IN THE APPEAL TRIBUNAL OF THE BROADCASTING COMPLAINTS

COMMISSION OF SOUTH AFRICA

Appeal No: A18/2020
Tribunal Case No: 09/2020

In the matter between:

eNCA First Appellant

eTV Second Appellant

and

MEDIA MONITORING AFRICA TRUST Respondent

MEDIA MONITORING AFRICA'S WRITTEN SUBMISSIONS

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INTRODUCTION

1 For well over a year, our country and the world have had to grapple with an unprecedented threat from the Covid-19 virus. More than 2.6 million people worldwide have died from the disease, including more than 50 000 South Africans. As the Full Bench of the High Court explained in *FITA*:

> *"South Africa, like the rest of the world, faces an unprecedented crisis following the invasion of the COVID-19 virus, which poses a clear and present danger to human life."*[1]

2 eNCA proclaims itself to be "*South Africa's most watched TV news channel*" and "*South Africa's most trusted independent TV and online news brand*."[2] e.tv proclaims itself to be "*the most viewed English channel in the country*".[3]

3 Given the circumstances and these lofty claims, one would have expected that eNCA and e.tv (the broadcasters) would ensure that their broadcasts contributed to providing useful and reliable information regarding the Covid-19 pandemic.

4 Yet, they did exactly the opposite.

5 On 22 and 23 July 2020 – four months into the pandemic – they broadcast an interview between Gareth Cliff and David Icke. During that interview, Mr Icke

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1 Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another [2020] ZAGPPHC 246 at para 1

2 https://www.enca.com/about-enca

3 https://www.etv.co.za/about

made various false claims about the Covid-19 pandemic. He said that it was "*a pandemic hoax*", that there was an "*obvious scam going on*" and that "*there is no virus*" at all. At no point did the host, Gareth Cliff, ever make clear to viewers that these claims were false.

6 In a complaint by Media Monitoring Africa (MMA), the BCCSA Tribunal rightly held that this breached the provisions of the BCCSA Codes dealing with the broadcast of comment. It emphasised the extraordinarily irresponsible nature of the broadcast:[4]

> *"When this programme was broadcast on 22 and 23 July 2020, South Africa was already 4 months into the various phases of lockdown and people were becoming restless on account of their freedoms being curtailed. If someone could convince them that there was 'no virus' and that the whole thing was a 'pandemic hoax', people would probably disobey all the regulations. That in turn would have caused a new outbreak of the pandemic and many more people could have died."*

7 Both the Subscription Code and the FTA Code are quite clear. They allow the broadcast of comment, but the comment "*must be made on facts truly stated or fairly indicated and referred to*". Or, as the Constitutional Court has explained in a defamation context, a person seeking to establish fair comment "*must justify the facts; but need not justify the comment*".[5]

8 For the broadcaster to succeed in this appeal, they must persuade this Tribunal that the comments of Mr Icke:

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4 Ruling of the Tribunal at para 22.

5 The Citizen 1978 (Pty) Ltd and Others v McBride 2011 (4) SA 191 (CC) at para 83.

8.1 were based on facts; and

8.2 those facts were truly stated or fairly indicated and referred to.

9 The broadcasters know that they cannot overcome this hurdle. So they try two strategies to muddy the waters and avoid their difficulty.

9.1 First, they say that the comment clauses do not apply at all to Mr Icke's comments. This a new argument – it was not pleaded or advanced previously. It has no basis at all in this Tribunal's jurisprudence or in the Code itself. As we show, it is plainly bad.

9.2 Second, they say that the "facts" on which a comment must be based need not be true. In other words, they contend that the Code allows for comments based on false facts. That argument too has no basis at all in this Tribunal's jurisprudence or in the Code itself. Again, we show below it is plainly bad.

10 We make one last preliminary point:

10.1 Throughout their heads, the broadcasters repeatedly pour scorn on Mr Icke and his views. In doing so, they try to suggest that no-one should take his views seriously.

10.2 The trouble for them is that this is not what Mr Cliff did during the interview. If the interview was to be aired at all (which it should not be), that is what Mr Cliff ought to have done. But he did not.

10.3 Equally, the broadcasters' heads seek to imply that Mr Icke is infamous and therefore no reasonable viewer would take him seriously. But this again not pleaded in the response to the complaint and, moreover, it is plainly wrong.

10.4 As the Tribunal's members explained in their ruling:

> *"When the interview started, we were uncertain whether Mr Icke was perhaps a medical doctor, but later in the interview he stated that he was a journalist. He added that he had done 30 years' research. He does not mention what the subject of his research was…."*

10.5 It is thus quite clear that members of the Tribunal did not know who Mr Icke was, nor was there any reason for them to know. Are the broadcasters suggesting that Professor Viljoen, Ms Fakude and Mr Naidu are somehow unreasonable viewers?

10.6 If so, the broadcasters should say so expressly. If not, their attempt to rely on Mr Icke's supposed infamy is plainly unsustainable.

11 In what follows, we address the following issues in turn:

11.1 The test on appeal;

11.2 The lack of value in false statements and the risk of misinformation;

11.3 The comment clause plainly applied;

11.4 The comment clause was plainly breached;

11.5 The question of sanction.

THE TEST ON APPEAL

12 Clause 4.9 of the Procedure of the BCCSA stipulates that "*[a]n Appeal Tribunal shall not set aside or amend a decision of the first Tribunal unless it is clearly wrong*" (emphasis added). This is a high threshold to meet, and one which we submit the broadcasters have failed to establish in the present matter.

13 In ***Belter v eTV***, the BCCSA explained that a mere difference of opinion between the Appeal Tribunal and the Tribunal would not constitute grounds for interference by the Appeal Tribunal; rather, intervention at an appeal level will only occur where there was a gross procedural irregularity or where the sanction was clearly inappropriate.[6] This threshold is applied to ensure that the Tribunal is not treated as a mere stepping stone towards a final appeal, as this would not be acceptable within a structure such as the BCCSA.[7]

14 As emphasised in ***Belter***, *"[t]he first Tribunal is given a particular task and when concluded in a procedurally fair manner, its finding should, in the ordinary course, be final*."[8] MMA submits that this approach should be followed in the present matter as well, taking into account the following considerations:

14.1 The matter was fully ventilated before the Tribunal, both in written submissions and in oral argument. The broadcasters have neither

[6] BCCSA Case No. 01/2010, undated at para 4.

[7] Ibid.

[8] Ibid.

alleged nor established that there was any procedural irregularity in the handling or determination of the complaint.

14.2 It is apparent from the Tribunal's ruling that careful regard was paid to the submissions of the parties, including in meticulously considering the previous cases raised by the broadcasters and distinguishing them on their facts.

14.3 There is nothing raised by the broadcasters to credibly suggest that the Tribunal overlooked or misdirected itself in finding that the Codes had been contravened.

15 Indeed, the Tribunal's ruling is quite consistent with the approach taken in other jurisdictions towards the broadcast of Mr Icke's statements.

