



File Ref No: GP/2009/0424

In the matter between:

JAN WILLEM LOTZ

Complainant

And

M-NET

Respondent

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

1. INTRODUCTION

- 1.1. The South African Human Rights Commission (the Commission) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
- 1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".
- 1.3. In terms of Section 184 (1) of the Constitution, the Commission is specifically mandated to:
 - 1.3.1. Promote respect for human rights and a culture of human rights;
 - 1.3.2. Promote the protection, development and attainment of human rights; and
 - 1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. Section 184(2) (a) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.

1.5. The Human Rights Commission Act 54 of 1994 ("the HRC Act"), further supplements the powers of the Commission. In addition to other powers, duties and functions, the HRC Act confers powers on the Commission to conduct or cause to be conducted any investigation necessary for the exercise of its broad powers under the Constitution.

2. THE COMPLAINANT

2.1 The Complainant is Professor Jan William Lotz, an adult male, a Professor presently residing at 12 De Mist Avenue, Welgemoed, Western Cape, South Africa and who is the father of Miss Inge Lotz (hereinafter referred to as the "deceased").

3. THE RESPONDENT

3.1 The Respondent is M-NET, a commercial satellite subscription broadcasting channel in Southern Africa and a signatory to the Broadcasting Complainants Commission of South Africa (the BCCSA), whose head office is situated at 137 Bram Fischer Drive, 2194 Randburg, Johannesburg.

3.2 The Respondent broadcasts Carte Blanche the program complained about herein, a flagship magazine and actuality programme launched in 1989 and aired every Sunday evening.

4. THE COMPLAINT

4.1 On 16 March 2005, the deceased was murdered in her apartment on the outskirts of Stellenbosch in the Western Cape. The deceased was 22 years old at the time of her death and was the only child of the Complainant and his wife.

- 4.2 A forensic team from the South African Police Services (SAPS) gathered and collected evidence from the deceased's apartment. As part of their investigation, videos and photographs were taken of the deceased and of the crime scene. The visual material gathered was explicit and graphic.
- 4.3 On 14 September 2008, Carte Blanche aired the programme "*Forensics Investigated*". The insert began with a narration outlining the details about the murder of the deceased on Wednesday, 16 March 2005.
- 4.4 Approximately 20 seconds into the segment, the camera cuts from an external view of the deceased's apartment building to an internal shot of her living room. The visual was created by using an editing device specifically designed to take the viewer into the heart of the crime scene.
- 4.5 The deceased's body, clearly visible in the three second shot, is viewed from behind, on the couch. The displayed image was an official police photograph taken of the crime scene. It appeared that the Carte Blanche programme editor had blurred the picture and had used a staggered zoom effect to make the shot appear as though it was a moving video footage.
- 4.6 The complaint arises due to the airing of these images, the Complainant relies on the following argument:
- 4.6.1 The Respondent failed to notify the Complainant or his wife a; about broadcasting the programme.
- 4.6.2 Carte Blanche did not request permission from the deceased's next of kin to broadcast the images;
- 4.6.3 Based on the above, the Complainant sought a public apology and requested that the programme not be rebroadcast. The Respondent refused to tender an

apology as requested and also rebroadcast the programme on a further two occasions.

5. RELIEF SOUGHT

- 5.1 The nature of the relief that the Complainant seeks is an unconditional public apology to both his wife and himself in memory of his late daughter.
- 5.2 The Complainant required that the apology be screened at the regular screening time allocated to Carte Blanche on MNET on a Sunday evening.
- 5.3 The Complainant required formal identification of the party who handed the police video of the deceased's death scene to the Respondent and Carte Blanche.

6. HUMAN RIGHTS ALLEGEDLY VIOLATED

6.1. Section 10 of the Constitution -Dignity

6.1.1. The Complainant contends that in terms of Section 10 of the Constitution, the right to dignity of the deceased was violated by M-Net and further contends that an individual's right to have their dignity respected, upheld and protected does not cease upon their death.

6.1.2. In addition, it is alleged that the producers were aware that the parents of the deceased would be distressed by the public broadcast of the images and that as a result, the deceased's parents' right to dignity had also been violated by such action.

6.2. Section 12(e) of the Constitution – Freedom and Security of person

The Complainant alleged that by showing pictures of his deceased daughter's body, the deceased's right to freedom and security of her person had been violated.

6.3. Section 14 of the Constitution - Privacy

The Complainant argues that his deceased daughter's right to privacy was violated when pictures of her body were broadcast without the permission of her next of kin.

