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CASE NUMBER: 07/2019

JUDGMENT DATE: 22 APRIL 2019

JUDGMENT RELEASE DATE: 23 APRIL 2019

PLANK

1ST APPLICANT

**KWAPE from MURPHY KWAPE MARITZ
ATTORNEYS**

2ND APPLICANT

vs

SABC2

RESPONDENT

FOR THE APPELLANT: MR JEROME LEVITS OF FLUXMANS ATTORNEYS

**FOR THE RESPONDENT: MR NYIKO SHIBAMBO, ACTING MANAGER:
BROADCASTING COMPLIANCE**

APPLICATION FOR LEAVE TO APPEAL

Application for leave to appeal against finding in Plank, Kwape, from Murphy Kwape Maritz Attorneys vs SABC2, Case 02/2019 – grounds on which application for leave to appeal considered – chairperson finding that matter was one of public importance, that comments by Broadcaster were opinions based on facts, and that Applicants had sufficient opportunity to fairly present their case – leave to appeal not granted - Plank, Kwape, Murphy Kwape Maritz Attorneys vs SABC2, Case 07/2019 (BCCSA)

SUMMARY

This is an application for leave to appeal against the finding in Plank, Kwape, from Murphy Kwape Maritz Attorneys vs SABC2, Case 02/2019. In terms of the Procedure of the BCCSA, this application must be decided by the chairperson of the BCCSA. The grounds on which the application for leave to appeal were based were considered. The chairperson found that the matter was one of public importance, that comments by the Broadcaster were opinions based on facts, and that the Applicants had sufficient opportunity to fairly present their case. Leave to appeal was not granted.

JUDGMENT

HP VILJOEN

[1] This is an application to the Chairperson of the Tribunal for leave to appeal on the merits of a judgment of the first Tribunal in case 02/2019 in the matter of *Plank & Kwape from Murphy Kwape Maritz Attorneys vs SABC2*. The Tribunal delivered its judgment on 4 April 2019.

[2] **The application for leave to appeal reads:**

“KINDLY TAKE NOTICE that the complainants intend to appeal the decision of the Tribunal of the Broadcasting Complaints Commission of South Africa (“**the Commission**”) dated 4 April 2019 on the following grounds and hereby make application for leave to appeal to an Appeal Tribunal of the Commission.

The grounds of appeal are set out more fully below:

1. The Commission erred in finding that the matter was one of public importance as contemplated in Clause 12(1) of the Code. In amplification of the foregoing:
2. The Commission erred in finding that the SABC complied with Clause 12 (2). In amplification of the foregoing:
 - 2.1. Lancer Trading 1022 CC (“**Lancer**”) was, to the knowledge of the SABC, who conducted its own search of the records of the Companies and Intellectual Property Commission, placed under voluntary liquidation before the programme was aired and was accordingly no longer trading. Therefore, there was no longer a risk that members of the public could enter into dealings with Lancer on an unsuspecting basis and without having knowledge of the allegations levelled against Lancer. Once Lancer was placed under liquidation, any legitimate interest to warn consumers of the risks of entering into dealings with Lancer was obviated.
 - 2.2. Airing the show, almost a year after the liquidation of Lancer and after a year had passed since the day of the recording cannot be reasonably viewed as a genuine attempt to alert members of the public against a genuine and existing threat to their consumer welfare – the delay is in fact so egregious and inordinate that any

public broadcaster desirous of vindicating the public interest would have aired the programme without delay.

