



P.O.Box 412365 • Craighall • Tel (011) 326 3130 • Fax (011) 326 3198 • email: bccsa@nabsa.co.za
Block No 8 • Burnside Island Office Park • 410 Jan Smuts Avenue • Craighall Park • 2196 • www.bccsa.co.za

CASE NUMBER: 03/2018

DATE OF HEARING: 18 JANUARY 2018
JUDGMENT RELEASE DATE: 19 FEBURARY 2018

GEMMIL

COMPLAINANT

vs

e.tv

RESPONDENT

TRIBUNAL: PROF HENNING VILJOEN (CHAIRPERSON)
MR BRIAN MAKEKETA (DEPUTY CHAIRPERSON)
ADV BOITUMELO TLHAKUNG

FOR THE COMPLAINANT: The Complainant was unable to attend.

FOR THE BROADCASTER: Mr Ndivhuho Norman Munzhelele, General Head: Regulatory and Strategy accompanied by Mr Morapedi Pilane, assistant Compliance Officer

Complaint that violent scenes in soap opera caused broadcast of episode of series called The Santa Diablo Aka Broken Angels to be in contravention of the Broadcasting Code – episode broadcast at a time when children at school and with the necessary warnings - episode considered to be bona fide drama and therefore exempt from the limitations contained in clauses 3 and 4 of the Code – no contravention of the Code found - Gemmil vs e.tv, Case No: 03/2018 (BCCSA)

SUMMARY

This is a complaint against a broadcaster that violent scenes in a soap opera were rather gruesome and should therefore be taken off air. This was an episode of a series called *The Santa Diablo Aka Broken Angels*. Tribunal explaining that it has no authority to take episode off air or ordering broadcaster to do so. Episode was broadcast at a time when children are at school and it was broadcast with the necessary warnings. The

episode is considered to be a *bona fide* drama and it is therefore exempt from the limitations contained in clauses 3 and 4 of the Code. No contravention of the Code found and complaint not upheld.

JUDGMENT

HP VILJOEN

[1] A complaint by the above-mentioned Complainant was received by the BCCSA against e-tv which broadcast a soap opera on 16th November 2017 entitled *The Santa Diablo Aka Broken Angels*. Because of the nature of some of the scenes, the complaint was referred to a Tribunal of the BCCSA to consider and to make a finding.

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

"I turned on my television set this morning Thursday 16 November 2017 and there was program on ETV which may be a movie or a series. To my absolute horror a man grabbed a women then took out a knife and slit her throat facing the screen. This shocked me so much because we live in a country where gender violence is rife. To watch this on TV is unacceptable. Surely this kind of action only encourages violence against women in general. This has only enforced the need to verify the programs that are being shown on TV because people of any ages can watch this and be affected by such violence. The Day I watched this is 16 November 2016 on ETV at 9.40 am and the program was "Santa Diablo AKA Broken Angel. I would be very grateful if you would undertake and remove this program. Without your help South Africa will never be able to curb violence and violence will increase.

I am a little shocked that BCCSA does not seem to have the authority to insist a program is removed from a TV Station. If this is the case then BCCSA simply cannot help when the viewer wants to complain and suggest a program be removed from being shown. There is no alternative for me but to stop watching TV altogether. The codes you want me to give you is 4 and 7. I hope that in the future BCCSA will seek to find a solution to this dilemma and that we will then have some kind of censorship."

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

"COMPLAINTS RE: SANTA DIABLA AKA BROKEN ANGELS

This letter is in response to a complaint by *Ms S Gemmill* about the broadcast of the Santa Diablo aka Broken Angels episode on e.tv on November 11 at 09H40. According to the complainant the episode contained violent scenes that were harmful to Children.

We have been asked to respond to the complaint in terms of clause 4 including harmful to Children and Watershed clauses of the Free To Air Code.

The Santa Diablo Aka Broken Angels is a typical soap opera and had a generic rating of 13V meaning that the content is not suitable for children younger than 13 years. A 13 years age restricted programme can be broadcast before the watershed period provided classification is given to assist parents to supervise children's viewing.

The Scheduling

The episode was preceded by Checkpoint current affairs show and was strategically slotted within a collage of 13 rated soapie genres that are not popular with children. For instance the episode was followed by Days of Our Lives. In so far as protecting children, the episode fell within the housewives slot this is the time when children are not expected to be home but at school.

The impugned scene and Advisories

In respect of the various provisions of the Code we respectfully submit that the following considerations should be taken into account.

- Violence in this regard was integral to the story and well within the context and cannot be viewed as glamorizing violence.
- In view of the content for this specific episode, the rating was upgraded with a 'V' advisory.
- The impugned scene appeared nearly twenty minutes after the commencement of the show so as not to ambush viewers with the scene.
- The violence was not gratuitously depicted. It is worth noting that the victim was immediately lowered down from the screen to obscure the viewers from seeing the wound and blood.
- The violence was fleeting and not repeated.
- The scene though might have looked offensive to some viewers it merely aimed to demonstrate the ruthlessness of the protagonist *Carlos* who trafficked women as prostitutes with no regard for human rights.

