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CASE NUMBER: 13/2019

DATE OF HEARING: 10 JULY 2019
JUDGMENT RELEASE DATE: 23 JULY 2019

SABC 2

APPELLANT

vs

VAMVAKOS

RESPONDENT

TRIBUNAL: MR BRIAN MAKEKETA (DEPUTY CHAIRPERSON)
DR MOHAMED CHICKTAY
MR EDWIN NAIDU

FOR THE COMPLAINANT: The Complainant was invited but was unable to attend.

FOR THE RESPONDENT: Mr Nyiko Shibambo, Acting Manager: Broadcast Compliance, accompanied by Ms Refilwe Timana, Acting Compliance Officer and Mr Mikhail Nqwana, Sabc Education: Editorial& Special projects of the SABC.

The documentary was not unbalanced and one sided as found in Adjudication No: 21/A/2019. Case No: SABC2 vs Vamvakos, Case No: 13/2019.

SUMMARY

This is a SABC appeal of Adjudication No: 21/A/2019 between Vamvakos vs SABC2, wherein the adjudicator found that the programme lacked an opposing point of view and was therefore unbalanced and one-sided. In the main, the SABC argument is that the documentary is made up of archived material and comments from people representing different civil and political organizations. Again, different experts were

interviewed for their divergent points of view, not in the studio, but in their different offices. This is not a live studio broadcast but just a putting together of archived recorded material from the past. In the end, the Tribunal found no contravention of Clause 13(1) and the original finding of Adjudication No: 21/A/2019 is thus overturned.

JUDGMENT

B MAKEKETA

[1] This is a SABC appeal against the BCCSA Adjudication No: 21/A/2019 decision of the contravention of Clause 13(1) of the Code of Conduct.

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

“The program *Once Upon a Country* aired at 10am on SABC 2 on 1st May showed extreme anti-white racism, and unsubstantiated one sided views which were anti-white. This type of racism should not be shown on TV, especially by taxpayers. Only radical views were expressed. Anti-white sentiment was pervasive throughout the entire documentary, by all those interviewed. There was no white person interviewed in the entire documentary and it was very one sided and showed anti-white sentiment by all. The interviewees alleged that white people in power are creating a small black business elite to appease the masses. This is clearly false information and unjustified.

People are entitled to opinions but then this should be balanced by opinions on the other side of the political spectrum.

The documentary made out as if whites control the economy and own most of the land which is a completely false and unsubstantiated claim. The people interviewed made out as if all profits from workers is sent overseas to white establishments, considering many mines in S.A. are black owned, this is racism and false information.

The SABC needs to be reprimanded for such racist propaganda.”

[3] **The Adjudicator’s decision was as follows:**

“I have watched the documentary. In its response the Broadcaster states that “*Once Upon a Country* is SABC2’s flagship documentary strand that was developed a few years ago to give a more contemporary analysis to our democracy. It does this through broadcasting special documentaries to celebrate national days. Each year a number of relevant national days are identified and targeted, which differ from year to year. The documentary was first broadcast on 28 April 2019, however, this complaint is based on the repeat broadcast on 1 May 2019. The question was asked: “*What are you free from, 25 years later?*”

The participants were the following:

- Zandi Radebe, one of the founding members of the Black House Collective in Soweto
- Sizwe Mpofu-Walsh, author of the book *Democracy and Delusion*, a fellow at WISER at Wits and the founder of SMWX, a Whatsapp news channel
- Lebogang Ramafoko, CEO of Soul City Institute for Social Justice
- Steven Friedman, professor at University of Johannesburg – political scientist

- Prince Mashela, political analyst
- Ralph Mathekga, writer, author and researcher in politics and law
- Ayabonga Cawe, a 28 year-old young African
- Motodzi Ramashia, attorney and poet.

