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CASE NO: 05/2011

DATE OF HEARING: 10 FEBRUARY 2011

**MAIL AND GUARDIAN MEDIA LIMITED
SAM SOLE**

**1ST COMPLAINANT
2ND COMPLAINANT**

vs

**SABC3
SAFM**

**1ST RESPONDENT
2ND RESPONDENT**

**TRIBUNAL: PROF JCW VAN ROOYEN SC (CHAIRPERSON)
DR LYNDA GILFILLAN
MR B MAKEKETA
PROF G OLIVIER**

For the Complainants: Matthew Chaskalson SC. Also present Ms Doris Tshepe and Ms Tumi Madiba from Cheadle Thompson & Haysom Inc Attorneys, instructing attorneys on behalf of M&G Media Limited and Mr Sam Sole.

For the Respondent: Mr Fakir Hassen: Acting General Manager: Special Projects accompanied by Ms Veronica Barnard, Compliance Officer of the SABC assisted by Mr Thabang Mathibe, General Manager: Litigation.

News – unfair treatment of newspaper and journalist by SABC3 in not having granted a newspaper and its journalist a fair opportunity to reply to accusations of bribery and racial bias. Complaint upheld. SABC3 directed to report summary of judgment. Mail & Guardian Media Limited and Sole v SABC3 Case No: 05/2011(BCTSA).

News – Complainants' case stated in separate opportunity to reply fairly granted by SAFM. Complaint not upheld Mail & Guardian Media Limited and Sole v SAFM Case

SUMMARY

The complainants complained that SABC3 and SAfm had not granted them a proper opportunity to reply to allegations of bribery that had been made against Mr Sam Sole, and of racial bias against the Mail & Guardian newspaper. These allegations were made by businessman Mr Robert Gumede in a news insert.

The Tribunal held as follows with regard to the SABC3 insert:

The defence of the SABC was that the Mail & Guardian's denial was included in the broadcast. The issue is, ultimately, whether the SABC complied with the fairness requirement in clause 34.1 of the Broadcasting Code. Looking at the number of claims made by Mr Gumede, it is clear that the response broadcast by the SABC does not address them all, and even the matter addressed in the Mail & Guardian's reported response is addressed in such a way that it is open to conjecture as to what exactly transpired.

Firstly the denial of the claim of a bribe or corruption is not supported by the mere statement that the price of the ticket was repaid. Even if a bribe is repaid, this does not negate the bribe – it remains a bribe, if it was one. The newspaper's reply, as summarised by the SABC itself was, accordingly, fundamentally flawed.

Secondly, the allegations made by Mr Gumede clearly included more than one payment (“and others”) being made and more than one air ticket being paid for. Once again, this was not addressed in the reported reply as broadcast. There was no evidence that any other amount had been paid to Mr Sole or that any other trips had been paid for. The allegation was, accordingly, clearly not supported by any evidence before the Tribunal.

Thirdly, the accusation as to racial bias was not addressed. Had the latter been the only omission, the Tribunal might have regarded the accusation as being so sweeping that no reasonable viewer would have believed it. However, taken together with the other omissions, it adds to the unfairness and cannot, within *this* context, simply be discarded. The SABC was under a legal duty to have made sure that each one of these three matters was addressed in the response, and clearly so. If, however, these matters were not addressed, as was indeed the case, the interview should not have been broadcast at all. Despite the use of the word “allegation”, the effect of the accusations by Mr Gumede was, judged as a whole, one of veracity.

The BCCSA directed the SABC to broadcast a statement on SABC3 during the 19:00 news programme on or before Wednesday 30 March 2011. This must be done within the first twelve minutes of the broadcast.

Although a fine was considered, the Tribunal, by a majority of votes, decided that it was not appropriate in this case. The reasoning was as follows:

The question arose whether the Tribunal should not also fine the SABC. Mr Makeketa is of the view that given the serious nature of the contravention this would be appropriate. The previous matter of *F v SABC*¹ was quoted as authority for imposing a heavy fine. That was a matter which concerned a serious defamation of *F*. The other Commissioners also considered the matter in depth. They, however, came to the conclusion that the order to correct during a newscast, which is not often made, amounts to a serious intervention in the independence of SABC3 to decide itself what would form part of the newscast. The order to include an item which is seriously negative of SABC3 is, accordingly, a substantial sanction which would, to our minds, overshadow even a maximum fine of R60 000. A factor which weighed in favour of this conclusion is that the Mail & Guardian and Mr Sole did not, in their complaint, ask for a fine to be imposed. In *F v SABC* the SABC was also, in the special circumstances of that matter, not ordered to broadcast a correction or the judgment of the BCCSA.

