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CASE NUMBER: 20/2018

DATE OF HEARING: 05 SEPTEMBER
JUDGMENT RELEASE DATE: 21 SEPTEMBER 2018

PHUMZILE VAN DAMME, MP
DA SHADOW MINISTER: COMMUNICATIONS

1ST COMPLAINANT

obo

DEMOCRATIC ALLIANCE

CHURR

2ND COMPLAINANT

vs

SABC NEWS CHANNEL 404

RESPONDENT

TRIBUNAL: **PROF HENNING VILJOEN (CHAIRPERSON)**
 ADV BOITUMELO TLHAKUNG
 MS NOKUBONGA FAKUDE
 DR LINDA VENTER

FOR THE 1st COMPLAINANT: Mr N Ferreira, Counsel for the Democratic Alliance, Ms E Jonker, Attorney, Director Litigation Department of Mindi Schapiro and Smith Inc, Ms P Van Damme, MP, Democratic Alliance Shadow Minister of Communications.

FOR THE 2nd COMPLAINANT: Mr Churr in person.

FOR THE RESPONDENT: Mr Nyiko Shibambo, Acting Manager accompanied by Mr K Mwelase, Legal Advisor, Ms N Mda, Acting General Manager: SABC News, Ms P Magopeni, Group Executive: News and Current Affairs, Ms Refiloe Timana, Broadcasting Compliance of the SABC.

Complaint that the DA was not afforded opportunity to fairly present its opposing point of view to that of the president of the ANC in a programme in which controversial issues of public importance were discussed – DA invited onto subsequent programme to present its view – complaint that broadcast was qualitatively and quantitatively inferior to that of the ANC president, that it was not in same series as original broadcast, was not done within a reasonable time and not in substantially the same time slot – Tribunal finding that broadcast of DA’s view within some 10 (night) hours after original broadcast was in same news series and was done within reasonable time – Tribunal condoning non-compliance with same time slot requirement – no contravention found and complaints not upheld - Democratic Alliance vs SABC News, Case No:20/2018 (BCCSA)

SUMMARY

Complaint that the Democratic Alliance was not afforded the opportunity to fairly present its opposing point of view to that of the president of the ANC in a programme in which controversial issues of public importance were discussed. The DA was invited onto a subsequent programme to present its views in a telephonic interview. The Complainants contended that this broadcast was qualitatively and quantitatively inferior to that of the ANC president’s address, that it was not in the same series as the original broadcast, was not done within a reasonable time and not in substantially the same time slot as required by Clause 13(1) of the Free-to-Air Code and Clause 28.3.1 of the Subscription Broadcasting Code respectively. The complaints by the two complainants were treated as one because the complaints were substantially the same. The Tribunal found that the broadcast of the DA’s view within some 10 (night) hours after the original broadcast was in the same news series and was done within a reasonable time. There is no obligation on a broadcaster to afford the same airtime to opposing viewpoints. This is part of the editorial freedom of a broadcaster. The Tribunal condoned the non-compliance of the Broadcaster with regard to the same time slot requirement. No contravention of the Codes was found, and the complaints were not upheld.

JUDGMENT

HP VILJOEN

- [1] The facts on which this complaint is based, are briefly the following: On 31 July 2018 at 22:10, the Respondent on its News Channel and in a programme called *The Globe*, broadcast an address by President Ramaphosa. In this address it was made clear to the

public that the ANC is in favour of amending the Constitution of South Africa to provide for the expropriation of land without compensation and that it intends to have legislation passed by Parliament to achieve this objective. The following morning (1 August at 08:04) on the programme *Morning Live* on SABC2 and simulcast on News Channel 404, after again broadcasting the address of the previous evening, Portia Adams, a spokesperson for the leader of the Democratic Alliance (DA) was invited by the Broadcaster to telephonically comment on the President's address and to put forward the views of the DA on this topic. After she had done this, the shadow minister of communications of the DA, Ms Phumzile van Damme, lodged a complaint with the Broadcasting Complaints Commission of South Africa (BCCSA) wherein she complained about the fact that the address by President Ramaphosa was ostensibly in his capacity as president of the ANC, while the impression was created that he did so in his capacity as president of the Republic of South Africa. She further complained that the broadcast on 31 July constituted a discussion of a controversial issue of public importance and therefore, in terms of Clause 13(1) of the Code of Conduct, the Broadcaster was obliged to fairly present opposing points of view which, according to the Complainant, it failed to do.

The second Complainant, Mr Churr, also lodged a complaint in which he dealt with substantially the same issues as the DA. The two complaints will be dealt with as one to the extent that they overlap.

[2] **The complaints read as follows:**

VAN DAMME: "COMPLAINT AGAINST THE SOUTH AFRICAN BROADCASTING CORPORATION

1. I lodge this complaint in my capacity as the Democratic Alliance's Shadow Minister of Communications.
2. We, as the Democratic Alliance, register our deep disdain over a South African Broadcasting Corporation ("SABC") broadcast that took place on 31 July 2018. The broadcast was at 22:10pm and the title of the programme was 'President Ramaphosa addresses the nation'. It was aired on the SABC News channel.
3. The broadcast featured the President of the Republic of South Africa, Mr. Cyril M. Ramaphosa, addressing the nation. However, Mr. Ramaphosa was dressed in regalia of the African National Congress ("ANC"), the background featured ANC flags, and he was discussing ANC policy decisions and the outcomes of an ANC *lekgotla* that had taken place over the course of the preceding two days.
4. It is clear from the broadcast that Mr. Ramaphosa was not speaking in his capacity

as President of the Republic of South Africa, but in his capacity as President of the ANC.

