

**BEFORE A TRIBUNAL OF THE BROADCASTING COMPLAINTS
COMMISSION OF SOUTH AFRICA**

In the matter between:

THE DEMOCRATIC ALLIANCE

Complainant

and

THE SABC

Respondent

COMPLAINANT'S HEADS OF ARGUMENT

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INTRODUCTION

- 1 On 31 July 2018 at 22:10 the SABC broadcast in its entirety a pre-recorded statement by the President of the African National Congress (ANC), Mr Cyril Ramaphosa. The strapline underneath the broadcast read: "President Ramaphosa addresses the nation".¹
- 2 Mr Ramaphosa made the address in his capacity as President of the ANC, not in his capacity as President of the Republic of South Africa.
- 3 In the speech, Mr Ramaphosa explained the ANC's position on land reform, and announced that the ANC would pursue a constitutional amendment to effect expropriation of land without compensation.
- 4 The DA contends that the broadcast infringed section 13(1) of the BCCSA Code of Conduct (the Code).
- 5 Section 13(1) of the Code provides that, when presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.

¹ Screen grab of first broadcast, factual bundle p 1

- 6 Mr Ramaphosa's announcement that the ANC had decided that it would amend the Constitution to allow for expropriation without compensation clearly amounts to a controversial issue of public importance. The SABC does not deny this.
- 7 The SABC contends that it met its obligations under section 13(1) by allowing the DA leader's spokesperson to appear on the Morning Live programme the following day to respond to the story.
- 8 Despite presenting a programme concerning a controversial issue of public importance, I submit that the SABC has breached section 13(1) in that:
- 8.1 The SABC did not make reasonable efforts to fairly present opposing points of view. Mr Ramaphosa was afforded more time, on a platform of significantly higher quality, to advance the ANC's position.
- 8.2 The SABC did not do so either in the same programme or in a subsequent programme forming part of the same series of programmes.
- 8.3 The SABC did not do so within a reasonable period of time of the original broadcast.
- 8.4 The SABC did not do so within substantially the same time slot.
- 9 I submit that the appropriate sanction in the circumstances is that:

9.1 The DA is afforded an opportunity to present its own offer on land and jobs to the electorate, as Mr. Ramaphosa did with the ANC's offer, on an equitable basis.

9.2 The Tribunal reprimands the SABC and directs that the Tribunal's findings be broadcast by the SABC.

10 In what follows, I address the following issues in turn:

10.1 The factual background.

10.2 The applicable provisions.

10.3 The broadcast breached section 13(1) of the Code.

10.4 Sanction.

FACTUAL BACKGROUND

11 On 31 July 2018 at 22:10 the SABC broadcast in its entirety a pre-recorded statement by the President of the African National Congress (ANC), Mr Cyril Ramaphosa.

12 The SABC news channel broadcast the recording on the SABC News Channel on a live programme called The Globe.²

² SABC's reply to complaint, p 23 of factual bundle, para 1

- 13 The SABC ran a strapline underneath the broadcast which read: “President Ramaphosa addresses the nation”.³
- 14 On 1 August 2018, at some time in the morning, the SABC changed the strapline on the online version of the address to read “ANC President Ramaphosa makes a special address”.⁴
- 15 It is apparent from a viewing of the broadcast of Mr Ramaphosa’s address that:
- 15.1 The SABC broadcast in its entirety a pre-recorded speech delivered by Mr Ramaphosa.
- 15.2 Mr Ramaphosa’s pre-recorded speech lasted for 6 minutes and 45 seconds.
- 15.3 The SABC did not show any other visuals during the broadcast, but simply re-broadcast the pre-packaged and edited address of Mr Ramaphosa.
- 15.4 Mr Ramaphosa addressed the camera directly, and was the exclusive focus throughout his address.
- 16 Mr Ramaphosa addressed the following issues:⁵

³ Screen grab of first broadcast, factual bundle p 1

⁴ Screen grab of the second recording, factual bundle p 2

⁵ Full text of ANC President Ramaphosa’s speech, factual bundle p 3 ff

- 16.1 The African National Congress (ANC) had just concluded a two-day national executive committee lekgotla in Tshwane. The lekgotla had engaged on issue of governance, social development and broader transformation.
- 16.2 “We thought that it was important for the President of the ANC to clearly and unambiguously articulate the position of the organisation on ... the ANC’s resolution on land reform.”⁶
- 16.3 Mr Ramaphosa stated the ANC’s position “that the Constitution is a mandate for radical transformation both of society and the economy.”
- 16.4 A proper reading of the Constitution enables the state to effect expropriation of land with just and equitable compensation and also expropriation without compensation in the public interest.
- 16.5 The lekgotla took the view that a comprehensive land reform programme enabling equitable access to land would unlock economic growth by bringing more land in South Africa to full use and enabling the productive participation of millions more South Africans in the economy.
- 16.6 The ANC will through the parliamentary process finalise a proposed amendment to the Constitution that outlines more clearly the conditions under which expropriation of land without compensation can be effected. The intention of the proposed amendment is to promote redress, advance economic development, increase agricultural

⁶ Full text of ANC President Ramaphosa’s speech, factual bundle p 3, emphasis added

production and food security and to transform unjust spatial realities in urban areas.