- 2.3. The failure to do so and provide any real justification for the delay leaves scope for one inference only, namely that the objective was sensationalist reporting to generate interest amongst the public, a matter very different to proving that it was in the public interest.
3. Mrs Mkhize and Mr Musina alleged that Mrs Mkhize's funds had been stolen by Mr Plank, aided by Mr Kwape. This allegation was clearly not couched as a matter of opinion but as a matter of fact but one that was incorrect and without substance. Mr Plank acting personally had no dealings with Mrs Mkhize and Mr Kwape was only his attorney.
4. Mr Musina alleged that Lancer and Murphy Kwape Maritz Attorneys operated from the same premises. This allegation was not couched as a matter of opinion but as a matter of fact. Again, and because Lancer was to the knowledge of the SABC already in liquidation, it no longer traded.
5. The SABC relied on facts that were, to the SABC's knowledge, incorrect, alternatively, the SABC failed to provide the viewers with all material information at its disposal that would assist the viewers in drawing their own conclusions.
6. In amplification of the foregoing, the gist of the complaint was that Mrs Mkhize's funds were stolen in that she had not received the trailer as undertaken by Mr Plank.
7. This is incorrect as Mrs Mkhize had received a complete trailer as well as a further trailer, albeit that it was incomplete – she elected to take delivery of an incomplete trailer. Mr Kwape had intervened to assist Mr Plank. Mrs Mkhize was advised that Lancer had been placed in liquidation and she was engaged by Mr Kwape in an effort to resolve the situation which culminated in the delivery of the incomplete trailer. At the very least, the SABC ought to have brought this information to the attention of the viewers, namely that Lancer had been placed under liquidation and that Mrs Mkhize had in fact received a complete as well as an incomplete trailer. The failure to create the necessary balance by referring to these facts was never explained and the only inference is that it was deliberately omitted as it would detract from the "compelling viewing" that the story made.
8. The allegation that Mr Kwape is Mr Plank's business partner is incorrect. The SABC was, on its own version, in possession of the information from the Companies and Intellectual Property Commission relating to Lancer and from which it would have been immediately apparent that Mr Kwape is not a director of the company. His only role is that of its attorney but importantly, he no longer fulfilled that role once the company was placed into liquidation as it was then under the control of the Master of the High Court.
9. In conveying the allegation that Mr Kwape was a business partner of Mr Plank, the SABC did not draw to the attention of the viewers that Mr Kwape does not appear anywhere in the documents from CIPC in relation to Lancer. The net result is that Mr Kwape was caught in the cross fire as it were with the result that his reputation as a professional person was tarnished.
10. The Commission erred in finding that the SABC was not in violation of clause 13(2) of the Code.
11. In amplification of the foregoing, the Commission disregarded the fact that Mr Plank's attorneys had addressed a letter to the SABC on 14 September 2017 inviting the SABC to provide Mr Plank with all questions and allegations levelled against him and that the SABC had failed to respond to the letter. There is further no justification advanced by the SABC as to why it failed and/or refused to furnish Mr Plank's attorneys with the list of questions and allegations as requested.

12. The only inference to be drawn is that it did not want to be met with cold hard answers in the light of day that would detract from the impact of its reality television genre. Regrettably its drive for sensationalism came at the expense of the reputations of Mr Plank and Mr Kwape.
13. WHEREFORE the complainants pray that leave to appeal to an Appeal Tribunal of the Commission be granted.”

We agree that the Chairperson of the Tribunal may decide the matter on the papers as stipulated in clause 4.3 of the Appeal procedure.

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

“RESPONSE TO THE COMPLAINANTS’ NOTICE OF APPLICATION FOR LEAVE TO APPEAL: *SPEAK OUT*”

The issues raised in the Application for Leave to Appeal were raised and addressed at the BCCSA Tribunal on the 6th of February 2019. However, we would to reiterate the following:

1. Speak Out is a 24 minutes Consumer Rights Programme on SABC2. The show receives complaints through letters, fax, email, walk-ins and WhatsApp messages. We receive complaints because a consumer has a dispute and their consumer rights have been violated by a service provider, in that, either both goods and services haven’t been delivered or delivered in a substandard or defective manner.
2. This is a factual reality show which deals with real people and real consumer issues. Our research is based on facts and evidence received from the complainant. All content that is shown on the show is based on factual information collected by the Research Team during the research phase of the production. The decision to film any complaint is then based on the research, evidence collected and a clear consumer right violation. In this case the consumer right violated (right to fair and honest dealings and the right to receive good quality goods) was clear in that Ms Lebo Mkhize, the complainant paid R286 000 to Lancer Trading 1022 t/a Mobile Trailer Solutions CC and received substandard goods and service which Mobile Trailer Solutions CC also conceded to.
3. By the time Ms Mkhize engaged Speak Out; it was already a year in her many attempts to receive all her goods or refund worth R286 000. She was also a year in her loan repayment plan with Gauteng Enterprise Propeller (GEP) of R7 326.00 per month.
4. Ms Mkhize’s complaint is of public interest in that:
 - Mobile Trailer Solutions CC was trading with consumers (the public) and that presents public interest.
 - There was also a clear consumer right violation by the company as they did not deliver all Ms Mkhize’s goods as per the agreement.
 - There were other complaints similar to Ms Mkhize’s, which proves the public interest beyond our complainant.
 - Also Ms Mkhize acquired the funds (R286 000) from a public entity, Gauteng Enterprise Propeller (GEP) that develops and loans funds to small businesses in Gauteng. Ms Mkhize is still paying back this loan despite her plea to be exempted by GEP; however they have indicated that she is liable for repayment. GEP also tried to intervene with Mobile Trailer Solutions without any luck. They were given a right of reply in the programme and they too conceded that after their investigation they remain suspicious of the entity. They