5. We are of the belief that this broadcast infringed upon the *BCCSA Code of Conduct* ("the BCCSA Code") and in particular on section 13(1) of this Code which states that:
Controversial Issues of Public Importance

*(1) In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make **reasonable efforts to fairly present opposing points** of view either **in the same programme** or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and **within substantially the same time slot.***

In his address Mr. Ramaphosa announced that the ANC had determined that they will amend the Constitution of the Republic of South Africa ("the Constitution") to allow for expropriation without compensation. This is clearly a very controversial issue of public importance. No effort was made on the part of the SABC to present opposing views in the same programme or in the same time slot.

6. On 1 August 2018, I wrote to the Chairperson of the SABC Board, Mr.

Bongumusa Makhathini ("Mr. Makhathini") requesting a right of reply for the Leader of the Democratic Alliance ("DA"), the official opposition party. The DA's views on expropriation without compensation differs substantially from that of the ANC. I attach my letter hereto as **ANNEXURE "A"**.

7. Mr. Makhathini responded to me on 2 August 2018, which response I attach hereto as **ANNEXURE "B"**. It is my submission that Mr. Makhathini fundamentally misinterprets the issue.

It is my submission that:

7.1 It is unacceptable that the public broadcaster accepted a recording from a political party and halted normal programming in order to broadcast it, without even attempting to balance the views of this political party with those of other political parties;

7.2 I am further of the opinion that offering the DA an opportunity to comment on Mr. Ramaphosa's announcement is an insufficient response by the SABC and does not satisfy the requirements of section 13(1) of the BCCSA Code.

8. I believe that the DA needs to be afforded an opportunity to present our own offer on land and jobs to the electorate, as Mr. Ramaphosa had done with the ANC's offer, on an equitable basis.

9. As the urgency and gravity of this matter is evident, your prompt action in this regard will be most appreciated.

ANNEXURE A: LIVE BROADCAST: ADDRESS BY PRESIDENT CYRIL RAMAPHOSA ON 31 JULY 2018

With reference to the live broadcast on 31 July 2018, in which President Cyril Ramaphosa addressed the country on the outcomes of an ANC lekgotla held in Tshwane on 30-31 July 2018.

We note that the President appeared on television during the above-mentioned broadcast dressed in ANC - branded apparel, with ANC flags in the background of the shot, and addressed the nation on the outcomes of an ANC lekgotla where it was determined that the ANC will push through amendments to the Constitution in Parliament in order to effect expropriation without compensation.

We find it entirely unacceptable that the leader of a political party is provided with unlimited opportunity to address the country on party-political matters on the public broadcaster -

even more so in that the same opportunity was not afforded to other political parties. That the leader in question also happens to be the president of the country is immaterial, as he was not speaking on state matters but on party matters.

The SABC, as public broadcaster, has a duty to ensure that their broadcasting is independent and impartial, and that political parties are provided with equitable coverage. This is crucial in order to ensure a well-informed electorate.

It is therefore our request that the Democratic Alliance be afforded the same opportunity as the ANC to address the nation on our party position on amending the Constitution to effect expropriation without compensation.

I trust you find the above request in order and look forward to hearing from you at your soonest convenience."

ANNEXURE B: "RE: ADDRESS BY PRESIDENT CYRIL RAMAPHOSA ON 31 JULY 2018

Your letter of 1 August 2018 to my office has reference.

I wish to reconfirm that the SABC like many other media institutions received a recording of President Cyril Ramaphosa's address in his capacity as the President of the African National Congress (ANC), and it was not the only media house to broadcast the address. The SABC made an editorial decision to broadcast the address as it was deemed newsworthy.

To alleviate your concerns, it is imperative to note that the SABC as a responsible public service broadcaster, made efforts to deliver a balanced story by soliciting reactions from other political parties, including the Democratic Alliance. In fact the Democratic Alliance represented by the Spokesperson for the leader of the DA, was on Morning Live today responding to this story.

I trust that you find the above in order and wish to assure you of the SABC's commitment to independence and impartiality."

Churr: "SABC NEWS channel 404 1 AUGUST 2018 - The ANC president addressing the Nation on changes to section 25 of the Constitution - property rights.

<http://www.sabcnews.com/sabcnews/anc-president-ramaphosa-addresses-the-nation-on-land-expropriation/>

I saw the above news on channel 404 on 1 August 2018.

SABC also has free channels 191, 192 and 193 and the SABC may well have broadcasted the same news on all the SABC channels.

There is no need to prove that the matter is of **National as well as International interest and is highly controversial in nature.**

The SABC TV station, funded and supported in part by the state, is in contravention of section 28.3 of the code of conduct. There are many other political parties and organizations that have not been afforded the opportunity to present an **OPPOSING POINT OF VIEW**, as of date, 8 days later.

28.3 Controversial issues of public importance 28.3.1 In presenting a programme in which controversial issues of public importance are discussed, a licensee must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.

COMPLAINT: The broadcaster has made NO reasonable effort to fairly present opposing points of view in the same or subsequent programme within a reasonable period of time of the original broadcast – nor in any other time slot.

The same complaint holds true if the SABC TV station also broadcasted on the free to air channels 191 to 193. Code 13.1 will then apply.