Even if the matter is to be judged differently it in any event constitute a bonafide drama and qualifies for exemption in terms of Clause 5(1)

We respectfully submit that all the provisions of the Code were complied with.

Given all these, we would be remiss not to give effect to the spirit in which the complaint is raised. To this end, we have asked the classification and scheduling divisions to review the warnings and scheduling guidelines. We really take note of the assertion made by *Mrs. Gemmill* that some programs need to go through stringent verification to avoid exposing sensitive viewers to unwanted material.

We thank the complainant for bringing this matter to our attention.

Accordingly, we do apologize to the complainant for any inconvenience caused. "

EVALUATION

[4] The Tribunal watched the episode of the soap opera *The Santa Diablo Aka Broken Angels* which was broadcast on Thursday 16 November 2017 at 9:40 in the morning. The Broadcaster incorrectly states in its response to the complaint that it was broadcast on 11 November 2017, which was a Saturday. Had it been on a Saturday, the outcome of this hearing would have been quite different.

[5] Before going into the merits of this complaint, there are a few principled matters that we have to explain. We say this because the Complainant requests the BCCSA to remove this programme from the airwaves. She also yearns for "some kind of censorship" in South Africa. Section 16 of the Constitution of South Africa guarantees freedom of expression to everyone, including broadcasters. This right to freedom of

expression is echoed in the Free-to-Air Code of Conduct for Broadcasting Services Licensees. However, this right is not absolute and certain limitations to this right are contained in the Code. The guarantee of the right to freedom of expression means that we have done away with the system of censorship which prevailed in South Africa before 1994. This freedom of expression also prohibits the BCCSA from ordering a broadcaster to remove a programme from the air.

- [6] The Complainant laments that the BCCSA simply cannot help when a viewer wants to complain. In this regard, we refer the Complainant to the case of *Mthembu v ANN7*¹, a case which was co-incidentally heard on the same day as this case. In that case the complaint was upheld, the broadcaster was fined R80 000 and ordered to broadcast an apology. This is proof, we think, that the rights of viewers and listeners are also protected by the BCCSA.
- [7] Returning to the merits of this complaint, we agree with the Complainant that some of the scenes in this particular episode are quite gruesome. We fully understand that the Complainant was upset by what she saw. The Registrar of the BCCSA decided that the Complainant has made out a *prima facie* case against the Broadcaster and referred the complaint to this Tribunal. Our task in this instance is to decide whether the Broadcaster contravened the Broadcasting Code by broadcasting the scenes mentioned by the Complainant.
- [8] In deciding this matter, there are various factors we have to consider, starting with the Broadcaster's freedom of expression; but, as stated, this freedom is not absolute. First, there is the watershed rule, meaning that adult material may not be broadcast before 21:00 in the evening (20:00 in the case of subscription broadcasting). However, an exception is made when the age restriction on a particular programme is not higher than 16 and when proper audience advisories accompany the broadcast. Adult material may also not be broadcast when a large number of children are expected in the audience (clause 6(1) of the Code). Applying these rules to the broadcast in question: The broadcast was at 9:40 on Thursday morning, 16 November, which was a school day.

¹ Case No:01/2018

Children were supposed to be in school at that time and we cannot find that a large number of children were in the audience, watching this particular broadcast.

[9] An audience advisory of 13V appeared on the screen of this broadcast. This served to warn viewers that this broadcast was not intended for young children and that scenes containing excessive violence could be expected in the broadcast. To the credit of the Broadcaster, we must also consider the fact that the allegedly offensive scenes occurred about 20 minutes after the start of the episode and they were fleeting. An adult viewer would have understood the context of these scenes of violence after watching the episode for 20 minutes. We can also state that the name *Diablo* in the title of the series should serve as an indication of what one could expect to see, as the words *diabolic*, *devilish* and *satanic* are associated with this word.

[10] A final argument in favour of the view that this broadcast was not in contravention of the Code, is the following: clauses 3 and 4 of the Code prohibits the broadcasting of material containing, *inter alia*, violence and hate speech. But in the next clause, clause 5 we find an exception as follows:

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.

We think that the series, in any case the episode that we watched, can be classified as *bona fide* drama, thereby exempting it from the limitations found in clauses 3 and 4 of the Code.

[11] We find that the Broadcaster took sufficient precautionary steps when broadcasting this episode, so as to stay within the limitations laid down by the Code. In any case, the episode falls within the exemption provided for in clause 5 of the Code.

[12] We note the Broadcaster's concern expressed in the following paragraph at the end of its response, as follows:

Given all these, we would be remiss not to give effect to the spirit in which the complaint is raised. To this end, we have asked the classification and scheduling divisions to review the warnings and scheduling guidelines. We really take note of the assertion made by Mrs. Gemmill that some programs need to go through stringent verification to avoid exposing sensitive viewers to unwanted material.

This, coupled with the Broadcaster's apology to the Complainant, we consider in a positive light.

In the result, we find that there was no contravention of the Code and the complaint is not upheld.



**PROF HP VILJOEN
CHAIRPERSON**

Commissioners Makeketa and Tlhakung concurred with the judgment.