Complainant:  The Complainant was unable to attend.

Respondent:  Mr. Bruce Mkhize, Regulatory Compliance Manager, Regulatory Affairs, Southern Africa, MultiChoice.

Violence – Alleged racist comments in music video containing shocking scenes of violence – Tribunal finding that the video does not contravene the Code since it does not promote violence, but instead condemns anti-ethnic violence – one dissenting view.  Capstick vs MultiChoice, Case No: 33/2010 (BCTSA).

SUMMARY

Complaint about a controversial music video that uses extremely violent images to convey its anti-violence message.
**Held** that the broadcaster did not transgress the Code, since the music video does not promote violence against specific racial groups, but instead offers a strong critique of violence. The broadcast should be viewed in the context of a world where violent imagery depicting inter-ethnic violence is frequently screened in television news clips and movies. In that sense, the content should not be taken at face value. The majority of Commissioners agreed that the images are not calculated to express anti-white sentiment, and that they are instead relevant to the anti-violence message of the video.

**Held** further that the broadcaster did, however, contravene the Code for not providing an eighteen age and violence advisory to viewers. For this contravention it was reprimanded. The main complaint was, however, not upheld.

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**JUDGMENT**

**DR L A GILFILLAN**

[1] The Registrar received a complaint about a music video clip shown on DSTV’s Mnet Action Channel between 21:50 and 22:00 on the 6th November 2010. DSTV is a subscription broadcaster, which falls under the jurisdiction of the BCCSA in terms of section 54(3) of the Electronic Communications Act 2005. We were informed by Mr Mkhize that DSTV, which is owned by Multichoice, takes responsibility for this channel. The Registrar referred the matter to the Chairman of the BCCSA, who appointed a Tribunal of the Commission to adjudicate the complaint.

The complaint read as follows:

“M.I.A Born Free, 21:50 on DSTV channel 106 Action. 6 November 2010. I'm thoroughly and utterly disappointed with the above music video clip, however well put together! It is said that a picture is worth a thousand words.... This clip was guilty of anti-white racism, sex, blatant nudity, graphic violence, and red head discrimination!!!!! I'm sure that was the reason You Tube BANNED it. I would appreciate it if this clip was taken off our
screens.... Please do me the courtesy of mailing me back to inform me of the action taken. Your co-operation is much appreciated with regards to this matter.”

[2] The Response of MultiChoice, the owner of DSTV, amounted to the following:

M.I.A is a British singer-songwriter, rapper and record producer. She was previously nominated for the Grammies and an American Film Academy award for her accompanying soundtrack to the hit movie, *Slumdog Millionaire*. She is also an activist, involved in supporting oppressed people around the world, including the Tamils, Palestinians and African Americans. She is renowned for attempting to depict realism in her music videos by sharing her own personal experiences of being a refugee and surviving the bombing of her school, at the age of ten. This experience is clearly reflected in this music video. The Born-Free music video, otherwise referred to in the international media as ‘Ginger Genocide’ shows the depiction of genocide by driving a message using violence in order to shock audiences, but also to spark debate, discussion and to put across a political point. This music video poses the satirical notion that if a state, government, agency or militia targeted, segregated, persecuted or conducted ethnic cleansing of red-haired white people from the majority of the population and boxed them as a minority, similar to how middle-eastern and Indian people in countries such as the UK and the USA did during the years after 9/11, there would be an outcry of racism. The music video also questions the militarization of police services and the use of force, more specifically aimed at American law enforcement elaborating the deterioration of civil liberties and human rights. The 12 year-old red-haired actor, Ian Hamrick, featured in the music video described the video as "showing violence to end violence.” The video does not encourage discrimination of red haired white people but uses their images and appearance to emphasize a point against discrimination based on a colour of one’s skin. MultiChoice accordingly submitted that the portrayal of violence against red-haired white people in the music video does not amount to the advocacy of hatred that is based on race, nor does it constitute incitement to cause harm, and therefore it does not justify limitations to MultiChoice’s right to broadcast such
material. The video uses creative and artistic freedom to deliver very powerful messages to society as a whole, messages against racial discrimination and stereotyping.

Whilst the complaint only dealt with what, in terms of the Subscription Code has a bearing on hate speech and promotion of violence, the Registrar requested MultiChoice to also address the question as to why it did not add an advisory as to age and violence. MultiChoice submitted that it is international practice not to use age restrictions for music videos. However, it is generally accepted, even internationally, that videos with more contentious content will be scheduled late at night. In this instance the scheduler made a decision to schedule the music video on the Action Channel only (a channel that has a more mature and male audience as demographic) and not on the other more family orientated channels. Due to the music video’s content a decision was also made to only schedule the video late at night. The music video has not been aired on any other channel on DSTV. Furthermore, the M-Net Action channel is designed to appeal to adult viewers and in most instances it is not suitable for family viewing. The majority of the movies broadcast on M-Net Action carry an age restriction between 16 and 18, which indicates the nature of the channel and its target market. Although the Commission did not request MultiChoice to comment on the watershed period, MultiChoice argued that it is important to note that the programme was broadcast at 21h50, almost two hours after commencement of the subscription watershed. In view of the above, taking into account the nature of the channel and the time of broadcast, MultiChoice argued that although the music video did not contain any age restriction, it had taken sufficient precautionary steps to protect children from watching the music video by broadcasting it on a channel that is aimed at adult viewers and also by broadcasting the video almost two hours after the commencement of the watershed. The video was also broadcast between two age restricted films.

