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**CASE NUMBER: 17/2018**

**DATE OF HEARING: 15 AUGUST 2018**  
**JUDGMENT RELEASE DATE: 03 SEPTEMBER 2018**

**KURIAN**

**COMPLAINANT**

**vs**

**e.tv OVHD**

**RESPONDENT**

**TRIBUNAL:**           **PROF HP VILJOEN (CHAIRPERSON)**  
                              **PROF S LÖTTER (DEPUTY CHAIRPERSON)**  
                              **MS NOKUBONGA FAKUDE**  
                              **PROF BONKE DUMISA**

**THE COMPLAINANT WAS UNABLE TO ATTEND.**

**FOR THE RESPONDENT: Mr Ndivhuho Norman Munzhelele, Regulatory Head and Strategy accompanied by Mr Morapedi Pilane, Compliance Officer and Mr Thabiso Seichoko, Technical Manager.**

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*Wrong age restriction provided on EPG- correct age restriction and audience advisories provided during the broadcast – Free-to-Air Code applicable to etv Open view HD – no contravention of Free-to-Air Code . Kurian vs e.tv OVHD, Case No: 17/2018(BCCSA)*

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## **SUMMARY**

**The complaint deals with a wrong age restriction that was provided by the broadcaster on the EPG for a film that was broadcast on etv's Open View platform. The age restriction was indicated as 13 on the EPG. The complainant's two daughters were watching television when the film started. The correct age restriction and audience advisories were provided during the broadcast, namely 16SNLV. etv Open View is a Free-to-Air Licensee broadcaster and therefore not subject to the Subscription**

**Broadcasting Code. The applicable Code is the Free- to- Air Code. Clauses 7(1) and (4) and Clause 9 were not contravened as the required information in terms of these Clauses were provided.**

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## **JUDGMENT**

### **S LÖTTER**

[1] This is a complaint against e.tv OVHD. The complaint concerns a film, Ex Machina, that was broadcast on etv OVHD. The Audience Advisory provided was 16SNVL and the film was broadcast at 20:00. The EPG (electronic programme guide) indicated that the age restriction was 13. The complainant relied on the information provided on the EPG with the result that his two young daughters were watching television when the film started.

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

“Please allow me to share our great displeasure and shock when we saw a movie given the age restriction that was absolutely incorrect.

Ever since we got OVHD, we immediately put age restriction control of any movies or programs over the age of 13 as we have 2 young daughters under 13 years of age.

Imagine our shock when we saw a movie Ex Machina that has an age restriction of 18SNL being aired on on EMovies+ with the age restriction of 13! And that too at 8pm. Our girls were checking on highlights for the world cup football match and they come across this movie with no restrictions!!!

This is not acceptable and I am formally placing a complaint with BCCSA that EMovies+ through OVHD has aired a movie that has the wrong age restriction and has given access to those who would otherwise use the the age restriction control.

Please see attached picture as proof.

I await your soonest reply beacuse i wonder how many other 16 or 18 SNVL movies are being aired with the incorrect age restriction.”

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

**“Complaints: Re Movie ex Machina**

This letter is a response to a complaint lodged by Ashbuy and Peal Kurian about the classification of the movie ex Machina on eMovies at 20H00. According to the complainants the classification was inaccurate.

The complainants seemed to be allege that we gave a13 years age restriction to the movie which was supposed to be rated 18. There is no substance in the allegation. Essentially the complainants relied on IMDB classification to lodge the complaint. We really believe this comparison is absurd considering that e.tv classifies its content independently and is not

obliged to follow IMDB classifications. The only classifications guidelines we consider is that of FPB.

We submit that *Ex Machina* was correctly rated 16 SNVL and this was consistent with the Film and Publications Board classification guidelines. The FPB gave the film 16NLV rating.

With regards to scheduling, a 16 years age rated programme can be broadcast before the watershed period. It is our submission that the content itself was not of an adult nature that it can only be shown after the watershed.

All considered, we submit there was no violation of the broadcasting Code.

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

“Thank you Ms. Martin for your reply.

But from the picture I took from our TV you have seen and they too will see they put the wrong age restriction. See at the bottom.. it shows 13!

Please let me have faith that the BCCSA holds public broadcasters accountable and if they have made a mistake they must admit it and apologize.

Awaiting your reply

I fail to understand how the FPB has 2 age restrictions, that too at both end of the spectrums for one movie, where by reading the parents guidance of IMDB, you will find it in no way backing a 13 age restriction.

Then comes to question how many other movies are being aired by ETV with the wrong age restrictions. I am going to check from now on to prove that they are not following in line with the BCCSA standards.

This is very upsetting. It means I cannot even trust the age restriction blocker that OVHD provides.

Thank you Ms Martin.

I understand what you are saying.

But the fact is that they placed the age restriction as 13 but from the little we watched had so much vulgar swearing and we switched off just in time before there was going to be full frontal nudity shown.