15.1 In April 2020, Ofcom – the communications regulatory authority of the United Kingdom – sanctioned a broadcaster for the broadcast of an interview with Mr Icke.[9]

15.2 In a ruling that that closely aligns with the reasoning of the Tribunal in the BCCSA, Ofcom similarly expressed the view that Mr Icke's statements "*had the potential to cause significant harm at a time when health care systems around the world are fighting to contain the deadly impact of the Coronavirus and the scientific consensus is that social*

[9] Ofcom, 'Ofcom decisions on recent programmes featuring David Icke and Eamonn Holmes', 20 April 2020, accessible at https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/david-icke-and-eamonn-holmes-decision.

distancing, and the public's compliance with it, is a key step to restricting the spread of the disease."[10]

15.3 Notably, in Ofcom's summary of its ruling, it stated as follows:[11]

> *"Our investigation found David Icke expressed views which had the potential to cause significant harm to viewers in London during the [Covid-19] pandemic. We were particularly concerned by his comments casting doubt on the motives behind official health advice to protect the public from the virus. … These claims went largely unchallenged during the 80-minute interview and were made without the support of any scientific or other evidence."*

16 Importantly, and contrary to eTV's approach, Ofcom did not hold that David Icke's views about Covid-19 were so far-fetched that they could simply be aired and the viewers could decide. Or that it was notorious that David Icke should not be believed.

16.1 Indeed, Ofcom actually made clear in its decision that it was "*prioritising cases related to the Coronavirus which could cause harm to audiences*".[12]

16.2 Ofcom explained that this would include:

16.2.1 Health claims related to the virus which may be harmful;

16.2.2 Medical advice which may be harmful; and

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[10] Ibid.

[11] Ibid. (Emphasis added.)

[12] Ofcom decision at p 1

16.2.3 Accuracy or materially misleading programmes in relation to the virus or public policy regarding it.[13]

17 The OfCom ruling makes plain that there was nothing "clearly wrong" in the ruling of the Tribunal that would warrant an interference on appeal.

18 That is precisely the reason that on appeal eTV has had to resort to new arguments that (a) were never pleaded; and (b) have no basis whatsoever in the BCCSA Codes or the BCCSA's jurisprudence.

THE LACK OF VALUE IN FALSE STATEMENTS AND THE RISK OF MISINFORMATION

19 This appeal is not about the dissemination of ideas or views which are merely controversial ideas or which may be considered offensive to some.

20 This appeal is about the dissemination of Icke's statements on Covid-19 which were (a) false; (b) known to be false by the broadcaster at the time of the interview; (c) without any indicators to the viewers that the factual claims were false. For instance, it was known that Icke's claim that no medical research had yet been able to isolate the Covid-19 virus was demonstrably false.

[13] Ofcom decision at p 1

21 The Courts both here and abroad have made clear that the publication of false statements are not protected in the same way as the publication of controversial political opinions.

22 In ***Khumalo v Holomisa*** the Constitutional Court held:[14]

> *"There can be no doubt that the constitutional protection of freedom of expression has at best an attenuated interest in the publication of false statements. As Cory J observed in the Canadian case, Hill v Church of Scientology of Toronto[15]:*
>
> > *'False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society'."*

23 In ***Bogoshi***,[16] the Supreme Court of Appeal made clear that:

> *"Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper. … [A] high degree of circumspection must be expected of editors and their editorial staff on account of the nature of their occupation; particularly, I would add, in light of the powerful position of the press and the credibility which it enjoys amongst large sections of the community."[17]*

24 Most recently in the ***Manuel*** decision the Supreme Court of Appeal held:[18]

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[14] *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 35

[15] *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 (SCC) at para 106.

[16] *National Media Ltd. and Others v Bogoshi* 1998 (4) SA 1196 (SCA)

[17] *Bogoshi* at para 31

[18] *Economic Freedom Fighters and Others v Manuel* [2020] ZASCA 172, [2021] 1 ALL SA 623 at para 112

> *"We accept that the spread of misinformation and disinformation on social media platforms is, notoriously, a worldwide concern. … The spread of falsehoods that threaten or infringe the rights of individuals and the public at large is a legitimate concern."*

25 eTV seeks to rely on jurisprudence from the European Court of Human Rights. But the European Court has flatly rejected revisionism on various occasions (similar to Icke's revisionist views on Covid-19).

26 For instance, in ***Garaudy v France***[19] the European Court said the following:

> *"The book which gave rise to the applicant's criminal convictions analyses in detail a number of historical events relating to the Second World War, such as the persecution of the Jews by the Nazi regime, the Holocaust and the Nuremberg Trials. Relying on numerous quotations and references, the applicant questions the reality, extent and seriousness of these historical events that are not the subject of debate between historians, but – on the contrary – are clearly established. …<u>There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth</u>. … <u>The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention</u>.*

27 The European Court concluded that, in accordance with Article 17 of the European Convention, the applicant was not entitled to rely on the right to freedom of expression to espouse views denying the holocaust.[20]

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[19] *Garaudy v France,* Application 64496/17

[20] The right to freedom of expression under the European Convention is expressly limited in two ways. First, Article 10(2) of the Convention provides: under this provision the exercise of the freedom of expression, "since it carries with it duties and responsibilities may be subject to such formalities, conditions, restrictions or penalties

28 The general need of limiting misleading revisionist views is amplified when dealing with a public health crisis like Covid-19. As the WHO Director-General has explained: "*We're not just battling the [Covid-19] virus … We're also battling the trolls and conspiracy theorists that push misinformation and undermine the outbreak response*."[21]

29 Disinformation about Covid-19 is of such significant concern that it has been criminalised. In terms of the Regulations issued under section 27(2) of the Disaster Management Act 57 of 2002 ("DMA"), which makes it an offence to publish any statement with the intention to deceive another person about Covid-19 or any measure taken by the government to address Covid-19.[22] Icke's views plainly fell into that category, and eTV provided the platform for Icke to air them.

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as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Second, Article 17 of the European Convention – the effect of which is that "*no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms*" (see the judgment by the European Court of Human Rights in *Lawless v. Ireland*, judgment on 1 July 1961, Series A no.3, pp 45 - 46 § 7)

[21] https://www.who.int/news-room/feature-stories/detail/immunizing-the-public-against-misinformation

[22] Regulation 11(5) of the Regulations issued under section 27(2) of the DMA, as published on 18 March 2020, provides that:

> "Any person who publishes any statement, through any medium, including social media, with the intention to deceive another person about –
>
> (a) COVID-19;
>
> (b) COVID-19 infection status of any person; or
>
> (c) any measure taken by the Government to address COVID-19,
>
> commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding six months, or both such fine and imprisonment."

30 Various international experts on freedom of expression have stressed that disinformation undermines – rather than promotes – the right to freedom of expression:[23]

> *"[D]isinformation and propaganda are often designed and implemented so as to mislead a population, as well as to interfere with the public's right to know and the right of individuals to seek and receive, as well as to impart, information and ideas of all kinds, regardless of frontiers, protected under international legal guarantees of the rights to freedom of expression and to hold opinions."*

31 Gareth Cliff's claim that he gave David Icke a platform to speak because he (Cliff) believes in freedom of speech demonstrates the problem. David Icke has no right to free speech which permits him to engage in the known dissemination of revisionist facts regarding Covid-19 that have the potential to harm others.

32 eTV claims in its heads of argument that: "*Truth-finding, the Constitutional Court has held, is best advanced by airing such views, no matter how far-fetched, wrong-headed or offensive they may seem*" and then cites the following passage from the decision in ***DA v ANC***:[24]

> *"[Freedom of expression] helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values."*

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[23] Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda, 2017. This was published by the Special Rapporteur on Freedom of Opinion and Expression of the United Nations, the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe, the Special Rapporteur on Freedom of Expression of the Organization of American States, and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights.

[24] 2015 (2) SA 232 (CC) at para 122

33 We agree whole-heartedly that when the topic is Covid-19, then truth-finding matters. But the David Icke interview was not about "truth-finding".

33.1 Importantly, the very passage that eTV cites emphasises that the value of airing the far-fetched view is to make clear that it is wrong. Cliff did not do so. As we show below, he lent credence to Icke's statements.

