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Sent: 14 November 2011 07:42 AM
Attach: Buthelezi Star Appeal Ruling Final 10 11 11.doc
Subject: FW: Buthelezi/Independent Newspapers RULING

Dear Moegsien

I refer you to this finding of the Press Appeals Panel. Please prepare text for publication and send it to the PAP for approval. The three members are cc-ed above – Judge Zulman, Brian Gibson and Peter Mann.

Kind regards

Johan

From: ralph zulman [mailto:ralphzulman@hotmail.com]

Sent: 12 November 2011 05:53 PM

To: tsischy@absamail.co.za; janet.smith@inl.co.za

Cc: Johan Retief; Khanyi Mndaweni; gibson@icon.co.za; petermann@meropa.co.za

Subject: Buthelezi/Independent Newspapers RULING

I attach a copy of the ruling in the above matter.

Please acknowledge receipt.

Thank you

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Sibusiso Buthelezi vs. The Star

On 18 October, 2011, the Appeals Panel of the Press Council of South Africa (SAPC) considered an appeal by Mr Sibusiso Buthelezi against a ruling on 16 August 2011 by the Deputy Ombudsman of the Press Council, Johan Retief, regarding a complaint by Mr Buthelezi about an article published in The Star on 8 November 2010 headlined "DA to sue after Gauteng ignores R50 million overspend".

The Panel was chaired by Retired Judge R H Zulman, assisted by two appeal panelists, Peter Mann (media representative) and Brian Gibson (public representative).

Mr Buthelezi was represented by Advocate L L Norman and The Star was represented by the news editor, Ms Jillian Green.

The Complaint and Ruling by the Deputy Press Ombudsman

In May 2011, Mr Sibusiso Buthelezi, the former head of the Gauteng Transport and Public Works Department (DPTRW), lodged a complaint with the Ombudsman. The 12-page document contained 58 paragraphs variously complaining and explaining why Mr Buthelezi was unhappy with the article.

Retief described the article thus: "The story, written by Anel Lewis, says that the Gauteng Department of Roads and Transport will not take legal action against Buthelezi for overspending by more than R50 million on a security contract. This reportedly came despite a call from Public protector, Thuli Madonsea for an investigation by the Gauteng government and the National Treasury into a R71 million contract that has been awarded to a company with links to the former communications minister, Siphwe Nyanda. The story says that a settlement was reached when Buthelezi resigned, adding that the DA was going to lay a charge of financial misconduct against him at the Police's Commercial Crimes Unit."

Retief summarised Buthelezi's complaint as follows:

1. The Star failed to verify the contents of the story with him and GNS Risk Advisory Services (GNS) or seek their comments prior to publication.

2. The Star falsely/untruthfully/inaccurately stated or implied that:

a) he was the culprit who illegitimately appointed GNS to G-Fleet and UTF;

b) he had "overspent" R50 million on GNS;

c) the companies that replaced GNS were doing the same work;

d) GNS was "exorbitant" and a "giant rip-off";

e) GNS did not do risk assessment for the DPTRW; and

f) GNS provided ordinary physical guarding services.

3. The Star failed to state that the Auditor General had not made any adverse findings about the appointment and the costs charged by GNS.

Based on the response of The Star and an informal hearing, Retief found as follows:

1. The Star was under no obligation to ask Buthelezi to verify the content as it was reporting on a "legislative process". The complaint was **dismissed**.

He observed, however, that The Star had indicated in an informal hearing that it was prepared to apologize to Buthelezi for failing to ask him for comment and was free to do so if it so wished, although he would not make it a formal ruling.