Are we still going to say that the 13 age restriction is justified as it was from a DVD certification? I fear that other movies are going out of etv or OVHD with the incorrect restrictions.“

## **EVALUATION**

- [5] The complainant set the parental control mechanism to block all programmes with an age restriction of 13 and above. In view of the incorrect information that was provided on the EPG, he did not block the film and his children were watching television when the film started.

[6] In order to determine whether the broadcaster contravened any provisions of the code, the applicable Code must be identified. Viewers gain access to the Open View platform once they have purchased a decoder and a satellite dish. No further moneys are paid as is the case with Subscription Broadcasting Licensees. According to the etv representative etv is a Free-to-Air licensee. In view of the fact that no monthly payments are made by viewers I am prepared to accept that the Free-to-Air Code is applicable.

[7] Clauses 7 and 9 of this Code are relevant. Clause 7(1) refers to the Watershed and determines that:

Programming on television which contains scenes of explicit violence and/or sexualconduct and/or nudity and/or grossly offensive language intended for adult audiences must not be broadcast before the watershed period; and

Clause 7(4) determines:

Television broadcasting service licensees may, with the advance of the watershed period, progressively broadcast more adult material.

[8] Clause 9 (1) refers to Audience Advisories and provides that:

To assist audiences in choosing programmes, television broadcasting service licensees must provide advisory assistance which, when applicable, must include guidelines as to age, where such broadcasts contain violence, sex, nudity and/or offensive language. The advisory must be visible on the screen for a minimum of 90 seconds at the commencement of the programme and for a minimum of 30 seconds after each advertisement or other break. Where the frequency of the said subject matters, or any one or some of them, is high, a continuous advisory will be necessary, whether it is broadcast before or after the watershed.

[9] The watershed for Free-to-Air Licensees starts at 21:00 and ends at 05:00. The film in question was broadcast at 20:00. Clause 7(4) allows that progressively more adult material may be broadcast with the advance of the watershed. This should be read in conjunction with the condition set out in Clause 7(3) which requires that when programmes that may not be suitable for very young children are broadcast outside the watershed, sufficient information must be provided to parents. Sufficient information will include regular scheduling patterns or audience advisories.

[10] Audience advisories are addressed in Clause 9. Audience advisories must provide guidelines as to age, where such broadcasts contain violence, sex, nudity and/or offensive language. The format is prescribed in Clause 9(2) as follows:

The following visual advisory age system must be used: 10, 13, 16 and 18. The following symbols must be used in accordance with the relevant content: V (violence), L (language), N (nudity), S (sex), PG (Parental Guidance).

[11] The broadcaster complied with the prescribed audience advisories. The age restriction as well as an indication of the content was provided on the screen in line with the age restriction provided by the Films and Publications Board (FPB).

[12] Although the Free to Air Code does not refer to a parental control mechanism or an EPG, the Tribunal understands the dilemma of the complainant. He relied on the age classification provided by the EPG when he decided not to block this specific programme on the decoder.

[13] Subscription Broadcasting Service Licensees are obliged to provide the classification of information on programmes in its hard copy programme guide and the EPG. They are also required to indicate the classification of the programme at the start of the programme. They are not required to display any audience advisories during the broadcast of the programme or after each advertisement break as is required from Free-to-Air Licensees. It can be accepted that the information required to be provided on the EPG replaces this requirement.

[14] *In casu* the broadcaster did not rely solely on the EPG to provide content information. Audience advisories were displayed in line with the provision of clause 9 of the Free-to-Air Code with an age restriction that is in line with that imposed by the FPB. The Audience Advisories alerted the parents to the inappropriate conduct and enabled them to prevent their children from viewing inappropriate conduct. However, had the complainant relied solely on the EPG information the outcome could have been quite different.

[15] Although etv operates under a Free to Air licence, the introduction of a decoder with a parental control mechanism and the display of an EPG create an expectation that

parents can block programmes based on information provided on the EPG. The impression is also created that the parental control mechanism provides an effective alternative manner in which to control their children's viewing.

[16] The underlying principle of both the Codes of Conduct is that content which may be viewed as inappropriate by some viewers may be broadcast as long as sufficient information about the contents of the programme is provided. This principle is of the utmost importance when it concerns children.

[17] To give effect to this principle, the Free-to-Air Code contains extensive directions regarding age appropriate guidelines and the display of audience advisories. As Subscription Broadcasting Licensees provide a parental control mechanism the Subscription Broadcasting Code provides extensive directions regarding the parental control mechanism and the EPG.

[18] It is trite law that a legal duty to act may arise from a previous positive act in certain circumstances. Once a broadcaster provides a parental control mechanism accompanied by an EPG, a concomitant duty to provide the correct information on the EPG arises. *In casu*, etv had a duty to ensure that sufficient correct information is provided by the EPG to enable parents to make informed decisions regarding their children's viewing patterns. In the final instance, however, etv complied with the requirements of Clauses 7 and 9 of the Free-to-Air Code.

**In the result, I find that there has been no contravention**



**PROF S LÖTTER  
DEPUTY CHAIRPERSON**

*The Chairperson Viljoen and Commissioners Fakude and Dumisa concurred with the judgment.*