In so far as the SAFM complaint is concerned, the Tribunal was satisfied that, since Mr Dawes from the Mail & Guardian had been granted a an opportunity to answer all the relevant matters in an interview, the Mail & Guardian was granted a right to reply and that the requirement of fairness was, in this respect, substantially complied with. Mr Dawes covered the position of Mr Sole in his interview. This complaint against SAFM was, accordingly, not upheld.

JUDGMENT

JCW VAN Rooyen

[1] This is a complaint in terms of clause 34 of the Broadcasting Code lodged by M&G Media Limited, the proprietors of the *Mail & Guardian* newspaper (“the Mail & Guardian”), and Mr Sam Sole (“Sole”), a journalist employed by the Mail & Guardian. The complaint is filed against the South African Broadcasting

¹ F vs SABC3, Case No: 01/2009

Corporation (“the SABC”) regarding a broadcast, on 3 November 2010, during the 19h00 news bulletin on SABC3, a television channel of the SABC, and repeated in part on 4 November 2010 during the 06h00 and 7h00 news bulletins on SAFM, a radio channel of the SABC.

- [2] On 3 November 2010 the SABC aired an interview with Mr Robert Gumede (“Gumede”) during its 19h00 news bulletin.

The transcript of the interview on 3 November on SABC 3 reads as follows:

Newsreader: Leading business man Robert Gumede, has accused a Mail & Guardian journalist of **accepting bribes** in return for publishing damaging allegations of corruption against him. Information contained in reports was allegedly sourced from Gumede’s business adversary. Gumede has also come out in support of the Media Appeals Tribunal to punish journalists who abuse the profession.

Reporter: Gumede has been in and out of the Press Ombudsman’s office for the past **nine-years** with little joy. His ways to do bitter battle with the Mail & Guardian newspaper over its reports that he is a dubious and corrupt businessman. This emanates from his failed business deal with a British partner John Sterenborg, which cost him his 25 million rand investment. Now he says he knows why. He **alleges** the Mail & Guardian newsman, Sam Sole, was **paid** by Sterenborg to write the damaging stories about him.

Gumede: Here’s a payment, one of the first **payments** that Sterenborg made out to a journalist who is an award-winning journalist, so called investigative journalist who goes out to attack **black people**, to say that they are **corrupt**, they **bribe** people and here it is. He must explain, why did Sterenborg paid him this money and the **others**? On this cheque alone which you can see is (R)900 again there’s an amount where John Sterenborg is paying for **air tickets** for Sam Sole. Sam Sole when he wrote all the negative articles he never disclosed that he had the relationship with Sterenborg and the company that was liquidated. Interestingly enough the money that was paid to him, is the money that I invested. Yet he could stand up and shout to say that I am **corrupt**. Guess who’s **corrupt** now?

REPORTER: “They found the evidence of **payments** to the journalist when they were going through the financial records of his liquidated venture with his British partner. Gumede says he’s been vilified by the paper because of his public support for the ANC and a suspicion that as a black man he must have acquired his wealth **dubiously**.”

The Mail & Guardian rejected the bribery allegation, saying the R900.00 payment was for an air ticket. The newspaper says Sole repaid the amount to Sterenborg.”
(emphasis added in bold)

- [3] The Mail & Guardian editor-in-chief, Mr Nicholas Dawes (“Dawes”), was, according to the Mail & Guardian, contacted by the SABC, through its reporter Mr Thami Dickson (“Dickson”), at 17h30 on 3 November 2010 and asked to

comment on allegations made against Sole and the Mail & Guardian by Gumede in a three page press release. Dawes indicated that he had not seen the press release and asked Dickson to read it to him. Dickson said he could not read it to Dawes as it was three pages long, but explained that it was about Gumede's complaint to the Press Ombudsman and the payment of R900 to Sole. The Mail & Guardian received Gumede's press statement from another journalist at 18h37 on 3 November 2010.

