DATE OF HEARING: 05 OCTOBER 2004

Monitoring and Complaints Unit (MCU of ICASA) & Others

vs

SABC1

TRIBUNAL: Prof Kobus van Rooyen SC (Chairperson)
Prof Willem de Klerk (Broadcasting Representative)
Rev Danie du Toit (Broadcasting Representative)
Dr Linda Venter (Co-opted)

Complainant: The Complainants did not attend

Respondent: Mr Fakir Hassen, Manager - Broadcast and Compliance, Policy and Regulatory Affairs and Mr Jimi Matthews, Head of TV News

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SUMMARY

[1] The beheading of a hostage by terrorists in Iraq once again drew worldwide shock and rejection. The Nguni TV news service broadcast explicit footage of the scene of a recent beheading at 19:30. The footage showed the captive’s head being severed by a number of cuts to his neck with what appears to be a
butcher’s knife. A loud cry was audible to viewers just before the deceased lost consciousness. The Registrar received a number of complaints from viewers. The Monitoring and Complaints Unit of the Independent Communications Authority of South Africa also lodged a complaint with the Registrar. The SABC apologized on all its services for the error, and the news editor was suspended pending the outcome of a disciplinary inquiry. So as to ensure that this tribunal would not express views that might prejudice the suspended employee in his disciplinary inquiry, we refrained from making comments as to his possible negligence. We have not heard his explanation, and it would be unfair to judge his decision. What we must, however, do is inquire whether, viewed objectively, the broadcast contravened the Broadcasting Code, and whether a sanction should be imposed on the SABC. It should be stated at the outset that the representatives from the SABC conceded that the Broadcast should not have taken place. It was argued, however, that the clauses dealing with violence in the Code were not transgressed. Nevertheless, it was conceded that the internal Code of the SABC had been transgressed. Mr Hassen argued that if this Tribunal were to find that the BCCSA Code had been contravened, a sanction such as a fine should not be imposed, given the steps which the SABC itself had taken to counter the contravention.

[2] We have come to the conclusion that an explicit visual presentation of the beheading of a human being is a severe violation of human dignity (as is also, of course, the beheading itself), and that the effect of such a presentation grossly exceeds the mere causing of offence, in cases where the intention may be to shock the viewer into an awareness of actual events that are brutal and barbaric. Such presentations go beyond mere offence in that they portray acts that are excessively cruel and inhuman, forcing the viewer into the position of voyeur, of unwilling and unwitting participant in barbaric acts that destroy the lives of actual individual human beings. In doing so, they violate the dignity of every human being that watches such acts. As such,
people are by no means obliged to tolerate a broadcaster’s visual presentation of explicit details of man’s inhumanity and cruelty to man. The manner of presentation has, in the present instance, resulted in its being regarded as gratuitous. In real life, the actual details of the beheading were, of course, a reality, but the broadcasting of these visual details of what may only be described as the real life “slaughter” of a human being are deemed to be totally unnecessary, thereby rendering the broadcast of the actual scene gratuitous. The warning beforehand was not sufficient to negate the contravention of the Code. The complaints were upheld.

[3] In the light of the internal steps taken by the SABC, as well as the apologies broadcast, it was argued that in case of a contravention being found, a fine should not be imposed. However, the crucial importance of respect for dignity in our Constitution and the fact that a huge audience was subjected to the explicit and gratuitous detail of the beheading, have convinced us that a serious censure of the Commission is warranted. As a result of the internal steps taken by the SABC, we will not impose the maximum fine of R40 000. It is our view that a fine of R15 000 will do justice to the case. The SABC is also directed to broadcast during the first 10 minutes of all its TV news broadcasts a statement to the effect that the BCCSA Tribunal has ruled that the insert in question amounts to a contravention of the Code.

