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CASE NO: 59/2002

DATE OF HEARING: 25 OCTOBER 2002

NI SCHOLTZ **COMPLAINANT**

VS

SABC **RESPONDENT**

TRIBUNAL: **PROF JCW VAN ROOYEN SC (CHAIRPERSON)**
MS L GOWER
PROF HP VILJOEN
DR L GILFILLAN

FOR COMPLAINANT: **IN PERSON**

FOR RESPONDENT: **MS DOROTHY VAN TONDER, MANAGER , BROADCAST COMPLIANCE, REGULATORY AFFAIRS**

Balance in comment and documentaries – role of "public importance" in clause 3 of Code discussed. Apartheid efforts in development not of "public importance" in terms of the Code and within the scope of the documentary under scrutiny. Scholtz v SABC59/2002

SUMMARY

The Complainant argued that a documentary dealing with a decade in the life of children after the 1992 World Summit at Rio should have included reference to the efforts of the apartheid govemment of the past in South Africa at bettering the position of Black People.

BCCSA holding that, given this kind of documentary, past efforts at development were not of "public importance" in terms of the Code. Balance, accordingly, not required.

In ensuring that material which addresses issues of public importance is balanced and fair in terms of clause 3 of the Broadcasting Code, the Commission must be realistic. Balance and fairness, in terms of the Code, are only required in regard to matters of "public importance". What happened in the past or in other countries is often not of public importance, since this is not relevant, or is not relevant to the present South African situation. Each case will be judged on its own facts and context, so as to establish whether it concerns a matter of "public importance".

The Commission held that the Broadcaster, in this instance, had no duty to ensure fairness insofar as the past is concerned. It is, simply, not of public importance to refer to efforts at development that took place in the past; Apartheid overshadows these from a public importance perspective. What is relevant, within the context of a documentary such as the one under consideration, are the iniquities of the past and what is done to address them. Judged within this context, the documentary is balanced.

JUDGMENT

JCW van Rooyen and L Gilfillan

[1] The SABC, a broadcaster that falls within this Commission's jurisdiction insofar as the Broadcasting Code is concerned, broadcast a documentary, *Children of Rio*, produced by an external producer. The documentary was filmed over a ten year period, and follows the lives of several children around the world who were born at the time of the World Summit in Rio de Janeiro in 1992. The children concerned live in China, South Africa, Kenya, England and Brazil. The documentary examines the effects of factors such as the environment, economic progress/decline, education, safety and security on the lives of this generation.

[2] Owing to the unique circumstances in South Africa, two children were chosen, both from rural areas, one black and one white. It was fortuitous that this filming began two years before the end of apartheid, and could therefore map the scene pre- and post-democracy: South Africa's efforts at rebuilding its society through the provision of electricity, the spiralling crime rate, for example, as well as the devastating effects of Aids (which were not yet appreciated in Rio) resulting in the fact that Africa is now poorer than in 1992.

The South African stories are presented in two parts. The first concerns the matter of safety, highlighting divergent views on what safety means/meant to children from black and white families – in the context of the country's history. The second segment is on education, taking a similar direction by pointing out the inequalities in educational facilities in previously whites-only schools and in previously disadvantage communities. It also emphasis the progress that has been made in dismantling racial segregation.

[3] The complainant accuses the programme of being "offensive, racist and totally devoid of truth", and of promoting "racial … hatred". He insists that "the other side of the story" be broadcast. In argument he referred to the large sums of money spent by the Government on the development of Natal in the 1970's and thereafter. He had worked there himself in the 1970's and had seen what had been done to further the needs of underprivileged Zulus. He and many of his colleagues had to leave their homes and spend long periods in Natal in their attempts at

development. He argued that it was utterly unfair for a broadcaster to continually accentuate the worst of the past, without also highlighting the positive things done during the Apartheid era.

[4] The SABC argued that the documentary was not about racism. The clear message about South Africa is that there is still separate development, but the division now is by wealth, not by race. The overall message is that the lives of all these children demonstrate the failure to reach the goals set in Rio: that the world has failed to protect against environmental degradation and consequent economic decline, has failed to meet challenges such as HIV/Aids, and that the gap between rich and poor has widened.