33.2 The same passage that eTV cites emphasises the value of "open debate". But again there was none of this on Cliff's show regarding Icke's statements. Icke was merely given a platform to propound and advance his position and there was no "*debate*" whatsoever with him. He was permitted a platform to espouse his false views without any correction of the content.

THE COMMENT CLAUSE PLAINLY APPLIED

The broadcasters' new test is untenable

34 Much of eTV's heads of argument are devoted to positing a <u>new</u> test under the comment provision based on the ***Jersild*** decision by the European Court of Human Rights.[25] In summary, eTV claims the comment clause only applies if the broadcaster itself *endorses* a view. If the broadcaster does not *endorse* the view then the clause does not apply at all.

35 eTV's appeal on that ground should be rejected for four reasons.

[25] *Jersild v Denmark* (Application 15890/89) (23 September 1994)

36 First, the Appeal Panel should not even consider this argument because it was never raised by eTV in its response to the complaint or before the BCCSA Tribunal. As set out above, the broadcaster must show that the Tribunal was clearly wrong – but here eTV is raising new arguments that the Tribunal did not even have an opportunity to consider.

37 Second, the argument is entirely at odds with the text of the BCCSA Code. Clause 28.2.1 of the BCCSA Code makes clear that the comment clause applies where a licensee has decided to "***broadcast***" comment – not where that licensee "*agrees with the comment that it has broadcast*".[26] There is no inkling whatsoever of eTV's construction in the language of the Code – it would be a complete rewrite of the provision, which is plainly impermissible.

37.1 Knowing this, eTV tries to rely on section 39(2) of the Constitution, in a desperate attempt, to argue that the Tribunal must prefer a construction that better gives effect to the right to freedom of expression. But the Constitutional Court has made clear – time and time again – that section 39(2) of the Constitution is limited to what the words of a provision can reasonably mean, and that the actual text used cannot be "*unduly strained*".[27]

37.2 In ***Chetty v M-Net***,[28] the Tribunal held that the comment clause in clause 28.2 of the Subscription Broadcasting Code did not apply to a

[26] The Comment clause in clause 28.2.2 applies to comment that is referred to in clause 28.2.1: "Licensees may broadcast comment on and criticism of any actions or events of public importance".

[27] *Investigating Directorate; Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* 2001 (1) SA 545 (CC) at para 24

[28] Case 41/2012

reality show like the cooking challenge *Masterchef* because clause 28.2 only applies to programmes which feature matters of public importance. The Tribunal dismissed an argument that section 39(2) of the Constitution permitted the Tribunal to disregard the wording of the text and held:[29]

> *"It is clear that this Tribunal would have to lift the words 'public importance' from clause 28 if it were to broaden the scope of the clause to include all mistakes made by a broadcaster. That would amount to a fundamental change to a clause which obviously does not deal with mundane matters such as the results of a reality show. … [T]here is no basis upon which we are permitted by section [39(2) of the Constitution] to fundamentally change clause 28.2 to cover the set of facts before us."*

37.3 eTV's attempted reliance on general free speech principles are equally misplaced. eTV, for instance, seeks to bolster its argument by referring to the general principle that freedom of speech also applies to speech that "*shocks and disturbs*".[30] But those general principles are subject to various requirements and exceptions that have already been considered and built into the fabric and text of BCCSA Codes. There is no challenge to the constitutionality of those Codes. It follows that the Codes must be interpreted and applied as they stand.

37.4 In ***Reinhardt's Place***, the Appeal Tribunal set aside the Tribunal's decision where the Tribunal had 'lifted' words from one clause of the

[29] Ibid at para 12

[30] *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754

BCCSA Code and imposed them on another clause on the basis of section 39(2) of the Constitution.[31]

> *"[I]t is clear that Clause 28.4 already incorporates the spirit, objects and purport (Section 39(2) of the Constitution) of the Bill of Rights insofar as privacy and dignity are protected with the corrective of public interest, which does not go against the Human Rights Bill. Therefore, it is not necessary to widen the clause any further."*
>
> *… The members of the Appeal Tribunal are of the opinion that the language used in Clause 28(4) is not ambiguous and that broadcasters are not in the dark with regard to its meaning. … It seems that it was a conscious decision of the drafters of the Subscription Code to protect dignity only in news, comment and in cases of public interest and not in entertainment programmes …"*

38 Third, eTV's construction is at odds with the purpose of the BCCSA Codes. The overarching purpose and theme that runs through the Codes is that the buck stops with the broadcaster. eTV is held accountable because it viewed the finished programme (one assumes) and considered the content of the interview between David Icke and Gareth Cliff and decided to air it – as is.

38.1 eTV's construction would create a free-for-fall where broadcasters could broadcast whatever they liked – no matter how damaging or false, as long as they did not expressly "endorse" it. Accountability could be side-stepped simply by broadcasters obscuring their attitude towards the views expressed in the programme.

38.2 The point of the Codes is that the broadcaster provides the stage and platform for the message, it therefore bears responsibilities in relation

[31] MultiChoice Kyknet Channel 144 v Reinhardt's Place and Another Case Number 43/2014 (AT) at paras 8 – 10

to the content of that message. Cliff himself admitted that he provided a platform for Icke to explain his position.

39 Fourth, eTV's construction is entirely at odds with the jurisprudence of the BCCSA Tribunal and Appeal Panel. Critically none of the BCCSA cases cited by eTV, which refer to the ***Jersild*** case, dealt with the comment clause in the BCCSA Code. Most of those cases dealt with hate speech. And – critically – none of the dozens of BCCSA comment cases in the Tribunal or the Appeal Panel introduced the requirement that a broadcast needs to endorse a view before the comment clause applies.

39.1 Indeed, the ***Kriel*** case[32] – one of the cases eTV refers to as citing ***Jersild*** demonstrates the opposite. The BCCSA Tribunal made clear that the key question was not whether the host endorsed the hateful view but whether the host stepped in where there was a duty to do so.

39.2 The BCCSA held that "*an experienced interviewer will know when to step in and bring balance or a correction to the interview*"[33] and in that instance the host "*brought in a correction where she reminded the interviewee that the freedom that South Africans now enjoy was fought for by both Black and White people. She furthermore did not concur with the hatred nor did she encourage such views*."[34]

[32] *Kriel and Lombard v SABC2*, Case number 22/A/2014

[33] Ibid at para 10

[34] Ibid at para 10

39.3 Whether the host endorsed the views was merely one factor in assessing whether the host complied with the duty to bring balance and correct the interviewee where necessary. Cliff – by contrast – remained entirely silent when Icke uttered known falsities about the Covid virus.

39.4 The ***Kriel*** case was not just a one-off. The same approach was followed in the case of ***Nzimande v SABC (SAFM)***.[35] During a programme with three panellists the host took comments from callers. One caller claimed that the entire Cabinet was corrupt without providing any factual basis for that claim. Minister Nzimande complained and the Tribunal found as follows:

> *"[4] … Although we accept, as stated unconditionally by the SABC, that the caller's view is not the view of the SABC, the SABC has to take responsibility for the content of its broadcasts – including this one. An omission to correct or comment may, in certain circumstances, also amount to a contravention of the Code. There is no reason to deviate from a long line of cases in the law of delict which have made it clear that an omission may also amount to a delict in circumstances where it was reasonable to have acted.*[36]
>
> *[12] … My view is that the caller's words, which were so clearly defamatory, were in need of some form of qualification by the SABC's presenter. She, however, said nothing to counter them. I should add that I do not believe that there was any evidence of malice on her part. It was a difficult situation to address, and clearly required extensive broadcasting experience."*[37] *(Emphasis added)*

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[35] *Nzimande v SABC (SAFM)* Case Number: 30/2014

[36] Ibid at para 4

[37] That case dealt with a complaint based on clause 15 of the BCCSA Code, which provides: "*Broadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest. … Public interest will, of course, not be a defence on its own. In the case of defamation, for example, the defence is public interest and truth*."

