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CASE NUMBER: 13/2017

DATE OF HEARING: 07 JUNE 2017
JUDGMENT RELEASE DATE: 14 JULY 2017

STEWARD
MIHAL

1ST COMPLAINANT
2ND COMPLAINANT

vs

RADIO 702/567

RESPONDENT

TRIBUNAL: PROF HENNING VILJOEN (CHAIRPERSON)
MS NOKUBONGA FAKUDE
DR LINDA VENTER

FOR THE COMPLAINANT: Mr Steward, who addressed the Tribunal telephonically. Mr Mihal was invited but was unable to attend.

FOR THE RESPONDENT: Mr Tebogo Mokoena, Regulatory Affairs Officer accompanied by Ms Khahliso Mochaba, Group Human Capital and Regulatory Affairs Executive, Primedia Broadcasting.

Discussion programme on the controversial issue of the role of ex president FW de Klerk in the political discourse on the future of this country, a matter of public importance – hostile environment created by presenter and intolerance demonstrated against opposing views – no reasonable efforts made by presenter to fairly present opposing points of views – no right to reply granted De Klerk or spokesperson by invitation to appear on programme that was clearly intended to criticise De Klerk – spokesperson's call cut off while trying to present an

opposing point of view – contravention of clause 13 of Code found - Steward and Mihal vs 702, Case No: 13/2017(BCCSA)

SUMMARY

A programme was advertised on 702 to discuss the controversial issue of the role of ex president FW de Klerk in the political discourse on the future of this country which is a matter of public importance. The presenter created a hostile environment on the programme by broadcasting a clip of a speech by De Klerk in 1993, out of context. Presenter demonstrated intolerance towards opposing views and made no reasonable efforts to fairly present opposing points of views. No right to reply was granted to De Klerk or his spokesperson by inviting any of them to appear on a programme that was clearly intended to criticise De Klerk. The spokesperson's call was cut off while he was trying to present an opposing point of view. A contravention of clause 13 of the Code was found.

JUDGMENT

HP VILJOEN

[1] This is a complaint against Radio 702, owned by Primedia Broadcasting. The complaint relates to a discussion programme hosted by the presenter, Mr Eusebius McKaiser, which was broadcast on 7 May 2017 at 10:00 on Radio 702 and on Talk Radio 567. After the broadcast two complaints were received.

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

Steward: "I should like to submit a complaint to the BCCSA regarding a programme hosted by Mr Eusebius McKaiser on Tuesday, 7 May between 10:00 and 11:00 am regarding the "place of FW de Klerk in contemporary South African discourse".

Mr McKaiser launched a vitriolic attack on Mr De Klerk without inviting comment in his defence. He was accompanied by Sithembile Mbete, an academic from the University of Pretoria, who was also hostile to Mr De Klerk. Both McKaiser and Mbete used quotes and extracts from recordings of Mr De Klerk's voice without providing context. Other callers who joined the discussion - including Terry Bell - were equally hostile to Mr De Klerk and made unfounded allegations against him. When I phoned in to try to provide other perspectives I was shouted down and ultimately cut off by Mr McKaiser. In subsequent programmes he continued to make derogatory remarks about me and Mr De Klerk - once again without allowing us any right of reply.

I am not complaining about my treatment - which could be viewed within the context of the cut and thrust of animated debate - but about Mr McKaiser's clear failure to observe the provisions of section 13 of the BCCSA's Code of Conduct in that he did not "make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme..." and in as far as he failed to give "a person whose views are to be criticised in broadcasting programme on a controversial issue of public importance the right of reply to such criticism on the same programme."

I would appreciate it if you would investigate this matter and take appropriate action within the framework of the BCCSA's mandate.”

Mihal: “I am a regular listener to the usually very informative and educating radio show called Cape Talk.

Yesterday the 09.05.2017, I listened to Eusebius McKaisers Show where he led a discussion about whether ex president De Klerk still is a relevant voice in political discussions . It is quite typical for this presenter, to guide the callers and guests towards his personal point of view, and that is understandable to a reasonable extent.

But yesterday Mr McKaiser cut the line while the Chairperson of the De Klerk Foundation was in the middle of a conversation.

Many people would have liked to hear what the Chair of the De Klerk foundation has to say about about this sensitive subject but Mr. McKaisers censorship will only allow selected comments to go on air.

I feel that this kind of conduct is upsetting to a lot of people and also agitating in an already volatile social climate.