The SABC argued that it could find no evidence of "totally untrue and unjustified allegations against white people and against former apartheid policies", nor of anything that could lead "to more black on white violence, theft and murders, as well as total intolerance of black people by whites". It is unfortunate that the complainant has not been specific about which statements he considers to be untrue or unjustified. There was nothing racist about the content at all, according to the SABC.

[5] The matter concerns race relations in South Africa today. The section of the programme that concerns South Africa is one of four narratives that depict the lives of children in China, South Africa, Brazil and England in a post-Rio '92

context. Each examines the impact of promises made at Rio on the lives of the children concerned.

[6] In a post-Cold War China, the effects of an open society are shown to be positive, though the point is made that globalisation (joining the WTO) has not benefited all strata of Chinese society. South Africa is contextualised as emerging from the "apartheid legacy", where children, both black and white, are victims, whether of crime, poverty or disease. The lives of a black child, Visumzi, and a white child, Justin, are depicted in the first section. Justin lives on a "fertile lowland farm", while Visumzi lives in a poor township, where the introduction of electricity serves, ironically, to remind him, via TV, of the "world of plenty that is beyond his reach". Justin is not, however, depicted as inhabiting a carefree "world of plenty". Instead, he is seen to live in a state of anxiety, if not siege, as he warns of the need to "always keep a gun and keep the door closed". He, too, is heir to the "legacy of apartheid". He is a prisoner of fear, in a society where there is "spiralling violent crime" where both black and white are portrayed as victims (Visumzi also complains of "thugs" who victimise his community).

[7] In the second part, a contrast is drawn between the educational prospects of Erdo, a black child who lives in a mud hut and walks for an hour to attend a poor school, and children who go to a more affluent school by car. A positive note is, however, sounded, when Justin says, "My best friend is Sibusiso", and the narrator points out, "Ten years ago this scene would have been impossible." The

implication is that, in South Africa, as in China, there is a gap in a globalised economy between rich and poor, rather than black and white. The "separate development" is now one that occurs along lines of class, rather than race.

[8] The film then examines children in Brazil and England, where the effects on children's lives of the modern economy are shown to be negative. It is sobering that Hayley, who sees England as a "considerate, generous" culture, has inherited a more positive legacy in terms of expectations, but that this ideal of English society has been eroded by "unpredictable economic forces" that include "overseas forces" that deprive English people of jobs in their own country.

[9] The programme is only an hour long, and it depicts four very different societies. Inevitably, the brush strokes are broad, and there are clichés and stereotypes. These are the obvious ones in the South African case, and, as time goes on, it is likely that the Sibusiso's of the country will provide the balance that the complainant demands. History will show a new black elite becoming more visible, and playing a more active role: the new legacy will be one where Blacks are not simply victims, but also beneficiaries of South Africa's wealth, and where Whites alone can no longer be blamed for economic inequality in a country with a black majority government.

[10] None of the societies depicted is portrayed in a positive light in the post-Rio scenario. Indeed, the narrator states, quite unequivocally, that the "story is one of failure, and progress is painfully slow, if at all."

[11] Whilst we appreciate the Complainant's case, it should be borne in mind that the programme focused on the post-Rio years and that the intention was not to give an historical overview of each country. The accent was on what happened in the ten years after Rio. The two children from South Africa are not contrasted with each other so as to achieve a political purpose. The white child is not portrayed as particularly wealthy and the optimistic plans of Rio would not seem to have removed problems which the family had in the early nineties. The perspectives of both the black child and the white child regarding the future are portrayed without bias. Genuine pictures are given of how they feel and live. If there is an accused in this documentary, then the accused would be the governments that participated in the Rio summit. The final question is whether sustained development is a reality, and whether an ever-increasing world population can in fact be fed and developed.

[12] In a sense, the Complainant would seem to have chosen the wrong programme to complain about. The documentary was not only about South Africa, but about a world that is struggling to attain its ideals. In fact, the Complainant conceded that he had stopped watching the programme after the insert on South Africa. This, with respect, led to his not having contextualised the South African section. On

the other hand, it is true that film producers would tend to concentrate on the immediate past. Apartheid has been condemned as a crime against humanity and, despite whatever efforts were made at development during that era, the eye of the media will remain on the fact that people of colour could not vote, were not allowed to live in so-called White areas, were detained without trial, died in detention, and were generally discriminated against in all spheres. The death of Steve Biko, the uprising of the children of Soweto in 1976, the death of Hector Petersen and others in the Police action which followed, the 27-year imprisonment of Nelson Mandela and the new democratic dispensation as from 1994, are matters which are of public importance in a documentary such as the present. This is a reality with which dissenting viewers must live.

