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Date of Examination: 20 June 2003 **CASE NO: 46/2003**

JC DEKKER **COMPLAINANTS**

vs

e-tv **RESPONDENT**

PANEL: **MR RATHA MOKGOATLHENG (DEPUTY CHAIRPERSON)**
MRS REFILOE MOKOENA (CO-OPTED)
PROF HENNING VILJOEN

FOR THE RESPONDENT: MR BOP TSHWEU COMPLAINTS AND COMPLIANCE EXECUTIVE

THE COMPLAINANT WAS NOT PRESENT.

SUMMARY

The complainant is aggrieved in that the Respondent broadcast a pornographic film "10" on the 3rd June 2003 at 02h49. The Complainant states that the film was disgusting, inappropriate and was harmful to the morals of society. The scene complained of depicted a topless woman playing pool -

Held that the film "10" does not fall into the genre of so-called pornography - further that the Respondent compiled with the Commissions guidelines by broadcasting the film at 02h49; as the film also carried the following restriction 16yrs (SNL).

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JUDGMENT

RATHA MOKGOATLHENG:

[1] The film "10" featuring Bo Derek and Dudley Moore was filmed and first shown in 1979; The Films and Publication Board issued the film with an age restriction of 2-18years. The film relates the mid life crisis of a successful Hollywood Composer, who is very rich but yearns for a physical relationship with a perfect and beautiful younger woman. The composer finally meets his ideal perfect woman; but she happens to be married already, despite this he chases her and spies on her and her husband. The impugned scene complained depicts

Bo Derek and her husband playing pool; in this scene Bo Derek is topless and her breasts are fully exposed.

[2] The Respondent argues that the film is not offensive and was shown after the watershed hour of 9h00. The Complainant contends that the film is pornography, that it was inappropriate to have broadcasted it on television, that the film was disgusting and harmful to morals.

[3] The BCCSA is enjoined in terms of Section 39(2) of the Constitution of the Republic of South Africa to promote the spirit, purport, and objects of the Bill of Rights. Further the BCCSA is bound to give effect to the judicial decisions of the Constitutional Court.

[4] The Tribunal in adjudicating the complaint is enjoined to apply Section 16(2) of The Republic of South Africa Constitution Act No 108/199

Section 16 of the Constitution provides as follows:

(1) Everyone has the right to freedom of expression, which includes-

? ? ?a) freedom of the press and other media

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research

(2) The right in sub-section (1) does not extend to -

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(a) propaganda for war;

? ? (b) incitement of imminent violence, or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[5] Section 36(1) of the Constitution sets out the criteria for the limitation of rights. Such limitation must be determined by what is justifiable and reasonable in an open and democratic society founded on human dignity, equality and freedom. The application of any limitation on the right of freedom of expression involves a process, described in S v3 Makwanyane 1995 (3) SA391 (CC) at para. 104 as "…weighing up of competing values, and ultimately an assessment based on proportionality …which calls for the balancing of different interests".

[6] *T*he Constitutional Court articulated the values underlying the guarantee of freedom of expression by stating as follows:

"Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental functions as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters. (See South African National Defence Union vs Minister of Defence and another 1999 (6) BCLR 615 (CC) 1999 (4) SA469 (CC) para 8). It is common cause that South Africa has recently emerged from a severely restricted past where the state extensively circumscribed and controlled freedom of expression. Those restrictions would be incompatible with the new democratic dispensation heralded by the Constitution which guarantees that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock, or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.

[7] The legal test in determining whether material broadcast is legally permissible is

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not what is offensive to individuals or whether members of a community themselves might be offended by seeing, but is what the community would not abide other members seeing because it would be beyond the contemporary South African standard of tolerance to allow them to see. It is the standards of tolerance not taste or approval that is relevant. The afore quoted test 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 Canadian4 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. In the cases of Case and Curtis v Minister of Safety and Security 1996 (3) SA 617 (CC) (two cases treated as one for purposes of the judgment) regarding the relevance of tolerance in this context, in paragraph 27 of the judgment, the judge had this to say:

"The corollary of freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views."

[8] The Complainant has a Constitutional right to freely express and articulate his views and sincerely hold opinions regarding what he perceives as pornography, so too the complainant has a Constitutional right to exercise its freedom of expression subject, to certain limitations.

[9] The onus of showing the limitation of the right to freedom of expression rests upon the party seeking to uphold such limitation. A tribunal cannot be asked to speculate on the justification in the absence of any factual basis therefore. It is for the party relying on the justification to establish those facts, and failure to do so may result in such party being unable to establish justification.

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[10] We have carefully considered the Complainant's submission regarding the offensiveness, or indecency or the harmfulness of the broadcast material, but in our view the factual justification presented by the Complainants fails to satisfy the requirements enunciated in section 36 (1) of the Constitution.

[11] It is our considered view that the Complainants presented no sufficient argument as factual justification to limit Appellant's right to freedom of expression. In any event, having recourse to what is generally available in the market of ideas vis-à-vis the genre of so-called pornographic films and publications, an attempt at the limitation of the freedom of the Respondent to broadcast the films, which are the subject matter of this appeal, would not be reasonable and justifiable in an open and democratic society.

[12] The panel viewed the film which had a 16- year age classification, with further warnings regarding sex and language, the 16SNL icon was shown for four minutes at the film's commencement, and after each advertisement. The film was broadcast at 02h49, well past the watershed hour of 21h00, in compliance with the Commission's guidelines regarding the so-called soft pornography genre of films.

[13] There are no explicit sexual scenes depicting erect genitalia or stimulated genitalia, there are no explicit sexual scenes depicting sexual thrusting movements, neither is there violence coupled with sex or any degradation or abuse of the female body. The scene complained of in the light of modern attitudes cannot be interpreted as so offensive to the extent that it would be beyond the contemporary standard of tolerance to allow persons to see it. The Tribunal's finding is that the film is not pornography, that the Respondent has compiled with the Commissions guidelines.

The complaint is dismissed

RATHA MOKGOATLEHNG
DEPUTY CHAIRPERSON
Commissioners: Prof Henning Viljoen and Mrs R Mokoena concurred in the above judgment.

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