JUDGMENT

JCW VAN ROOYEN (Chairperson)

[1] The beheading of yet another hostage by militants in Iraq once again drew worldwide shock and rejection. In a recent 19:30 news programme, the Nguni Tv news service broadcast explicit footage of the scene. It showed the captive’s head being severed when a number of cuts were made to his neck with what appeared to be a butcher’s knife. A terrible cry was audible just before the victim lost
consciousness. The Registrar received a number of complaints from viewers. The Monitoring and Complaints Unit of the Independent Communications Authority of South Africa also lodged a complaint with the Registrar. The SABC apologized on all its services for the error and the news editor was suspended pending the outcome of a disciplinary inquiry. In order to ensure that this tribunal does not express views that might prejudice the suspended employee in his disciplinary inquiry, we shall refrain from making comments as to his possible negligence. We have in any case not heard his explanation and it would therefore be unfair to pass judgment in this regard. What we are, however, required to do is to ascertain whether, viewed objectively, the broadcast contravened the Broadcasting Code and whether a sanction should be imposed. It should be stated at the outset that the representatives from the SABC conceded that the broadcast should not have taken place. Mr Hassen argued that although the clauses in the Code relating to violence were not transgressed, the internal code of the SABC was transgressed. He argued further that if the Tribunal were to find that the Code had in fact been contravened, a sanction such as a fine should not be imposed, given the steps that the SABC had taken to counter the contravention.

[2] The complaints read as follows:

“The Monitoring and Complaints Unit (MCU) of ICASA wishes to register a formal complaint against the news broadcast on SABC1 Xhosa language news at 19h30 on Tuesday, 21 September 2004. The MCU is of the view that the scene wherein an American soldier, Eugene Armstrong, was shown being beheaded live on television is a contravention of clause 34.8 of the ICASA Code of Conduct which states that, ‘Licensees shall employ discretion in the use of explicit or graphic language related to stories of destruction, accidents or sexual violence which could disturb children and sensitive audiences.’ The MCU requests the Commission to investigate and adjudicate on this matter.”

Other Complainants:
It would amount to repetition to quote the numerous complaints which we received. The following complaints are, however, a representative sample:

“SZ Lelaka – I would like to register my protest with regard to the News item shown on the 20 Sept 04, about the beheading of an American taken hostage by the Iraqi militants (terrorist). It was shown on SABC1 on the 7h30 news bulletin.
The video clip shown was gruesome and barbaric. It was not worth showing. I will be happy if the matter is addressed.

**T Ntuli - Date: 21 September 2004, Time: 7:30pm – 7:45pm.** A news clip about a hostage shown being slaughtered during this particular time. Let alone that this was during the family hour. No warning was issued before hand about the nature of the item that was to follow. I still cannot understand what the producer of the news was thinking when they highlighted that clip. I am saddened and my family is extremely distressed and offended, to see that our beloved national broadcaster has been reduced to using shock tactics to make its point. That news clip was very insensitive.

**T Keene - Viewing of hostage execution, SABC1 – 07:30 news -** We find that the graphic content of the hostage in IRAQ, whose head was hacked off with what appeared to be a large knife, offensive and shocking. Although it is important to be made aware of the savage things that are going on in the world today; we need to know about it and not see it.

Furthermore this can be seen as inciting racial hatred against Muslims, while encouraging others to commit these actions. The SABC has done exactly what these people want, to inflict terror into peoples homes. These pictures are on the websites that these people have created, but this is a passive form of information i.e. you have to make the effort to get them while the TV is a active form of communication where you only have control over power and the channel you select, if you can find the remote in time to change the channel.

Please can you take the appropriate action against the SABC as we, a valid TV licence holder, find that the SABC has overstepped the line with this news article.

[3] The SABC responded as follows:

“Jimi Matthews, Head of TV News, has advised that as soon as he saw the item on the Nguni News, he immediately initiated steps to ensure that the item involving the beheading of an American hostage was not used in further bulletins across all channels. This was therefore the only SABC News bulletin on which the offending material was broadcast.

