



P.O.Box 412365 • Craighall • Tel (011) 325-5755 • Fax (011) 325-5736 • e-mail: bccsa@rubsa.co.za  
No 2 Albury Park • Magalieszicht Ave • Dunkeld West • 2196 • www.bccsa.co.za

**DATE OF HEARING: 23 JULY 2009**

**CASE NUMBER: 15/2009**

**M VISSER**

**COMPLAINANT**

**vs**

**e-tv**

**RESPONDENT**

**TRIBUNAL: PROF KOBUS VAN ROOYENS SC (CHAIRPERSON)  
DR LYNDA GILFILLAN  
ADV ILSE VAN DER MERWE**

**FOR THE COMPLAINANT: Represented by attorney, Mr B Coutsoudis**

**FOR THE RESPONDENT: Mr. Olefile Bop Tshweu, Regulatory Affairs Executive accompanied by Ms Debra Patta, Editor in Chief and Ms Debbie Meyer, Executive Producer.**

---

*Violence – effects of – documentary material on murders screened after 21:30 - no contravention of Code – Visser vs e-tv, Case No: 15/2009 (BCTSA).*

---

### **SUMMARY**

**Mrs Visser, the mother of a young man who had been murdered together with a group of other persons in 2003, lodged a complaint against e-tv for having screened a rehash of scenes of the murder during its 21:30 slot, in the programme, *Third Degree*. Some scenes were taken from actual police files, while others were re-enacted. The matter was referred to a Commissioner to adjudicate the complaint. He did not uphold the complaint. Mrs Visser appealed to this Tribunal against the decision.**

**It was argued on behalf of the complainant that the programme had been sensationalistic and, accordingly, that it went beyond the bounds of what might be regarded as a *bona fide* documentary. Not much became of the broadcaster's stated intention of approaching the subject of dealing with trauma. The programme contents**

constituted sensation for the sake of sensation and shock. The broadcaster argued that the Respondent had been entitled to broadcast the kind of material shown in the programme, and that it had taken the necessary precautions by way of a PG advisory and broadcasting the programme after the watershed.

The Tribunal *held*:

- (1) that the public had a right to be informed by way of a reminder about the events that took place at the venue known as *Sizzlers* in 2003. The re-enactment of the shooting, and the broadcast of police file photographs of the dead bodies, would probably be regarded by many viewers as offensive. A documentary, by definition, re-creates actual events, without including fictional elements. It is, accordingly, within the rights of a broadcaster to include a re-enactment in a documentary even if it were to be offensive;
- (2) that the re-enactment, in the present instance, included an element of sensationalism. However, that this aspect did not exceed the limits of what might legitimately be defined as a documentary;
- (3) in so far as a warning is concerned, clauses 19-23 and 32 of the Code protect only children in so far as advisories are concerned. In that sense the PG was, accordingly, a sufficient warning. Otherwise, clause 19 permits material of a more explicit nature to be broadcast after 21:00. The material was not so explicit that it should have been broadcast, as required by clause 23, in a later slot than the 21:30 slot;
- (4) that the privacy of the Complainant had not in any manner been invaded. She did not feature in the programme at all. It is, however, understandable that the programme had surely been most disturbing to her. However, this is an instance where it would probably have been a more prudent choice not to have watched the programme. With regard to the majority of viewers, the programme would certainly have been informative. To have excluded the re-enactment and the police material – however shocking these were - would have been tantamount to withholding information from the public, even if it had been presented in a sensational manner. Had the terrible nature of the murders not been conveyed, viewers would not have been in a position to fully grasp the sole survivor’s recovery from the trauma of the attack;
- (5) that the reference to the complainant’s deceased son as a “rent-boy” had not been a contravention. The privacy of a person who has passed away is not protected in our law and, in the absence of a contrary provision in clause 38 of the Broadcasting Code, this rule would also apply to this broadcast.

The complaint, and thus the appeal, was not upheld.

