P.O.Box 412365 • Craighall • Tel (011) 325-5755 • Fax (011) 325-5736 • e-mail: bccsa@nabsa.co.za
No 2 Albury Park • Magalieszicht Ave • Dunkeld West • 2196 • www.bccsa.co.za

CASE NUMBER: 03/2014

DATE OF HEARING: 20 FEBRUARY 2014
JUDGMENT RELEASE DATE: 6 JUNE 2014

THE WORLDWIDE FOUNDATION CC, T/A RHINO FORCE **COMPLAINANT**

vs

SABC2 **RESPONDENT**

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
MR B MAKEKETA
MS Z MBOMBO
MR A MELVILLE
MR B MMUSINYANE

FOR THE COMPLAINANT: Mr ACE Boerner from Jurgens Bekker Attorneys, accompanied by Ms Joanne Lapin Thorpe.

RESPONDENT: Mr Fakir Hassen, Manager: Broadcasting Compliance, Policy and Regulatory Affairs accompanied by Mr Timothy Magampa, Compliance Officer, Broadcasting Compliance, Legal and Regulatory Affairs.

Fairness – lacking in programme – The Worldwide Foundation CC, T/A Rhino Force vs SABC2, Case: 03/2014(BCCSA).

SUMMARY

A complaint was received from Worldwide Foundation CC, T/A Rhino Force, in regard to a programme aired on the show "50/50" broadcast by SABC2. The subject of the

interview was the sale of bracelets by the Complainant, which undertook to clients that it would donate the profit from each sale to saving rhinos, which are currently being killed by poachers on a large scale for commercial purposes. The complaint was that the interview was not balanced, and that, in spite of the SABC's production team being provided with facts that demonstrated the Complainant's honesty, the programme nevertheless projected an image of dishonesty.

Held:

1. **Whilst the original reason for the programme was reasonable and justified, and certainly dealt with a controversial issue of public importance, the programme was not fair to the Complainant. The errors of fact, together with the omission of relevant material, amounted to a contravention of the BCCSA Code.**

2. **The programme included facts and opinions that were not based on facts, or on a reasonable perception thereof.**

3. **Furthermore, the programme created an impression of dishonesty and/or lack of transparency on the part of the Complainant – an impression which was not based on the facts.**

4. **Moreover, the programme referred to facts, or opinion stated as facts, to which the Complainant was not given a substantively fair right of reply, and in so doing, the programme did not provide sufficient balance to afford audiences the opportunity of forming their own opinions.**

In the result the complaint was upheld and the SABC reprimanded for its contravention of the Broadcasting Code.

JUDGMENT

JCW van Rooyen SC and AJ Melville

[1] A complaint was received from Worldwide Foundation CC, T/A Rhino Force, relating to a "50/50" broadcast by the SABC2. I referred the matter to a Tribunal.

[2] **The complaint comprises the following:**

"On 28 October 2013, the conservation show 50/50, which airs on SABC 2 broadcast a program about the sale of bracelets by Rhino Force and the allocations of funds.

The program contained numerous factual inaccuracies and omissions concerning our business.

It is thus our opinion that 50/50 are in breach of the Code of Conduct of the Broadcasting Complaints Commission of South Africa. They presented a programme in which controversial issues of public importance were discussed, without making reasonable efforts to fairly present our opposing points of view.

Rhino Force is not an NGO but a registered company. The failure to provide RhinoForce with a fair right of reply and the selective omissions by 50/50 is most disappointing. We have instructed Jurgens Bekker Attorneys to issue a complaint to the BCCSA and protect our legal rights. We shall not allow something that has taken hours of work, love and dedication to build, to be unfairly and unlawfully dismantled."

[3] **The Broadcaster (hereinafter "Respondent") responded as follows:**

1. The Complainant has raised a whole range of issues which are outside the ambit of the BCCSA Code of Conduct. There are also issues which relate to the non-broadcast of sections of the broader interview that was conducted with the Complainants, which are clearly attempts to infringe on the editorial rights of the SABC and again not within the jurisdiction of the BCCSA. We will therefore only respond briefly to the item that was actually broadcast in terms of the two relevant requirements of the Code.

2. The clause on comment states that Respondents are entitled to broadcast comment on and criticism of any actions or events of public importance. It is common cause that the issue of conservation of the rhino population, in which the Complainants were engaged, is one of great public importance. This clause further requires that any comment made must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to. We submit that this was indeed done with all elements of the item that was broadcast.

3. The clause on controversial issues of public importance requires that a Respondent must make reasonable efforts to fairly present opposing points of view in the same programme. A further requirement is that 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. Viewing of the programme shows that the Complainant is present throughout the interview; that every question related to views or opinions expressed about their venture in selling bracelets to raise funds for the conservation of the rhino population was clearly put to them by the presenter; and that they were given every opportunity to answer every question.

We submit that there has been no contravention of the BCCSA Code and that this complaint be dismissed as vexatious."

[4] **The Complainant replied as follows:**

"On 4 December 2013 the Respondent delivered its response to the complaint.

1. The Complainant incorrectly cited sections 11 and 15 in its complaint. The Complainant herewith withdraws those sections from its complaint. The Complainant does not request the Tribunal to make a finding in respect of the second complaint. The second complaint simply highlights the mala fides of the Respondent.

2. The Complainant agrees that rhino conservation is of great public importance. It should however be specifically noted that the program is entitled "Rhino bracelet investigation" and centered around the Respondent's investigation concerning the raising of funds for rhino conservation through the sale of bracelets. Thus the emphasis was not on conservation of rhino populations as stated in their response. It is uncontested that the issue of investigations into organizations raising funds for rhino conservation is of public interest. However the Respondent elected to broadcast their personal views and criticisms of the Complainant and omit damning and relevant details of a public interest nature regarding the other two organizations (EWT and Relate). The EWT and Relate Trust are also involved in the raising of funds for rhino conservation through the sale of bracelets. Relate and EWT formed part of the broadcast but were not publically scrutinized or called to account in the raising of funds for rhino conservation. Nor were their business models, pricing, beneficiary detail, raised funds and partners details broadcast in order to provide an accurate, fair and comparative broadcast. Instead their (EWT and Relate's) allegations wereput towards the Complainant by the Respondent and not the other way round.