In the Nguni bulletin where it was indeed used, there was a newsreader warning about the visuals possibly offending sensitive viewers. Despite this, however, we agree that the item should not have included the actual beheading.

The responsible Executive Producer has been relieved of his duties with immediate effect, pending a full investigation into the matter, and all SABC news bulletins this evening, not just the Nguni bulletin, will carry a prominent apology to viewers.
I trust this allows you to appease the many complainants approaching your office on this matter.”

A further response was submitted by the SABC which reads as follows:

“Further to the comments provided to you earlier regarding the complaints on the News item, our response in respect of the clauses quoted by you is as follows:

“Clause 34.8

Licensees shall employ discretion in the use of explicit or graphic language related to stories of destruction, accidents or sexual violence which could disturb children and sensitive audiences.”

Response: This clause is not applicable to the item in question, as there was no explicit or graphic language broadcast.

“Clause 14

Licensees shall not broadcast any material which, judged within context:-

(i) contains gratuitous violence in any form i.e. violence which does not play an integral role in developing the plot, character or theme of the material as a whole.

(ii) sanctions, promotes or glamorizes violence.”

Response: (i) While we concede that the material broadcast could have caused offence to insensitive viewers and especially children, we would argue that it certainly was relevant to the theme of the news item as a whole. The item dealt with the execution of a hostage by militants in Iraq, a story which made international headlines for more than a week before the actual beheading of the hostage, and also for days thereafter.

(ii) The item did not aim to sanction, promote or glamorize violence, as it was shown in the context of a news item.”

“Clause 16/17

16.1 Licensees shall not broadcast material which, judged within context, sanctions, promotes or glamorizes violence based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age or mental or physical disability.

16.2 Licensees are reminded generally of the possible dangers of some people imitating violence, details of which they see, hear or read about.

17.1 The abovementioned prohibitions shall not apply to –
(i) a bona fide scientific, documentary, dramatic, artistic, or religious broadcast, which judged within context, is of such nature;

(ii) broadcasts which amount to discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or

(iii) broadcasts which amount to a bona fide discussion, argument or opinion on a matter of public interest.”

Responses: As mentioned in our response 14 (ii) above, the item did not aim to sanction, promote or glamorize violence in any of these categories, as it was shown in the context of a news item.

Hostage kidnappings and killings have become a regular feature of daily life which is in the public interest and therefore needs to be reflected on news. All complaints received by the SABC directly and the BCCSA were unanimous in their rejection of broadcasting what many referred to as an inhuman act, but none expressed any concern that someone would emulate the deed.

“Clause 18.1

Broadcasters shall not broadcast material unsuitable for children at times when large numbers of children may be expected to be part of the audience.”

Response: The nature of news is such that it is likely that bulletins may include items which may offend sensitive viewers and in particular children. The Editorial Policies of the SABC make it incumbent on responsible staff members to ensure that appropriate warnings are provided in such instances. This allows parents a measure of control over what their children may watch. In the insert in question, there was indeed a presenter warning about the sensitivity of the material.

As has been pointed out in my earlier responses, the SABC concedes that the material should not have been broadcast.

As mitigation, however, we submit that there was no deliberate attempt to show material that could cause offence to any viewers – it was an oversight on the part of the responsible Executive Editor, who nonetheless ensured that a presenter warning about the material was done.

Appropriate steps were immediately initiated by the Head of Television News, Mr Jimi Matthews, to ensure that the material was not repeated in later news bulletins. The staff member responsible was relieved of his duties with immediate effect pending further internal steps.

A prominent and hitherto unprecedented apology was also carried on all news bulletins on all SABC channels the next day, even though the material only featured in a single bulletin on one channel only.”
Possible Applicable Clauses of the Broadcasting Code

We believe that the possibly applicable clauses are as follows:

“14. Licensees shall not broadcast any material which, judged within context,
(i) contains gratuitous violence in any form, i.e. violence which does not play an integral role in developing the plot, character or theme of the material as a whole;
(ii) sanctions, promotes or glamorizes violence.