My overall impression was that the majority of the participants/interviewees were in agreement that there will be no real freedom in South Africa until the land that was taken away from black people, is returned to them. They felt that black people have no identity because they are only 'tenants' and have no ownership of the places where they live, even if it is a shack. The opinion was expressed that rich people and poor people can never live side by side and this is the reason why white people and black people do not mix. One participant said that the poor people will stone the rich people. Further, that a house in Stellenbosch can never be compared to living conditions in black townships. Another participant said that there is going to be a revolution and that it should be welcomed because without it there will be no change because nowhere in the world you find that a minority rules a majority. More than one participant expressed the view that black people inherit poverty while white people inherit wealth. The main message that came through is that after 25 years of democracy, no progress has been made in land reform and in creating equality for all, and that this is going to happen now, irrespective of the cost. It was clear that the comments made by the participants reflected their own personal opinions, which were based on facts as they perceived the facts to be. In the end, when they were asked to rate the freedom in South Africa on a scale of 1 to 10, most participants rated it 4 out of 10. One participant rated it 6 out of 10 and one (or two) participant(s) rated it 0 out of 10.

The Complainant argues that the participants repeatedly stated that only black Africans have rightful ownership of the land in South Africa because those that came later stole the land from them. He included screenshots from the documentary that "*depict ships in 1652 landing (whites) with commentary that these settlers disposed land and raped women. As we know, this is factually incorrect as there were no black Africans living in the Cape*". The Complainant contends that this implies that white people and Indians have no right to the land. He also refers to the images of white policemen hitting black protestors, but that the current situation where black policemen hit black protestors is not shown. He further refers to statements made that the Freedom Charter was a sell-out document because other races were allowed to write it and during the process included their rights in owning land. All of the above indeed form part of the documentary. Whether these statements are factually and historically correct or incorrect is irrelevant since this was not a news programme.

However, I agree with the Complainant that no opportunity was given for any opposing view. The presentation of an opposing point of view would entail the presentation of arguments against a certain view or, at the very least, a critique of that view. A fair presentation of the opposing point of view in this case would therefore entail:

- First, the expression of disagreement with a participant's view; and
- Second, an explanation of the reasons for that disagreement or critique.

Clauses 13 (1) and (2) provide that when controversial issues of public importance are discussed, broadcasters have the obligation to ensure that reasonable effort is made to present opposing points of view.

There can be no doubt that most of the topics covered in the documentary, including the land issue, are currently controversial issues of public importance in South Africa. The Complainant contends that the Broadcaster failed to make reasonable efforts to fairly present opposing points of view, that there was no white person interviewed in the entire documentary, that the documentary was one-sided and unbalanced and that it contained nothing that could be classified as an opposing point of view. The Broadcaster argues that those who participated in the documentary were "*carefully selected to ensure a diversity of opinions and ideologies*". Regarding the complaint that there was no white person interviewed, it was not unreasonable to have used predominantly black participants because the documentary dealt with what the impact was on people who were disenfranchised by the previous dispensation in South Africa. It is true that the participants included analysts and

social commentators from different fields, for example, academics, political analysts, economists, civil rights activists and social critics, however none of them offered an opposing point of view. All the participants' contributions were supportive of each other and none of them disagreed with any other.

Since most of the comments entailed a reflection of the last 25 years of government, the government could have participated in the documentary to draw the attention to all their achievements of the last 25 years, for example, free education in schools, bursaries and free tertiary education, medical clinics, new houses and title deeds for houses, provision of essential services, broad based Black Economic Empowerment, minimum wages and improved scope and extent of social grants. The policy decision on expropriation of land without compensation had already been taken in December 2017 at the ANC National Elective Conference and this was followed by President Ramaphosa's announcement that the government will proceed with the amendment of section 25 of the Constitution that will make this possible. Such contributions by the government would have established an opposing point of view. Alternatively, this opposing point of view could have been presented by specialists in the abovementioned fields.

