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Case No: 22/99

Date of Hearing:2 August 1999

BAPTIST UNION OF SOUTHERN AFRICA AND OTHERS **Complainants**

v

SABC **Respondent**

In regard to the programme "BUT, IS IT ART?" screened on Sunday the 4th of July 1999

Commission: **Prof Kobus van Rooyen SC (Chairperson)**
Mr Sam Mphuthi
Ms Lauren Gower
Mr Windsor Leroke
Prof Sunette Lötter

For the Complainants: **Rev Reuben Ihlenfeldt and Mrs Patricia Ihlenfeldt**

For the Respondent: Mr Malan Otto, General Manager, Central Complaints Office, SABC and with him Ms Esthea du Toit, Legal Department, SABC accompanied by Mr Chris du Plessis from Awfully Nice Productions , Ms Hannetjie Fourie of the SABC, Mr Eddie Manzingana , Ms Sherell Schmulian, Mr Pat Kelly.

SUMMARY

Complaint about documentary programme on the production of soft pornography in South Africa. Complaints that it was too explicit. Commission held that although many aspects of the programme were particularly vulgar, the time of the screening, which was well past the watershed at 22:00, was a particularly alleviating factor in this adjudication. Programme itself,

accordingly, not indecent or obscene of offensive. However, held that the classification plus age restriction should have preceded the screening.

JUDGMENT

Prof Kobus van Rooyen:

On the 6th of June 1999 at 20:00 SABC 2 broadcast a documentary in the programme *But Is It Art?* on the production of soft pornography in South Africa. Several viewers complained about this programme, arguing that it was indecent or obscene or offensive to public morals.

Clause 7 of the BCCSA Code provides that a broadcaster shall not broadcast indecent or obscene or offensive material.

Since the introduction of the fundamental rights chapter in the 1993 Constitution of the Republic of South Africa, now the 1996 Constitution, the Constitutional legality of vague terms such as "indecent", "obscene" and "offensive" has been questioned. Mokgoro J in *Case and Another v Minister of Safety and Security and Others* 1996(3) SA 592(CC) in fact found that these terms were constitutionally invalid in the light of the freedom of the press guarantee in the fundamental rights chapter of the 1993 Constitution. The other judges did not go quite as far : they found that within the context of the Indecent or Obscene Photographic Matter Act 1967 which prohibited the possession of indecent or obscene photographic material, this terminology was too vague to justify an invasion into privacy to the extent which this Act allowed for.

The Task Group appointed by Dr MG Buthelezi, Minister of Home Affairs of the Republic of South Africa in 1994, also argued that these terms were too vague - see the printed Report which was published in March 1995 by the Government Printer, Pretoria. On page 12 of the report the Commission says the following:

> "We have, therefore, combined two approaches: as far as possible, we have delineated the factual circumstances upon which a refusal of classification may be based, while adding the words 'explicit' and 'prolonged' which emphasizes the discretion which the adjudicator must exercise, but are not too vague. Reference to words such as 'indecent', 'obscene' and 'offensive' was therefore avoided."

Schedule 1 of the Independent Broadcasting Authority 1993 as well as the BCCSA Code both still

contain the concepts "indecent" or "obscene" or "offensive".

That these terms are regarded as dated and probably as unconstitutional and in any case as too vague, clearly appears from the Draft Code which the Independent Broadcasting Authority published in April 1999. Since Schedule 1 of the IBA Act can only be repealed or amended by Parliament itself, Schedule 1 still remains in force. The BCCSA Code was approved by the IBA in 1994 in accordance with Section 56(2) of the IBA Act.

The BCCSA has, however, interpreted its Code in more than 150 judgments. Issues concerning indecency or obscenity or offensiveness have been discussed in quite a number of judgments. The BCCSA has, according to these judgments, clearly been influenced by the fundamental rights chapter of the Constitution of the Republic. Whilst the 1993 Constitution, according to the Constitutional Court in *De Klerk v Du Plessis* 1996(3) SA 850(CC) held that the Interim Constitution only applied to relations between the State and individuals, it is clear from the 1996 Constitution that where appropriate, the fundamental rights chapter also applies between citizens or citizens and a legal persona.

The relationship between the BCCSA and broadcasters who have signed its Code, is a contractual one. We are, however, of the view that as a result of the disciplinary relationship which is created in this contract, it is appropriate for this Commission to be guided by the Constitution in its interpretation of the Code. In fact, Section 39(1) of the Constitution provides that when a Court Tribunal or Forum interprets the Bill of Rights, it must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 39(2) also provides that when interpreting any legislation, and when developing the common law or customary law, every Court, Tribunal or Forum must promote the spirit, purport and objects of the Bill of Rights.

We have no doubt that especially Section 39(2) is binding on this Commission which falls in the category of a quasi judicial tribunal.

When we are called upon to interpret terms such as indecent or obscene or offensive, emphasis must be placed on the guarantee of freedom of expression for the media in Section 16 of the Constitution. Furthermore, one should bear in mind that Section 36 of the Constitution requires that limits to fundamental rights should be in the form of "law of general application". This limitation must also, according to Section 36(1), be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors (some factors are then mentioned).

One of the fundamental values of a democracy is that its laws must be clear or at least reasonably certain. If we were empowered to do so, we could ignore clause 7 of our Code and simply state that the terms "indecent" or "obscene" or "offensive" are void for vagueness. However, given the fact that these concepts still form part of our Code, we must do our best in delineating the circumstances when we would be empowered to intervene. When a programme flagrantly violates the basic values such as dignity, privacy and the rights of children, then, to our mind, we would be acting constitutionally in finding a programme to be in contravention of the Code as a result of its indecency or obscenity or offensiveness. A limited and very narrow meaning must be given to these terms in any case.

In the light of what has been said above, we have come to the conclusion that the documentary is particularly vulgar and in particular poor taste. The fact that it attempts to be a documentary, however poor that documentary is, counts in its favour. There is no attempt to be explicit although some scenes verge on the explicit. The fact that the screening took place well after the watershed at 22:00 is also a particularly alleviating circumstance. Two members of the Commission were, however, of the view that 23:00 would have been a more appropriate time for this broadcast. The majority, by way of the casting vote of the Chair, however, decided that they could not unequivocally come to the conclusion that 22:00 was too early.

The Commission was, however, unanimous in its view that the omission to publish a classification at the beginning of the programme and the absence of a warning, amounted to contraventions of the Code. We, however, accept the explanation of the SABC that the programme organiser who usually attends to these matters, had left the services of the SABC in that week and that the omission could be contributed to an administrative oversight. We also realise that the whole matter of classification plus age restriction is a matter which is presently still been introduced and developed and have understanding for the omission.

The complaint is accordingly dismissed insofar as the content of the programme is concerned, but upheld insofar as the Respondent omitted to publish a warning at the beginning of the programme.

JCW VAN ROOYEN SC
CHAIRPERSON