7. STEPS TAKEN BY THE COMPLAINANT

- 7.1. The Complainant advised the Commission that subsequent to the programme being broadcast on the aforementioned date, he had informed William Booth, the attorney representing the person accused of the murder of the deceased, Fred Van Der Vyver, of his dissatisfaction with the insensitive manner in which the matter was handled by both Van Der Vyver's attorneys and Carte Blanche.
- 7.2. The Complainant advised that he had also unsuccessfully attempted to address the matter through the Broadcasting Complaints Commission of South Africa (BCCSA). The BCCSA is an independent quasi-judicial tribunal¹ that is required to adjudicate complaints from the public against broadcasters which are members of the National Association of Broadcasters (NAB) without fear or favour. In terms of its Constitution, the objects of the BCCSA are to "*ensure the adherence to high standards in broadcasting and to achieve a speedy and cost effective settlement of complaints against full members of NAB who have submitted themselves to the jurisdiction of the BCCSA and its Code and, where a settlement cannot be attained, to adjudicate upon a complaint and take appropriate steps in accordance with [its] Constitution*".²
- 7.3. In light of the above, the Complainant alleged that he had exhausted all internal remedies available to him and on that basis, proceeded to lodge a complaint with the Commission on 8 April 2008.

¹ http://www.bccsa.co.za/index.php?option=com_content&view=article&id=18&Itemid=32

² http://www.bccsa.co.za/index.php?option=com_content&view=article&id=12&Itemid=26

8. STEPS TAKEN BY THE COMMISSION

- 8.1. In assessing the complaint, the Commission considered the Complainant's engagements with the BCCSA unsuccessful.
- 8.2. Although this complaint does not fall within the jurisdiction of the Commission as it is more appropriate for the BCCSA, the Commission saw fit to consider the complaint in terms of **its broad human rights mandate with a view to deepening the understanding of the right to dignity and privacy and its relationship to enhanced broadcasting ethics.**
- 8.2. The matter was therefore accepted by the Commission on the basis stated above and transferred to the Gauteng Provincial Office (GP) of the Commission. The Complainant was requested to furnish the following further information to the Commission:
- 8.2.1 Details of the Carte Blanche programme in question;
- 8.2.2 Date, time and subject matter of the programme
- 8.3 When no response was received to the first request for information dated 20 July 2009, further correspondence was forwarded to the Complainant dated 18 September 2009.
- 8.4 On the 22 September 2009, the Complainant responded to the Commission's letter dated 20 July 2009 and requested a time extension to provide the additional information to the Commission, which request was agreed to.
- 8.5 On 26 October 2009, the Commission received from the Complainant a document titled, "Official Report to The Human Rights Commission of South Africa".
- 8.6 On 23 June 2010, the Commission wrote to the Respondent requesting a copy of the footage at issue, a copy of which was received on 17 November 2010. Upon viewing the footage it became evident that the body of the deceased and other photographs depicting the deceased during her lifetime had been shown during the introduction of the show.

8.7 A summary of a progress meeting held thereafter between the Commission and the Complainant on 16 April 2012 is provided below:

8.7.1 During the meeting, the Complainant confirmed and acknowledged that he **understood and respected the limitation** of the Commission's mandate. He however appealed for assistance from the Commission based on a human rights interpretation of the complaint;

8.7.2 In support of the request, the Complainant pointed out that the Respondent had failed to take into consideration the effect the broadcasting would have on the family of the deceased and that the Respondent had not contacted him to establish whether he had any objections to the broadcasting of the video or to enquire whether he had any comments or input concerning the deceased's case. The Complainant further emphasized that as a result of their actions, the Respondent had not shown any compassion towards him or his wife.

8.7.3 The Commission fully explained to the Complainant that should the Commission's attempt to engage with the producer of Carte Blanche fail to achieve the relief he sought, it would have no option but to close its file as the matter was being addressed by the Commission based on a human rights interpretation of the complaint.

8.7.4 The Complainant confirmed that he had not previously engaged the Respondent or Carte Blanche regarding his dissatisfaction with the airing of the programme and had instead reported the matter to Van Der Vyver's attorney, William Booth.

8.7.5 In addition, the Complainant confirmed that he had also lodged a complaint with the BCCSA but that he had not been assisted.