Eusebius McKaisers conduct does not help the people of South Africa to understand the importance of open, honest dialogue as an important tool to solve problems. He causes tension between races and people with different background.

His personal agenda seems to be his only guideline . Unfortunately his personal agenda does not seem to include tolerance and respect. Please let me know your organisation's point of view . Awaiting your response.”

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

“Dave Steward and Thomas Mihal v 702/CapeTalk - Controversial Issues of Public Importance

1. Background

- 1.1 702/CapeTalk (“702”) received two complaints regarding a broadcast aired on 9 May 2017 on “The Eusebius Mckaiser Show” between 10h00 and 11h30. The point of discussion on the broadcast was the inclusion of a former apartheid president in a forum of former presidents aiming at promoting a dialogue around issues facing the country, and whether it was appropriate for an apartheid president to be included in the initiative.
- 1.2 The first complaint is from Mr. Thomas Mihal (“the first Complainant”), and it reads as follows-

“...yesterday Mr McKaiser cut the line while the Chairperson of the De Klerk Foundation was in the middle of a conversation.

Many people would have liked to hear what the Chair of the De Klerk foundation has to say about about this sensitive subject but Mr. McKaisers censorship will only allow selected comments to go on air. I feel that this kind of conduct is upsetting to a lot of people and also agitating in an already volatile social climate.

Eusebius McKaisers conduct does not help the people of South Africa to understand the importance of open, honest dialogue as an important tool to solve problems. He causes tension between races and people with different background.

His personal agenda seems to be his only guideline. Unfortunately his personal agenda does not seem to include tolerance and respect...

- 1.3 The second complaint is from the Chairperson of the FW De Klerk Foundation Mr. Dave Steward (“the second Complainant”), and it reads as follows –

“...Mr McKaiser launched a vitriolic attack on Mr De Klerk without inviting comment in his defence. He was accompanied by Sithembile Mbete, an academic from the University of Pretoria, who was also hostile to Mr De Klerk. Both McKaiser and Mbete used quotes and extracts from recordings of Mr De Klerk's voice without providing context. Other callers who joined the discussion - including Terry Bell - were equally hostile to Mr De Klerk and made unfounded allegations against him. When I phoned in to try to provide other perspectives I was shouted down and ultimately cut off by Mr McKaiser. In subsequent programmes he continued to make derogatory remarks about me and Mr De Klerk - once again without allowing us any right of reply.

I am not complaining about my treatment - which could be viewed within the context of the cut and thrust of animated debate - but about Mr McKaiser's clear failure to observe the provisions of section 13 of the BCCSA's Code of Conduct in that he did not "make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme..." and in so far as he failed to give "a person whose views are to be criticized in broadcasting programme on a controversial issue of public importance... the right of reply to such criticism on the same programme..."

- 1.4 The Broadcasting Complaints Commission of South Africa (“the BCCSA”) Registrar has requested 702 to submit to respond to the complaints in terms of Clause 13 of the BCCSA Free – To – Air Code of Conduct for Broadcasting Service Licensee 2009 (“the Code”). We will address the two complaints in a single response as they both relate to the same matter.

2. 7 02 's R e s p o n s e

- 2.1 As mentioned in 1.1 above, the said broadcast was a reflective piece on the role of a former apartheid regime president in public discourse in a post-apartheid South Africa, and whether a leader of an Apartheid Regime, has any moral standing to take part in such a dialogue or debate. The discussion was not aimed at discussing former president FW De Klerk in his personal capacity, but was rather a discussion on whether an individual who held office as the last president of an apartheid regime should be given a public platform to address matters relating to a democratically elected government. It so happens that former president FW De Klerk was the last apartheid regime president.
- 2.2 In the said discussion, the presenter was joined by Sithembile Mbete, an academic from the University of Pretoria. The conversation between the presenter and the guest started off by reflecting on the uncertainty that exists on whether a former apartheid regime president should form part of public debates or discussions on the present state of the country. In the attempt to address the uncertainty, the presenter reflected on the response of the former president when asked if he should be excluded on the panel of former presidents discussing the current state of the country and in response, the former president said that the Truth and Reconciliation Commission did not make any finding against him with regards to atrocities committed by the then apartheid regime and that he was

privileged to have prevented a catastrophe in South Africa. The presenter and guest also reflected on the point that the former president never apologised for the actions of the apartheid state that he presided over.