**EVALUATION**
The complainant alleges that the music video is “guilty of anti-white racism, sex, blatant nudity, graphic violence, and red head discrimination” and expresses the opinion that that is the reason why YouTube banned it.

It is indisputable that the music video is shocking – indeed, it has been described on the internet as “a shocker of a video”, and it has aroused much controversy. The singer-songwriter is Tamil, and her real name is Mathangi "Maya" Arulpragasam. She herself has suffered the travails of being a refugee, and apparently speaks largely from her own experience of discrimination against “other” race groups.

The video opens with graphic scenes of a military team staging a raid and rounding up prisoners. It is a disturbing scene, which recalls the kind of scene that is frequently screened during television news clips depicting inter-ethnic violence. In such clips, troops (often US troops), round up Palestinians, Afghans, or Iranians – anyone, indeed, whom they are currently at war with. But the shocking difference is that the mainly white troops in the music video are rounding up members of their own kind – who happen to have ginger hair.

In the UK, ginger hair has particular significance, since “Gingers” or red-headed people are frequently the butt of jokes or abuse. It soon becomes clear that the video is allegorical, and by selecting an arbitrary physical characteristic such as the colour of a person’s hair, it is indicating the arbitrariness of discriminating against people on the basis of their skin colour, or the shape of their eyes or noses, or whatever. As such, the Gingers are a metaphor for any ethnic group that is under attack by authority, whether these people be Jews, Rwandans or Romany people.

Far from promoting “anti-white racism” and “red head discrimination”, the video forces the viewer to confront the mindlessness and arbitrariness of racial discrimination, and graphically depicts the eventual effects of such discrimination.
when the red-headed people are rounded up and summarily executed by mainly white-skinned troops. As such, the video is not calculated to injure in any way – on the contrary, the video uses shocking images of violence as an argument against arbitrary acts of violence.

[9] The video also suggests that violence breeds violence – hence the shot of a mural depicting armed red-headed men and the slogan "Our day will come". It is no coincidence that this was once the motto of the Irish Republican Army – and since Irish people are very often red-headed, the use of “Gingers” as a victimised group is especially significant. To get its message across, the video uses many violent images, including one of a body being blown up and a boy being shot at point-blank range. It is a sad fact that similar images are all too familiar on news programmes and movies, and they recall the grotesque savagery that human beings are capable of perpetrating on their own kind.

[10] There is nothing unusual about artists using violent imagery to convey a message on anti-violence. One has only to think of Picasso’s “Guernica” and Goya’s disturbing mass-execution painting “The 3rd of May”. Such images have always shocked those who view them, and there is nothing new in artists using shock tactics to get their message across. While M.I.A. is arguably not of the same stature as Picasso and Goya, she has a broad following, and has enjoyed much acclaim (for example, she is an Academy Award winner for her musical contribution to the award-winning film *Slumdog Millionaire*). The M.I.A. “Born Free” video is rich in cultural references, the most obvious of which is the seminal statement by JJ Rousseau, “Man is born free, yet everywhere is in chains.” By using the white-skinned red-headed group as victims, there is a subtle reference to Pastor Niemoller’s famous WWII anti-genocide statement which ends: “Then they came for me, and by that time there was no one left to speak up” (the “me” here is a clear reference to any unlikely group of people – and M.I.A. takes this to a logical extreme by defining it as red-heads).
It is possible that not all viewers would be aware of the nuances described above. However, the critical criteria for art and drama should not be at the level of ordinary community standards, but should rather be set at an objective level, as justifiably decided by the Canadian Supreme Court in *Regina v Sharpe*¹ and referred to with approval by this Tribunal in its judgment on the *The Story of ‘O’*. Although that film made out a case that the female involved willingly submitted to sadistic sexual acts, it was held that, from a dramatic and historical perspective, the film had value in the broader social debate about sado-masochism, and that these factors saved it from the hate speech clause in the Broadcasting Code. The principle of freedom of expression will often require that that which is perceived to be offensive be tolerated. Dramatic and artistic works frequently play an important role in keeping freedom of expression alive, and one of the ways they do so is by confronting citizens with the horrific realities that threaten to destroy the basis of that freedom, which is the right to life and freedom. In the present video, this is achieved by confronting the viewer with the kind of violence that frequently stems from racial hatred. It should, moreover, be borne in mind that the Constitutional Court has – per Moseneke DCJ – emphasised that a generous interpretation should be afforded to the value of freedom of expression.² Given the strong message of the video against violence and racism, a generous interpretation is, most certainly, justified on the facts of the matter before this Tribunal.

