BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA

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

Case no: 17/2004

Date of Hearing: 21 June 2004

e-tv **Applicants**

vs

I Jacobson and three others **Respondents**

Appeal Panel: Mr Ratha Mokgoatlheng (Deputy Chairperson)

For the Appellant: Mr Olefile Bop Tshweu, Regulatory Affairs Executive

For the Respondents: No Appearance.

JUDGMENT

Ratha Mokgoatlheng (Deputy Chairperson)

[1] This is an application for leave to appeal against the decision of the BCCSA Tribunal handed down by Mr Ratha Mokgoatlheng on the 28th April 2004. The Appellant was found to have contravened Clause 18.1 of the Code, and fined thirty thousand rands, half of which was suspended for a period of three years on condition that the Appellant is not found to be in contravention of Clause 18.1 again.

[2] The Appellant's grounds of appeal are the following:

> "(1) e-tv views and classifies all drama series it broadcasts. This is because the Films and Publication Board usually does not classify drama series. In the absence of an FPB classification certificate, it is the Responsibility of the broadcaster to provide adequate warning to advise viewers as to the content of the series.

(2) In our response to complaints against the *Bonanno* episode, we said, that "There is a scene early in the episode in which one of the characters gets shot at close range. Later another scene concerns one character being stabbed and another getting shot. These scenes were brought to the attention of our programme reviewer after receiving complaints. It was an oversight that the scenes were not classified." From this the Commission inferred that programme advisers did not view the episode at all and were therefore negligent.

(3) We submit that the inference is incorrect. The proper inference should be that, while programme reviewers did view the episode, they failed to ensure that the classification was attached to the episode on air.

(4) After the Commission's decision, we investigated the matter to find out why the impugned episode was not given a classification. We found out the following:

4.1 The *Bonanno* series was previously broadcast on e-tv as a two-part mini-series on a Friday night – we ran it as a mini-movie in two two hours slots. We therefore took the master copy of the series and transferred it into two parts. To enter a programme into Paradigm, you have to give the programme what is called a Title ID and then specify the number of episodes – in this case it was two. We viewed the programme at that time and classified it. The classification was entered into the Paradigm system against the Title ID. When the programme was broadcast on 5 September 2002 at 10.15pm and 12 September at 11.15pm it carried the classification.

4.2 When we decided to screen *Bonanno* for a second time, we chose the one-hour slot on a Monday night at 8pm. As this slot accommodates an hour-long programme only, we re-transferred the *Bonanno* master copy into four parts. However, the system will not allow you to change the number of episodes against the Title ID. We therefore had to re-enter *Bonanno* into the system under a new Title ID. When the relevant information was transferred from the two-part *Bonanno* to four-part *Bonanno*, the system did not transfer the classification. This resulted in the four-part version going to air without the warning.

5. While we do not seek to appeal the decision of the Tribunal to uphold the complaint, we are appealing against the finding that we were grossly negligent. We also appeal against the sanction, which we believe, as a result of circumstances outlined above, is too harsh.

6. We would appreciate the opportunity to address the Tribunal on the matter as provided for by section 4.3 of the appeal procedure."

[3] The appellant amplified its grounds of appeal by verbally arguing that:

(a) The Tribunal made an improper inference from Appellants submission that; "There is a scene early in the episode in which one of the characters gets shot at close range. Later another scene concerns one character being stabbed and another getting shot. These scenes were brought to the attention of our programme reviewer after receiving complaints. It was an oversight that the scenes were not classified."

[4] The Appellant now contends that the impugned episode did not carry any classification because of the problem with the Appellant's Paradigm System which failed to carry and depict classification during the broadcast of the first episode of the series "*Bonanno: The Youngest Godfather Part I*". The failure by the Paradigm System was a technical fault, not ascribable to human failure.

[5] The Appellant further submits that after the fault was identified, the paradigm system's technical fault was rectified before the broadcasting of the second episode.

[6] The Tribunal erred therefore in inferring that the Appellant's programme reviewer did not view and classify the series before broadcasting same, and therefore incorrectly finding that the Appellant had been grossly negligent, in so far as sanction was concerned. The Appellant argues that the fine is too harsh and induces a sense of shock because it is premised on the wrong, incorrect and improper assumption and inference, that the Appellant did not view and classify the impugned episode before broadcasting same, further that Appellants conduct was grossly negligent.

[7] The Appellant contends that given the conspectus of evidence the Tribunal should properly have drawn the inference that the Appellant did view the impugned episode, but failed to ensure that its classification was attached and depicted on to the episode on broadcast. Such an inference, argues the Appellant, would have materially affected the sanction, resulting in a wholly suspended sanction.

[8] In terms of Clause 4.2 and 4.8 of the Tribunal's Appeal Rules:

Clause 4.2: *"A party who files such an application (for leave to appeal) must set out the grounds fully upon which that party believes that an Appeal Tribunal is likely to come to a different decision."*

Clause 4.8: *"An Appeal Tribunal shall not set aside or amend a decision of the first Tribunal unless it is clearly wrong."*

[9] The Appellant in paragraph (5) of its written grounds of appeal, submits that it does not seek to appeal (against) the decision of the Tribunal to (in) uphold(ing) the complaint. That is in strict legal convention, "the conviction", but Appellant states that it is appealing against the finding that it was grossly negligent, that is, in strict legal convention, the Tribunal's finding of fact that it was grossly negligent. The Appellant is further appealing against the

sanction, "the sentence", that it is too harsh, that is the sentence is too severe and induces a sense of shock.