After considering all the information before me, I concluded that (perhaps due to the nature of the particular documentary strand) the Broadcaster did not make reasonable efforts to fairly present opposing points of view, if not in the same programme, then in a subsequent programme forming part of the same series of programmes within a reasonable time and in the same time slot. It is essential to obtain balance in a programme that addresses a controversial issue of public importance, so that the viewers can come to their own conclusions, and to avoid the risk of the programme becoming (a tool for) propaganda. The use of the word *must* in the second line of the Clause, is indicative of the obligation upon the broadcaster to make reasonable efforts to present opposing points of view.

The Complainant also feels that the documentary was anti-white and racist. Black's Law Dictionary defines hate speech as "*speech that carries no meaning other than the expression of hatred for some group, especially in circumstances where the communication is likely to provoke violence*". For expressions to be classified as advocacy of hatred, it must constitute incitement to cause harm. The word *advocacy* is derived from the word *advocate* and as we know, an advocate is a person who pleads a case and actively supports a cause or proposal. Advocacy thus requires much more than the mere stating of a viewpoint or the use of certain vocabulary. It implies an element of exhortation, pleading for, supporting or coercion. None of the opinions raised in the documentary entailed advocacy of any action against white or non-black people. In any event, according to Clause 5(3), **the hate speech clause does not apply to a broadcast which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.**

In summary, I find that the programme lacked an opposing point of view and was therefore unbalanced and one-sided. Thus Clause 13(2) of the Code was contravened.

The Broadcaster and Complainant were afforded an opportunity to file submissions regarding sanction in terms of Clause 14 of the Constitution of the BCCSA:

Complainant: "Thank you again for your efforts and for Dr Venter's involvement and assessment. I am not sure what course of action is recommended and advisable, perhaps an apology by the broadcaster, or a reprimand of those responsible. I am not sure how a fine would help as it would basically be paid by the tax payers."

Broadcaster: "**SABC'S RESPONSE ON A SANCTION RELATING TO ONCE UPON A COUNTRY** - In respect of the above-mentioned matter, the SABC wishes to inform the Commission of its discomfort about the decision taken. We submit that an appropriate sanction should be a reprimand."

After considering the submissions regarding sanction filed by the Broadcaster and the Complainant respectively, I have decided that in the light of the sensitive nature of the

documentary, the following sanction be imposed:

That the Broadcaster be reprimanded for contravening Clause 13(2) of the Code.”

[4] **The Broadcaster lodged the following application for leave to appeal:**

“APPEAL AGAINST A RULING: THE DOCUMENTARY “ONCE UPON A COUNTRY – FREEDOM DAY”

In respect of the above-mentioned matter, please find our comments as follows:

1. The SABC values and has the utmost respect for the role of the BCCSA and its processes. This has been demonstrated over the years.
2. The SABC continues to comply with BCCSA findings even those that are very difficult to implement. We however believe that in this instance, the commission may have erred in its decision.
3. The SABC has over the years hardly challenged BCCSA's decisions, however, after carefully studying the findings of the recently released adjudication pertaining to the broadcast of a documentary titled *Once upon a country – Freedom Day*; the SABC wishes to therefore appeal against the ruling.
4. The SABC wishes to submit the following:
 - 4.1 The documentary features a leader of political party Congress of the People (COPE), Mr Mosioua Lekota who openly opposes land grabs and encourages co-existence amongst races. His relationship with organisations like Afriforum is well documented.

Documentary quote:

13'04” *“You cannot allow for anybody to think they can go around taking properties belonging to other citizens. We cannot allow it (speaking in Afrikaans).”*

- 4.2 The documentary features archive material of a white person expressing that black people do not have a right to land in South Africa. In our view this also constitutes the opposing view that the complainant was lamenting as missing.

Documentary quote:

19'03” *“No I definitely do not believe that (Black South Africans have claim to land in the country). They have the historical areas where they settled. We couldn't take all of the rest of South Africa for ourselves. Therefore, in 1936, a lot of land that belonged to the White at the time, was also given to Black people.”*

20'54” *“Firstly, there was a lot of land in South Africa that was not inhabited by anyone. That land was occupied by the Voortrekkers”.*

In addition, Ernst Roests of Afriforum is also featured in the documentary demonstrating that ordinary South Africans are not interested in the land question. That clearly is an open and opposing view as far as we are concerned.