13. Controversial Issues of Public Importance (1) In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot

COMPLAINT **PROPAGANDA clause 28.3.1**

The BCCSA

- APPLICATION NUMBER: 16/2018
JUDGMENT DATE: 06 AUGUST 2018

States inter alia in paragraph [4] (with my bold underlining added for emphasis)

[4] In his documentation, the Applicant states:
*The BCCSA code does not address incorrect opinions, propaganda or untruths expressed as “opinions”. It does however request that **broadcasters take due note of the source of the opinions aired**. And this what the complaint was all about. That by listing all the untruths, that the broadcaster should take due regard as to the source of the untruths.*
He is correct that our Code does not address incorrect opinions or untruths (except in the case of untruths in news broadcasts). **However, he is wrong that our Code does not address propaganda. That is precisely the reason for clause 28.3.1 which provides that:**
In presenting a programme in which controversial issues of public importance are discussed, a licensee must make reasonable efforts to fairly present opposing points of view ...

It is possible that the news broadcast, address to the Nation, may be seen as propaganda. It will be appreciated if the **BCCSA can confirm its own definition of propaganda** as it is not found in the **BCCSA code of conduct**. Thus there are two matters for the BCCSA to rule upon.

The following does not imply that the BCCSA should be guided by the examples supplied.
Propaganda- noun

information, especially of a biased or misleading nature, used to **promote a political cause or point of view**.

Southern Illinois University, 2005

I analyze this division between propaganda and persuasion by discussing propaganda as one-way communication process and persuasion as a two-way communication process.

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

“RESPONDENT’S HEADS OF ARGUMENT

1. The SABC broadcast a pre-recorded message from the ANC President on the 31st of July 2018 at at 22h10. The address was about the resolutions that the ANC had taken at their Lekgotla. The recording was in the public interest because people wanted to know the outcomes of the lekgotla. The strap on screen read as follows: **President Ramaphosa addresses the Nation.**
2. As prescribed in the BCCSA Code, clause 11.6 that, *“Where is subsequently appears that a broadcast was incorrect in a material aspect, it must be rectified forthwith, without reservation or delay. The rectification must 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 error was corrected in the same broadcast to reflect the following strap: **ANC President Ramaphosa makes a special address.**
3. Later in the broadcast the following strap was shown: **ANC resolves to amend Constitution to fast track land expropriation.**
4. After Ramaphosa’s message, the SABC interviewed Angelo Fick, a researcher and analyst between **22:43 – 22:52**. In this instance we are addressing **clause 13.1** which was allegedly contravened. The clause states that, *“In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within reasonable period of time of the original broadcast and within substantially the same time slot.”* Amongst other things mentioned by Fick was to clarify that the President was speaking as the leader of the ANC. The SABC does not dictate to its guests as to what to say on air. We invite them based on their knowledge of the subject under discussion and also to give alternative views.
5. We also had a studio guest in Ms. Bulelwa Mabasa, a Land Reform Specialist between **23:10 – 23:24**.
6. The Democratic Alliance **erroneously** believes that opposing points of views means opposition party. Opposing points of views may come in the form of analysts, bloggers, public comments etc. The fact that we invited Fick and Mabasa in the programme to deal with the ANC’s resolution that night is enough to meet the demands of Clause 13.1. **It is inconceivable that the DA would expect the BCCSA to rule that they are the only interested party that can offer opposing points views.**
7. On 01 August 2018, *Morning Live*, which is simulcast both on SABC 2 and News Channel 404, played Ramaphosa’s message. The aim was to update viewers who may have missed the story the previous night and also to introduce it to SABC 2 viewers. The presenter also introduced a Twitter topic to get public reaction to the ANC’s resolution. The SABC also rebroadcast an interview with Ms. Mabasa. We also interviewed Mr. Kallie Kriel of Afriforum. **The overlays were used.**

8. The spokesperson of the DA leader, Portia Adams reacted to Ramaphosa's message. She was not interrupted or stopped from airing her party's views. It should be noted that this was not a right of reply, rather a reaction to the issue that involved the ANC'S internal affairs.
9. **Important developments that we submit be seriously considered when assessing the evidence:**
 - 9.1 The DA shadow minister of the communications who also happens to be the complainant in this case, wrote a letter of complaint about Ramaphosa's recorded message to the Chairperson of the Board, Mr. Bongumusa Makhathini on 01 August 2018. Mr. Makhathini received the letter and responded on the 2nd of August indicating that the SABC had already afforded the DA airtime. Though the BCCSA cannot rule on the complainant's unbecoming behaviour in this instance, it should be noted that she was asking the Chairperson of the Board to interfere with editorial matters.
 - 9.2 The DA did not make any attempt to share their views on the 31st of July 2018. The ANC took their resolution as a political party and not as government. Therefore the DA's ill-informed conviction that they had an inherent right to comment immediately after Ramaphosa's speech is misplaced. Other parties that reacted to the ANC's resolution did so as political parties and not oppositions. Political parties become opposition in a specific legislative framework like parliaments, legislatures and councils. Outside these frameworks, they are independent political parties and should not be addressed as such.
 - 9.3 In a scenario wherein the DA was to announce a resolution on a specific matter, they would not want to be referred to as an opposition party, but in this BCCSA complaint, find it convenient to invoke the 'opposition' status to suit their arguments. In this matter involving the ANC, the DA was not reacting as an opposition party but as a party that has an interest in the land question.
 - 9.4 Morning Live is shown on the same News Channel 404 and not a separate one as alleged by the DA. The DA got an unfair advantage because Morning Live is simulcast both on Channel 404, which is satellite based and SABC 2. The DA could have informed the SABC that they were not interested in that morning time slot but grabbed the opportunity with both hands and used it optimally. The DA cannot prove any harm that has been caused to them as a result of that broadcast.
 - 9.5 The fact that the DA spokesperson was interviewed telephonically does not change the content of their reaction. **The complainant herself has had telephonic interviews before and continues to.**
10. There is no clause in the BCCSA Code that prescribes that anyone who reacting to a message must be given equal time.
11. It may be politically correct for the DA to suggest that the President was given, **"unlimited opportunity to address the country"** but factually incorrect. Ramaphosa's speech was limited and focused on specific issues that are in the public domain.
12. Again, it is factually incorrect that normal programming was halted to make way for the President of the ANC to address the nation. There was no such a thing.

