



P.O.Box 412365 • Craighall • Tel (011) 326 3130 • Fax (011) 326 3198 • email: bccsa@nabsa.co.za
Block No 8 • Burnside Island Office Park • 410 Jan Smuts Avenue • Craighall Park • 2196 • www.bccsa.co.za

CASE NUMBER: 09/2016

DATE OF HEARING: 17 MAY 2016
JUDGMENT RELEASE DATE: 24 JUNE 2016

MANKONKWANA & BOOI

COMPLAINANTS

vs

e.tv

RESPONDENT

TRIBUNAL: **JUDGE RATHA MOKGOATLHENG (CHAIRPERSON)**
 PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)
 DR NONANDI NANA MAKAULA-NTSEBEZA
 ADV ROBIN SEWLAL

THE COMPLAINANTS: The Complainants were invited but did not attend.

FOR THE RESPONDENT: Mr Mpho Thulane: Executive Legal Counsel, Mr Bobo Mokgor: Executive Producer accompanied by Mr Morapedi Pilane: Assistant Compliance Executive.

Complaint against a documentary programme broadcast which was intended to throw light on the abuse of a custom of a certain part of the population and which resulted in an increasing number of deaths of young boys - documentary proposing solutions for the deaths and mutilations that sometimes result from circumcision - no intention by broadcaster to disrespect or humiliate the custom which is regarded by a certain part of the population as being sacred - broadcast was found by the Tribunal to be in the public interest - Tribunal finding that there is no reasonable justification to limit Respondent's freedom of expression regarding the broadcasting of the documentary - no contravention of the Broadcasting Code found in this instance - Mankonkwana & Booi vs e.tv, Case No: 09/2016(BCCSA)

SUMMARY

This case deals with various complaints received against a documentary broadcast by the Respondent, the intention with the broadcast being to throw light on the abuse of a custom of a certain part of the population which resulted in an increasing number of deaths of young boys. While the custom is regarded by some as sacred, the Broadcaster had no intention to disrespect or humiliate the custom itself. In the programme solutions were proposed to minimise the deaths and mutilations that sometimes result from circumcision. No pictures of circumcision were broadcast. The Tribunal found that the broadcast was in the public interest and that there was no reasonable justification to limit the Respondent's freedom of expression regarding the broadcasting of the documentary. No contravention of the Broadcasting Code was found.

JUDGMENT

[1] The complaints concern the documentary *Inkankatha* which was broadcast on e.tv on 13 March 2016. The programme dealt with initiation schools and the custom of circumcision of young men of the *Amahlubi Tribe* in the area of *Whittlesea*, better known as *Hewu*. The focus of the programme was mainly on health issues pertaining to the consequences of circumcision and the safe return of initiates "from the mountain" as the initiation schools are commonly referred to. In the programme it is alleged that in Hewu deaths following upon circumcision do not occur on the same scale as in the townships and in the Transkei. A few complaints were received after the broadcast of this programme, all from Xhosa men, it seems, who all emphasise that the whole initiation process "on the mountain" is regarded in the Xhosa culture as being sacred and the rituals may not be seen by anyone who has not personally undergone the initiation process.

[2] **The complaints read as follows:**

Mankonkwana: "I just saw a preview of the above-mentioned program, some of the things done at the initiation school are sacred to only people who have been there, they are not supposed to be seen by other people, especially women. It is really sad and disturbing to see how much disrespect you display for our culture and tradition as Xhosa men - highly disturbed!!! Ask someone there in your office, someone who is a Xhosa man and has been to the initiation school. Thanks for your reply. As I have mentioned in my previous mail, people who have never been to the initiation school, especially women, are not supposed to see what goes on at the initiation school. Even when a young boy on his way to the initiation school, there is a certain point where we as men no that even if he decides to change his mind, there is no way he can - its a point where he has seen too much. The program I am referring to here, has gone way pass that point! The clip in particular, where they show an initiate being smeared with something on the body, is a very sacred step, one which cannot

be performed by any man, never mind showing it to anybody, in particular women. The shelters themselves, there very specific details about them, that are known to men who have been there, and they are not supposed to be discussed with anybody, in particular women and young boys who have not been there yet, never showing them in public.

The works of 'Ikhankatha' on its own, is a very sacred form of work, which as per our Xhosa culture, should not be discussed with women, and people who have not been to the mountain. Ask someone who is a Xhosa man, and has been to the mountain. I won't go into the Legal details as you requested, we don't have that in the Xhosa tradition. You are stepping way over the line with this IKHANKATHA program.”

