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CASE NUMBER: 18/2011

DATE OF HEARING: 30 MAY 2011

SAEED & OTHERS **COMPLAINANT**

vs

e-tv **RESPONDENT**

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)
DR LYNDA GILFILLAN
MR BRIAN MAKEKETA
MS ZALI MBOMBO

FOR THE COMPLAINANT: Ms Sabera Suleman from Sulemans Inc Attorneys

FOR THE RESPONDENT: Mr Dan Rosengarten, Mr David Feinberg, Giselle Clemson of Rosin Wright Rosengarten Attorneys accompanied by Mr Monde Twala and Mr Vasili Vass of e-tv .

Nudity – after midnight – not prohibited by Broadcasting Code - Saeed & Others vs e-tv (Case 18/2011)

SUMMARY

The BCCSA Tribunal had to decide whether *Naked News*, which portrays women with naked breasts reading the news after midnight on e-tv, was in contravention of the Broadcasting Code.

The Tribunal held as follows: Our Courts have, time and gain, held that nudity as such is not indecent or obscene in terms of the two Publications Acts that preceded the present 1996 Act. It is also clear from the 1996 Act that, except in the case of child pornography, nudity as such is not prohibited in publications or films. Of course, age restrictions and classification strive to exclude children from such publications and films. The Tribunal could find nothing degrading to women in *Naked News*. A case could also not be made out that the nudity portrayed is likely to contribute to violence against women, or to rape. The test in law is not that of the dysfunctional person who might be influenced by a multitude of factors. The mere fact that the nudity makes no contribution to a better society is irrelevant in law. It is part of the freedom of choice of adults whether they wish to watch the *Naked News* or not. If they are suddenly confronted with the nudity and find it offensive, they can switch channels or switch the television off.

It should be pointed out that the advertisements shown before, during and after the slot do not fall under the jurisdiction of the BCCSA but under the jurisdiction of the Advertising Standards Authority. No opinion is, accordingly, expressed as to the advertisements.

The complaint was not upheld

JUDGMENT

JCW van Rooyen SC

[1] The Registrar decided not to entertain complaints against the broadcast of *Naked News* after midnight on the free-to-air broadcaster, e-tv. Her decision was based on a previous judgment of the BCCSA Tribunal.[1] The core of that judgment was that somewhat explicit sex is permitted to be broadcast around midnight and later into the night with due classification and an age restriction which is shown on the screen throughout the programme. The sex referred to in that judgment, it should be pointed out, was not nearly as explicit as the sex which is, per definition, permitted as X18 in terms of the Films and Publications Act 1996 and which is made available in licensed video shops. Of course, neither did the sex referred to even come close to child

[1] e-tv vs Rev Howell & Others, Case No: 28/2002.

pornography and violent sex, and there was also no denigration of women in the films broadcast.

[2] Since new Broadcasting Codes were published in 2003 and 2009 by the Independent Communications Authority of South Africa, and since both Codes have been accepted by the BCCSA, I decided that the matter of nudity on free-to-air television should again be considered in the light of the new Code. It should be pointed out that, given the availability of a parental block-out mechanism in the case of subscription television, it is permissible to broadcast explicit sex well after the watershed on those channels. Although somewhat explicit sex is available on subscription television, the subscription broadcasters have not ventured into showing so-called X18 material, where nothing is left to the imagination and explicit non-violent sex is shown. As mentioned earlier, such material is available in licensed video shops, to which only adults have access. It might also be mentioned that TopTV, the second subscription broadcaster, blocks out films with an age restriction of 18 and R18. It is only when the adult subscriber types in his or her individual PIN that the broadcast may be seen. In the case of DSTV parents are provided with a block-out mechanism with which they can block out films with any age restriction, or from higher age restrictions than 13 up to 18. Unfortunately, television operators have not yet reached this standard of technological capability in the case of free-to-air-television, which might in future provide similar devices to be used so as to protect children. However, it is clear from the Broadcasting Code that after the watershed at 21:00 more explicit material may be broadcast on a sliding scale towards midnight up to 05:00. It should be pointed out that the advertisements do not fall under the jurisdiction of the BCCSA but under the jurisdiction of the Advertising Standards Authority. We will, accordingly, not express any opinion on the advertisements shown before, during and after *Naked News.*