- 8.7.6 In order to assist the Complainant, who had clearly been traumatized by the incident, the Commission undertook as a final measure, to intervene and engage further with the Respondent regarding the reason(s) for its alleged failure to inform the Complainant and his wife that the programme would be broadcast. The Complainant asks for an apology as well as to establish the name of the person(s) who had furnished the footage to the Respondent.
- 8.8 On 25 April 2012, correspondence setting out the allegations was forwarded to Carte Blanche, providing until 9 May 2012 to respond.
- 8.9 On 16 May 2012, the Commission received an email from Mari Truter, the personal assistant of the Executive Producer of Carte Blanche, requesting a meeting with the Commission regarding the complaint.
- 8.10 On 4 June 2012, during a telephonic discussion with the Commission, the Complainant advised that due to the emotional and psychological pain suffered by him and his wife as a result of the incident, the meeting could proceed in their absence. The Complainant did however emphasize that he required an **unconditional apology to his wife, to him, and to the memory of the deceased and that such apology should be aired during Carte Blanche**. In addition, the Complainant again confirmed that he required formal identification of the party who had handed the police video of the deceased's death scene to the Respondent.
- 8.11 During a meeting between the Commission and the Respondent on 7 June 2012, the following was discussed:
- 8.11.1 The executive producer of the Respondent, Mr. George Mazarakis, informed the Commission that there had been **no malicious intent** on the part of the Respondent when it broadcast the video. Mr Mazarakis further stated that both he and the Respondent fully understood the emotional pain suffered by the Complainant and his wife.

- 8.11.2 Mr. Mazarakis however emphasized that the Respondent had **no legal/ethical obligation to inform the Complainant** prior or subsequent to the broadcast of the footage as the programme was not centred around the deceased or her death *per se* but rather around the fabrication of evidence by the SAPS during its forensic investigations.
- 8.11.3 Mr. Mazarakis alluded to the fact that the matter was treated with a sufficient degree of sensitivity and was reported on **within the relevant bounds of broadcasting standards**.
- 8.11.4 Carte Blanche insisted that they had not acted in a manner which was questionable and indicated that the visuals used could have been more graphic. For that reason, **Carte Blanche could not apologise** as it had not done anything ethically and / or legally wrong.
- 8.11.5 In addition, Mr. Mazarakis stated that the Respondent could not apologise notwithstanding its view that it had not contravened any legal or ethical boundaries as such apology would **compromise the journalistic credibility of the show and its reporters**. In this respect, Mr. Mazarakis also raised a concern that should the Respondent tender a written apology; the Complainant would present same to the media for publication, thereby calling the Respondents integrity into question.
- 8.11.6 Mr. Mazarakis did however advise that the Respondent was willing to meet with the Complainant as **a sign of compassion and respect** for the Complainant and his family.
- 8.11.7 The Respondent also requested that the Commission, on its behalf, **extend an apology to the Complainant** for what he and his wife had been through following the murder of their daughter;
- 8.11.8 The Respondent emphasized that had it acted incorrectly, it would have tendered an apology but that **in the present case, an apology was unwarranted**.

8.12. The Commission notes the time it has taken in the issuing of its recommendations herein. A number of factors are attributable for the finalisation of this complaint. Amongst these

included attempts made to engage with the Respondent, as more fully set out above, and other on-going legal proceedings relating to the death of Ms Lotz.

8.13. It is recorded that pursuant to finalizing its recommendations in this matter, the Commission issued its draft findings and recommendations to the parties in February 2014 in terms of Article 30(1) of its Complaint Handling Procedures (CPH). The relevant excerpts of the parties' responses are summarised below:

8.13.1. On 5 March 2014, the Complainant responded to the Commission's preliminary findings and recommendations. In summary, the Complainant confirmed that in his view, and given his own vulnerability to continue a challenge of the Respondents conduct, the Commission had courageously assessed measures for reform to strengthen the right of individuals.

8.13.2. On 12 March 2014, the BCCSA provided its response to the Commission. The BCCSA challenged the mandate of the Commission's finding and stressed that the matter be governed by the Code for Subscription Broadcasters (the Code), which was exclusively within its jurisdiction.

8.13.3. In response to its recommendation that the BCCSA consult with its membership, it should also consider codifying best practice guidelines regarding the content of clause 28.4 (dignity) of the Code, particularly in regard to deceased persons and their relatives (and that the BCCSA should provide the Commission with confirmation thereof) The BCCSA recommended that the Commission could make such submissions to the Independent Communications Authority of South Africa (ICASA) or to itself when it next held inquiries regarding the amendment of the Codes for broadcasters.

8.13.4. On 14 March 2014, the Commission received responses from the Respondent which addressed the substantive contextual considerations undertaken by the Commission in arriving at its recommendations, challenged the mandate of the Commission and indicated concerns around the potential for forum shopping by parties whose complaints are not accepted by the BCCSA.

8.13.5. The Respondent also raised concerns regarding the delay between the broadcast and the issuing of the preliminary findings and recommendations by the Commission. In this regard the Respondent did not appear to have noted the steps taken by the Commission in attempting to engage with the Respondent regarding this complaint, as set out in paragraphs 8.6. to 8.11 above;

8.14. Having considered the response of the parties, the Commission is of the view that its recommendations remain relevant for the protection of human rights. The Commission has however noted the submission from the BCCSA regarding the role of ICASA and on that basis, accepts that ICASA be included for the purposes of communicating its recommendations toward reform on the broader concerns raised rose through this matter.