- 2.3 In an attempt to address the uncertainty that exists, the discussion questioned the moral standing of a president who was not democratically elected and who presided over a police state to critique a democratically elected president. The presenter put a forth a view that it is easy to say that former president De Klerk is morally tainted because of the atrocities committed by the apartheid government and, whether that morally tainted past can be compared to a democratically elected president such as Thabo Mbeki whose stance on HIV/AIDS led to many deaths, or even compering FW De Klerk's moral deficit to the Marikana Massacre under the Presidency of Jacob Zuma. The presenter pointed out the challenge of compering a democratically elected president to a leader of an authoritarian state and whether their actions as leaders are equivalent. The presenter further commented that he is not sure whether being democratically elected should be the only criteria to qualify to critique the current state and that is the reason that he is still deeply conflicted and has not settled on a position
- 2.4 Although 702 has been requested to respond in terms of clause 13 of the Code, we also view the discussion that ensued as comment [underlining own emphasis] on an issue that has intrigued the public and sparked debate amongst South Africans. In as much as the participation of former president De Klerk on the panel discussing the current state of South Africa can be viewed as a controversial issue, we hold a view that it can be regarded as a matter of public importance in terms of clause 12 (1) and 12 (2) of the Code. The Code entitles broadcasters to comment on and criticise any event of public importance. We deem the discussion on the current state of affairs in South Africa as a matter of public importance, and as such 702 was/is entitled to comment on it. The presenter and studio guest were expressing their opinions on events that had taken place, and in expressing their opinions, they referred to the former president's views on apartheid and his role as a leader of an apartheid state *vis- a-vis* his role in a democratic South Africa as someone who can critique acts of democratically elected state. The comments expressed during the discussion were done so on facts fairly indicated in the discussion and based on what the former president had previously said on public platforms. We therefore submit that the discussion was comment in terms of clause 12 (1) and 12 (2) of the Code.
- 2.5 Clause 13 of the Code provides that:

“(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 reasonable period of time of the original broadcast and within substantially the same time slot.

“(2) A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given the right of reply to such criticism on the same programme. If this is impracticable, reasonable opportunity to respond to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.”

Fair Representation of Opposing Views

- 2.6 Both complaints are centred around the allegation that Mr. Dave Steward (the second Complainant) was not given an opportunity to respond to the discussion at hand, therefore in essence both complaints are that there was no fair representation of opposing views during the discussion.
- 2.7 The second Complainant alleges that the presenter “*launched a vitriolic attack on Mr De Klerk without inviting comment in his defence.*” We dispute this allegation in that, not only did the presenter and studio guest reflect on the former president but they also questioned whether being democratically elected should be the sole criterion to be given a platform to speak or comment on the current state of the country. Furthermore, the presenter invited listeners to call in and express their views on the topic, and the second Complainant was the second caller to go on – air and express his view in defence of the former president and in fact put forth a different point of view.
- 2.8 As mentioned in 2.7 above, the second Complainant was one of the listeners who called in to studio to present their view on the topic. Immediately upon going on-air, the second Complainant questioned whether the presenter invited anyone in support of the Former President and commented that the discussion was “*bias and unbalanced*”, to which comment the presenter responded, that balance can be obtained in different ways. We agree with the presenter’s sentiments that balance can be obtained in different ways including by allowing listeners to call in or when as a presenter, you make your audience aware of the differing viewpoints that exists, as was the case in this matter. When the second Complainant called in, he had an opportunity to introduce a different perspective to the topic however, instead of addressing the issue at hand and bringing a different perspective to the discussion, the second Complainant commented that there would not be a democratic South Africa if it was not for the role that the Former President played in bringing a democratic South Africa. It is at this point that the conversation degenerated into a totally different debate and the second Complainant remarked “*who the hell are you*” to decide if the Former President should be given an opportunity discuss the state of the country and that the presenter is “*Anti-White*” and “*emotional*”. We submit that the allegation that the second Complainant was not given a chance to defend the Former President is incorrect because as already mentioned, an opportunity was given to the second Complainant to express his views, but he opted to discuss a different matter.
- 2.9 Having regard to the above, 702 cannot be found to have contravened clause 13(1) of the Code, in that reasonable efforts through the open line [underlining own emphasis] were taken to fairly present opposing points of view in the programme by first presenting different views on whether being democratically elected should be the only criterion to criticise or comment on the current government and second, through the open line which allowed listeners to call in to express their views on the topic. The Tribunal has in *Allen vs SAFM*¹ held that allowing listeners to call into a talk show programme presents a form of inherent balance in such a programme.

