

**BEFORE THE APPEALS PANEL OF THE PRESS COUNCIL OF SOUTH AFRICA.**

Case number: 388/06/2018

In the matter between:

KAIZER CHIEFS FOOTBALL CLUB

APPELLANT.

and

SUNDAY SUN

RESPONDENT.

---

Findings of the Appeal Panel.

---

**Introduction and context.**

At the hearing on the 28<sup>th</sup> of November 2018, the appellant was represented by Mr B Winks instructed by Rupert Candy Attorneys and the respondent was represented by Mr L Mtukushe instructed by Jurgens Bekker Attorneys. At the commencement of the hearing, I indicated to the parties that Judge Bernard Ngoepe, the Chair of the Appeals Panel, had delegated the responsibility of chairing this particular appeal to me.

In essence, the appellant is aggrieved by an article published by the respondent on the 10<sup>th</sup> of June 2018 which it states is fabricated, inaccurate and misleading. The article states that Mr I Khune, the goalkeeper of Kaizer Chiefs and the current national team goalkeeper, was unable to attend an awards ceremony because he either adversely reacted to the alcohol he consumed the evening before the awards ceremony or because someone jealous of his success had spiked his drink.

The Press Ombud, Mr J Retief, found that as two sources had confirmed the allegations, it was reasonable for the respondent to have formed the view that it was permissible to report the allegations as allegations. However the Ombud went on to find that the journalist, Mr P Mzila, either did not ask the appellant's spokesperson, Mr V Maphosa, about Mr Khune's alleged drinking or did not accurately report his response to that question. He thus concluded that this amounted to a breach of Section 1.8 of the Press Code which states:

The media shall seek the views of the subject of critical reportage in advance of publication.... If the media are unable to obtain such comment, this shall be reported.'

There is no appeal by the respondent against the finding that section 1.8 was breached and hence the conclusions on this issue remain binding on all the parties. The appellant was dissatisfied with the finding that it was reasonable to publish the article and appealed against the finding. Judge Ngoepe found that there was a reasonable prospect that this appeal is likely to succeed and granted the appellant leave to appeal.

### **Locus Standi**

The respondent contended that as the article concerned Mr Khune, the appellant which is a football club, had no standing to approach the Ombud or to prosecute this appeal. In essence, the respondent argued that Mr Khune could have acted in his own name but chose not to do so. The appellant resisted this argument by pointing out that the article referred to it on three occasions. As the article reported on a player that was closely associated with the club in the minds of the public and as the club was referred to on three occasions in the article, it was submitted that the club was acting in its own interest in this matter. Further it was submitted that as this point was not raised before the Ombud, it was now too late to argue on appeal that the appellant lacks standing.

We are of the view that this point in limine stands to be dismissed. The Ombud specifically found in favour of the appellant that the respondent acted contrary to section 1.8 of the Press Code. This finding is premised on the appellant having the requisite standing to lodge the complaint. If the appellant lacked the requisite standing then the Ombud ought not to have entertained the complaint in the first instance. The specific findings in favour of the appellant made by the Ombud could only have been made if the former had the standing to lodge the

complaint. The respondent decided to accept the decision and not appeal against this finding.

After the appellant lodged its appeal against the finding that the respondent acted reasonably in publishing the allegations, the respondent took the point that the appellant lacks standing. It appears to us that by not questioning the standing of the appellant before the Ombud and having decided to accept the Ombud's ruling that it transgressed section 1. 8. of the Press Code, the respondent cannot now, at an appeal, question the issue of standing. This point ought to have been properly taken before the Ombud. It also is not legally sustainable to accept the finding of the Ombud that the respondent transgressed the code but still question the standing of the complainant in whose favour the finding was made.

The respondent sought to rely on the decisions of *Mvusiwekhaya Sicwetsha v The Herald*<sup>1</sup> and *Sekunjalo Investments v Sunday Times*.<sup>2</sup> The facts of these cases are materially dissimilar to the facts at hand and the conclusions reached are not applicable.

In any event, it is our view that the definition of complainant in section 1 of the Complaints Procedure should be given a reasonably wide interpretation. A person acting in their own interests has standing in terms of section 1.1 of the Complaints Procedures. The reference in the article to the appellant and suggestions that one of its leading players missed an important awards day because of a drinking session is sufficient in law to clothe it with the requisite standing to have its complaint adjudicated upon. It is in its interest to have that impression corrected if the publication was not reasonable.

We now turn to the merits of the matter.

