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CASE NUMBER: 20/2009

DATE OF HEARING: 14 AUGUST 2009

R. PHELAN **COMPLAINANT**

vs

MULTICHOICE (DSTV) Discovery Channel 250 **RESPONDENT**

TRIBUNAL: **Prof Kobus van Rooyen SC (Chairperson)**
Prof Henning Viljoen (Deputy Chairperson)
Mr Brian Makeketa
Prof. Gerrit Olivier
Dr Linda Venter

COMPLAINANT: **The Complainant did not attend**

For the respondent: Mr Kwezi Mtengenya, General Manager of Policy and Regulatory Affairs, Mr. Bruce Mkhize, Regulatory Compliance Manager, Regulatory Affairs and Mr. Umikuwo Sugars Yengwa, Platform Specialist - Southern Africa, MultiChoice.

Complaint about alleged shocking and offensive images in promo broadcast during family viewing time - Tribunal finding that right to freedom of expression includes the right to offend within reasonable limits - Tribunal also finding that the horribly distorted and grotesque human faces and bodies contained in the promo might lead to sleeplessness and nightmares in young children, especially since last image shows a child cringing away from a human being who is covered in long hair like an animal - Respondent explaining that Discovery programmes are packaged outside South Africa, and transmitted directly via satellite and that MultiChoice has no control over timing or scheduling of promos – Tribunal finding that in light of the lack of control and MultiChoice's request to Discovery to avoid broadcasting promos that contain offensive and shocking material during family viewing time, a finding of negligence would be unreasonable since Clauses 12 and 13 of the Code for Subscription Broadcasters state that licensees must, wherever practicable, avoid broadcasting such material - Under normal circumstances broadcast would have constituted

a contravention of the Code, but Tribunal concluding that since it was practically impossible to control the timing of the promo and in light of the measures taken to address the problem, the complaint is not upheld. Complaint not upheld - Phelan vs MultiChoice, Case No: 20/2009 (BCTSA).

SUMMARY

Complaint about alleged shocking and offensive images in a promo broadcast during family viewing time. As far as offensiveness is concerned, the Constitution guarantees freedom of expression, which includes the right to offend within reasonable limits. However, the Tribunal found that the horribly distorted and grotesque human faces and bodies contained in the promo might have been very scary for young children, especially since the last image shows a child cringing away from a human being who is covered in long hair like an animal. Research found that distorted images is one of the most common types of fright stimuli for children that leads to sleeplessness and nightmares. The Respondent explained that Discovery programmes are packaged outside South Africa and transmitted directly via satellite and that MultiChoice has no control over the timing or scheduling of promos contained in such programmes. Clauses 12 and 13 of the Code for Subscription Broadcasters state that licensees must, wherever practicable, avoid material which is unsuitable for children. It was argued that although the promo was broadcast during family viewing time, MultiChoice had no control over this and thus a finding of negligence would be unreasonable. MultiChoice has also requested Discovering channel to avoid broadcasting promotional material that contains shocking images that may offend sensitive viewers and upset children during family viewing time or at least warn viewers that the images may be offensive. Under normal circumstances broadcasting of the promo during family viewing time would have constituted a contravention of Clauses 12 and 13 of the Code. However, the Tribunal concluded that since it was practically impossible to control the timing of the promo and in the light of the measures taken by the broadcaster to address the problem, the complaint is not upheld. It is trusted that Discovery channel will take MultiChoice's request seriously.

JUDGMENT

HL VENTER

[1] The complaint relates to promotional material for the programme *My Shocking Story* broadcast on the *Discovery* channel on 1 June 2009 at 19h00. The complainant contends that the promo was broadcast without warning during family viewing time and contained offensive shocking graphical material (in line with the title of the programme it was advertising).

[2] *My Shocking Story* is a programme that documents unusual medical ailments and conditions. The documentaries are based on factual accounts and because of their potential to shock people they are broadcast very late in the evening. The programmes follow emotional journeys taken by people struggling with extraordinary medical conditions as they try to lead normal lives. Some of these people are desperate to find a cure for their condition and often it is a matter of life or death.

[3] After watching the promo, the members of the Tribunal were of the opinion that the graphic images of horribly distorted and grotesque human beings might indeed be offensive to sensitive viewers. Notwithstanding this, the Code for Subscription Broadcasters does not cover offensive material since the Constitution guarantees freedom of expression, which includes the right to broadcast offensive material within reasonable limits. In a democracy such as South Africa, the viewing public has the right to be informed about what is going on in the world. However, it is well-known that one of the main tasks of the BCCSA is to protect children against exposure to material that is unsuitable for them.

[4] With regard to the promo under discussion, the members of the Tribunal were of the opinion that the shocking images of distorted faces and bodies might have been scary and harmful to children, especially since the last image shows a child cringing away from a human being who is covered in long hair like an animal. A study by researchers Harrison and Cantor, respectively from the universities of Michigan and Wisconsin in the USA, found that disturbing sounds/distorted images is one of the most common types of fright stimuli for children. Harrison writes: *Given that very young children may not yet know what types of stimuli frighten them most, nor enjoy the power to choose which media the family will view, they are in special need of protection from exposure to such scary stimuli* (USA Today - Society for the Advancement of Education, April 2000). It is well-known that television is a very powerful medium and although the images in the promo under discussion are very fleeting, on an unconscious level the brain is still able to processes such material. Young children are particularly impressionable and do not dispose of established cognitive frameworks that would enable them to interpret such images in context. It is even possible that they might suffer from an inability to sleep and nightmares after being exposed to material such as this.

[5] The following clauses of the Code for Subscription Broadcasters specifically refer to unsuitable material for children:

> **12. A television or composite subscription broadcasting service licensee, wherever practicable, must avoid broadcasting programming material, including promotional material, which is unsuitable for children and/or contains nudity, explicit sexual conduct, violence or offensive language before the watershed period.**
>
> **13. A television or composite subscription broadcasting service licensee, wherever practicable, must attempt to ensure that the more the broadcasting of programming material is unsuitable for children, the later that programming material must be broadcast after the commencement of the watershed period.**

[6] At the hearing, Mr. Mkhize, for the Respondent, explained to the Tribunal that subscription broadcasters function differently from free-to-air broadcasters. Programmes packaged outside South Africa (such as the Discovery channel) are transmitted directly via satellite and MultiChoice has no control over the contents of the programmes or over the timing or scheduling of promotional material that they may contain. There is not even an opportunity to view programmes before broadcast.

[7] Mr. Mkhize requested the Tribunal to particularly consider the words *wherever practicable* in the above clauses. He argued that although the promo was broadcast during family time, MultiChoice had no control over this and thus a finding of negligence would be unreasonable. He further informed the Tribunal that MultiChoice has requested Discovery channel to avoid broadcasting promotional material containing shocking images during family viewing time or at least warn viewers that the images may be offensive to sensitive viewers.

[8] Under normal circumstances broadcasting of the promo during family viewing time would have constituted a contravention of Clauses 12 and 13 of the Code. However, the Tribunal concluded that since it was practically impossible to control the timing of the promo and in the light of the measures taken by the broadcaster to address the

problem, **the complaint is not upheld.** It is trusted that Discovery channel will take MultiChoice's request seriously.

H.L. VENTER
BCCSA COMMISSIONER

Chairperson, Van Rooyen SC and *Commissioners Viljoen, Makeketa and Olivier concurred in the judgment.*