13. The DA contends that the time they were given was not sufficient; however what is clear from the broadcast of *Morning Live* on 01 August 2018, is that Adams was asked a question and she spoke freely without interjection until she was done. **No one from the SABC had told Adams in advance that she only had a minute to react.** It was purely her prerogative to fully express her party's views.

VIEWERSHIP

1. The broadcast of President Ramaphosa's recorded message on **31 July** on "**The Globe**" achieved an average of **27,500** viewers on that specific broadcast.
2. The ***Morning live*** broadcast, in which the DA was interviewed, on **01 August 2018** achieved an average of **527,000** on **SABC2**, and **66,200** on **SABC News channel**.

CONCLUSION

Over the years, the BCCSA Tribunal has proven not to be influenced by politics when taking decisions and we trust that even in this case, sanity will prevail. From the explanations above, it is undoubtedly clear that the DA's complaint is vexatious and therefore should be dismissed. The SABC complied with the Code.

BCCSA COMPLAINT: L D CHURR - CHANNEL 404 - THE GLOBE - 31.07.2018 - 22:10

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

1. On Tuesday, 31 July 2018 the SABC broadcast a statement by ANC President, Mr. Cyril Ramaphosa, following an ANC Lekgotla. The statement, released to media houses including the SABC, in pre-recorded form, was broadcast on the SABC News Channel at 22:10 on the live programme called *The Globe*.
2. The SABC proceeded to seek comment from other political parties, analysts and South Africans. Again, the next morning, on *Morning Live*; the DA represented by its leader's spokesperson, Portia Adams, was interviewed at 08:04 offering its views on Mr. Ramaphosa's statement.
3. While it may not have been in the same programme *The Globe*, the subsequent most viewed programme was *Morning Live*. To have waited for *The Globe* at 22:00 on 1 August would not have been editorially sound as the story would have possibly lost traction by then. In any event; *Morning Live* has a far wider audience reach than *The Globe* because the former simulcasts on SABC 2 while the latter is confined to the satellite channel.
4. The complaint goes on a fishing expedition and makes references to news broadcasts on other channels that he did not watch. We find it to be desperate to the extreme.

We submit that there was no contravention of section 13(1) of BCCSA Code of Conduct."

[4] The second Complainant replied as follows:

"BCCSA COMPLAINT: L D CHURR - CHANNEL 404 - THE GLOBE - 31.07.2018 - 22:10

In reply to SABC letter dated 11 August 2018.

The BCCSA and the SABC is commended for the prompt reply to the complaint dated 10 August 2018.

Paragraph 1

The SABC letter does not clarify why SABC chose to air said received pre-recorded message as:

The **PRESIDENT OF SOUTH AFRICA ADDRESSING THE STATE OF THE NATION**, when it was a party political statement resulting from a party political meeting.

Paragraph 2

The SABC attempt to adhere to the BCCSA code of conduct by obtaining a balanced opposing point of view is rejected.

The original news broadcast showed the **ANC president addressing the nation without distractions**. The SABC early morning attempt the next day at balance via a telephone call of poor quality, was distracted by images of land invasions and riots. Distracting viewers with flashing images from what was trying to be conveyed via a telephone call.

It is strange that the SABC fails to mention that the leader of the opposition party forwarded a pre-recorded message to the SABC. The SABC had no need to go looking for comments, as it was forwarded to them by the official opposition party. I am sure there must have been many others also clamoring for an opportunity to comment on this **very controversial Constitutional change message**. The best that can be said is that SABC made a token gesture in this regard.

To add insult to injury, the SABC further promotes the one-sided discussion on their various online posts. One link is supplied here for easy reference.
<http://www.sabcnews.com/sabcnews/anc-president-ramaphosa-addresses-the-nation-on-land-expropriation/>

A cursory review of the SABC own online placement as per above link makes it more than abundantly clear that they are promoting only a one sided conversation.

Paragraph 3

Most people watch TV at night and not in the morning. I never watch SABC in the evening. I only watched as the news spread very fast that the South African president was going to "**Address the Nation**" on "**Changing the Constitution**". Each item on its own is extremely news worthy and combined even more so. Stating that the story "**May possibly**" lose traction is belied by the fact that many commentators are still commenting on this. Commentators not on SABC platforms. If anything, the story is gaining traction, even internationally, and not losing traction despite SABC best attempts to not show opposing points of views.

SABC appears to ignore their own "**editorial sound policy**" decision as they placed the same "State of the Nation" **news online on 3 August 2018** as per link. This link further enforces the fact that SABC is promoting only one side of the narrative.
<http://www.sabcnews.com/sabcnews/author/mocheet/>

The above link clearly shows that SABC has not lost interest in the **land expropriation debate** nor the **changing of the constitution announcement**.

Paragraph 4

Fishing expedition means:-

Legal grasping at straws; the use of pretrial investigation discovery or witness questioning in an unfocused attempt to uncover damaging evidence to be used against an adversary.
https://www.law.cornell.edu/wex/fishing_expedition

I am falsely accused by SABC of fishing as I allegedly :-

The complaint goes on a fishing expedition and makes references to news broadcasts on other channels that he did not watch.

