which is an extremely serious allegation);
  - 6.14.5 that our client is a slut, loves sex and had an extra-marital affair;
  - 6.14.6 that our client's wife is an old hag with grandchildren the same age as Mbali;
  - 6.14.7 that our client's wife is a husband-snatcher;
  - 6.14.8 that our client is a witch who turns people into cockroaches; and
  - 6.14.9 that our client entered into Mbali's home without permission.
7. It is therefore evident from the above that the Commissioner in his Adjudication, failed to take into consideration the fact that the Broadcaster was aware /ought to have been aware that our client is complying with a Maintenance Court Order and that the complainant's application instituted at the Maintenance Court for an increase in maintenance for the children, was dismissed only a few months prior to her approaching the Show, due to her being unable to substantiate her claim. The complainant's sole aim in approaching the Show was clearly to humiliate our client and to defame his character on television, which effect was certainly achieved. In such circumstances, it cannot reasonably be held that our client's right to privacy and dignity was outweighed by a legitimate public interest. The Broadcaster must be held to a higher standard to ensure that the Show's aim of "*exposing people who are not honouring their obligations to pay child maintenance*" is actually achieved. If not, then there are no limits to the Broadcaster's ability to infringe one's privacy and dignity, when accused of not paying sufficient maintenance, so long as the 'accused' is given an opportunity to defend himself on national television. Furthermore, the Broadcaster allowed the episode to be broadcast which contained highly defamatory accusations against our client and his wife, that are entirely unrelated to the issue of child maintenance.
8. We therefore request that our client be given leave to appeal the Adjudication on the grounds as set out above.
9. We trust the above is in order and look forward to hearing from you."

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

**“RE: APPLICATION FOR LEAVE APPEAL ADJUDICATION: 74/A/2018**

**1. INTRODUCTION**

- 1.1 We refer to the application for leave to appeal brought by Mr Sibisi, hereafter referred to as the applicant, against the ruling of the Adjudicator in the abovementioned matter.
- 1.2 In essence, the applicant is applying for leave to appeal against the ruling on the basis that the Adjudicator was wrong when s/he ruled that the respondent had not contravened the Code.
- 1.3 We are of the view that the complainant has not demonstrated that the ruling by the Adjudicator was clearly wrong or that the Appeal Tribunal is likely to rule that the Adjudicator was clearly wrong and we demonstrate this point in the subsequent paragraphs.<sup>2</sup>

## **2. GROUNDS FOR OPPOSING THE APPLICATION FOR LEAVE APPEAL**

- 2.1 It is now a well-established jurisprudence of the Commission that "an Appeal Tribunal shall not set aside or amend a decision of the first Tribunal unless it is clearly wrong"<sup>3</sup>.
- 2.2 In other words, it is not sufficient for the Appeal Tribunal to differ with the ruling of the first Tribunal or the Adjudicator in order for the appeal to succeed but the Appeal Tribunal should conclude that objectively the first Tribunal's ruling was not supported by the facts before it or that it clearly interpreted the clause of the Code wrongly.
- 2.3 We submit that was not the case in respect of the ruling in this instance.

The Adjudicator clearly considered arguments from both parties and correctly found that:

- 2.3.1 The applicant was offered opportunity to respond to allegations on more than one occasion<sup>4</sup>. The applicant did not take advantage of any of those opportunities, instead his wife attempted to provide their side of the story<sup>5</sup> and on a second occasion, the complainant indicated that his attorney will respond on his behalf.<sup>6</sup>
- 2.3.2 The Adjudicator, therefore correctly ruled that the applicant was offered opportunity to state his case.
- 2.3.3 The programme was clearly in the public interest and the interest of minor children are paramount when it comes to matters affecting them and therefore overrides privacy of the complainant.
- 2.4 The complainant has not demonstrated why the Appeal Tribunal might find that the Adjudicator's consideration of these factors was clearly wrong.
- 2.5 While we accept that the other Tribunal may differ with the Adjudicator, we submit however that is not applicable test.