3. The Respondent cannot state that the broadcast was an honest expression of opinion when the presenters and producers clearly illustrated gross and unreasonable bias towards EWT and Relate. Furthermore, at times it was unclear if the "expression of opinion" by the Respondent was clearly presented as comment, as opposed to being presented as fact e.g. the insinuation that the Respondent had seen proof of intellectual property violation by the Complainant.

4. The Respondent has failed to address the parts of the broadcast that did not carry the opinion of the Complainant (quoted verbatim from the broadcast transcript):

BONNé VOICE OVER (SABC)

- The Rhino Force bracelets are part of a collection that also includes other products that are sold by The Bead Coalition Pty Ltd the name under which Chris and Joanne now trade.

- The financial statements on their website show sales between May 2011 and February 2013.

- According to that, 431467 products were sold in this period to the value of R 9612 003.

- It was previously R30-00 and with such sales there is no retailer involved.

- Joanne's email only addresses the sales of Rhino Force bracelets and her calculations are close enough to what the financial statements say, but that means that the sale of Cycle Force bracelets that were launched in November 2012 are not included neither are any of the other products sold between May 2011and February 2013.

- Then there are the bracelets sold in the past two years under the name of a previous closed corporation Aspidus 306 CC t/a Afrika force.

- there's uncertainty whether Aspidus's statements were transferred to the new company.

- 50/50 had no access to them.

- Let's take the R1-50 model and the sales figures rhino force provided to calculate the women's income. 500 000 bracelets at R1-50 each, give us R750 000 but this graphic presentation is based on the sales of R30-00 bracelet ad R8-00 per bracelet goes to labour. So they should've actually earned R4 million which is half of what Chris planned in 2011. So where is the more than 3 million rands supposedly due to the beading ladies. In 2011, Chris told us that the women will get paid R8 per bracelet

BONNé EWT INTERVIEW:

- On 11 April this year, the EWT announced in a media statement that they had ended the relationship with Rhino Force

YOLAN FRIEDMANN

- They had produced a range of mirror socks with EWT'S logo on it that they were selling through various outlets that clearly claimed on the packaging that R25-00 from the sale of each one would go to the EWT.

- So there had been no retrospective disclosure that they had already begun using our brand and logo.

- There had been no disclosure of the fact that monies had been owed to us.
- Bonné: we did, we received it in full, but that was after months and months of negotiations.

- By the time we had brought in attorneys and both sides were then communicating through attorneys.

BONNé VOICE OVER

- But on 9th August 50/50 received this email from David Millard the CEO of Africa foundation: "Africa foundation has not received any further funding or commitment from rhino force"

GLENN GILLIS:

- We designed a rhino bracelet, we designed a closing.

- We have those closings, we have the original designs that we came up with for the rhino bracelet.

BONNé RELATE INTERVIEW:

- Do you have proof that the original design was in fact Relate's design?

GLENN GILLIS:

- Unfortunately, I can't give you specifics on exactly what we do and don't have proof of.

- For the longest time we did toss and turn about whether to pursue legal action against the Thorpe's and it became apparent to us that we had no choice.

- In fact it's quite dangerous for us to precipitate the action that we have because we could call into question peoples belief as mechanism to raise funding and that would jeopardise all the work that we do and all the money that we've put in.

BONNé STUDIO:

- Due to the pending legal action against Chris and Joanne Thorpe, Glenn couldn't expand on the allegations concerning copyright infringement.

- In 2010, Chris Thorpe worked for a franchise through which he came into contact with Relate.

GLENN GILLIS:

- He was seconded to Relate to do certain work for us, including United against Malaria, we had made bracelets way before that, going back as early as late 2008,I believe when we did a bracelet for Nandos 21" birthday.

5. The Respondent responds to the complaint to state that the Complainant is attempting to infringe upon the editorial rights of the Respondent. This is not the case as will be demonstrated; the Respondent cannot simply hide behind the vague notion of editorial rights. It is not denied that the Respondent has freedom of speech and therefore editorial discretion, however such right must be exercised fairly.

6. The editorial right of the Respondent is not disputed. What is disputed is that the Respondent failed to exercise that right fairly, taking into consideration the complaints made, the omissions and the bias towards EWT and Relate. Clause 13(1) of the Code states that a Respondent must make reasonable efforts to fairly present opposing views. This does not simply mean that there must be an answer to every question but that the answer broadcast must encapsulate and be a fair reflection of the entire answer provided, in other words they must broadcast the gist of the answer. The Complainant is aware that the Respondent cannot air every word verbatim from an entire interview but the Respondent must fairly exercise its editorial right to provide the viewer with the gist of the answer to a question, particularly when the answer satisfies the allegation made, and such answer is further substantiated by documented proof.

7. It is the broadcast as a whole that is complained about. It is however fairness that underpins the complaint. The Honourable Tribunal has held previously that the criticism of a commercial venture is an extremely serious matter. Hence *'a Respondent may not simply criticize a named person or a shop without ensuring that the shop or the individual is afforded a reasonable opportunity on the same programme to respond'.*

8. The right to reply is not a formal right to have relevant questions put to the person concerned. Rather it is a substantive right to be treated fairly by the Respondent. Care must be taken to put substantive allegations to the company who is to be criticised. This has the dual effect of treating the person subject to the broadcast fairly. It also improves the quality of information placed in the public domain. Clause 13 incorporates a general duty to be fair. This requires the Respondent to make reasonable efforts to fairly present opposing points of view. This was most certainly not the case.

9. The complaint set out numerous instances whereby the Respondent failed to include a fair right of reply, failed to include the actual, substantiated reply to allegations and failed to obtain comment from the Complainant in its entirety.

10. If it is the contention of the Respondent that the entire content of its broadcast and clear indication of bias, comply with the code of conduct, then it is clearly the view of the Respondent that its editorial right may be exercised without limitation.