- 1) SABC has no idea what I watch, how I watch, and when I watch news broadcasts. The following link serves multiple purposes. It shows but one of many ways that I watch

multiple news broadcasts on other channels. It is also a good example of a “real balanced opposing point of view.” <https://www.youtube.com/watch?v=0YjOK2F4wus>

- 2) What I wrote was:- SABC also has free channels 191, 192 and 193 and the SABC may well have broadcasted the same news on all the SABC channels. It would be insulting to define what may well have means.
- 3) I also wrote:- The same complaint holds true if the SABC TV station also broadcasted on the free to air channels 191 to 193. Code 13.1 will then apply. It would be insulting to define what holds true if means.
- 4) As I made no other references to watching other news broadcasts on other channels as falsely claimed, SABC must quote where I as per their allegation:-

makes references to news broadcasts on other channels that he did not watch.

I suggest that SABC reply is a prime example of misdirection and “desperate to the extreme” and does not convince that SABC attempted to adhere to the BCCSA code of conduct clause 28.3.1.”

[5] **The SABC replied as follows to Mr Churr:**

“SABC’s ADDITIONAL COMMENTS TO CHURR’S RESPONSE

In reply to Churr’s comments dated 14 August 2018, please find our comments as follows:

Paragraph 1

Mr. Churr must learn to read his own complaints before pressing the SEND button. In our initial response, we were responding to the things that he had raised relating to the broadcast. We admit that there was an error in terms of Ramaphosa’s title. That error was corrected in the same broadcast consistent with the BCCSA Code of Conduct.

Paragraph 2

It is Churr’s subjective view that he was distracted by pictures being shown during the interview with the representative of the DA. He could have chosen to look away. He has no right to dictate to the SABC as to how we should do interviews.

It is also strange that the party that had already shared its views about the same matter would also want a recorded message to be aired. We would like the BCCSA to ask Churr as to when was that recorded message delivered to the SABC and to whom?

News cannot be a promotion of anything. It is quite confusing as to why is the DA’s message not seen as promoting a one sided conversation.

Paragraph 3

It is not our business that Churr does not watch TV at night. We do not even know as to where did he get that message that the, “South African president was going to “Address the Nation” on “Changing the Constitution”.

Unfortunately Churr will have to accept that the SABC will not be deterred from broadcasting news that will not excite him. News is not for entertainment. The issue of land is very important to the majority of South Africans who have been deprived of their land by apartheid government. Churr must accept that the SABC does not make stories, it covers them. If he does not like us covering the land story, then he should take his fight to those who are pushing it.

Paragraph 4

If he had watched the channels concerned, could have effortlessly made references to them in his initial complaint without telling a long winding story. He sounds very desperate to push a narrative that seeks to portray SABC journalists as people who do not know what they are doing, which is plainly false. We have clearly seen through Churr’s response that as long as the news about the DA, he is at peace with it and agitated when airtime is accorded to the ANC.”

EVALUATION

- [6] The first point of dispute is that the strapline on the screen with the camera focussed on President Ramaphosa when he started his address on 31 July, stated “*President Ramaphosa addresses the nation*”. However, the background on the screen is dominated by an ANC flag and the President, *inter alia*, states at the start of his address that

The African National Congress has just concluded a two-day NEC Lekgotla in Tshwane, and

We thought that it was important for the President of the ANC to clearly and unambiguously articulate the position of the organisation on two matters ...

From this, it is clear that President Ramaphosa made the announcement in his capacity as president of the ANC and not in his capacity as president of South Africa. The Broadcaster was clearly at fault with the wording of its strapline.

- [7] The Broadcaster apparently realised its mistake and a little more than halfway through the broadcasting of the address, the strapline disappeared from the screen and a few seconds later a new strapline appeared on-screen, announcing “*ANC President Ramaphosa makes a special address*”. Later in the broadcast, the strapline was again amended to read “*ANC resolves to amend Constitution to fast track land expropriation*”.

The Broadcaster admitted that it had made a mistake and that is the reason why the wording on the strapline was changed. In this context it referred the Tribunal to Clause 11(6) of the Code, because the address by President Ramaphosa was broadcast as a news item. This subclause reads:

Where it subsequently appears that a broadcast report was incorrect in a material respect, it must be rectified forthwith, without reservation or delay. The rectification must 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.

It is clear that the Broadcaster corrected the wording of the strapline without reservation or delay. As neither of the two Complainants pursued this aspect of the complaint at

the hearing and neither of them referred to an alleged contravention of the Code, it is not deemed necessary for the Tribunal to make a finding in this regard.

- [8] The main complaint is that there were allegedly no opposing points of view broadcast on 31 July or that there was not proper compliance with the requirements of the Code. The allegation by the DA is that Clause 13(1) of the Free-to-Air Code was contravened. Mr Churr, on the other hand, alleges that Clause 28.3.1 of the Subscription Broadcasting Service Licensees Code was violated. This clause reads:

In presenting a programme in which controversial issues of public importance are discussed, a licensee must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.

Complainant Churr is correct when he refers to Clause 28.3.1 because the address by President Ramaphosa was broadcast by the SABC on Channel 404 which is a subscription channel. In the end, however, it matters not that the DA referred to Clause 13(1) because the interview with the representative of the DA was broadcast on SABC2 and the wording of the clauses in the two Codes is identical, save for the use of the singular in Clause 13(1) (“a controversial issue”) and the reference to a “broadcaster” instead of a “licensee”.

The point is that the Complainants contend that the topic of expropriation of land without compensation is a controversial issue of public importance and that the Broadcaster failed to make reasonable efforts to fairly present opposing points of view. It is common cause that the DA was not invited to present its opposing point of view on *The Globe* news programme on 31 July. It is also not denied by the Broadcaster that the broadcast touched upon a controversial issue of public importance. From this it follows that the Broadcaster must have made reasonable efforts to fairly present opposing points of view.

