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CASE NUMBER: 34/2002

DATE OF HEARING: 10 JUNE 2002

RENÉ DE VILLIERS AND OTHERS

COMPLAINANTS

VS

e-tv

RESPONDENT

**TRIBUNAL: PROF. KOBUS VAN ROOYEN SC (CHAIRPERSON)
PROF. RAVI NAYAGAR
DR. LINDA VENTER (CO-OPTED)**

COMPLAINANT: MR DE VILLIERS ADDRESSED THE TRIBUNAL PERSONALLY

FOR THE RESPONDENT: MR. OLIFILE BOB TSHWEU, REGULATORY AFFAIRS EXECUTIVE, E-TV AND ASSISTED BY MS DEBRA PATTA, THE PRESENTER AND MS DEBBIE MEYER, 3RD DEGREE PRODUCER.

Nudity – documentary on “swinging” at 20:00 - complaints that the programme was broadcast too early, that the classification was inappropriate given the time of the broadcast, that the sexuality degraded women and could cause sexual abuse. BCCSA holding that the programme amounted to a bona fide documentary and that although it might have been prudent to have broadcast the programme at 20:30, the Commission came to the conclusion that a clear-cut case for such timing could not be made out, given the critical stance taken by the presenter and that the material shown was not sufficiently explicit to warrant a later time slot.

SUMMARY

The Respondent Broadcaster broadcast a documentary at 20:0. The subject was on switching sexual partners (“swinging”) at a club. Several complaints were received that the programme should not have been broadcast or that the programme was too early and that the classification was inappropriate given the time of the broadcast. BCCSA holding that the programme amounted to a bona fide documentary and that although it might have been prudent to have broadcast the programme at or after 20:30, the Commission came to the conclusion that a clear cut case for such later timing could not be made, given the critical stance taken by the presenter and the fact that the sexual material was not explicit. The complaints were dismissed.

JUDGMENT

JCW van Rooyen

- [1] The Respondent Broadcaster (which has voluntarily subjected itself to the jurisdiction of this Commission a few years ago, when it was granted a license by the Independent Broadcasting Authority of South Africa) during its regular current affairs programme, **Third Degree**, broadcast a programme on the subject of so-called “swinging”. The programme inquired into the activities of a club, where members could take part in “swinging” sexual partners.

Ms Debra Patta, a well known investigative journalist, as usual, led the inquiry on screen. She had interviews with the club owner as well as a psychologist; the club owner making out a case for this facility, given the freedom of choice which adults have; the psychologist also explaining the benefits of such swinging where both partners consent.

Ms Patta was critical of their arguments throughout the programme.

- [2] **Mr. De Villiers** argued that the broadcaster was constantly “pushing” towards more explicit sexuality on screen and that the programme was, accordingly, not bona fide and, in any case, far too explicit. His written complaint motivated his complaint as follows:

“At approximately 20:30 the programme on “Swinging” was offensive in general terms and, particularly offensive was the repeated reference to an “exchange of body fluids”.

- [3] **Mrs. Van den Berg**, one of the other complainants, argued that the defense of such practices by the owner and the psychologist could be described “as nothing else but a blatant invitation to awareness of such lecherous practices”. Her main concern was, however, that 20:00 was still a family time slot, when many undiscerning youngsters are unwittingly exposed to “this kind of trash”. There had also been insufficient warning beforehand on air as well as in TV guides.
- [4] **Mrs. Poulter**, a further complainant, also felt that the programme had been unsuitable for that hour. She argued that it is not good enough for the Respondent to have given warnings, since this would simply tempt the curious (i.e. both children and adults) since the broadcast is free-to-air. She felt that the explicit visuals in the first part of the programme were unnecessary and were primarily intended to boost viewership. In this respect, she argued, “e-tv is no better than purveyors of pornography, who exploit innate human depravity in order to make a profit. More licentious individuals (i.e. those with desensitized consciences) might think the programme was tastefully done, but in my view the explicitness was unnecessary and especially inappropriate (as was the subject matter) for the hour at which it was broadcast. Furthermore, the club owner tried to justify his views by misinterpreting and distorting the Bible, using the misapplied example of Abraham having a son by servant-woman Hagar at the instigation of his wife Sarah, and Solomon with his many wives and concubines. Mrs. Poulter then argued that the argument of the owner was not justified from a Biblical and ethical perspective – in essence, that the argument was used out of context. It should be mentioned that Mrs. Poulter said that she would not normally watch this kind of programme, but having inadvertently seen an advert for the programme, was concerned about such a subject being broadcast at such an early hour and, once she had seen the programme, about its explicitness.
- [5] **Mrs. Gottschalk**, another complainant, was also concerned about the early hour of the broadcast. She complained that she had felt degraded watching the programme in the presence of her husband. She strongly objected to what she called pornography on television, particularly when shown at prime time. Warnings were irrelevant at that time, when people are doing the dishes and putting the “little ones” to bed.
- [6] **Mohan Nair** complained that the programme essentially worked as an advertising forum for swingers. The programme showed excessive sex. Given the fact that South Africa has the highest aids epidemic in the world, the government should enforce the strictest media censorship of sex-related programmes in the world. The complainant also argued that the programme did not amount to proper