11. *In Dyambu Operations (Pty) Ltd and Gavin Watson vs M-Net (Carte Blanche) (Case 11/2000)* the Honourable Tribunal stated that *'producers are called upon to ensure that their facts are correct and when they enter into the legal field, they should obtain legal advice.'* Hence the Respondent failed to engage expert advice on contractual law in respect of the contractual disputes with EWT and intellectual property law in respect of the dispute with Relate. In fact, the Respondent states that they have seen proof of the

intellectual property violation by the Complainant. It is well established that the consultation of experts is necessary.

12. The omissions highlighted in the complaint are substantial enough to illustrate that what is being complained of is not the editorial right of the Respondent but that the Respondent unfairly exercised such a right. The answers given by the Complainant that were broadcast were not a fair reflection of what was stated and substantiated with proof during the interview.

13. The Respondent abused its editorial right by manipulating the answers of the Complainant in order to paint the Complainant in a negative light, that resulted in the public forming a false opinion due to omission, selected editing, sabotage and non-presentation of all the facts and information.

14. The Complainant submits that the Respondent has violated clauses 12 and 13 of the BCCSA Code of Conduct. The Complainant asks for the relief sought in terms of the complaint."

EVALUATION

[5] In evaluating this complaint, it has been necessary to work through a voluminous, very detailed, submission by the Complainant, including excerpts of the transcript of the third and final interview that took place. The excerpts were made from a transcript of a film made by the Complainant of the interview. Prior to the Tribunal hearing, the Complainant also provided a reply to the Respondent's submission, as well as a file containing further detailed submissions regarding the original broad grievance, now broken down into individual component complaints, numbered 1–13.

[6] The response from the SABC has been set out above. At the core of its response, the SABC put forward the following: the Complainant's issues are "*clearly attempts to infringe on the editorial rights of the SABC and again not within the jurisdiction of the BCCSA*". The Respondent does acknowledge two "relevant requirements of the Code", but asserts accordingly that 1) the Respondent "is "*entitled to broadcast comment on and criticism of any actions or events of public importance*" and 2) that "*reasonable efforts to fairly present opposing points of view in the same programme*" were indeed made.

[7] At the Tribunal hearing, the Respondent reiterated these issues, and emphasised various aspects of its existing submission. The following points were stressed:

1. That this broadcast was concerned with the fact that the Complainant had claimed "*that so much would be raised and paid to various charities*" and that the information to hand was that "*this was not the case*", thereby making this a matter of public importance;

2. That the broadcast was only 20 minutes in length and therefore "*it is impossible to put in everything*"; and

3. That the viewers are not naïve, that even the "*first time viewer would form perceptions*", and that the Respondent "*leaves it to them to investigate further*" should they deem it necessary.

[8] The Complainant initially claimed contraventions in terms of Clauses 2, 11, 12, 13 & 15 of the BCCSA Free to Air Code (2011), but the Clause 11 and 15 complaints were later withdrawn.

[9] Clause 2 of the Code provides as follows:

2. Scope of Application

(1) Broadcasting service licensees must ensure that all broadcasts comply with this Code.
(2) Broadcasting service licensees must ensure that relevant employees and programme producers, including those from whom they commission programmes, understand the contents and significance of this Code.
(3) All broadcasting service licensees should also have procedures for ensuring that programme producers can seek guidance as to the application of the Code from them.

To activate this clause, the Complainant has to show that the SABC has not complied with what is prescribed in sub-clauses (2) and (3) of Clause 2. There is no evidence that there was any failure to comply with the said sub-clauses. Since the matter before this Tribunal concerns the SABC's compliance with the requirements of Clause 2(1), there is, accordingly, no need to deal with Clause 2.

[10] This inquiry will be conducted in terms of Clauses 12 and 13 of the Broadcasting Code. The Clauses provide as follows:

12. Comment

(1) Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance.

(2) Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.

(3) Where a person has stated that he or she is not available for comment or such a person could not reasonably be reached, it must be stated in the programme.

13. Controversial Issues of Public Importance

(1) In presenting a programme in which a controversial issue of public importance is discussed, a Respondent 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 to reply to such criticism on the same programme. If this is impracticable, reasonable opportunity to respond to the programme should be provide where appropriate, for examples in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.

By way of introduction it should be stated that since the Respondent, the SABC, is obliged to take responsibility for the broadcast complained of in terms of the Code, we have decided to simply refer to the Respondent as if it were, indeed, the production company or, alternatively, the "Respondent's producers".

[11] The issues raised in the programme are clearly of public importance and also controversial.[1] This case revolves around freedom of expression, the right of reply and

[1] Compare the following cases, where similar issues were adjudicated upon: There are two pertinent Freedom of Expression cases from previous BCCSA Tribunals: Case 06/2006 Judgments Online (JOL)16787; City of Tshwane vs Carte Blanche (Case 06/2009) JOL23467 and Buthelezi vs Talk Radio 702 (Case 34/2012) JOL 29259.There are two pertinent Right of Reply cases from previous BCCSA Tribunals: Dr Bool Smuts (Landmark Foundation) vs SABC (Case 23/2011); Inkatha Freedom Party vs SABC (Case 29/2012) JOL 29037.There are also two pertinent Editorial Independence cases for consideration: Sukdhev vs Lotus FM (Case 11/2008)JOL22642;Lorgat vs SABC/SAFM (Appeal Case 29/2013).

editorial independence. The general logic, based on these cases, is as follows: the Respondent has the right to editorial independence and freedom of expression. However, this right has to be exercised in accordance with the Code which, broadly, requires of a broadcast dealing with a matter of public importance, that it be reasonable in the manner it treats of the subject matter, and that the broadcaster's opinions are based on facts truly stated or fairly indicated.

[12] Furthermore, programmes on controversial issues of public importance should have sufficient balance in order to afford audiences the opportunity to form their own opinions. In addition, the Respondent has a duty to grant a right of reply where a person is seriously criticised – or where their credibility is questioned – on a matter of public importance. This is especially true for private persons and/or organisations that cannot necessarily rely on access to various public platforms, the so-called "marketplace of ideas", to defend themselves – their only opportunity to exercise their defence lies in a right of reply.