39.5 Like eTV's broadcast, it took place in the context of a programme that was not news but comment. There was no suggestion that unless there was endorsement by the host the broadcaster is off the hook because the comment provisions in the Code are not triggered.

In any event, there was a heightened duty on the to knock down the false statements

40 eTV's construction would require a radical departure from previous comment cases and for the reasons above, the construction is entirely without merit. Even if the position in ***Jersild*** were somehow applicable, the holding in ***Jersild*** was not, as eTV suggests, that endorsement is always required for liability to a broadcaster. Rather, the European Court found that the criminal punishment of a journalist for publishing the statements made by another person should not be envisaged "*unless there are particularly strong reasons for doing so*".

41 If the Icke interview was to be aired at all, there are "*particularly strong reasons*" that the host was required to indicate and demonstrate that Icke's views are false. In other words, merely refraining from "endorsing" Icke's statements was patently insufficient.

42 First, the interview was with someone whom Cliff knew (but the public did not know) generally ignores and manipulates facts.

42.1 In assessing whether a broadcast – whether news or comment – was lawful some consideration is given to "*the nature of the information on*

which the allegations were based and the reliability of their source".[38] David Icke is neither a respected journalist nor a researcher of any kind. Quite the opposite, David Icke has some of the most absurd views and frequently distorts facts and misleads the public. But the viewers were not told this.

42.2 eTV claims that there was frequent reference[39] to David Icke's views about reptilian overlords. With respect, that is entirely incorrect. There were a few extremely vague references made to "lizard overlords". These were unexplained and would have meant nothing to most viewers, who – like the three Tribunal members who heard the matter – did not know who Icke was.

42.3 The viewer was not provided with any real context on Icke or that the references to "lizards" were not metaphorical – nor figurative or hyperbole – but that David Icke actually claims to believe that the world is run by actual lizards. That is precisely why eTV for the first time on appeal – seeks to explain Icke's position in more detail and then to suggest that Icke was obviously a lunatic thus Cliff need not refer to the fact that Icke's views were false. We agree that this background context about Icke was <u>critical</u> but it was entirely absent in Cliff's broadcast.

42.4 If the Cliff was serious about presenting the viewers with an accurate picture of Icke's lack of credibility, Cliff would have done at least the following:

[38] *Bogoshi* at para 31

[39] eTV's heads of argument at p 1 para 2.

42.4.1 Cliff would have told viewers clearly that David Icke claims to truly believe that an elite group of people, including Queen Elizabeth, George W. Bush, and Bill and Hillary Clinton are not human beings at all. Instead they are shape-shifting reptilian humanoids – in fact many of the elite are part of this reptilian race.

42.4.2 Cliff would have explained that this is not a science fiction novel but Icke's "factual" account of how the world actually works.

42.4.3 Cliff would have provided viewers with a choice quote or two from the "facts" set out in Icke's book '*The Biggest Secret: The book that will change the world'* – first published in 1998 where he says the following:

> *"[A] reptilian race from another dimension has been controlling the planet for thousands of years. I know other people who have seen [George] Bush shape-shift into a reptilian."*[40]
>
> *"[There is an] obsession with interbreeding among the Elite bloodline families. They are seeking to maintain a genetic structure which allows them to move between dimensions and shape-shift between a human and reptilian appearance."*[41]
>
> *"These reptile full-bloods and reptile-possessed people hold the major positions of power in the world or work in the background controlling those in the positions of apparent power like prime ministers and presidents. Having a reptilian or reptilian-controlled human as president might sound fantastic if you have allowed yourself to have your vision of possibility suppressed to*

[40] The Biggest Secret at p 64

[41] The Biggest Secret at p 65

the size of a pea, <u>but</u> when you see the evidence put together over thousands of years, it makes perfect sense of the 'mysteries' of history".[42]

42.5 But Cliff did none of that. Instead, he afforded David Icke the same courtesy as all other guests on the programme where the premise is: "*you get to make up your own mind. I'm not selling any narrative. Do we have a deal?"*[43]

42.6 While David Icke might well be "notorious" in other countries – the extent of him publishing untruths and distorted and misleading facts is not known to the reasonable South African viewer. The members of the BCCSA Tribunal made clear that they had no idea who Icke was and thought he was possibly a medical doctor.[44]

43 <u>Second,</u> there was the need to stop the spread of misinformation surrounding the Covid-19 pandemic. Governments around the world are having enough trouble ensuring that the public comply with social distancing measures and proper hygiene. The last straw – as far as YouTube, Facebook, the BBC and Chris Roper (a former editor of the Mail & Guardian) are concerned – was David Icke's Covid-19 theories.

43.1 As the Tribunal correctly explained:[45]

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[42] The Biggest Secret at p 454

[43] Timestamp: 06:00 – 06:07

[44] Ruling of the Tribunal at para 20.

[45] Ruling of the Tribunal at para 22.

"When this programme was broadcast on 22 and 23 July 2020, South Africa was already 4 months into the various phases of lockdown and people were becoming restless on account of their freedoms being curtailed. If someone could convince them that there was 'no virus' and that the whole thing was a 'pandemic hoax', people would probably disobey all the regulations. That in turn would have caused a new outbreak of the pandemic and many more people could have died."

43.2 Since March 2020, the Covid-19 pandemic has posed an unprecedented threat to the lives of South Africans. Our courts have recognised this in emphatic terms.

43.2.1 In **Democratic Alliance v President**, a Full Bench of the High Court explained that the "invasion of the Covid-19 virus into South Africa, threaten[s] untold physical, social and economic harm".[46]

43.2.2 In ***Mohammed v President***, the High Court held:

> *"This pandemic poses a serious threat to every person throughout South Africa and their right to life, dignity, freedom of movement, right to access healthcare and their right to a clean, safe and healthy environment. In a country where we are dominated by so much poverty, where people don't have access to basic amenities such as clean running water, housing, food and healthcare, the potential risk to those households poses a further threat which places an additional burden on the Government to combat – the risk then, in light of those circumstances rises exponentially."*[47]

43.2.3 In ***Moela v Habib***, the High Court took a similar approach:

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[46] *Democratic Alliance v President of the Republic of South Africa and Others (Economic Freedom Fighters Intervening)* [2020] ZAGPPHC 237 at para 1

[47] *Mohamed and Others v President of the Republic of South Africa and Others* [2020] 2 All SA 844 (GP) at para 62

> *"The world has changed, and we are all in a quandary as to how to go about our daily lives in view of the pandemic. I would implore the applicants and all other students seeking to ignore the Directives issued by the University, in the spirit of Ubuntu, to follow the protocols issued by the University, the President, the NCID and the WHO. This is an unprecedented time for all of us. We are stronger if we work together. Nkosi sikelel' iAfrica."*[48]

43.3 eTV as a leading broadcaster should have shown scrupulous responsibility and compliance to their obligations under the BCCSA Code when it comes to dealing with Covid-19. eTV did precisely the opposite.

44 Third, David Icke's views on Covid-19 are not "controversial" as Cliff suggested – they are patently false once a viewer has been provided with the facts. But eTV failed to ensure that those facts were presented as part of the interview with David Icke.

