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CASE NO: 17/2011

In the matter between

SABC3 **Applicant**

and

MAIL & GUARDIAN **First Respondent**

S SOLE **Second Respondent**

Application for leave to appeal – matters to be considered in such application – present dispute is not a constitutional matter as required by the Constitutional Court for applications to itself – no particular "interest of justice" issue present that requires leave to appeal – as for administration of justice, there seems to be no nexus between the administration of justice and the accusations "striking at the core of journalism" – for appeal to succeed, appeal body must be convinced that decision of first Tribunal was "clearly wrong" – considering all the facts before the Tribunal and the reasons for the finding, designated Chairperson of the BCCSA Appeal Tribunal not convinced that the appeal body would find that the decision was clearly wrong.

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

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[1] In Case No 05/2011 the Tribunal of the Broadcasting Complaints Commission of South Africa found that SABC3 had contravened the Code of Conduct. The case resulted from a complaint by the Mail & Guardian newspaper and Mr Sam Sole, a

journalist in the services of the said newspaper, about a news bulletin that was broadcast on 3 November 2010 at 19:00.

[2] In the judgment by the Tribunal, accusations that were made by a certain Mr Robert Gumede during the broadcast against the Mail & Guardian and a journalist, Mr Sole, were considered by the Tribunal, and the Tribunal found that the newspaper and the journalist were not granted sufficient opportunity to reply to the accusations made by Mr Gumede. In the process the Tribunal identified in the SABC reported reply that there was one matter which was ambiguously answered and two matters which were not answered. From the evidence before the Tribunal, it then indicated what the omissions were. No evidence was led by the SABC to counter the evidence from the side of the Respondents. The SABC consistently argued that the reply, as broadcast, took care of the accusations made by Mr Gumede. The object of the case before the Tribunal was not to resolve the possible dispute between Mr Gumede and the Mail & Guardian and Mr Sole, but to resolve the dispute between the *SABC* and the Complainants. This was done in accordance with the evidence and argument before the Tribunal.

[3] After the finding by the Tribunal that SABC3 had contravened the Code, the Broadcaster applied to the Chairman of the BCCSA, who had chaired the Tribunal, for leave to appeal to the Appeal Tribunal of the Commission in terms of clause 4 of the Procedure of the Commission. On 5 April 2011 the Chairperson, after a hearing, dismissed the application for leave to appeal. See the reasons for the dismissal on the BCCSA website: www.bccsa.co.za.

[4] The Broadcaster then applied to me as Deputy Chairperson, duly designated thereto by the Commission in terms of clause 4.5 of the Procedure, for leave to appeal. I was not a member of the Tribunal that considered this complaint as adjudicating body in the first instance.

[5] In a well-argued judgment of some 19 pages the Tribunal of first instance comes to conclusions which are based on the facts as set out in the judgment which accord with the evidence placed before the Tribunal. Mr Gumede did not give evidence at the hearing. He was not called by the SABC. For reasons explained later in my judgment,

I do not think that Mr Gumede could be allowed to give evidence at an appeal hearing, should leave to appeal in fact be granted.

[6] In the "Applicant's reply to Respondent's response to petition for leave to appeal", reference is made to the Constitutional Court judgment in *Bernert v Absa Bank Ltd.*[1] According to this judgment, the requirements for an appeal to the Constitutional Court are that the intended appeal must raise a constitutional matter and that it must be in the interests of justice to grant the leave. Further considerations are the prospects of success, should leave indeed be granted, and the impact of the decision on the administration of justice.

[7] Because this is not an application for leave to appeal to the Constitutional Court, I do not see the relevance of the first requirement. The Applicant argues that it was not permissible for the Tribunal to prescribe the terms of the apology and therefore, by implication, this has become a constitutional matter. The Tribunal did not order the Applicant to broadcast an *apology*. The Chairperson mentioned explicitly that the Tribunal does not have the power to do so. What it in fact did was to order the Applicant to broadcast a *summary* of the judgment. This sanction is prescribed in clause 14.3 of the Constitution of the BCCSA. The Applicant was one of the signatories to this Constitution of the BCCSA and even if it should take this matter to the Constitutional Court, I do not believe that it is likely that the Constitutional Court would find that this sanction, as prescribed in the "Procedure of the Commission" as a possible sanction, is unconstitutional. In any case, my task is not to decide what the Constitutional Court is likely to hold, but what an Appeal Tribunal of this Commission is likely to hold.

[8] As for the requirement that it must be in the interests of justice, no convincing arguments are proffered as to why it would be in the interests of justice to grant leave to appeal. Considered in the context of the other requirements, I do not think that there is a particularly important interest of justice issue that requires leave to be granted. A full hearing was held by the first Tribunal and there is no indication that the interests of justice were not served. Another consideration is the impact of the

[1] 2011(4) BCLR 329 (CC).

decision on the administration of justice. In this regard, the Applicant argues that the accusations strike at the core of journalism. Even if this were true, I do not see the *nexus* between this and the administration of justice. Of course the matter is an important one, but the mere fact that a matter is important, does not mean that it justifies a second hearing by an Appeal Tribunal or that it is in the interests of justice to do so.

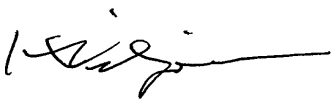
[9] According to clause 4, the prospects of success in an appeal must be considered. In this regard, I refer to clause 4.9 of the "Procedure of the Commission". This clause determines: *"An Appeal Tribunal shall not set aside or amend a decision of the first Tribunal unless it is clearly wrong"*. By this, I understand that what is intended is the so-called narrow appeal as opposed to the wide appeal, as it is known in Administrative law. In a narrow appeal, no new evidence is to be allowed or considered by the appeal body and the appeal body is limited to the record of the proceedings before the body of first instance in coming to a decision. When one reads clause 4.9 in the context of clause 4.2, it is clear that the only matter to be considered is whether it is likely that an appeal tribunal will come to the conclusion that the first decision was clearly wrong.

[10] I am of the view that there was a thorough analysis of the evidence before the Tribunal of first instance, and reasonable conclusions were arrived at. No new evidence may be presented, should leave to appeal be granted. Even if new evidence on appeal were to be permitted by the "Procedure of the Commission", the SABC is not basing its application for leave to appeal on any new evidence. My conclusion is, accordingly, that success on appeal is not likely and, in any case, it is not likely that an Appeal Tribunal would find that the conclusions reached by the first Tribunal are "clearly wrong". The requirements of clause 4 of the "Procedure of the Commission" have, accordingly, not been met.

[11] In the meantime, the BCCSA has received an application from the attorney of Mr Gumede for admission to the appeal hearing as *amicus curiae* in order for him to be able to have certain findings of the Tribunal "corrected" by presenting new evidence. The application has become academic in the light of the conclusion which I have reached : there will not be an appeal hearing. I should, in any case, mention the

following: (1) The BCCSA Procedure does not provide for an *amicus curiae* as does the Uniform Rules of the Supreme Court and the Rules of the Constitutional Court. (2) Even those rules do not generally permit new evidence to be introduced by the *amicus curiae*. Thus, even if I were to assume that this application of Mr Gumede had a bearing on the success of this application for leave to appeal, I would have come to the same conclusion.

Leave to appeal is not granted to the Applicant.



Prof Henning Viljoen
Deputy Chairperson: Broadcasting Complaints Commission of SA

31 May 2011