9. **LEGAL FRAMEWORK**

9.1. **Jurisdiction**

On the basis of the submissions from the Respondents, the Commission has specifically addressed the question of mandate hereunder.

9.1.1. The Commission has a broad mandate to promote and protect the rights in the Bill of Rights. In this respect, the only complaints expressly excluded from the mandate of the Commission are those that occurred before April 1994 (See article 4(1) of the Commission's CHP). Other complaints *maybe* rejected by the Commission on various other grounds contained in Article 4(2) of the Commission's CHP. One such ground upon which the Commission may or may not elect to reject a complaint is that the matter "*(c) is the subject of a dispute before a court of law, tribunal, any statutory body, any body with internal dispute resolution mechanisms...or in which there is a judgment on the issues in the complaint or finding or such court of law, tribunal, statutory body or other body...".*

9.1.2. With specific respect to the Code, ICASA is mandated to review existing regulations and prescribe regulations relating to the conduct of broadcasting service licensees. Although the BCCSA is the body responsible for enforcing such code of conduct, it does not necessarily have the exclusive mandate to do so, especially considering the broader constitutional mandate of an institution such as the Commission. In addition, the Code (as with other enabling legislation, regulations, by-laws etc.) gives content to the rights contained in the Bill of Rights, which the Commission has a clear mandate to promote and protect in terms of its own Constitutional mandate.

9.1.3. Regarding the Respondent's allegation relating to the exclusivity of the BCCSA's mandate, the Commission submits as follows:

9.1.3.1. Section 192 refers to the enactment of *national legislation* in terms of which an independent authority to regulate broadcasting must be established. In contrast, the Commission is directly established in terms of Chapter 9 of the Constitution, elevating its jurisdictional basis. In any event, the Code and the jurisdiction of the BCCSA only applies to full members of the National Association of Broadcasters (NAB) whereas the Commission's mandate extends to all in South Africa (including non-juristic entities);

9.1.3.2. The overlapping mandates of Chapter 9 institutions and statutory bodies themselves does not limit the mandate of the Commission, which has the broadest mandate of all Chapter 9 institutions to ensure the protection and promotion of all constitutional rights; and

9.1.3.3. The Commission's previous referral of matters to the BCCSA, based on that institution's mandate does not preclude it from making decisions on any future matters where it deems its intervention appropriate.

9.1.3.4 Having considered the nature of the complaint, the form of relief being sought by the Complainant, and the impact of necessary reform in its broadest sense in such matters, the Commission found it appropriate to deliberate on the matter and issue recommendations with the intent of promoting broader reform through the appropriate authorities and assisting the Complainant at the same time.

9.1.4. Based on the above, the Commission finds that it has a mandate to attend to the present matter and to make findings and recommendations in respect thereof in terms of its CHP.

International legal framework

9.1. Universal Declaration of Human Rights (1948)

The Universal Declaration of Human Rights (UDHR) was adopted by the General Assembly of the United Nations on 10 December 1948 and provides human rights standards binding on all States as a matter of customary international law.

Dignity

Article 1 of the UDHR states that *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*

Privacy

Article 12 of the UDHR states that *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

Freedom of Expression

Article 19 of the UDHR represents the normative basis that led to the formulation of the standards for freedom expression. Article 19 states that *"Everyone has the right to the freedom of opinion and expression; this right includes freedom to hold opinions without*

interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".³

9.2. International Covenant on Civil and Political Rights (1966)

The International Covenant on Civil and Political Rights (ICCPR) entered into force in 1976. It elaborates the principles laid out in UDHR and is legally binding on all states who have signed and ratified its provisions.

Privacy

Article 17 of the ICCPR states that *"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation."*

Freedom of Expression

Article 19 of the ICCPR stipulates that:

*"(1) Everyone shall have the right to hold opinions without interference.
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals."

³ <http://www.un.org/en/documents/udhr/>

9.3. The guarantee of freedom of expression is also found in the following three important **regional human rights systems**:

9.3.1. Article 9 of the African Charter on Human and Peoples' Rights (a Declaration of Principles of Freedom of Expression was adopted by the ACHPR in October 2002);

9.3.2. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

9.3.3. Article 13 of the American Convention on Human Rights.⁴

Domestic legal framework

9.4. The Constitution of South Africa, 1996

9.5.1. Section 10 – Dignity

"Everyone has inherent dignity and the right to have their dignity respected and protected."