## **3 CONCLUSION**

We submit that the applicant has not demonstrated that there is a likelihood that the Appeal Tribunal will rule that the Adjudicator was clearly wrong.

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<sup>2</sup> Rule 4.9 of the BCCSA Procedures

<sup>3</sup> Supra

<sup>4</sup> Paragraphs 8-10 of the Ruling.

<sup>5</sup> Paragraph 10 of the Ruling.

<sup>6</sup> Paragraph 11 of the Ruling.

## EVALUATION

[8] The Tribunal watched the episode in question. After the standard introductory statement in the broadcast about the rights of children, highlights of the confrontation between the Appellant and the co-parent were shown. The confrontation was chaotic and was coupled with an altercation between the co-parent, the host of the show, the Appellant's current wife and the Appellant. Immediately from this clip, it was evident that there was a level of sensationalism by the Broadcaster, prior to even getting into the merits of the alleged non-payment of child maintenance by the Appellant. The co-parent was then given an opportunity to state her grievance against the Appellant. The co-parent stated that she was in an 18 (eighteen) year marriage with the Appellant. She stated that she met the Appellant when she was 15 (fifteen) years old and he was between 10 (ten) and 11 (eleven) years older than her. The co-parent alleged that during the time when the Appellant was trying to pursue a romantic relationship with her, he was already married. The co-parent alleged further that the Appellant was violent towards her and that he would force her to agree to intercourse even when she refused. The host then gave his opinion on this, and he stated that the Appellant took advantage of the co-parent while she was at a tender age. This statement by the host was made as fact and was not presented in a way that suggested that it was just an allegation. The host further stated that there are dangers when a younger woman is involved with an older man who is of a higher social and financial standing, because the relationship becomes one sided, and there is abuse of power, being the position that the co-parent found herself in. At this point, the host equated the Appellant to a *'blesser'*. A *"blesser"* is an informal term used to describe an older man, who often has multiple girlfriends whom he lavishes with gifts and money in exchange for sex and companionship.

The co-parent stated that the Appellant, after abandoning her and their children, constantly resigned from work with the sole purpose of avoiding to pay child maintenance. The co-parent alleged further that the Appellant would then claim his resignation packages and squander the funds with his current wife. The Appellant's current wife was then portrayed by the co-parent as being an old traditional healer

(*Isangoma*) who snatched the co-parent's husband and threatened the co-parent's life. The host then alluded to this allegation and called on the department of justice to take action against fathers who repeatedly resign from work with the sole purpose of avoiding to pay child maintenance. Further allegations were made by the co-parent against the Appellant regarding his sexual activities, alleging that the Appellant's brother hinted to the co-parent that the Appellant is not "well". In commentary, the host then stated "*.....You should be careful that you don't go picking up things from the street and bringing them home with you, it's clear that Thami's life has no peace, I mean this can't be good for his health or his spirit.....*" This, together with all the other allegations evidently had nothing to do with the maintenance of the children. There was only approximately 2 minutes spent by the co-parent talking about the pertinent issue of child maintenance, out of approximately 11 minutes (with commentary from the host) speaking on collateral issues. The majority of time was spent thoroughly portraying the Appellant as a devious and irresponsible man. Relevant to the issue of child maintenance, the co-parent only spoke about a 2012 Maintenance Court appearance with the Appellant, which she alleges was futile because the Court file got lost. Thereafter the co-parent listed her monthly expenses towards the children and explained her struggle in taking care of the children. Nothing further was stated about child maintenance or any Court appearances with the Appellant.

- [9] From the above, it is clear that the reputation and dignity of the Appellant was greatly impaired. The reasonable viewer would conclude that the Appellant is an irresponsible parent who abandoned his children. He is violent and is promiscuous.