- [4] During this telephone conversation with Dickson, Dawes, according to the Mail & Guardian, denied the bribery allegations. He explained to Dickson that Sole had worked for the magazine *Noseweek* at the time, and that his editor, Mr Martin Welz ("Welz") had instructed him to fly to Johannesburg to meet with Sterenborg. Dawes told Dickson that Welz had at the time agreed with Sterenborg that Sterenborg would pay for Sole's air ticket to travel from Durban to Johannesburg to obtain information that Sterenborg claimed to have in his possession. Because he was uncertain of the value of the information, Welz had been reluctant to pay for the flight. Dawes explained to Dickson that Sole had ended up paying cash for the flight out of his own funds, and that Sterenborg had reimbursed him.
- [5] During his telephone conversation with Dickson, Dawes further explained, according to the Mail & Guardian that the Mail & Guardian intended to release a statement shortly in response to allegations made by Gumede in his complaint to the Press Ombudsman, which included the allegations about payments by Sterenborg. Although, according to the Mail & Guardian, Dickson informed Dawes that he would wait for the Mail & Guardian's press statement, this was not done. The press statement was released at 19h02 on 3 November 2010. The statement was emailed to Dickson at about the same time.
- [6] In the SABC3 news bulletin it was stated that that the Mail & Guardian rejected the bribery allegation saying that the R900 was payment for an air ticket and that Sole repaid the amount to Sterenborg. According to the Mail & Guardian Dickson did not inform Dawes that the SABC had interviewed Gumede or that Gumede had

alleged that Sterenborg had paid Sole several bribes. Dawes was also, according to the Mail & Guardian, not asked to comment on Gumede's allegations of racism against Sole.

- [7] According to the Mail & Guardian neither Sole nor Welz were contacted for comments on these allegations. The broadcast did not mention that the R900 payment was made at the time when Sole was employed by *Noseweek*.
- [8] In addition to the broadcast on 3 November 2010, the SABC broadcast parts of Gumede's allegations on SAFM in the 06h00 and 07h00 news bulletins. At the time the 06h00 and 07h00 news bulletins were aired, the SABC was, according to the Mail & Guardian, in possession of its press release in which the Mail & Guardian responded to Gumede's allegations and set out the circumstances around which the allegations were made. However the SABC, according to the Mail & Guardian, focused only on reporting Gumede's allegations against the Mail & Guardian and Sole and alleged that the SABC chose to ignore the Mail & Guardian press release, failing to report on the Mail & Guardian's response to those allegations as contained in the press release.

BACKGROUND: AS FROM MAIL & GUARDIAN

- [9] In 2001, Sterenborg contacted Welz, stating that he had certain facts that he wanted to relate to *Noseweek*. He asked to do this in person. Sole, who was working as an investigative journalist for *Noseweek* at the time, was instructed by Welz to meet with Sterenborg in Johannesburg. Welz and Sterenborg reached an agreement that Sterenborg would pay for Sole's flight from Durban to Johannesburg.
- [10] The payment to Sole of R900 by Sterenborg was made as compensation for the cost of his flight from Durban to Johannesburg, which Sole had paid himself. The payment of the R900 to Sole was dealt with in a section 417 of the Companies Act inquiry ("the inquiry") into the solvency of Applied Card Technologies, Sterenborg's company in which Gumede had invested. The inquiry was held during January 2004. During the inquiry Sterenborg was asked to explain the payment

made to Sole. He explained that the payment was made to reimburse Sole as he had personally paid for his air ticket.

[11] *Noseweek* did not publish any story after the meeting between Sole and Sterenberg, as Sterenberg did not provide sufficient corroboration for his allegations. No other payment was made to Sole by Sterenberg.

THE COMPLAINT BY THE MAIL & GUARDIAN

[12] The SABC is, in terms of the Broadcasting Code, required to offer truthful, accurate and fair news reporting. Clause 34.1 of the Code of Conduct provides that licensees *shall be obliged to report news truthfully, accurately and fairly.*

[13] The complaint was that the SABC contravened clause 34.1 in that:

- (a) Sole, against whom the corruption and racism allegations were made, was not contacted for a response to the allegations against him. As a result, the story did not accurately reflect the truth nor was it done in a fair manner. Sole's version was not explained by him at all and Dawes' comment was not properly reported on.
- (b) Furthermore, Dawes, in his comment to Dickson informed Dickson that the cheque was issued to reimburse Sole who had paid for the air ticket himself. At no point did Dawes inform Dickson that Sole repaid the R900 to Sterenberg.
- (c) Approximately eight seconds, of the two minutes and twenty three seconds allocated to the story, were utilised for Dawes' explanation of the payment. Gumede, on the other hand, was allocated one minute and two seconds. Gumede's allegations (including his appearance on screen and those mentioned by the news anchor and voice-over journalist) make up 2 minutes and 15 seconds of the total 2 minutes and 23 seconds of the entire news item. This is supported by an independent inquiry by Media Monitoring Africa, whose report was handed in.