[13] The SABC has defended itself in this case on the basis of editorial independence: "… and it is true that the BCCSA has previously held that '*the Respondent has the editorial freedom to broadcast this … when and where it chooses to do so*', and whether or not the choice of programme accords accord with the view of the listeners/viewers." In *Lorgat vs SABC,*[2] the BCCSA held that the "*editorial activities of the SABC are not within the jurisdiction of the BCCSA*". However, the phrase "editorial activities" does not suggest an all-encompassing freedom. In the same judgment, the BCCSA held that "*the Right of reply is limited to persons or organisations directly or indirectly affected by an alleged omission by the (Respondent) to grant them such a right in a broadcast*" – thus making it clear that editorial independence does not extinguish the right to reply in cases of public importance.

[14] Finally, it must be noted, particularly by the Complainant, that the BCCSA is not necessarily an adjudicator of the facts of the matter, aiming to resolving disputes. The

[2] Supra note 1.

following comments in respect of Clause 35 (in the present matter 14) in the *Sudkhev* judgement[3] are noted;

> *Clause 35 of the Code is aimed at providing for both sides of a controversy of public importance. The Tribunal had no doubt that the matter is one of public importance, hospital services being one of the priorities within this democratic state. However, the aim of clause 35 is not necessarily to resolve the dispute; that would be a matter, if need be, for the courts to address.*

The BCCSA's concern, therefore, is whether all the relevant facts on both sides of the matter have been fairly represented and, indeed, presented. Moreover, where required, a right of reply must be granted.

[15] In the present case, then, the SABC exercised its right to freedom of expression, as it is entitled to do. In fact, the SABC could reasonably argue that it was duty-bound to investigate the matter at hand, and hold the Complainant accountable to the public – on the basis that the Complainant's public fundraising, and then disbursement of those monies, qualifies it as a public entity. If this "public interest" argument is accepted – and it appears from the submission of the Complainant that it has no objection to scrutiny of either its activities and/or its accounts – then the following principle,[4] albeit appearing in the context of a government body, should apply, as quoted in *City of Tshwane vs Carte Blanche:*[5]

> "The State, and its representatives, by virtue of the duties imposed upon them by the Constitution, are accountable to the public. The public has the right to know what the officials of the State do in discharge of their duties. And the public is entitled to call on such officials, or members of government, to explain their conduct. When they fail to do so, without justification, they must bear the criticism and comment that their conduct attracts, provided of course that it is warranted in the circumstances and not actuated by malice."

[16] A good example of judicial interpretation of this freedom, as it relates to the printed media, is to be found in the case of *Mthembi-Mahanyele v Mail & Guardian* Ltd & *Another:* [6]

> [65] Freedom of expression in political discourse is necessary to hold members of Government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what Government does. Errors of fact should be tolerated, provided that statements are published

[3] Supra note 1.
[4] Quoted from *Mthembi-Mahanyele v Mail & Guardian Ltd & Another* 2004(6) SA 329(SCA).
[5] Case 6/2006.
[6] *Supra* at [65]-[66].

> justifiably and reasonably: That is with the reasonable belief that the statements made are true. Accountability is of the essence of a democratic State: It is one of the founding values expressed in s 1(d) of our Constitution

On this basis, the Tribunal is of the view that the Respondent was fully entitled to investigate the activities of the Complainant, and to "*call on… [the complainant] … to explain their conduct*". Further, as already stated, the BCCSA has previously allowed Respondents wide latitude in such cases so as to allow "*robust and frank comment*", and the Tribunal is of the opinion that the same principle applies in this specific case, with the proviso that "*conclusions are published justifiably and reasonably*".

[17] In respect of the non-inclusion in the programme by the Respondent of the other two parties named by the Complainant, the Tribunal is of the view that this falls under the editorial rights of the Respondent. The latter chose to profile the Complainant in this particular insert, as is their right. The fact that the other parties are mentioned, or that their views in respect of the Complainant were included, does not necessarily mean that they must be investigated in the same programme or even in a future programme.

[18] We do not find it necessary to deal with all the complaints. The complaints with which we deal hereunder are of the essence of the matter, considered as a whole. In the light of our finding, it is not necessary to deal with the alleged agreement not to broadcast the so-called second interview. Our task is to adjudicate what was broadcast, whatever agreements were reached.

[19] The Complainant states that it is "the broadcast as a whole that is complained about" and refers to a previous decision whereby a Tribunal stated that a *"Respondent may not simply criticize a named person or a shop without ensuring that the shop or individual is afforded a reasonable opportunity on the same programme to respond."* The Respondent, as quoted in the section above, claims that the Complainant was interviewed, that all of the questions were put to them, and that they therefore had a reasonable opportunity to respond. The Respondent has elsewhere claimed that it has the editorial right to use that footage (and other footage) in its sole editorial discretion. However, the question is, ultimately, one of fundamental fairness.

[20] The Tribunal has had the opportunity to read parts of the transcript of the third interview (provided by the Complainant's attorney and not disputed by the Respondent), and then to compare this to the actual programme as broadcast.

[21] On the face of it, it would appear that the Respondent made reasonable efforts, during the pre-production and production phase, to source opposing points of view. The number of interviews conducted, not only with the Complainants, but also with other third parties, would fairly indicate that this was the case. Even the so-called "clandestine" interviews indicate efforts to thoroughly investigate all aspects of the story in question. However, there is a strong indication that these same reasonable efforts were not carried through fully to the third and final phase, namely post-production, better known as the editing phase. Of course, in the process a certain amount of selection is made by the broadcaster, but then the truth and balance must remain intact.