Clause 28.4 of the Code provides that:

"Insofar as both news and comment are concerned, broadcasting licensees must exercise **exceptional (my emphasis)** care and consideration in matters involving the private lives, private concerns and dignity of individuals, bearing in mind that the rights to privacy and dignity may be overridden by a legitimate public interest."

The word "exceptional" as stated in the Code places an extraordinary burden on the Broadcaster. It is therefore not a typical level of caution that the Broadcaster must employ when dealing with the private lives and dignity of individuals. It is an atypical

standard that was significantly overlooked by the Broadcaster. In the case of *Delange v Costa*,<sup>7</sup> the Appellate Division clearly laid out the test for the impairment of dignity. The court held that the test consists of two elements: firstly, the plaintiff's self-esteem must have been impaired (subjective test) and secondly, whether a person of ordinary sensibilities would have regarded the conduct as offensive (objective test). The objective test requires application of the reasonable person test. In this case, it is without doubt that the reasonable viewer would assume that the allegations levelled against the Appellant are the truth. During oral submissions before the Tribunal, it transpired that the Appellant is employed as deputy school principal. After the broadcast of the show, the Appellant was questioned by the school principal about what had been broadcast. There were also concerns from the parents of the school children. The Appellant's current wife, who is also a school teacher was tainted by the broadcast, leading to her being called in for a disciplinary hearing. The Appellant also submitted that he and his family were subsequently taunted by members of their community. It is clear that the Appellant's dignity was subjectively and objectively impaired. Actual prejudice was suffered by the Appellant as a result of the show. The Broadcaster has thus contravened clause 28.4 of the Code.

- [10] The allegations made by the co-parent were ostensibly vindictive. The co-parent spent the majority of the time talking about issues that broke up her marriage to the Appellant, rather than the issues of child maintenance. The host also did not hesitate to put more flesh to these immaterial averments. The only thing that was alleged by the co-parent about maintenance is the failed 2012 Maintenance Court appearance subsequent to the Appellant's alleged failure to pay child maintenance. This ultimately means this is the only aspect the Appellant was required to reply to when confronted by the Broadcaster, because all the other allegations levelled by the co-parent were irrelevant to the issue of child maintenance. Which now takes me to the question of the right to reply.

The Appellant was confronted by the host of the show at his home. Full view of his home and the building activities that were taking place at the time were shown. No prior

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<sup>7</sup> 1989 (2) SA 857 A

permission to enter the premises was obtained from the Appellant, nor was he pre-warned about the questions or allegations that he was required to provide answers to. It was clear from the clip that the Appellant was shocked and agitated by the confrontation. The host then informed the Appellant that the co-parent has alleged that he does not pay “sufficient” maintenance, and when he does pay, payments are inconsistent. This was not mentioned by the co-parent at inception of the show when she uninterruptedly delivered her grievance. She only spoke about a failed 2012 Maintenance Court appearance, after she alleged that the children she has with the Appellant do not even know of a single shoe bought for them by the Appellant. Only at this point of the confrontation did it emerge that the Appellant has actually been paying child maintenance, but allegedly not paying enough. In response to the questions by the host, the Appellant’s first response was “*did you check her bank statement*” The host then confirms that he has not checked the bank statement. The Appellant replied: “*then how do you know that it’s inconsistent?*” The host then invited the co-parent to join in the confrontation. When the co-parent joined in, she now stated that the Appellant is only paying R2000 (two thousand Rands) for the children. The co-parent then revealed the Appellant’s monthly salary, or what she believes it to be, and states that he earns way too much to be paying that little as child maintenance. The Appellant then stated that he has been to Court many times with the co-parent and has always proved to Court that he is paying sufficient child maintenance. At this point, the co-parent exclaims that she will ensure that the Appellant continues going to Court. From this statement alone, it is clear that the intention of the co-parent was to torment and continue to torment the Appellant, including using the show as a means to do so.

