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DISPUTE RESOLUTION ALERT

Landmark Judgment

IN THIS
ISSUE

REINFORCING THE RESPONSIBILITY OF BROADCAST MEDIA

It is not often in practice that one can achieve success in a matter, as well as achieve a benefit for wider society. Very recently we have been able to do both.

REINFORCING THE RESPONSIBILITY OF BROADCAST MEDIA

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It is not often in practice that one can achieve success in a matter, as well as achieve a benefit for wider society. Very recently we have been able to do both.

Broadcast media and in particular television, enjoy a powerful position in South Africa. Statements made on a television news programme, especially one which ostensibly enjoys a good reputation, will be taken by the viewer of that programme as being truthful.

Such power is therefore accompanied by the power to do great damage to the reputations of parties who are the subjects of programmes – since what is stated about those parties is perceived to be the truth. With such great power ought to come great responsibility to ensure such truthfulness. When broadcasters make statements which impact upon others, they should take the necessary precautionary steps to ensure that these statements are accurate, and also be prepared to take responsibility if they are not.

The broadcast media in South Africa is self-regulated. It has set up, under guiding legislation, a voluntary self-regulating body known as the Broadcasting Complaints Commission of South Africa (BCCSA). The BCCSA is in fact an association of broadcasters whose members have chosen to be self-regulated rather than state-regulated. This is in the interests of press freedom.

The BCCSA has formulated a voluntary Code of Conduct (Code) to which all its members subscribe. The Code regulates the manner in which members must present programmes to meet prescribed standards of fairness and accuracy.

Audiences of broadcasts (whether radio or TV) will know the existence of the Code is frequently publicised - they are reminded that complaints may be made to the BCCSA if such standards are not met. On the face of it, therefore, the broadcast media is meant to be responsible for its conduct or, if it deviates from its self-imposed standards, its misconduct.

What the general broadcast public may not know, however, is that buried within the Constitution of the BCCSA existed, until very recently, a procedural rule which undermined the rights of the complaining public. This provision expressly protected broadcasters from the consequences of their actions. This has now been found to be unconstitutional.

The procedural rules of the Code are contained in Appendix 1 to the BCCSA Constitution. The particular provision of the procedural Code which has been found to be offensive and unconstitutional is (or rather was) sub-rule 3.9.



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REINFORCING THE RESPONSIBILITY OF BROADCAST MEDIA

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Sub-rule 3.9 provided in terms that the Chairperson of the BCCSA had a discretion, when considering a complaint received from a member of the public, to require the complainant to waive any other rights it had to institute any civil proceedings.



Sub-rule 3.9 provided in terms that the Chairperson of the BCCSA had a discretion, when considering a complaint received from a member of the public, to require the complainant to waive any other rights it had to institute any civil proceedings against the broadcaster as a pre-condition to the complaint being considered by the BCCSA.

As will be appreciated when considering this provision, this has far reaching consequences for members of the public who complain. Waiver of their other civil rights (if any) is potentially a “ticket to entry” to have complaints under the Code considered by the BCCSA.

REDISA recently challenged this provision of the Code as unconstitutional, and applied to the High Court to have it expunged.

REDISA argued that a broadcaster was obliged to be held accountable to the standards set out in the Code regardless of whether or not its conduct may have caused civil damages to REDISA as complainant.

The High Court agreed with REDISA.

The Judge concluded that:

The effect of sub-rule 3.9 ... is that it empowers the second respondent (the chairperson of the BCCSA) to oblige a complainant to choose between either having his complaint into the ethical and professional conduct of a broadcaster investigated and adjudicated by the first respondent (the BCCSA), or to pursue a civil claim for damages against the broadcaster that may be shown to have infringed the complainant’s personality rights. The BCCSA can thus refuse to discharge its statutory obligation to investigate and adjudicate complaints if a complainant wishes to retain the right to pursue a civil claim against an offending broadcaster in due course.

In other words, a complainant could be required to pay the price of losing all its rights to its civil remedies against a broadcaster (whatever these may be) in order to determine whether or not a broadcast adverse to its interests also amounted to a breach of the Code of the BCCSA.