9.5.2. Section 14 – Privacy

"Everyone has the right to privacy, which includes the right not to have –

- (a) Their person or home searched;*
- (b) Their property searched;*
- (c) Their possession seized; or*
- (d) The privacy of their communications infringed."*

9.5.3. Section 16 – Freedom of Expression

"(1) Everyone has the right to freedom of expression, which includes –

⁴ http://www.unesco.org/webworld/publications/mendel/inter_standards.html

- (a) *Freedom of the press and other media;*
- (b) *Freedom to receive or impart information or ideas;*
- (c) *Freedom of artistic creativity; and*
- (d) *Academic freedom and freedom of scientific research.*

9.5.4. Section 36 – Limitation of rights

“(1) The rights in the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) *The nature of the right;*
- (b) *The importance and the purpose of the limitation;*
- (c) *The nature and extent of the limitation;*
- (d) *The relation between the limitation and its purpose; and*
- (e) *Less restrictive means to achieve the purpose.*

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

Applicable codes and standards (and findings of tribunals)

Countries around the world, including South Africa, have developed codes to regulate their broadcasting services and to ensure adherence to certain ethical standards. This is emulated regionally in countries such as Nigeria,⁵ Tanzania,⁶ Malawi⁷ and Ghana⁸ which have all produced codes reiterating the need for maintaining a certain degree of care in the broadcasting industry.

⁵ Applicable provisions of the Nigerian Code of Ethics for Nigerian Journalists include the following:

*“3. Privacy
As a general rule, a journalist should respect the privacy of individuals and their families unless it affects the public interest...”*

and

Domestic

9.5. Carte Blanche is a programme aired on the subscription channel, MNFT, which is a **signatory to the BCCSA's Code of Conduct for Subscription Broadcasting Service Licensees ("the Code").**⁹ It is therefore obliged to comply with the provisions of the Code.¹⁰

9.6. Of relevance to the present matter is clause 28.4 of the Code which provides that *"Insofar as both news and comment are concerned, broadcasting licensees **must***

"5. Decency

In cases involving personal grief or shock, enquiries should be carried out and approached made with sympathy and discretion."

⁶ Applicable provisions of the Tanzanian Code of Ethical Practice for Broadcasters include the following:

"2.7. Privacy

- a) *Respect of the privacy of individuals and recognise that intrusions have to be justified by serving a higher public good...*
- i) *In depicting disasters and tragic events there is need to emphasise the importance of compassion. Coverage should not add to the distress of the people who already know their loss...*
- l) *Use of library material depicting suffering, pain, violence or grief becomes less defensible as the original event passes into history. Avoid needless or repeated use of traumatic library material especially if it features identifiable people..."*

"2.9. Violence...

- b) *The dead should be treated with respect, and not shown unless there are compelling reasons for doing so. Close-ups should be avoided and if justified, then they must be not lingered over. Nor should there be undue concentration on the bloody consequences of an accident or terrorist attack..."*

⁷ Applicable provisions of the Malawian Media Council of Malawi Code of Ethics and Professional conduct include the following:

"2.2. Distinction in presentation: a journalist shall avoid traumatizing shocking or obscene pictures as much as possible. Pictures must be used appropriately, not for the sake of sales promotion. A journalist shall not publish pictures that infringe on individuals' right to privacy."

⁸ Applicable provisions of the Ghana Journalists Association (GJA) Code of Ethics include the following:

"5. Respect for privacy and human dignity

Journalists should respect the right of the individual, the privacy and human dignity. Enquiries and intrusions into a person's private life can only be justified when done in public interest."

"16. Personal grief and sensationalism

In case of personal grief or distress, journalists should exercise tact and diplomacy in seeking information and publishing."

⁹ The BCCSA Constitution and Code of Conduct for Subscription Broadcasting Service Licensees are available on the BCCSA's website: <http://www.bccsa.co.za>

¹⁰ See clause 3 of the BCCSA Constitution

exercise exceptional¹¹ care and consideration in matters involving the private lives, private concerns and dignity of individuals, bearing in mind that the rights to privacy and dignity may be overridden by a legitimate public interest. (Own emphasis).

9.7. The following rulings of the Broadcasting Complaints Tribunal of South Africa's ("the Tribunal") relating to the broadcasting of bodies of deceased persons are of particular relevance to the present complaint:

a) In **Taylor v E-TV** the "*principle of dignity of bodies of deceased persons [was] confirmed.*"¹²In that matter, the Tribunal referred to a previous ruling made by it in 2009¹³ where it was stated that "*the body of a dead person is protected by common law and legislation... [but] this is not an absolute rule...*"¹⁴ (own emphasis). In making its ruling, the Tribunal took into account the following factors:

- i. When the images were displayed i.e. during a news bulletin largely intended for adult viewing
- ii. The distance of the camera from the images
- iii. Lack of detail of the images
- iv. The duration that the images were displayed on screen

b) In **Van Breda v E-TV?**,¹⁵the Tribunal stated that the "*The broadcasting of shots of the body of a dead person could be highly insensitive towards, and therefore traumatic to, the next-of-kin of such person . . . The point is made to impress*