[9] The DA, as the official opposition in Parliament, insists that the Broadcaster should have broadcast the DA's equivalent party-political statement¹. While it might not be unreasonable of the party to expect to get media coverage on this topic, no such duty on the Broadcaster towards the DA can be determined by an objective reading of the relevant clause of the Code. As long as opposing points of view are broadcast, we cannot find a contravention. The next question is whether opposing points of view by anybody were broadcast. The Broadcaster states that directly after the address by President Ramaphosa, the views of Angelo Fick, a researcher and analyst, and Bulelwa Mabasa, a land reform specialist, were broadcast on the same programme. The Tribunal did not listen to these views at the hearing, but after we reserved judgment, I requested that clips of these broadcasts be sent to all the members of the Tribunal and to the two Complainants with the further request that the Complainants submit written arguments pertaining to the clips, if they so wish. These arguments must then be copied to the Broadcaster who may respond to the arguments by the Complainants. In the meantime, the Tribunal has received comments from both the DA and the SABC on the question whether the interviews with the two commentators directly after the address by the President on 31 July constituted opposing points of view. We deal with these comments in the paragraphs below.

[10] We have read the transcription of the interview with Angelo Fick which was broadcast directly after the address by Mr Ramaphosa. The Broadcaster's argument is that "*Opposing points of views may come in the form of analysts, bloggers, public comments etc.*" That might be true, but one will have to analyse the interviews to decide if they really presented an opposing point of view. Mr Fick, according to the Broadcaster, is a researcher and analyst. In our view, nothing that he said in the interview could be classified as an opposing point of view to that of the Mr Ramaphosa. He merely discussed the timing of the address and he gave an analysis of the political challenges that face Mr Ramaphosa. In terms of Clause 13(1) of the Code, his interview cannot be considered to be in compliance with the requirement of an opposing point of view to that of the president of the ANC. In this context we have to agree with the arguments submitted by the DA.

¹ See the DA's Heads of Argument, point 32.2.

[11] We have also listened to the comments by Ms Bulelwa Mabasa, who is described as a land reform specialist. Although she gave some interesting perspectives on the issue of expropriation of land in general and on expropriation of land without compensation, we cannot find in her interview an opposing point of view to that of Mr Ramaphosa. We have to distinguish three aspects which came to the fore on this interview: firstly, expropriation of land, secondly, expropriation of land without compensation, and thirdly, the amendment of section 25 of the Constitution to authorise the second aspect. We think the announcement to proceed with the amendment of section 25 was the most newsworthy part of the address, because the policy decision on expropriation of land without compensation had already been taken in December 2017 at the ANC National Elective Conference. An opposing point of view on this would have entailed the land reform specialist to state that section 25 should not be amended or something to this effect and to motivate such opposing point of view. This did not happen, and we do not think the Broadcaster can rely on this interview as putting forward an opposing point of view and thus complying with the requirement of Clause 13(1). We also agree with the DA on this score. The Broadcaster also referred to an interview with a representative of AfriForum in which an opposing point of view was allegedly expressed. We did not listen to this interview because it was not presented to us. In light of our conclusion at the end of this judgment, we do not think it is important to decide whether or not that interview constituted compliance with the Code.

[12] As stated in paragraph [1] above, the DA was granted the opportunity to put its views to the public the following morning on SABC2, which was simulcast on News Channel 404 just after 8:00, in other words some 10 hours after the broadcast of the address the previous evening. This was an opposing point of view, but the question we have to decide is whether this was in compliance with the requirements of Clause 13(1) of the Free-to-Air Code (for the SABC2 broadcast) or Clause 28.3.1 of the Subscription Broadcasting Code (for the Channel 404 broadcast). Both Complainants contend that there was not compliance by the Broadcaster with the requirements: firstly, because the SABC did not make reasonable efforts to fairly present opposing points of view; secondly, that the opposing point of view expressed by the DA was not presented in the same programme or in a subsequent programme forming part of the same series of programmes; thirdly, that the SABC did not do so within a reasonable time; and fourthly, the SABC did not do so within substantially the same time slot.

[13] As for the first argument, the Complainants state that the address by President Ramaphosa was a pre-recorded and edited political statement. The camera was focussed on Mr Ramaphosa for 6 minutes and 45 seconds without interruption. In contrast, the interview with Ms Portia Adams, spokesperson for the leader of the DA, lasting 1 minute and 43 seconds, was a telephonic interview during which visuals were shown of rural landscapes and of public hearings into expropriation of land, that this distracted the attention of the viewers and the interview was therefore qualitatively and quantitatively inferior to that of the address by the ANC president, according to the Complainants. The DA further objects to the fact that, due to the haste in which they had to go on air, their leader could not present the party's viewpoint. The question could be asked whether they should not have negotiated with the broadcaster to properly present their viewpoints at a later time.

[14] The Broadcaster, on the other hand, argued that there is no duty on it to allow the opposing point of view to be broadcast for the same length of time. It states that the spokesperson for the leader of the DA could talk uninterruptedly and she was not limited in time to put forward the views of the DA on expropriation of land without compensation. The clear message of her interview was that the DA will oppose the ANC in Parliament on this matter as it is the view of the DA that it is not a requirement to amend the Constitution for a successful land reform policy. As for the argument about equal time to be allowed for the presentation of opposing views, it should be noted that this Tribunal has decided on more than one occasion that there is no obligation on a broadcaster to accord contending viewpoints equal time on a broadcast.² Such a mathematical balancing of broadcasting time is almost impossible to achieve. This is within the editorial freedom of the broadcaster, part of its freedom of expression.

