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Case Number: 30/2004

Date of Hearing: 23 JULY 2004

M HUMAN **Complainant**

vs

M-NET **Respondent**

TRIBUNAL: **Prof Kobus van Rooyen SC (Chairperson)**
Mr Ratha Mokgoatlheng (Viewer Listener Representative)
Ms Refiloe Mokoena - Msiza(Co-Opted Member)
Prof Ravi Nayagar (Viewer Listener Representative)

Complainant: **The Complainant did not attend.**

Respondent: **Ms Samantha Britnell, programme Acceptance Manager accompanied by Mr Sibusiso Ndebele from M-Net**

Sex –bondage – when viewed in context the scenes did not amount to a gratuitous exploitation of violence and sex. M Human vs M-Net Case No: 30/2004.

SUMMARY

The Registrar of the Commission received a complaint against M-Net, the South African subscription broadcaster, as a result of its broadcasting the film *Killing Me Softly* as from 21:30. The complaint was that the film included pornographic images of sexuality in the form of bondage. The Tribunal held that that the film amounted to bona fide drama, was duly screened after the watershed and that M-Net conveyed the necessary information. Although the Tribunal is not bound by the classifications

and age restrictions of the Films and Publications Board, it is comforting to know that that Board certified the film as an 18SNV and not as XX material, which is prohibited.

JUDGMENT

JCW van Rooyen, Chairperson

[1] The Registrar of the Commission received a complaint against M-Net, the South African subscription broadcaster, as a result of its broadcasting the film *Killing Me Softly* as from 21:30. The complaint was that the film included pornographic images of sexuality in the form of bondage.

[2] The complaint which the Registrar received reads as follows:

> "I refer to the following on M-Net - FILM: " Killing Me Softly" DATE AND TIME: Friday 25 June 2004 at 9.30 pm. COMPLAINT: Pornographic film depicting full nudity, sexual acts and bondage. REASON FOR COMPLAINT: I did not view the whole film and my complaint is based on approximately the first quarter of an hour and then another scene later on when bondage was depicted. I found the pornographic scenes offensive and particularly disturbing in view of the harmful effect on young viewers. This effect is well documented - please see attached letter to the Cape Times. Parental supervision and "switch-off" are both irrelevant excuses for showing porn with violent overtones so early in the evening. I note with interest that this film was screened on the 29 June at 11pm – a much later time."

[3] The Response from M-Net reads as follows:

> "Restriction decision
>
> Killing me Softly was broadcast on Friday 25th June at 21h30, with an age restriction warning of 18VSNL, (V) violence , (S) sex, (N) nudity and (L) language.
>
> The Film and Publications Board, gave the film a restriction of 18SNV (eighteen for sex, nudity and violence). We used their recommended restriction as a guideline, and after viewing the film, we added a language warning to our restriction.
>
> PARENTAL CONTROL OPTIONS ON THE DECODER
> The usual sanitation cuts to the sound track of the film were made, thereby "blanking out" any strong language for the duration of the film. Any person who has set his/her decoder to the GREEN CHANNEL will have received a censored version of the soundtrack to this film. This means that all bad language would have been be blanked out.
>
> Each decoder contains a parental control mechanism. So, if parents wish to prevent their children from viewing certain films with high age restrictions, this mechanism can be enabled to block films that carry the selected age restrictions.

ADDITIONAL WARNINGS

TV Guide: The synopsis for "Killing me Softly" in the June TV Guide was the following: KILLING ME SOFTLY 18VSNL. Erotic thriller, set in London, revolving around a designer who falls for a mysterious mountain climber. THRILLER DRAMA

On-air graphics and voice over: Just before the movie commenced we showed an age restriction slide, which is 10 seconds in duration.

On-air voice-over: The voice over that would have been heard by the viewer says, "This movie is rated 18 and contains scenes of nudity, sex, strong language and violence. Viewer discretion is advised.

Age restriction key: Once the film commenced, the viewers would have been able to see a square in the top left hand corner of the screen, with the warning 18VSNL (eighteen for violence, sex, nudity and strong language). This would have remained on screen for the entire duration of the film.

On-air promotion: All promotional and marketing elements for Killing me Softly, showed the age restriction of 18VSNL.

CLOSING COMMENTS

M-Net is a Pay Television Broadcaster and our watershed is 20h00 on a sliding scale. As mentioned before, the film in question carried an age restriction of 18 with warnings for violence, sex, nudity and language.

Friday nights are our action nights and are branded as such, and on many occasions high age restricted films are broadcast on Friday evenings. Killing me softly was not broadcast in the 20h00 premier slot, but was broadcast later at 21h30. Mrs. M. Human mentions that the next screening of the film was on the 29th June at 23h00, which is correct. Due to the restriction that the film carries, we would not schedule it's repeat any earlier than 21h30.

From the synopsis and warnings in the TV magazine, the high age restriction the film carried and the on-air warnings, one can gauge that due to it's content, this film is not suitable for all viewers, and especially for viewers younger than 18.
The restriction clearly warns viewers that violence, sex, nudity and strong language are all present in the film, and that the film would not be suitable for viewers under the given age, or for sensitive viewers.