### **Was the publication of the article reasonable?**

It is clear that the article refers to the allegations as allegations. It was not disputed that the Appellant issued a media statement indicating that Mr Khune, who was suffering from abdominal pains, would not feature in the final match of the season. It is also uncontested that the medical advice was that Mr Khune should not attend the awards ceremony and that he was on prescribed medication at the time.

---

<sup>1</sup> . Mvusiwekhaya Sicwetsha v The Herald 15 April 2013

<sup>2</sup> . Sekunjalo Investments v Sunday Times (case number 526/ 2013 14 April 2014

The Ombud correctly identified the issue as being whether the respondent had adequate grounds to believe that it was justified in publishing the allegations. The primary reason for the Ombud concluding that the respondent had acted reasonably and was justified in publishing the allegations was that two sources had confirmed the allegations. The office of the Ombud then contacted the two sources who 'confirmed the allegations.'<sup>3</sup> Based on this, the respondent contended that the Ombud was correct in finding that it acted reasonably in publishing the allegations. The appellant disputed that the publication was reasonable primarily on the basis that there was insufficient verification of anonymous sources. As a consequence, they contended that a fabricated, inaccurate and misleading article was published in breach of section 1.1 and 1.2 of the Press Code.

On a close reading of the article, it becomes apparent that one of the sources reported what the lady dating Mr Khune had told him or her and is therefore hearsay. In argument it was submitted that the respondent had a third source. We are of the view that the reasonableness or otherwise of the publication must be determined and assessed in the light of the facts and context existing at the time of publication.

The Ombud was correct in concluding that there are circumstances, where a publication has to protect the identities of its sources. Section 11 of the Press Code recognises the need to protect confidential sources of information but requires that care should be taken to corroborate the information supplied by the anonymous sources.

It appears to us that there was one anonymous source that was corroborated by another source indicating what he or she was allegedly told by Mr Khune's girlfriend. The appellant contended that the Ombud acted contrary to his own advice in *Maarohanye*<sup>4</sup>, where he cautioned against using hearsay to corroborate information.

It does appear to us that when Mr Vino Maphosa effectively denied the versions of the sources, more verification was required. The conversation with Mr Maphosa should have alerted the reporter to the fact that the appellant had a version that was materially different to that presented by the sources. Mr Mzila, despite the absence of any urgency, chose not to

---

<sup>3</sup> . E-mail from Ms Khanyi Mndaweni dated 16 October 2018.

<sup>4</sup> . The Maarohanye Family v Sunday World. Ombud Ruling, 30 July 2013.

revert to and solicit the response of the sources to the version presented by Mr Maphosa. No reasonable explanation was provided for this failure.

With respect, it was necessary for the office of the Ombud to do much more than just enquire from the sources whether they confirmed the allegations. From the papers before us, it seems that the sources 'confirmed the allegations.' Whilst we appreciate that the office of the Ombud was simply seeking to determine whether the allegations were made by the sources to the reporter, this is an instance when more should have been done. In the light of the appellant's version that the article is untrue, which appears to draw support from objectively verifiable facts such as public statements made by the club, the sources should have been questioned more closely. An anonymous source supported by another source repeating what someone else had indicated, had to be approached with a measure of circumspection. No attempt was made to determine whether these sources were independent of each other, neither were asked to comment on any detail such as where Mr Khune was taken for treatment and neither were asked for their response to the appellant's refutation of their assertion. The conversation that Ms Khanyi Mndaweni of the office of the Ombud had with the sources, in these circumstances, should have been more detailed.

The issue that remains is whether it was reasonable for the respondent to publish the article as allegations. Describing the assertions as allegation does not excuse the publishers from complying with the requirement that the publication must be reasonable. As stated in **Bogoshi**,<sup>5</sup> in addition to the nature, extent and tone of the allegation, regard must also be had to the nature of the information on which the allegations were based, the reliability of the sources, and the steps taken to verify the information.

In this case, reliance is placed on an anonymous source and on another who appeared to be reporting hearsay statements. No effort appeared to be made to ascertain whether these sources were independent of each other and wholly inadequate attempts were made to verify their versions after the club had provided a contrary narrative. The respondent did not revert to the sources and solicit their views on the alternative version provided by the club. There was no urgency in publishing the story and no reasonable explanation was provided for failing to report fully and accurately on the contrary version provided by the appellant. A reasonable

---

<sup>5</sup> . **National Media Ltd v Bogoshi** [1998] (4) SA 1196 (SCA)

publication would have accurately reported the version advanced by the appellant categorically denying the allegations and should have expended more effort in verifying its sources. Subsequent to the hearing of the appeal, the respondent provided the names of its sources. This disclosure does not justify either the failure of the respondent to revert to the sources with the version of the appellant or their further failure to report fully and accurately the contrary version provided by the club.