2 a) The article did not say or imply that Buthelezi illegitimately appointed GNS and this complaint was **dismissed**.

b) The newspaper correctly admitted that the phrase "for overspending" could be misleading and that it should have read "for authorizing" expenditure. This was a **breach** of Art. 1.2 of the Press Code that states: "*News shall be presented in context and in a balanced manner, without any intentional or negligent departure from the facts whether by distortion, exaggeration or misrepresentation...*" It was also unfair to create the impression that he was responsible for all the amounts that were mentioned later on in the story, as at least a part of the expenditures may well have been spent by somebody else after his initial suspension on 14 July 2009 and later resignation on 30 November 2009 (a period of eight months has elapsed between his suspension and the cancellation of GNS's contract). This is a **breach** of Art. 1.1 of the Press Code that states: "*The press shall be obliged to report news truthfully, accurately and fairly.*"

c) The complaint that The Star implied that the new service providers "rendered the same service" as GNS was **dismissed**.

d) The complaint that The Star had falsely stated that GNS was paid "exorbitant" monthly fees and was "a giant rip-off" was **dismissed**, as both statements were attributed to others.

e) The statement in the article that GNS did not do a risk assessment was not true and was in **breach** of Art. 1.1 of the Press Code that states: "*The press shall be obliged to report news truthfully, accurately and fairly.*"

f) The part of the complaint relating to GNS providing ordinary physical guarding services was **dismissed** as the concept "guard" could also refer to guarding systems and not only to people who do a guarding job.

3. This complaint that The Star was under an obligation to state that the Auditor General did not make any adverse findings about the appointment and the costs charged by GNS was **dismissed** as the newspaper was merely reporting on a legislative process.

The Star was **reprimanded** for:

- Misleadingly stating that Buthelezi had overspent R50 million, instead of saying that he had authorized that amount;
- Unfairly creating the impression that Buthelezi was responsible for all the expenditure that was mentioned towards the end of the story; and
- Erroneously stating as a fact that GNS did not do a risk assessment.

The newspaper was directed to **apologise** to Buthelezi for the first two issues for which it was reprimanded and to **publish a summary** of the finding.

The Appeal:

Mr Buthelezi appealed against the ruling on the grounds that:

1. The Star should not have been given the discretion whether or not to apologize for failing to verify the contents with, or seek comment from, Mr Buthelezi.
 2. The Deputy Ombudsman misunderstood the complaint as being that Buthelezi "was the culprit who illegitimately appointed GNS to G-Fleet and UTF" when the original complaint was that "it (the article) doesn't distinguish (sic) clearly that DPTRW, G-Fleet and UTF each appointed GNS independently and that GNS contracted/rendered services with each unit independently"; and further that the appellant in his former capacity as HOD of DPTRW did not personally appoint the two services providers: "The appellant can therefore not be held accountable as to whether the appointment of GNS to G-Fleet and UTF was legitimate as they were separate entities".
 3. Although the Deputy Ombudsman found in favour of the complainant that The Star give an incorrect impression that Mr Buthelezi (rather than the Department) had "overspent" the R50 million, The Star should also have made it clear that Head of Department was only accountable for the portion of the expenditure directly attributable to the Department; and not that which was attributable to the underlying entities, namely G-Fleet and UTF.
 4. The Deputy Ombudsman should have found against The Star for not drawing a clear distinction between the different services offered by the new service providers (as opposed to GNS) as this would have made it clear that the Department and its underlying entities received fair value for money from the original service provider, GNS.
 5. The Star failed adequately to attribute the "giant rip-off" and "exorbitant spending" comments to the sources.
 6. The Deputy Ombudsman failed to understand the critical difference between ordinary "guarding services" and "specialized integrated security services".
 7. The failure to ask Mr Buthelezi for his comment deprived him of the opportunity to point out that the Auditor General had made no adverse findings on the appointments.
- The heads of argument submitted by the complainant's legal representative at the panel hearing expanded further on the basis for the appeal:
- The Star published information that was "untruthful, inaccurate, not in a balanced manner and omitted relevant information";
 - The Star did not make it sufficiently clear to the reader that the article was based on the outcome of a legislative process (i.e. a written reply to a question in the legislature);
 - Even if it did not say the contracts were illegitimate, the tone and content of the report "imputes" that GNS was not appointed legitimately; and
 - While the Deputy Ombudsman found that Buthelezi did not personally spend the disputed funds, The Star misquoted the MEC on the matter and should be forced to issue a correction.