[3] The complaint and appeal to the Chairman to entertain the complaint read as follows:

> **Complaint:** "I would like to record my objection against e.tv's nude news programme, Naked News, being made available to local viewers and accordingly I support the call made by Churches asking their congregations to pray that female news readers do not continue to reveal their curves along with the truth on Friday nights.
>
> I find it really disgusting that such a news channel even exists. I cannot think of anything worse than making someone strip in front of an audience.
> It is so unfortunate that women all over the globe are mostly reduced into simple objects and are oppressed in different ways.

Capitalists are always in search for super profits and new markets. This system has turned the female psychic into commodities or as marketing tools.

Take for example the advertising industry and how it objectifies women. Just by adding a little spin about sex advertisers attract much more attention than without it. Everything from simple beauty products to cars advertisers uses women's bodies to push the item for consumption. Studies prove that women are portrayed more often than not in subservient or minor roles rather than significant ones.

As a community we have the right to live in a normal family environment, not one poisoned by pornography. Such immoral films damages and destroys the family unit, the recognized source of a stable society.I strongly object to such immoral broadcasting."

Appeal:
RE: e.tv's nude news programme.

I would like to appeal the decision to allow e.tv's nude news programme, Naked News, being made available to local viewers and accordingly I support the call made by Churches asking their congregations to pray that female news readers do not continue to reveal their curves along with the truth on Friday nights.

I find it really disgusting that such a news channel even exists. I cannot think of anything worse than making someone strip in front of an audience.

It is so unfortunate that women all over the globe are mostly reduced into simple objects and are oppressed in different ways.

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Take for example the advertising industry and how it objectifies women. Just by adding a little spin about sex advertisers attract much more attention than without it. Everything from simple beauty products to cars advertisers uses women's bodies to push the item for consumption. Studies prove that women are portrayed more often than not in subservient or minor roles rather than significant ones.

Naked News is "soft porn". Period.

Numerous well researched scientific and religious documents are available concluding that all forms and levels of pornography has the potential for causing harm to women, children and the family unit.

Pornography or sexually explicit material- the alternative term distorts the reality; it has an attribute of dominance and is factually linked in many ways to an entire range of physical human injury and harm. It leads people into a world of fantasy and desire that isolates them from realism, morals, loyalty, responsibility and respect which should manage our lives and interactions. Above all it reduces women as objects with which to live fantasies and as a result diminishes women as to their human dignity and right to bodily integrity. Research has shown that men who see women depicted as sex objects are more likely to treat them so and tend to become more abusive towards women, less responsive to pain and suffering of rape victims, and more willing to accept various myths about sex and related issues.

Moreover, Pornography is frequently implicated in such shocking sex crimes against the human race that it is impossible to quote them all in this correspondence.

Let us be clear and unambiguous that pornography is harmful, and that the harm is serious enough to call it a crime against humanity. Women are the heart beats of every household and undermine that blessed beat, the entire structure of family life crumbles.

> Unfortunately, our culture calls pornography adult entertainment, or adult material. People of all faiths abhor pornography and regard it as unlawful. Moreover, it is shameless, degrading, morally wrong and symptomatic of a sick mind. Pornography should be banned as a risk to women because it dehumanises women into becoming sexual objects. Women in pornographic pictures or films are required to perform in demeaning ways, leading individuals into believing that this is the way that women like to be treated.
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> Pornography should not be transmitted into millions of homes. It is not about rights or censorship. It is about respecting and protecting the rights of all of us to live in a safe, decent and moral society.
>
> As a community we have the right to live in a normal family environment, not one poisoned by pornography. Such immoral broadcasts damages and destroys the family unit, the recognized source of a stable society.
>
> Agreed, there are many other more prevailing influences on adolescent sexual development, however, teenagers are especially vulnerable to the messages that are broadcast on television. Television messages undoubtedly play a major part in helping not only to inform the young mind, but also to cultivate their ideas of what other folks their age are thinking, saying and doing.
>
> Agreed, In the end it is the duty of every parent to monitor what his or her child is watching but as adults it is our duty to be one step ahead of them.I strongly object to such immoral broadcasting."