17 On 1 August 2018 at 08:04, a DA spokesperson commented on Mr Ramaphosa's address on the Morning Live show. It is apparent from a viewing of a clip of this segment of the show that:

17.1 The DA's opportunity to comment was on a different channel, in a different time slot, and on a different show to that of Mr Ramaphosa's address.

17.2 The Morning Live presenter asked the DA's spokesperson for her comment on Mr Ramaphosa's address over the telephone.

17.3 The DA spokesperson's comment was broadcast live, rather than in pre-recorded form.

17.4 While the DA spokesperson was making her comment, the SABC broadcast visuals, initially of a DA logo, then of rural landscapes, then of the public hearings into expropriation.

17.5 The DA's spokesperson was permitted to comment for 1 minute and 43 seconds.

18 On 1 August 2018 the DA Shadow Minister: Communications, Phumzile van Damme, wrote to the chairperson of the SABC Board.⁷ In her letter the Shadow Minister recorded the following:

⁷ Van Damme letter 1 August 2018, factual bundle p 10

- 18.1 The President had appeared during the broadcast dressed in ANC apparel with ANC flags in the background. He spoke about an ANC lekgotla where it was determined that the ANC would amend the Constitution to effect expropriation without compensation.
- 18.2 The DA found it unacceptable that the leader of a political party had been provided with an unlimited opportunity to address the country on a party-political matter on the public broadcaster and that the same opportunity was not afforded to other political parties.
- 18.3 The fact that Mr Ramaphosa is also the President of the country was immaterial as he was speaking on party and not state matters.
- 18.4 The DA requested the same opportunity as the ANC to address the nation on its party position on amending the Constitution to effect expropriation without compensation and sought a response within 24 hours.
- 19 On 2 August 2018, the chair of the SABC responded to the DA Shadow Minister. He informed her that:⁸
- 19.1 The SABC had received the recording of President Cyril Ramaphosa's address in his capacity as the President of the ANC.
- 19.2 "The SABC made an editorial decision to broadcast the address as it was deemed newsworthy".

⁸ Letter from SABC to Shadow Minister 2 August 2018 factual bundle p 11

19.3 The SABC “made efforts to deliver a balanced story by soliciting reactions from other political parties, including the Democratic Alliance. In fact the Democratic Alliance represented by the spokesperson for the leader of the DA, was on Morning Live today responding to this story”.

20 On 6 August 2018 the Shadow Minister lodged a complaint with the Broadcasting Complaints Commission.⁹ The complaint stated that:

20.1 It was clear from the broadcast that Mr Ramaphosa was not speaking in his capacity as President of the Republic of South Africa but in his capacity as President of the ANC.

20.2 The DA is of the view that the broadcast infringed section 13(1) of the BCCSA Code of Conduct (the Code).

20.3 The issues addressed in the broadcast related to the amendment of the Constitution to allow expropriation without compensation, which is clearly a controversial issue of public importance. The SABC made no effort to present opposing views in the same programme or in the same time slot.

20.4 The DA contended that it is unacceptable for a public broadcaster to accept a recording from a political party and to halt normal programming to broadcast it without even attempting to balance the

⁹ DA's complaint, 6 August 2018, p 14 of the facts bundle

views of the political party concerned with those of other political parties.

20.5 The DA contended that the offer of an opportunity to the DA to comment on the announcement was an insufficient response by the SABC and did not satisfy the requirements of section 13(1) of the Code.

20.6 The DA requested the opportunity to present its own offer on land and jobs to the electorate as Mr Ramaphosa had done with the ANC's offer.

21 On 6 August 2018, the DA issued a press statement in which it said that it would submit a packaged video of the DA leader Musi Maimane speaking on land reform to the SABC. It asked the SABC to air the packaged content in order to demonstrate its commitment to the Principle of Equitable Broadcasting.¹⁰

22 On 8 August 2018, the SABC filed its answer to the DA's complaint in the BCCSA.¹¹ The SABC said that:

22.1 It had broadcast the statement by the ANC President on the SABC News Channel at 22:10 on a live programme called The Globe.

22.2 The strap on the programme had erroneously referenced the broadcast as "President Ramaphosa addresses the Nation". This was a legitimate human error which was removed when it was detected.

