



P.O.Box 412365 • Craighall • Tel (011) 325-5755 • Fax (011) 325-5736 • e-mail: bccsa@nabsa.co.za
No 2 Albury Park • Magalieszicht Ave • Dunkeld West • 2196 • www.bccsa.co.za

CASE NO: 41/2000

DATE OF TRIBUNAL: 01 DECEMBER 2000

In the matter between

E NAIDOO, K PAYNTER AND OTHERS

COMPLAINANTS

and

e-tv

RESPONDENT

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
 PROF HENNING VILJOEN
 MS REFILOE MOKOENA (CO-OPTED)
 MR ARTHUR MAIMANE

Pastor K Paynter put his case personally, assisted by C Dobrowsky, P Collier, M Selibas, D Dobrowsky, P Wissner, R Curtzen, G Sahling, J Delpont and K Stolpe.

Mr E Naidoo put his case personally and indicated that he was also acting for several Capetonian communities

e-tv was represented by Mr Quraysh Patel, Channel Director and Ms Bronwyn Keene-Young, Regulatory Advisor.

SUMMARY

The feature Film *Emanuelle* broadcast at 10:00 on a Saturday evening held to have been broadcast in contravention of the *Broadcasting Code* in that it was harmful to public morals. It contained scenes of violent sex without a sufficiently strong story

line so as to place it within the genre of *bona fide* drama. Scenes found to be degrading of the dignity of woman.

Film in any case also screened far too early. The genre is that of soft pornography, albeit rather inexplicit, compared to modern soft pornography.

BCCSA not expressing view whether the film, without the debasing scenes referred to, could not possibly have been screened after midnight, since it would amount to speculation as to what the size and nature of the audience would have been.

JUDGMENT

JCW van Rooyen

Introduction

The feature film *Emanuelle* was screened by the Respondent broadcaster at 22:00 on Saturday 18 November. It was accompanied by an age restriction of 18 plus classification symbols indicating Sex, Language, Nudity and Violence (SNVL) for 180 seconds at the beginning of the film and a repetition of these symbols after each advertisement break. Promotion material about the film was broadcast at times earlier than the watershed.

Background

The Registrar received numerous complaints from viewers *before* the screening of the film. She rejected these complaints since the Commission is not authorized to inquire into a matter before a broadcast. In any case, it appeared that the film had been certified by the Directorate of Publications in 1994 as a film subject to an age restriction of 18 plus classification of Sex and Nudity. We do not have evidence as to whether the film was exactly the same as the film which was examined in 1994. In any case, although the certificates of the Directorate and the Film and Publication Board (its successor) are of particular importance for broadcasters and this Tribunal as guidance when deciding on the acceptability of a film in terms of the Code, television has its own character and audience, which must be taken into consideration. Whilst cinema and video renting have controls as to who may enter or rent and adults would be taking a conscious decision as to whether they would wish to view or rent a film, free-to-air television, as is provided by the Respondent, has less built in controls. We have often accentuated that after the watershed, on a sliding scale, parents have the duty to ensure that children do not watch adult movies. Yet, given the easy accessibility of free-to-air television, a broadcaster cannot simply abandon its responsibility and totally rely on parents, especially at 22:00 on a Saturday evening, when the watershed is, in contrast to weekday evenings, 21:30 instead of 21:00. The watershed is also not a waterfall from which time a broadcaster can simply move into explicit adult material, but should be approached as a time from which, on a sliding scale, more explicit material may be broadcast.