44.1 Following an interview in April 2020 – months before the eTV interview – David Icke's views were discredited, pulled from various reputable sites and David Icke was banned from YouTube[49] and Facebook.[50] Moreover, as set out above, the UK Regulator – Ofcom found on 20 April 2020 that the London Real interview with Icke violated the applicable UK Code.

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[48] Moela and Another v Habib and Another [2020] ZAGPJHC 69 at para 60

[49] "YouTube terminates David Icke's account over Covid-19 conspiracy theories", dated 2 May 2020 – available at: https://www.itv.com/news/2020-05-02/youtube-terminates-david-ickes-account

[50] "Coronavirus: David Icke kicked off Facebook", dated 1 May 2020 – available at: https://www.bbc.com/news/technology-52501453

44.2 All that eTV says of the Ofcom decision is that the relevant UK code catered for a "*far broader category of prohibited material than the comment clauses under the BCCSA Codes*"[51] and that, by contrast to Gareth Cliff, the "*interviewer offered no meaningful challenge*"[52] to Mr Icke and gave him "*free rein to espouse his view that Covid-19 is a hoax*".[53]

44.3 But the complaints are similar in material respects. As we show below, like the London Real piece, Mr Cliff offered no meaningful challenge to Icke's views. Quite the opposite, he expressly refrained from commenting on them and repeated his refrain that the public would decide for themselves – importantly – without being told the full context. Importantly, the premise underlying the UK Ofcom decision was that – even though Icke's information was patently false and far-fetched – there was still risk that UK reasonable viewers may believe Icke.

44.4 Critically, Cliff and eTV knew all of this at the time the interview was conducted and aired but still Cliff failed to squarely test Icke's propositions (when there had already been worldwide criticism of Icke's position) but the viewer would not necessarily know about it and was not given the proper context from Cliff's interview.

44.5 It was extremely simple for him to do so. For example, on 1 May 2020, for instance, the BBC reported that "Facebook has taken down the

[51] eTV's heads of argument at p 38 para 86.1

[52] eTV's heads of argument at p 38 para 86.3

[53] eTV's heads of argument at p 38 para 86.2

official page of conspiracy theorist David Icke for publishing 'health misinformation that could cause physical harm'." Note that the BBC reporting about Icke says: "Mr Icke has made several false claims about coronavirus, such as suggesting 5G mobile phone networks are linked to the spread of the virus. In one video, [Icke] suggested a Jewish group was behind the virus".[54] Icke's comments were – rightly – not described as 'controversial views' that make sense to some people (as Cliff did).

44.6 Cliff not only failed in his duty to push back and demonstrate that Icke's claims were false. Cliff suggested that a viewer might not "*buy*" the "*lizard stuff*" but might buy some of Icke's other ideas – the clear implication of that was that some of Icke's other views may be more reliable and have merit.

45 The arguments advanced on appeal appear to be that a broadcaster can comfortably broadcast statements even when (a) they are entirely false; and (b) the broadcaster does not demonstrate that falsity to its viewers. This grossly misunderstands what is required of a broadcaster – as is illustrated by the decisions in ***Kriel*** and ***Nzimande***.

46 We now show how the Codes were breached.

[54] https://www.bbc.com/news/technology-52501453

THE COMMENT CLAUSE WAS PLAINLY BREACHED

The meaning of the comment clause

47 eTV's case rests on the premise that under the BCCSA Codes a comment can be made on "false facts". eTV claims:

> *"The facts upon which the comment is based may be true, false, far-fetched or entirely made up, as long as some 'fair' reference is made to them." (Emphasis added)*

48 This makes no sense whatsoever, textually or at the level of principle.

49 Clause 28.2.2 of the Subscription Code and clause 12.2 of the FTA Code require that:

> *"[c]omment must be an honest expression of opinion and must be presented in such a manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to."*
>
> *(Emphasis added.)*

50 Clause 28.2.2 of the Subscription Broadcasting Code and clause 12.2 of the Free to Air Broadcasting Code recognise that comment may be broadcast, provided that the following requirements are met:

50.1 The comment must be an honest expression of opinion.

50.2 The comment must be presented in such a manner that it clearly appears to be comment.

50.3 The comment must be made on facts truly stated or fairly indicated and referred to.

51 Read purposively and contextually as clause 28.2.2 must be,[55] the word "facts" means what it says.

51.1 The Oxford Shorter English dictionary defines a fact as "*a thing known for certain to have occurred or to be true*".[56]

51.2 The Cambridge Dictionary defines a fact as "*something that is known to have happened or to exist, especially something for which proof exists, or about which there is information*".[57]

51.3 The South African Oxford Dictionary defines a fact as "*a thing that is indisputably the case*".

52 Indeed, at a textual level, the very idea of "*false facts*" is a contradiction in terms.

53 eTV's interpretation is also entirely at odds with the various other references to the term "*facts*" in the BCCSA Codes. For instance, Clauses 28.1.3, dealing with news, make clear that the word facts means "true facts":

> *"28.1.3 Only that which may reasonably be true, having due regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with due regard to context and importance. If a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate clearly that such is the case"*

[55] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras 18 – 19

[56] Shorter Oxford English Dictionary, Oxford University Press (2007 edition)

[57] https://dictionary.cambridge.org/dictionary/english/fact

54 If facts could be "*entirely made up*" then the journalists and broadcasters who agreed to be bound by the BCCSA Code would not have used the term "facts" at all. At the very least, there would have been some form of explanation in the provisions of the Code.

55 eTV's construction would render the comment clause entirely pointless. The notion of facts being "far-fetched" or entirely "made-up" is equally misguided when the common law legal position is considered, which has been frequently cited by the BCCSA Tribunal.

56 Our courts have made clear – with unwavering clarity – that the purpose of requiring facts to be true or fairly indicated is to ensure that viewers are able to make a clear distinction between fact and comment. If this is not done, then viewers are left to assume the authoritative nature of the statements being made, even in cases where they may be patently false (as Icke's claims are).

56.1 In ***Roos v Stent and Pretoria Printing Works Ltd, quoting from Hunt v Star Newspapers Co***, Innes CJ explained as follows:

> *"[I]f fact and comment be intermingled, so that it is not reasonably clear what portion purports to be inference, [the reader or viewer] will naturally suppose that the injurious statements are based on adequate grounds known to [the writer or broadcaster], though not necessarily set out by him."*[58]

56.2 Innes CJ explained further as follows:

> *"I do not desire to say that in all cases the facts must be set out verbatim and in full; but in my opinion there must be some reference in the [article*

[58] *Roos v Stent and Pretoria Printing Works Ltd* 1909 TS 988 at 999. (Emphasis added.)

or broadcast] which indicates clearly what facts are being commented upon. If there is no such reference, then the comment rests merely upon the writer's [or broadcaster's] own authority."[59]

57 The approach by the Tribunal is consistent with the findings of the Constitutional Court in ***McBride***,[60] where it was explained that "*to receive the benefit of the defence [of protected comment] it must be clear to those reading a publication 'what the facts are and what comments are made upon them'*."[61] In sum, "*the defendant must justify the facts; but need not justify the comment*."[62]

58 eTV's position is also entirely at odds with the manner in which the Tribunal has applied the comment clause before. It follows that if eTV's radical approach were to be adopted then heaps of prior cases decided over the last decade by the BCCSA would have been wrongly decided. eTV has not shown that this is so. If that is eTV's position then, again, it must say so expressly. Investigative journalist programmes such as *3rd Degree* and *Carte Blanche* have not been permitted to base their comments on facts that they have themselves made up. Quite the opposite, the Tribunal interrogates the truth value of the facts. This is clear from the various decisions referred to elsewhere in these heads.

