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CASE NUMBER: 25/2011

Date of Hearing: 15 June 2011

In the matter between

SABC 3

APPLICANT

and

MAIL & GUARDIAN LIMITED

1ST RESPONDENT

SAM SOLE

2ND RESPONDENT

For the Applicant: Vas Soni SC, instructed by Mabuza Attorneys, Johannesburg

For the Respondent : Mathew Chaskalson SC, instructed by Cheadle Thomson and Haysom, Johannesburg

Hearing to establish the basis on which the SABC intended approaching the Complaints and Compliance Committee of ICASA so that the date for the broadcast of the summary of a judgment of the BCCSA Tribunal may be extended by the Tribunal that made the order. SABC v Mail and Guardian and Sole - Case No: 25/2011 (BCTSA)

SUMMARY

Background

The Broadcasting Complaints Commission directed the SABC to broadcast a summary of its judgment, as drafted by the Tribunal, within seven days. The BCCSA held that

the SABC had contravened the Broadcasting Code. When an application for leave to appeal was lodged, the Tribunal extended the period to seven days after the appeal judgment was issued or, if no appeal was allowed, seven days after the last judgment within the BCCSA structure dismissing such an application for leave to appeal.

When the second application for leave to appeal also failed, the SABC informed the BCCSA Registrar that it intended applying to the Complaints and Compliance Committee of ICASA to set aside the decision of the Tribunal on the basis that it had committed a serious irregularity in the proceedings, and that it had not applied the rules of fair administrative justice. This was the first time that this argument had been put forward in these proceedings and no details were given, even at this stage.

Since the order of the Tribunal was still valid and the summary had to be broadcast within seven days, the Chairman of the BCCSA called upon the parties to address him as to whether the seven-day period should, once again, be extended by the Tribunal.

Judgment

The Chairman refused to propose to the Tribunal to extend the period until the Complaints and Compliance Committee of ICASA had decided the matter, for the following reason:

The Regulations in accordance with which the SABC stated that it would approach the Complaints and Compliance Committee of ICASA do not grant the SABC the right to approach the Complaints and Compliance Committee. This right was only available to *complainants* who, in the present matter, were the Mail and Guardian and Mr Sole, one of its journalists. The SABC, as a licensed broadcaster, could accordingly not, in law, take the matter to ICASA.

There was, accordingly, no necessity to propose to the Tribunal that the order only be broadcast after the matter had been decided upon by the Complaints and Compliance Committee.

In fairness, however, the Tribunal at the proposal of the Chairman, has permitted SABC3 to broadcast the summary on or before the 28th June 2011 during the first twelve minutes of that evening's seven o'clock news.

If this order is not given effect, the BCCSA will be obliged, in terms of its recognition conditions, to inform ICASA of the omission of the SABC to conscientiously give effect to its order. It should be stated that the SABC has an unblemished record of compliance with the BCCSA orders since the inception of the BCCSA in 1993.

JUDGMENT

JCW VAN ROOYEN SC

[1] Before I address the issues, I should sketch the background to this hearing. An SABC3 broadcast of 3 November 2010 has led to three judgments in terms of the Broadcasting Complaints Commission's Procedural Rules.

Firstly, a complaint by the Respondents was heard by a Tribunal of the Commission. The Tribunal upheld the complaint and found that the Code of Conduct had been contravened and ordered that a summary of its judgment, as set out in the judgment, must be broadcast within seven days of the release of the judgment.

The SABC, however, applied to me as Chairman of the first Tribunal for leave to appeal to the Appeal Tribunal. After a hearing of the matter, I issued a judgment in which I motivated why, in my opinion, an Appeal Tribunal was not likely to come to a different conclusion within the Rules. In the process the parties, at my request, agreed to an amendment of the summary that was to be broadcast. The members of the Tribunal agreed to the amendment.