¹⁰ DA press statement 6 August 2018, facts bundle pp 17 ff

¹¹ SABC answer to BCCSA complaint, 8 August 2018, facts bundle p 23

- 22.3 After the broadcast of 31 July 2018, the SABC sought comment from other political parties, analysts and South Africans on 1 August 2018. The earliest and “most prime opportunity to do this was on Morning Live”. The DA, represented by its leader’s spokesperson, was indeed on Morning Live at 08:04 offering its views on Mr Ramaphosa’s statement.
- 22.4 The SABC concedes that the DA’s comment did not appear in the same programme, namely The Globe. It says that “to have waited for The Globe at 22:00 on 1 August would not have been editorially sound as the story would have possibly lost traction by then. In any event; Morning Live has a far wider audience reach than The Globe because the former simulcasts on SABC2 while the latter is confined to the satellite channel.”

THE APPLICABLE PROVISIONS OF THE CODE OF CONDUCT

- 23 Section 13(1) of the Code provides:

“In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.”

- 24 The effect of section 13(1) is the following:

- 24.1 If the broadcaster is “*presenting a programme in which a controversial issue of public importance is discussed*”, then it is required to do each of the following:

24.1.1 First, it must make reasonable efforts to fairly present opposing points of view.

24.1.2 Second, it must do so either in the same programme or in a subsequent programme forming part of the same series of programmes.

24.1.3 Third, it must do so within a reasonable period of time of the original broadcast.

24.1.4 Fourth, it must do so within substantially the same time slot.

THE BROADCAST BREACHED SECTION 13(1) OF THE CODE

25 The DA says in its complaint that Mr Ramaphosa's announcement that the ANC had decided that it would amend the Constitution to allow for expropriation without compensation clearly amounted to a controversial issue of public importance.¹²

26 In its reply to the BCCSA, the SABC does not deny that the broadcast constituted a programme in which a controversial issue of public importance is discussed.¹³

27 Nor could it have done so.

¹² DA's complaint to the BCCSA, p 15 para 5

¹³ SABC reply to BCCSA, p 23 of the facts bundle

- 27.1 The question of expropriation without compensation is arguably the leading public issue of the day. A search of Google news websites for the terms “expropriation” and “South Africa” on 28 August 2018 returned 155,000 results.
- 27.2 The issue has dominated political and public discourse in South Africa for at least the last four months. It has even provoked a comment by the United States President Donald Trump.
- 27.3 Clearly, the question of an amendment to the South African Constitution in order to permit expropriation without compensation is one of enormous public interest and controversy.
- 28 Once that is so, in order to comply with section 13(1) the SABC must:
- 28.1 make reasonable efforts to fairly present opposing points of view;
- 28.2 do so either in the same programme or in a subsequent programme forming part of the same series of programmes;
- 28.3 do so within a reasonable period of time of the original broadcast; and
- 28.4 do so within substantially the same time slot.
- 29 This Tribunal has held that where it is not denied that a programme touches upon a matter of public interest, the onus falls on the broadcaster to demonstrate that it has complied with section 13(1) of the Code:

“The onus is thus on the broadcaster to prove, on a balance of probabilities, that it made reasonable efforts to fairly present opposing points of view.”¹⁴

30 The SABC attempts to justify its breach of section 13(1) by saying that:

“While it may not have been in the same programme The Globe, the subsequent live programme was Morning Live. To have waited for The Globe at 22h00 on 1 August would not have been editorially sound as the story would have possibly lost traction by then. In any event: Morning Live has a far wider audience reach than The Globe because the former simulcasts on SABC2 while the latter is confined to the satellite channel.”

31 It is clear from the SABC’s response to the BCCSA that it has not complied with the four requirements.

32 First, the SABC did not make a reasonable effort to fairly present the opposing point of view.

32.1 The SABC simply broadcast Mr Ramaphosa’s pre-recorded and edited political statement on behalf of the ANC. The length of the statement was 6 minutes and 45 seconds.

32.2 The SABC refused to broadcast the DA’s equivalent party-political statement.

32.3 The SABC says that it sought comment from other political parties, analysts and South Africans on the following day, 1 August 2018.¹⁵

¹⁴ *Busch v Mnet* [2017] JOL 38264 (BCCSA)

¹⁵ SABC response, p 23 of the facts bundle, para 3

32.4 The opportunity afforded to the DA to present the opposing point of view was manifestly inferior to the opportunity afforded to President Ramaphosa:

32.4.1 The DA's spokesperson was afforded 1 minute and 43 seconds to comment over the telephone. By contrast, Mr Ramaphosa's pre-packaged and edited speech of 6 minutes 45 seconds was broadcast in its entirety.

