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CASE NUMBER: 11/2017

DATE OF HEARING: 17 MAY 2017

JUDGMENT RELEASE DATE: 07 JUNE 2017

VAN WYK AND SEVERAL OTHERS

COMPLAINANTS

vs

SABC3

RESPONDENT

**TRIBUNAL: PROF HENNING VILJOEN (CHAIRPERSON)
PROF SUNETTE LOTTER (DEPUTY CHAIRPERSON)
DR MOHAMED CHICKTAY
ADV BOITUMELO TLHAKUNG**

FOR THE COMPLAINANTS: MR VAN WYK IN PERSON.

**FOR THE RESPONDENT: MR NYIKO SHIBAMBO, ACTING MANAGER,
BROADCASTING COMPLIANCE, POLICY & REGULATORY AFFAIRS OF THE
SABC.**

Several complaints about inter racial violence being shown on family programme called Isidingo – no contravention found of sanctioning or promotion of violence between races (clause 4(1)) or of hate speech (clause 4(2)) because broadcaster saved by provision of clause 5 which exempts a broadcaster from the provisions of clauses 3 and 4 in case of bona fide drama - Van Wyk & Several Others vs SABC3, Case No: 11/2017(BCCSA)

SUMMARY

Several complaints were lodged with the Registrar of the BCCSA after scenes were shown in subsequent episodes of the soapie *Isidingo* in which two White farmers insulted, assaulted and buried a Black man who came to pay his respects at his father's grave on the White men's farm. Various complaints have been received regarding incitement of hatred, racism, offensiveness, irresponsible broadcasting, perpetuation of anger and breaking down of racial harmony achieved so far. Tribunal considering clause 4(1) that prohibits the sanctioning or promotion of violence based *inter alia* on race and clause 4(2) that prohibits hate speech. Broadcaster is exempted from provisions of clauses 3 and 4 by clause 5 in the case of, *inter alia*, *bona fide* drama. Tribunal finding that *Isidingo* is *bona fide* drama and therefore exempt from provisions of clause 4(1) and (2). No contravention found and complaints not upheld.

JUDGMENT

[1] The Registrar of the BCCSA received several complaints concerning the SABC3 programme, *Isidingo* broadcast on 26th April, 1st, 2nd and 3rd May at 19:00 during which explicit violence was shown between a Black character, Sechaba, and two White farmers.

[2] **One of the complainants, Mr van Wyk's complaint reads as follows:**

“On Wednesday night, SABC3 viewers were shaken to their core as the show ended in a violent, racially charged scene as a black male character was verbally abused, then attacked and buried alive by two white Afrikaans male characters. The scene was uncomfortable to put it mildly. I myself was very angry - though there is no denial that what was being shown is a fictional depiction of a very real problem (racism) in South Africa, it was a scene that also stereotyped a certain group of South African citizens (white male Afrikaners), yet again.

- 2) Time and time again, we are confronted with tales, both in traditional news media and on social media about racially motivated attacks. The media (mostly?) does not make these things up; they merely share what has transpired. The fact that these things keep happening and these stories keep coming up, is proof of the problem at hand. So I don't deny that racism is still rife in South Africa.
- 3) Afrikaans speaking white male characters don't often make an appearance in *Isidingo*; many episodes ago there was a highly dysfunctional Afrikaans family, who appeared in a few episodes, and then those remaining family members gradually trickled away after the younger son killed his own father.
- 4) Now many episodes later, white Afrikaans males make an appearance again - they are portrayed as being violent, racist and abusive. Typical white Afrikaans males, some would (and do indeed now) say. I just find it interesting and concerning that white Afrikaner male characters seem to only make appearances in *Isidingo* to feature as caricatures and stereotypes. In South Africa we sit with the lunatic fringe (radical left and radical right) who

will jump at every opportunity to fuel the fire of hate based upon skin colour or ethnicity, and who would use any real and/or fictional event to further their agendas.