¹¹ <http://www.macmillandictionary.com/dictionary/british/exceptional> -

Exceptional is defined as follows in the Macmillan Dictionary:

"extremely good or impressive in a way that is unusual... much more or greater than usual... unusual and not likely to happen or exist very often"

<http://oxforddictionaries.com/definition/english/exceptional>

"unusual; not typical... unusually good; outstanding"

¹² Taylor v e-tv, 42/2001

¹³ Goss v SABC, 05/99

¹⁴ Taylor v e-tv, 42/2001

¹⁵ 37/2000, 17 November 2000.

upon the media the seriousness with which this Tribunal regards the principle of dignity of the body of a dead person" (own emphasis). This ruling acknowledges the impact of visual images on the next-of-kin of deceased persons.

- c) In *Faull v e-tv*,¹⁶ the Tribunal stated that "[I]n showing bodies, care must . . . be taken not to gratuitously invade the respect for death and the dignity and privacy of persons related to the deceased" (own emphasis). The public interest justification was upheld by the Tribunal in this matter.
- d) In *Swanepoel & Others v SABC*,¹⁷ the Tribunal confirmed that "[It] must accentuate that only under very exceptional circumstances such photographs [i.e. of bodies of dead persons] may be shown. If the slightest impression of sensationalism had been conveyed, we would have held that the broadcast of the photographs had contravened the Code." (Own emphasis)."
- e) In *Visser v e-tv*,¹⁸ the mother of a young man who had been murdered approximately six years prior to the incident, lodged a complaint with the BCCSA against e-tv for screening scenes of her son's murder in the programme, *Third Degree*. Some scenes included police file photographs of the dead bodies. The majority of the Tribunal found that the broadcast was justified for the following reasons:

"It is our opinion that the public had a right to be informed by way of a reminder about the events that took place . . . The re-enactment of the shooting, and the broadcast of police file photographs of the dead bodies, would probably be regarded by many viewers as offensive. . . . However, it is our view that this aspect did not exceed the limits of what might legitimately be defined as documentary . . . To have excluded the re-enactment and the police-material – however shocking these were – would have been tantamount to withholding information from the public" (own emphasis).

¹⁶ 23/2006, 8 June 2006.

¹⁷ 24/2000, 30 August 2000.

¹⁸ 15/2009, 23 July 2009.

The majority of the Tribunal found that the mother's right to privacy was not in any manner invaded, as she did not appear in the programme. While the Tribunal acknowledged that the mother would have been disturbed by the programme, it observed that ***"it would probably have been a more prudent choice not to watch the programme"***. One member of the Tribunal had dissented on the basis that the display of images was unwarranted and that the images were not required and were therefore more sensationalist than value-adding.

It is noted that specific statutory protection for personal information of an individual was not in place at the time of the decision.¹⁹

International

United Kingdom

9.8. United Kingdom's broadcasting regulatory authority, Ofcom, published a revised Broadcasting Code in March 2013.²⁰ The new Broadcasting Code includes the following provision in the chapter on privacy under the heading "*Suffering and distress*":

"8.19 Broadcasters should try to reduce the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well as factual programmes.²¹ (Emphasis added) In particular, so far as is reasonably practicable,

¹⁹ The Protection of Personal Information Act

²⁰Ofcom's Broadcasting Code is available at: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/bguidance/>.

²¹This provision must be read with Ofcom's definition of "warranted":

"In this section "warranted" has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public."

surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past (own emphasis)."

- 9.9. In a previous version of the UK Broadcasting code, Ofcom applied an equivalent provision in the *Alyson Evans v ITV1* matter.²² In that case, Ofcom affirmed that **it is "good practice" for the family to be consulted before the broadcast** of a programme regarding the murder of a family member, given its potential to cause distress. It found that without providing prior notification, the broadcaster violated the family's right to privacy. The Tribunal emphasised that although there was **no specific requirement to obtain the consent** of the family to broadcast the programme, **the family should nonetheless have been informed.**

Australia

- 9.10. Two Australian TV Broadcasting Codes address the broadcast of images likely to cause distress to persons who have suffered personal tragedy. Firstly, the Codes of Practice (2007) for Subscription Broadcast Television of the Australian Subscription Television and Radio Association (enforced by the Australian Communications and Media Authority ("ACMA")) provides that:

"2.2(c) In broadcasting news and current affairs program[m]es licensees must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there are identifiable public interest reasons for the material to be broadcast.

- 9.11. The Privacy Guidelines referred to under clause 2.2 state that *"The public interest is assessed at the time of the broadcast...Whether something is in the public interest will depend on all the circumstances, including whether a matter is capable of affecting the community at large so that citizens might be legitimately interested in or concerned*

²²Crime Secrets, ITV1, Wales (21 September 2005).