Thereafter, the SABC applied to the Deputy Chairman¹ for leave to appeal. The Deputy Chairman likewise came to the conclusion that it was not likely that an

¹ Designated by the Annual General Meeting at the end of August 2010.

Appeal Tribunal would find that the first decision was clearly wrong. Before he issued his judgment, the Registrar received an application by a Mr Robert Gumede² to participate in the appeal proceedings as an *amicus curiae*. His motivation was that he wished to place new facts before the Appeal Tribunal. The Deputy Chairman, after considering this application, held that:

(1) *the Rules of the BCCSA did not provide for the participation of an amicus curiae and that in any case*

(2) *new facts could not be added at the appeal stage. At no stage did any of the parties to this matter apply for the presentation of new facts at the appeal stage.*

[2] It should also be pointed out that the SABC never argued that a procedural error had been made by the first Tribunal. In terms of Procedural Rule 5.1 and at the request of the parties I granted an extension of the period within which the SABC had to broadcast the summary of the Tribunal's judgment. I also referred this application to the Commissioners on the first Tribunal: they agreed to this amendment. The extended period would run for seven days after the judgment in the application for leave to appeal was turned down either by me or the Deputy Chairman and, unless the first Tribunal's decision were to be overturned, seven days after the judgment of the Appeal Tribunal – unless the latter Tribunal determined a new date for the broadcast.

[3] After the issue of the judgment of the Deputy Chairman the Registrar was notified by SABC3 that it intended to file an application to the Complaints and Compliance Committee ("CCC") of the Independent Communications Authority of South Africa ("ICASA") to overturn the decision of the first Tribunal on the grounds that the Tribunal had committed a gross irregularity in the proceedings and had failed to comply with the rules of natural justice. At the present hearing no details in the documentation were given of the gross irregularity or why the rules of natural justice had not been applied. In fact, these points have never been raised until now. One

² Mr Gumede was the person who was provided airtime by SABC3 to voice three accusations against the Mail & Guardian and its journalist, Mr Sole.

matter was, however, added by Mr *Soni*, who appeared for the SABC. He argued that the Tribunal itself was not entitled to formulate the summary to be broadcast, and that this should instead have been left to the SABC, which has, so it was contended, the editorial prerogative to broadcast its own summary of the judgment. I was told that this is the approach followed by the Press Ombudsman of South Africa.

[4] *In limine* it was argued that I was *functus officio* and that the BCCSA should simply await the outcome of the judgment of the Complaints and Compliance Committee of ICASA. There are, however, two very real reasons why this hearing was important:

- (a) The Tribunal's order (as amended) was that the summary had to be broadcast within seven days of the last judgment of the BCCSA on this matter. There was a specific reference to the judgment of the Appeal Tribunal as the last judgment, if the matter were to proceed to that stage. The last judgment, however, turned out to be the refusal of the application for leave to appeal by my colleague Prof Viljoen, the Deputy Chairman. This means that the SABC had seven days to broadcast the order after the issue of the judgment of Prof Viljoen.
- (b) Since the ruling by the IBA in 1995, when it approved the BCCSA, included the condition that the BCCSA had to inform the IBA (now ICASA) when a broadcaster did not comply with an order of the BCCSA³, it was particularly relevant for me to hear what the grounds for the application to the CCC would be. I could then inform the Commissioners who had sat on the Tribunal as to the position, and obtain their agreement that the seven-day period be extended until after the matter had been decided upon by the Complaints and Compliance Committee.

