

Before the Appeals Panel of the Press Council of South Africa

In the matter between:

Mthembu Sibongiseni Jerome

Appellant

and

News24

Respondent

Matter No: 8971/06/2021

APPEAL DECISION

1. This is an appeal by Mr Jerome Sibongiseni Mthembu (appellant) against a Ruling of the Deputy Press Ombud dated 25 August 2021. It was a Ruling on a complaint that was filed by the appellant against News24 (respondent). The complaint was against three articles published by the respondent on 28 May 2021 (first article), 29 May 2021 (second article) and 5 June 2021 (third article).

2. The articles complained of

Regarding article 1: The part of the first article the appellant complained about was the following: “... *Despite these successes and requests from the SIU that Bowmans’ mandate be extended Mthembu, the then acting head of the legal office, and Solly Tshitangano, the now-suspended chief procurement officer, informed Bowmans on 15 May 2019 its co-operation agreement with the SIU to investigate various parts of the business- including significant instance of alleged corruption at Kusile, former acting chief executive Matshela Koko and*

allegations of corruption around contracts with ABB and fuel oil supplier Econ Oil- was terminated”.

Regarding article 2: The complaint relating to this article was correctly dismissed by the Deputy Press Ombud, and the appellant was denied leave to appeal against that decision. This complaint therefore does not feature in the appeal.

Regarding article 3: The article stated that there was a preliminary forensic report by Bowmans attorneys “... *that found evidence of impropriety and possibly corruption by former Eskom official Thandi Mara in her dealings with Econ Oil. Shortly after this report was provided by Eskom, Tshitangano and former head of legal Jerome Mthembu suspended Bowmans’s co-operation with the SIU, and by May 2019 Bowmans mandate was suspended, again with the knowledge of Mr Mthembu and Tshitangano. Bowmans was also told by Mr Mthembu that it could only finalise investigations into matters as instructed by Eskom – But Econ Oil was not finalised until after De Ruyter’s appointment”.*

3. It is clear from the two articles that the main accusation against the appellant is that he was, together with one Tshitangano, responsible for the termination of investigations by Bowmans against possible corruption Thandi Mara in relation to Econ Oil, Matshela Koko, and a company known as ABB. The gist of the articles was therefore that the appellant terminated investigations into possible corruption. The crux of the appellant’s complaint was that the story that he suspended or terminated the investigations relating to the above people or entities was false and malicious. He argued that the articles were in breach of articles 1.1, 1.2 and 1.3 of the Code. In his Ruling, the Deputy Ombud held that

the respondent acted in breach of article 1.2 and imposed a sanction, but dismissed complaints that articles 1.1 and 1.3 were also contravened. The appellant then sought, and obtained, leave to appeal the dismissal. The respondent's counter-application for leave to appeal the finding that it had breached article 1.2 was dismissed.

Background to the complaint

4. The appellant gave some background to the matter. He was at one time the legal head at Eskom, together with one Bartlett Hewu. On 8 August 2018 Eskom appointed and gave mandate to Bowmans to investigate corruption allegations at the Kusile and Medupi Power Stations. The appellant had personally written a motivation for the mandate and the appointment which was signed on 8 August 2018 by Eskom's Chief Operating Officer, Mr Jan Oberholzer. The mandate had to do with the investigations of alleged fraud and corruption in the construction of the two power stations, a project which he says was assigned to him to manage at the time, and no other investigations.
5. By a memorandum dated 25 June 2019, the Medupi and Kusile Mandate was terminated as a result of budgetary constraints. The appellant said that the termination followed "*a series of meetings with Bowman and Eskom regarding the same issue. The memorandum was prepared by (him), recommended by Jan Oberholzer and approved by Mr Caleb Cassim, the current Chief Financial Officer*". The appellant attached a copy of the memorandum to his complaint.
6. The appellant says that on 3 May 2021 at 19h57 he received a WhatsApp message from a journalist from News24, Kyle Cowan which read: "*I have some questions regarding your role in the suspension of the mandate of Bowmans*

during your time at Eskom as well as Econ Oil We are aiming to publish something on Thursday morning that will seek to clarify your role". On 4 May 2021 the applicant responded that as he had resigned in December 2019 from Eskom, he might be limited in providing information, but invited Mr Cowan to submit questions to him if he thought he would be of some assistance. On the same day, Mr Cowan sent a number of questions to the appellant's email address.