Documentary quote:

22'28” *“While the vast majority of people have no interest in racist ideas, they do not believe that land reformation is the most important thing that we should be doing in South Africa. We should be protecting property rights; we should be toning down on government regulation and interference in people's lives”.*
(Freedom Front)

Documentary quote:

25'28" *"The land issue is not really about land. It's about frustrations that the old racial patterns that existed in the past are still there."* Prof Steven Friedman.

President Ramaphosa allays concerns in the same programme that there is no reason for anyone to panic about the land reform process.

Documentary quote:

26'03" *"There is no reason for people to be afraid or fear that there will be a whole scale expropriation."*

The statement below also constitutes a balance of views evidenced in the programme.

Documentary quote:

27'59" *"Yes, we have a problem with violence and racial intolerance but the majority of South Africans want to live in peace".* – Lebogang Ramafoko.

The leader of the Freedom Front, another political party, is also featured in the same programme highlighting another view to the land issue and actually threatening war over how the land issue will finally be resolved. But no Black viewer took offense to the same because the land question is understood by the country to be a contested terrain.

Documentary quote:

29'42" *"If anybody, in South Africa thinks you can take the land without compensation, you are living a dream. Let me put it quite frankly to you, if you want to start a civil war in South Africa, do that! Do that!"* – A White contributor in parliament can be heard commenting.

5. It should also be noted that the experts were interviewed separately and had all the opportunity to offer different views. It is our belief that the diversity of experts featured in the said documentary in itself is enough to represent opposing views. It is therefore not correct that they "were in agreement..." because that creates an impression that they were interviewed together at the same time.
6. With reference to the quote that, *"they felt that black people have no identity because they are only 'tenants' and have no ownership of the places where they live, even if it is a shack,"* whilst there is a participant who spoke about blacks being tenants in the country, the last part of the sentence is inaccurate. Here is what we think it has been taken from:

Documentary quote: 22'55" – *"We must fight for our Rights. We want our land which we were separated from, even if we build shacks – it's still our land."*

Another contributor gives further context in saying that...

Documentary quote: 30'13"

"They have no land; they live in shacks. It is not a life you want to live". – Mothodzi Ramashiya

Documentary quote: 35'31"

Further, Political Analyst Ralph Mathekga, merely cautions and does not incite bloodshed in his observation that, *"the greatest risk in any society is to have that inequality gap. To simply phrase it, the poor are just going to stone the rich, if they are not already doing it."*

7. In short, the documentary therefore does not advocate for violence but it sends a warning about the devastating consequences of ignoring the inequalities.

8. The opinion was expressed that rich people and poor people can never live side by side and this is the reason why white people and black people do not mix. One participant said that the poor people will stone the rich people. Further, that a house in Stellenbosch can never be compared to living conditions in black townships. Some creative licence was taken by the contributor in making the comparison. But the point attempted speaks to racial disparities of living conditions in the country.
9. Another participant said that there is going to be a revolution and that it should be welcomed because without it, there will be no change because nowhere in the world do you find that a minority rules a majority. To be more precise, we wish to draw the attention of the Commission to the actual quote from the documentary and point out that this recollection is inconsistent with the comment in the documentary as evidenced below.

Documentary quote: 28'36"

"South Africa is an unsustainable country because there is nowhere in the world where you have 10% of the people controlling 90% of the economy and you have peace for hundreds of years. Something is bound to happen. A certain generation is going to make that sacrifice."

10. Again, we wish to draw the Commission to the misquotation and misrepresentation below:

More than one participant expressed the view that black people inherit poverty while white people inherit wealth.

The below quote needs to read in context; it is a statement of fact that the majority of white South Africans enjoy white privilege which automatically come with wealth and advantage.