- 5) I also don't deny that white Afrikaans males have played a pivotal role in the establishment and administration of the apartheid system. However, I am opposed to the persistent scape-goating of any group of people - be it from a political podium or in a fictional story line. In pre-Nazi Germany the scape-goating and stereotyping of the Jews, eventually lead to the large scale extermination of Jews in Nazi Germany. The great majority of Germans, capable of reasoning, rational thought and humanity, was relatively easily brainwashed to believe that the irrational and the inhumane treatment of Jews, was indeed justified.
- 6) The scene contributed nothing substantially positive to the debate on racism in South Africa; as a matter of fact, I am of the opinion that it did the opposite.
- 7) I am also of the opinion that the scene was discriminatory and denigratory to white Afrikaans males, and that it impaired the dignity of men in this group.
- 8) On the one hand the Constitution guarantees freedom of expression to broadcasters and this freedom includes the right to offend within **reasonable** limits. On the other hand, audiences or sections of audiences have the right not to be offended or hurt by broadcasts such as this one, which reinforce incorrect and negative stereotypes.
- 9) I hereby contend that the broadcasting of this scene constitutes a breach of the BCCSA Code of Conduct, and that it therefore requires the BCCSA's intervention. Kind regards

Addendum 1 to my complaint:

"I think you are comparing apples with bananas here. The Jews of Germany did not provoke German anger either physically or otherwise, atleast according to historical records, unlike these disgusting racist whites of South Africa who continuously torment the majority black population everyday hoping that we are stupid enough not to realise this. To demonstrate this point, how many racist black murders that happened this year alone. Your kind has really gone to far..." (verbatim response to my expression of dissatisfaction on FB)

Addendum 2 to my complaint:

"Its a classic case of one being made to eat his own poo...Disgusting is it'nt....Imagine how it feels to us when your kind make us eat that racist shit every day...he..." (verbatim response to another expression of dissatisfaction on FB)"

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

“BCCSA COMPLAINT: SEVERAL COMPLAINTS – SABC 3 – ISIDINGO – 26 APRIL, 01, 02 AND 03 MAY AT – 19:00

In respect of the above-mentioned complaint, we submit a copies of the segments on DVD. Please find our comments as follows:

1. The SABC feels that the issue of race is an important one to interrogate and explore on the show In light of the media stories around race that continue to plague our country. To pretend that racism and racial practises are a creation of *Isidingo* is mischievous.
2. It is the role of drama as permitted in the BCCSA Code to confront difficult topics like racism with an intention of creating dialogue that could possible lead to finding lasting solutions.

3. The episode in question had a **13 LVP and LV** on screen.
4. The Sechaba story is intended to address an important and complex part of our history and the present day South Africa. The story hopes to speak to the preconceived notions and stereotypes on both sides of the colour divide that still needs to be addressed in order for the country, to find healing. Its intent is to open a continuing dialogue on the issue of race to the benefit of all South Africans and our collective future.
5. The scenes in question are the set up to this story and therefore highlight the aforesaid stereotypes and preconceived notions. In the upcoming episodes the story will address the complex and nuanced issues around race and resolve it in a way that is thought provoking and encourages a continued debate.
6. The SABC has consistently warned against complainants who do not want to give a storyline enough time to run in order to see how the matter is ultimately resolved. We have always emphasised that good overcomes evil and it is not different in this case, hence we encourage the complainant to continue watching.

We submit that there was no contravention of the Code.”

EVALUATION

THE NATURE OF SOAPIES

- [4] “Isidingo” is a well-known soapie which is broadcast by SABC TV. “Soapie” or “soap opera” is defined in the Oxford Dictionary of Current English as “a television or radio serial dealing with the daily lives of a group of characters.” Apparently the moniker ‘soapies’ originates from the fact that serials were originally sponsored by soap manufacturers. A characteristic of soapies is that they continue for years on end and that viewers become (almost) addicted to them – identifying with the characters and sometimes confusing fiction with reality.
- [5] We, at the Broadcasting Complaints Commission, often deal with complaints against certain scenes or dialog being broadcast in soapies. In this case the Registrar of the BCCSA received 109 complaints after the broadcast, of which 35 complied with the requirements for valid complaints and were thus accepted. One of the complainants, Mr Van Wyk, is mentioned by name as his complaints were set out logically with reference to the Code of Conduct we apply to broadcasts. He was also the only complainant who took the trouble to attend the hearing and argue his complaint in person before this Tribunal.

[6] The broadcaster's response to complaints such as this one, is often that the broadcaster's intention in including the scene or dialogue was merely to reflect reality and to stimulate debate about controversial issues in society. Examples from the past include scenes of high-jacking, assault, drug abuse and many other of the social ills that are plaguing South African society. Regarding the broadcast in point an incident was reported in November 2016 in Middelburg in Mpumalanga where two White men forced a Black man into a coffin and threatened to pour petrol over him and to put a snake with him in the coffin. This ostensibly inspired the writer(s) of Isidingo to cast this in the episode complained about.