7. As indicated above, the respondent's articles were about the alleged termination of Bowmans's investigation into corrupt dealings in connection with Econ Oil. The last of the question said it all: "*Do you deny that you and Mr Tshitangano acted in a manner to benefit Econ Oil with regard to the suspension of the Bowmans Mandate in May 2019?*" Equally, the first question was: "*Can you confirm that in May 2019, yourself and Mr Tshitangano suspended the mandate of Bowmans and can you please provide clarity on the reasons for this?*"
8. On 5 May 2021, the appellant responded to the above questions in detail; he attached a copy of his email; amongst others, he stated that he never worked with Mr Tshitangano on the issue of the suspension of Bowmans mandate. He explained why, and the circumstances leading to, the suspension of the mandate as stated in paragraph 5 above and added that the suspension memorandum was signed off by both Mr Oberholzer and Mr Cassim. At this stage, it must therefore be said that Mr Oberholzer's claim, as alleged by the respondent, that he did not know about, or had nothing to do with, the suspension must be rejected because he signed the suspension memorandum.

The applicant also stated, in his detailed response, that he never participated in any decision with Mr Tshitangano involving Econ Oil whilst at Eskom; that he was only involved in investigations relating to Medupi and Kusile Power Stations as *per* the engagement letter of 8 August 2018 referred to above. His last point bears repeating: “*I was never ever involved in any investigation whatsoever concerning Econ Oil. Therefore, any allegation linking me to Econ Oil investigation and Bowmans suspension is misleading, malicious and devoid of any truth”.* (Own emphasis). When the respondent published the first and the third articles which conveyed that the appellant was involved in the termination of Bowmans mandate to investigate Econ Oil (and for that matter Ms Mara and Mr Koko), the appellant’s above response was actually on respondent’s desk. It is noteworthy that on 5 May 2021, at 15h37, Mr Cowan sent an email to the appellant: “*Thank you for this detailed response. It is much appreciated*”. Indeed, it was a detailed response. A copy of Mr Cowan’s email was also attached to the complaint papers.

9. The following submission by the appellant, lengthy as it is, is worth repeating:

“2.13 it is important to bring to the Press Ombudsman’s attention that prior to responding to Mr Cowan’s questions..... Mr Cowan had already contacted Mr Bartlett Hewu, my then Co-Head of Legal at Eskom who worked with Bowmans to investigate Ms Thandi Mara for allegations of misconduct and improper relationship in connection with Econ Oil following a whistle blower report alleging acts of misconduct against Ms Mara involving Econ Oil.”

Mr Cowan inquired from Mr Hewu if I was ever involved in Econ Oil investigation and whether I influenced him to stop the investigation of Econ Oil. Mr Hewu responded to Mr Cowan and confirmed that:

- the first time Eskom commissioned Econ Oil 'specific' Investigation was in May 2020; and*
- that there was no push back from me regarding the finalisation of the Econ Oil investigation report. (Appellant's own emphasis).*

2.14 It is also important to state that I left Eskom employment on 31 December 2019, and when Eskom first commissioned an investigation of Econ Oil in May 2020 as per Me Hewu's confirmation to Mr Cowan in 2.13 above, I was no longer in the employ of Eskom at the time". (Appellant's own emphasis).