Right to Reply

- 2.10 Clause 13(2) of the Code provides that were a person’s views are to be criticised in a broadcast programme on a controversial issue of public importance, such a person should be afforded the right of reply on the same programme or in another programme. We reiterate the point we make at paragraph 2.1 above namely

¹ A *Allen vs SAFM* BCCSA Case No: 17/2005 at paragraph 9, page 7

that the discussion was not aimed at discussing former president FW De Klerk 's views, but was rather a discussion on a position held by virtue of one's office in the instance at hand, the question was whether an individual who held office as the last president of an apartheid regime should be given a public platform to address matters relating to a democratically elected government. It so happens that former president FW De Klerk was the last apartheid regime president. Of course, in the process of the discussion, some reference was made to some of the statements made by the former president but this was not the crux of the debate. The was a debate open to the public and we submit that as such, clause 13.2 is not applicable. The clause would apply where the programme discussed in particular the former president's views. All the programme did, was discuss participation by virtue of the office he had previously held.

- 2.11 By going on air, the second Complainant had an opportunity to counter the views expressed by the presenter and the guest in the same programme. When one calls in to a radio station to express a view, there must be some expectation that the view one holds may be criticised by those with a different view. The precedent set in *Roy Fisher vs 567 Cape Talk*² would be applicable in this instance, wherein Commissioner Gilfillan held that:

"It is the nature of talk show debates that there are robust exchanges between participants. Mr Fisher, a frequent caller, had seen fit to enter the public domain of radio debate; he had apparently also seen fit to disclose the nature of his previous occupation to a broad listening public, thereby inevitably opening himself to comment and criticism by others" [underlining own emphasis]

- 2.12 The second Complainant deemed it fit (and rightly so) to express his views on what was discussed, and it was his decision to divert from the core issues of the discussion and introduce a new debate into the discussion, and by so doing the second Complainant opened himself up for criticism. The criticism levelled against the Former President and the second Complainant is what follows when one's views are introduced into the "*the market of ideas*" as referred to in *Allen vs SAFM*³ where his views can be debated and scrutinized, but it does not afford him the right of reply every time his views are criticized. Thus 702 cannot be found to have contravened section 13 (2) of the Code."

EVALUATION

BACKGROUND TO THE COMPLAINTS

- [4] On 7 May 2017 at 10 am a discussion was conducted by Mr Eusebius McKaiser of the respondent broadcaster with a guest by the name of Sithembile Mbete, an academic from the University of Pretoria. The topic for discussion was the place of FW de Klerk in contemporary South African discourse. This programme was advertised on radio before the broadcast.

- [5] What probably gave rise to the choice of the topic was a dialogue arranged under the auspices of the National Foundations Dialogue Initiative (NFDI). The Foundations of

² Roy Fisher vs 567 Cape Talk BCCSA Case No: 02/2005

³ *Supra* at note 1

Chief Albert Lethuli, FW de Klerk, Jakes Gerwel, Thabo Mbeki, Robert Mangaliso Sobukwe, Helen Suzman, Desmond and Leah Tutu and the Umlambo Foundation form part of the NFDI. The intention with the dialogue was to start a new national dialogue with the purpose, inter alia, to protect the Constitution and to foster racial relations in the country⁴.

THE COMPLAINTS

- [6] The FW De Klerk Foundation, through its chairman, Mr Dave Steward, lodged a complaint with the BCCSA after the broadcast. The gist of the complaint is, firstly, that the presenter did not make reasonable efforts to fairly present opposing points of view and, secondly, that the person whose views were to be criticised, was not given the right to reply to the criticism. It is thus alleged that the broadcast was in contravention of clause 13 of the BCCSA Free-to-Air Code of Conduct for Broadcasting Service Licensees. There was a second Complainant, Mr Thomas Mihal, whose arguments correspond with those of Mr Steward.

Clause 13 states:

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.

(2) A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given the right to reply to such criticism on the same programme. If this is impracticable, reasonable opportunity to respond to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.

- [7] We do not think there can be any doubt that in this case a controversial issue was the topic of discussion. Just by listening to the broadcast and the heated debate that

⁴ See www.nfdi.co.za

ensued, it was clear that we are dealing with a controversial issue. There is also no doubt that the topic is of public importance. Given the run-up to this discussion, namely the dialogue between the foundations regarding the protection of the Constitution and the fostering of race relations, this is surely of public importance.