32.4.2 The ANC had complete control over the content that was broadcast setting out its position. During the broadcast of the ANC's position, the visuals focused exclusively on Mr Ramaphosa as he delivered the address to camera. By contrast, during the DA's Morning Live phone-in, the SABC broadcast a range of visuals in the background, making for a less compelling broadcast.

32.4.3 Due to the short notice it was not possible for the DA's leader and the leader of the opposition, Mr Musi Maimane, to appear in person on Morning Live. He had to be represented by his spokesperson on that show.

32.4.4 The ability to pre-record a message includes advantages such as the opportunity to write a speech in advance, to practise it, and to ensure through many recordings and editing that the best version of the speech is presented. In addition, a pre-recorded message gives the speaker the power to control the visuals that are broadcast. Mr Ramaphosa delivered his

address on camera, in person. This opportunity was denied to the DA and Mr Maimane.

32.4.5 A fair presentation of the opposing point of view would have entailed affording the DA a comparable opportunity to put across its position on the same programme in the same format.

33 It is accordingly clear that the DA was not afforded a fair opportunity to put the opposing point of view, because the opportunity afforded to Mr Ramaphosa was both qualitatively and quantitatively superior to that afforded to the DA to put the opposing point of view.

34 This Tribunal has held that where a one-sided impression is created in a broadcast and where there is no sufficient balance in presenting a controversial issue of public importance, the broadcaster breaches section 13(1). It has held that:

“When the presenter is dealing with controversial issues of public importance, he or she should treat all parties involved in the issue fairly, and see to it that balance is obtained in presenting different view points. If this is not done, the broadcast can deteriorate to propaganda, a situation that cannot be allowed in the new democracy.”¹⁶

35 I submit that the SABC’s unedited broadcast of Mr Ramphosa’s speech on land expropriation in his capacity as ANC President, and its refusal to afford a similar opportunity to the leader of the DA, created precisely this situation. The

¹⁶ *Foundation for Equality before the Law v SABC3* [2009] JOL 23221 (BCCSA) at para 12

broadcast deteriorated into ANC propaganda without fair presentation of opposing views.

- 36 Second, the opposing point of view was not presented in the same programme or in a subsequent programme forming part of the same series of programmes.

36.1 The SABC says that the DA was represented by its leader's spokesperson on Morning Live at 08:04 on the following day to offer its views on Mr Ramaphosa's statement.

36.2 It is therefore common cause that the opposing points of view were not presented in the same programme or in a subsequent programme forming part of the same series of programmes.

- 37 Third, the SABC admits that the opposing point of view was not presented within substantially the same time slot.

- 38 On the SABC's own version therefore, it has not complied with section 13(1).

SANCTION

39 It is effectively common cause that the SABC has breached section 13(1) of the Code. The only question is what sanction should be imposed.

40 In terms of the BCCSA's Constitution, this Tribunal has the following powers of sanction:

"14. Powers of an Adjudicator or a Tribunal

Following any investigation of an alleged infringement of the Code by a signatory, a Commissioners acting as Adjudicator or, as the case may be, a Tribunal may

14.1 dismiss the complaint;

14.2 reprimand any respondent adjudged to have been guilty of an infringement of the Code;

14.3 direct that a correction and/or a summary of the findings of an Adjudicator or Tribunal be broadcast by the respondent in such manner as may be determined by the Adjudicator or Tribunal;

14.4 direct that a respondent grant reasonable access in its broadcasts on an equal opportunity basis to a political party, organisation or movement or candidate in a case where the Code was not complied with and the BCCSA has jurisdiction to hear the matter in terms of its recognition in terms of section 54(3) of the Electronic Communications Act 2005 or where any applicable legislation does not provide for jurisdiction of the CCC of the ICASA. The same rule shall apply with the necessary changes in the case where the sanction of the Tribunal or an Adjudicator is that a broadcaster must afford a complainant a right to reply.

14.5 impose a fine not exceeding R80,000 on any respondent adjudged to have infringed the Code, whereupon the fine so imposed shall be a debt due to the BCCSA and recoverable as such. The maximum amount of the fine may be increased by resolution taken at an AGM or SGM.

14.6 in its reasons for its findings, record criticism of the conduct of the complainant in relation to the complaint, where such criticism is in its view warranted;

14.7 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."

41 In its complaint, the DA seeks “an opportunity to present our own offer on land and jobs to the electorate, as Mr. Ramaphosa had done with the ANC’s offer, on an equitable basis”. This relief is plainly contemplated in paragraph 14.4 of the BCCSA Constitution and I submit that it would be appropriate.

42 In addition, I submit that it would be appropriate for the Tribunal to:

42.1 Reprimand the SABC; and

42.2 Direct that the Tribunal’s findings be broadcast by the SABC.

NICK FERREIRA

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