S Booi: “I'm ... a former Initiate. I would like to kindly raise a complaint on the contents of the programme currently broadcasting on etv (2016-03-13) at 18:30 Ikhankatha. I find 95% content of this programme insulting and humiliating to the Xhosa culture. The initiation process (Ulwaluko) is a sacred and respected deed that we (amaXhosa) do discreetly and honorably, now to broadcast almost everything about the process and use names that are only used in the mountain (endle) is equivalent to ridiculing the whole initiation process that we amaXhosa are proud of. A small portion of the programme might be educational but I believe it has done more harm than good. The Initiation Process and all its contents i.e language, procedures, etc is only for the ears and sight of those concerned NOT all etv viewers. Its not etv's place to educate the nation about our sacred, confidential cultural activities. I'm torn, if this is how things are done, then might as well do the whole initiation process Live on etv. This is unacceptable to me, I don't know about other isXhosa unions. I hope the above will be dealt with properly.”

U Booi: “I'm really not happy with this programme as Xhosa male. I would like to kindly raise a complaint on the contents of the programme currently broadcasting on etv (2016-03-13) at 18:30. A small portion of the programme might be educational but I believe it has done more harm than good. The Initiation Process and all its contents i.e language, procedures, etc is only for the ears and sight of those concerned NOT all etv viewers. Its not etv's place to educate the nation about our sacred, confidential cultural activities. I'm torn, if this is how things are done, then might as well do the whole initiation process Live on etv. This is unacceptable to me, I don't know about other isXhosa unions. I hope the above will be dealt with properly.”

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

“This letter is in response to several complaints received concerning the content of the above documentary.

Complaints

According to the complainants, the Xhosa ritual of circumcision, is sacred. They allege that it is taboo to broadcast anything on this subject. They argue that it is a secret that young uncircumcised boys and women should not know about. The following excerpts are a common thread throughout the complaints.

What they showed is not supposed to be broadcasted as it is a secret. (Zongezile Nkolelo)

That programme shouldn't be played on national tv, as much as we respect our culture we don't share it with anyone, it's only for men not for the boys who haven't circumcised. (Sbongiseni Gobo)

A small portion of the programme might be educational but I believe it has done more harm than good. The Initiation Process and all its contents i.e. language, procedures, etc is only for the ears and sight of those concerned NOT all etv viewers. It's not e.tv's place to educate the nation about our sacred, confidential cultural activities. (Unathi Booi)

It is against my culture to have what happens in the bush to be made public. I felt belittled as everything aired on e.tv was supposed to stay in the bush (mountain)...What happens in the bush stays there. (Andile Kondlo)

The initiation process (Ulwaluko) is a sacred and respected deed that we (amaXhosa) do discreetly and honorably, now to broadcast almost everything about the process and use names that are only used in the mountain (endle) is equivalent to ridiculing the whole initiation process that we amaXhosa are proud of. (Siyasanga Boo) People who have never been to the initiation school, especially women, are not supposed to see what goes on at the initiation school...The clip in particular, where they show an initiate being smeared with something on the body, is a very sacred step, one which cannot be performed by any man, never mind showing it to anybody, in particular women. (Mbulelo Mankonkwana)

The common theme of the complaints is that the ritual is sacred, "restricted to the mountain" and should not be made public in any manner. The complaints are therefore generally less focused on how the documentary covered this sensitive topic and more aggrieved by the fact this topic was chosen at all. e.tv contends that it is squarely within its editorial discretion to choose topics and themes for broadcast and that the choice of this topic cannot in and of itself be construed as a Code violation.

The Code

The BCCSA has asked us to respond in terms of Clause 15 (privacy, dignity and reputation) of the Broadcasting Code which provides as follows.

- 15.1 Broadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest.*
- 15.2 In the protection of privacy, dignity and reputation special weight must be afforded to South African cultural customs concerning the privacy and dignity of people who are bereaved and their respect for those who have passed away.*
- 15.3 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.*

e.tv respectfully submits that it has struggled to address the complaints in terms of the above sections of the Code. Clearly, clause 15.2 does not apply to the documentary as it concerns the bereaved and respect for those who have passed away. Neither does Clause 15.3 as it deals with the privacy and dignity of children, the aged and the physically and mentally disabled.