Even then there are limitations:

- (1) one limitation is to be found in Schedule 6 read with Schedules 9 and 11 of the Films and Publications Act 1996 (child pornography, explicit violent sexual conduct, bestiality, explicit sexual conduct which degrades a person and which constitutes incitement to cause harm and the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm. “Sexual conduct” is defined in Schedule 11 and “degrade” is defined as “advocate a particular form of hatred which is based on gender” in section 1 of the Act. Schedule 9 exempts *bona fide* drama, scientific material and art. There is no exemption for *bona fide* art in the case of child pornography, which is defined in section 1 of the Act.
- (2) a second limitation is to be found in Schedule 10 of the 1996 Act according to which the advocacy of hatred based on religion and which incites to harm is prohibited, subject to certain exceptions.
- (3) a third limitation is to be found in section 29 of the Act which prohibits the advocacy of hatred based on race, religion, ethnicity or gender and is in the form of a direct criminal sanction; the above two instances being within the jurisdiction of the Board, whilst the latter is not. However, when the material has never been before the Board and it falls within the ambit of limitations 1 and 2 as stated above and a film is screened in public or distributed, a prosecution may also be instituted against the person responsible for such screening.

The above rules do not form part of the present *Code of Conduct*, but in the interpretation of terms such as “indecent or obscene or harmful to public morals” in section 7.1 of the *Code*, guidance may be sought from the said Film and Publication Act’s limitations, insofar as they relate to public morality.

- (4) the fourth limit is to be found in the *Code of Conduct* and insofar as sexuality is concerned, section 7.1 is applicable: “broadcasters shall not broadcast material which is indecent or obscene or offensive or harmful to public morals”.

A problem of definition

We are aware of the controversy concerning the meaning of terms such as “indecent” or “obscene” or “offensive” and of the judgment of the Constitutional Court in *Case v Minister of Security* 1996(3) SA 617 (CC), where it was held that the terms “indecent or obscene” were too vague to withstand constitutional scrutiny within the context of the *Indecent or Obscene Photographic Matter Act* 1967, which prohibited mere possession of such material. Although the Court’s ruling has a bearing on that Act only, we are particularly wary of finding material to be “indecent or obscene or offensive to public morals”, given the South African history surrounding these words; a history which reminds of harsh and unreasonable bannings of works such as Wilbur Smith’s *When the Lion Feeds* by the Appellate Division of the Supreme Court in 1965 and *A Sparrow Falls*

in 1977 by the Publications Appeal Board and Leroux's *Magersfontein* by the Publications Appeal Board in 1977, to mention but a few. Fortunately all these works and others, such as *Lady Chatterley's Lover*, were unbanned by the Publications Appeal Board as part of its new approach in the eighties.

The history of the said words in other countries is also evidence, if not proof, of their vagueness and of their having been subject to an ever changing moral climate or, to put it frankly, the ever changing views of courts and juries on this subject.

The Task Group which drafted the new Films and Publications Act in 1994 wisely steered a course clear of the terms and the words are not to be found in the 1996 Act. Compare their Report as published by the *Government Printer* on 3 March 1995. The approach propounded by the Task Group and accepted by Parliament, is based on likelihood of harm and steers a course clear of ideology and morality. It should be noted that the Independent Broadcasting Authority in its 1999 *Draft Code*, has also omitted these words.

We have, accordingly, approached the present complaints with particular sensitivity to the possible subjectivity of any decision as to whether the material is indecent or obscene. We have also rejected as unfounded claims by some complainants that all forms of pornography contribute to sexual crime. The TV interview of the rapist and murderer, Ted Bundy, who blamed his misdeeds on pornography, which interview was referred to by a Complainant as justification for banning *all* pornography, is suspect and will not be taken into consideration by this Tribunal. I also cautioned Pastor Paynter not to threaten with action to the "highest authority". This Tribunal should not be threatened directly or indirectly, lest the public may gain the impression that threats have led to a certain decision. The task of this Tribunal is to apply the Code, and to do so impartially, independently and fearlessly. I must add that after the admonition the discussions were conducted in an amicable atmosphere.

We are aware of research which, however, indicates that there is evidence that the gratuitous and crude combination of violence and sex contributes to violent sex in some males – compare the work of prof Donnerstein and for references compare Kutchinsky "Pornography and Rape: Theory and Practice?" 1991 *International Journal of Law and Psychiatry* 47. Kutchinsky himself, however, contends that there is no evidence of such causal connection. New Zealand and Australia have included in their Statutes limitations on the depiction of the crude mixture of sex and violence and the Canadian Supreme Court, in *R v Butler* 1992 CCC 129, has included the crude mixing of sex and violence within the ambit of "undue exploitation of sex". Paragraph 184 of the German Criminal Code also prohibits violent pornography.