suspected that the entity could be involved in running a fraudulent operation with criminal intentions.

5. Mobile Trailer Solutions CC voluntarily liquidated the company on the 12th of May 2017. However Ms Mkhize stated that she was never engaged by Mobile Trailer Solutions CC or by Mr Kwape who is the company's lawyer with regards to the liquidation. When the production team went to film on the 7th of September 2017 it was clear that the company was operational despite their voluntary liquidation status and this is supported by the following:
 - Speak Out arranged a set up with the entity. A Researcher was sent to contact the company to purchase a mobile trailer. This was done prior to filming to double-check if the entity was indeed operational. The researcher spoke to Mr Alan Plank, owner of Mobile Trailer Solutions CC with regards to purchasing a mobile trailer. Our researcher was provided the address to the Jan Smuts premises by Mr Plank.
 - This was interesting in that the same address had been provided to us by Ms Mkhize who had called claiming that she saw Mr Plank entering these premises. Upon investigating further, she claimed that she had seen trailers in the yard. These are the same trailers that can be seen in the programme when we later went there to film.
 - In addition to the above, there were the same Mobile Trailer Solutions CC employees who were working on these new premises that Ms Mkhize recognised from the previous premises. There was also equipment and mobile trailers visible in the lawyer's business premises.
 - As the filming team would soon discover; Mr Kwape and Mr Plank were also in the same premises at the same time which indicated that they had a business relationship at the time when Mr Plank claims liquidation and Mr Plank was free to give out the lawyer's address to clients who call him (our researcher) as his trading address!
 - Ms Mkhize was also engaged by Mr Plank on e-mail after the stated liquidation date that her goods would be completed and delivered which never happened. That is another proof that the liquidation was on paper only.
 - Speak Out is editorially managed by the SABC. The series focus is on consumer rights and assisting consumers to get a favourable recourse or redress. The SABC enjoys editorial control on commissioned programmes and no external interference in its editorial is permitted. The SABC's editorial team was satisfied that the selected education elements contained in the episode met the requirements of the series premise and the episode in question was approved and transmitted.
6. It is common practice that episode's broadcast would be delayed to allow for complainants to find a positive resolution to the issues brought to the show. Whilst it remains the SABC's scheduling decision on when programmes are broadcast; Mobile Trailer Solutions CC was provided with more than sufficient opportunity to remedy the situation and address Ms Mkhize's complaint. They have no right to dictate to the SABC as to how it can use recorded material.
7. The correspondence we received from Mobile Trailer Solutions CC through their letters or telephone conversations with the Producer was indicative of an entity with no intention to resolve a matter but their priority seemed to be stopping the broadcast of the episode. To date, this entity has not shown remorse for the unfortunate position that Ms Mkhize finds herself in and any intention to remedy the situation.

8. Mobile Trailer Solutions CC owner Mr Plank and the company's lawyer Mr Kwape have clearly not shown an intention to resolve Ms Mkhize's long overdue complaint about the money she paid and lack of service. This was also evident when we filming at Mr Kwape's premises where Mr Plank walked away and locked himself in the office whilst Mr Kwape insisted that we leave his premises. All this happened in the presence of the complainant Ms Mkhize.
9. Even during the tribunal, they still did not show any interest to resolving Ms Mkhize's matter but it is our opinion that the extent they have gone in legally challenging the broadcast of the episode and the costs involved in legal fees, could have gone some way in alleviating Ms Mkhize's situation.