The Star did not respond to the notice of appeal and its representative at the hearing confirmed that she was not well prepared.

The proceedings of the Panel

The nuanced and sometimes confusing "interpretations" of the article by the complainant's representatives and the Deputy Ombudsman caused the Panel to first examine its own understanding what was reported in the article.

The thrust of the article:

It is clear to the Panel that the thrust of the article was that a DA representative, Jack Bloom, intended to lay a charge on 8 November 2011 with the Commercial Crimes Unit alleging financial misconduct by Buthelezi in terms of the Public Finance and Management Act.

This was in terms of a "controversial" contract awarded without an open tender process to GNS Risk Advisory Services in October 2007.

Bloom said in a statement that he had acted because the MEC had advised him in a written reply to a question posed in the provincial legislature that no action would be taken against the former HOD in terms of a settlement when Mr Buthelezi resigned.

The article quoted extensively from the MEC's written reply, providing a comparison between the prices charged by GNS and other service providers later appointed to replace GNS.

On the basis of this information, Bloom estimated that the department had overpaid more than R50 million before the GNS contract was stopped in March 2010.

The article also said that the Public Protector had called for an investigation into the GNS contract.

The Panel's assessment:

Given the complexity of the proceedings, the Panel decided to start at the beginning and review the basis for the original complaint.

In essence, Mr Buthelezi was unhappy because he felt that the article implied that he had sidestepped tender processes and had personally directed that R50 million should be "overpaid" to GNS.

The Panel understood Mr Buthelezi's argument to be that there are degrees of accountability and that, although he was the accounting officer for the department and accepted responsibility for his personal actions, he was not accountable for the conduct of others in the department that was beyond his direct knowledge or influence.

He would have liked the opportunity to point out to The Star that he was not personally involved in the appointments of GNS to service the needs of the G-Fleet and UTF, that much of the

contractual expenditure had taken place without his direct knowledge (or while was suspended and/or after his resignation), and that the Auditor General had not given an adverse finding on the contracts.

The Star responded that it was not obliged to ask Buthelezi for his comment because their story was based on the MEC's response to Bloom's question in the legislature. However, in its response to the original complaint, The Star said that "if anything" it was prepared to apologise to Mr Buthelezi for not asking for his comment.

The Deputy Ombudsman was impressed with the "privilege defence" offered by The Star: it had been reporting on a "legislative process" and was therefore not bound to verify the facts (Article 1.4 of the Press Code) or seek further comment (Article 1.5).

The Panel found it necessary to explore the issue of "parliamentary privilege" more thoroughly, especially because it is not specifically dealt with in the Press Code.

Section 117 of the Constitution of South Africa states: "(1) Members of a provincial legislature and the province's permanent delegates to the National Council of Provinces – (a) have freedom of speech in the legislature and in its committees, subject to its rules and orders; and (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for – (i) anything that they have said in, produced before or submitted to the legislature or any of its committees; or (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the legislature or any of its committees. (2) Other privileges and immunities of a provincial legislature and its members may be prescribed by national legislation."

Clearly, members of the provincial legislature enjoy absolute protection and may therefore speak freely in the legislature without fear of civil or criminal action.

But how far can a publication go in reporting what was said in a privileged environment? International convention (and legal precedent in some countries) is that the media may freely report privileged statements – even if they are defamatory, as long as it does so fairly and accurately.

According to "The Media and the Law: A handbook for community journalists" published by the South African Freedom of Expression Institute in 2007: "Statements made by witnesses in court, arguments made in court by lawyers, statements by legislators on the floor of the legislature, or by judges while sitting on the bench, are ordinarily privileged, and cannot support a cause of action for defamation, no matter how false or outrageous."