A further argument by the Broadcaster relates to the impact which the relevant broadcasts made on the viewing public. According to the RAMS (Radio Audio Measurement) statistics, the address by Mr Ramaphosa on 31 July reached an average 27 500 viewers of *The Globe* programme, broadcast on Channel 404. On the other

² See for instance Case 37/2003 *South African Dental Association v M-Net*.

hand, the interview with Ms Adams on 1st of August, according to the RAMS statistics, reached an average 527 000 viewers on SABC2 and 66 200 on the simulcast broadcast on SABC News Channel (Channel 404). Even though the profile of the Channel 404 audience on 1 August in the morning might not have been the same as the Channel 404 audience on 31 July the previous evening, the difference in size of the audiences reached is significant. This means that 565 700 more viewers were reached with the broadcast on 1 August than with the broadcast on 31 July.

- [15] The Complainants further contend that the broadcast of Mr Ramaphosa's address on 31 July deteriorated into ANC propaganda without fair presentation of opposing views³. We cannot agree with this. Seen in a broader context, the debate around expropriation of land without compensation has been raging since the decision by the ANC about this policy at its National Elective Conference in December 2017 at NASREC. This topic was since debated in Parliament and recently at public hearings facilitated by a Parliamentary Committee all over the country⁴. The only "newsworthy" part of the address, as far as expropriation of land without compensation is concerned, was that the ANC had decided to proceed to have section 25 of the Constitution amended through the parliamentary process.

One definition of propaganda (there are many) on the Internet, reads:

Information or ideas that are spread by an organised group or government to influence people's opinions, especially by not giving all the facts or by secretly emphasizing only one way of looking at the facts.

Objectively seen, the announcement that the ANC is proceeding with its plan to have section 25 of the Constitution amended, can hardly be considered to be propaganda, even though the DA was not offered the opportunity to put its opposing point of view on *The Globe* broadcast on 31 July. The fact that the DA was allowed to put its point of view the next morning to a much bigger audience, negates any suggestion of propaganda.

³ Paragraph 35 of the DA's Heads of Argument, with reference to *Foundation for Equality before the Law v SABC3* [2009] JOL 23221 (BCCSA) at par 12.

⁴ In par 27.1 of the DA's Heads of Argument it is referred to as "arguably the leading public issue of the day".

[16] The second contention by the Complainants (see paragraph [12] above), is that the opposing points of view were not broadcast in a subsequent programme forming part of the same series of programmes. This requirement poses some problems: What, in broadcasting parlance, does “same series of programmes” mean? The representative of the DA could not throw light on this problem⁵. A quick Wikipedia search revealed that a TV series is usually released in episodes that follow a narrative and are usually divided into seasons or series. A North American description of TV series is a connected set of TV program episodes that run under the same title. “Series” in this context seem to refer to programmes which are colloquially called soaps. This is not helpful in understanding what the words mean in the Broadcasting Code. Because *The Globe* is a news programme on Channel 404, we think that “series” in Clause 13(1), in this context, would mean other news programmes. The broadcasting of the interview with Ms Adams on SABC2 was on the programme *Morning Live*. On the website of this programme it states that *Morning Live* gives all the regular news updates and it delivers news as it happens. It is clear that *Morning Live* is basically a news programme, like *The Globe*, and therefore it forms part of the same series of programmes. The simulcast on 1 August was broadcast on *The Globe*, like the broadcast the night before, and there can be no argument that this was not in compliance with the Code. The broadcasting of the DA’s opposing point of view on another news programme would thus be in compliance with this requirement in Clause 13(1) or Clause 28.3.1, whichever is applicable.

[17] The third contention by the Complainants is that the opposing point of view of the DA was not presented within a reasonable period of time. Combined with this requirement is the fourth contention, namely that the opposing point of view must have been presented within substantially the same time slot. The Complainants did not labour the point about a reasonable period of time. To decide whether these two requirements have been complied with or not, it is necessary to interpret the meaning of this part of Clause 13(1). We refer here to some legal authorities who have written about the topic of mandatory and directory provisions in legislation⁶. Prof George Devenish⁷, who has

⁵ See par 36 of the DA’s Heads of Argument.

⁶ It should be understood that the Broadcasting Code is being regarded as subordinate or administrative legislation (like rules and regulations) and should be interpreted by applying the same rules as those used to interpret statutes (like Acts of Parliament).

⁷ *Interpretation of Statutes*, Juta 1992.

written a chapter on this topic in his book, refers to the different theories used to come to the true meaning of legislative provisions. For example, he refers to “teleological evaluation” where there must be compliance with the object or aim of the prescription in the context of the statute as a whole, rather than with its detail. In order to ensure that the object of the statute is fulfilled, one must take into account the principles and the ethos of our common law, which requires that justice must be done to the parties concerned.⁸ Prof Lourens du Plessis⁹, in his work, refers to the intention of the lawgiver as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular.¹⁰

- [18] From the authorities quoted, it seems that we must discern what the intention or object of the authors of the Broadcasting Code was when they drafted Clause 13(1). It deals in the first instance with broadcasts in which controversial issues of public importance are discussed. In order to obtain balance in such a programme, so that the listeners/viewers can come to their own conclusions, and to avoid the risk of the programme becoming (a tool for) propaganda, it is required that opposing points of view be presented. 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. That would constitute the purpose with the clause or the intention of the law maker (the drafters of the clause). That could, according to the authors quoted above, be described as the peremptory or imperative provision of the clause. Non-compliance with this requirement will lead to a finding of contravention of the Code.