The applicable provision is arguably Clause 15.1, although this deals with the privacy, dignity and reputation of individuals not cultural customs.

Notwithstanding the difficulties in locating the relevant sections of the Code in which to consider the complaints, it is our submission that there is a legitimate public interest to broadcast the documentary and that it does not undermine the privacy and dignity of the complainants.

Public interest

In the introduction, relevant background information is provided in the documentary. It's reported that the number of deaths in initiation schools rose by 42% nationally in 2015. The Department of Health (DOH) shut down 168 unlicensed initiation schools nationally in November and December 2015. Approximately 29 initiates died in the 2015 season across regions of the Eastern Cape, Limpopo and the Free State. Furthermore, every year the media widely reports an outcry at the unnecessary deaths of young men who attend these initiation schools. The DOH has been forced to intervene and regulate initiation schools.

This background establishes a clear public interest in the matter. The documentary provides a glimpse, in a responsible and sensitive way, into this topical issue and specifically explores the role of traditional nurses in ensuring the health and safety of initiates.

Freedom of speech

In its judgements, the BCCSA has repeatedly emphasized the importance of the right to freedom of expression as expressed in section 16 (1) of the Constitution. This right is not absolute, and is subject to limitation in terms of section 36 (1) of the Constitution. However, the limitation has to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This calls for a proportionality test to balance the right to free expression with the complainants' right to dignity and privacy.

e.tv respects and is sensitive to the culture and customs of all South Africans, including the Xhosa culture of the complainants. However, the complainants argue that it is a taboo to broadcast the contents of the documentary on national television. In other words, they call for a total ban of the broadcast regardless of the specifics of its contents. Such a blanket ban cannot be reasonable and justifiable in an open and democratic society. None of the complainants even tries to propose a less restrictive limitation to the broadcast while giving effect to the right to free speech. As some complaints put it, their ritual is "sacred", "secret" and "only for the eyes and ears of those concerned". It means it should not be broadcast at all in whatever manner. This approach offends the Constitution.

We submit that the complaints have not discharged the onus of reasonableness and justifiability required by section 36 (1).

Contents

The people featured in the documentary are Xhosa-speaking and very proud of their culture, especially about the role played by inkhankatha in their culture. This is evident in the statements made by traditional elders, residents and people from the royal house. They voluntarily agreed to be part of the documentary, well aware of its "sacredness" in Xhosa culture. However, they obviously do not share the complainants' sentiment that no aspect of this ritual should be broadcast.

It is important to note that the documentary deals mainly with the role of traditional nurses in the initiation process. No details of the actual circumcision are shown, neither is it revealed what the initiates are taught at every step of the process. The programme actually exalts rather than denigrate the process. Traditional nurses are shown explaining the importance of safety and health for initiates in contrast to the deaths experienced in other initiation schools. They explain that, following proper traditional protocol, the initiation process is dignified and respected. They condemn, not the documentary, but the unscrupulous and dishonest people who bring the ritual into disrepute.

We submit that the documentary presents the ritual – when properly practiced - in a positive light. The ritual is treated with sensitivity. In its execution, the programme simultaneously gave effect to e.tv's right to broadcast an important aspect of the Xhosa tradition, while upholding the dignity and privacy of an intimate and important cultural tradition. Even one of the complainants, Unathi Boo, grudgingly admitted that a "small portion of the programme might be educational."

It is our submission that, in light of controversies surrounding practices at initiation schools, the documentary played an important role in promoting understanding and restoring the dignity of the ritual.

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

[4] **The Complainants replied as follows:**

Mankonkwana: “Whose Constitution is being referred to here? Is it the writer's constitution? What I put it to the writer, that my rights as well, as Xhosa man who went through the initiation process, what if I say that the documentary went a step way too far in terms of my Xhosa tradition?”

Let me repeat this, there is a particular step in the journey to manhood, a particular point where people who have not been there CANNOT cross! I even stated that, at that particular point, even if the initiate to be changes his mind, he wouldn't be allowed as per tradition – would say that is also unconstitutional???

As per our Xhosa tradition, when the young man comes back home from the mountain, mothers are not allowed to see him until a particular point - why must this documentary show initiates going home prior to the point I am referring to???

That clip I referred to, where the initiate is being smeared with something, I have been man for roughly 2 decades, but I am still not allowed to carry that task - its a very sacred step in the journey to manhood, where initiates are about to leave the phase of the initiation school, to enter another phase. I will take this matter further. Kindly refer me to a Xhosa man if there is one in your office. It is hugely disturbing how our Xhosa tradition in connection to circumcision is being disrespected and humiliated on tv.”

