T KHAAS           COMPLAINANT
vs
SABC1         RESPONDENT

TRIBUNAL:  Prof Kobus van Rooyen SC (Chairperson)
            Mr Barnard Mokwena (Broadcasting Representative)
            Prof Sunette Lötter (Listener Representative)
            Dr Linda Venter (Co-Opted)

Complainant: The Complainant did not attend

Respondent: Mr Fakir Hassen, Manager - Broadcast and Compliance, Policy and Regulatory Affairs.

Privacy – skit on Mr and Mrs Mandela – not contravening the Code. T Khaas vs SABC1, Case No: 38/2004.

SUMMARY

A complaint from a member of the public concerning the broadcast of a skit featuring the characters Mr Nelson Mandela and his wife Graca Machel was received by the Registrar. The matter was referred to the SABC for a response and thereafter the matter was the subject of a hearing. As a starting point the Broadcasting Code does not protect the right which a person has to his or her image. We, accordingly, do not express a view as to whether the image of the Mandelas was invaded upon. A person, whose image has been invaded upon unlawfully, may take the matter to the courts and obtain an interdict and if it led to damages, also claim damages. The first question is whether the right to privacy has been invaded upon. Has the skit in fact disclosed anything about the private lives,
the “intimate personal sphere”, of the Mandelas? We believe that this has not happened. Nothing is revealed that is not in any case well known. It is true that the skit has the “bedroom” of the Mandelas as background and that it repeats what is well known: that Mr Mandela gets up particularly early. The voice is also the typical Nelson Mandela voice. We agree that the skit would evoke feelings of discomfort for some viewers. Mr Khaas is one of them. However, within the Broadcasting Code there is no contravention. This conclusion is, of course, no guarantee that all future broadcasts of this kind of skit would lead to similar decisions. Each case would have to be decided on its own merits. The Complaint is not upheld

JUDGMENT

VAN ROOYEN (Chairperson)

[1] A complaint from a member of the public concerning the broadcast of a skit at 22:00 on SABC TV1 featuring the characters Mr Nelson Mandela and his wife Graca Machel was received by the Registrar. The matter was referred to the SABC for a response and thereafter the matter was the subject of a hearing, with other matters, at a session of this Tribunal.

[2] The complaint read as follows:

“On Friday 6th August 2004 at about 22:00hrs during the airing of the PMS show on SABC1, certain distasteful and/or insensitive comments were made of Mr Nelson Mandela and his wife Ms Graca Machel. Since I did not record the said utterances at the time, I am not in a position to repeat ad verbatim the actual words mentioned during a parody of Mr Mandela and Graca while they (ostensibly) were in bed. I am sure that the SABC should be in a position to assist with the actual transcript of the program. The point is, what was actually said made me feel ashamed of the manner in which the said parties were depicted. For Ms Machel, this could not have come at a more inopportune time with August being Woman’s Month.

Firstly, it is contrary to our African custom to lampoon or even talk about the goings on of our elders, never mind while they are (ostensibly) in their bedroom or privacy. One of the lines (while “Ms Machel” was lying in bed in her night dress) went on to depict her comparing Mr Mandela with the late Samora Machel, her late husband and former president of Mozambique. Secondly, almost everyone looks up to Mr Mandela. In fact, it is common cause that he is the embodiment of moral authority and has done a lot towards mending the decaying
fabric of our society. To see the SABC take such cheap shots at the universal idol in the name of humour was, at best, pitiful and below the belt.

Granted the poetic licence bestowed on them (the actors and the producer) under the guise of freedom of speech, the SABC could at least have ensured that the content of the said parody was edited out to ensure that it was not demeaning on the couple - as it was also insulting to any self-respecting person watching the program. I believe that the actors (and the SABC through commission or omission!) had gone a step too far in their articulations. I personally do not believe that the SABC senior management or its board encourages such acts of disrespect for our elders.

At the very least, all the good work and effort by the SABC that went towards making this year’s Woman’s Day a memorable and joyous occasion is in danger of counting to naught if the SABC chooses to ignore or condone such conduct which demeans one of the very women it has come out in praise of over the entire weekend.

On the strength of the aforegoing, I believe it congenial for the SABC to apologise unreservedly to both Mr Mandela and his wife as well as to all the viewers who were offended by this. I trust this meets your urgent and favourable consideration.”

[3] The SABC responded as follows:

“The insert complained about needs to be seen in the context of satire of political and public figures that happens frequently across the world on television shows. Often this is done using life-size puppets, but in this instance, real-life actors portrayed the roles of the Madibas.