[22] The presenter of the programme claimed that they had evidence for their assertions, but also referred to informant confidentiality. The alleged aggrieved third party also claimed a broad and unspecific "sub-judice" reason for not disclosing information. Even if it is accepted that a court case had been filed, there is no reason in law why the facts may not be mentioned, even if they are part of a summons or a founding affidavit in a court case. Conversely, even if the *sub judice* rule were as strict as claimed, there should be no reference to the matter at all. The Complainant raised the decision of a previous Tribunal in *Dyambu Operations (Pty) Ltd and Gavin Watson vs M-Net (Case 11/2000)* in which the Tribunal made it clear that broadcasters should secure expert legal advice in instances where they plan to refer to legal disputes. That decision was concerned with the law of contract, but applies equally to the Intellectual Property Law of this case. Although the Respondent's producers would not seem to have secured legal advice on the matter, they implied that legal recourse was justified. The same principle should have been applied in regard to inferences relating to financial matters. This is clearly not a field a broadcaster should venture into without obtaining advice from an auditor, and in fact disclosing such advice to the Complainant for a reply, which should then be broadcast.

SPECIFIC COMPLAINTS

[23] **Complaint concerning the 1 million bracelets sold**. In the broadcast, emphasis was placed on the issue as to the number of bracelets sold, creating, at worst, the impression that there was something to hide, and, at best, that there was poor administration of the business by the principals. The following studio-based presentation was made:
"*If what Justin*[7] *says is true, that means Rhinoforce's facebook page, their website and even Chris himself have represented the wrong information concerning the number of bracelets sold"*

However, from the excerpts of the transcript of the full interview provided to the Tribunal by the Complainant, as well as the annexures which detail correspondence between the parties, it is clear that the Respondent's producers, for which the SABC takes responsibility, were in possession of the correct information (refer to Annexures AB9, AB10, AB11 to the presentation of the Complainants to the BCCSA Tribunal). The excerpts from the transcript also clearly corrected the reference of the "almost one million" bracelets sold, referred to by Chris Thorpe in the so-called second interview. Despite this, the broadcast created the impression referred to above. Perhaps more seriously, the insert further alleged that "*wrong information*" had been presented, when in fact it was the Respondent who was not presenting the latest information to hand.

It is difficult not to conclude that the manner of presentation was unfair.

[24] **Complaint 2: Addressing of Justin Lapin as Spokesperson**
Although Justin Lapin was introduced as a lawyer leading the interview, we are of the view that this introduction, when judged as a whole, did not create the impression that the Complainant had done anything untoward. Lapin was, in any case, not the only person who put the case of the Complainant. The only reason for obtaining the services of an attorney was, in any case – even if he were acting "*pro amico"* (as he indicated) – that the matter at hand was an intricate matter which involved problematic areas of law and finances. A reasonable viewer of the programme would have appreciated that. The

[7] Who led the team on behalf of the Complainant during the interview. Others present were Joanne and Chris Thorpe, the members of the Complainant. The interview was conducted by Bonné.

inclusion of the fact that the person is an attorney does not justify a negative inference against the Respondent. The fact is, he is an attorney, and even if he was acting *pro amicis*, he acted as an attorney.

[25] **Complaint 3: Funds to Africa Foundation**

The insert, as broadcast, clearly created the impression that something was untoward in the dealings with, and monies donated to, Africa Foundation. Despite the fact that the third interview (as judged from excerpts of the transcript), as well as other information provided to the Respondent, makes the status of the arrangement and financial transactions between Rhino Force and Africa Foundation quite clear, the Respondent still went ahead and stated that "*a lack of transparency seems to be a recurring issue".* This statement, alleging recurring transparency breaches, is a serious accusation to make in a public broadcast forum. And it was not supported – in fact it was directly gainsaid – by the facts that the Respondent's producers were provided with, and had to hand at the time (see Complainant's excerpt of the transcript of 3rd interview and Annexure AB13). The Respondent also did not present any other facts or specific proof from other sources to contradict those provided by the Complainant.

This is quite clearly a case where the substantiated facts at the disposal of the Respondent's producers were not used, to the detriment of the Complainant. This omission is unfair in terms of clause 12 of the Code.

[26] **Complaint 4: R30 Model vs R40 Model**

The overwhelming conclusion, when viewing the insert broadcast by the Respondent, is one of confusion in respect of the pricing of the bracelets, and the different price structures used over the time period referred to. It is clear, however, from an excerpt of the Complainant's transcript, that the Respondent's producers had been given the correct pricing information (see Annexure AB10). The Respondent has a duty to convey accurate information, on both sides of the story, and in the event that it does not fully understand something (for example financial statements), it is required to seek specialist advice from someone who does, in order to ensure accuracy of comment. Alternatively, the Respondent should simply contact the interviewees again. There is no doubt that the Respondent succeeded in creating an impression of confusion in this

regard, and thus "*cast the Complainant in a negative light*", as claimed by the Complainant.

[27] **Complaint 5: Profit made by Complainant**

The profit issue is directly related to the financial models referred to above. The portion of the broadcast dealing with this aspect suffers from the same lack of transparency, namely that the Respondent's producers had the information as provided to hand, but that this was not used. In fact, having been given a full explanation of the matter according to the excerpt of the transcript provided by the Complainant– and having on at least three separate occasions been offered full disclosure of audited financials, including an offer of a forensic audit – there was no basis for raising this matter in the programme. Having ventured into the area, however, it was incumbent on the Respondent to "*have broadcast the correct breakdown of the Complainant's profit margins*", as these facts were to hand. This was not done.

[28] **Complaint 6: Save the Rhino International (SRI)**

This issue is two-fold: firstly, the broadcast brought up the matter of some monies being used to support projects outside of South Africa, and sought to convey the impression that this was misleading the South African public; and secondly, the Respondent sought to clarify whether monies had indeed been paid to SRI. In the first instance, the Respondent is free editorially to raise this matter. The comment that "every second person will think they are donating money to protect Rhino specifically in South Africa" is a valid point and is clearly conveyed as comment, something the Respondent is entitled to do. The broadcaster is not speaking for the South African public, as alleged by the Complainant, but merely conveying opinion as to how it thinks the public might reason in this matter. Further, the issue about full disclosure not being on the packaging is also valid, and is in fact something that was conceded and acknowledged as "a very good idea" by Mr. Lapin.