- (d) The SABC went to great lengths to tell Gumede's story, attending at his office to interview him at around 14h00 in the afternoon of 3 November 2010. Gumede was given sufficient time to tell the nation just how corrupt Sole is, even going as far as holding up the cheque paid to Sole by Sterenborg as proof of Sole's corruption. The Mail & Guardian on the other hand was approached at 17h30 for comment, barely an hour and a half before the story was aired. And, unlike Gumede, the Mail & guardian and Sole were not given the opportunity to state their story on camera. Indeed, Sole, who was personally accused of corruption and racism, was not approached at all. The manner in which the SABC conducted itself is clearly unfair to the Mail & Guardian and to Sole.
- (e) Furthermore, the innuendo by Gumede is that the R900 was one of many other payments made to Sole, which is incorrect.
- (f) The SABC reported that Gumede has been in and out of the Press Ombudsman for the past nine years. This is not true. There have only been two previous complaints to the Press Ombudsman against the Mail & Guardian by Gumede, neither of which involved Sole at all. These resulted in two apologies by the Mail & Guardian. The process of both complaints lasted for two years, not nine years as reported by the SABC.

[14] Clause 34.2 provides that *news shall be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by:-*

- (a) *Distortion, exaggeration or misrepresentation.*
- (b) *Material omissions; or*
- (c) *Summarisation.*

As stated above, Dickson contacted Dawes to request the Mail & Guardian's comment on the allegations made by Gumede. Dawes explained the circumstances surrounding payment of the R900 to Sole. Dickson, in the story, misquoted Dawes, intentionally or negligently departing from the facts so that it appeared as though

the Mail & Guardian admits that Sole accepted a bribe from Sterenborg in return for publishing unfavourable articles on Gumede and subsequently repaid it. Dickson failed to report on the circumstances surrounding the payment of R900 to Sole, even after this was explained to him by Dawes, choosing instead to incorrectly summarise Dawes' explanation. This is a clear contravention of clauses 34.2(a), (b) and/or (c). Further contraventions of clauses 34.2(a), (b) and/or (c) are set out below.

- [15] The SABC also reported on articles published by the Mail & Guardian which Gumede complained about to the press ombudsman, suggesting that Sole had been involved in writing these articles. These articles were in fact written by Mr Adriaan Basson and not by Sole as is suggested in the report. Sole's articles on Gumede were never reported to the press ombudsman.
- [16] The Gumede / Mail & guardian story also intentionally or negligently creates the innuendo that Sole received more payments from Sterenborg.
- [17] The story also intentionally or negligently distorts or misrepresents the facts in that it creates an impression that the payment of R900 to Sole has just been uncovered. As stated above, Sterenborg explained the payment to Sole during the inquiry in 2004. Gumede participated in the inquiry personally and/or through his representatives.
- [18] The press release issued by Gumede contains Annexures A to C. Annexure A is a copy of the cheque made out to Sole by Sterenborg. Annexure B is a credit card statement reflecting a payment of R900 to South African Airways ("SAA") and annexure C is pages 850 and 851 of the transcript to the inquiry where Sterenborg explains, under oath, the cheque made out to Sole as well as the R900 payment to SAA. The press release and its annexures were provided to the SABC. The SABC, in its broadcast, failed to report on the explanation provided by Sterenborg regarding the payment to Sole and to SAA.