Documentary quote 31'45"

"Some people inherit poverty across generations. It becomes so difficult to correct those wrongs in society, whereas in South Africa you are going to find out that a majority of white people are rich because they have inherited that wealth. Even if some may refuse to acknowledge, they do not understand the complexity that you inherit a privilege while others inherit the opposite". – Ralph Mathekga

Documentary quote 34'56"

"White people here exercise a lot of power in the economy and professions purely because they are white. This is because privilege gets inherited, for instance, if my parents were middle class, immediately I am middle class. Most black middle class citizens are the first generation so they do not have those privileges and so forth." - Prof Steven Friedman

11. The main message that came through is that after 25 years of democracy, no progress has been made in land reform and in creating equality for all.
12. Could we please take the Commission back again? This documentary is about participants' views and opinions about their country. This is how they feel about South Africa and they come from different areas of expertise. The SABC deliberately took the decision editorially to not include government officials because it would defeat the very intention of the documentary; to hear from ordinary South Africans about their views on this matter. The aim was to get analyses from citizens who are experts in their various fields.
13. It was clear that the comments made by the participants reflected their own personal opinions, which were based on facts as they perceived the facts to be.
14. We however agree with the Commission that this could well be a microcosm of the views of the general public on these issues. There are people who continue to be optimistic like

Prof Friedman and it normally goes with the years. The older generation tends to be less jaded and more hopeful. Equally, you do get those who are pessimistic like the two participants who rated their freedom at zero, and they are mostly young, radical and less patient. This scoring in our view is consistent with the diversity of views that the contributors held throughout the documentary.

15. In the end, when they were asked to rate the freedom in South Africa on a scale of 1 to 10, most participants rated it 4 out of 10. One participant rated it 6 out of 10. To us this fluctuation of ratings spoke to the diversity of opinions and responses to the leading question posed to interviewees. The scores reflected the different moods and prevailing sentiments in the country on this issue.
16. The Complainant argues that the participants repeatedly stated that only black Africans have rightful ownership of the land in South Africa because those that came later stole the land from them. He included screenshots from the documentary that "*depict ships in 1652 landing (whites) with commentary that these settlers disposed land and raped women. As we know, this is factually incorrect as there were no black Africans living in the Cape.*"

This perhaps is the personal view of the complainant. It is a well-documented fact that Cape Town was "founded" by the Dutch East India Company or the Vereenigde Oost-Indische Compagnie (VOC) in 1652 as a refreshment outpost but that it was the gradual dispossession of local Khoikhoi (Africans) pastoralists by early Dutch settlers that opened up the area for European settlement; unless if the complainant is advancing the argument that KhoiKhoi people were/are not Africans?

The Complainant contends that this implies that white people and Indians have no right to the land. We submit that that is his view and contend that in the documentary, this matter was presented in a contextualised manner in the documentary and we believe that context is critical.

17. He also refers to the images of white policemen hitting black protestors, but that the current situation where black policemen hit black protestors is not shown. Those images and comparisons were limited to and situated within the pre-'94 era. It was therefore not necessary and would have been out of context to use the images the complainant alludes to.
18. Further, when the context is relevant as in the following time-code...

17'49" We see black policemen brutalising students during the "Fees Must Fall" protests.

He further refers to statements made that the Freedom Charter was a sell-out document because other races were allowed to write it and during the process included their rights in owning land. All of the above indeed form part of the documentary. Whether these statements are factually and historically correct or incorrect is irrelevant since this was not a news programme.

We agree fully with the Commission's findings of the above.

19. There can be no doubt that most of the topics covered in the documentary, including the land issue, are currently controversial issues of public importance in South Africa. The Complainant contends that the Broadcaster failed to make reasonable efforts to fairly present opposing points of view, that there was no white person interviewed in the entire documentary, that the documentary was one-sided and unbalanced and that it contained nothing that could be classified as an opposing point of view. The Broadcaster argues that those who participated in the documentary were carefully selected to ensure a diversity of opinions and ideologies.
20. Regarding the complaint that there was no white person interviewed. Firstly, there was a white person strongly featured in the documentary but not that it would be unreasonable

to have used predominantly black participants because the documentary dealt with what the impact was on people who were disenfranchised by the previous dispensation in South Africa. And now that 1994 has come and gone and its 25 years later; the documentary seeks to evaluate where we are. It is true that the participants included analysts and social commentators from different fields, for example, academics, political analysts, economists, civil rights activists and social critics.