However, as with so much of this insert, instead of just presenting the facts, the Respondent's producers laboured the point, despite having been given the facts of the matter, one of which was that the bracelets are sold worldwide and that the funds are designated for worldwide use, albeit that South Africa effectively enjoys priority. The

Respondent's producers were in possession of evidence that clearly demonstrated that the public trust had not been abused in this regard. The content of the third interview (from the excerpts of the Complainant's transcript) is very clear on this matter, with the presenter at one point querying, "*You've paid already, R100 000?"* and the answer, "*We have the dates of payment, I think May and September, and those payments were made on the due date, R100 000.*" Furthermore, at the time of editing, the Respondent's producers had been provided with letters from SRI (Annexure AB14) stating that they had received the R100 000, funded in two tranches of R50 000.

The Respondent did not dispute any of these issues at the Tribunal, and set against this indubitable proof, no freedom of expression provision, or indeed claim to editorial independence, could excuse this distortion of the real facts within the ambit of the Broadcasting Code.

[29] **Complaint 7: Endangered Wildlife Trust**

The Complainant's issue with the lack of investigation of the EWT has already been dealt with under the Respondent's editorial rights to choose whom and what it investigates. Whilst the Complainant may feel aggrieved that it was investigated, and the EWT was not, the investigation is a consequence of the public-spotlight role they chose for themselves when they elected to involve the public. However, the main complaint here is that the Respondent included an interview with an EWT spokesperson, and that person stated that the Complainant had committed numerous contractual breaches. However, the insert as broadcast failed to mention that the Respondent and the EWT had in fact signed a settlement agreement, and that therefore, in law, the alleged breaches had been resolved. The Respondent's producers had been made aware of this settlement. This is therefore another incidence where the Respondent's producers should have obtained legal advice regarding this matter, but failed to do so, resulting in the broadcast of a factual inaccuracy.

[30] **Complaint 8: Use of EWT Logo**

This matter is related to the previous one, and falls under the same settlement agreement, and should therefore have been regarded as of no consequence. However, the post-production team nevertheless chose to go down this road – an approach which

created an impression in the mind of the reasonable viewer of a pattern of deceit by the Respondent. It is also noted that, having decided to raise this issue in the programme, the answers chosen from the third interview in post-production to illustrate the response of the Complainant, cannot be deemed to constitute a proper right of reply.

[31] **Complaint 9: Accountability of Relate & EWT**

The issue of the producers' alleged private support of both Relate and EWT on social media platforms is beyond the jurisdiction of the BCCSA, as already stated above, and we will not comment further on this matter. The issue of the financials of EWT and/or Relate, and the omission to question these two third parties, has already been dealt with. However, the statements made about the Complainant's company/companies does fall within the ambit of the BCCSA, as this information, whether factually correct or not, was broadcast in the insert by the Respondent. This information was presented in the context that other third parties were willing to share financial and other information, but that the Complainant was not. The presenter of the insert clearly states that "*50/50 had no access to them*" when referring to the financial statements of the company Aspidus 306 CC, T/A Afrika Force. However, it is clear from an excerpt of Complainant's transcript that the Complainant presented "*the available financial statements of the company*" to the presenter on the day of the third interview.

Further, as already referenced, and here restated for emphasis, offers were made on at least three separate occasions for the Respondent's producers to have access to the financials, including an offer of a forensic audit. The transition of the company from a shelf company through to its final legal form at the time of the interview, was also explained in detail during the interview/s. It is therefore difficult for the Tribunal to understand the position ultimately taken by the Respondent. The Tribunal's finding is that substantial errors were made and that there was an omission to broadcast the facts as communicated by the Complainant.

[32] **Complaint 10: Intellectual Property Violation by Complainant**

This matter has already been dealt with – suffice it to say at this point that the Respondent alleges that they have seen "proof" of an intellectual property violation, but no specialist in the field of Intellectual Property Law was presented to corroborate this

assertion. As a consequence, the broadcast creates a strong impression of dishonesty on the part of the Complainant. We shall not express a final view on this, except to say that copyright is an intricate field of law and that the different ways in which a rhino head can be represented do not seem to be so varied that a definite conclusion as to a breach of copyright can, necessarily, be inferred in the present case. This will be a matter for a Court to decide. As to how complex the question of copyright infringement may be, see *Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd* 1998 (2) SA 965 (SCA) at 972. The impression created of a breach of copyright was, accordingly, not necessarily justified, and balance should have been provided by stating that the matter is subject to expert legal opinion.

[33] **Complaint 11: Breakdown of Costs**

Again, this matter has been dealt with under the sections dealing with the financial models and the profits. It is known that the complete breakdown of costs was shown to the Respondent's producers during the third interview, a fact which is not in dispute. The Tribunal was given a copy of these, and they are patently clear and easy to understand. If the Respondent's producers nevertheless had problems in understanding them, then there is a duty to consult specialist resources.

[34] **Complaint 12: Beaders**

The insert made much of the beaders and their (lack of) earnings, in an attempt to indicate that the direct beneficiaries of the production were not in fact as advantaged as claimed, and hence that there was something amiss in the financial costs as claimed. The Annexures 23 to 26a are pertinent to this evaluation, in that many are complaints against the production crew (from the project co-ordinator of the beaders and from some of the beaders themselves) for the way in which interviews were conducted, and then taken out of context. These complaints are not part of the main complaint, and they are treated for this Tribunal's purposes as merely supplementary evidence of the alleged absence of fairness. The Respondent, as evidenced by an excerpt from the transcript, was given a full explanation of the production-line process and, in particular, the fact that there are several beaders in the production process. The beaders' wages were discussed, and the issue of one beader's remuneration of R1.20 per bracelet was

clearly explained, i.e. the beader is just one person in a production line of many such persons. But then, in the final insert, the presenter makes the following statement:

> *"In 2013 we have already heard two different stories. According to Chris Thorpe the people making the bracelets get R4 to R5 per bracelet. According to the ladies in Groot Marico, they get just over R1. So which version is correct?"*

It is, accordingly, clear that the Respondent omitted to provide the full picture, and that this was likely to lead to a misconception of the true situation by viewers. The device of masking faces, as well as a hidden camera, added to the perception that something was amiss. An inclusion of the explanation as to how wages were divided, given during the third interview, would have removed that perception. That was, however, not done.