- [19] The SABC, at the time the Gumede / Mail & Guardian story was broadcast, had been informed by Dawes of the fact that only one payment of R900 was made to Sole and of the reasons for the payment. The SABC was also in possession of the transcript of the inquiry where Sterenborg explains the reason for the payment to Sole. The SABC, however, chose to disregard this information and report only the damaging allegations made by Gumede, thus intentionally departing from the facts of the payment to Sole and withholding from viewers and listeners this vital information, which is central to the story.
- [20] On 25 October 2010 the Mail and Guardian sent Gumede a list of questions on a payment of R100 000 by Gumede's former wife, Zongi Gumede ("Zongi"), on the instructions of Gumede, to Nomzamo Petje ("Nomzamo"), the wife of former Telkom procurement specialist, Thapelo Petje. The payment was made two years after Gumede's company Gijima Afrika Smart Technologies ("GAST") was awarded a tender by Telkom to manufacture smart cards, and ten months before the tender was extended. These questions were sent to Gumede as part of the Mail & Guardian's investigation, with the intention of writing and publishing an article on Gumede.
- [21] On 3 November 2010 Gumede's attorneys, Brian Kahn Inc., wrote a letter to the Press Ombudsman ("the complaint letter") complaining about the Mail & Guardian's conduct towards its client over the years, and in particular the questions sent to Gumede by the Mail and Guardian on 25 October 2010. Also on 3 November 2010, Gumede released a press statement, dealing with the Mail & Guardian's treatment of him as well as the Mail & Guardian's investigation into his affairs.
- [22] The SABC was provided with Gumede's press statement, and possibly also the complaint letter. As a result, the SABC was aware that Gumede's allegations were made in response to an investigation by the Mail & Guardian relating to Gumede. However the SABC failed to mention this in its report, again intentionally or negligently omitting an important part of the story.

- [23] According to clause 34.3 of the Code of Conduct “*only that which may reasonably be true, having regard to the source of the news, may be presented as fact, and such fact shall be broadcast fairly with due regard to context and importance. Where a report is not based on fact or is founded on opinion, supposition, rumours or allegations it shall be presented in such a manner as to indicate clearly that such is the case*”.
- [24] This clause is contravened by the SABC report in that the allegation that Sole received several bribes from Sterenborg is reported in such way that it appears to be fact and not merely the opinion of Gumede. Furthermore, the SABC presented, as fact, the allegations of corruption and racism made by Gumede against the Mail & Guardian and Sole. This was done even though the SABC failed to thoroughly investigate the allegations, merely accepting that which was stated by Gumede as truth. This is in clear contravention of clause 34.3 of the Code of Conduct.
- [25] Further, the SABC is required, in terms of clause 34.4 of the Code of Conduct, to verify the correctness of its reports. Clause 34.4 provides that “*where there is reason to doubt the correctness of the report and it is practicable to verify the correctness thereof, it shall be verified. Where such verification is not practicable, that fact shall be mentioned in the report.*” In this case the correctness of Gumede’s allegations could have been verified by simply contacting Sole. Welz could also have been contacted to verify Dawes’ explanation of the payment to Sole. In addition, had the SABC taken the time to investigate Gumede’s allegations against Sole in respect of the R900 payment, they would have learned that the payment had been explained by Sterenborg at the inquiry, the relevant pages of the transcript of which they had in their possession. The SABC’s failure to look beyond Gumede’s say-so is a flagrant disregard of clause 34.4 of the Code of Conduct.
- [26] Furthermore, the SABC report suggests that Sole accepted payment from Sterenborg to publish damaging stories on Gumede. No effort was made by the SABC to verify the truth of this allegation, merely accepting that Sole indeed accepted bribes. The three stories Sole wrote about Gumede in 2003 could have

been obtained by the SABC quite easily, to check if indeed they were unfair to Gumede and suggestive of a corrupt relationship with Sterenborg. On a reasonable reading, they are not.

[27] Clause 34.5 of the Code of Conduct requires signatories, “*where it subsequently appears that a broadcast report was incorrect in a material respect, to rectify the report without delay or reservation. The rectification shall be presented with such a degree of prominence and timing as in the circumstances may be adequate and fair so as to readily attract attention.*” The Mail & Guardian released a press statement at 19h02 on 3 November 2010 responding to the allegations made by Gumede in his press statement and in the SABC news. In the press statement the Mail & Guardian again explains the circumstances surrounding the payment of R900 by Sterenborg to Sole. It also makes it clear that only one payment was made to Sole. This is clearly inconsistent with the SABC report that Dawes informed Dickson that Sole received payment of R900 and later repaid the amount to Sterenborg, and with the allegations of corruption and racism made against Sole by Gumede. The Mail & Guardian press statement was made available to the SABC. However, the SABC failed to rectify the errors contained in the report, in contravention of clause 34.5. The SABC was clearly not acting as an objective news broadcaster in this case.