10. With particular reference to the third article, the appellant submitted the following to the Ombud: *"Econ Oil related investigation was never my matter/project to begin with, but Mr Hewu (sic) and secondly, Econ Oil 'specific' investigation was first commissioned by Eskom in May 2020, long after I had since left Eskom employment. Thirdly, the mandate I terminated together with Jan Oberholzer and Calib Cassim, related to Medupi and Kusile Mandate and nothing further than that. These facts are known to News24. It is therefore clear in the two paragraphs of Article 2 above that Mr Cowan is painfully trying to connect Bowmans mandate termination with the investigation of Econ Oil despite evidence to the contrary. Mr Cowan and/or News24 chose and still chooses to deliberately ignore the facts that Bowmans mandate termination had nothing to do with Econ Oil investigation. This, he did so in order to pursue*

News24's malicious and deliberate misrepresentation of facts that, I terminated Bowmans mandate in order to stop the investigations of Econ Oil despite evidence to the contrary. News24's conduct flies against the prescripts of the Press Code".

- The crux of appellant's complaint

11. In conclusion, the appellant submitted that when publishing the above articles, respondent already knew that the allegations that Bowmans mandate was terminated in order to advance the interests of Econ Oil, or stifle the investigations of Econ Oil, was malicious, ill conceived, unfounded and not supported by any shred of evidence. He referred to Mr Hewu's exculpatory response to Mr Cowan; to the fact that it was Mr Hewu who was in charge of Econ Oil related investigations at Eskom; he also referred to the Medupi and Kusile Power Stations Memorandum, and finally, his detailed response referred to above to Mr Cowan's questions. He argued that articles 1.1, 1.2 and 1.3 were breached. He sought a retraction of what was said, and an apology.

The crux of respondent's response

12. In his Ruling, the Deputy Ombud accurately summarizes the respondent's response: respondent disputes that Bowmans were mandated to investigate only Medupi and Kusile Power Stations; in this respect, reference was made to the mandate given to Bowmans on 9 May 2018, with the subsequent mandate of 8 August 2018 as a further mandate to investigate both stations. The preliminary report that raised irregularities was submitted in January 2019; the suspension of the Bowmans mandate therefore, amongst others, put the Econ Oil investigations on ice, only to be resurrected in 2020 when the new CEO, Mr

De Ruyter, was appointed. The memorandum motivating the suspension on the grounds of costs restraints was not a formal suspension of Bowmans's mandate; the mandate was already suspended by then.

Conclusion

13. In his Ruling, the Deputy Ombud stated: The two contentions issues are therefore whether (a) Mthembu stopped investigations into Econ Oil and Matshela Koko and (b) whether he did so alongside Solly Tshitangano, then chief procurement officer. It was in resolving these questions that the Deputy Ombud came to the decisions the appellant is appealing, namely, the dismissal of complaints that articles 1.1 and 1.3 were breached.
14. In his opening address to us, counsel for the respondent, Mr Du Plessis, correctly emphasized the importance of the investigation and exposure of corruption by the media, particularly at an institution such as Eskom. But even as such commendable work is done, it must be done in accordance with the prescripts of the Press Code; otherwise, the credibility of the media, and its effectiveness, would be imperilled. Complaints against the media must be considered on their merit.
15. The problem with the finding of the Deputy Ombud is that he conflated investigations against Ms Mara which were related to Econ Oil and Matshela Koko on the one hand and which were under Hewu, with those related to Medupi and Kusile Power Stations that were run by the appellant. There was first a broad mandate given to Bowmans in May 2018; thereafter specific

mandate was given later to conduct investigations into the two power stations of which the appellant was in charge. From the comprehensive factual matrix given about, the respondent ought not to have reported, as a fact (clause 1.1) that the appellant stopped investigations into Econ Oil and Mr Koko, given the following facts which were on the respondent's desk when the articles were written:

15.1 Mr Hewu made it known that he was in charge of the investigations against Ms Mara, and not the appellant. They both enjoyed equal status as legal advisors at Eskom.