[35] **Complaint 13: Bias of the Respondent**

This complaint, which is about an alleged relationship between the producers and third parties, is outside the jurisdiction of the BCCSA, and we will not be drawn into adjudicating the debate. This Tribunal is called upon to decide on material that has been broadcast, and on inferences that may be drawn from the broadcast in the light of the Broadcasting Code and evidence at hand.

[36] **Conclusion**

After taking all of the aforementioned into account, the Respondent is found to be in contravention of Clause 12 and 13 of the BCCSA Free to Air Code, in that:

1. Whilst the original reason for the programme was reasonable and justified, and certainly dealt with a controversial issue of public importance, the programme itself was neither reasonable nor justified. The errors of fact, together with the omission of relevant material, eliminates any justification for such a programme within the ambit of the BCCSA Code.

2. The programme included facts and opinions that were not based on the truth, or on a reasonable perception of the truth.

3. Although there were instances of facts fairly indicated by the Respondent, not all such facts were fairly indicated, or they were simply omitted. Therefore, it was not possible for the Respondent to claim that it had a reasonable conviction that all the statements it made were true.

4. Furthermore, the programme created an impression of dishonesty and/or lack of transparency on the part of the Complainant – an impression which was not based on the facts.

5. Moreover, the programme referred to facts, or opinion stated as facts, to which the Complainant was not given a substantively fair right of reply, and in so doing it did not provide sufficient balance to afford audiences the opportunity to form their own opinions.

6. From a more detailed perspective:
   (a) The correct information about the payments to the Africa Foundation was provided by the Complainant, but this was either misinterpreted, incorrectly stated or not included.

   (b) The breakdown of the costs of the bracelets was given in detail in the interview, as evidenced by an excerpt from the Complainant's transcript of the interview as filed by the Complainant. However, this was presented in the programme as either not readily available, or made out to be so confusing as to create an impression of mistrust.

   (c) In a similar vein, the issue of profits was presented in a confusing manner in the programme, yet the matter was made quite clear in the excerpt from the transcript provided by the Complainant.

   (d) The programme dwelt on the issue of profits, and implied that the full profits were not being properly disbursed to beneficiaries, yet the Complainant's multiple offers (on three separate occasions) to disclose full audited statements – even in fact to undergo a forensic audit – were not taken up, nor indeed were

these offers of full transparency disclosed to the viewers. The positive aspects of the funding of the projects, which included the sale of personal assets, were ignored.

(e) The intellectual property dispute was presented as a pending litigation, with apparent proof of a breach having been provided. However, no actual proof was offered to this effect, and the Complainant's answers in this regard were not properly presented.

(f) The beaders' wages were presented as not tallying with the costs claimed. This was despite the clear and lengthy explanation in the third interview, that they were a part of a longer value-chain.

(g) At the end of the broadcast there is a clear implication by the presenters of 50/50 of dishonesty on the part of the Complainant. In the light of all the facts provided by the interviewees, this was unfounded.

SANCTION

[37] A draft judgment was sent to the parties in this matter. They were requested to provide the Commission with argument as to sanction. The SABC, however, raised the following issues and, since a judgment is only final after it has been issued publicly,[8] we were prepared to consider what the SABC raised with us via the Registrar. The following points were raised:

1. *The Commission should only consider what is actually in the programme and whether there was indeed balance and the right of reply in those questions and answers, as that is all that the viewers saw.*
2. *Is it within the jurisdiction of the BCCSA to have watched the raw footage of the interview recorded by a third party and then make judgments on that ?*
3. *We find problematic the repeated references in the judgment expressing a range of opinions on what should have been done rather than addressing the issues at hand. In fact, we could argue that the judgment seeks to prescribe production processes and opines speculatively on a lot of the matters.*
4. *There are several assumptions made about the lack of the SABC consulting which we submit is beyond the scope of the BCCSA.*

[8] *Firestone South Africa(Pty) Ltd v Genticuro 1977(4) SA 298(A).*

Hope this assists for now, I will provide a more detailed response next week.

[38] It is true that the Tribunal is bound to only consider what is in the broadcast, and to reach a conclusion on what was broadcast. However, where there is a dispute on the facts which pertain to the broadcast, there is no reason why evidence as to what took place between the parties may not be provided to the Tribunal.[9] In fact, the Rules provide that "any other evidence, including affidavits in support of the complaint", form part of the matter before the BCCSA.[10] The Complainant had, with the permission of the producer,[11] made a DVD copy of the full interview, which was edited for purposes of the final product as broadcast. That editing would take place was common cause. Of course, this would not mean that crucial facts could be left out. Any reference to *editing* in the judgment on the merits, must be understood within this framework. Obviously, the producer of a programme may choose what he or she wishes to include in the final product. However, this does not mean that the producer has the discretion to omit crucial evidence which, either directly or indirectly, might run counter to claims made in the programme. As to the omission regarding the consultation of experts: of course, a broadcaster may decide to broadcast material without consulting experts in the field. But then a broadcaster must take the consequences and live with a finding that it made a mistake in areas where it is clearly risky to draw conclusions without the advantage of expert advice. Had the producers, for example, consulted a legal expert on the *sub judice* rule, they would have realized that the *sub judice* rule no longer prohibits discussion of the issues raised in the founding papers or summons which could lead to a court case – see *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA).