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The consequence of this order is that members of the public may now proceed to lodge complaints with the BCCSA without fear that they will be called upon to abandon other rights which they may have (and which would discourage them from making such complaints before the BCCSA as they would be at risk of losing such rights).



The Court therefore found that sub-rule 3.9 was, as contended by REDISA, inconsistent with s192 of the Constitution. Section 192 of the Constitution requires a regulator of broadcasting, including the BCCSA, to exercise its functions in the public interest and in accordance with the principles of fairness.

The Court further agreed with REDISA that sub-rule 3.9 did not operate in the interests of a complainant or a member of the public, but operates in favour of a broadcaster – by limiting the complainant's rights and in fact forcing such a complainant to make a choice of rights to its own detriment.

For these reasons the Court found that:

- Sub-rule 3.9 contravened the public interest and fairness requirements of s192 of the Constitution;
- Sub-rule 3.9 was an unreasonable and unjustifiable limitation on the constitutional right of access to the courts. More specifically, it was found that by implementing sub-rule 3.9 a complainant was deprived of its constitutional right to have its justifiable dispute decided in a fair public hearing before a court; and
- In the circumstances, the court found that it was a just and equitable remedy to strike down sub-rule 3.9 in its entirety. The court accordingly made such an order.

The consequence of this order is that members of the public may now proceed to lodge complaints with the BCCSA without fear that they will be called upon to abandon other rights which they may have (and which would discourage them from making such complaints before the BCCSA as they would be at risk of losing such rights). The striking down of sub-rule 3.9 will also mean that broadcasters will not be protected by imposing this choice of rights and remedies on complainants. Broadcasters will be held accountable to the Code regardless of whether or not they may be at risk (for other legal reasons) for other claims by complainants.

This is not unfair to broadcasters. The mere fact that the factual circumstances of a broadcast, which may give rise to infringement of the Code may also give rise to civil remedies for damages is not inconsistent, nor does it amount to a double jeopardy for such broadcaster. Whether or not the Code has been contravened is a matter of fact in its own right just as much as whether or not such conduct also gives rise to a separate civil claim and remedy. Remedies under the Code and civil claims arising, for example, from defamation are entirely distinct.

The BCCSA has stated in terms that the incorporation of sub-rule 3.9 was made at the insistence of broadcasters who were afraid that complaints would use complaints under the Code as a precursor to lawsuits against them. But this argument

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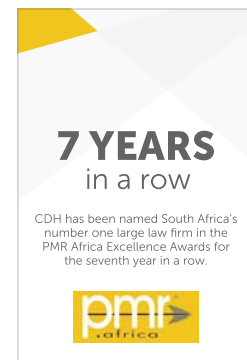
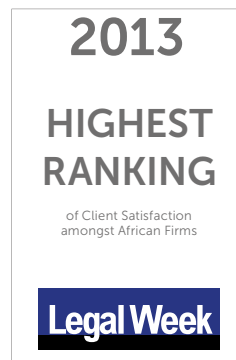
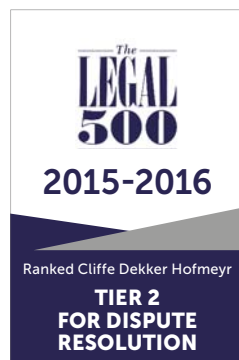
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The High Court, at the instance of REDISA, has rightly found that broadcasters could not cause a rule in the Code which is intended to protect them from the civil consequences of their misconduct.

misses the point. The purpose of the Code is – presumably – to ensure that required journalistic standards of fairness and accuracy are met. The remedies for breach under the Code do not include the power to award damages. If it so happens that the conduct of broadcasters infringes both the Code and a person's right of dignity and reputation such broadcaster must take the consequences of its unlawful misconduct.

The High Court, at the instance of REDISA, has rightly found that broadcasters could not cause a rule in the Code which is intended to protect them from the civil consequences of their misconduct. The existence of such a protective measure (now struck down), of course, undermines the very purpose of the Code, which is to ensure the media subscribe to high standards of journalistic integrity.

Richard Marcus



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