For these reasons, we are of the view that the publication was not reasonable in that inadequate care had been taken to report the news truthfully, accurately and fairly in contravention of section 1.1 of the Press Code.

We are also of the view that the argument that the article did not cast Mr Khune in a poor light is without merit. He is a national figure and it is asserted that he was unable to attend an important event either because of an adverse reaction to alcohol that he had consumed or because someone had spiked his drink. Both the appellant and Mr Khune had cause to complain that the article portrayed them as ill-disciplined and not particularly committed to their responsibilities.

Mr Khune initially did not submit a confirmatory affidavit and nor did he indicate that he associated himself with the assertion that the article was untrue and that his rights to dignity, reputation and privacy were infringed by the publication. Mr Winks indicated that an affidavit was not submitted as the appellant did not think it was necessary to do so. However the appellant was willing to submit an affidavit by Mr Khune. After some prevarication, the respondent agreed that an affidavit can be submitted by Tuesday, the 4<sup>th</sup> of December 2018. After a further delay occasioned by Mr Khune's playing commitments, an affidavit was submitted. In the affidavit, Mr Khune denied the allegations in the story and affirmed that he fully supported this complaint lodged by the appellant.

**The issue of repeatedly offending.**

The Complaints Procedure makes provision for a finding that the publication is a repeat offender. The appellant argued that if the respondent violated clauses 1.1 and 1.2 of the Press Code, they should be declared repeat offenders. Reference was made to a previous ruling by

this panel in *Julegka Motaung v Sunday Sun*,<sup>6</sup> in which the respondent was ordered to include in its apology that it was a repeat offender. The respondent disputed that the Appeal Panel had such power and contended that section 8.3 vests this power in the Ombud. The appellant pointed out that the Appeal Panel has fairly wide powers on appeal and these must include the power to either make or upset a finding that the publisher is a repeat offender.

Section 8.3 of Complaints Procedures provides that ‘when the Ombud finds that a publication is a repeat offender, he or she should specifically point this out in the ruling.’ A further issue is whether the Appeal Panel can consider this issue when the Ombud has not made a finding one way or the other on this point. As a consequence of the conclusions we have reached, it is not necessary for us to make a definitive finding on this point. From our perspective, an investigation and finding by the Ombud on this issue will be of considerable assistance to the Appeal Panel. The power to declare a publication a repeat offender can only be made if there has been a material similarity between the present and a past transgression. The mere fact that the publication has transgressed the same provision or provisions of the Press Code in the past does not of itself justify a finding that the publication is a repeat offender. There has to be material similarity between the various transgressions. The Press Code is crafted at the level of principle and the transgressions of the same sections can occur in materially different circumstances. Whether the same journalists and editors were involved, whether the subject matter was similar, whether the nature of the transgression were materially similar and the period of time between the transgressions are some of the facts that need to be considered prior to arriving at a decision as to whether the publication is a repeat offender. We simply do not have adequate information before us to reach a conclusion that there is a material similarity between this transgression and past matters involving the respondent. In the circumstances no ruling is made that the publication is a repeat offender.

In the circumstances the following order is made:

---

<sup>6</sup> . *Julegka Motaung v Sunday Sun* (Appeal Panel Ruling, 12 October 2018)

**Order:**

- 1. The appeal succeeds as the respondent is found to have breached article 1.1 of the Press Code.**
- 2. The respondent is directed to issue an apology for failing to take care to report the news truthfully, accurately and fairly.**
- 3. In drawing up the apology, the respondent is to have regard to the comments made in our decision.**
- 4. The findings of the Ombud must be incorporated in the apology.**
- 5. The respondent must, within 5 days of receipt of this Order, email a copy of the draft apology to the appellant and to the Director of the Press Council.**
- 6. Within 3 days of receipt of the draft apology, the appellant must submit its comments, if any, to the respondent and the Director of the Press Council.**
- 7. Within 5 days after the 3 days referred to in paragraph 6 above, the Director will, in the event the parties do not agree thereon, immediately determine the final version to be published and inform the parties accordingly.**
- 8. The date for the publication of the apology will be determined by the Director, and shall enjoy the same prominence as the story complained about.**

Dated this 24<sup>th</sup> day of January 2019.



Prof. K Govender, Acting Chair, Appeals Panel

Mr J Thloloe, Member, Press Representation

Ms C Mohlala, Member, Public Representative.