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**CASE NUMBER: 07/2015**

**DATE OF HEARING: 14 APRIL 2015**
**JUDGMENT RELEASE DATE: 5 MAY 2015**

**JUSTICE ALLIANCE OF SOUTH AFRICA** **COMPLAINANT**

**vs**

**ODM (TRADING AS STARSAT)** **RESPONDENT**

**TRIBUNAL:** **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
**MR BRIAN MAKEKETA (DEPUTY CHAIRPERSON)**
**DR N MAKAULA-NTSEBEZA**
**MS ZALI MBOMBO**
**MR ALAN MELVILLE**
**MS GIUSEPPINA HARPER**

**FOR THE COMPLAINANT: Adv Margaretha Engelbrecht instructed by Naomie Marais Attorneys**

**FOR THE RESPONDENT: Adv Stephen Budlender accompanied by Lina Dyer, Attorney, Sophia Zhang, CEO, Simon Woodland, CFO and Eddie Mbalo, Executive Consultant of ODM.**

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*Providing a broadcasting service without an approval by ICASA, following a Court order which set such approval aside – contravention of Code for Subscription Broadcasters admitted – extenuating circumstances found – fine nevertheless imposed: Justice Alliance of SA vs v ODM trading as Starsat – Case: 07/2015(BCCSA)*

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## SUMMARY

**The Independent Communications Authority of South Africa ("ICASA") in April 2013 permitted the Respondent, ODM (trading as STARSAT), to broadcast what is generally referred to as pornographic content on three channels during the watershed period for**

**subscription broadcasters. Subscribers may gain entry to this service by entering pin numbers. On 11 August 2014, an application to set aside this decision of ICASA was heard by the Western Cape Division of the High Court. ICASA's decision was set aside by the Court on 3 November 2014. An application for leave to appeal was lodged. This application was turned down, however. In spite of letters from the Complainant regarding this matter, ODM continued its service pending the lodging of an appeal to the Supreme Court of Appeal. The appeal, which suspended the order, was however, only lodged by 7 January 2015. The application for leave to appeal was dismissed.**

**The Complainant lodged a complaint with the BCCSA in terms of the Subscription Code, which prohibits broadcasts on channels which have not been permitted by ICASA. The permission by ICASA was, of course, no longer valid after the Court order. At the hearing of this matter, the Respondent conceded a contravention of the Code and argued that a reprimand would be an appropriate sanction. It also argued that sufficient extenuating circumstances existed to obviate the need for the BCCSA to impose a fine, which could amount to a maximum of R60 000.**

**The BCCSA held that, in the circumstances, the maximum fine of R60 000 was not justified - the service having been provided to less than 300 subscribers. However, since the provision of a broadcasting service without the necessary authority was a serious matter, a fine of R25 000 was imposed.**

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## JUDGMENT

**JCW VAN ROOYEN SC**

[1] A complaint was received regarding the provision of a subscription broadcasting service by the Respondent after the High Court had set aside an authorisation by the Independent Broadcasting Authority of South Africa ("ICASA") to provide what is generally referred to as pornographic content on three of its channels. The channels were only available to subscribers once they had entered two separate pin numbers. Despite the Court order, the Respondent nevertheless went ahead and provided the service on two of the channels (the third was not operative) since it was in any case planning to apply for an appeal to the Supreme Court of Appeal. This provision of the service was, of course, no longer authorized. Only when the application for leave to appeal was lodged the Court order was suspended. Ultimately, the Supreme Court of Appeal turned down the application for leave to appeal, following which the Respondent stopped the service. The Complaint before us is that, by having provided the service for the intervening period, the Respondent had contravened the Subscription Code for Broadcasters, which provides that a subscription broadcaster

may only provide a service that has been approved by ICASA. Since the Court had set aside the approval by ICASA, the channels were no longer approved. Effectively, for the period 10 December 2014 to 6 January 2015, StarSat provided the service in conflict with the Subscription Code. This was conceded by the Respondent at the hearing of this matter, and the only question before us related to what an appropriate sanction might be.