[7] The scene complained about is one in which two White farmers (a father and his son) confront a Black man (Sechaba) who came to their farm with the purpose to pay his respects at the grave of his father. The last mentioned was a worker on the farm and was buried there. The confrontation turns ugly when the White men start to sling all kinds of accusations at Sechaba, calling him amongst others a baboon. The confrontation eventually leads to an assault on Sechaba followed by a scene that shows Sechaba with a bloodied face being shoved into what appears to be a shallow grave and his face being covered with soil. It takes no special knowledge of the South African psyche to realise that these scenes stirred up deep emotions amongst Black and White people alike: for Black people, the indignation about one of their kin being humiliated in this way, and for White people, the way in which they are still being stereotyped as racist and cruel to Black people. The gist of the complaints is that the broadcast was irresponsible, very offensive to Black and White alike, damaging to what has been achieved in the area of race relations, causing hatred between the races and perpetuating anger and racism.

THE PROMOTION OR GLAMORIZATION OF VIOLENCE

[8] We are firstly dealing with this complaint in terms of clause 4(1) of the Free-to-Air Code of Conduct for Broadcasting Service Licensees. This clause reads as follows:

Broadcasting service licensees must not broadcast material which, judged within context, sanctions, promotes or glamorises violence or unlawful conduct based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability.

It could be argued that the scenes depicted in these episodes sanctioned or promoted violence between the White and Black races in South Africa. In its written response to the complaints, the Broadcaster stated:

The story hopes to speak to the preconceived notions and stereotypes on both sides of the colour divide that still needs to be addressed in order for the country, to find healing. Its intent is to open a continuing dialogue on the issue of race to the benefit of all South Africans and our collective future.

In oral argument before this Tribunal Mr Shibambo, for the Broadcaster, said that the issue is (also) about land. Every South African knows, or should know, that preconceived notions and stereotypes about race is still plaguing our country and we all know that the restoration of land is still a hotly debated subject. One contra argument, as mentioned by some of the complainants, is that by continuously hammering on these sensitive issues, we will be keeping them alive and not come to a peaceful solution. We do not think that we can question the motivation by the Broadcaster for showing these scenes because the requirement for finding of a contravention of the Code, based on clause 4(1), is conditional upon the provisions of clause 5 of the Code which reads:

Clauses 3 and 4 do not apply to:

(1) a broadcast which, judged within context, amounts to a bona fide scientific, documentary, dramatic, artistic, or religious broadcast;

The question is whether *Isidingo* passes as *bona fide* drama? “Drama” is defined in the Oxford Dictionary of Current English as either “a play” or “plays as a literary form” or “an exciting series of events.” We think there can be no doubt that “*Isidingo*” can be regarded as *bona fide* drama. One must also keep in mind that the scenes complained about should be judged in context. This means they should be seen as part of the story line and not as isolated scenes of gratuitous violence. We have been assured by the representative of the Broadcaster that, the story unfolds in such way in following episodes as to offer a corrective to the scenes that have offended many viewers. This demonstrates the nature of soapies: Because of their ongoing nature, a scene or dialogue that offends cannot be judged in isolation. Judging this in context would require that the whole story line encompassing the offending part should be considered. In this instance, we find that

the episodes of “Isidingo” complained about did not constitute a contravention of clause 4(1) of the Code because it is saved by clause 5 of the Code.

- [9] Before considering another clause of the Code which have possibly been contravened, we make haste to answer the question that might arise from the finding in the previous paragraph that clause 5 excludes the prohibitions in clauses 3 and 4 in the case of *bona fide* drama, namely: “But can anything then be broadcast, however violent or offending?” The short answer to this is no, but one must keep in mind that the task of the BCCSA is to balance the freedom of expression of broadcasters, guaranteed by section 16 of the Constitution of South Africa, with the right of the viewing and listening public not to be offended by what is broadcast over the airwaves which is public property. The right to freedom of expression is not an absolute right. It is limited, *inter alia*, by the provisions contained in the Broadcasting Code referred to above. Examples where this Tribunal found that the freedom of expression of a broadcaster was overstepped, are the cases of *Coetzer & Petersen v SABC*¹ and *Herbst & Du Plessis v SABC*² respectively. Both these cases concerned soapiess being broadcast in the early evening. In the *Coetzer* case the complaint was that there were scenes of intimate kissing, fondling and implied sex in the soapie “Swartwater”. The Tribunal found that because there was no warning beforehand of the nature of the scenes, and because it is the duty of the BCCSA to protect children, especially when watching family programmes, the broadcaster exceeded its right to freedom of expression and it was fined R10 000. In the *Herbst* case there were complaints about the violence in the attack on the café in “Sewende Laan”. Although there was a PG13 and V warning, the Tribunal found that the violence was too excessive, even with the advisory as to age and violence and that the broadcast was in contravention of the Code.

