



BROADCAST COMPLAINTS COMMISSION OF SOUTH AFRICA

VUYANI NGALWANA

Complainant

and

eNCA

Respondent

In re: False or negligent news reporting

FORMAL COMPLAINT

A. INTRODUCTION

1. My name is Vuyani Ngalwana. I am an adult of sound mind. I am also a member in good standing of the Pan African Bar Association of South Africa with chambers at 1st Floor, 82 Maude Street, Sandton. I have occasionally acted as a Judge of the High Court of South Africa since 2009, and continue to avail myself from time to time when requested by the Judge-President. I have Chaired the General Council of the Bar of South Africa, the Professional (Ethics) Committee of the Johannesburg Society of Advocates (JSA), and the Transformation Committee of the JSA. I have also been a member of the first Legal Practice Council from which I voluntarily resigned to focus on my practice and other professional interests.
2. I lodge this formal complaint against eNCA in my personal capacity as a citizen of South Africa and as a consumer of television and online news provided by eNCA.
3. I lodge this complaint in the reasonable belief that eNCA is a signatory to the BCCSA Code of Conduct, or a member of the National Association of Broadcasters, and therefore on the understanding that it subscribes to the BCCSA Code of Conduct. If this is not the case, I'd appreciate your directing this complaint to the appropriate authority. I have, however, seen judgments or rulings of the BCCSA arising from complaints that have been lodged with the BCCSA against eNCA.

B. BASIS FOR AND DETAIL OF COMPLAINT

4. The basis for the complaint is eNCA's breach of clause 11 of the BCCSA Free-To-Air Code of Conduct for Broadcasting Service Licensees, 2009, or, alternatively, clause 28.1 [specifically, clauses 28.1.1 to 28.1.5] of the BCCSA Code of Conduct for Subscription Broadcasting Service Licensees. The text of the two sets of Codes is materially similar and provides as follows:

"News

- (1) *Broadcasting service licensees must report news truthfully, accurately and fairly.*
- (2) *News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by:*

- (a) *Distortion, exaggeration or misrepresentation.*
 - (b) *Material omissions; or*
 - (c) *Summarisation*
- (3) *Only that which may reasonably be true, having reasonable regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with reasonable regard to context and importance.*
 - (4) *Where 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.*
 - (5) *Where there is reason to doubt the correctness of the report and it is practicable to verify the correctness thereof, it must be verified. Where such verification is not practicable, that fact must be mentioned in the report.*
 - (6) *Where it subsequently appears that a broadcast report was incorrect in a material respect, it must be rectified forthwith, without reservation or delay. The rectification must be presented with such a degree of prominence and timing as in the circumstances may be adequate and fair so as to readily attract attention.”*
5. It is my submission that eNCA breached clause 11(1) to 11(6) of the BCCSA Free-To-Air Code of Conduct for Broadcasting Service Licensees, 2009, or, alternatively, clauses 28.1.1 to 28.1.5 of the BCCSA Code of Conduct for Subscription Broadcasting Service Licensees, whichever is applicable.
 6. It did so when it published, on Monday 29 June 2020, at 13h50, a news report that the Supreme Court of Appeal had, in dismissing the application of the Public Protector of South Africa for leave to appeal against a judgment of the North Gauteng High Court concerning the Vrede Dairy Farm project, found that

“the Public Protector should pay at least 85 percent of the costs in her personal capacity following the matter between her, the DA and the Casac.”¹
 7. As demonstrated by the order of the Supreme Court of Appeal in relation to the leave to appeal application to which eNCA adverts, this is false.
 8. The order of the Supreme Court of Appeal, dated 21 June 2020 and, if the date stamp is any indication, issued on 26 June 2020, reads:
 - “1. Condonation as applied for is granted. The applicant is to pay the costs of the application.
 2. The application for leave to appeal is dismissed with costs on the grounds that there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard.”
 9. The order had been made on 21 June 2020 and issued on 26 June 2020. When eNCA published its false news story, the Order had been in the public domain for well over 48 hours. There is nothing in this order, on any reading, that says the Public Protector must pay **“at least 85 percent of the costs in her personal capacity”**. The High Court had ordered that the Public Protector pays 15% of the combined costs of the DA and CASAC.

10. Upon seeing and reading the online eNCA report in these terms, I tweeted the following at 14h56 on the same day, copying eNCA in the tweet and attaching the order of the Supreme Court of Appeal:

“Can @eNCA explain where it got info that the PP was ordered to pay ‘at least 85 percent of the costs in her personal capacity’? Please.”

11. When that tweet had by 19h55 [some 5 hours later] elicited no response from eNCA, I tweeted, again copying eNCA, the following, referencing my earlier tweet:

“This was NOT a rhetorical or clickbait question @eNCA. Explain to your viewers where the SCA ordered the PP to pay ‘at least 85 percent of the costs in her personal capacity’. Consider this a final demand. You have until midnight tonight”

12. I then prepared this complaint at 22h00 on the off-chance that eNCA would ignore my demand as a consumer of its news broadcast and publication. This was more than 8 hours after the false news report by eNCA had been published. It had still not been corrected despite the SCA Order having been posted publicly not only by me in a tweet but also by the director of CASAC.

