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CASE NUMBER: 08/2010

DATE OF HEARING: 13 MAY 2010

G BARRETT

COMPLAINANT

vs

MULTICHOICE CHANNEL 126

RESPONDENT

TRIBUNAL: **PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)**
MR BRIAN MAKEKETA
MS MODJADJI NKWANE
PROF GERRIT OLIVIER

Complainant: **The Complainant was not present**

Respondent: **Mr. Bruce Mkhize, Regulatory Compliance Manager,**
Regulatory Affairs , Southern Africa, MultiChoice.

Complaint about a scene of simulated sex with a goat by a human in a broadcast by a subscription broadcasting service licensee – clause 9 of Code prohibiting broadcasting of scenes of, inter alia, bestiality – condition added in clause that broadcaster must “knowingly” broadcast such scenes – broadcaster explaining that it did not knowingly broadcast the scene complained of because it merely relayed the signal it received from the overseas broadcaster to its subscribers and was not aware of the exact content of the broadcast – Tribunal accepting explanation and finding no contravention of the Code although expressing frustration with the powerless position in which this left the Tribunal - Barrett vs Multichoice, Case No: 08/2010(BCTSA)

SUMMARY

This complaint deals with a scene of simulated sex with a goat by a human that was broadcast by a subscription broadcasting service licensee. The applicable clause (clause 9) of Code of Conduct prohibits the broadcasting of scenes of, *inter alia*, bestiality. Clause 9 prohibits broadcasters from “knowingly” broadcasting such scenes. The broadcaster explained that it had bought the channel and that it did not knowingly broadcast the scene complained of because it merely relayed the signal it received from the overseas broadcaster to its subscribers and was not aware of the exact content of the broadcast. The Tribunal accepted the broadcaster’s explanation and found no contravention of the Code although it expressed frustration with the powerless position in which this left the Tribunal.

JUDGMENT

PROF HP VILJOEN

[1] This complaint is about a scene of bestiality in a programme that was broadcast by MultiChoice on the Animax Channel (Channel 126) on 16th March 2010 at 21:55. Because of the seriousness of the complaint, this dispute was referred to a Tribunal of the BCCSA. There is no dispute as to the fact that the scene complained of contains visuals of simulated sex with a goat by one of the characters in the programme.

[2] The complaint reads as follows:

“At 21:55 16th March 2010 on DSTV animax channel 126, Kenny vs Spenny. I was shocked and horrified to [see] one of the characters half naked on all fours being mounted by a goat from behind while the other character was saying to him come on take him, make him come. They were showing close up shots of the goats balls and acting out the disgusting sex seen with a live animal on TV!! cannot agree with that and as it is still before 10pm on ANIMAX a supposed animation channel that minors would watch, is terrible. I feel sick to stomach! What will be done about this? A mere apology to me is not going to cut it. “

[3] Multichoice responded as follows:

“Re: Complaint regarding Kenny vs Spenny

1. Introduction

1.1 We refer to the complaint by Garry Barret (“the complainant”) regarding the episode of the show “Kenny vs Spenny” which was

broadcast on the Animax Channel (Channel 126) on 16 March 2010 at 21h55.

- 1.2 The complaint relates to the simulated act of bestiality between one of the characters and a goat.
- 1.3 We have been requested by the Commission to respond to the complaint taking into account provisions of Clause 9 of the Code which deals with the content that may not be broadcast.

2. The Show

- 2.1 The Kenny vs Spenny show is a reality TV show which features two best friends who compete against each other. Their competitions are ridiculous, bizarre and immature.
- 2.2 Whoever wins the competition gets to humiliate the loser by asking the loser to perform a humiliating act.
- 2.3 In the episode in question Kenny and Spenny picked the theme “who can be tied to a goat longer” for their competition.
- 2.4 Kenny and Spenny then proceeded to compete and loser was humiliated by simulating bestiality with one of the goats.

3. Our Response

- 3.1 We have been requested by the Commission to respond to the complaint taking into account clause 9 of the Code.
- 3.2 Clause 9 provides as follows:
 - “9. A subscription broadcasting service licensee **may not knowingly** broadcast material which, judged within context, contains a scene or scenes, simulated or real, of any of the following;
 - 9.1.....
 - 9.2 **bestiality**,
 - 9.3(Our emphasis)”
 - 9.4
- 3.3 We submit that it is apparent from Clause 9 of the Code that for any subscription broadcasting service to be in contravention of this clause, it must have (i) **knowingly** (ii) broadcast (iii) prohibited material; in this case, simulated scene of bestiality.