59 As this Tribunal has held in upholding a clause 28.2.2 complaint against *Carte Blanche* in ***Diamond v Carte Blanche***:[63]

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[59] Ibid at 999-1000.
[60] *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC)
[61] Above n **Error! Bookmark not defined.** at para 88.
[62] Ibid at para 83. (Emphasis added.)
[63] at para 13

> *"The next alleged error in the programme is significant. There is reference to an eviction order having been granted against the Diamonds and the allegation made that, in spite of this, the Third Complainant – and thus Mrs Diamond (as sole director of the Third Complainant) and indirectly Mr Diamond, remained in occupation of the property. … The implication [i.e. the comment or opinion] is clear: the Complainants had been occupying La Montanara illegally during the time they were operating it as a wedding venue, in spite of an eviction order. This reference to an eviction order is not based on the truth".*

60 The Tribunal concluded that: "*It is simply not true or reasonably connected to the truth that an eviction order had been issued. The implication of criminality was, accordingly, unfounded*". If eTV's radical construction of the BCCSA Codes were correct and facts can simply be made up as long as they are referred to then the ***Diamond*** decision, the ***isiMangaliso*** decision[64] and various other careful decisions previously given by the Tribunal were wrongly decided. This demonstrates how untenable eTV's position is.

61 In ***eNCA v Strydom and Taylor***[65] the Appeal Panel analysed a comment made by a news anchor at the end of a broadcast. The reporter made the following remark: "*[Orania] … that enclave of White people, designed to be like that, and I repeat that Black people are only welcome there if they are domestics or they are [gardeners]."* The Appeal Panel held:[66]

> *"The [broadcaster] submitted to members of the Tribunal that the comment was based on facts and was truly stated based on the overall reputation of the [Orania community], which the [broadcaster] stated it deduced from*

[64] *Isimangaliso Wetland Park Authority v Electronic Media Network* BCCSA 02/2016 – see for instance paras 55 to 57

[65] Case Number 14/2019

[66] Ibid at para 12

> *its social media platforms where there were numerous allegations of racism against the [Orania community]. … These views did not form part of the broadcast and could not be relied on as the factual basis for the newsreader's comment."*

62 The Appeal Panel rejected the so-called inside information about the Orania community from other sources because "*this was not referenced in the comment made by the newsreader in the broadcast, with the result that the comment was not made on facts truly stated, or fairly indicated and referred to*".[67]

63 Critically, in the ***Strydom*** case the comment made by the host was not based on the facts. The facts that emerged from the people interviewed in that particular segment were, as set out in the BCCSA, that:

> *"Representatives from Orania said repeatedly that the community was built on three principles including the fact that all forms of labour be done by Afrikaners – even gardening and house cleaning. At one stage the field reporter remarked that he himself made the observation that all the work, [including] the domestic work as the hotel, was done by Afrikaners".*[68]

64 In other words, the evidence presented in the programme as true was that: in Orania black people are not permitted to be part of the community, all jobs including gardeners and domestic workers must be Afrikaans people. The host was – of course – entitled to express his view on the Orania system being reprehensible, exclusionary and racist. But what the host could not do was invent a fact. Broadcasters and journalists must present the facts, not invent them.

[67] Ibid at para 14

[68] Outlined at para 4 of the Appeal Judgment.

The statements by David Icke breached the clause

65 In the present matter, no effort was made to provide a factual basis for the impugned statements. For instance, in describing COVID-19 as "a pandemic hoax", Icke states that he has "absolute factual evidence" to support the statement. However, he does not indicate or refer to any facts in support of this. This is similarly so in respect of the other impugned statements identified in MMA complaint and reply,[69] as the table below (reproduced from the papers) demonstrates:

Statement	Is the comment based on true facts?	Are the facts fairly indicated or referred to?
"a pandemic hoax"	No. COVID-19 was declared a global health pandemic on 11 March 2020, and its existence has been confirmed by international organisations, leading medical experts and other relevant stakeholders around the world.	No. Although Mr Icke states that he has "absolute factual evidence" to support the statement, he does not indicate or refer to <u>any</u> facts in support of this, still less true facts
"we have this quite obvious scam going on in terms of communication of information"	No. There is no evidence to support the claim that there is a scam in respect of the communication of information. The information communicated by the National Institute for Communicable Diseases and the Department of Health, as well as from other stakeholders, has been seen to be reliable and credible. South Africa's communication efforts in relation to COVID-19 "have been widely described as a sign	No. Mr Icke does not indicate or refer to <u>any</u> facts to support his claim of there being a scam in terms of the communication of information, still less true facts

[69] MMA complaint, 21 August 2020 at paras 14-17; MMA reply, 7 September 2020 at para 7.

	of what dedicated leaders can achieve".[70] According to Think Global Health, "[t]he performance of the South African government in the COVID-19 response has granted it a reprieve. Praise for the government emanating from all sectors of South African society are at a level that I have never seen before. Political party leaders, the business sector, civil society and the public have all commended the government's efforts against COVID-19."[71]	
"[The World Health Organization] was created by people like the Rockerfeller family to control global health policy from a central point"	No. The World Health Organization is a specialised agency of the United Nations, and was created by member states to the United Nations.	No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts
"[The World Health Organization] was fronted up by a guy called Tedros, the DG, who is just an asset of Bill Gates, who owns the WHO"	No. The funding of the World Health Organization is made transparently known, and is received from member states paying their assessed contributions, in addition to voluntary contributions from member states and other partners. As a specialised agency of the United Nations, the World Health Organization is independent from any state or private sector actor, and is not owned by any single individual.	No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts

[70] Brightness Mangolothi & Malesela Maubane, 'Effective communication from leadership is essential during a crisis', *Mail & Guardian*, 15 April 2020.

[71] Charles Shey Wiysonge, 'South Africa's war on COVID-19', *Think Global Health*, 20 April 2020.

"this is what they are terrified of people realising: there is no virus"	No. At the time of submitting the complaint, there were more than 20 million people globally who had confirmed infections of COVID-19, and more than 700 000 people who had died as a result of the disease. While co-morbidities may present an additional risk to affected persons, this does not negate the existence or direct impact that COVID-19 has had on the health and lifespan of millions of people around the world.	No. While Mr Icke appears to base this statement on his claim of there being no evidence of anyone having died of COVID-19, this is a circular argument and is not sufficient to comply with the Code. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts
"there is not a scientific paper on planet earth that has isolated the virus they call SARS-CoV-2 or COVID-19, they've never isolated it to show it exists"	No. Again, that is false and was known to be false at the time of the interview. In fact, various studies in fact were able to isolate the pathogen in patients from as early as February 2020.[72] A collaborative effort between the University of the Western Cape and Stellenbosch University obtained the first-known laboratory isolate of COVID-19 in South Africa on 1 April 2020.[73] This has also been done in other countries, such as Canada for example, where a Canadian team of researchers from Sunnybrook Research Institute, McMaster University and Toronto University successfully isolated a strain of COVID-19 from two specimens and then cultivated	No. Mr Icke does not indicate or refer to <u>any</u> facts to support his statement, still less true facts.

