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CASE NUMBER: 17/2015

DATE OF HEARING: 25 NOVEMBER 2015
JUDGMENT RELEASE DATE: 21 DECEMBER 2015

NATHANE-TAULELA

COMPLAINANT

vs

e.tv

RESPONDENT

TRIBUNAL: JUSTICE RATHA MOKGOATLHENG (CHAIRPERSON)
PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)
DR N MAKAULA -NTSEBEZA
MR ALAN MELVILLE

THE COMPLAINANT:

FOR THE RESPONDENT: Mr Barry Ashman, Group Advisor accompanied by Mr Bop Tshweu: Compliance Executive and Mr Morapedi Pilane: Assistant Compliance Executive.

Complaint about a broadcast of a children's home where the faces of some of the children were shown on television - Broadcaster denying that children's identities were disclosed by the broadcast - Tribunal finding that mere showing of faces of some children on television was sufficient identification - children falling in category of "children in need of care and protection" as determined in s 150(1) of Children's Act, 2005 - Broadcaster not affording special weight to the privacy of the children - contravention of clause 15(3) of the Broadcasting Code found and Broadcaster reprimanded - Nathane-Taulela vs e.tv, Case No: 17/2015(BCCSA)

SUMMARY

Complaint about a broadcast of Berea-Hillbrow Home of Hope, a children's home where children in need of care and protection are being cared for. In the broadcast, which was intended to make people aware of the plight of the children, the faces of some of the children were shown on television. The Complainant, quoting section 150(1) of the Children's Act, 2005, complained that by showing the faces of some of the children, they were being put at risk because some of them had been the subjects of human trafficking and had been victims of sexual exploitation. The Broadcaster denied that the children's identities were disclosed by the broadcast because their names were not mentioned. The Broadcaster also relied on a document called "Consent umbrella release regarding broadcast of minors". The Tribunal found that the mere showing of faces of some children on television was sufficient identification and that put them at risk. It further found that the consent given by the person acting *in loco parentis* could not override the provisions of the Children's Act. The Tribunal found that the Broadcaster did not afford special weight to the privacy of the children and therefore contravened clause 15(3) of the Broadcasting Code. The Broadcaster was reprimanded.

JUDGMENT

HP VILJOEN

[1] On 17 October 2015 at about 11:00 the Respondent broadcast a reality show in the series "She is the One". The broadcast carried an advisory of PG13. In the show the contestants are challenged to give time and effort to contribute to the well-being of others. In this episode the contestants visited the Berea-Hillbrow Home of Hope, an organisation that provides shelter for children. During the broadcast the faces of some of the children were shown. This caught the attention of the Complainant who is a lecturer in the Department of Social Work at the University of the Witwatersrand and she lodged a complaint with the Registrar of the BCCSA.

[2] **The complaint reads as follows:**

"I would like to bring the etv matter to the attention of the Commission. On Saturday the 17th October 2015 around 11am there was a reality show that was aired on etv. The name of the show is She is the One. On this particular episode the contestant of the show visited Home of Hope which is a home for homeless girls who have been abandoned, removed from their homes due to abuse and some once lived in the streets.

The main complaint the faces of underage children were shown on the camera without the protection of their identity. This is a huge child protection issue in terms of the safety risk of

the children. Since some of the children have been removed from abusive homes and in some cases perpetrator do not know the whereabouts of the children the faces of underage children to be on national television. Also underage minor children in this case are considered to be a vulnerable population and must be protected at all time. Therefore, from a child protection perspective; the rights of these vulnerable underage minors have been violated and their safety is the main issue. Please investigate accordingly,

[3] **The Broadcaster responded as follows:**

“Complaints Re: e.tv “She is the One”

This letter is in response to a complaint by *Ms Tlale Nathane* about the broadcast of *She is the One* episode on the 17th of October 2015 at 11h00. According to the complainant the episode contained faces of underage children without protection of their identity.

We have been asked by the BCCSA to respond in terms of clause 15(3) which provides that

“In the protection of privacy, dignity and reputation special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled”

We have in the past been asked by the BCCSA to comment on a similar case about showing the faces of minors and our response has always been that we uphold South African legislation governing the protection of children. Child victims of rape or abuse cannot be named or identified even if parental consent is given to do so. It is the same principle which we have applied in this show as well.