[5] Before I come to the core of the problem that the SABC faces, I should mention that a bald reference to a "gross irregularity" and not having applied the rules of natural

³ The 1995 Ruling of the IBA reads as follows: "The BCCSA shall file a certificate with the IBA every twelve months or as often as required by the IBA that each signatory to the Code of the BCCSA is, on the whole, adhering to that Code in a satisfactory manner and that **if found to have transgressed the Code, has conscientiously given effect to the decision of the BCCSA.** (emphasis added)

justice is not acceptable. As stated earlier, one matter was, however, raised by Mr *Soni*, who acted for the SABC at the hearing: that the BCCSA Tribunal did not have the authority to determine the content of the summary which was to be broadcast. The relevant sub-clauses of clause 14 of the Constitution of the BCCSA provides as follows:

“The BCCSA may

14.3 direct that a correction and/or a summary of the findings of an Adjudicator or Tribunal be broadcast by the respondent *in such manner as may be determined by an Adjudicator or Tribunal*;

14.7 make any supplementary or ancillary orders or directions that it may consider necessary for carrying into effect orders or directives made in terms of this clause and, more particularly, give directives as to the broadcasting of its findings.” (emphasis added)

I have no doubt that sub-clause 14.3 authorises the Tribunal to determine the contents of the summary. To leave it to the broadcaster would, in any case, create a possibility for further complaints. The summary has nothing to do with the editorial rights of the SABC, as argued convincingly by Mr *Chaskalson*. It was clearly a repetition of what was directed by the BCCSA Tribunal as a summary of its judgment. That judgment was reached within the parameters of the evidence before the Tribunal.

It was also mentioned that the Press Ombudsman allowed newspapers to determine their own summary of the decision of the Ombudsman. However, an inquiry at the Press Ombudsman confirmed the opposite. I will give details in a footnote.⁴ I need

⁴ The Press Ombudsman and Appeal Panel may, in terms of 5.2.2 of the Complaints Procedure of its Constitution, “direct that a correction, retraction or explanation and, where appropriate, an apology and/or the findings of the SAPO or SAPAP be published by the respondent in such manner as may be determined by the SAPO or the SAPAP as the case may be.” Mr Joe Tholoe, the Press Ombudsman, confirmed that the ombudsman writes the summary of a ruling to be published by a newspaper. However, looking at the adjudications on the website, there are several ways in which this is implemented. In one case, *Bosasa vs Mail and Guardian* in 2010, the M&G was ordered to publish an appropriate apology *approved* by the ombudsman. In other cases, e.g. *SABC vs Sunday Times*, October 2010, the newspapers were instructed to publish a summary of the ruling subject to prior submission to the Ombudsman. In *Richtersveld Sedi Hub Property Association vs Eland News* in 2010, the paper was instructed to “publish the following text on its front page:” Mr. Ed Linington, the previous Press Ombudsman, informed me that when he was the Ombudsman he also, on occasion, asked a newspaper to draft both an apology and a summary of the ruling to be published *subject to his approval*. At times he wrote them himself. He confirmed that, in all cases, the ombudsman has the final say on the matter. I might add that when I was the Chairman of the Press Council (1991-1997) the Council also determined the summary which was to be published. Mr. Ron Cohen from the Canadian Broadcasting Standards Commission has also confirmed in an e-mail to me that the Commission determines the content of the summary of its judgment. Para 9 of the Australian Press Council’s (“APC”) Statement of Principles states: “Where the Council issues an adjudication, the publication concerned should publish

not dwell on these aspects any further, since the next paragraph will show that the SABC is not entitled to approach ICASA at all.

- [6] The Regulations published under Government Notice 1432 in *Government Gazette* 25573 of 9 October 2003 indeed provide for an application to the Independent Broadcasting Authority, now ICASA. These Regulations accord with a ruling⁵ by the Independent Broadcasting Authority (“IBA”) in November 1995 that an application by a *complainant* as to a procedural irregularity by the BCCSA could be made to the IBA, now ICASA. The 2003 Regulations added the full procedure that must be followed when such an application is launched.⁶ Both the 1995 condition quoted in footnote 6 and the said Regulations (in the Preamble), however, only grant a *complainant* the right to take a matter, as defined, to the IBA, now ICASA. No such right is granted to a *broadcaster*. The Regulations provide that “in these regulations any word to which a meaning has been assigned in the Independent Broadcasting Authority Act... and the Broadcasting Act... has that meaning unless the context indicates otherwise”. The definition section of the IBA Act does not define the word “complainant”. One, accordingly, has to look at the IBA Act itself.