SUMMARY OF THE BROADCAST

- [8] The programme started with extracts of a speech in 1993 by former president De Klerk in which he authorised a raid on a base in Umtata (as it was then known) in which some children were killed. The presenter and his guest agreed that De Klerk had to take responsibility for this deed because “the buck stops with the president”. There is a perception, according to the presenter, that De Klerk only “came into existence” after the Nobel Peace Prize was awarded to him and president Mandela, but both the presenter and his guest agreed that De Klerk continued to be deeply racist and violent. This, according to them, was because he did not apologise for his part in the oppression of Blacks and that he did not play open cards with the Truth and Reconciliation Commission. In other words, according to them, De Klerk is morally tainted and should not be allowed to partake in political discourse in this country.
- [9] The discussion then briefly turned to former president Thabo Mbeki and his denial of the HIV crisis in the country, which led to the death of some 360 000 people. Although this was also reprehensible, the difference between the two was that president Mbeki was democratically elected, while De Klerk was not. The presenter then exclaimed (obviously addressing De Klerk): “Where’s your shame?” He then asked rhetorically: “Should he be at the table (to discuss the future of South Africa) or should he wither away somewhere?” Although there was some further reference to president Mbeki, it is quite clear from what followed in the rest of the programme that the main target was De Klerk.
- [10] It was a phone-in programme and the presenter then took calls from the following people:
- 10.1 A Mr Mabusa, who suggested that De Klerk should retire to a backroom in Orania. He pointed out that democracy should not be confused with morality,

obviously referring to president Mbeki. Because De Klerk oppressed Blacks, he should not be invited to gatherings to discuss the future of the country.

- 10.2 Mr Steward, the Complainant, then phoned in. He complained that there was lack of balance in the programme in that Mr De Klerk was not given the opportunity to respond. He pointed out that De Klerk was instrumental in the creation of the new democratic system in South Africa and that even Mr Mandela had praised him for this. He stressed the point that all South Africans have the right to discuss the future of the country. The presenter's response to this was that the Complainant cannot tell Black people that they cannot save themselves and that he (the Complainant) is laughable. As for the lack of balance, the presenter stated that he cannot have all the people whose views are discussed on the show. It would be irresponsible to have De Klerk on the show. During the heated discussion that ensued, there were exclamations of: "Who the hell are you?" and the presenter then cut off the call of the Complainant.
- 10.3 A Mr Terry Bell then came on air. He referred to the killing of the children in the raid on Umtata and he was very critical of De Klerk. As to the tone of the debate on air, he said that there is no such thing as a value neutral tone, thereby condoning the emotional way in which the debate had been conducted. He said there was no calm way of talking about the legacy of apartheid.
- 10.4 Next was Mr Zwelenzima Vavi, the well-known labour federation leader. He was equally critical of De Klerk and accused him of undermining conciliation in South Africa. According to him the task of the Blacks was not to forget (about apartheid), but to forgive. He referred to White supremacy arrogance and their lack of humility.
- 10.5 Ms Lizette (surname unknown) phoned in next. Although she admitted, as a White person, to benefitting from the system of apartheid, she was very critical of De Klerk and alleged that he never showed any remorse. Then she exclaimed: "He is a criminal!".

- 10.6 The following caller's name sounded like Skhu. He stated we have Coligny (referring to the incident in that town where a young Black boy died, allegedly at the hands of two Whites) because of De Klerk. He stated that he was angry and that something must happen in South Africa before we can go forward. He did not elaborate on this.
- 10.7 Johnno (or Johnny - not certain about the name) came on next. He argued for less emotional debate and asked if, according to the debate so far, all White people are excluded from giving their opinions on the future of South Africa. The presenter's response to this argument was that the legacy of De Klerk is that people in undemocratic elections decided on the future of Black people. After some heated debate with the presenter, the caller ended the call.
- 10.8 In a call of short duration, a woman named Lusanda, merely stated that we should not listen to De Klerk.
- 10.9 The last caller, Mbete, referred to his sense of outrage about the myth that the White people gave the Blacks their freedom. He stated categorically that De Klerk did not have a place (in the debate about the future of the country).