investigative journalism. The programme simply amounted to a reproduction of facts easily found in one club. The complainant was “scared at what you will throw at us next.” There was nothing in the programme that people did not know of previously. The Complainant copied the Registrar with numerous arguments in the same vein, which were also sent to Debra Patta.

[7] **Mrs. X** (we omit her name since she states that she has been the subject of rape) argued that programmes, such as these, encourage men to treat women as sex objects. This is degrading to women. Children were also likely to watch TV at this time of the day since many parents are at work and too tired or too stressed to supervise their children’s TV viewing times. The programme encouraged young people that anything goes. They need to learn life styles that will protect their health and minds. Showing bare breasts and semi-naked women feeds the lust in a person, “especially if that person is struggling to keep their lust under control. These programs may just be the last straw that breaks the camel’s back and they may be encouraged to go out and rape. It can fuel the belief that women are there for their pleasure only. She was concerned about rape victims such as herself and the person at whose hands she had suffered. He used to watch this kind of programme.

[8] Complainant **Conradie** felt that the timing was wrong and also complained about the lack of warnings in the TV guides. It is insufficient to warn parents just before a programme commences. The complainant also said that only white people were shown in the club and that this does not seem fair, since whites form a “small minority” in the country.

[9] **The Respondent Broadcaster, e-tv**, responded as follows:

“3rd Degree is a well-known current affairs programme which deals with a variety of important issues. We believe it was important to flight the above lifestyle programmes to expose how some people live. Viewers are familiar with the established 3rd Degree timeslot on Wednesday at 20h00. Because of the content of the programme, rather than disrupt the established timeslot, we felt it would suffice to provide adequate warning to viewers to make a choice whether to watch the programme or not.

In this respect several promos carrying the SN advisory were flighted prior to the broadcast of the two programmes alerting viewers, in particular parents, to the content of the forthcoming programmes. The programmes themselves, when broadcast, also carried the SN advisory as to content. Furthermore, a written warning appeared on-screen prior to the broadcast of both programmes warning viewers to expect content regarding sex and nudity. Viewer discretion was advised. Under the circumstances, we are of the opinion that, given the nature of the content, adequate warning was given to viewers.

Regarding content, we are of the view that the subject matter was treated sensitively and was in no way gratuitous. This applies also to promos publicising

the programmes.”

- [10] The Code which we apply as agreed to by the Respondent and as approved in 1995 by the Independent Broadcasting Authority of South Africa (now the Independent Communications Authority of South Africa), provides that the electronic media shall not broadcast material which is indecent or obscene or offensive or harmful to public morals. These terms have often been the subject of criticism for their vagueness and, in the result, being subject to arbitrary decision-making. The terms “ indecent or obscene” have, within the context of the Indecent or Obscene Photographic Matter Act been found to have been constitutionally invalid as a result of their width and vagueness – the terms, as defined, according to Didcott J, also including reproductions of many works of ancient and modern art. See *Case and Curtis v Minister of Security* 1996(3) SA 617(CC). The Ministerial Task Group which drafted the first version of the Films and Publications Act 1996, and whose version was almost in its entirety accepted by Parliament, moved away from this kind of terminology and adopted an approach which was based on the Canadian and UK approach, where language describing the relevant forbidden visuals replaced the vague “indecent or obscene or offensive to public morals”. Compare the Task Group’s Report (as published on the 3rd of March 1995 by the *Government Printer*) para 3.6
- [11] Although not pronouncing upon the constitutional validity of the indecency and obscenity provision of the Broadcasting Code in the IBA Act, the Constitutional Court recently, in *The Islam Convention v The IBA and Others* (CCT 36/01) invalidated one of the other provisions of the Code for not being well tailored to its purpose. It would not be surprising if the same fate befell the indecency, obscenity, offensive and harmful to public morals-paragraph. In spite of many years of limiting legal interpretation, the fear that the words would, nevertheless, be interpreted subjectively and arbitrarily, is justifiably very real amongst the Commissioners and legal scholars