21. The documentary's gaze had been pre-determined and therefore there was no need to open up the parameters of discussion to include the Commissioners suggestions. Ours was a question posed to the panellists.
22. We note the following: "The policy decision on expropriation of land without compensation had already been taken in December 2017 at the ANC National Elective Conference and this was followed by President Ramaphosa's announcement that the government will proceed with the amendment of section 25 of the Constitution that will make this possible. Such contributions by the government would have established an opposing point of view. Alternatively, this opposing point of view could have been presented by specialists in the abovementioned fields."

We would like to remind the Commission that this documentary's focus was on the past 25 years and to do that experts in their various fields were utilised to reflect and respond on this question of Freedom as opposed to focusing on current developments.

23. The commission should have dismissed the complaint's insinuation that the issues were not sufficiently ventilated by virtue of the fact that most of the interviewees were black. We would like to believe as the broadcaster that our content has grown and evolved not to have our engagements guided by race but by the integrity level of expertise and insight of our selected contributors. Furthermore, there were white voices in the programme and to us the content of those voices is more important than colour of the speaker. It is common knowledge and history records that the casualties of colonialism, apartheid and racism were and are indeed black. Similarly, then, their experiences as well as the opinions of the panel will overlap and echo each other given their shared experience under the yolk of apartheid. Our submission is that the platform articulated a majority feeling felt by the country that cannot be un-experienced or reversed by any number of opposing voices inserted into the panel. The insertion of a particular voice to achieve a pre-determined outcome in the documentary would be disingenuous on the part of the broadcaster.
24. It is entirely misleading to conclude that, "all the participants' contributions were supportive of each other and none of them disagreed with any other." The experts were interviewed in different places and at different times. Their views were not based on what others said but their own views. They spoke on their personal capacity in relation to their expert analysis of where they see themselves and the country currently.
25. In quoting another source: In a AV Club article titled, "Do Documentaries Need to Be Fair to Both Sides of an Issue? 10/10/2012 - Noel Murray argues, "Documentaries are a different kind of journalism, more like magazine reportage or a non-fiction book, where a strong point of view isn't just allowable, it's preferable". www.avclub.com. The documentary is not scripted hence the experts shared their views on issues under discussion. There was no expectation for the SABC to force experts to oppose for the sake of opposing. If there was a need to afford a right of reply, would have done so.
26. By way of background, documentaries themselves come in different forms and there are six that are popular and well-known as outlined and presented by Bill Nichols books Introduction to Documentary (2001) and Representing Reality (1991). Once Upon a Country can safely sit well between Expository and Reflexive documentary forms. The execution in every form takes a particular style that the producer may adopt or they may navigate between one or two forms to deliver a unique proposition.