*about what is going on...Any material that invades a person's privacy in the public interest must directly or indirectly contribute to the public's capacity to assess an issue of importance to the public, and its knowledge and understanding of the overall subject...knowledge and understanding of the overall subject...It **should be proportionate and relevant** to those issues, and not disclose peripheral facts or be excessively prolonged, detailed or salacious.*

- 9.12. Secondly, the ACMA's Commercial Television Industry Code of Practice, 2010 (2010 Code), includes the following provision relating to news and current affairs programmes:

"4.3 In broadcasting news and current affairs program [mes], licensees..

*4.3.3 should have **appropriate regard to the feelings of relatives** ... when including images of dead or seriously wounded people."*

- 9.13. Rulings by the ACMA where clause 4.3.3 of the 2010 Code were applied indicate that **whether or not the broadcast in question is justified, there is an obligation on the broadcaster to take measures to prevent broadcasts concerning the death of a person from causing distress to family members.** A case in point was the *Investigation Report 2623: TCN Channel Nine Pty Ltd, 60 Minutes (1 March 2012)* matter. In this matter, the ACMA received a complaint about a segment of the programme known as *60 Minutes* in which crime scene photographs of the Complainant's sister were shown. Here, the ACMA held that the broadcaster had breached clause 4.3.3 of the 2010 Code for the following reasons:

- a) The photograph in question showed the deceased's body lying on the floor with her arms and legs exposed and her torso covered by a sheet. The ACMA was of the view that **it was reasonably foreseeable that the broadcast of the image would significantly distress the deceased's family members** regardless of the time that had passed since her death or the fact that the photograph had formed part of court evidence during the murder trial. The photograph was also displayed twice, for a five second period and then for four second period.

- b) Based on the above, the tribunal found that **steps should have been taken to mitigate or prevent distress to the family**. However, this was not done as the family had not been informed prior to the broadcast that the images would be displayed nor had they been informed of the date of the broadcast.
- c) In finding a breach of clause 4.3.3, the ACMA emphasized that the image was included in a **repeat-broadcast** even after the broadcaster was fully aware that the Complainant was not happy with the display of the images, thereby **demonstrating 'a total lack of compassion'** for the family.

New Zealand

9.14. The New Zealand Television Code of Broadcasting Practice, 2008 contains a provision dealing specifically with distress to surviving family members. Clause G17 provides that:

"Broadcasters must avoid causing unwarranted distress by showing library tape of bodies or human remains which could cause distress to surviving family members. Where possible, family members should be consulted before the material is used. This standard is not intended to prevent the use of material which adds significantly to public understanding of an issue which is in the public arena and interest."

9.15. The duty to consult the family is applied strictly by the New Zealand broadcasting authority (the Authority), as evidenced in the *CC and DD and TV3 Network Services Ltd* ruling.²³

- a) The case involved the broadcast of images of the body of the Complainant's grandchild (a baby) and daughter-in-law who were killed in a car-crash. **The Authority noted that the fact that neither the Complainant nor other immediate family members were consulted or notified before the**

²³1999:055-057, 27 May 1999.

broadcast was the principal reason for the Complainant's distress. The broadcaster argued that the production company had taken measures to contact persons with the surname of the deceased, to no avail.

- b) However, notwithstanding the **alleged attempts made by the broadcaster, the Authority found that, given the content of the programme, such steps did not meet the standard** set in clause G17. The Authority further noted that additional steps could have been taken to obtain the contact details of the family through alternative sources but that this was not done.

9.16. Important to note is that the comparative studies above indicate that **the duty to inform the family is not limited to the second part of the enquiry relating to whether or not the broadcast of specific images is in the public interest exclusively,** but rather on the broader duty to exercise care and notify surviving families.

10. LEGAL ANALYSIS

This complaint primarily entails a consideration of three human rights; freedom of expression, human dignity and the right to privacy; and the manner in which these fundamental rights intersect with each other in relation to deceased persons and in relation to their surviving next-of-kin.

FREEDOM OF EXPRESSION

10.1. Freedom of expression is a fundamental right revered by democracies globally. In its first session in 1946, the UN General Assembly adopted resolution 59(I) stating "*Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.*"²⁴ It is however also a right which because of its nature, most often has its parameters tested in relation to potential conflicts with the rights to dignity and privacy.