[4] E-tv rejected these accusations and argued that the nudity portrayed after midnight in no way degrades[2] females and was not likely to lead to rape or to non-consensual sexual acts short of rape. It also argued that the Broadcasting Code clearly permits it to broadcast this kind of "lampoon" material at that time of the night.

[5] The Complainant has, in the main, argued that the nudity in *Naked News* amounts to pornography; that some adult men having watched the *Naked News* could be inclined to resort to rape after having seen the nudity; and that in the case of dysfunctional homes, where a teenager may be in charge or where parents are mostly absent, no controls by parents or other custodians would be exercised. The Complainant also emphasised the possibility that a man who suffers from a psychological affliction, or a paedophile, could be encouraged by the nudity to break the law.

[2] Compare the judgment of the Canadian Supreme Court in *Regina v Butler* 1992 CCC 129 per Sopinka J where violent sex, in contrast to mere nudity, was rightly referred to as degrading of women. A judgment with which one cannot but agree. Also compare the Report of the Ministerial Task Group into the Publications Act p 40 et seq, published by the Government Printer on 3 March 1995 (a copy of which can be found under "Annual Reviews" on the BCCSA website:www.bccsa.co.za)

[6] Although it is accepted that many people in society believe that material in cinemas and on television should be judged according to standards that accord with those of the deranged, semi-deranged or the dysfunctional viewer, the *law* applicable to films and broadcasts does not operate in this manner. Where a person is mentally challenged, violent or inappropriately sexually uninhibited, film or video material might well provide a link to antisocial conduct. But that might be true of any kind of object – from sweets to shoes to nude female breasts – as pointed out by Justice Kennedy of the US Supreme Court in *Ashcroft.*[3] And, of course, to apply that test would place all drama, literature, science, documentaries and films at risk: the disturbed mind rather than the "reasonable" mind would become the test. The test is that of the normal adult person who, according to law, must tolerate the possibility that other adults may wish to watch nudity or explicit sex at midnight in their own homes. The High Court has, in fact, accepted this test: it is not what one would oneself not tolerate seeing, but what one would reasonably not tolerate other people seeing.[4] It is also clear from a judgment of our Appellate Division[5] that the so-called 1868 *Hicklin* test, which applied the test of "those whose minds are open to such immoral influences" is unacceptable in law.[6] It should also be borne in mind that our Constitutional Court has held that a generous application[7] should be given to freedom of expression and thus freedom of choice of adults, that

[3] *Ashcroft v Free Speech Coalition et al*. 122 S.Ct.1389(16 April 2002) at p 10-11

[4] *South African Connexion Cc T/a Reel Communications v Chairman, Publications Appeal Board* 1996 (4) SA 108 (T) where Streicher J (as he then was) states: "From this statement it is clear that the test to be applied in determining whether an object, publication or film is indecent or offensive to public morals is to ask whether the fictional reasonable man, whose morality represents the morality of the community, taking all relevant factors into account, inter alia, who the likely viewers would be, would consider it to be indecent or offensive to public morals. The issue, in my view, is what the community will tolerate in its midst, not what members thereof might themselves be offended by seeing. In my view, that concept was aptly stated by the Canadian Supreme Court in *Towne Cinema Theatres Ltd v R (*1985) 18 DLR (4th) 1 ([1985] 1 SCR 494) in the following terms: 'The cases all emphasise that it is standard of tolerance, not taste that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.'"