We believe that we are able to resolve the present matter without resorting to the criteria of indecency, obscenity or offensiveness and will apply the criterium of harmfulness to public morals, as set out hereunder.

Dignity as a core fundamental right

Tribunals, such as this Tribunal, are called upon by section 39 of the Constitution of the RSA to promote the values that underlie an open and democratic society based on human dignity, equality and freedom when they interpret the Bill of Rights. Section 39(2), furthermore, provides that when developing the common law every Court or Tribunal must promote the spirit, purport and objects of the Bill of Rights. We have often held that when we interpret the *Broadcasting Code*, we are bound by section 39 as quoted.

In deciding whether the film is harmful to public morals in terms of the *Code*, it should be borne in mind that the Constitution of the RSA has, in 1994 and in 1996, set out basic principles according to which the rights of individuals will be protected. These fundamental rights represent a total break from the past where White domination over Blacks and other People of Colour was central to the Government's policy, where the dignity of the majority was ignored or relegated to a very low level as a result of race or ethnicity, where the position of women was relegated by some men to that of "those who assist men" and as being, *inter alia*, sex objects. The Bill of Rights endorses quite a number of principles which are also part of public morality, such as respect for dignity, privacy, equality and human life.

One of the core rights of the Bill of Rights is that of dignity. Our Constitutional Court has, in a substantial number of judgments, accentuated the central nature of this right. Compare *S v Makwanyane and Another* 1995(3) SA 391(CC); *Ferreira v Levin NO* 1996(1) SA 984(CC) at paras 47-49; *President of the Republic of South Africa v Hugo* 1997(4) SA 1 (CC); *Prinsloo v Van der Linde and Another* 1997(3) SA 1012 (CC) at paras 31-33; *Harksen v Lane NO and Others* 1998(1) SA 300 (CC) at paras 46 and 50-53, paras 91-92; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999(1) SA 6 (CC) at paras 17-32, 120-129; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000(2) SA 1 (CC) at paras 41-42 and 48.

On the other hand our Constitutional Court has also held that freedom of expression lies at the heart of our democracy. See *South African National Defence Union v Minister of Defence and Another* 1999(4) SA 469(CC). This right obviously also applies to broadcasters, who have a most important role to play. Information, education and entertainment are important functions of broadcasters, whether they be community, commercial or public broadcasters.

The Content of the Film

The film deals with a young, recently wed woman, Emanuelle, who comes to live with her husband in Bangkok, where he had already established a home and had obviously been living for some time. One of the first scenes shows them making love behind a mosquito net, which does not allow for much detail for a viewer. A man servant who

watches the sex and calls a female worker to also watch, thereafter runs after her and rapes the woman or, if it is not rape, it at least amounts to violent sex.

Thereafter, in accordance with their marital philosophy, Emanuelle's husband allows her sexual freedom. Emanuelle falls in love with a woman and accompanies her to a rural area where they make love.

At a stage there are flashback inserts of seduction, sex on seats and in the toilet of an aeroplane - two men are involved consecutively.

In a further episode, one Mario, who is requested by her husband to teach Emanuelle the true love and sex, takes her through the steps by letting a man, who happens to be next to the road, fondle her legs; thereafter he arranges for her to be raped and later on to experience what would seem to be "sodomy" or rear entry sex.

At a stage the husband, during her absence, visits a night club, where nude dancers fill the stage with what is obviously meant to be sexually titillating movements. One performer places a cigarette in her vagina or anus, lights it and "exhales" smoke in the process. The husband also visits another woman who invites him to have sex with her by pulling up her dress. He calls her a "bitch" and then has violent sex with her, which is described as rape by the woman when she later on discusses the incident with Emanuelle.