Background

She is the One is a PG13 reality show hosted by *Thapelo Mokoena*. In this episode the contestants were given a challenge of contributing their time to an organization called *Berea - Hilbrow Home of Hope* which provides shelter to children. Contestants were tasked with shopping clothes, cooking meal and doing industrial piece that encapsulate women empowerment for children. It is difficult to see how e.tv could have been in breach of the clause by showing contestants doing these activities. The facility itself is well publicized and members of the public are encouraged to donate.

e.tv sought permission from the founder of the facility before filming with an undertaking that the children’s dignity would not be compromised as it is always the case with our broadcasts. ***(Please see the annexure below)***

ANNEXURE

**INTERVIEW/PHOTO/AUDIO/VIDEO RECORDING
CONSENT UMBRELLA RELEASE REGARDING BROADCAST of MINORS**

I, **Khanyisile Motsa**, hereby consent to interview(s), photography, audio recording, video recording of minors under my care in the project entitled “She’s the One Season 2” (“Project”), granted that the minors are only filmed at the HOME of HOPE premises (“Location”) and that the content broadcast is dignified in its representation of any or all minors filmed, and thus, broadcast.

I hereby declare that I am at least eighteen (18) years of age and am legally competent to execute this release as a parent or guardian set forth below has executed this release on my behalf.

I acknowledge that I have fully informed myself of this consent, waiver of liability, and release.

Parent/Guardian (print): Khanyisile Motsa

We have accordingly weighed in the dignity and reputation of the kids to avoid any possible harm or prejudice as a result of the broadcast. The owner and founder of the facility was there with the crew throughout and appreciated all the good work the show was doing for the shelter. E.tv showed social responsibility roles of the contestants in the premises and did not single out any child on television as a victim of child abuse or rape. In this instance we have demonstrated that a contravention cannot be found in that no child's dignity was impaired.

Ethical considerations

By all account showing the images or faces of minor children on television is legal it can only be illegal if the identity of the child who is a victim of rape or abuse is divulged without the permission from the court of law. We do not think asking for permission from the courts was necessary because the show was not about the identity of children who are victims of abuse or rape.

We submit that the broadcast of the show at the facility was for a good cause and that it was well within the reasonable limits.

In the result, we submit that there is no contravention of the broadcasting code."

EVALUATION

- [4] At the outset we would like to make it clear that we accept that the Broadcaster had good intentions with this programme and made sure that the consent of the lady in charge of the Home of Hope, Khanyisile Motsa, be obtained before recording of the programme started. Both parties at the hearing, the Complainant and the Broadcaster, were in agreement that the work being done at the Home of Hope was exemplary and was to the benefit of all the children in the care of Ms Motsa. As is clear from the reasons for the complaint, the only issue that the Complainant has with this broadcast, is that by showing the faces of the children on television, their safety had been compromised and that this exposure had been to their detriment. The Complainant lodged a comprehensive document in which she substantiated her complaint and in this way made our work easier.
- [5] The Broadcaster, in its defence, submitted the following arguments: They denied that the children were identified in the programme, no names of the children were disclosed, the children were just having a good time, no harm was done to them and they were not exposed to risk and no unhappy faces appeared on the programme.
- [6] The applicable clause in the Free-to-Air Code of Conduct for Broadcasting Service Licensees is clause 15(3) which states:

In the protection of privacy, dignity and reputation special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled.

As with the rest of the Code, special attention is given to the protection of children. This is in accordance with section 28(2) of the Constitution of South Africa which reads:

A child's best interests are of paramount importance in every matter concerning the child.

A child is defined as a person under the age of 18 years.

[7] The problem with which the Broadcaster is confronted in this case is that the children whom the Broadcaster filmed in this programme are not just ordinary children. As testified by the Complainant, and we accepted her evidence, the children are being categorised as vulnerable minors. The reason for this is that the children come with a history of the violation of their rights, some being the subjects of human trafficking, victims of sexual exploitation, some being rescued from brothels, etcetera. All these circumstances comply with the description in section 150(1) of the Children's Act, 38 of 2005, of "children in need of care and protection". What is especially applicable in this instance is s 150(1)(g) which reads:

(1) *A child is in need of care and protection, if the child -*
(g) *may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child.*

The Complainant referred the Tribunal to cases where children were rescued from drug dealers whom they still owed money, from abusive fathers who did not know where they were but would forcibly take them back to the households from which they had been rescued if their whereabouts were known. By being identified on television they were also at risk that other learners at their schools would recognise them and that they could then be stigmatised.

