TSHWARANANG obo PN & NAS  

vs

SABC1 ("NOW OR NEVER")

TRIBUNAL: PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)  
PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)  
ADV BOITUMELO MMUSINYANE  
DR LINDA VENTER

FOR THE COMPLAINTANT: No appearance for the complainant

RESPONDENT: Mr Fakir Hassen: Manager: Broadcasting Compliance assisted by Ms Veronica Barnard: Compliance Officer, Broadcast Compliance.

Complaint that dignity and privacy of two sex workers were violated by showing them in a programme about another woman who was able to leave her life as sex worker behind - identity of two sex workers was not revealed in programme and Tribunal finding that the two sex workers could not be identified - no violation of dignity and privacy of the two sex workers could be found - complaint not upheld - Tshwaranana vs SABC1, Case No: 34/2013 (BCCSA)
SUMMARY

The complainant complained on behalf of two sex workers that their dignity and privacy was violated by showing them in a programme about another woman who was able to leave her life as sex worker behind. The identity of the two sex workers was not revealed in the programme and the Tribunal could not find that the two sex workers were identified in the programme. Under these circumstances no violation of the dignity and privacy of the two sex workers could be found and the complaint was not upheld.

JUDGMENT

Prof Henning Viljoen

[1] A complaint was received from Tshwaranang Legal Advocacy Centre on behalf of two women whom we shall call PN and NAS and who are described as street based sex workers. According to the complaint, the two women saw themselves under compromising circumstances in a programme called "Now or Never", broadcast on 6 June 2013. The detail of the complaint appears from the letters below.

[2] The complaint reads as follows:

"I am an attorney acting on behalf of the below organisation in respect of a complaint received by two of our clients.

Tshwaranang Legal Advocacy Centre (TLAC) to end violence against women is a non-profit, independently funded centre established in 1997 in terms of section 21 of the Companies Act, 61 of 1973.

TLAC was established to advance the human rights of women and to promote and defend the rights of women to be free from violence and have access to quality effective services. TLAC fulfills its aims through conducting research and engaging in advocacy, and capacity building aimed at the promotion and protection of women’s right to be free from violence in South Africa. TLAC also conducts awareness raising campaigns relating to the impact of gender based violence on South African women and also undertakes training for law enforcements agents, including police and court officials.

We consulted with two sex workers on 12 June 2013 at our offices and was advised that in a broadcast of a show on SABC1 on Tuesday 4 June 2013 in the evening they saw themselves in full view of the public. The show is called Now and Forever and this particular episode that was being aired dealt with sex workers who have opted to leave the industry. The two ladies had no knowledge of the filming of the show and did not provide their consent to be filmed as part of the show."

The ladies feel that their dignity and privacy have been infringed by this broadcast and feel that the producers of the show had no right to film them without their knowledge or consent. Your assistance in resolving this matter is requested as the show has impacted negatively on the lives of these two woman and their families.
The ladies can be contacted directly or via the offices of Tshwaranang who have an already established and trusted relationship with the woman in the Johannesburg Sex Worker Industry.

**In a further letter the complainant expanded the complaint as follows:**

The above matter and our previous correspondences have reference.

As indicated in my previous correspondence to your office, I consulted with two ladies at my offices on 12 June 2013. The reason for the consultation was that the week preceding the consultation the ladies had viewed a broadcast on SABC1, a programme called Now and Forever at approximately 20h30 or 21h00 in the evening of 4 June 2013 (the exact time may be incorrect).

PN aged 23 years with two infants (ages unknown) and NAS aged 33 currently in a relationship, are both street based sex workers in Johannesburg. The two ladies have never disclosed the fact that they are sex workers to either family or friends.

As they were viewing the show, (each lady in the privacy of her own home) approximately halfway through the broadcast they saw themselves being shown clearly in the course of doing business with clients.