The skit is about former President Nelson Mandela’s well-documented habit of waking up at 04:30. This is emphasized several times by the character playing his wife, Graca Machel, through affectionate exasperation at living with someone who consistently wakes up at what would be considered extremely early by a fair amount of our viewers.

Our writers have obviously never observe this in real life and are merely drawing upon their imaginations and what they imagine their responses would be if hypothetically they lived with someone who woke up at 04:30. The Graca character’s reaction was considered humorous because it was felt it was something the majority could relate to.

While we acknowledge that any bedroom as a location has the potential to be seen as a loaded context, we made absolutely sure that there was no content or connotation that was explicit in any way.
The scriptwriters of the show take their cue from cartoonists and newspapers and create comedic situations from events, incidents and interviews that are well documented by the media. This was the case in this sketch as well.

It is public knowledge that the Honourable Mrs Graca Machel Mandela is in the incredibly unusual position of having being married to two presidents in her lifetime – two great and well respected icons of our time and our continent.

It was never our intent to offend or detract in any way from the dignity and respect that we hold for these two great statesmen and celebrated leaders – President Nelson Mandela and President Samora Machel. The comparison is purely based on the former and the latter’s imaginary and supposed difference in waking habits.

We laugh at what we can relate to, what we feel is true about ourselves or what we imagine to be truisms about our society. The scriptwriters imagined if they were in the position of having woken up early they would reminisce about days when they did not have to do the above. They made that response more specific because they were writing a skit based on the characters of the Madibas. The scriptwriters chose The Madibas precisely because they are this nation’s Royal Family – loved, recognized and respected by everybody.

The purpose of the skit was to create a place and space above the strife of everyday life to laugh together as a nation, to portray what we the producers saw as the humanness of Madiba, and the humanity of all of us.

Granted, humour is always personal and subjective. Comedy can sometimes be irreverent, and when it is, one has every right to question the intent behind something they did not find funny that others did. We submit however, that there is nothing offensive intended or portrayed in this skit and that there has been no contravention of the Code.”

Clause 38 of the Broadcasting Code provides as follows:

“Insofar as both news and comment are concerned, broadcasting licensees shall exercise exceptional care and consideration in matters involving the private lives and private concerns of individuals, bearing in mind that the right to privacy may be overridden by a legitimate public interest.”

In Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) Ackermann J emphasised the “intimate personal sphere” as being at the core of privacy. In Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd 2001 (1) SA 545 (CC) Langa DP (as he then was)
elaborated on what Ackermann J stated in regard to the “intimate personal sphere of life” to which privacy pertains, in paragraph [16]:

“The right, however, does not relate solely to the individual within his or her intimate space. Ackermann J did not state in the above passage that when we move beyond this established (intimate core) we no longer retain a right to privacy in the social capacities in which we act. Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the State unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play.” (italics added)

[6] As a starting point the Broadcasting Code does not protect the right which a person has to his or her image. We, accordingly, do not express a view as to whether the image of the Mandelas was invaded upon. A person whose image has been invaded upon unlawfully, may take the matter to the courts and obtain an interdict and if it led to damages, also claim damages.

[7] Furthermore it is impossible to declare categorically whether this kind of skit would always not invade privacy. Each skit would have to be judged on its own. There is, indeed, no reason why a skit could not, under certain circumstances, invade privacy unlawfully. Privacy is one of the rights which falls under the umbrella of dignity. Human dignity is a founding value of the Constitution Act 108 of 1996 (see sections 1, 10 and 36). Its value has been described as follows in Khumalo v Holomisa\(^1\) by O’Regan J:

“The value of human dignity in our Constitution is not only concerned with an individual’s sense of self-worth, but constitutes an affirmation of the worth of human beings shared by all people as well as the individual reputation of each person built on his or her own individual achievements. The value of human dignity in our Constitution therefore values both the

\(^1\) 2002(5) SA 401(CC) at para [27].
The first question is whether the right to privacy has been invaded upon. Has the skit in fact disclosed anything about the private lives, the “intimate personal sphere”, of the Mandela couple? We believe that this has not happened. Nothing is revealed that is not, in any case, well known. It is true that the skit has the “bedroom” of the Mandelas as background and that it repeats what is well known: that Mr Mandela gets up particularly early. The voice is also the typical Nelson Mandela voice.

We agree that the skit would evoke feelings of discomfort for certain viewers. Mr Khaas is one of them. However, within the Broadcasting Code there is no contravention. This conclusion is, of course, no guarantee that all future broadcasts of this kind of skit would lead to similar decisions. Each case would have to be decided on its own merits.

The Complaint is upheld.

JCW VAN ROOYEN SC
CHAIRPERSON

Commissioners, Mokwena, Lötter and Venter concurred.

14 October 2004