ARGUMENTS BY THE PARTIES

- [11] The second Complainant (Mihal) could not attend the Tribunal hearing, but we have his arguments in writing. However, the arguments by the first Complainant are comprehensive and we are satisfied that in dealing with the first Complainant's arguments we have covered all of the second Complainant's arguments. The first Complainant could also not attend the Tribunal hearing, but after we had listened to the broadcast, the first Complainant (or rather, spokesperson for the Complainant, Mr Steward) was invited to argue his case by way of a teleconference call. He referred to clause 13 of the Code and argued that it was clearly the intention of the programme to criticise De Klerk, but that the latter was not invited on to the programme and there was no follow-up with him. He mentioned that De Klerk had been involved in the transition to democracy, but the programme reflected very strong negative views

about him. He argued that the presenter was not tolerant of opposing views in this instance. When phoning in to the programme, the Complainant was asked three times why he wanted to speak on the programme.

[12] The Complainant continued to emphasise De Klerk's role in the transition to democracy. He was the president of the country during the constitutional negotiations that resulted in the abolishing of apartheid. He also became a Nobel Peace laureate. The Complainant then criticised the biased view created against De Klerk by broadcasting his speech, referred to in paragraph 5 above, without giving any context. The truth is, according to him, that the Goldstone Commission found that De Klerk had information, after the APLA attack on the St James Church in Cape Town, that minister Holomisa of the Transkei harboured the attackers and that De Klerk decided to order a raid on the attackers. The raid, however, was botched by the South African Defence Force and some children died in the attack. De Klerk was highly upset by this and ordered that compensation be paid to the victims' families. The fact that context was not given to the broadcast of the speech, is proof, according to the Complainant, that the programme was one-sided and the message of this broadcast was that nothing good could come from the past.

[13] Mr Mokoena, the representative for the Broadcaster, denied that the intention of the programme was to criticise De Klerk. Instead, he insisted, it was to discuss whether a former apartheid president could partake in the discussions on the future of the country. He added force to his argument by stating that ex-president Mbeki and current president Zuma were also criticised in the programme: Mbeki for his denial of the HIV crisis and Zuma for what happened at Marikana. The difference between them and De Klerk was that last-mentioned led the apartheid government. He argued that there was a balanced discussion between the presenter and Ms Mbete, the invited guest on the show. They looked at the whole picture and again he emphasised that the sole purpose of the programme was not to criticise De Klerk. As far as balance in the discussion is concerned, he quoted the example of Mr Steward being allowed on to the programme by way of a phone-in. This created the necessary balance according to Mr Mokoena. The Broadcaster also argued, in its written arguments, that the presenter is entitled, in terms of clause 12 of the Code, to his views and to comment on events of public importance – which he did during the show.

We have no problem with this statement and in any case, this was not part of the complaint by any of the Complainants. We thus do not have to deal with this clause.

[14] Mr Mokoena was assisted by Ms Mochaba and she also addressed us. Her argument was that it was disingenuous to bring the position of ex-president Mbeki into the argument because he was democratically elected while De Klerk was not. She also referred to the hostility on both sides of the discussion and particularly the exclamations from both sides of “Who the hell are you?”

[15] In reply, Mr Steward pointed out that the programme was specifically structured to focus on De Klerk. The programme was advertised in such way that it was clear that the intention was to focus on De Klerk and to discuss whether he should be allowed to partake in the discussions on the future of this country. Playing the clip of De Klerk’s speech was clearly a hostile act and the discussion was conducted in a hostile manner.

THE MERITS OF THE COMPLAINTS

[16] Our point of departure in deciding complaints of this nature, is the freedom of expression accorded to everyone, including broadcasters, by the Constitution of South Africa⁵. In this regard, we should emphasize the roll of the media in exercising this right by referring to the judgment by Judge O’Regan of the Constitutional Court in the case of *Khumalo and Others v Holomisa*⁶ where she said:

The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. As Deane J stated in the High Court of Australia:

“. . . the freedom of the citizen to engage in significant political communication and discussion is largely dependent upon the freedom of the media.”²⁶

⁵ See section 16

⁶ 2002(5) SA 401 (CC) para 22

The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression. (our emphasis)

In the case of *Islamic Unity Convention v Independent Broadcasting Authority and Others*⁷ the Constitutional Court stated that freedom of expression must be generously interpreted in our democracy. This means that we as the BCCSA or any court will not easily find that the media has overstepped the line in the exercise of this freedom.

It is also informative to take note of the decision of the US Supreme Court in the case of *New York Times Co. v Sullivan*⁸ where the court referred to the profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.