[28] Further, the SABC repeated allegations made by Gumede during the 06h00 and 07h00 news bulletins on SAFM on 4 November 2010. This was done in the face of the Mail & Guardian press release, with which the SABC had been provided. The SABC again failed to report on the Mail & Guardian position regarding Sterenborg’s payment to Sole as explained in the press release. The SABC made a conscious decision to continue misleading the public with false and biased reporting, again in contravention of clause 34.5 of the Code of Conduct.

CONCLUSION OF COMPLAINANT

[29] The SABC is a public broadcaster and a free-to-air licensee. Its news reports are watched and heard by millions of South Africans. It is obliged to broadcast news in

an ethical manner, news that is truthful and unbiased. In its Gumede / Mail & Guardian story the SABC failed to meet its obligations to the public. The story was inaccurate and, in material respects, intentionally or negligently distorted; it misrepresented the facts explained by Dawes and/or materially omitted essential facts relating to the story. The allegations made by Gumede against Sole are very serious and damaging. Sole's credibility as an investigative journalist was questioned and he was not afforded the opportunity to defend himself. The SABC is clearly biased against the Mail & Guardian. This is evidenced by: the intentional or negligent distortion and misrepresentation of the facts, and in particular, the allegation that: Sterenborg paid Sole as a bribe and Sole repaid the amount, despite the fact that Dawes informed Dickson that the payment was for the purpose of refunding Sole for having paid for the air ticket himself; the payment of R900 was one of many other payments made by Sterenborg to Sole; and Sole's actions were motivated by racism; the SABC failing to contact Sole, against whom the most serious and untruthful allegations were made; the SABC's conduct in approaching the Mail & Guardian only an hour and a half before the story was to be aired, while they met Gumede three and half hours earlier; the SABC failing to wait for the Mail & Guardian's press release before proceeding to air the story, despite being informed by Dawes that the Mail & Guardian's press release would be made shortly; the time given to Gumede to air serious and untruthful allegations against the Mail & Guardian and Sole, compared to the time taken to inaccurately summarise Dawes' response; and the SABC, having received the Mail & Guardian's press release on 3 November 2010, proceeding on 4 November 2010 to repeat parts of Gumede's allegations on SAFM without regard to the Mail & Guardian's position as explained in its press release.

[30] Thus: The SABC has failed to comply with the BCCSA Code of Conduct by broadcasting the Gumede/Mail & Guardian story in a manner which is inconsistent with the requirements of the Code of Conduct.

[31] The BCCSA is requested to order the SABC to broadcast an apology to the Mail & Guardian and Sole on the SABC 3 19:00 news bulletin and on the SAFM 06:00 and

07:00 news. The apology must be given the same prominence as the original broadcast.

THE SABC'S RESPONSE

[32] The SABC responded as follows:

1. It needs to be said from the outset that there is only one principal issue in question – and that relates to the allegation by Mr Robert Gumede that the Mail and Guardian journalist Sam Sole had been paid a bribe. This was the essence of the story and the rest of our response to the allegations in the complaint will hinge on this basic element of the story.
2. As there is a great deal of repetition in the allegations, we will confine ourselves to overarching remarks on them, rather than responding to every point in the complaint. We will however refer to the relevant clauses in the complaint when this is deemed necessary.
3. In attempting to secure a right of reply to the allegation that there had been a bribe solicited by the journalist concerned, our reporter approached the Editor of the Mail and Guardian, Mr Nic Dawes, who responded to the allegation. His denial of the bribery allegation, which is confirmed in clause 7 of the complaint, was indeed featured in the story.
4. A very important element of Mr Dawes' response is that once the denial was acknowledged, there was deemed to be no further need to approach any other parties mentioned in the story regarding the allegation of bribery, as it had effectively been denied by Mr Dawes.
5. The complainant indicates ... that a detailed response was forwarded to the SABC. This is correct, but the material fact that the response was only received by the SABC when the bulletin on which this story featured was already on air is not mentioned. Although the more detailed response might have been considered if it was received in good time, we do not believe it would in any way have detracted from the adequate right of reply from Mr Dawes through his denial of the bribery claim.
6. In clause 9 of the complaint, much is made of the "ten seconds" afforded to the denial referred to. In any TV news item, which on average is 30 to 60 seconds long, the principle of equitability rather than equality of airtime applies to ensure fairness. It is not always possible to ensure absolutely equal airtime to both parties – the issue is rather that there be equitable airtime to address the main issue concerned, in this case, that of the bribery allegation, which was effectively denied by Mr Dawes.
7. Clause 11 refers to the fact that "neither Sole nor Welz were contacted for comment on these allegations." This is true – once Mr Dawes had denied the allegations of bribery, it was deemed sufficient to not approach others for a comment. If Mr Dawes had exercised his right not to comment or to request our reporter to rather contact the people mentioned, he would have done so. But there was no such request from Mr Dawes. He gave a clear denial of the allegations, which was then referred to in the story.