27. Expository documentaries speak directly to the viewer through employing different elements and proposing a strong arguments and points of view. These are rhetorical and they try to persuade the viewer using commentary. Images are often not paramount as they may only exist to advance a particular argument or forming an account and interpretation of past events.
28. Reflexive documentaries on the other hand don't see themselves as a transparent window on the world; instead they are representations. This can be seen in the way the producer in *Once Upon a Country* goes about selecting contributors who are always carefully selected to ensure a diversity of opinions, views and ideologies. This strand of documentaries brought new analysts and social commentators from different fields i.e. academics, politics, economists, civil rights activists and social critics. They are selected on the basis of their interest, expertise, the values and diverse views that they hold.
29. How does the world get represented by documentary films, is central to this sub-genre of films? They prompt us to "question the authenticity of documentary in general" and they are regarded as the most self-conscious of all the modes, and highly sceptical of 'realism.' They jar us, in order to 'defamiliarize' what we are seeing and how we are seeing it.
30. The documentary stays with the theme on Freedom Day, post 1994 and asks the question, "What are you free from, 25 years later?" From the onset, the documentary demonstrates its intention to present diverse views bringing to the fore up-sounds taken from the documentary. The selection criteria for the different voices and viewpoints is the backbone of this form and the ability to piece the beats of a story together to create dots that connect elements pulled from different spaces into a single story is critical. The overall premise has been established and it is important for the producer to stay within the confines of it or risk losing focus. In putting the story together, the producer has to build story beats from one segment to the next and ensure fluidity of narrative and balanced views.
31. Throughout, the documentary applies the same style of utilising up-sounds from interviews and archives to establish and drive a continuous, interconnected journey and story from beginning to end. Some of the diversity in opinion is expressed in the opening of the documentary by the following speakers in the mentioned time codes;
- 0:6" "We inherited a broken state" – Lebogang Ramafoko
 0:10" "We couldn't take all of South Africa for ourselves" (A white contributor)
 0'15" "We are "freed" slaves but slaves nonetheless" Zandi Radebe
 0'18" "Confrontation is not a bad thing" Matodzi Ramashia
 0'24" "We must arrest politicians who are corrupt; lock them up! Let them go to jail"
 – Prince Mashele
 0'29" "Where did we go wrong" – Winnie Madikizela-Mandela
 0'33" "We need to start demanding action" – Sizwe Mpofu-Walsh
32. In this regard and in its findings, is the Commission suggesting that the SABC cannot produce documentaries in certain sub-genres such as the reflexive subgenre as is the case on this particular documentary?
33. In conclusion, freedom comes with responsibilities. The responsibility of ensuring freedom of speech and presenting balanced viewpoints is one that the SABC does not take lightly. This perhaps could be a well-received topic but given the history of South Africa and racial divisions of the past that continue to rear its head in the present; the term, 'freedom' and the question of land that is related to it, quickly becomes a rather emotive and sensitive topic but one that is critical for the nation to engage on rather than shy away from or even the SABC to silence it.
- 09'35" to "The reason why people living in poverty do not speak is not because they are ignorant. It's because they think that everyone else has power and if they speak nobody

will listen to them and they'll simply be punished" Steven Freedman – Prof. at UJ – Political Scientist.

Thus, the SABC has the responsibility to give a voice to the voiceless. Indeed, the documentary is dealing with a very sensitive issue of freedom and land; and the fact that inequalities of apartheid persist and the majority of black people find themselves at the receiving end of it, 25 years later; the discussions are bound to have racial undertones.

The SABC has the responsibility to tell these stories, give voice to them and do this objectively. We believe that we achieved this but the reality is that there are current deep existing inequalities and it is therefore the issues dealt with in the documentary that present a gloomy picture and not how the story is treated and presented.

We believe that the above elucidations justify why the initial decision to uphold the complaint should be reconsidered by the Commission. It is our prayer that the BCCSA will grant us leave to appeal the Adjudication."

[5] The Complainant responded as follows:

"I accept the SABCs statement, however nowhere in the documentary did they discuss how the ruling party and many black people have benefited financially and actually outnumber wealthy white people, and that this poverty situation is actually a result of government corruption and the conditions of townships are the result of poor service delivery by the government. In this way it is biased towards the ANC. The documentary does not make a single mention of the faults of the ruling party in allowing the influx of foreigners and lack of service delivery which had caused squatter camps, gross unemployment and poverty. I still hold the view as with Dr Venter that the documentary was biased, anti-white and Indian, and inconspicuously pro ruling party."

EVALUATION

[6] Our task is to decide whether the Adjudicator erred when she concluded in her adjudication that the Broadcaster contravened Clause 13(1) of the Code of Conduct. This clause is about balance in a broadcast. The idea behind this is that a broadcast about a controversial issue of public importance must be done in such way that in the end the viewers/listeners should be able to form an objective, informed opinion about the issue. This is why the clause requires that opposing viewpoints on the issue should be broadcast.