- 3.4 It is clear from the wording of Clause 9 that the Code anticipates that there may be instances where the subscription broadcasting services would **unknowingly** broadcast the prohibited material.
- 3.5 In such circumstances, we submit the Commission would find that the subscription broadcaster would not have contravened the Code.
- 3.6 MultiChoice admits that at face value it could be argued that the broadcast of a simulated bestiality is in contravention of Clause 9 of the Code.
- 3.7 However as indicated [in] paragraph 3.3 above, for any subscription broadcasting service to be in contravention of Clause 9 of the Code, the broadcaster must have transmitted the offending scene **knowingly**.
- 3.8 In other words, broadcaster must have transmitted the offending scene intentionally or deliberately and with full knowledge.
- 3.9 Such a situation can only occur in the circumstance where the broadcaster had prior knowledge of the offending scene or where the broadcaster either commissioned the broadcast or had the opportunity to preview the broadcast and despite the having previewed the scene takes a decision to broadcast it anyway.
- 3.10 As previously submitted and accepted by the Commission, MultiChoice is a multichannel subscription broadcaster that carries both local and international channels on its platforms and does not interfere with the schedules of the foreign channels.
- 3.11 With respect to foreign channels like Animax, MultiChoice submits that such channels are broadcast directly to the subscribers' home without any chance for preview. Animax as a foreign based channel is carried **as is** on MultiChoice's platform. MultiChoice does not interfere with its schedule in [anyway].
- 3.12 We submit therefore that MultiChoice did not knowingly broadcast the prohibited material as MultiChoice had not previewed the offending scene. In such circumstance we submit that the Commission must find that MultiChoice did not contravene Clause 9 of the Code.
- 3.13 The Commission has previously adopted similar approach when dealing with the phrase "**practicable reasonable (sic)**" which appears in several clauses of the Code.

- 3.14 On those occasions, the Commission ruled that there were instances where it could not be **reasonable (sic) practicable** for MultiChoice to comply with the requirements of the Code, in particular where the programme complained of was broadcast by a foreign channel¹.
- 3.15 MultiChoice however is in a position to communicate with the channel to ensure that in future the channel does not broadcast similar programmes which are prohibited in terms of the Code.
- 3.16 MultiChoice has communicated with the channel and instructed it accordingly and in response the channel has agreed to suspend the episode pending the Commission's response.
- 3.17 Finally, we would also like to draw to the attention of the Commission [that] it is not the entire episode that simulates bestiality but only one scene dealing with the humiliation of the loser.

4 Conclusion

- 4.1 MultiChoice submits that it did not contravene clause 9 of the Code as it did not knowingly broadcast the prohibited material.
- 4.2 MultiChoice has now instructed the channel not to repeat the offending episode in the future.
- 4.3 MultiChoice takes the views from its subscriber seriously and we are grateful to Mr Garry Barret for bringing this matter to our attention and we trust that our intervention referred to in the previous paragraph will go a long a long way in addressing his concerns.”

[4] Further comments were received from the complainant after response by the Broadcaster, as follows:

“I agree that the Animax channel is broadcast outside of this country, but surely that does not mean “carte blanche” to what is shown on our screens. I see no apology from Multichoice, rather an attempt to pass the blame on the Animax channel who under license from Multichoice airs there offensive material in this country.”

[5] At the hearing, the representative of the Broadcaster, Mr Mkhize explained to the Tribunal the technical intricacies of subscription broadcasting. Taking the present

¹ Anderson vs MultiChoice, R Phelan vs MultiChoice and M Simpson vs MultiChoice.

circumstances regarding this complaint as an example, he explained that MultiChoice, the Respondent in this case, is not really in the same position as a broadcaster but merely provides a platform for broadcasting. In this matter, MultiChoice has bought a channel by the name of Animax, and has undertaken to relay the signal it receives from Animax to its subscribers. The way in which the contract between MultiChoice and Animax is concluded, is that Multichoice would inquire into the nature, content and popularity of programmes or series of programmes of a channel and, if satisfied, would then buy the channel. This process does not entail that MultiChoice views and approves each and every programme or each and every episode of a series. This means that Multichoice, when relaying the signal received from Animax to its subscribers, does not know what the exact contents of its “broadcast” are. Mr Mkhize assured the Tribunal that the broadcasters from whom they buy their channels are in possession of the “BCCSA’s Code of Conduct for Subscription Broadcasting Service Licensees”. In this respect it should be noted that clause 8 of the Code determines that a channel must first be “authorized” by ICASA in terms of regulation 3 of the Subscription Broadcasting Services Regulations. What this authorization entails is not clear to us.