---

## JUDGMENT

### JCW VAN ROOYEN and L GILFILLAN

[1] Mrs Visser, the mother of a young man who had been murdered together with a group of other persons in 2003, lodged a complaint against e-tv for having screened a rehash of scenes of the murder during its 21:30 slot, in the programme, *Third Degree*. Some scenes were taken from actual police files, while others were re-enacted. I referred the matter to a Commissioner to adjudicate the complaint. He did not uphold the complaint. Mrs Visser appealed to this Tribunal against the decision.

[2] The original complaint read as follows:

“SIZZLERS MASSACRE PROGRAMME ON THIRD DEGREE

My complaint is in reference to 'Sizzlers Massacre' programme shown on "Third Degree" 3 March 2009, at 21h30. My son Warren Visser, was one of the unfortunate victims brutally murdered on 20 January 2003.

I feel that Etv violated the Broadcasting Complaints Commission's Code for the following reasons:

- a) It involves scenes of gratuitous violence
- b) This program contains disturbing photos, and video clippings of the bloodied, and bound corpses of these young men at the crime scene.
- c) Images of bloodied rooms, carpets, furniture, walls, and toilet at the crime shown were depicted.
- d) No warning was given about the graphic, harmful, upsetting, and traumatizing nature of the programme, which had a PG rating.
- e) They used actors to re-enact my son and the other victims being sadistically tortured, and brutally murdered.
- f) These young men were labeled 'rent boys' throughout the show. This label is condescending, undignifying, and harsh.
- e) Third Degree's anchor Debora Patta has publicly claimed that the programme in question was focused on the survivor, Quentin Taylor's emotional recovery. But, as far as we are concerned, the re-enactment of the murders and graphic images of the murder scene were aimed solely at seeking sensation. Thank you for your time and consideration.”

[3] The adjudicator's reasons read as follows:

- ? The programme was shown at 21h30, after the watershed.
- ? The programme carried a PG (parental guidance) warning.
- ? As a bona fide documentary, the programme contained extracts from police footage that is already in the public domain. Furthermore, the dramatisation of the original event was not glamorised, and instead presented in a restrained manner.

[4] Mrs Visser's criticism of the adjudication is, in a nutshell, that it is 'vague, bears little substance', and in 'intellectualising' the issues raised in her original complaint, fails to address them.

[5] Mr Tshweu, for the Respondent, argued broadly as follows at the hearing of this appeal:

- ? The programme was broadcast at 21h30, after the watershed.
- ? Since 3rd Degree is a serious current affairs programme, children would not be expected to form part of the audience.
- ? The programme carried a Parental Guidance (PG) warning.
- ? Adults are able to exercise choice in their viewing of programmes.
- ? In order to deal properly with the subject of recovery from trauma, it was necessary to show what the victims experienced.
- ? The term 'rent boys' is commonly used and is not demeaning.
- ? While no clause is mentioned in the complaints, Clause 38 dealing with privacy may be inferred from some of the statements. However, the material and information are already in the public domain, and these were dealt with as being in the public interest in a country where violent crime and the resultant trauma are common.
- ? The complaint is 'personalised'; there is nothing gratuitous in the material, which is integral to the programme.

[6] Mr *Coutsoudis*, for the Complainant, criticised the programme for the following reasons at the hearing of the appeal in Cape Town:

- ? Its intention was to shock, as the message could have been conveyed without visuals. As such, the programme went beyond the bounds of an actuality programme.
- ? The PG rating was inadequate. There should have been more explicit warnings.

[7] Clauses 14 and 17 of the Broadcasting Code are relevant in deciding upon the merits of this complaint. The clauses provide as follows:

14. Licensees shall not broadcast any material which judged within context :
- (a) contains gratuitous violence in any form i.e. violence which does not play an integral role in developing the plot, character or theme of the material as a whole.
  - (i) sanctions, promotes or glamorizes violence.
17. The abovementioned prohibitions shall not apply to–
- (a) *a bona fide* scientific, documentary, dramatic, artistic, or religious broadcast, which judged within context, is of such nature;
  - (ii) .....
  - (ii) broadcasts which amounts to a bona fide discussion, argument or opinion on a matter of public interest.