[2] Initially the complaint before us also dealt with the content as broadcast. The Registrar required the Complainants to provide examples of where the code had been contravened. The Subscription Code permits the broadcasting of explicit sex scenes, except where it is violent or (in summary) if it is degrading. Such examples were not provided and a prima facie case was, accordingly, not made out. Consequently, the second complaint was not entertained by the Registrar and it is therefore not before us either.

[3] The Broadcaster responded by admitting that a contravention of the Code had occurred but, *Mr Budlender*, for the Respondent, contended that, given several extenuating circumstances, the BCCSA should not impose a fine but instead regard a reprimand as an appropriate sanction. *Ms Engelbrecht*, for the Complainant, contended that, since the Respondent had, in spite of notices to it by the Complainant's attorneys, continued to broadcast during the period when the appeal had not yet been lodged with the Supreme Court of Appeal, it had broadcast in full knowledge that they were acting without authorization. This conduct, it was contended, justified more than a mere reprimand and, in fact, warranted a fine. R60 000 is the highest fine which may be imposed by the BCCSA.

**EVALUATION**

[4] *Mr Budlender* contended that the case law of the BCCSA supported his contention that a fine was not justified. Since this is the first time that such a matter has come before us, he had to refer to other matters which have come before us, to demonstrate that there were sufficient extenuating circumstances present to justify nothing more than a reprimand.

[5] *Ms Engelbrecht* argued convincingly that whatever the content was and whatever alleviating circumstances were present, the fact remains that it is a serious contravention to provide a service without authorisation, and to have done so knowingly.

[6] We agree with *Ms Engelbrecht* that a fine should be imposed to demonstrate to the Respondent and other broadcasters that it is a serious contravention to broadcast without authorisation. However, there are circumstances present that support *Mr Budlender's* approach that the maximum fine should not be imposed. Firstly, one should not approach the matter from the perspective that *pornography* was broadcast. In fact, the Code for Subscription Broadcasters permits non-violent pornography to be broadcast. In 1994 the Ministerial Task Group, which would draft the 1996 Films and Publications Act, concluded, after a broad inquiry, that such material may be distributed by licensed shops, as long as the films are provided with an "X18" certificate by the Films and Publications Board – a classification that contrasts with an "XX" certificate, which indicates that the material may not be distributed at all, for example in the case of violent sex scenes with neither dramatic nor artistic merit.[1] Parliament endorsed this approach in the 1996 Act. The conclusion that the classification of material as art (i.e. essentially aesthetic by nature) might negate a finding of pornography was also made clear by the Constitutional Court in *De Reuck v Director of Public Prosecutions* 2004(1) SA 404(CC). The Court effectively rejected the argument by the *amicus curiae* that pornography was unacceptable as permitted by the Act and concentrated instead on the question as to whether the definition of child pornography was sufficiently clear. In fact, the Court redefined the vague definition of child pornography which Parliament had introduced in its 1999 amendment to the Act, in essence returning to the definition which was accepted by Parliament in 1996 on the advice of the Ministerial Task Group.

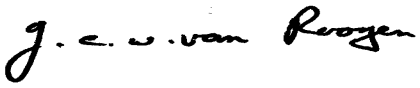
An important alleviating circumstance is that the service was only provided to 284 subscribers who had, moreover, to take special steps to gain entry: subscribers had to

[1] The report of the Task Group, which was chaired by the author of this judgment, was published by the Government Printer on 3 March 2005. A copy is available on the BCCSA Website under Annual Reports ( it is the last "Report").

conclude a special contract for the service, prove that they were above eighteen years of age, and use a special double pin system to activate a programme, having to do so each time. The service was in any case only available during the watershed from 08:00 to 05:00.

We have accordingly decided that a fine of R25 000 is sufficient to indicate the seriousness of the offence. However, the impact of the service was a very limited one. Moreover, the Respondent has a clean record with the BCCSA.

**The complaint is, accordingly, upheld and a fine of R25 000[2] is imposed, such fine being payable on or before 30 June 2015 to the Registrar.**



**JCW VAN ROOYEN SC**
**CHAIRPERSON**
**30 April 2015**

***Commissioners* Harper, Makeketa, Makaula- Ntsebeza, Mbombo and Melville *concurred with the judgment of the Chairperson.***

[2] Plus VAT.