[17] Having said this, we must also mention that the right to freedom of expression is, like the other basic rights protected by the Bill of Rights, not an absolute right. The Constitution, in section 36 thereof, provides for limitations to the basic rights on certain conditions. Such limitations are built into the two Codes of Conduct to which broadcasters have bound themselves and which we apply to all complaints. Examples of such limitations are the prohibitions on the broadcasting of material that sanctions, promotes or glamorises violence or unlawful conduct, the broadcasting of propaganda for war or the advocacy of hatred based on race, ethnicity, religion or gender and that constitutes incitement to cause harm. Another limitation, which has a direct bearing on this complaint, is contained in clause 13 of the Free-to-Air Code, quoted above. We will apply these limitations to the facts and then conclude whether the broadcaster has contravened this clause or not.

[18] As far as balance is concerned, the Broadcaster has referred us to our judgment in the case of *Allen v SAFM*⁹ where it was said that it is in the nature of a phone-in programme to create a market place of ideas and in this way balance between different viewpoints is obtained. We also said that balance cannot be assessed with mathematical precision. However, each complaint must be judged on its own merits.

⁷ 2002(4) SA 294 (CC) at paras 27-28

⁸ 376 US 254, 270 (1964)

⁹ Case 17/2005

In the *Allen* case the topic of discussion in the programme was HIV/AIDS and the guest had a particular view of the subject which the complainant considered to be one-sided, to the extent that listeners would be misinformed. There were callers who had opinions contrary to those of the guest.

[19] We think that the present case can be distinguished from the *Allen* case in the following aspects: In the *Allen* case the topic of discussion was HIV/AIDS, also controversial, especially at that stage in our country, and also of public importance. But the discussion was not aimed at one person, although a lot was said about then president Mbeki's view on the subject. In the present case, the target was De Klerk although the Broadcaster representative ingeniously argued that the intention with the programme was to discuss whether a past apartheid president could partake in discussions on the future of the country. As De Klerk was the last apartheid president and as his foundation took part in the National Foundations Dialogue Initiative which gave rise to this discussion, it does not take much insight to realise that the intention of the programme was to discuss the person of De Klerk and his views. From the start of the discussion it was clear that both the presenter and his guest were very critical of De Klerk and they scoffed at him for having had the nerve for his foundation to join the other foundations in setting up a national dialogue on the political situation in our country.

[20] The Broadcaster's representative argued that by allowing Steward to phone in on the programme, balance was attained as required by clause 13(1). As stated above, Steward's call was cut off after some heated debate. The only other caller who was not critical of De Klerk, was Johnno who asked whether all White people of South Africa are excluded from giving their opinion on the future of the country. After some heated debate, the caller himself ended his call. In contrast with this, seven other callers, the one more vitriolic in their criticism of De Klerk than the other, phoned in. In all these cases, the presenter agreed with them and made no effort to question their views or to present an opposing point of view.

[21] When Lizette phoned in, she called De Klerk a criminal. In the case of *Nzimande v SABC (SAFM)*¹⁰ a caller referred to an “entirely corrupt cabinet”. The presenter did not question or correct the statement and the Tribunal found that this omission was in contravention of the Code and upheld the complaint in this regard. Until a person has been found guilty of committing a crime in a court of law, such a person may not be called a criminal on air. By omitting to correct the caller, the presenter associated himself with this statement.

[22] In *Motsepe and New Africa Publications obo Sowetan Newspaper v Yfm*¹¹ the Tribunal had to decide whether there was balance in a programme where a controversial issue of public importance was discussed. In its judgment, the Tribunal stated *inter alia*:

*It is important to note that the decisions in Timile*¹² *and Muslim Judicial Council of South Africa*¹³, which were delivered after Allen, did not hold that all phone-in and talk shows invariably achieve balance and that balance can therefore never be in issue if the complaint relates to a phone-in or talk show. In *Timile and Muslim Judicial Council of South Africa* the tribunal held that allowing listeners to phone in is part of the process of attaining balance and usually does achieve such balance. However, if balance is not achieved at all, the tribunal will step in. In the present case, the "process of attaining balance" failed.