8. We reject the allegation in clause 24 of the complaint that Mr Dawes was misquoted by our reporter in the story, as the denial by Mr Dawes was clearly mentioned in the story which was broadcast.
9. A number of clauses of the complaint refer to “innuendo” in the story and “an impression” created by it. We cannot be held responsible for instances where material is interpreted differently by viewers or the complainant from the facts presented.
10. We reject the allegations in ... the complaint regarding alleged omission of facts, in particular the allegation that “the SABC failed to mention this in its report, again intentionally or negligently omitting an important part of the story”. As indicated earlier, the duration of a television report does not allow for lengthy detailed material. It becomes the responsibility of the reporters and the editorial team to make a call on the relevance of material and what should be included in that limited time available. Attempts by parties involved in the story to decide what should be included, clearly from a position of vested interest, amounts to an attempt to exercise undue influence on the SABC’s right to editorial independence.
11. The allegations contained in clauses 34 to 39 (para 23-26 above) are all countered by the fact that Mr Dawes’ denial of the allegations was included in the story.
12. The allegation in clause 40 (para 27) above is addressed by the fact, mentioned earlier, that the statement by the Mail and Guardian was received too late for consideration.
13. We dismiss the allegation in clause 41 (para 28 above) of the complaint that the SABC “made a conscious decision to continue misleading the public with false and biased reporting”. We do not set out to engage in such exercises, as our mandate dictates that we act in the public interest at all times. This was also the case in the matter at hand, which has been in the public domain for several years now, particularly in the complainant’s own publication.
14. In respect of the comment that parts of the television story were repeated on SAFM bulletins on radio the following morning, the complainant fails to mention that within the same programme, Mr Dawes was interviewed at length to state his case, affording him more time than what was used as the entire story on the News bulletins. A copy is attached for perusal.

In conclusion, the SABC has an obligation as a signatory to the BCCSA Code of Conduct to ensure a right of reply, which we submit was done in this instance. In the case of radio in particular, there was more than adequate compliance with this principle. We therefore believe that there has been no contravention of the Code.

EVALUATION

[33] In so far as the SAFM complaint is concerned, we are satisfied that, since Mr Dawes had been granted an opportunity to answer in an interview, the Mail & Guardian (and, in effect, Mr Sole) was in fact granted a right to reply and that the

requirement of fairness was, in this respect, substantially complied with. It would appear that Mr Dawes had forgotten about this interview when he instructed counsel. We accept his bona fides, given the circumstances explained in further material filed with the BCCSA after the hearing.

The Complaint against SAFM is not upheld.

[34] As to the television interview,² the SABC clearly stated that Mr Gumede had “alleged” what was to follow in his statement. The word “alleged” is often not a sufficient excuse, especially where allegations are stated as facts thereafter. Nevertheless, we note that the SABC at least referred to what Mr Gumede said as an allegation.

[35] The defence of the SABC was that the Mail & Guardian’s denial was included in the broadcast. The issue is, ultimately, whether the SABC complied with the fairness requirement in clause 34.1 of the Broadcasting Code. Looking at the number of claims made by Mr Gumede, it is clear that the response broadcast by the SABC does not address them all, and even the matter addressed in the Mail & Guardian’s reported response is addressed in such a way that it is open to conjecture as to what exactly transpired. *Firstly* the denial of the claim of a bribe or corruption is not supported by the mere statement that the ticket was repaid. Even if a bribe is repaid, this does not negate the bribe – it remains a bribe, if it was one. The reply, as summarised by the SABC itself was, accordingly, fundamentally flawed. *Secondly*, the accusations made by Mr Gumede clearly included more than one payment (“and others”) being made and more than one air ticket being paid for. Once again, this was not addressed in the reply as broadcast. There was no evidence that any other amount had been paid to Mr Sole or that any other trips had been paid for. The allegation was, accordingly, clearly not supported by any evidence before us. *Thirdly*, the accusation as to racial bias was not addressed. Had the latter

been the only omission, we might have regarded the accusation as being so sweeping that no reasonable viewer would have believed it. However, taken together with the other omissions, it adds to the unfairness and cannot, within *this* context, simply be discarded. The SABC was under a legal duty to have made sure that each one of these three matters was addressed in the response, and clearly so. If, however, these matters were not addressed, as was indeed the case, the interview should not have been broadcast at all.

