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Case Number: 30/2003(2)

Date of Inquiry: 24 October 2003

N CARELSE **COMPLAINANT**

VS

E-TV **RESPONDENT**

TRIBUNAL: PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)
MR RATHA MOKGOATLHENG (DEPUTY CHAIRPERSON)
MS LAUREN GOWER (BROADCASTING REP)
MS REFILOE MOKOENA-MSIZA (CO-OPTED)

For the Respondent: Adv Gilbert Marcus, instructed by Rosin Wright, Rosengarten, also present Mr Dan Rosengarten and Mr. Bob Tshweu, Regulatory Affairs Executive

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Procedure – application for re-opening of matter denied – audi alteram partem applied in first inquiry – no further consideration justifiable – in future the merits of the matter may be reconsidered when a similar question arises

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SUMMARY

Respondent applied for a re-opening of the matter of the appropriate time for showing the adult film *Steaming*. It was contended that the Tribunal might have erred in holding that a large number of children was likely to have been present during a weekday morning screening of the film. The Tribunal held that it would not be justified in re-opening the matter since the *audi alteram partem* rule had

already been applied as to the crucial aspects on which the Tribunal had to decide. The Tribunal would, in future, probably be confronted with a similar screening of an adult film during a weekday morning slot. In that case, the Respondent would be invited to attend the proceedings and address the Tribunal so that the matter can be inquired into again. If it were to be found that the Commission had erred on the merits in the present matter, the Tribunal will express a view on that so that the Respondent can make an amendment to its record.
Application dismissed as to re-opening.

JUDGMENT

JCW van Rooyen

[1] On the 4th July 2003 this Tribunal held an inquiry into a complaint concerning the screening of the film *'Steaming'* during a weekday morning in November 2002. The film was classified as an 18 film by the predecessor of the Films and Publications Board in 1985. On the 18th July 2003, we handed down a judgment in the matter. We held that the respondent had contravened the Code. We required that it broadcast a statement as to the outcome of our judgment and provide us with written representations as to why the Tribunal should not impose a fine for the contravention.

[2] The Registrar received a letter in which the Commission was requested to fully re-open the inquiry into this matter. We have on occasion done this before, where it appeared that the matter had a particular point had not been argued at the first hearing and it was in the interests of justice to re-open the matter. In the present matter it was decided decided not to re-open the matter. A letter in this regard was sent to the Respondents' attorneys on the 23rd September, 2003. The following paragraph from that letter is relevant:

"The representative of the Respondent has had a full opportunity to address the commission on the matter of age restrictions and children. Children and age restrictions were the only matters discussed at the hearing. It should be borne in mind that the commission may come to a decision without evidence being led and we believe that we have stated time and again that films which justify an age restriction of 18 should be broadcast in the watershed period between 21:00 and 05:00."

[3] The Registrar reminded the Respondent that a date would be set down for argument as to the possible fine. On that occasion counsel for Respondent, *Gilbert*

Marcus SC, argued for a re-opening so that we could reconsider the matter as to whether a large number of children was likely to have been in the audience during that weekday morning.

[4] We have considered this argument and have come to the conclusion that we cannot, in the present circumstances, re-open the matter. As mentioned in the letter of 23 September 2003, the main matters were argued before us by the representative of the Respondent at the first hearing. If it was deemed necessary at that stage to obtain evidence as to the likelihood of a large number of children being present in the audience, we should have done so then. We did not, however, regard it as necessary and, in any case, were of the view that the age restriction of 16 was too low. This was a film which should have been screened after 21:00.If we were wrong in our decision, there is no way in which we can find a reason to re-open the matter. We have been addressed on the matter and must live with the outcome of the matter, even if we might now have second thoughts on it.

[5] We are, however, prepared to reconsider the matter of the likely presence of a large number of children during weekday mornings when the opportunity arises again after a similar complaint is received as to a film screened during a weekday morning. I shall direct the Registrar to invite the Respondent to such a hearing and if the Tribunal then decides that the conclusion which was reached in the present matter was incorrect, it will say so. An endorsement can then be made on this file and it could be recorded as such by the Respondent.

[6] In so far as sanction is concerned, we agree that we have not heard argument on it. We are, accordingly, prepared to look into the full matter of sanction again. The matter of a fine was, in any case referred to argument. The *bona fides* of the respondents was clearly established and it was also clear that the matter of children in the audience during a weekday morning is a matter which should be re-considered when the opportunity arises again. In the light of the circumstances, we impose no sanction on the Respondent.

JCW VAN ROOYEN
CHAIRPERSON
17 December 2003

The other Commissioners concurred in the judgment of the chairperson.