NAS was portrayed in two separate shots were she is seen negotiating with a client and then getting into the vehicle. She is then also shown returning. Her face is in clear view of the camera and there is no attempt to hide her identity from the public. She was never approached by any one from the SABC requesting her permission or informing her that a broadcast was going to be filmed in which she may appear.

The filming was done without her permission/consent or knowledge. Her family and friends were not aware of the fact that she was/is a sex worker and the airing of this broadcast has impacted greatly on her in that her family, friends and her community have now seen or heard about the show and that she was seen in it. This has caused both NAS and her family great embarrassment and humiliation. Ashley is of the view that the producers of the show and the SABC have violated her rights to dignity and privacy.

PN is the mother of two minors (ages unknown) and her family too are unaware of the fact that she is a sex worker. Similarly to NAS PN was sitting at home watching television when she saw herself being featured in the broadcast. The ladies had allegedly seen the highlights of the show and decided to watch it. Precious is seen only once during the entire show and is shown standing on the street in an area well known for sex work. This incident has also impacted on Precious and she too feels that her rights to dignity and privacy have been violated.

Section 10 of the South African Constitution Act 108 of 1996 guarantees that everyone inherent dignity and has the right to have their dignity respected and protected. Sex workers in SA are a vulnerable group as the majority of these women enter the industry to support their families who live in extreme poverty. In addition to this they face harassment and exploitation from police and members of the public on an almost weekly basis. In the Constitutional Court case of *S v Makwanyana* O’Reagan J stated that “Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.”

Under section 14 of the Constitution it is stated that:

*Everyone has the right to privacy, which includes the right not to have*

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1. 1995(3) SA 391 (CC) par 144
2. *S v Makwanyana* 1995(3) SA 391 (CC)
(a) their person or home searched; (b) their property searched; 
(c) their possessions seized; 
(d) the privacy of their communications infringed.

In relation to the Right to Privacy, it should be noted that both the common law and the constitution regulate this right. The constitutional right to privacy is two fold. In the first instance it guarantees a general right to privacy and second it protects against specific infringements of privacy, namely searches and seizures and the infringement of the privacy of communications. The Common law recognizes the right to privacy as an independent personality right that the courts have consider as being part of the concept of dignitas. At common law a violation of the right to privacy constitutes an iniuria and such violation occurs when there is an unlawful infringement of the persons personal privacy or an unlawful disclosure of private facts about the person/s. In the matter at hand the question of privacy is inextricably linked to the question of dignity and is accordingly viewed from this perspective.

In light hereof and the overarching fact that the ladies have disputed any knowledge of the filming of the producers intent to include photage of these two ladies and further that their permission and consent was not sought prior to the filming of the broadcast it is TLACs contention that there exists a prima facie case for the infringement of their rights to dignity and privacy.

It is on this basis that the matter has been referred to the BCCSA for further investigation and resolution.

[3] The Broadcaster responded as follows:

*BCCSA COMPLAINT: TSHWARANANG - SABC1 NOW OR NEVER - ALLEGED OFFENSE TO DIGNITY - 04.06.13*

Please find our comments as follow:

1. Now or Never is a strand of 48 minute documentaries that look at individuals who have taken steps in their lives that will change the course of its direction for each individual’s benefit. The show is a six-part series that has followed the lives of young men and women who will stop at nothing towards changing their lives for the better.

2. The episode in question was a story about a young woman named Bongiwe Nkwalase. In this episode, Bongiwe’s journey involves an attempt to leave behind her life as a sex worker within the streets of Johannesburg. In the episode we do not mainly focus on her occupation as a sex worker, but rather put emphasis on the fact that she is a mother and aspiring musician who will stop at nothing towards fulfilling her dreams of becoming a musician.

3. A lot of research, planning and organizing went into the project. We took advice and guidance from a psychologist and life coach on how best to treat Bongiwe both off and on camera. To visually show the need for Bongiwe to make a breakthrough and find the courage to leave her current occupation, we had to use shots that supported her statements in her interview that her job was dangerous and that she worked at night in order to create an emphasis on her desire to leave her job for the benefit of her child.