M-Net believes that viewers were sufficiently warned with regards to the content of this film and that the film was played out in a time slot relevant to the theme and nature of the film and that the code of the BCCSA has not been breached."

[4] The Broadcasting Code contains several provisions which protect viewers against gratuitous violence and a crude and explicit mixture of violence and sex. It is of interest that research in the field of violence has shown that there is evidence that persons react more aggressively in their sexual approaches after having seen films

in which there was a crude mixture of violence and sex. This approach of Donnerstein[1] was accepted by the Task Group Films and Publications Control (1994),[2] which drafted the new Films and Publications Act in 1994. There are, however, experts such as Kutchinsky[3] who have denied that there is any reliable evidence that the viewing of pornography increases rape and indecent assault. The Broadcasting Code has also adopted the Donnerstein approach.

[5] The following clauses of the Code deal with sex and violence:

14. **Violence:** Licensees shall not broadcast any material which judged within context

(i) 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.

(ii) Sanctions, promotes or glamorizes violence.

15. **Violence against women:** Broadcasters shall:-

(i) not broadcast material which, judged within context, sanctions, promotes or glamorizes any aspect of violence against women;

(ii) ensure that women are not depicted as victims of violence unless the violence is integral to the story being told;

(iii) be particularly sensitive not to perpetuate the link between women in a sexual context and women as victims of 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;

[1] For references see Kutchinsky "Pornography and Rape: Theory and Practice?" 1991 *International Journal of Law and Psychiatry* 47; Lahey "Pornography and Harm – Learning to listen to Women" 1991 Journal of Law and Psychiatry 39. Also see Sopinka J's judgment in *R v Butler* 1992 CCC 129. Sopinka J was also one of the advisers to the Task Group (1994).
[2] Published by the Government Printer, Pretoria 3 March 1995.
[3] See note 1.

b. broadcast which amount to discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or

c. broadcast which amounts to a bona fide discussion, argument or opinion on a matter of public interest.

28. **Sexual Conduct:** Licensees shall not broadcast material, which judged within context, contains a scene or scenes, simulated or real of any of the following:

(i) A person who, or is depicted as being under the age of 18 years, participating in, engaging in or assisting another person to engage in sexual conduct of a lewd display of nudity;

(ii) Explicit violent sexual conduct;

(iii) Bestiality;

(iv) Explicit sexual conduct which degrades a person in the sense that it advocates a particular form of hatred based on gender and which constitutes incitement to cause harm.

29. Save for 28.(i) above, the prohibition in 28.(ii) to 28 (iv) shall not be applicable to *bona Fide* scientific, documentary, dramatic material, which judged within context, is of such nature. The prohibition in 28.(i) shall however be applicable to artistic material which judged within context is of such a nature.

30. Scenes depicting sexual conduct, as defined in the Films and Publication Act 65 of 1996, should be broadcast only during the watershed period. Exceptions to this may be allowed in programmes with a serious educational purpose or where the representation is non-explicit and should be approved in advance by the most senior programme executive or a delegated alternate.

31. Explicit portrayal or violent sexual behaviour is justifiable only exceptionally and the same approval process as referred to in 30 above must be followed.

[6] From the above it appears clearly that although specific interests are protected against certain gratuitous forms of violence, bona fide drama is protected absolutely. This protection is obviously based on the guarantee of the right to artistic creativity in section 16 of the Constitution of the Republic. The

Constitutional Court[4] has also recognized the protection of art in the most problematic situation, that of child pornography. It has held that when the predominant purpose of material which deals with child nudity and sex is the stimulation of *aesthetic* feelings rather than *erotic* feelings, the child pornography prohibition is not applicable. The Court has also, as does the Films and Publications Act and the Broadcasting Code, accentuated the importance of a contextual approach.

[7] In considering the film which is before us, it is clear that if the scenes of which the Complainant complains are viewed in isolation, they would seem to be gratuitous. The Complainant in fact did not view the whole film and, accordingly, it must have been impossible for her to have viewed the material in context. When viewed in context the scenes are clearly not gratuitous, but fit into the plot, from which it emerges that the activity portrayed is not glamorized. The time of screening was well after the commencement of the watershed and due classification and age restrictions were included. It should also be borne in mind that if viewers do not wish to be confronted with images which are offensive to them, they should simply exclude 18 films from their television by making use of the parental control mechanism provided by M-Net to their subscribers.

[8] In the result we are of the view that the film amounts to a bona fide drama, that it was duly screened after the watershed and that M-Net conveyed the necessary information. Although we are not bound by the classifications and age restrictions of the Films and Publications Board, it is comforting to know that that Board certified the film as an 18SNV and not as XX material, which is prohibited.

The complaint is not upheld.

JCW VAN ROOYEN SC
CHAIRPERSON
Commissioners Mokgoatlheng and Mokoena-Msiza concurred

[4] *De Reuck v Director of Public Prosecutions WLD and Others* 2004(1) SA 406(CC) at para [32]