The film ends where Emanuelle is shown preparing herself for what is obviously a further escapade with Mario.

Evaluation

The film was made in the early seventies and is conservative if compared to the modern day soft pornography films where explicit shots of copulation in a variety of styles, *fellatio* and *cunnilingus* are the main ingredients of the material. At the heart of soft pornography lie endless scenes of sex and at times dialogue which thinly links the scenes which are usually calculated to excite lust or prurient interest. Flimsy dialogue is often introduced to give some sense of a story to the film as a whole.

The present film attempts at building some kind of a story so as to link the scenes of promiscuity of Emanuelle. The consenting sex scenes are not explicit and *cunnilingus* and *fellatio* are implied. Female nudity is frequently part of the scenes, but there are no close up shots.

The problem with the film is that in several scenes it degrades woman to such an extent that her dignity is ignored and she becomes a mere object of pleasure for man. Schedule 6 read with Schedule 9 of the Film and Publication Act 1996 prohibits scenes of explicit violent sexual conduct in films which do not amount to *bona fide* drama, art or science. In determining what is harmful, guidance is *inter alia* sought from that provision.

In scenes in this film women are subjected to violent sex and we are of the opinion that the attempt at a supporting story line for these scenes, amounts to mere simulation. The violent sex scenes are shown for their own sake and, in any case, are examples of male domination over woman which degrades her to such an extent that she becomes a worthless, debased chattel. The scene where the male worker rapes his female colleague is utterly disgusting and if some may believe that the women might have succumbed voluntarily, such a deduction strengthens the stereotype of women enjoying to be raped. When Emanuelle's husband adds the insult of calling the woman a "bitch" before he has sex with her, sex is lowered to the level of mechanical copulation and degradation. Woman's dignity is debased. When Emanuelle is raped as part of her "course" with Mario, it takes place amongst a group of men, a factor which adds to the insulting nature thereof. Mario's "course" is a poor excuse for blatant rape. The scene where Emanuelle is "sodomized" also debases her to the level of a purely mechanical object which is there for men to play with. The scene where the dancer places a cigarette in her vagina or anus, utterly degrades woman to a mechanical object of derision.

The incidence of rape is particularly high in South Africa, and news of gang rapes of young children and adult women, fill our newspapers and electronic media almost daily. Whilst it is understandable that a film could address the problem of rape (see, for example, *The Accused*) where *bona fide* drama is used as a vehicle, it is indefensible in our society to screen scenes in a film without any such *bona fide* defence. This is rape for the sake of showing rape or violent sex for the sake of showing it, and nothing else.

Our conclusion is accordingly that the film contains scenes which are harmful to public morals in that they debase woman to such an extent that it amounts to an implicit advocacy of hatred for women and incites to harm in the sense of being calculated to further disrespect for women. No watershed or midnight screening would excuse these scenes. The value of the film in terms of expression or information is non-existent or meagre and accordingly the right to freedom of expression is overridden by the right to dignity. The respondent's argument that the Research Reports have shown that the likely viewers of the programme fall into an educated, informed category, is possibly alleviating but nevertheless does not grant the right to broadcast debasing material of this nature.

Insofar as the balance of the film is concerned, we are of the opinion that 22:00 was, in any case, too early to screen the film. The watershed on a Saturday evening is 21:30 and a screening at 22:00 is far too early. Since we do not know what the viewership at midnight would have been, it is impossible to express an opinion on such a screening. We therefore leave this aspect open. As mentioned earlier, the film was in any case harmful to public morals as a result of the inclusion of the scenes discussed above.

Since the Respondent *bona fide* believed that the watershed plus age restrictions and classification would take care of problems, we impose no sanction on it for having contravened the Code. If the Code is, however, contravened again for a similar reason, this decision will be taken into consideration in deliberations concerning sanction.

We are unanimous in upholding the complaints.

JCW VAN ROOYEN SC

CHAIRPERSON

6 December 2000