Thus, The Star would have a strong defence against defamation claims in regard to the portions of the disputed article that were reliant on the privileged exchange between Bloom and the MEC.

But is the media required to seek comment from the subject of privileged debate?

The Press Code allows only three exceptions to the strict requirement that the other side should be heard: where there are reasonable grounds to believe that publication might be blocked, evidence destroyed or witnesses intimidated.

The authors of the Code do not entertain "privilege" as an excuse for reporters not seeking pre-publication comment from those who have been maligning in a privileged environment. The Panel accepts however that such a requirement places an intolerable burden on the media. The Press Code is currently under revision and this oversight should perhaps be addressed.

In considering this appeal, the Panel also had to consider the more nuanced question whether the Star was obliged to seek Buthelezi's comment before reporting what was said about him in a non-privileged environment.

In the Panel's view:

- The factual account in the article of what was asked by Bloom and answered by Nkosi in the legislature fell squarely under the heading of privilege and The Star's defence that it was not necessary to seek comment is solid in respect of these portions of the article. With the exception of one small transposition, The Star reported accurately from the MEC's written reply to Bloom in the provincial legislature.

- Bloom's further analysis and commentary on the matter in his press statement was a subsequent development that took place in the public domain and fell outside of the protection of privilege. The Star was therefore bound to seek Buthelezi's comment on these new developments prior to publication.

In passing, the Panel believes that The Star erred in not referring to Buthelezi only as "Sibusiso Buthelezi". This was not only discourteous but placed an emphasis on the person as opposed to the position of accounting officer of the Gauteng's Transport and Public Works Department. It was important to let the reader know that Buthelezi was being charged in his official capacity.

The Panel also dwelt on the variable interpretation of accountability given by Mr Buthelezi in his appeal. He was of the opinion that the accounting officer cannot be held accountable for actions that took place without his knowledge or approval; or in some remote corner of the organisation.

www.businessdictionary.com defines accountability as follows: "The obligation of an individual or organisation to account for its activities, accept responsibility for them, and to disclose the results in a transparent manner. It also includes the responsibility for money or other entrusted property."

As the accounting officer, Mr Buthelezi was responsible for everything that occurred in the department on his watch, whether or not he directly supervised or personally knew of it. In many other jurisdictions, the responsible accounting officer would have fallen on his sword. The Panel rejects his assertion that The Star had an obligation to point that he had not personally authorised all elements of the contract monies.

Mr Buthelezi complains specifically about the estimation made by Mr Bloom (R50 million) and his description of the contract as "a giant rip-off". The Panel can find no fault in The Star reporting the attributable views of a leading politician.

Furthermore, the Panel accepts that The Star expressed a legitimate editorial opinion when it said that MEC "Nkosi revealed that Abalozi (formerly GNS) was paid exorbitant monthly fees for work that could have been done at a fraction of the price" (**our emphasis**).

The Panel considered the numerous other complex arguments put forward by Mr Buthelezi and his legal team relating to the nature, cost and timing of services offered by GNS and other providers, as well as the numerous new points raised in their heads of argument, but decided against ruling on them because, as argued by The Star, they were irrelevant to the main thrust of the article and the finding by the Deputy Ombudsman.

THE RULING OF THE APPEALS PANEL

Ruling of the Appeals Panel	Basis of Appeal
<p>Dismisses the appeal and confirms the ruling of the Deputy Ombudsman that The Star was under no obligation in respect of Article 1.4. of the Press Code to ask Buthelezi to verify the content of the article because it was clearly attributed (and also arose directly from privileged information).</p> <p>Grants the appeal and overrules the opinion of the Deputy Ombudsman that The Star was not obliged in respect of Article 1.5. of the Code to seek Buthelezi's comment on the article (and that The Star was at liberty to apologise for not doing so if it so wished). Article 1.5. requires a publication to seek the views of the subject of serious critical reportage in advance of publication. The Star's has no defence of privilege relating to the subsequent actions of Mr Bloom outside of the legislature.</p>	<p>1. The Star should not have been given the discretion whether or not to apologize for failing to verify the contents with, or seek comment from, Mr Buthelezi.</p>
<p>Dismisses the appeal on the grounds that Mr Buthelezi was wholly accountable for what occurred in the department while he was the accounting officer.</p>	<p>2. The Deputy Ombudsman misunderstands the complaint as being that Buthelezi "was the culprit who illegitimately appointed GNS to G-Fleet and UTF" when the original complaint was that "it (the article) doesn't distinguish (sic) clearly that DPTRW, G-Fleet and UTF each appointed GNS independently and that GNS contracted/rendered services with each unit independently"; and further</p>