[5] Cf *Publications Control Board v Republican Publication (Pty) Ltd 1972(1) SA 288 (A)* per Ogilvie Thompson CJ *at 292-3.*

[6] *Q. v Hicklin and Another*, L.R. 3 Q.B. 360 at p. 371, where the following test was propounded: "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

[7] *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).

morality is not the morality of the people of South Africa or a part thereof, but the morality which the *Constitution* of the Republic represents[8] and that, although religion has played an important role in shaping our society, it is not a source of law when interpreting and applying the Constitution.[9]

[7] Neither the nude news readers in *Naked News* nor the nude people whom they at times interview, are portrayed in a sexually provocative manner. At most, one is inclined to question the taste of adult viewers who have a serious interest in nudity that is portrayed simply for its own sake. However, it is not our task to decide whether the material has a positive moral message or not, but whether there is any cogent reason for stopping this kind of worthless material from being broadcast after midnight. It is also not our task to decide whether the material will make society a more moral society, but whether the *law* forbids a broadcaster from broadcasting this kind of worthless material – in this case a decidedly feeble lampoon – after midnight. Of course, it is also true, and we are convinced that this is the case, that most viewers would simply watch the *Naked News* out of curiosity, and that very few of these viewers would be likely to watch *Naked News* again, or on a regular basis. We were told at the hearing of this matter that e-tv decided to blur the pubic areas of the naked news readers and their interviewees so that nothing is visible to the viewer, and that this decision was taken out of respect for the dignity and privacy of women. It was, however, not conceded that this was done from a legal perspective.

[8] Our Courts have, time and gain, held that nudity as such is not indecent or obscene in terms of the two Publications Acts that preceded the present 1996 Act.[10] It is also clear from the 1996 Act that, except in the case of child pornography, nudity is not prohibited in publications or films. Of course, age restrictions and classification strive to exclude children from such publications and films. We could find nothing degrading to women in the scenes. We also do not believe that a case could be made out that the nudity portrayed is likely, in any way, to contribute to violence against

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[8] Cf *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) (2002 (2) SACR 499; Lötter "Prostitution and the Enforcement of Morality" (Ed. Joubert) *Essays in Honour of CR Snyman(2008) 196*

[9] *Minister of Home Affairs v Fourie (Doctors for Life Intl, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

[10] *See Van Rooyen Censorship in South Africa (Juta 1988) 8-17.*

women, or to rape. The mere fact that the nudity makes no contribution to a better society is irrelevant in law. It is part of the freedom of choice of adults whether they wish to watch the *Naked News* or not at that time of the night. And if they are suddenly confronted with nudity, they are at liberty to switch channels or switch the television off.

In conclusion, the following statement from the minority judgment of Rumpff JA (as he then was) in *Publications Control Board v William Heinemann* 1965(4) SA 137(A)- often quoted with approval by many Courts, including the Supreme Court of Appeal[11] and the Constitutional Court[12] - is particularly meaningful when one considers the vehement attacks launched against the broadcast of *Naked News* by members of the public, many of whom have obviously not even watched the programme:

> "The freedom of speech - which includes the freedom to print - is a facet of civilisation which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it. The other is the inclination of those who want to protect it *to repress more than is necessary. The latter is also fraught with danger. It is based on intolerance and is a symptom of the primitive urge in mankind to prohibit that with which one does not agree.* When a Court of law is called upon to decide whether liberty should be repressed - in this case the freedom to publish a story - it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost. And in its approach to the law, including any statute by which the Court may be bound, it should assume that Parliament, itself a product of political liberty, in every case intends liberty to be repressed only to such extent as it in clear terms declares, and, if it gives a discretion to a Court of law, only to such extent as is absolutely necessary.
>
> I am not convinced that in applying the provisions of the Act it is absolutely necessary to ban 'When The Lion Feeds'." (emphasis added)

In the result it is held that the broadcast of *Naked News* during the night of 13-14 May 2011 did not contravene the Broadcasting Code.

The complaint is not upheld.

JCW VAN ROOYEN SC
CHAIRPERSON 22 June 2011

Commissioners Viljoen, Gilfillan, Makeketa and Mbombo concurred with the judgment of the Chairperson

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[11] *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A).
[12] *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).