13. On the morning of Tuesday 30 June 2020 I woke up to a revised version of the eNCA news report, now removing reference to the SCA having ordered the Public Protector to pay “**at least 85 percent of the costs in her personal capacity**”, adding an interview clip on the SCA finding which makes no reference to the 85% personal costs order, and attaching the SCA order. This appears to have been effected around 8AM.

14. While I welcome the alteration – even though done furtively – I do not believe it is a correction. If broadcasters are to be held accountable in an effective manner under the BCCSA Code, then eNCA should be required to draw attention to its false news reporting, openly correct it, apologise to its viewers, and explain how the error came about – if it was at all an error.

15. For this reason, I persist in my complaint and seek the relief set out under “**appropriate relief**” below.

C. WHY IS THIS COMPLAINT AND RELIEF SOUGHT IMPORTANT?

16. This complaint and the relief sought need to be understood in the broad constitutional context of the role of the media and chapter nine [of the Constitution] institutions in South Africa.

17. I run a busy practice as an independent advocate and so have little time to read newspapers. My time is consumed mostly by reading latest court judgments – both here and in other jurisdictions like the UK, the US, India, Canada, Australia, European Court of Human Rights, and other online publications on legal issues that have a bearing in areas of my legal interest. So, my source of news is online publications and, occasionally, television, on most occasions on the hoof.

18. In that broad context, for me as a consumer of online and television news this complaint and the relief sought are important for a number of reasons:

- 18.1 The media in South Africa has a right to “**freedom of the press and other media**” entrenched in s 16(1)(a) of the Constitution of the Republic of South Africa, 1996.
- 18.2 That right and freedom does not confer on the media power to report falsely.
- 18.3 The media also has freedom in South Africa to “**impart information**” to consumers of news [s 16(1)(b) of the Constitution]. That freedom comes with a concomitant responsibility to impart accurate information and not to mislead, especially when the information is readily available and contained in a Court Order that the media references in a report. One would expect a reporter to have read the one-page Court Order s/he references in a news story.
- 18.4 The freedom of “**artistic creativity**” [s 16(1)(c) of the Constitution] (to the extent that this may be of application to the media in South Africa) does not confer on the media the freedom to be creative with the truth, especially a truth that is readily available in a Court Order referenced in the news story.
- 18.5 While the media (such as eNCA) has freedom to “**impart information**” [s 16(1)(b) of the Constitution] to consumers of its news (such as I) I also have the freedom “**to receive**” such information, and not be misled by being fed false information.
- 18.6 Accurate up to date information on orders of the courts, especially the Full Bench, the SCA and the Constitutional Court, is the staple food of a busy successful senior practice as such recent orders may have a material bearing on a case on which one is working at the time.
- 18.7 As it happens, at the time of reading the eNCA news report, I was working on a case on which this false report had a material bearing and so had to be considered. If the SCA can alter a high court costs order from an order that a representative litigant pay 15% of the respondents’ costs in her personal capacity to an order that she pays 85% of the respondents’ costs from her own pocket (an unprecedented phenomenon, to be sure) and without even hearing argument on the point, then that clearly has material implications in the manner in which a lawyer advises other clients in litigation.
- 18.8 That is why I had to stop what I was doing and make enquiries about the accuracy of this news report, discovered it was false, and gave eNCA an opportunity to correct it as other lawyers may well be in the same position as I was.
- 18.9 Another consideration is that personal costs orders against the Public Protector appear to have taken on something of a political dimension among political parties and some special interest groups lately, potentially capable of being used as a Sword of Damocles hanging over the head of any chapter nine institution, thereby possibly rendering these institutions gun shy in the performance of their constitutional functions and obligations. This, for me as a citizen, is a worrying development. And so news of the SCA ordering the head of a chapter nine institution to pay 85% of costs in her personal capacity has a chilling effect as such an order could potentially be used by politicians to avoid being held accountable by these chapter nine institutions.
- 18.10 When eNCA publishes a false report on this issue, it plays into that political and special interest group space – wittingly or unwittingly.

D. APPROPRIATE RELIEF

19. The BCCSA Code is a welcome intervention which is necessary to ensure a responsible and accountable exercise of the freedom of the media in South Africa. If the BCCSA Code means anything, and if the responsibility that comes with freedom of the press and other media is taken seriously by the BCCSA, broadcasters should not be able to get away with publishing

false information that is easily verifiable, simply by surreptitiously amending the false story. They must at the very least be ordered to draw attention to the false story or erroneous reporting, correct the story openly, apologise to consumers of their news for having misled them, and explain how the error came about. Anything less would make false and/or negligent reporting a risk worth taking in the race either for a scoop or for earning brownie points in pushing a specific narrative only to retreat quietly and imperceptibly later without any consequence.

20. I thus ask that eNCA be ordered:

- 20.1 to issue an apology for the false report on all its platforms and prominently;
- 20.2 to make an undertaking it will never do so again both to the BCCSA and in such prominent apology;
- 20.3 to subject the person/s responsible for the false report to disciplinary hearing; and
- 20.4 to report back to the BCCSA within a reasonable period on the outcome of such disciplinary proceedings in a full report containing the bases for its findings and sanction, if any.

21. This complaint and the BCCSA ruling will be published on my website www.anchoredinlaw.net for the information of those who may have an interest in how this matter is resolved by the BCCSA.

V NGALWANA SC
Chambers, Sandton
30 June 2020