the adjudication promptly and with due prominence.“ It adds in a footnote: “The Council Interprets ‘due prominence’ as requiring the publication to ensure the retraction, clarification, correction, explanation or apology has the effect as far as possible of neutralizing any damage arising from the original publication and that any published adjudication is likely to be seen by those who saw the material on which the complaint was based.” Looking at the adjudications published on its website, it appears that the APC does not make any order as to publication, presumably relying on the above rules being observed by the newspapers. In so far as the British Press Complaints Commission is concerned: under Sanctions, the Council’s website states: “The PCC can enforce a range of sanctions, summarized below: 1. Negotiation of an agreed remedy (apology, published correction, amendment of records, removal of article); 2. Publication of a critical adjudication, which may be followed by public criticism of a title by the Chairman of the PCC.” This obviously puts the PCC in control of what a respondent newspaper must do. In so far as the New Zealand Press Council is concerned: under adjudications, it states “ editors are obliged to publish with due prominence the substance of Council adjudications that uphold a complaint.” It, like the APC, leaves it at that. The Irish Press Council’s rules state: “When requested or required by the Press Ombudsman and/or the Press Council to do so, newspapers and magazines shall publish the decision in relation to a complaint with due prominence.” That means the PO and PC control the publication. In the case of the Ontario Press Council the respondent newspaper “undertakes to publish” an adjudication, but it is not an order that the newspaper must obey.

⁵ This Ruling followed upon the successful application of the BCCSA for recognition by the IBA as an adjudication body set up by the National Association of Broadcasters for its members.

⁶ The 1995 condition reads as follows: “A **complainant** shall have the right to approach the IBA if he or she is of the opinion that the BCCSA has not applied the principles of natural justice and its procedure in a legally acceptable manner, whereupon the IBA shall, if it finds in favour of the Complainant, refer the matter back to the BCCSA for re-hearing. (emphasis added)

[7] Judged within the context of sections 62 and 63 of the IBA Act, it emerges clearly that a “complainant” is not the broadcaster.⁷ Section 56(1) of the IBA Act requires all broadcasting licensees to adhere to the Code of Conduct. Section 62(1) requires the Broadcasting Monitoring and Complaints Committee (“BMCC”) to monitor compliance by broadcasting licensees with, inter alia, the Code of Conduct (section 62(1)(a)(ii)). In terms of section 62(3), the BMCC is required to enquire into and adjudicate upon any alleged or suspected non-compliance or non-adherence with, inter alia, the Code of Conduct. Section 63(1) permits an interested person who has reason to believe that a *licensee* is guilty of any non-compliance with, inter alia, the Code of Conduct, to lodge a complaint with the BMCC within 30 days of the occurrence of such non-compliance. The complaint must be lodged with ICASA for consideration by the BMCC (section 63(2)). This complaint must be in writing and must be served on the licensee concerned. Section 63(4) provides as follows:

“The Broadcasting Monitoring and Complaints Committee shall as soon as may be reasonably practicable . . . investigate and adjudicate any complaint received by it and shall, in doing so, afford the complainant and the respondent a reasonable opportunity to make representations and to be heard in relation thereto.”

After the BMCC has made a finding in terms of section 63(7) that a complaint is justified, it must recommend in writing to the IBA which of the steps set out in section 66(1)(a) to (g) should be taken against the licensee (s 64(1)).