16.1 Licensees shall not broadcast material which, judged within context (COMMA?) sanctions, promotes or glamorizes violence based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability.

16.2 Licensees are reminded generally of the possible danger of some people imitating violence, details of which they see, hear or read about.

17.1 The abovementioned prohibitions shall not apply to –
(i) bona fide scientific, documentary, dramatic, artistic, or religious broadcasts which, judged within context, are of such a nature;
(ii) broadcasts which amount to discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or
(iii) broadcasts which amount to a bona fide discussion, argument or opinion on a matter of public interest.”

In the light of the conclusion we have reached, it is unnecessary to inquire as to whether the scene of the beheading was likely to have contributed to more violence or whether it glamorized violence that is connected in some way to race or ethnicity. We also do not need to consider children, since clause 14(i) provides a succinct answer: if material falls into this category, it is prohibited for adult audiences also.

As a starting point it must, of course, be accepted that the truth was portrayed. A hostage was beheaded in a most gruesome manner. The Constitutional Court has held that the right to inform also includes the right to offend, subject to the limits set by section 36 of the Constitution. At times it is also necessary to shock, so that viewers remain informed as to unacceptable attitudes and conduct within the

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1 See De Reuck v Director of Public Prosecutions WLD and Others 2004(1) SA 406(CC) at para 49.
community. There are, in addition, the exceptions mentioned in clause 17 of the Code which pertain to bona fide documentaries, drama and the like.

[7] The next question is, however, whether the scene contained gratuitous violence in terms of clause 14.1, “i.e. violence which does not play an integral role in developing the plot, character or theme of the material as a whole.” The quoted part of the Code would seem, at a first glance, to pertain to fiction only. However, we are of the view that the nature of the material relates to the effect which a scene (whether real-life or fictional) has on a viewer, and that the same rule therefore applies to news and fiction. Once a viewer realizes that a scene is mere fiction, he or she is generally likely to be less readily offended by what is perceived to be mere acting. However, when a gruesome scene from real life is portrayed, the dignity of the person comes to the fore, and the reasonable viewer is likely to experience a concomitant shrinking of his or her tolerance. 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* 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 personal sense of self-worth as well as the public’s estimation of the worth or value of an individual.”

[8] We have come to the conclusion that the explicit visual presentation of the beheading of a human being is destructive of human dignity to the extent that it grossly exceeds causing mere offence to a viewer in order to shock him or her into an awareness of reality. The effect of this kind of visual presentation far exceeds causing mere offence in that it affronts the dignity of human life in a fundamentally cruel and inhuman manner. It shows the destruction of an

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2 Compare the judgment of the European Human Rights Court in *Jersild v Denmark* 36/1993/431/510; also *Human Rights Commission v SABC* 2003(1) BCLR 92(BCCSA) at par [19].

3 2002(5) SA 401(CC) at para [27].
individual human life, violating the essential dignity of the viewer by causing him or her to be an unwilling voyeuristic witness to and therefore passive participant in, the act portrayed. The warning beforehand was not sufficient to counter the serious onslaught on the human senses. The style of presentation has, furthermore, led to its being regarded as gratuitous. In real life, the beheading was, of course, an actual event, but in broadcasting the actual details of what may only be described as the “slaughter” of a human being, the presentation went beyond what may reasonably be regarded as absolutely necessary in order to inform the viewer, thereby rendering the broadcast of the detail gratuitous. The present matter differs from a previous matter where the SABC broadcast scenes where dogs were set on illegal immigrants so as to “exercise” the dogs. The BCCSA held that it had been in the public interest to show the cruelty by officials. The violence was also gruesome and offensive to watch in that case, but it was not as explicit as in the present matter. There is, in any case, no room for a defence of public interest in the present matter.