[72] J Kim, Y Chung et al, "*Identification of Coronavirus Isolated from a Patient in Korea with COVID-19*", Osong Public Health Research Perspective, republished in the US National Library of Medicine, National Institutes of Health available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7045880/

[73] Stellenbosch University, 'South Africa obtains first laboratory isolate of SARS-CoV-2', *News Medical*, 11 May 2020.

	it in a secure containment facility.[74]	
"the information has come from doctors, virologists and medical specialists who will never get on a mainstream program because they've sussed there is no virus"	No. The existence of COVID-19 has been confirmed by, among others, the World Health Organization, the National Department of Health, the National Institute of Communicable Diseases, the South African Medical Association, the Association of Surgeons of South Africa and the Health Professions Council of South Africa.	No. While Mr Icke refers broadly to "doctors, virologists and medical specialists", he does not indicate or refer to any facts to support his statement, still less true facts

66 As regards Icke's reference to unspecified "doctors, virologists and medical specialists" who backed up his version – in the discredited London Real interview that was the subject of the Ofcom complaint – David Icke referred to one of the actual sources: a YouTube video of a New York Doctor who Icke alleges "*broke ranks*" and confessed that there was no such thing as Covid-19. But when one goes and looks at the interview with the Doctor nothing could be further than the truth.[75]

67 Again, this is not a scenario of an individual forgetting to refer to factual information that actually exists. It is an individual who distorts factual information and who – eTV and Gareth Cliff – knew had distorted the only 'facts' that Icke referred to. But still there was no attempt to state that Icke was incorrect or refer to the fact that Icke's views on Covid-19 were demonstrably false.

[74] Harry Cockburn, 'Coronavirus: Scientists isolate virus responsible for deadly COVID-19 outbreak', *Independent*, 13 March 2020.

[75] Dr Cameron Kyle-Sidell was not saying (as Icke suggests) that Covid-19 did not exist. Rather his discussion was questioning the use of ventilators and the new nature of Covid-19 and how it could better be treated: https://www.youtube.com/watch?v=UmS4AL_jUeE

68 At no stage – either in response to the complaint or in either of the applications for leave to appeal – have the broadcasters sought to refute the abovementioned falsehoods contained in the broadcasts.

69 Instead, the broadcasters claim that Mr Icke does make some reference to the facts on which his opinion rests. But those facts are demonstrably false.

70 Contrary to the position espoused by the broadcasters, MMA submits that these blithe references made by Mr Icke exacerbated the harmful nature of the broadcasts. In particular, Mr Icke created the false impression that he had credible information to verify the claims he was making, without pointing the viewer to any such evidence to be able to test the credibility of his claims. In this regard, as correctly noted by the Tribunal:

> *"When the interview started, we were uncertain whether Mr Icke was perhaps a medical doctor, but later in the interview he stated that he was a journalist. He added that he had done 30 years' research. He does not mention what the subject of his research was. It could not have been COVID-19 because this virus was only identified towards the end of 2019 … If Mr Icke's statement was intended to create the impression that he had done 30 years' research on COVID-19, this comment was not justified – plainly put, it was a lie."*[76] *(Emphasis added)*

71 It is also not helpful to the broadcasters' case that the other segments in the show contained more credible guests discussing the COVID-19 pandemic. To the contrary, this would likely result in the ordinary viewer treating Mr Icke with the same level of credibility as the other guests. In any event, the Codes require

[76] Ruling of the Tribunal at para 20. (Emphasis added.)

each expression of comment to themselves be justifiable by facts that are true or fairly indicated and referred to. In the present matter, Mr Icke was given a platform to disseminate patent falsehoods regarding the global pandemic, without any substantiation and in circumstances where the host himself made little to no credible effort to counter these views. This is simply not countenanced by Clause 28.2.2 of the Subscription Broadcasting Code and clause 12.2 of the Free to Air Broadcasting Code.

72 MMA submits that there was ample evidence before the Tribunal for it to have correctly come to the conclusion that the comments contained in the broadcasts were not based on facts truly stated or fairly indicated and referred to. The broadcasters have failed to provide any evidence to the contrary. Accordingly, there is no basis to find that the Tribunal was "clearly wrong" in finding that the broadcasts contravened clause 28.2.2 of the Subscription Broadcasting Code and clause 12.2 of the Free-to-Air Broadcasting Code, and the appeal falls to be dismissed.

The failures by Gareth Cliff breached the clause

73 Importantly, when the interview was broadcast on 22 and 23 July 2020 there was nothing "*controversial*" about David Icke's opinions or the facts that they were based on. Quite the opposite, Icke's views were demonstrably false.

74 Cliff said the following:

74.1 He described David Icke as "*having some <u>controversial</u> opinions*"

74.2 "*Now some of what you say may sound crazy to some people, some of it makes sense to some people, but I'm a proponent of free expression, even if I don't buy it, and everyone gets to decide for themselves*".

74.3 "*We won't have time to interrogate this in any detail*"

74.4 "*With you being banned from so many platforms … how can we find the balance, in your opinion, between blocking perceived harmful narrative and allowing actual freedom of expression? And who gets to decide, David?*"

75 eTV seeks to place a lot of emphasis on what Cliff apparently *intended* by including the interview segment with David Icke and its apparent purpose. eTV then claims that: "*At no point does Mr Cliff ask Mr Icke to provide his views on Covid-19. In fact, Mr Cliff makes clear that he is not seeking to give airtime to Mr Icke's Covid-denialism*".[77]

76 With respect that is expressly contradicted by Gareth Cliff himself when he says:

> *"Well I'm pleased to have given you a place to tell your story and to explain your position because so many people would rather shut you down but I think there are many of us who are left more confused than when we started". (Emphasis added)*

77 Cliff then says he plans to get Icke "*on the radio show as well, give you some room*" – to give further airtime for Icke to explain his views.

[77] eTV's heads of argument at p 9 para 29.

78 In fact, portraying something that is patently false as "debatable" or "controversial" is a technique that has been used throughout history to counter actual evidence that: (a) there is a link between smoking and lung cancer; (b) there is a link between HIV and AIDS; (c) that the holocaust, in which approximately 6 million Jewish people were murdered by the Nazi party, took place.

79 The reasonable viewer would assume that a trusted source like eTV would not host someone actively spreading disinformation, which was known to be false, without demarcating this. Particularly where, as eTV points out, the premise of the show is:

> *"Gareth Cliff hosts smart and creative guests – both left and right-of centre thinkers, opinion makers, thought leaders and alternate voices to open our minds and prepare for change – the only thing of which you can really be certain. You may not always agree but … great minds don't always think alike."*[78] *(Emphasis added)*

80 David Icke is not a great mind. Cliff did not say that David Icke's views were nothing more than a harmful untrue narrative. Quite the opposite, Cliff said Icke's views were merely "*perceived*" by some as harmful while "*some of it makes sense to some people*". Which parts? The viewer was never told.

81 In response to the extraordinary statements by Icke that "what I would call a pandemic hoax" and "The WHO was created by people like the rockerfeller family

[78] eTV's heads of argument at p 4 para 8; Response to complaint at para 7.

to control global health policy from a central point", the host's immediate response is not to disagree at all but say:

> *"Part of the reason I was curious to have you on is because this almost feels like a perfect storm for this kind of suppression of information, conspiracy theory stuff – it looks like the world is ripe for all of this to take root at the moment because people just don't know who to believe, right?"*

82 In various instances, Cliff was either silent, or expressed affirmation or agreement with such views, including by stating that "*I'm pleased to have given you a place to tell your story and to explain your position*".

83 Indeed, at times the host repeated the views expressed by Icke without in any way gainsaying or challenging them, for example:

> *"You've been very vocal about this coronavirus pandemic being a planned conspiracy theory, a conspiracy rather for global governance. We won't have time to interrogate this in any detail". (Emphasis added)*

84 The word "interrogate" implies that there was a view that could still be interrogated, i.e. that there might possible be some degree of merit in Icke's view. But Cliff suggesting as much is patently false.