[7] The producer of the show describes the programme as an exploratory documentary where many archived broadcast material were put together to produce the documentary in question. He emphasised that in putting together the archived material for the show, they ensured that different popular and unpopular views were reflected in the programme. Again, they took care that different experts' views were reflected in the programme.

[8] In the process of deciding whether the clause has been contravened, we have to consider and weigh the rights of the Complainant and of the Broadcaster against each other. The Complainant has the right not to be offended by a broadcast in which the airwaves are being used for propaganda purposes; in other words where the broadcast covers just one side of the case (issue). The Broadcaster, on the other hand has the right, guaranteed in section 16 of the Constitution of South Africa, to freedom of expression. Part of this freedom is the editorial discretion of the Broadcaster in putting together a programme. In this process we have to judge whether the Broadcaster took advantage of its freedom of expression by presenting only one point of view on the issue. If so, then we would have agreed with the adjudicator to uphold the complaint. We cannot expand on the legal position more eloquently than as in the case of *South African Veterinary Council & Lester v M-Net*¹ where the BCCSA said the following:

*Ms Ampofo, who appeared for the Respondent [also in this case] and put the case for the broadcaster well, argued that a broadcaster has an editorial right to choose its subject, and, in producing a programme, to exclude certain material. As a starting point this is an important point. It should, indeed, be clearly stated that the editorial right to include or exclude material is part and parcel of a broadcaster's right to freedom of expression. This does not, however, necessarily mean that a broadcaster has the right not to include certain material. The right is, of necessity, always limited by the Broadcasting Code and, of course, also by limits set by the Constitution of the Republic of South Africa. However, any inquiry by the BCCSA must commence with freedom of expression as a basic premise. One does not commence with a negative view in regard to a broadcast, but with what may be termed an open-minded, freedom-oriented approach to the material before us. Yet, as pointed out by Langa DCJ (as he then was) in *De Reuck v Director of Public Prosecutions and Others*, all the fundamental rights (even the rights of children) must be placed at the same level before the balancing of the rights commences. This Tribunal has also often held that, in so far as the Code requires balance in broadcasts concerning matters of public importance, it may be accepted that absolute balance is an almost unattainable ideal. On the other hand, the public's right to be informed fairly and accurately in so far as news is concerned, and in a balanced manner insofar as comment is concerned, is a*

¹ BCCSA Case no. 42 of 2014

right that may be said to be of equal importance to that of the broadcaster's. In fact, section 16 (1) of the Constitution of the Republic of South Africa guarantees the right to information and ideas. Information can, in the case of news, only mean information that is accurate and fair.

[9] While watching the programme in question, it was very clear to me that this is a documentary and not an in studio prearranged panel discussion. The nature of the documentary is such that diverse experts' and ordinary peoples' points of views are reflected in the documentary. Views like those of Mr. Dawie Roodt of Afriforum, Mr. Mosioa Lekota on land are reflected in the same programme as those of the EFF and other political and civil society individuals. Again, it is clear in this documentary, that divergent experts' views were sought and presented as such. All in all, this was just a mere cut and paste of archived broadcast clips from the past.

[10] The test for the contravention of Clause 13(1) is not necessarily whether it's a black person or a white person propagating a particular view, but that divergent views are reflected in the programme in a balanced way. I do agree with the Broadcaster that the insert incorporates views from a number of different role players who hold opposing views and it is therefore balanced.

[11] **In the result we find that this broadcast was not in contravention of Clause 13(1) of the Broadcasting Code because an opposing point of view was fairly presented. The original finding of Adjudication No: 21/A/2019 is thus overturned.**



**MR BRIAN MAKEKETA
DEPUTY CHAIRPERSON**

Commissioners Chicktay and Naidu concurred with the above judgment.