- [8] In *Islamic Unity Convention v The Independent Broadcasting Authority and Others*<sup>1</sup> Langa DCJ (as he then was) convincingly contrasted the current situation regarding freedom of expression with that of the restrictive past, as follows:

“Notwithstanding the fact that the right to freedom of expression and speech has always been recognized in the South African common law, we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa’s present commitment to a society based on a ‘constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours’.

South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members . . . As such it is protected in almost every international human rights instrument. In *Handyside v The United Kingdom*<sup>2</sup> the European Court of Human Rights pointed out that this approach to the right to freedom of expression is –

“applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”

*The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of “human dignity, the achievement of equality and the advancement of human rights and freedoms.” Thus, open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself. Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere.”* (our emphasis in italics and footnotes omitted).

- [9] Mr *Coutsoudis* argued that the programme was sensationalistic and, accordingly, that it went beyond the bounds of what might be regarded as a *bona fide* documentary. Not much became of the broadcaster’s stated intention of approaching the subject of dealing with trauma. The programme contents constituted sensation for the sake of sensation and shock. Mr. Tshweu argued that the Respondent was entitled to broadcast the kind of material shown in the programme, and that the broadcaster had taken the necessary precautions by way of a PG advisory and broadcasting the programme after the watershed.
- [10] The following factors, based on Constitutional Court and Supreme Court of Appeal thinking on the fundamental right to freedom of expression, must be taken into consideration when deciding on the *bona fides* of the documentary: freedom of

<sup>1</sup> 2002(4) SA 294(CC).

<sup>2</sup> (1976) 1 EHRR 737 at 754.

expression must be given a generous interpretation;<sup>3</sup> even offensive material is accommodated by the principle of freedom of expression, as long as it remains within reasonable limits;<sup>4</sup> *bona fides* is an objective standard, and is not dependent on the intention – whether good or bad – of the broadcaster;<sup>5</sup> where there is doubt, the matter must go in favour of the broadcaster’s right to freedom of expression.<sup>6</sup>

[11] The main question is whether, in a programme where it might be inferred that part of its aim was a sensationalistic one, this would necessarily lead to a finding that the programme did not amount to a *bona fide* documentary. Accordingly, even if we accept for purposes of this judgment that the programme was indeed – if judged objectively – aimed at being sensational or gratuitous,<sup>7</sup> the question would be whether such a conclusion would necessarily lead to a finding against the broadcaster. In principle, it would be wrong to state that a programme lacks documentary *bona fides* purely on the basis of the inclusion of certain sensational aspects. For example, it would not be convincing to argue that the sensational aspect in broadcasts of the speeches of Hitler or Mussolini could lead to a finding that the broadcasts are not of a *bona fide* documentary nature. At the heart of a documentary, when judged as a whole, lies the transmission of information, at the basis of which, in turn, lies the fundamental right of each person to be informed in terms of section 16 of the Constitution of the Republic of South Africa. *Naked Yoga*, a publication in which photographs of nude women appear in order to demonstrate various yoga poses, was regarded as sensational in the 1970s, yet it was held to have amounted to a scientific publication by our Appellate Division in spite of the fact that the nude photographs would, at the time, generally have been regarded as indecent.<sup>8</sup> In 1994, the German *Bundesverfassungsgericht* held that a the book, *Wahrheit für Deutschland*, which put forward the view that the Second World War had not been caused by the Germans, fell within the category of a scientific publication, in spite of the fact that the view expressed was factually untrue. The test was whether the work satisfied the aims of

---

<sup>3</sup> *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

<sup>4</sup> See *De Reuck v Director of Public Prosecutions, WLD and Others* 2004(1) SA 406 (CC).

<sup>5</sup> See *Publications Control Board v Central News Agency Ltd* 1977(1) SA 717(A).

<sup>6</sup> See *Publications Control Board v William Heinemann Ltd* 1965(4) SA 137(A) per Rumpff JA.