[8] We do not think it is necessary to go into the detailed provisions of other national and international documents pertaining to the rights of children. We mention here the Convention on the Rights of the Child, the South African Children's Rights Charter, the African Charter on the Rights and Welfare of the African Child and the World Summit on Children. Suffice it to say that the statutory protection prescribed in the Children's Act and to which reference is made in paragraph [7] above, is clear and needs no further exposition.

[9] The Broadcaster defended itself against this complaint and relied mainly on two arguments. The first argument is that no child was identified in the programme and no child was singled out as a victim of child abuse or rape. When asked about the argument regarding identification, the representative of the Broadcaster tried to convince the Tribunal that it did not name any of the children "in need of care and protection" and therefore did not disclose any child's identity. This argument defies logic: In a few camera shots the faces of some of the children could be seen clearly. It needs no further explanation that by showing their faces they have already been identified. A person is not only identified by disclosing the name or other personal detail of such person - a mere picture of a person is disclosure enough of identity. The place where they are being kept and protected was clearly identified by mentioning the name of Berea-Hillbrow Home of Hope. It would not need a Sherlock Holmes to trace the address of this home and for any evil minded person to abduct a child from this home. By showing the faces of the children, we are convinced that their safety and well being were being put at risk. In its written response to the complaint, the Broadcaster stated the following:

Child victims of rape or abuse cannot be named or identified even if parental consent is given to do so.

By referring to "...named or identified ..." the Broadcaster by implication concedes that there are different ways in which a person can be identified. Showing a picture of a person is surely one such way.

[10] Another argument on which the Broadcaster relied was that Ms Motsa who is in charge of the home and who acts *in loco parentis*, or in the stead of a parent, signed a written consent consisting of an "umbrella release regarding broadcast of minors". We do not know whether the Broadcaster and/or the Home were not properly advised, but there is a general rule of our law that you cannot by contract or agreement override the peremptory provisions of a law. The provisions of the Children's Act in this regard are quite clear and they cannot be set aside or overridden by a contract of any nature. That does not mean that the Broadcaster was barred from making and broadcasting a programme of this nature. There are ways in which pictures of the children could be shot from behind or their faces could be blurred on screen. It is not within our power to prescribe to the broadcaster how it should go about with its programmes in order to comply with the law.

[11] A question asked in this context at the hearing deserves some discussion. The question was whether a broadcaster would be allowed to show the faces of children of refugees who are fleeing to Europe in these days. We think that that situation should be distinguished from the situation we are dealing with in this complaint. The refugee problem in Europe is currently a news item that is holding the attention of millions of viewers and listeners of the media all over the world. Should any country put restrictions on the media to show the faces of child refugees, that would amount to a serious inroad into the freedom of expression by the media. It would practically amount to censoring of the news. In filming a news event like people fleeing over an international border, the director is working without a script. From this scenario should be distinguished the programme at hand where the director had a script, we assume, wherein the decision had already been taken where the film would be shot and who would appear in the picture. Being made in South Africa, the producer was aware, or should have been aware, that South African law applied and that the "children in need of care and protection" had to be filmed in a way that their identities would not be disclosed to the outside world. We therefore do not think that the comparison with the filming of the child refugees in Europe is valid.

[12] In the result, we find that the Broadcaster contravened clause 15(3) of the Free-to-Air Code of Conduct in that it did not afford special weight to the privacy of the children at Home of Hope. This is because the children fell in the category of children in need

of care and protection and the disclosure of their identity by showing their faces on television put them at risk.

[13] As for the sanction, we accept that the Broadcaster had good intentions with the programme and did not foresee that the broadcast would put the children at risk. However we think that the Broadcaster should have foreseen the risk. We have decided that a reprimand would be an appropriate sanction.

The Broadcaster is found to have contravened clause 15(3) of the Code and is reprimanded. The complaint is upheld.



**HP VILJOEN
DEPUTY CHAIRPERSON**

The Chairperson, Justice Mokgoatheng and Commissioners Makaula-Ntsebeza and Melville concurred with the judgment.