[12] This Commission, in *e-tv v Howell and Others (case 22 /2002)* accepted the Canadian approach to what should be allowed in this field, an approach which has also been adopted by our High Court. Deputy Chair Mokgoatlheng states as follows:

“The correct test, according to Mr. Marcus, is the one laid down by the Canadian Supreme Court in the case of *Towne Cinema Theatres Ltd v R (1985) 18 DLR (4th) 1* and this test has been accepted in our jurisprudence (see *South African Connexion CC t/a Reel Communications v Chairman, Publications Appeal Board 1996 (4) SA 108(T)*). According to the Canadian Supreme Court, the test in matters such as these is that it is the standard of tolerance, not taste, that is relevant. What matters is not what members of society think is right for themselves to see. What matters is what members of society would not abide other members of society seeing because it would be beyond the contemporary community standard of tolerance to allow them to see it.”

The Tribunal then applied this principle to a new version of the once famous *Emmanuelle* series and held that the broadcast of the film at 23:30 with due classification, did not amount to a contravention of the Code, as was held by the adjudication panel at first level. The decision was, according to the Tribunal, limited to the facts of the two films before it: soft pornography not showing genitalia, penetration and oral sex explicitly. The films also did not include any mixture of violence and sex.

[13] Section 26(4)(a) of the Films and Publications Act 1996 provides that broadcasters may not broadcast material which has been classified as XX by the Film and Publication Board or, where not classified, amounts to XX or religiously offensive material as defined in the Schedules to that Act. It is particularly useful if, in our interpretation of the indecency, obscenity and offensive and harmful to public morals criterion, we were to have regard to what the Legislature regards as forbidden for broadcasters within this field (as well as religion). Until further clarity is given by Parliament as to the Broadcasting Code, we will regard section 26(4) as the guiding criterion in this field.

The relevant Schedules provide as follows:

SCHEDULE 6 [Note : Prohibited subject to Schedule 9]

XX Classification For Films

A film shall be classified as XX if, judged within context, it contains a scene or scenes, simulated or real, of any of the following:

- (1) child pornography;
- (2) explicit violent sexual conduct;
- (3) bestiality;
- (4) explicit sexual conduct which degrades* a person and which constitutes incitement to cause harm; or
- (5) the explicit infliction of extreme violence or the explicit effects of extreme violence which constitutes incitement to cause harm.

* “degrade” is defined in section 1 of the Act as meaning the advocacy of a particular form of hatred based on gender.

Schedule 8

Age Restriction for Films **

An age restriction may be imposed only if the classification committee or the Review Board is of the opinion that, judged within context, it is necessary to protect children in the relevant age group against harmful or disturbing material in the film.

**The Commission has, with the agreement of the tv Broadcasters in its jurisdiction, provided for rules as to watershed, classification and age restrictions in this regard.

Schedule 9

Art and Science Exemption for Films

The XX or X18 classification shall not be applicable to a bona fide scientific, documentary, dramatic or, except in the case of Schedule 6(1), an artistic film or any part of a film which, judged within context, is of such a nature.

Schedule 10

Promotion of Religious Hatred

- (1) A publication or a film which, judged within context, advocates hatred that is based on religion, and that constitutes incitement to cause harm, shall be classified as XX.
- (2) Clause (1) shall not apply to-

- (a) a bona fide scientific, documentary, dramatic, artistic, literary or religious publication or film, or any part thereof which, judged within context, is of such nature;
- (b) a publication or film, which amounts to a bona fide discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or
- (c) a publication or film, which amounts to a bona fide discussion, argument or opinion on a matter of public interest.