15.2 A legitimate explanation was given why Bowmans's mandate was terminated, namely, resource constraints. A memorandum to Bowman to that effect was signed by Mr Oberholzer, the COO, and Mr Cassim the CFO; it is therefore wrong to suggest that the excuse given by the appellant was a ruse to prevent investigations into Ms Mara, Econ Oil or Mr Koko and ABB. This would have required collusion with the two senior officials.

15.3 Crucially, in an email to the appellant after some irregularities were found pointing to Ms Mara, Mr De Villiers of Bowmans sought authority from the appellant to investigate Ms Mara's dealings with Econ Oil. Had such mandate existed, the email would not have been necessary.

15.4 The point made in 15.3 above accords with the appellant's version that the mandate to investigate Econ Oil did not exist at the time he was there, but was given only after his departure from Eskom. Bowmans's mandate was suspended in May 2019. In light of these facts, which

cannot be disputed and which were before the respondent at the time the articles were written, the Deputy Ombud should have found that the respondent's first and second stories also breached articles 1.1 and 1.3 of the Code. In reporting as a fact that the appellant, by suspending Bowmans's mandate, was contriving to prevent investigations into Ms Mara, Eco Oil, Matshela Koko and ABB, the respondent made a huge jump without facts; in fact, against the facts before it. Nobody is saying they should not have reported on the matter, but should have put it as an allegation and not as a fact. The Deputy Ombud says that the appellant's distinction between the revelation of irregularities in the January 2019 report on the one hand, and the May 2020 investigations that focused more directly on Econ Oil, is untenable. If it was one and the same seamlessly continuous investigation, Mr De Villiers of Bowmans would not have sought specific authority in the email referred to above. It just does not make sense. Even though the January 2019 report might have raised some irregularities, the specific mandate to investigate Econ Oil, Koko and others only came in 2020 after appellant had already left Eskom; there was therefore no such specific mandate while he was still at Eskom for him to stop.

16. In light of the above, the appeal ought to succeed. The following Order is therefore made.

16.1 The appeal is upheld.

16.2 The Deputy Ombud's decision dismissing the appellant's complaint based on articles 1.1 and 1.3 of the Press Code is set aside and

replaced by the following: News24, in publishing its articles of 28 May 2021 and 5 June 2021, acted in breach of articles 1.1 and 1.3 of the Press Code.

- 16.3 The finding by the Deputy Press Ombud that News24 acted in breach of article 1.2 of the Code is confirmed.
- 16.4 The breaches are Tier 2 infringements.
- 16.5 The sanction imposed by the Deputy Press Ombud is set aside in its entirety and replaced by the sanction as set out in the paragraphs 16.6 to 16.10 below.
- 16.6 News24 is directed to publish a retraction on the factual statement that Mr Mthembu terminated Bowmans's mandate to investigate corrupt allegations at Eskom against Econ Oil and Matshela Koko, AND the retraction must be accompanied by an apology to Mr Mthembu.
- 16.7 There must also be an apology to Mr Mthembu for not reflecting Mr Mthembu's version, and such apology should contain the following:
 - (a) A summary of Mr Mthembu's version.
 - (b) Should refer to the fact that the complaint was lodged with the Office of the Ombud and end the apology with the sentence, "Visit www.presscouncil.org.za for the full finding", together with the Press Council logo.

- 16.8 The retraction, the apology referred to in 16.6 and the apology referred to in 16.7 should be published at the top of the original articles published on 28 May 2021 and 5 June 2021
- 16.9 The retraction and the apologies referred to in paragraphs 16.6 and 16.7 must also be published separately on News24's home page and contain the words "retraction" and "apology" respectively in the headline with a link to the original articles.
- 16.10 The wording of the retraction and the two apologies referred to above must be approved by the Executive Director of the Press Council before publication.

Dated this 23rd day of November 2021

Judge B M Ngoepe, Chair, Appeals Panel

Prof M Chaka, Public Representative

Ms H Viljoen, Media Representative