The way in which this purpose could be attained, is set out as follows in the rest of the clause:

- 18.1 by presenting opposing points of view in the same programme; or
- 18.2 by presenting opposing points of view in a subsequent programme forming part of the same series of programmes; and
- 18.3 presented within a reasonable period of time; and

⁸ At p 225.

⁹ *The Interpretation of Statutes*, Butterworths 1986.

¹⁰ At p 144.

18.4 within substantially the same time slot.

These provisions can be regarded as directory provisions because it confers a wide discretion on the decision maker (the broadcaster in this instance) to comply with the requirement. The compliance or not with the provisions enumerated under 18.1 and 18.2 has been dealt with in paragraphs [13] to [16] above. We must now decide whether the provisions mentioned in paragraphs 18.3 and 18.4 were complied with or not.

[19] As far as the “reasonable period of time” requirement is concerned, the following decided case throws some light on the problem at hand: In *Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour & Another*¹¹ the court stated that:

“the principle ... has now been firmly established that, in all cases of time limitations, whether statutory or in terms of the Rules of Court (or, in our case, “in terms of administrative legislation”) the Supreme Court (or, in our case, “the administrative tribunal”) has an inherent right to grant condonation where the principles of justice and fair play demand it to avoid hardship and where the reasons for strict non-compliance with such time limits have been explained to the satisfaction of the Court” (or the Tribunal, in our case).

Devenish¹² states *“If the provision involves elastic language or an indefinite concept or phrase such as for instance ‘without unreasonable delay’, there is a presumption in favour of validity. Thus, indefiniteness of language may justify the inference that a provision is intended to be directory only.”*

In our opinion, the words “within a reasonable period of time” denote a directory provision and non-compliance with this may be condoned by the Tribunal in accordance with the principles of justice and fair play. The same applies to the requirement of “substantially the same time slot”.

¹¹ 1978(1) SA 1027 (SWA). Note that this case was decided when SWA was still being administered by the South African Government.

¹² Op. cit. p 231.

[20] The next question which arises is: What would a reasonable period of time be after the initial broadcast on 31 July? In fairness to both parties, we have to consider this, together with the requirement of “substantially the same time slot”. The DA states that the Broadcaster admits that the opposing point of view was not broadcast within substantially the same time slot. On a strict interpretation of the words “within substantially the same time slot”, the Broadcaster would have complied with the provision, had it broadcast the DA’s opposing viewpoint at 22:00 on 1 August on *The Globe* news broadcast. This would have been 24 hours after the first broadcast. But would that have been within a reasonable period of time? The Broadcaster explained that “[T]o have waited for *The Globe* at 22:00 on 1 August would not have been editorially sound as the story would have possibly lost traction by then.” This Tribunal has often decided that editorial freedom of a broadcaster is part of its right to freedom of expression, which is a basic right of everyone in South Africa, as explained in paragraph [14] above. The Broadcaster seems to have found itself in a “catch 22” situation. Had it broadcast the DA’s viewpoint in the same time slot, i.e. at 22:00 on 1 August, it would have complied with paragraph 18.4 above but probably contravened the requirement of a reasonable time, mentioned in paragraph 18.3. The fact is that it broadcast the DA’s viewpoint within about 10 hours (night time) after Mr Ramaphosa’s address, which is within a reasonable period of time, but was strictly speaking in violation of the requirement mentioned in paragraph 18.4, namely the same time slot. The solution to this problem, we find, is that the requirements mentioned in paragraphs 18.3 and 18.4 are directory in nature and that this Tribunal has the power to condone non-compliance with the provisions because the reasons for this deviation have been explained to our satisfaction. In our view, an injustice is not being done to the Complainants with this decision of ours, as the DA has had the opportunity to put forward its views on expropriation of land and on amendment of the Constitution. As for the Complainant Churr, in our view his right not to be offended by what the national broadcaster broadcasts or fails to broadcast, has not been violated, because our finding is that the Broadcasting Code has not been contravened by the Respondent in this matter.

[21] In the case of *Abel v SABC*¹³, the Tribunal had to consider whether a contravention had been committed when the reaction by the leader of the DA to the President's state of the nation address in Parliament was not included in a news bulletin in the evening when the address was broadcast, but only the following morning. Although the clause dealing with news was applicable here and not the clause dealing with controversial issues of public importance, the principle on which this was decided, is that the omission was not material and was addressed by the broadcaster the next morning. In that case it was decided that the editorial freedom of the broadcaster was more important than the prejudice suffered by the complainant, which was in any case remedied the next morning. The editorial freedom of the Broadcaster, as part of its right to freedom of expression, is also an important factor in this judgment, provided that the Broadcaster has not contravened any clause of the Code with this broadcast. We have not found any contravention of clause 13(1) of the Free-to-Air Broadcasting Code or Clause 28.3.1 of the Subscription Broadcasting Service Licensees Code.

[22] We do not find it necessary to make a finding about or comment on accusations and acrimony that flew between the Broadcaster and the Complainants, especially the Complainant Churr, some of which were very personal. Nor are we going to comment on the fact that the shadow minister of communications of the DA wrote to the chairperson of the SABC Board to complain about this matter. As explained in paragraph [7] above, we also need not make a finding on the incorrect strapline in the broadcast on 31 July.

As we have found no contravention of the Code(s), the complaints are accordingly not upheld.



**PROF HP VILJOEN
CHAIRPERSON**

Commissioners Tlhakung, Fakude and Venter concurred in the above judgment.

¹³ BCCSA Case 5/2015.