Schedule 11

Sexual Conduct

For the purpose of these Schedules "sexual conduct" means genitals in a state of stimulation or arousal; the lewd display of genitals; masturbation; sexual intercourse, which includes anal sexual intercourse; the fondling, or touching with any object, of genitals; the penetration of a vagina or anus with any object; oral genital contact; or oral anal contact.

- [14] The complaints, when analyzed, amount to the following: sexual material as broadcast causes sexual abuse and rape; sexual material as broadcast degrades women; the Respondent was constantly “pushing” the limits and referred to the “exchange of bodily fluids” ; the programme promoted extra-marital sex and “swinging ”; the programme was offensive to Christians; the programme was broadcast too early; warnings were ineffective and are, in any case, counter-productive.

- [15] We do not agree with the point of view that sexual material which is not mixed with violence is a cause of sexual abuse or rape. This has been shown convincingly by the research of Prof. Donnerstein, whose view was also accepted by the Ministerial Task Group in 1994. Compare Donnerstein *The Question of Pornography Today (1988)* as well as numerous other articles and books by Donnerstein. Parliament itself adopted this view by prohibiting sexual conduct combined with violence in Schedule 6 of the Films and Publications Act, but allowing visually portrayed sexual conduct which amounts to soft pornography, to be distributed from licensed premises. By not including X18 material within the prohibition in section 26(4) of the Act, Parliament left the question as to whether X18 material (soft porn) could be shown on TV to be decided upon by the Broadcasting Monitoring and Complaints Committee or a body such as the

BCCSA ,in terms of the IBA Act 1993.

- [16] The 1994 Ministerial Task Group advised against the inclusion of degradation as a criterion. It was felt that “degradation” is so wide and vague, that it would result in confusion comparable to the confusion caused by the terms “indecent or obscene”. Parliament, however, felt that it should be included and the Task Group then put a formulation to Parliament which it accepted: a form of hate speech would be included. Schedule 6(4) accordingly reads: “explicit sexual conduct which degrades a person and that constitutes incitement to cause harm”. In section 1 “degrade” is defined as “advocate a particular form of hatred based on gender”. Prof. Sunette Lötter 1997 *SA Public Law* 423 convincingly argues in her inaugural lecture, that degradation is so vague a concept that in spite of attempts to limit it insofar as definition is concerned, it would simply not serve the interests which it was thought to be serving. Furthermore, the introduction of degradation to protect women is, in her view, counter-productive in that it makes the plight of women for equality dependent on special protection. The more special protection she gets, the more dependent on male assistance she becomes. Also see Prof. Nadine Strossen *Defending Pornography*(1995) 247. Profs Lötter and Strossen also deal with and convincingly counter the McKinnon-Andrea Dworkin pro-degradation views on the matter. In *R v Butler* 1992 CCC 70, the Canadian Supreme Court recognized that degradation constituted a workable standard and that it depended, to a great extent, on community standards and tolerance at a given time. Sopinka J states:

“The portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production”

[17] We, accordingly, believe that if the degradation standard is applied with due cognizance of the point of view of Profs. Lötter and Strossen, the failures in the US at legislating for it, the recognition by Sopinka J in Canada and within the strict limits of Schedule 6(4), it could under unequivocal circumstances be applicable. We cannot, in any case, ignore the existence of Schedule 6(4). The mere fact of portrayal of sexuality cannot, however, be regarded as “degradation” in terms of Schedule 6(4). The degradation must be of such a dignity-depriving nature that no other conclusion can be reached than that it amounts to the advocacy of hatred based on gender that constitutes incitement to harm. Such cases would amount to the crudest forms of degradation and the present facts, most certainly, do not amount to such a situation. It illustrates consenting sex between adults. In spite of the fact that adultery has, since 1914, been held not to constitute a crime (compare *Green v Fitzgerald 1914 AD 88*), a very large number of South Africans would, however, still regard adultery as immoral or as a sin. Many would argue that the swinging club is nothing else than a brothel, the management of which is forbidden by the Sexual Offences Act 1957. Others would say that whatever the position is, the screening of sex on free to air television, for everyone to see, is simply unacceptable and conceptually degrading to all. Yet, in law, no subject is forbidden for the media. Compare what Steyn CJ says in *Publications Control Board v William Heinemann Ltd 1965(4) SA 137(A) at 154*. All depends on how that subject is treated of. Of course, some subjects would only be appropriate for adults, and post-watershed broadcast thereof would be crucial.