HATE SPEECH

- [10] Some complainants, in their written complainants, argued that the scenes complained about amounted to hate speech. The clause in the Code dealing with hate speech, is clause 4(2) which reads:

¹ Case 21/2014 BCCSA

² Case 4/2015 BCCSA

Broadcasting service licensees must not broadcast material which, judged within context, amounts to (a) propaganda for war; (b) incitement of imminent violence; or (c) the advocacy of hatred that is based on race, ethnicity, religion or gender and that constitutes incitement to cause harm.

This Tribunal has interpreted these clauses, especially clause 4(2)(c) in various judgements. One such case was *De Klerk & Another v 702*³ where the complainants alleged that the diatribe, as they called it, in which the guest presenter on a show lashed out at Whites, was nothing less than hate speech. The Tribunal discussed the two elements of hate speech, namely the advocacy of hatred and incitement to cause harm. Advocacy of hatred means an endeavour to instil detestation, enmity, ill-will or malevolence against another. This could be achieved not only through the spoken word, but the spoken word would probably be the strongest medium to achieve this aim. Incitement to cause harm, whether physical or psychological, means to stir up or urge others to act in a manner which is likely to harm others.

- (11) It should be emphasized that mere offence does not amount to hate speech. In this regard, we refer to what was stated in the *De Klerk* case mentioned above:

“In support of this principle, we often refer in our judgments to a judgment by the European Court of Human Rights, namely *Handyside v The United Kingdom*⁴ where the following was said:

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

³ Case 8/2016 BCCSA

⁴ 1976 ECHR par. 49. This dictum has been accepted by our Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority* 2002(4) SA 294 (CC) at par. 26

[12] Freedom of speech and freedom of expression are hard-won rights in our democracy and should not be easily limited. Although we realise that many viewers of the episodes of Isidingo which are the subjects of these complaints, were upset and offended by what they saw, that was not sufficient to find that the broadcasts amounted to hate speech. The Broadcaster has, in terms of its licence, the duty, *inter alia*, to educate and to entertain. We were informed that with these episodes the Broadcaster intended to promote democracy by setting up a debate about racial relations and the struggle for land. We have no authority to find that the Broadcaster exceeded its licence conditions. That would be a matter for ICASA to decide. Our duty is to judge whether the content of the programme exceeded the boundaries of freedom of expression as determined in the Code of Conduct. In this regard, we can refer to the judgment by Prof Van Rooyen, the erstwhile Chairperson of the BCCSA, in the case of *Maree v Multichoice (KykNet)*⁵ where he said the following regarding a complaint about a film depicting the evils of apartheid:

Lastly, it should be mentioned that the Complainant's apparent disgust at the film being shown in these times when apartheid has been outlawed by the Constitution, is of course a permissible personal reaction. However, the views underpinning this reaction are not accommodated by the Code, which permits broadcasters to broadcast material of their choice, as long as the material does not infringe upon the rules laid down in the Code. Films portraying the evils of the past are not forbidden – in fact, history cannot and should not be ignored, even if it reminds one of a terrible past.

(13) We do not think that the broadcasts concerned constituted hate speech because they did not amount to the advocacy of hatred and there was no incitement to cause harm to members of another race group. But even if we had found that the broadcasts constituted hate speech, the Broadcaster would still have been saved by clause 5 of the Code because of our finding that Isidingo is *bona fide* drama and therefore not subject to the limitations to freedom of expression contained in clauses 3 and 4 of the Code.

⁵ Case 31/2014 BCCSA

In the result we find that the broadcasting of episodes of Isidingo on 26 April, 1st, 2nd and 3rd May 2017 did not contravene clause 4(1) or (2) or any other clause of the Code of Conduct and we therefore do not uphold any of the complaints.



**HP VILJOEN
ACTING CHAIRPERSON**

Commissioners Lotter, Chicktay and Tlhakung concurred in the above judgment of the Chairperson.