[39] At the hearing, a transcript of substantial parts of the original interview, which included parts that were not broadcast, was made available to the Tribunal. A DVD was also handed in, which we did not watch. From the excerpts of the transcript, it was clear that crucial facts, as provided during the interview, were not included in the final broadcast. It should be mentioned that the Procedural Rules do not permit the Tribunal to order a broadcaster to make available its original materials. However, there is no rule against a

[9] See Procedural 5.2 and 5.3.
[10] See Procedural Rule 3.2.5 read with Rules 5.2 and 5.3.
[11] To confirm this, the Chairperson watched the initial stages of the DVD as handed in.

broadcaster or a complainant providing such material voluntarily as evidence. We accept that the SABC informed the Complainant before the hearing that it would not respond to the extraneous material. In the present matter, however, the Complainant took special steps to record the full final interview, and the SABC, at no stage during the hearing or before that, informed the *Tribunal* that it regarded such evidence as impermissible. In any case, a broadcaster or a complainant has a right to lead evidence as to what was in fact said in the relevant interview. In this case, the evidence was recorded and transcribed and handed in at the hearing, without the SABC arguing before the Tribunal that it was impermissible. The SABC would, most certainly, have been allowed to lead evidence, in any format, as to what took place. As pointed out, the BCCSA does not have the authority to subpoena material from any of the parties before it. The Chairperson may, however, require evidence by way of affidavit from any of the parties – see procedural Rule 3.2.5. Evidence of who the sources of the material were, may, however, not be required. In the present matter we were provided with excerpts of the transcript of the interview as filmed by the Complainant and it was not disputed before us that the transcript was correct.

[40] The SABC, in its written argument on sanction, pointed out that it had informed the Complainant that it would not have regard to the so-called raw material of the interview. The Tribunal was not informed of this at the hearing. What was available to us was the final product, which we watched at the hearing, a transcription of parts of the original interview as well as argument on each aspect of the points raised. Let us, again, deal with a few of the points.

[41] Firstly, details as to how the women did the beading and made the bracelets, was provided during the original interview. It was clear that the beading process was shared among a number of women, and that when the amount of R1.20 per string was mentioned by an interviewee, this amount was only for her *part* in the process. Accordingly, it was not possible to rely on claims she made in the broadcast relating to payment for a completed beaded bracelet. Mr. Faul, who was in charge of the process, was also not questioned as to what the total wage for a finished bracelet was. He simply said that the workers were paid R1.20 per string for their work. Judged within the context of what was explained during the full interview, the process of production was

divided among the women for each complete bracelet. The amount of R1.20 was, accordingly, not the amount earned for the finished product as marketed; yet this claim was broadcast in the programme, without any reference to the explanation given by the team interviewed.

[42] Secondly, Justin Lapin, the lawyer who was mandated to lead the interview with the production team, on more than one occasion offered the audited statements to Bonné, the interviewer. This was not referred to in the interview as broadcast. At a later stage Joanne Lapin, in an email to the producer, also offered to submit the company's audited statements for a *forensic* audit. This was also not mentioned in the programme.

[43] Thirdly, an emphasis was placed on Chris Thorpe's previous interview, where he referred to the target of a million strings, which had almost been reached. It was unfair to have placed an emphasis on this rather than on Justin Lapin's clear indication, in the final interview, of the 512 000 bracelets which had been distributed.

[44] Lastly, the Tribunal was duty bound, in the light of the evidence produced (emails and excerpts from the full interview) to compare the final product with what was put forward as having been said. Relevant omissions from the full interview caused an imbalance in the interview as broadcast. Without their inclusion, an unjustified shadow was cast over the integrity of the interviewees. Furthermore, negative comments made by the anchors after the broadcast were likely to have strengthened doubts concerning the integrity of the company.

[45] It should be added that it is not customary for this Tribunal to respond on points concerning the merits at the stage of sanction. In this case it was, however, important to address the concerns raised by the SABC, since this was the first time in the existence of the BCCSA that a complainant had provided relevant excerpts from the transcript from the interview, which it had filmed itself, and which had not been broadcast.

[46] The SABC, after having raised the issues which were answered above and having taken note of what was said in paragraphs [38] –[45], provided us with the following proposal:

"We still do not believe, as per our earlier submission, that the programme has been in default of the Code for the material that was actually broadcast and that therefore, there should be no sanction in this matter. However, to allow fairness to both parties involved, which the complainant has alluded to as well in their proposal for sanction, we submit the following:1.That the BCCSA clearly point out the errors of fact and omissions that are referred to in the judgment.2.We will invite the complainants back onto the programme for an insert in which these issues will be put to them for clear answers to correct the alleged default. 3. We believe that this approach will give the complainants the same public platform that was used initially, and that they would therefore have a more than fair opportunity to address the same audience that they had in the earlier programmes."

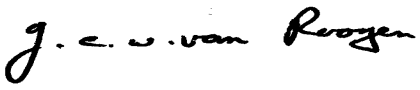
[47] Finally, returning to the matter of sanction. Although the Complainant, at the hearing, indicated that it would not seek a corrective broadcast, the Complainant, later on, provided us with a detailed list of corrections which should, it argued, be broadcast by the SABC. We are of the view that such a broadcast would simply confuse viewers, who would not necessarily remember the programme, or even have watched the programme. Even if we were simply to require the SABC to state that the BCCSA has upheld the complaint, it would not amount to much more than demonstrating that the BCCSA has decided against the SABC. Once again, viewers would not know why this was happening, given the complicated facts. We have, on occasion, directed the SABC and other broadcasters to broadcast a short statement, however, such directives related to far less complicated matters. The offer by the SABC, received this week, to grant the Complainant an opportunity to answer questions, as indicated by the BCCSA to have amounted to omissions, was not accepted by the Complainant, inter alia, arguing that the judgment, which went in its favour, provided sufficient satisfaction.

[48] Ultimately, the question arose whether a fine should not be imposed. To create an impression of dishonesty in a broadcast without sufficient grounds to do so is, certainly, a serious matter. We have, indeed, followed this approach where a person had unjustifiably been made out to be a pedophile.[12] The present matter, although serious, is

[12] [12] *F v SABC3(01/2009) [2009] JOL 23411 (BCCSA)*

not as serious as that matter. We tend to agree with the Complainant that the judgment itself is a satisfactory sanction. A reprimand would, in the circumstances, suffice.

In the result, the complaint is upheld and the Respondent is reprimanded for its contravention of the Broadcasting Code.



JCW VAN ROOYEN SC
CHAIRPERSON

Commissioners Makeketa, Mbombo and Mmusinyane concurred with the judgment of the Chairperson and Commissioner Melville.