[18] We have come to the conclusion that the activities portrayed in the programmes do not amount to degradation in terms of Schedule 6. Consenting sexuality between adults is portrayed in such a manner that it is not that visible and also not that prolonged. Woman is, in no way, portrayed as the sexual slave of man and *vice versa*. The argument by the club owner would be accepted by some viewers, but the vast majority would simply laugh his Biblical defense of the concept off or be most cynical about it. No reasonable viewer would, however, be convinced by

this programme to go to such a club or become more amenable to join. Ms Patta, in any case, constantly, rejects the concept in her debates with the owner of the club and the psychologist. The concept of a swinging club is, in any case, not portrayed as commendable: the red lights are all but alluring and tend to give the club an atmosphere which is most certainly not inviting.

[19] It was argued by Mr. De Villiers that e-tv is constantly pushing the limits in the sense that it would be sailing either close to the wind or simply, for the sake of high viewer rates, go beyond the limits of what society would accept. We have found no evidence of this and would, in any case, not take cognizance of commercial endeavours of a broadcaster. Freedom of speech, dignity, privacy and the protection of children are not measurable in money. The reference to “exchange of fluids” is most certainly in particularly questionable taste, but not degrading or overly explicit.

[20] Insofar as one complainant argued that the Biblical references of the club owner were incorrect, we have already dealt with this aspect from a moral perspective. From a religious point of view, the point of view does not amount to the advocacy of hatred based on religion that constitutes incitement to harm. This test was laid down by the Constitutional Court in *The Islam Convention v IBA and Others (CCT 36/01)*

The test also accords, in essence, with Schedule 10 of the Films and Publications Act. The club owner puts forward his obviously lay perspective of the Biblical facts and he has a right to his view, even if incorrect or questionable. He does not, in any way, propagate or advocate hate by stating his view.

[21] This brings us to the last question: was 20:00 too early for this programme? Although it might have been prudent to have aired the programme after 20:30, we do not believe that the material was that explicit or pronounced that it could not have been shown as from 20:00. The programme amounts to a bona fide

documentary and its message is anti-swinging. We do not believe that the reasonable person would not tolerate that other viewers could see the programme if they so chose. The presence of a television set in a home, places a co-responsibility on parents to exercise due care as to what and when their children watch. They cannot simply argue, as one Complainant did, that they are too stressed and busy washing the dishes at that time of the day, that they cannot exercise due care. Of course, the broadcaster also has a responsibility: we expect a broadcaster to classify the programme properly and warn viewers beforehand – both on air and in tv guides. Some may regard this as counter-productive, but on balance, this is the only workable manner to address the right of the public to be informed and to make choices. The SN advisory was, to our minds, insufficient: an age restriction of 16 should have accompanied it. We, however, do not regard this omission as so serious that we can find against the broadcaster on this point alone. Ultimately, the programme is dominated by the documentary nature thereof. If some may think that the nude portrayal was a little overdone, then they would be justified in this view. The red lighting, however, tends to obscure the details of what took place. Nevertheless, the short shots of nudity do not justify a decision by us that the Code had been transgressed.

We also received a complaint as to the promo for the programme. We do not believe that it was so explicit that it could not have been shown. The time of the screening also did not create a problem: fact is, the promo was not so explicit that it could harm children. The message is a grown-up one and also warned parents of the coming programme and its content. That the promo could influence some persons to watch the programme, is, of course, abundantly clear. But TV viewers have a right to be informed and make choices. Parents have a duty to inform themselves of coming programmes and should, if they deem it appropriate, take the necessary steps.

The Complaints are not upheld.

JCW van Rooyen SC

Chairperson

8 July 2002

The other Commissioners concurred in the above judgment