[36] It is, accordingly, clear that the broadcast contravened the Broadcasting Code in that it was unfair and therefore in contravention of clause 34.1 of the Code. Ultimately, the effect of the item, judged as a whole is that an untruth was broadcast to the public; this is so despite of the use of the word “alleged”. The effect of the accusations by Mr Gumede, judged as a whole, was one of veracity. The meagre reported response did not serve to counter it sufficiently.

[37] The contravention is a serious one. The Mail & Guardian has asked the Tribunal to order an apology. The BCCSA Rules do not provide for such an order. In line with the thoughts expressed by Mokgoro J in *Dikolo v Mohlatla 2006(6) SA 235(CC)* at paragraphs [66] et seq, the SABC may add an apology to what it will be directed to broadcast. An apology must flow from the principle of *ubuntu*, as explained by Mokgoro J, before it can have any value. Accordingly, the SABC has to decide whether it wishes to add an apology or not. Omitting to do so should, however, in law not be held against the SABC. The Rules do not require it to apologise, and that puts an end to the matter, from the perspective of the Tribunal.

[38] The question arose whether the Tribunal should not also fine the SABC. Commissioner Makeketa is of the view that, given the serious nature of the contravention, a fine would be also be appropriate. The previous matter of *F v*

² We shall refer to the statement as an “interview”, though in actual fact Mr Gumede was not interviewed but was instead granted the opportunity to make a statement, with comments by the SABC.

*SABC*³ was quoted as authority for imposing a fine. That was a matter which concerned a serious defamation of *F*. The other commissioners also considered the matter in depth. However, we have come to the conclusion that an order to broadcast a correction during a newscast amounts to a serious intervention into the independence of SABC3 to decide itself what should form part of the newscast. The order to include an item that is seriously critical of SABC3 is, accordingly, a substantial sanction which would, to our minds, overshadow even a maximum fine. A factor that weighed in favour of this conclusion is that the Mail & Guardian and Mr Sole did not, in their complaint, ask for a fine to be imposed. Moreover, in *F v SABC*, the SABC was, considering the special circumstances surrounding that matter, not ordered to broadcast either a correction or the judgment of the BCCSA. With great respect to the view of our colleague, Commissioner Makeketa, the majority has decided not to impose a fine for the reasons stated above.

[39] The Complaint is, accordingly, upheld in that the SABC acted unfairly against the Mail & Guardian and Mr Sole in terms of the News clause 34.1 of the Broadcasting Code. Ultimately, this led to an untruthful news item being broadcast. The sanction is a reprimand plus an order to broadcast a summary of this judgment, as set out hereunder. In the event of this kind of contravention being repeated, the Tribunal will give consideration to imposing a fine.

[40] The BCCSA directs the SABC to broadcast the following statement on SABC3 during the 19:00 news programme on 30 March 2011. This must be done within the first twelve minutes of the broadcast.

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

‘A newscast of 3 November 2010 dealt with allegations made by Mr Robert Gumede against a Mail & Guardian reporter, Mr Sam Sole. These allegations included bribery

³ *F vs SABC3*, Case No 01/2009

of Mr Sole by Mr John Sterenberg, and racial bias in the Mail & Guardian's reporting on the affairs of Mr Gumede himself.

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. The finding is that Mr Sole did not receive 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 his denial in the Mail & Guardian's reported reply.

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

In conclusion, these omissions constitute unfairness towards Mr Sole and the Mail & Guardian, and the broadcasting of an untruth. The BCCSA has therefore issued a reprimand against SABC3."



**JCW VAN ROOYEN SC
CHAIRPERSON**

Commissioners Gilfillan and Olivier concurred with the judgment. Commissioner Makeketa agreed with the finding on the merits but would have added a fine, given the seriousness of the contravention.