[8] From the above, it is clear that the complaint relates to non-compliance by a *licensee*. It is the complainant’s complaint that is adjudicated by the BMCC, now the CCC. In the present matter before the BCCSA, the Mail & Guardian and Mr Sole are the complainants and they would also have been the complainants before the BMCC, now the CCC, if the latter body had jurisdiction to hear their complaint. *They* have the right to approach the CCC on the procedural grounds set out in the ruling of 1995 and the Regulations of 2003. The broadcaster, who is a licensee, is not permitted to take the BCCSA to ICASA. Of course, it could approach a Court for review. But that is not the case here: the SABC wishes to approach the CCC of ICASA. It, however, does not have the right to do so: it is not a *complainant*, and only a complainant is entitled to approach the CCC. It is abundantly clear from the IBA Act who exactly a

⁷ Unless a broadcaster files a complaint against another licensee, which is not the case here.

complainant is, and it is equally clear that a complainant is not the licensed broadcaster.⁸

[9] The SABC has also referred to section 17C of the ICASA Act as the section under which the CCC will deal with its application. This is, with respect, not correct. The SABC could only be a complainant in terms of that section if it files a complaint against a *licensee*, licensed in terms of the Electronic Communications Act 2005. This is not such a case. Neither the Mail & Guardian nor the BCCSA are licensees.

[10] In the result the intended application by the SABC as licensee to the CCC is not provided for in the Regulations and, accordingly, I can find no reason to obtain the permission of the Commissioners on the Tribunal for a further extension of the seven-day period after the application to the CCC.

To be fair, I have asked the members of the first Tribunal to allow a further seven-day extension in the circumstances, and they have approved it: the summary must be broadcast within seven days of the date of release of this judgment – that is, at the latest during the 19:00 news on the 28th June 2011. The SABC is requested to inform the Registrar as to when this broadcast will take place.

If the Tribunal's order is not given effect, the BCCSA will be obliged, in terms of its recognition conditions,⁹ to inform ICASA of the omission by the SABC to conscientiously give effect to the BCCSA order. It should be stated that the SABC has an unblemished record of compliance with the BCCSA orders since the inception of the BCCSA in 1993.

⁸ The exclusion of a broadcaster probably has to do with the fact that the National Association of Broadcasters set up the BCCSA in 1993 and that the SABC is a member of the National Association of Broadcasters. Since a complainant was not part of this arrangement, it is understandable that a complainant should have access to the CCC on the grounds set out in the 1995 ruling of the IBA and the 2003 Regulations.

⁹ See note 3 above.

The summary, as amended previously and agreed to by the parties and the Tribunal, is repeated in this footnote.¹⁰



JCW VAN ROOYENS SC
CHAIRMAN
20 June 2011

¹⁰ The summary that must be broadcast within the first twelve minutes of the 19:00 SABC News, reads as follows:

“The Broadcasting Complaints Commission has directed SABC3 to broadcast the following finding by it :

A newscast of 3 November 2010 dealt with allegations made by businessman Mr Robert Gumede against a *Mail & Guardian* reporter, Mr Sam Sole. These allegations included bribery of Mr Sole by a Mr John Sterenborg, and racial bias in the *Mail & Guardian*’s reporting on the affairs of Mr Gumede himself. (continued on next page)

Firstly: SABC3 news did not deal fairly with the *Mail & Guardian* newspaper or Mr Sole. The SABC did not adequately address the matter of the alleged bribe. There was no evidence that Mr Sole had received a bribe, and despite the reply broadcast on behalf of the *Mail & Guardian* and Mr Sole, an incorrect inference could still have been drawn. Mr Sole had merely been reimbursed for an air ticket that he had purchased in order to interview a potential news source.

Secondly: The SABC3 news item did not counter unsubstantiated insinuations regarding the further payment of bribes to Mr Sole. Mr Sole denied receiving any bribes at all, and the SABC should have included this denial in the *Mail & Guardian*’s reported reply.

Thirdly: In this reported reply, the *Mail & Guardian* was not granted the opportunity of denying accusations of racial bias by Mr.Gumede against the Mail & Guardian.

In conclusion, these omissions constitute unfairness towards Mr Sole and the *Mail & Guardian*, and the broadcast of an unsubstantiated accusation as to further bribes.

The BCCSA has therefore issued a reprimand against SABC3.”

[Please note that a slight editorial change has been made to the sentence after “Thirdly”]