[10] It is trite law that leave to appeal shall not generally be granted unless there are reasonable prospects of success that another court adjudicating the matter on the same facts may arrive at a different decision. See in this regard *Derby-Lewis v Chairman Amnesty Committee of the Truth and Reconciliation Commission 2002 (3)* SA 485 (C).

[11] It is also trite law that a court of appeal will not generally interfere with the trial courts findings of facts, unless it can be clearly demonstrated that such findings are patently irregular.

[12] At the trial hearing, the Appellant did not tender or adduce evidence that the impugned episode was broadcast without any classification due to the failure of the Paradigm System in depicting the classification. The Appellant clearly states in paragraph 4 of its written grounds of Appeal that, "after the Commission's decision, we investigated the matter to find out why the impugned episode was not given a classification. We found the following… This resulted in the four-part version going to air without the warning."

[13] The contention by the Appellant is that if the Tribunal was aware of the facts and reasons which resulted in the failure of the Paradigm System, it would not have inferred that the Appellant's conduct was grossly negligent and therefore resulting in a concomitantly severe sanction. The Appellant's submission is clearly based on new or further evidence, which was not adduced or tendered at the hearing of this matter. By this submission the Appellant is in essence arguing for the re-opening of its case, and the adducement of new and further evidence.

[14] In *S v de Jager 1965 (2) SA 612 A at 613A-B* the learned judge held that an Applicant seeking to re-open a case and lead further evidence will generally be required to satisfy the following requirements:

> "(a) There should be some reasonable sufficient explanation, based on allegations which may be true, why the evidence which is sought to be led was not led at the trial.
>
> (b) There should be a *prima facie* likelihood of the truth of the evidence.
>
> (c) The evidence should be materially relevant to the outcome of the trial."

[15] I*n S v Ndweni and others 1999 (4) SA 877* it was held that in an Application for leading further evidence, the requirement is that there should be a *prima facie* likelihood of truth of evidence.Although *prima facie* likelihood is established in *casu*, special features must also be present arising through the unusual circumstances of the present matter justifying, by way of exception, the re-opening of the case. The dictates of fairness require that all relevant

information bearing on Applicant's guilt or innocence should be before the trial court to enable it to determine the true facts, lest there be injustice either to the Applicant or State."

[16] The Applicant has not proffered any cogent reasons why this new and further evidence was not adduced at the hearing. The Applicant states that it only became aware of this new evidence after the Tribunal's decision when Applicant, as a result of the said Tribunal's decision, only then commenced to initiate investigations. The reason proffered by the Applicant in paragraph 4.1 and 4.2 of its written grounds of Appeal is not regarded as arising from unusual circumstances justifying by way of exception the re-opening of the case, to enable the Applicant to lead new and further evidence.

[17] In any event since the Applicant is not appealing against the decision of the first Tribunal in upholding the complaint, that is the "conviction", this new evidence cannot be regarded as materially relevant to the outcome of the trial, because the reasons for the failure of the Paradigm System in not depicting the classification on the episode does not in itself alter the fact that the scenes broadcast in the episode were not classified, which is the gravamen of the complaint.

[18] The inference of gross negligence was properly arrived at by the first Tribunal having regard to the evidence led at the trial, and the concessions made by the Applicant. It is unlikely that the Appeal Tribunal will come to a conclusion that the decision of the first Tribunal was clearly wrong. The further reason is that the Appellant has not demonstrated evidence of any irregularity in the proceedings of the Tribunal in arriving at the disputed inference. It follows logically that in the determination of the sanction the Tribunal properly assessed all relevant evidence. In arriving at this conclusion it also had regard to the Applicant's previous contraventions of Clause 18.1.

[19] In conclusion I am of the view that the Applicant has failed to discharge the onus resting upon it on a balance of probability of persuading me that an Appeal Tribunal hearing this matter on the same evidence adduced at the trial, or even on the admission of new and further evidence (which submission was rejected) is likely to come to a different conclusion, based on a decision that then first Tribunal was clearly wrong.

[20] Further as the Appellant states that it is not applying to appeal against the first Tribunal's decision in upholding the complaint, it would be an exercise in futility in acceding to the Appellant's request to be granted leave to appeal against the inference that Appellant's conduct in broadcasting the episode without any classification was grossly negligent, as in terms of Clause 4.8 of the Tribunal's Appeal Rules an Appeal Tribunal can only set aside, or amend the first Tribunal's decision if it is clearly wrong; in this case the Appellant concedes that the first Tribunal's decision is correct and Applicant abides by it. There rests an onerous responsibility on broadcasters to ensure that films are appropriately classified and that a double check should be done on classifications. Classification and the need for it, should call for a red flag and when, after at least two years of accentuation of the importance of

classification and age restrictions by this Commission a broadcaster still does not Red Flag it, this amounts to gross negligence in the circumstances.

[21] The Application for leave to appeal is dismissed with costs; costs being determined by the Chairperson of the Commission.

RATHA MOKGOATLHENG
DEPUTY CHAIRPERSON