<sup>7</sup> It is our view that the scenes were not gratuitous. So as to gain an understanding of the trauma which Quentin Taylor experienced, it was necessary to have included the re-enactment and the Police files of the bodies.

<sup>8</sup> See *Publications Control Board v Central News Agency Ltd* 1977(1) SA 717(A).

science, as generally understood. The Court also held that the term “science” should be awarded a wide meaning.<sup>9</sup> A view such as that expressed in the book would, indeed, be regarded as sensational, and yet it passed muster. The inclusion of scenes in the seven o’clock SABC news, where dogs were set on illegal immigrants for the “training” of the dogs, was regarded as documentary by this Tribunal in spite of the sensational nature of the scenes.<sup>10</sup> Our conclusion from the above examples is that the term “documentary” should, in the light of the approach of the Constitutional Court quoted above in the *Laugh-it-off* matter, be interpreted generously and that even if aspects could be regarded as sensationalistic and views expressed questionable, a programme could nevertheless qualify as of a documentary nature.

[12] It is our opinion that the public had a right to be informed by way of a reminder about the events that took place at the venue known as Sizzlers in 2003. The re-enactment of the shooting, and the broadcast of police file photographs of the dead bodies, would probably be regarded by many viewers as offensive. A documentary, by definition, recreates actual events, without including fictional elements. It is, accordingly, within the rights of a broadcaster to include a re-enactment in a documentary. The re-enactment, in the present instance, includes an element of sensationalism. However, it is our view that this aspect did not exceed the limits of what might legitimately be defined as documentary – compare the examples of *Naked Yoga*, the *Kriegsschuld-Buch* judgment of the *Bundesverfassungsgericht* and, especially, the scenes of the dog attacks.

[13] In so far as a warning is concerned, clauses 19-23 and 32 of the Code protect only children in so far as advisories are concerned. In that sense the PG was, accordingly, a sufficient warning. Otherwise, clause 19 permits material of a more explicit nature to be broadcast after 21:00. The material was not so explicit that it should have been broadcast, as required by clause 23, in a later slot than the 21:30 slot.

[14] In conclusion, it should also be added that the privacy of the Complainant was not in any manner invaded. She does not feature in the programme at all. Of course, the

---

<sup>9</sup> Compare BverfGE 90,1-22 (1994) (“Kriegsschuld-Buch”)

<sup>10</sup> JE Glibbery, N Obel and Others vs SABC, Case No 38/2000; in *MCU of ICASA & Others v SABC 1* (39/2004) it was, however, held that a close-up scene of the be-heading of a hostage during the 1930 SABC news was gratuitous within the context of news and not saved by clause 17.

programme was surely most disturbing to her. That is fully understandable. However, this is an instance where it would probably have been a more prudent choice not to watch the programme. With regard to the vast majority of viewers, the programme would certainly have been informative. To have excluded the re-enactment and the police material – however shocking these were – would have been tantamount to withholding information from the public, even if it was presented in a sensational manner. Had the terrible nature of the murders not been conveyed, viewers would not have been in a position to fully grasp the sole survivor’s recovery from the trauma of the attack. As to the reference to the complainant’s deceased son as a “rent-boy” we need not say more than that the dignity or privacy of a person who has passed away is not protected in our law and, in the absence of a contrary provision in clause 38 of the Broadcasting Code, this rule would also apply to this broadcast.<sup>11</sup>

**The Complaint, and thus the appeal, is not upheld.**



**JCW VAN ROOYEN SC  
CHAIRPERSON**

**Minority View.** Adv van Der Merwe did not agree with the view of the majority. She was of the view that the sensational nature of the re-enactment and the screening of the police material outweighed the merits of what was put forward as a documentary. In her view the scenes of re-enactment and the police files were gratuitous. The programme could have been produced just as effectively without these scenes.

---

<sup>11</sup> R van Der Wouden & Others vs 94.7 Highveld Stereo, Case No: 11/2007