S Booi: “I do not agree with etv regarding the matter. Explicitly disclosing Ulwalukho *Initiation* procedures is hardly reducing nor preventing deaths at the mountain, its merely increasing viewing for etv since people who are not concerned in the process are curious about it. The amaXhosa participants who willingly volunteered to take part in the show would have done a great job if they practically performed their act at Initiation schools not on national television for everyone to see. Its for a good reason that Ulwalukho is not performed in a publicly open space. I may not have powerful words and clauses to quote from but I can confidently state that the contents of that programme are insulting to the isiXhosa initiation (Ulwalukho).”

EVALUATION

- [5] In a country like South Africa with its so-called rainbow nation, cultural differences are very real and they might be a source of friction. "Culture" is a very wide concept which includes religion, language, customs, especially of eating, drinking and dress. This list is not complete. Religion is a particularly sensitive matter and where custom is elevated to religion, it becomes even more complicated.
- [6] The founders of this democracy in 1994 had the vision of forging the different racial and ethnic groups in this country, each with their own culture, into one nation. In order to achieve this, they had to promote a culture of respect for and tolerance of each other. This they hoped to achieve with the acceptance of a new Constitution for South Africa and founding a democratic state based on certain values. Some of these

values are "human dignity, the achievement of equality and the advancement of human rights and freedoms."¹

[7] The custom which is the subject of this complaint, and one which seems to have been elevated to the sphere of religion² is the initiation process called "Ulwaluko" where young boys are taken to "the mountain", as it is called, where they are initiated into manhood. This process includes the ritual of circumcision. Unfortunately this ritual, when not done under strict hygienic conditions and/or by qualified persons, has caused many young boys to be maimed for life and even causing some to die. The cause of all this seems to be the fact that the parents of young boys apparently have to pay quite substantial amounts of money for the privilege of sending their sons to "the mountain". The substantial amounts of money seem to have attracted unscrupulous entrepreneurs who have started their own (illegal) initiation schools, and not using authorised traditional healers to perform the circumcisions, as is required. This has resulted in the deaths and mutilations referred to above. The injured boys often end up in public hospitals. The botched circumcisions thus become public health issues, to such extent that the provincial health authorities have had to step in to regulate the subject of circumcision in initiation schools. Despite this, the problem of illegal initiation schools and the resultant injuries and deaths remain and in some parts even seem to be on the increase. This is the background to the documentary programme called "Inkankatha" and the complaints following the broadcast thereof. One could fairly state that this has become a matter of public interest and therefore public debate on this matter should be allowed. More about this follows below.

[8] This is where the media has a role to play. In a democracy it is the duty of the media to keep the public informed of what is going on in their country and what are the issues (social, political, economic, etc.) affecting them. The Respondent broadcaster in this case, in performing this duty, thought it wise to inform their viewers of the health issues pertaining to initiation schools. It is important to note that a broadcaster

¹ See section 1(a) of the Constitution of the Republic of South Africa 1996. Section 10 of the Constitution specifically protects the right to dignity. This protection has also been included in clause 15 of the Broadcasting Code that is applicable to this complaint.

² We refer here, *inter alia*, to the statement by the complainant Mankonkwana, namely "The works of 'Ikhankatha' on its own, is a very sacred form of work."

is free to choose any subject it thinks is necessary to make its viewers aware of. In this regard the BCCSA in *Scholtz vs SABC*³ decided as follows:

“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 or director has chosen. In this sense, freedom of speech, although not regarded hierarchically as a right superior to other fundamental rights, does act as the heart of democracy, as held by our Constitutional Court.”

- [9] The producers of "Inkankatha" thus exercised their freedom to choose the topic of their programme, and – given the complexity of the theme – the aspects of the topic on which to focus. The documentary was not a live broadcast and its main focus was on the deaths and problems which are encountered during these ceremonies. Recommendations are made on how to overcome the deaths. During the programme the traditional surgeon and nurses explain what their responsibilities are and what is done and used after the circumcision to heal the wound and ensure the boy's safe return to his family.
- [10] The programme also featured interviews with residents explaining the importance of the traditional nurse during this process, as he carries the responsibility of bringing the boy back alive. According to the residents, during his stay in the mountain the traditional nurse is expected to offer all the teachings and guidance to manhood. One of the nurses recommends that government must intervene because there are not enough training schools for traditional nurses. He also said that the biggest problem is that parents send underage boys to the mountain. A representative of the Zukulama Traditional Authority suggests that families must discuss if a boy is ready for initiation, since some people send the child too soon and this is where problems occur if they are not able to take care of themselves. It is made clear that if a boy has an ailment other than what he went to the mountain for, he is allowed to take Western medicine during the process. It is also suggested in the programme that people who do not follow proper procedures must be arrested and prosecuted and that families must ensure that authorised and qualified traditional nurses are engaged to look after