4. In this episode, we selected wide angle camera shots to hide the identity of any individual who was part of Bongiwe’s surroundings and we did that at the best of our ability. Each camera wide angle shot was recorded from a distance to give a broad perspective of the
night life and not a personal attack on an individual. The production company treated the episode with utmost care with every angle, shot and edit being chosen with utmost consideration.

5. Regarding the recording of wide angle shots of the Johannesburg CBD, these were used to describe the night scene in the Johannesburg CBD, in which the two complainants allegedly feature. There was no planned recording or deliberate attempt to single out either of the complainants, who are in any event not easily identifiable in the fleeting shot in which they are seen. There is also no identification of the complainants or any mention in any way that they are sex workers.

We submit that there has been no transgression of the Code."

EVALUATION

[4] The gist of the complaint is that the dignity and privacy of the two sex workers had been infringed by the broadcast of the programme that related the story of one Bongiwe Nkwala. In the context of the latter’s efforts to leave behind her life as a sex worker on the streets of Johannesburg, some scenes were broadcast of sex workers being active at night in the central business district of Johannesburg. It is alleged by the complainant on behalf of the two women that both of them figured in these scenes under compromising circumstances; that they and their families, who were unaware of their activities, were embarrassed and humiliated and that their dignity and privacy had been violated. After both the women had signed documents waiving their rights to take civil action against the broadcaster concerned, the Chairperson of the BCCSA referred this complaint to a Tribunal for a hearing.

[5] At the hearing a DVD recording of the programme was watched by the Tribunal members and the respondent. There was no representation on the part of the complainant and neither of the women was present. As explained in the broadcaster’s written response to the complaint and during oral presentation at the hearing, this type of reportage is done with the utmost care and discretion so as not to intrude on the privacy of innocent bystanders. The broadcaster went to lengths to explain the technicalities of wide angle and long distance shots. It was also explained to us that the “actors” who are about to be filmed have to sign an indemnity, while the faces of people who are not part of the script are blurred out so as to protect their identity. Moreover, the particular scenes were shot while it was raining and it was done in dimmed lighting, making the identification of people, except the "actors", extremely difficult.
The two women concerned were not present at the hearing. We therefore do not know what they look like. After watching the recording, we realised that there was no scene where one could clearly identify women who answered to the description by the complainant. We therefore watched it a second time. After the second viewing, we were still in the dark as to the identity of the two women. According to the complaint the women "saw themselves being shown clearly in the course of doing business with clients" and also where "she is seen negotiating with a client and then getting into a vehicle. She is then also shown returning. Her face is in clear view of the camera ..." After watching the recording twice, not one of the members of the Tribunal could identify any of the scenes described or see any woman whose features were so clearly exposed as to make identification possible.

We have to conclude, on a balance of probabilities, that the women on whose behalf this complaint was lodged, could not be identified. It was also submitted by the broadcaster that there was no deliberate attempt to single out either one of the women so as to violate their privacy. This submission has been accepted by the Tribunal.

In a recent decision, the Tribunal of the BCCSA had to decide on a complaint by a husband who alleged that the privacy of his wife had been violated by a news item wherein it was reported that a woman had been taken in by the police for questioning after alleging that she had faked her own kidnapping. The identity of the woman was not disclosed in the news item, neither could she be identified in the footage of the incident as the broadcaster used angled and long shots of her from behind. It was found by the Tribunal that because the identity of the woman was not disclosed by the broadcaster, no rights to dignity or privacy (Clause 15(1) of the Code of Conduct) had been violated. In this instance we also find that because the two women could not be identified in this programme, their dignity and privacy had not been violated.

The complaint is, accordingly, not upheld.

PROF HENNING VILJOEN

3 Case no 25/2013 Linda v SABC1 & SABC3 News
VICE CHAIRPERSON

The Chairperson and Commissioners Mmusinyane and Venter concurred with the judgment of the Vice Chairperson.