<p>that the appellant in his former capacity as HOD of DPTRW did not personally appoint the two services providers: "The appellant can therefore not be held accountable as to whether the appointment of GNS to G-Fleet and UTF was legitimate as they were separate entities".</p>	<p>Dismisses the appeal on the grounds that Mr Buthelezi was wholly accountable for what occurred in the department while he was the accounting officer.</p>
<p>3. That, although he found in favour of the complainant in regard to the incorrect impression given that Mr Buthelezi (rather than the Department he led) had "overspent" the R50 million, The Star should have made it clear that Head of Department was only accountable for the portion of the expenditure directly attributable to the Department and not that which was attributable to the underlying entities, namely G-Fleet and UTF.</p>	<p>Dismisses the appeal on the grounds that The Star was reporting on the content of a written reply in the provincial legislature and had no duty to explain further.</p>
<p>4. The Deputy Ombudsman should have found against The Star for not drawing a clear distinction between the different services offered by the new service providers (as opposed to GNS) as this would have made it clear that the Department and its underlying entities received fair value for money from the original service provider, GNS.</p>	<p>Dismisses the appeal in that The Star was expressing a fair editorial comment in terms of Article 4 of the Press Code.</p>
<p>5. The Star failed adequately to attribute the "giant rip-off" and "exorbitant spending" comments to the sources.</p>	<p>Dismisses the appeal in that the distinction made by the appellant is irrelevant to the thrust of the article.</p>
<p>6. The Deputy Ombudsman failed to understand the critical difference between ordinary "guarding services" and "specialized integrated security services"</p>	<p>Acknowledges that the breach of Article 1.5. of the Press Code could have had this effect, although the Panel is reluctant to make</p>
<p>7. The failure to ask Mr Buthelezi for his comment deprived him of the opportunity to point out that the</p>	

Auditor General had made no adverse findings on the appointments.	assumptions as to how Mr Buthelezi might have responded had been given the opportunity.
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Given its analysis of the issue of accountability, the Panel also felt it logical to overturn **ruling 2) b)** of the Deputy Ombudsman that the newspaper was in breach of Article 1.1. (*fairness*) and Article 1.2. (*balance*). The Deputy Ombudsman said The Star should have made it clear that Mr Buthelezi was accused of authorising rather than incurring the expenditure; and that some of the expenditure might have taken place while he was suspended or after his resignation. In the Panel's view, not only was Mr Buthelezi wholly accountable for what transpired on his watch but it was unreasonable to expect The Star to provide a detailed calendar of events.

Furthermore, the Panel **overturns ruling 2) e)** of the Deputy Ombudsman that The Star was in breach of Article 1.1 of the Press Code when it reported that GNS did not do a risk assessment. Buthelezi insists the work was done. However, this statement in The Star was taken directly from the MEC's written response to Mr Bloom and therefore privileged.

Sanction:

The Sanction imposed by the Deputy Ombudsman is withdrawn and replaced with the following:
 The Star is directed to publish an apology to Mr Buthelezi for failing prior to publication to seek his comment on elements of the article that were not covered by privilege.

Retired Judge Ralph Zulman
 Chairman
 Press Appeals Panel

Mr Peter Mann
 Media Representative

Brian Gibson
 Public Representative

10 November 2011