85 Chris Roper, a former editor of the Mail & Guardian, summed up Cliff's various failures as a host in an opinion piece:[79]

> *"Is it OK to hate Jews, and to blame them for the creation of the coronavirus? Is it OK to decide that the coronavirus doesn't exist, and that if it does it's spread by 5G technology, so it's OK to beat up mobile technicians and set*

[79] C Roper, "How conspiracist David Icke 'confused' Gareth Cliff", published in *Financial Mail*, dated 6 August 2020 available at: https://www.businesslive.co.za/fm/features/2020-08-06-how-conspiracist-david-icke-confused-gareth-cliff/

fire to mobile infrastructure? I don't know! Can we ever know? You decide for yourself. That's freedom, buddy. I didn't invent it.

Some people on social media proffered a defence of Cliff's decision to host Icke [before the programme aired], by claiming that he would use his Superior Intellect™ to demolish Icke's arguments. That never happened, of course, and in fact Cliff very openly laid out his own rationale for his decision. 'I need to put a disclaimer upfront. You have been banned from social media platforms, and even from appearing on television internationally, for putting out what has been reported as harmful information,' he said."

86 Ironically, as Roper notes, a "*controversy*" is defined as a discussion marked by the expression of opposing views.[80] There was nothing of the sort in Cliff's broadcast. For these reasons, too, the programme failed to comply with the comment clause in the BCCSA Codes.

THE QUESTION OF SANCTION

87 As noted above, the Appeal Panel will not upset the Tribunal's decision at all unless it was clearly wrong.

88 But this is particularly so in relation to the question of sanction. Even in court proceedings, appeal courts defer to the lower court on the issue of sanction, it can only do so where there is an irregularity of such an extreme nature that the irregularity is said to result in "*a failure of justice*".[81]

[80] Ibid

[81] *Bogaards v S* 2013 (1) SACR 1 (CC) at paras 41 – 42

89 eTV was, with respect, extremely lucky that the Tribunal was a lenient as it was. Given the content of the broadcasts and the conduct of the broadcasters, as well as the seriousness of the contravention, MMA submits that the broadcasters were appropriately sanctioned with both an apology and a fine for the following key reasons:[82]

89.1 First, the broadcasts were harmful in nature in the context of a global health crisis. In this regard, the broadcasts were a clear example of disinformation pertaining to the COVID-19 pandemic.

89.2 Second, the broadcasts were unlawful in terms of the Regulations issued section 27(2) of the Disaster Management Act.

89.3 Third, the harmful and unlawful content was intentionally broadcast in circumstances where the broadcasters were aware thereof.

89.4 Fourth, the broadcasters have shown no remorse or contrition for their conduct or the violation of the Codes.

89.5 Fifth, the broadcasters have elected to continue to perpetuate the harm of the broadcasts through the ongoing publication on their website.

90 It is apparent from the ruling of the Tribunal that the sanction was informed by a confluence of considerations, including the sincerity of the broadcasters' proposal to broadcast an apology while the broadcasts remain accessible on the eNCA website;[83] the potential harm to the population resulting from the

[82] Ibid at para 27

[83] Ibid at para 29.

broadcasts;[84] the failure by the host to counter the misinformation divulged by Mr Icke;[85] and the seriousness of the contravention and the potential harm it could have caused.[86]

91 In the light of these considerations, MMA submits that the Tribunal was not wrong, let alone "clearly wrong", in making its determination regarding the sanction. Accordingly, the application for leave to appeal falls to be dismissed.

Cumulative sanctions

92 According to eTV, there is no precedent for both an apology and a fine being ordered by the Tribunal. There is, however, ample authority which shows that cumulative sanctions may be imposed:

92.1 In ***Loonat v Radio Islam***, the Tribunal ordered both an apology and a fine taking into consideration the seriousness of the contravention.[87]

92.2 In ***Hubbard and Warburton v Multichoice***, the Tribunal accepted the apology by Multichoice, but was still of the view that the error amounted to aggravated negligence that was likely to have a very harmful effect on a substantial number of persons.[88] The Tribunal therefore decided to impose a fine of R20 000, in addition to the apology, to demonstrate its conclusion that this was a serious transgression.[89]

[84] Ibid at para 30.

[85] Ibid.

[86] Ibid at para 32.

[87] Ibid at para 8.

[88] BCCSA Case No. 21/2011, 14 June 2011 at para 11.

[89] Ibid.

92.3 In ***Mthembu v Multichoice ANN7 Channel 405***, the Tribunal ordered both an apology and the maximum fine of R80 000, and added that the apology must be broadcast for two consecutive days that correspond with the times on which the offending broadcasts were flighted.[90]

Wording of the apology

93 Clause 14 of the Constitution of the BCCSA provides the Tribunal with broad powers in determining an appropriate sanction. In particular, clause 14.7 empowers the Tribunal to "*make any supplementary or ancillary orders or directions that it may consider necessary for carrying into effect orders or directives made in terms of this clause and, more particularly, give directives as to the broadcasting of its findings*."

94 An apology is an important remedy in addressing the harmful nature of the broadcasts. MMA submits that the apology set out in the ruling of the Tribunal complies with the requirements of ***Prince v Heart 104.9 FM***, which stipulated that an apology should be heartfelt, seek to rectify the matter, be in the usual language style of the broadcasters, and be done with the necessary gravity.[91] Notably, in ***eNCA v Strydom and Taylor*** – where eNCA similarly argued that it should be reprimanded for its contravention rather than be directed to apologise – the Appeals Tribunal of the BCCSA dismissed the appeal and ordered eNCA to broadcast an apology in line with the prescribed wording set out by the

[90] BCCSA Case No. 01/2018, 9 February 2018 at paras 24-25.

[91] BCCSA Case No. 43/2013, 14 January 2014 at para 4.

Tribunal.[92] Furthermore, in ***Loonat v Radio Islam***, the Tribunal rejected the apology tendered by the broadcaster on the basis that it was not convinced that such apology was indeed sincere, and instead prescribed the wording to be used by the broadcaster.[93]

95 Clause 14 of the Constitution of the BCCSA (in particular clause 14.7 thereof) make clear that there is nothing impermissible in the Tribunal providing the wording of the apology. MMA notes that the parties to the complaint were provided with an opportunity to make submissions on the content of the apology before the Tribunal reached its ruling. The broadcasters also do not point to anything incorrect or untoward in the content of the apology.

CONCLUSION

96 For the above reasons, MMA submits that the Tribunal was not wrong, let alone "clearly wrong", either in its decision on the merits or the sanction. Quite the opposite, it is telling that eTV has had to resort to two radical arguments in order to attempt to justify the host's conduct during the broadcast. Neither of these strategies is consistent with the text of the Code, the jurisprudence of the BCCSA or the particular need – as identified by the WHO – to curb the spread of disinformation during the Covid-19 pandemic in order to curb the virus.

97 And while virtually the rest of the free world has deemed it not only acceptable but appropriate to limit David Icke's views on Covid-19 and actively denounce

[92] BCCSA Case No. 14/2019, 23 August 2019 at para 16.

[93] BCCSA Case No. 03/2008, 14 February 2008 at para 8.

them as false, eTV – which proclaims itself to be "South Africa's most trusted independent TV and online news brand"[94] and "the most viewed English channel in the country"[95] – still gives Icke's views a platform on its website today, and does so without any additional warning to potential viewers.

98 The appeal should be dismissed in its entirety.

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[94] https://www.enca.com/about-enca

[95] https://www.etv.co.za/about