- [6] The above paragraph serves to explain the logic behind the word “knowingly” in clause 9 of the Code. The relevant part of clause 9 is quoted *verbatim* in the Respondent’s written submission to the Commission. Because the Respondent did not know the exact contents of the episode that it “broadcast” to its subscribers, it cannot be held accountable for the broadcast – so the argument goes. The Respondent’s denial that it contravened the Code is thus based on the word “knowingly” in clause 9. Here we have to point out that clause 10 of the Code, which deals with the prohibition of the advocating of war, violence or hatred also contains the word “knowingly”.
- [7] This argument places the Tribunal of the BCCSA in a powerless position. We have no jurisdiction over the broadcaster from whom MultiChoice buys its

channels and who is in possession of our Code. We do have jurisdiction over the Respondent who has signed our Code and agreed to submit itself to our adjudications and judgments. However, in a case like this, the “broadcaster” merely shrugs its shoulders, in a manner of speech, and pleads that it was not aware of the bestiality scene in the broadcast. Therefore, they did not broadcast the scene knowingly and therefore we cannot find that they are in contravention of clause 9 of the Code. The frustration resulting from this situation is expressed by the Complainant in his further comments above to the Respondent’s response.

[8] When the provisions of the Code were negotiated with the subscription broadcasters, the word “knowingly” was probably inserted with the present situation in mind. This, we have been informed, is the result of the technical circumstances relating to this kind of broadcast. The consequence of this is that the Tribunal of the BCCSA will in future have difficulty in finding a contravention of clause 9 (and clause 10) of the Code where the broadcaster pleads that it did not know what content it was broadcasting. A similar situation would prevail in respect of the clauses providing that a broadcaster must do something or omit doing something subject to the condition “wherever practicable”. This condition is to be found in clauses 12, 13, 14, 17, 20, 21 and 22. We can foresee complaints in regard to these clauses where the broadcaster could state that it was not practicable to comply with the relevant clause. This Tribunal would similarly be in a powerless position. These situations, to our mind, are in contravention of the conditions of the broadcaster’s licence that it received from ICASA and which determines that the broadcaster is responsible for the content that it broadcasts.

[9] Turning to the merits of this case, we consider the following facts to be in the Respondent’s favour: the programme was broadcast to subscribers only. This means that the subscribers have access to the parental control mechanism and can deny their children access to broadcasting material that is harmful to children.

Furthermore, the programme was broadcast at 21:55 which is well after the watershed.

[10] The most convincing fact in favour of the Respondent is that it states that it did not know beforehand what the content of its broadcast would be. In the absence of evidence to the contrary, we have to accept the correctness of this statement. When we apply clause 9 of the Code to the facts, the only conclusion that we can arrive at is that the Respondent did not knowingly broadcast the scene of bestiality and therefore did not contravene the clause.

[11] This leaves us in the unsatisfactory situation as described above. We, as the Tribunal, do not have the technical knowledge to suggest a solution to this impasse. We would like to suggest that the subscription broadcasters come up with practical solutions to this technical problem and that the terms of the Code be re-negotiated with the subscription broadcasting services licensee. We have to add that in certain situations we could find a contravention of the Code, more specifically of clauses 9 or 10, based on the local broadcaster's *dolus eventualis*. This means that where the broadcaster foresees the possibility of a contravention but nevertheless continues to broadcast, the intention can be imputed to the broadcaster to contravene the Code. That would be in the case where the Tribunal has found that a scene in a film or programme is in contravention of the Code, but the broadcaster nevertheless decides to re-broadcast the programme or where the local broadcaster provides to its viewers a channel that it knows produces risky material but does not make sure of the content before it broadcasts and nevertheless continues to do so. These points should be taken into consideration when the Code is re-visited.

In the result, we find that the broadcaster has not contravened the Code and the complaint is, accordingly, not upheld.

HP VILJOEN
DEPUTY CHAIRPERSON

Commissioners Makeketa, Nkwane and Olivier concurred in the above judgment of the Deputy Chairperson.