In conclusion, Ms Mkhize still continues to re-pay her R286 000 loan from GEP as per their contractual obligation. From 2016 to date Ms Mkhize is still fighting, trying to resolve her complaint of non-delivery by Mobile Trailer Solutions CC. All that this entrepreneur wants is to grow her business to support her family and get recourse for money she paid. Give all the elucidations above, we submit that the tribunal has sufficiently dealt with this matter and no other platform could arrive at a different conclusion hence we strongly recommend that their application for leave to appeal be denied.

EVALUATION

[4] Clause 4 of the Procedure of the Commission as set out in the Constitution of the BCCSA provides for an application for leave to appeal against a finding of a Tribunal as follows:

- 4.1 If any of the parties to a matter which has been decided upon by the Tribunal is aggrieved by the decision, that party may, within 5 days, apply to the Chairperson of the Tribunal in writing for leave to appeal to an Appeal Tribunal of the Commission
- 4.2 A party who files such an application must set out the grounds fully upon which that party believes that an Appeal Tribunal is likely to come to a different decision.

[5] The parties to this application for leave to appeal agreed that I as Chairperson of the BCCSA may decide this matter on papers only. I have read the application for leave to appeal and the grounds on which the application is based. I have also read the Broadcaster's response to the application. I have applied my mind to this matter.

[6] In their first ground of appeal, the Applicants deny that the issue in this complaint is one of public importance. The fact is that a business was conducted which entailed that the public was invited to buy custom made trailers. Whether the invitation came from a close corporation (CC) or from an individual is irrelevant. What is important is that the public was invited. In this way the Complainant's interest in the product was created and after some discussions, she concluded a contract and paid for the goods. The issue is one of public importance because the public was invited to buy the products.

Whether the Complainant concluded the contract with a close corporation (which was later liquidated) or with a private individual is also not relevant to determine whether the matter is one of public importance. The argument that the issue at stake is not one of public importance cannot succeed.

[7] The second ground of appeal is based on the argument that the finding by the Tribunal, namely that the comments made by the Broadcaster were honest expressions of opinion based on fact, is wrong. After viewing the video of the programme, the Tribunal was convinced that the Broadcaster did proper research and expressed its opinion in the programme based on facts. The argument by the Applicants that the Broadcaster merely made allegations based on incorrect facts cannot be sustained, since the Broadcaster based its opinion on the information given by the Complainant and other witnesses in the programme.

[8] The third ground is that the Appellants were not granted an opportunity to fairly present their case to the viewers. From the evidence before the Tribunal it appears that there was sufficient communication with the Applicants before the programme was broadcast and an offer was made to them to appear on the programme or to have their views broadcast. The fact that the programme was broadcast so long after the first interviews is not relevant because the Broadcaster has the editorial freedom to decide when to broadcast a programme. In the broadcast one could clearly see that both Applicants were present at their place of business when the Broadcaster went there with its television team. The Applicant Kwape talked to the presenter of the programme, but the Applicant Plank seemed to hide from the team as if he was covering up something. Mr Plank's failure to produce his evidence to the Broadcaster was of his own making, and he cannot expect an appeal Tribunal to decide that he did not have a fair opportunity to present his case.

[9] I should just mention that the average viewer of the programme would probably not be interested in or knowledgeable about the fact that the contract to buy the goods was concluded with a legal entity like a close corporation or with a natural person. It could be assumed that the first Applicant was hiding behind the corporate veil because of the undue weight placed, during the hearing and now in the papers, on the argument that

the contract was concluded between the Complainant and a close corporation which has since then been liquidated. This has little to do with the gist of the programme, namely that the Complainant had paid for goods which were not completed when they were delivered by the first Applicant. The second Applicant's role was probably unclear to most of the viewers, but the fact that he ceased to be the lawyer for the closed corporation upon liquidation of same, also had little to do with the main message of the programme.

[10] After considering all the arguments by the Applicants, I come to the conclusion that an Appeal Tribunal is not likely to come to a decision different from the one arrived at by the first Tribunal.

The application for leave to appeal is, accordingly, not granted.

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

**PROF HP VILJOEN
CHAIRPERSON: BCCSA**