Taking the above into account, in particular the context of the song, and the fact that the video was broadcast on MNet Action at 21h50, the majority of members of the Tribunal agreed that there has been no contravention of the Code of Conduct for Subscription Broadcasters which prohibits the advocacy of hatred based on race, ethnicity, religion or gender or explicit violence or the effects thereof which constitutes incitement to harm. It was concluded that the song and

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² *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC); also see *De Reuck v DPP and Others* 2004(2) SA 406(CC)
action do not satisfy these requirements. Moreover, far from advocating harm, the video is calculated to shock viewers into an awareness of the danger and consequences of ethnic violence in particular. Its message is thus one of anti-racism and anti-violence. Furthermore, insofar as explicit violence and the explicit effects of such violence are shown, these are countered by the dramatic merit as well as the socio-political value of the message conveyed by the video. As a result of these circumstances, the harm requirement is also not satisfied.

However, in view of the violent content of this controversial video, the broadcaster did contravene the Code by not adding an advisory with an 18 age restriction and a violence caution. The fact that it is not internationally customary to add an advisory to music videos with problematic content, conflicts with the requirements of the Code. The Respondent is reprimanded for not providing such an advisory.

In the result the main complaint is not upheld.

The Chairperson and co-opted Commissioner Linington concurred in the above judgment of Dr Lynda Gilfillan.

MINORITY JUDGMENT

DR LINDA VENTER

After reading the judgment of my colleague, Dr Lynda Gilfillan, which represents the view of the majority, I am, with respect, unable to agree with some of the arguments. In my opinion the relevant music video violates clause 9.5 of the Code, which prohibits the explicit infliction of or explicit effects of extreme violence which constitutes incitement to cause harm (my emphasis). I do not concur with the judgment for the following reasons:

- In its response, the Broadcaster states that the M-Net Action Channel has a “more mature and male audience as demographic”. In my opinion many of the typical male viewers of this channel will not be media-literate
enough or have the inclination to analyse the message of the video in the way that the broadcaster (and panel) are able to do (relying inter alia on political and cultural knowledge, media literacy and background information on the personal experiences, activism and involvement in political movements of the producer). That the panel members understand the goal and message of the video does not mean that all viewers will understand it.

- In my opinion the first part of Clause 9.5, which prohibits the explicit infliction of or explicit effects of extreme violence is contravened. South African society is by nature pluralistic and deeply divided and for this reason particularly sensitive and vulnerable in respect of material that portrays hatred and glamorizes graphic violence. I do not dispute that the video does not seem calculated to injure, however, material such as this might provoke underlying political and social tensions, which could eventually lead to an increase in the violence which is already so rife in South Africa. Violence has become endemic in South Africa. Politicians and other social commentators persistently look at screen violence (especially violence on television) as a possible explanation for violence in society. Most of the research has focused on the potential danger of imitative effects.

The Broadcaster states that “the music video poses the satirical notion that if a state, government, agency or militia targeted, segregated, persecuted or conducted ethnic cleansing of red-haired white people from the majority of the population and boxed them as a minority, similar to how middle-eastern and Indian people in countries such as the UK and the USA did during the years after 9/11, there would be an outcry of racism.” It is probable that the depicted extreme violence may incite harm in two possible ways (and so fulfil the requirements of the second part of Clause 9.5):

- Notwithstanding the fact that violence on television is only one of a set of interdependent variables that may play a role in the acquisition and
maintenance of aggressiveness, the possibility exists that viewers who have aggressive personalities or who are in a state of aggressiveness for whatever reason, may become more aroused and aggressive when exposed to explicit violence on television. This video portrays frequent, explicit, graphic, and gory violence during the scenes where the children are murdered without provocation. The visuals reflect an imbalance of power between young red-haired children and brutal, militarized police. This is a particular sensitive issue in the light of the increased numbers of reported violent crimes in South Africa that seek to demean and dehumanise people, whether on the basis of their race, ethnic or social origin.

- The rationale of “showing violence to end violence” may not be understood by all viewers. Apart from shock, sensitive viewers may be emotionally harmed and disturbed by the killings which are extremely explicitly depicted, as well as the gory and grisly consequences which are graphically displayed. The video portrays the tangible fear in the children who are about to meet their end, and invokes short-term terror-provoking suspense in the viewer, awaiting the executions. It is possible that exposure to such explicit violence may cause emotional stress in some viewers. My view is that visuals such as these are harmful per se, especially for sensitive viewers.

[16] The media play a powerful role in shaping public opinion, perceptions and attitudes. Material that portrays hatred by stereotyping on the basis of immutable characteristics (especially when the message is not understood correctly) is particularly harmful as it may reinforce and perpetuate patterns of discrimination and inequality, and have the potential to further divide the South African society in this time of rapid socio-political change.

[17] The fact that similar violent images are familiar on news programmes and in Motion pictures, is no justification that viewers should be exposed to them in the
genre of music videos as well. In my view, artists (as well as broadcasters) should make an effort to use less extreme avenues for social commentary or for communicating complicated messages such as this one to diverse audiences.

JCW VAN ROOYEN SC
CHAIRMAN
21 DECEMBER 2010