[9] The broadcast of the scene is, moreover, not saved by clause 17. In the context of this clause, bona fides is an objective criterion. A broadcaster cannot argue that it had the subjective intention of broadcasting a documentary version of the beheading. The test is whether the broadcast of the insert fits within the mould of the right to impart information as guaranteed in section 16 of the Constitution. The right to impart information is limited where other fundamental rights weigh more heavily in the circumstances. See SA Human Rights Commission v SABC where the following was said at para [28]:

“The song is also a form of art, and it should be afforded the protection which section 16(1) grants to the right to artistic creativity. Art was so often, in the Apartheid era, ignored as a significant value. When art accorded with traditional (often Euro-centric) values, there was never a problem. But when art (whether in

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5 As to the application of bona fides within the context of the Publications and Entertainment Act 1963, see Publications Control Board v Central News Agency Ltd 1977(1) SA 717(A). The term bona fides, within the same context, is also to be found in Schedules 5, 9 and 10 as well as section 29 of the Films and Publications Act 1996.
6 2003(1)BCLR 92(BCCSA).
drawings, paintings, plays or films) was used as a vehicle for political change, it was often down played or banned. On the other hand, the Constitution does not, in any way, rule out that artistic creations can also advocate hatred. The problem is, of course, to determine where art ends and hate speech commences – as the German Courts have so often had to decide upon, in the light of absolute protection which the Grundgesetz affords to art. Compare Kulczak Strafrechtliche Einbruchstellen in den Lebensbereich “bildende Kunst” (1993) at 233; Fischer Die Strafrechtliche Beurteilung von Werken der Kunst(1996) 112; Beisel Die Kunstfreiheitsgarantie des Grundgesetzes und ihre strafrechtlichen Grenzen (1997). Special weight is afforded to the protection of dignity, the serious invasion of which negates or overrides art in hate speech cases. Compare BVerGe 67,213 at 228 – Anachronistische Zug judgment of the Bundesverfassungsgericht.” (emphasis added in bold).

We have come to the conclusion that the explicit and visual nature of the televised beheading of the hostage constitutes a serious infringement of the right to human dignity, and that any attempted justification on the grounds that it amounts to bona fide documentary material is accordingly negated. The right to dignity outweighs the right to impart information in the present instance.

**The Complaints are upheld.**

[10]  In the light of the internal steps taken by the SABC, as well as the apologies broadcast, it was argued that in case of a contravention being found, a fine should not be imposed. However the crucial importance of respect for dignity in our Constitution and the fact that a huge audience was subjected to the explicit and gratuitous detail of the beheading, have convinced us that a serious censure of the Commission is warranted. As a result of the internal steps taken by the SABC, we will not impose the maximum fine of R40 000. It is our view that R15 000 will do justice to the case. The SABC is also directed to broadcast during the first 10 minutes of all its TV news broadcasts a statement to the effect that the BCCSA Tribunal has ruled that the insert in question amounts to a contravention of the Code.

**The SABC is directed to broadcast the following statement before the 20th October 2004 on all its TV news services during the first ten minutes of the broadcast:**
“The Broadcasting Complaints Commission of South Africa has held that the recent broadcast of the explicit details of the beheading of a hostage in Iraq on the Nguni TV news service had contravened the Broadcasting Code, in spite of a warning that the scene might be offensive to sensitive viewers. The Commission held that the explicit visual presentation of the beheading of a human being is destructive of human dignity to the extent that it grossly exceeds causing mere offence to a viewer in order to shock him or her into an awareness of reality. The effect of this kind of visual presentation far exceeds causing mere offence in that it affronts the dignity of human life in a fundamentally cruel and inhuman manner. It shows the destruction of an individual human life, violating the essential dignity of the viewer. The SABC was reprimanded and fined for the contravention.

The Commission remarked that the SABC had acted reasonably by immediately after the broadcast prohibiting that the explicit scene be repeated on any of its television services. The Commission also noted that the SABC had apologized on all its services for the error, which had been made in one of its TV news bulletins.”

JCW VAN ROOYEN SC
CHAIRPERSON

Commissioners De Klerk, Du Toit and Venter concurred.