[23] In the present case we find that the presenter did not make reasonable efforts to fairly present opposing points of view. We base this finding on the following: The purpose of the programme was clearly to discuss De Klerk’s role in the political discourse on the future of South Africa; the clip of De Klerk’s speech in 1993 that was played out of context at the start of the programme was clearly intended to turn the sentiment against De Klerk; the hostile attitude demonstrated towards De Klerk by what both the presenter and his guest said; the fact that only Steward of all the callers made an effort to put forward an opposing point of view, but that his call was cut off; and the fact that the presenter made no effort to correct Lizette when she said that De Klerk

¹⁰ Case 30/2014

¹¹ Case 2/2009

¹² *Timile v Radio 702*, Case 4/2007

¹³ *Muslim Judicial Council of SA v Radio 702*, Case 28/2007

was a criminal. The conclusion of the discussion on air is that De Klerk does not have the moral authority to express an opinion on the political future of this country. This is in stark contrast with what the late president Mandela said about De Klerk on his 70th birthday, namely:

*Around the world people recognize you as an historic peace maker and nation builder.*¹⁴

It is also significant that the foundations of Chief Albert Lethuli, Jakes Gerwel, Thabo Mbeki, Robert Mangaliso Sobukwe, Helen Suzman, Desmond and Leah Tutu and the Umlambo Foundation which form part of the NFDI were prepared to talk to the foundation of De Klerk. This puts a question mark behind the conclusion which the programme reached that De Klerk did not have the moral authority to talk about the future of the country.

By omitting to mention or to allow someone to mention such facts, a lack of fairness was demonstrated. The lack of respect towards callers and lack of tolerance towards views which do not correspond to those of the presenter also appear from what is said above. These are qualities that are expected of presenters in this type of programme.

THE RIGHT TO REPLY

- [24] The second part of the first Complainant's complaint is that De Klerk should have been afforded the right to reply (clause 13(2)). The clause refers to the right of a person whose views are to be criticised. De Klerk's views appeared from the speech made by his foundation at the National Foundations Dialogue Initiative¹⁵. As stated above, the intention with this programme was clearly to criticise De Klerk. The argument by the Broadcaster that "... the discussion was not aimed at discussing former president FW de Klerk's views, but was rather a discussion on a position held by virtue of one's office in the instance at hand ..." is, to say the least, ingenious. The many times that De Klerk's name was mentioned during the programme, which lasted about 80 minutes, is proof of the fact that the programme was about him and, by

¹⁴ See www.fwdeklerk.org.za

¹⁵ See www.nfdi.co.za

necessary implication, his views. During the hearing, the Broadcaster representative argued that it would have been irresponsible to have De Klerk on the show. We find that it was a contravention of clause 13(2) of the Code not to have him or a spokesperson of his foundation on the show. The first Complainant, who is a spokesperson for the FW de Klerk Foundation, was not invited to appear on the talk show and when he phoned in, he was cut off before finishing his contribution to the debate. It is clear to us that the intention of the presenter was to cast as bad a light as possible on De Klerk and in the process he was not tolerant towards opposing views, thereby not obtaining balance between opposing points of view. Finally, it was clearly the intention to criticize De Klerk and therefore, in terms of the Code of Conduct, De Klerk or his spokesperson should have been invited onto this show.

In the circumstances, we find that the broadcast in question was in contravention of clause 13(1) and (2) of the Free-to-Air Code and the complaints are upheld. As we have not heard argument on sanction, we request written argument in mitigation and aggravation, respectively, by the Broadcaster and the Complainants.

- [25] We have received submissions on sanction from the Complainants and the Broadcaster. The first Complainant asked for a reprimand and a direction to broadcast a correction and/or summary of our findings. However, a correction will be inappropriate and impractical. The Broadcaster submitted quite comprehensive arguments in mitigation of sanction. In discussing a possible sanction, the Broadcaster states that a sanction more serious than a reprimand might have a chilling effect on the Broadcaster's freedom of expression. In this regard, we think it is important to state that nowhere in this judgment do we say or even suggest that the Broadcaster should not have discussed De Klerk or his views. That is the content of the right to freedom of expression which the BCCSA enforces. But the Code of Conduct is clear in its requirements for the way in which this right should be exercised. We reiterate that the presenter did not make a reasonable effort to fairly present opposing points of view. Neither did the Broadcaster allow De Klerk a right to reply, while its intention with the programme was clearly to criticize De Klerk.

[26] The appropriate sanction in this instance will be a reprimand. As for the first Complainant's request that we direct the Broadcaster to broadcast a summary of our finding, we expect that the media will probably take note of this judgment and accord it the publicity which they think necessary. We therefore do not deem it necessary to order the Broadcaster to broadcast a summary of this finding.

In conclusion, we find that the broadcast on 7 May 2017 was in contravention of clauses 13(1) and (2) of the Code of Conduct and the complaints are upheld. The sanction for the contravention is that the Broadcaster is reprimanded.



**HP VILJOEN
CHAIRPERSON**

Commissioners Fakude and Venter concurred with the judgment of the Chairperson.