During oral submissions before members of the Tribunal, it arose that a Maintenance Court order was granted by the Court in 2012. In 2016, the co-parent applied for variation of the order. Therefore the 2012 Court file never got lost as was alleged by the co-parent at the beginning of the show. Consensus was reached by the Appellant and the co-parent in Court on the maintenance amount. There were several Court appearances until the matter was postponed with no determined date because the co-parent chose to withdraw the case. This however was not mentioned in the show; the host also confirmed during

the broadcast that no prior verifications were made before attempting to confront the Appellant. It is a cardinal principle of our law that “he who alleges must prove”. It is however clear that the Broadcaster left it to the Appellant to disprove allegations that were made by the co-parent with the help of the host of the show. The co-parent’s version was taken religiously and the Broadcaster attempted to veil this by proclaiming that the Appellant was given the right to reply.

As the confrontation continued, the Appellant’s current wife intervened with records of payments made to the co-parent. Inevitably, the confrontation became heated and argumentative. While the host was addressing the Appellant and his current wife, the co-parent was seen on the side of the road, shouting profanities and seemingly inciting the crowd that had gathered. This was solely aimed at embarrassing the Appellant even more. The Broadcaster’s submission that the Appellant was given the right to reply is flawed. The Appellant’s dignity was thoroughly impaired throughout the show. After the “damage was done” to the Appellant’s dignity, the Broadcaster then “afforded” the Appellant the opportunity to reply. What this suggests is that the Broadcaster was justified in impairing the Appellant’s dignity and infringing in his privacy, provided that the Broadcaster then gave the Appellant the opportunity to respond after the fact. A compelling *dictum* in this regard is found in the English case of *Nicholson v Chapman Eyre*.<sup>8</sup> The case dealt with the right of a plaintiff to claim compensation from the defendant who “benefitted” from the plaintiff’s unsolicited intervention into the defendant’s affairs. The court held that “... *the general right of recovery under this action will encourage wilful attempts of ill-designing people to turn floats and vessels adrift, in order that they may be paid to find them*”. In this case, the Broadcaster impaired the Appellant’s dignity and privacy. The Appellant was subjected to a predicament he had no choice in being part of, but because the Appellant, after being ambushed at his home, reacted with emotion and refused to reply after the fact; the Appellant was then construed to be the author of his own misfortune. Under the circumstances, this reasoning is not justifiable. The opportunity to reply that the Broadcaster alleges was given to the Appellant was used to camouflage the damage that was already done. The Broadcaster

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<sup>8</sup> (1793) 2 H Bl 254

cannot be given credit for creating a conundrum for the Appellant, and then placing the burden on the Appellant to rectify the situation in the guise of affording the right to reply. As such, the Broadcaster has contravened Clauses 28.3.1 and 28.3.2 of the Code. During the Tribunal hearing, the Broadcaster offered the Appellant the right to reply. The Appellant has the choice to make use of this offer. It is not an order of the BCCSA.

- [11] It is common cause that in all matters concerning a child, the best interests of the child are of paramount importance. The show also seeks to uphold this principle, as can also be seen in the show's preamble before the broadcast of the episode. The Courts are the upper guardian of children, hence the Maintenance Court exists to deal with parents who fail to honour their obligations. The Appellant showed to the members of the Tribunal that he is paying child maintenance and that there are Court orders in this regard. The Broadcaster failed to uphold and protect the interests of the children involved. Instead, the very same children the show sought to assist ended up being taunted by their peers after their names and identities were revealed on the show and their parents portrayed negatively. The premise of the episode was largely flawed and had very little to do with the protection of children. The best interest of the children in question were not observed.

**The Broadcaster is found to have contravened the Code. The appeal is accordingly upheld. The sanction is a reprimand. The Appellant may accede to the Broadcaster's offer to broadcast his version.**



**MS. NOKUBONGA FAKUDE  
COMMISSIONER: BROADCASTING COMPLAINTS COMMISSION**

*Chairperson Viljoen and Deputy Chairperson Makeketa concurred in the above judgment.*