[13] Freedom of speech includes the right to choose the subject matter of a documentary. Perfect balance is an unattainable objective. Each product carries the accent, which the producer and director have chosen. In this sense, freedom of speech, although not regarded hierarchically as a right superior to other fundamental rights,[1] does act as the heart of democracy, as held by our Constitutional Court.

[14] The Constitutional Court has, in several judgments, accentuated the role of freedom of speech. In *S v Mamabolo* 2001 (3) SA 409(CC) par 37, Kriegler J stated the following in regard to the value of freedom of expression in our present

[1] See Navsa J's observations in Van Zyl and Another v Jonathan Ball Publishers (Pty) Ltd and Others 1999(4) SA 571(W).

society, in contrast to the Apartheid history of censorship and thought control:

"Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed."

In *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) par [7] O'Regan J stated that

"Freedom of expression lies at the heart of a 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 recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters . . . " [footnotes omitted.]

[14] The "heart" ensures that the eyes of the public remain open to the realities of our time. For many viewers, and this includes the Complainant, it is offensive merely

to witness criticism of the past without recognition of what was also previously achieved. However, the "heart" is, essentially, a modern organ which, *inter alia*, has to keep viewers alive to poverty, child- and gender- orientated abuse, misery, rape, social injustice, people without water and food, people dying of Aids, as well as farm murders, and thus instil compassion in the hearts of viewers and readers. Of course, this can become extremely distressing and has given rise to the complaint that the media concentrates on the negative without giving hope by showing the "positive" side. Although this accusation might seem true to some viewers, the latter are, in our view, inclined to ignore or forget the very positive news which the media also shows: economic success, the addressing of corruption and crime generally, the decline in the crime rate, the direct involvement of Parliament's standing committees in social development, and the like. And, of course, there is also entertainment, which offers an escape valve from the daily routine. In the area of documentaries on South Africa, however, viewers should not expect significant reference to whatever development was undertaken in the past – especially not when Apartheid overshadows the scene from a news and public importance perspective.

[15] In ensuring that material which addresses issues of public importance is balanced and fair in terms of clause 3 of the Broadcasting Code, we must be realistic. Balance and fairness, in terms of the Code, are only required in regard to matters of "public importance". What happened in the past[2] or in other countries[3] is often

[2] Compare our judgment in Federal Council of National Parties (Ulibambe Lingashone) 04 /1994
[3] Compare our judgment in EMET SA v M-NET 11/2001

not of *public importance*, since they are not relevant, or that relevant, to the South African situation. Each case will be judged on its own facts and context, so as to establish whether it concerns a matter of "public importance". We find that the Broadcaster, in this instance, had no duty to ensure fairness insofar as the past is concerned. It is simply not of public importance to refer to development, that may have taken place in the past; Apartheid overshadows this from a public importance perspective. What is relevant, within the context of a documentary such as the one under consideration, are the iniquities of the past and what is done to address them. In this sense, the documentary is balanced. We agree with the Respondent's argument.

[16] Insofar as the complainant alleged the furthering of racism and possible violence by the film's exclusion of the positive steps taken in the past, we could find no evidence of the "advocacy of hatred based on race that constitutes incitement to cause harm".[4] The treatment of realities, even if done by way of certain stereotypes as were present in this documentary, do not amount to the advocacy of hatred. They amount to an expression of an opinion, which the reasonable likely viewer would place in the melting pot of political debate. The viewer would realise that the programme has set out to attain certain objective realities, as seen by the producer, in development during the last decade, in contrast to the ideals expressed at Rio. We do not believe, as argued by the Complainant, that the documentary is likely to incite to violence when less fortunate black children view

[4] Compare our judgment concerning the " Ngema song" – Human Rights Commission of SA v SABC 31/2002

the film. The documentary was broadcast at 22:00 and would have drawn a likely viewer who would be able to discern the context of the film. Even if black children were to have watched the programme, they would be able to cope with it. What they see is not, indeed, that alien to the real world in which many of them live.

The Complaint is not upheld.

JCW van Rooyen SC
Chairperson
26 November 2002

The other Commissioners on this Tribunal concurred in the above judgment.