³ Case no. 59/2002 par 13.

their sons. Sometimes parents hand over their sons to strangers and people who have never done a circumcision before and this results in botched practices and that is when boys do not return. The views are expressed in the programme that Government must intervene and ensure that the illegal traditional surgeons are arrested because they destroy this Xhosa tradition. Boys die because of the illegitimate traditional nurses. There are, however, no actual scenes in the programme of how the circumcision is performed.

[11] The programme does not mention the specific details of the shelter in which the boys are housed, other than that a shelter is built. The scene complained about was fleeting and when the smearing of the yellow substance on the boy's chest took place, the camera cut away and was followed by a scene where a black cloth is placed on his head. Thereafter it shows the boy covered in a blanket walking home. No secret information was revealed during this scene.

[12] The Broadcaster was requested by the Registrar of the BCCSA to respond to the complaint in terms of clause 15 of the Free-to-Air Code of Conduct for Broadcasting Licensees. In response to this request the Broadcaster stated the following:

Clearly, clause 15.2 does not apply to the documentary as it concerns the bereaved and respect for those who have passed away. Neither does Clause 15.3 as it deals with the privacy and dignity of children, the aged and the physically and mentally disabled.

The applicable provision is arguably Clause 15.1, although this deals with the privacy, dignity and reputation of individuals not cultural customs.

We cannot agree with this interpretation of the meaning of clause 15, especially sub-clauses 1 and 3. As for sub-clause 1 the Broadcaster seemingly tries to separate individuals from their customs. The logic of their argument escapes us as their interpretation seems to isolate an individual from his or her cultural customs, religion, good name, etc. It is the affront to a person's self-image and to what a person believes in that causes the person to complain that his or her dignity has been impaired. As for sub-clause 3, we think that it could apply to this complaint because we are dealing here with children attending the initiation school and their privacy and dignity are at

stake. We are therefore not prepared to give such a restricted interpretation to clause 15 as the Broadcaster would want us to do.

- [13] What is important in this case is that clause 15.1 continues with the words:
"... bearing in mind that the said rights (to privacy, dignity and reputation) may be overridden by a legitimate public interest."

While the BCCSA respects the views and sentiments of the complainants and accepts that their customs relating to initiation might be sacred to them, this case is a classic example, we think, where the rights to privacy, dignity and reputation are overridden by a legitimate public interest. When it is considered necessary by a broadcaster to reveal possible abuse, a broadcaster is justified in publishing such material in the public interest. In this regard it must be borne in mind that public interest is not the same as that which is interesting to the public.⁴ It means that some higher value is sought by the broadcaster and, in the present instance, the higher value lies in the possible abuse of a custom that is important for a section of the population and which abuse is resulting in, *inter alia*, extra pressure on the public health system which in turn makes higher demands on already scarce public funds. This, indeed, is a matter of public interest.

- [14] We have come to the conclusion that the programme was intended to throw light on the abuse of a custom of a certain part of the population which resulted in an increasing number of deaths of young boys and to propose solutions for the deaths and mutilations that sometimes result from circumcision. We do not think that there was any intention on the part of the Broadcaster to show disrespect to the people who regard the custom as sacred or to humiliate the custom itself. The Tribunal finds that there is no reasonable justification to limit the Respondent's freedom of expression regarding the broadcast of the documentary. Consequently we find that there was no contravention of the Broadcasting Code.

The Complaints are, accordingly, dismissed.

⁴ See *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451(A) where Corbett CJ said (at 464C-D), in delivering the majority judgment: "(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known . . ."

A handwritten signature in black ink, appearing to read 'Ratha Mokgoatlheng' with 'Judge' written below it.

**JUDGE RATHA MOKGOATLHENG
CHAIRPERSON**

Commissioners Viljoen, Makaula-Ntsebeza and Sewlal concurred with the judgment of the Chairperson.