²⁴ http://www.unesco.org/webworld/publications/mendel/inter_standards.html

- 10.2. The European Court of Human Rights has stated: "*Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... 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 pluralism, tolerance and broadmindedness without which there is no 'democratic society'.*"
- 10.3. Regarding the role of media specifically, former United Nations Secretary General stated that "*Press freedom is a cornerstone of human rights. It holds governments responsible for their acts, and serves a warning to all that impunity is an illusion*".²⁵ In a paper prepared by the International Federation of Journalists, it was confirmed that "*[t]he contribution made by journalists is clear: by exposing violations of rights media can improve the climate of democratic debate and reduce corruption in public life. At the same time, media sensitive to the importance of human rights provide reliable sources of information through which citizens, human rights groups, private organisations and public authorities can work together to promote development and to eliminate arbitrary abuse.*"²⁶
- 10.4. Notwithstanding the importance of freedom of expression, there remains a clear need for codes of ethics to shape and give content to the enjoyment of the right to freedom of expression by ensuring that, where appropriate, **best practice guides and mitigates the potential limitation** of other basic rights. That being said, there is also a need to avoid applying very strict or narrow guidelines which **suffocate expression** and to ensure that the very essence of the right is not lost. Limitations to the right are therefore best interpreted exceptionally and narrowly.

²⁵ Kofi Annan, *UN Secretary General, International Herald Tribune, June 2, 1999*

²⁶The Role of Media in Promotion of Human Rights and Democratic Development, December 1999, International Federation of Journalists.

DIGNITY AND PRIVACY

The Commission thought it prudent to consider this complaint on two broad bases insofar as the alleged violations of basic human rights are concerned. In doing so, it has distinguished between the rights, if any, accorded to a deceased person and secondly those of the deceased's next-of-kin.

A. The rights of a deceased person

- 10.5. A central aspect of the complaint before the Commission is whether the rights of the deceased were violated as a result of the Respondent's actions. The Commission was therefore tasked with analyzing whether a deceased person is the bearer of rights and if so, which rights.
- 10.6. Due regard was accorded to our Common Law for guidance. It is generally accepted in South African law that **a deceased person does not have a legal personality and cannot therefore be the bearer of rights.**²⁷
- 10.7. In *Christian Lawyers*,²⁸ the scope of legal personality was addressed in relation to the unborn foetus and the right to life under section 11 of the Constitution. The High Court found that the unborn foetus did not have a right to life protected under the Constitution. The Court reasoned that the Constitution contained no express provision affording the foetus legal personality or protection, and further that the word "*everyone*" in the Bill of Rights must be interpreted consistently and that many of the rights extended to "*everyone*" in the Bill of Rights could not be exercised by the foetus. It could be argued that this viewpoint should equally apply to deceased persons.

²⁷Neethling, Potgieter & Visser, *Neethling's Law of Personality* (Durban: LexisNexis, 2005) at 13. Hahlo and Kahn *Union of SA: Development of its Laws and Constitution* 348; Van Heerden, Cockrell and Keightley (eds) *Boberg's Law of Persons and the Family* (2 ed) (1999) 52; Heaton *The South African Law of Persons* (3 ed) (2008) 28; Jordaan and Davel *Law of Persons* (2005) 182.

²⁸*Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T).

- 10.8. Under the Common Law, it is well established that where a person is deceased, there **can be no injury to that person's personality** for the purposes of establishing an *actio iniuriarum*.²⁹
- 10.9. However, Article 1(1) of the German Basic law is said to extend to a deceased person. As stated by Botha,³⁰ "[p]ersonality rights likewise enjoy posthumous protection." However, Botha further states that "*the protection afforded to the **personality rights of the deceased [are] temporally bound...As time goes by, the memory of the deceased fades, and the protection of a person's dignity diminishes accordingly.***"³¹
- 10.10. The German Constitutional Court has also recognized that the state's duty to protect human dignity continues after death. In the Mephisto case,³² a son sought to interdict the publication of a novel on the basis that it would defame his deceased father. In that case, the Court held that "*an individual's death does not put an end to the State's duty under Art 1 GG [i.e. Article 1 of the Germany's Basic Law] to protect him from assaults on his human dignity*".
- 10.11. Orr & Siegler talk about respect for the dead as evidenced in certain Common Law crimes e.g. violating a corpse³³. This view is reiterated in the following South African cases:
- 10.11.1. In the Crossley case, Patel J held as follows: "*I am of the considered opinion that in this democratic era the higher constitutional value of the right to dignity, embedded in every international human rights instrument, embraces not only those who are living but also those who have departed. They too, like the deceased, need to rest undisturbed with dignity...If such an order [to stop the burial of the deceased] is*

²⁹Nevertheless, the law protects the body and regulates the disposal of it. This is not done in the interests of the deceased person but partly in the interests of public health and partly because of respect for the dead. The deceased's former assets are also protected, not in his or her own interests but in the interests of creditors and heirs.

³⁰Henk Botha "Human dignity In comparative perspective, 2009 Stell LR 171 at 192

³¹supra

³²30 BVerfGE 173 (1971).

³³RD Orr and M Siegler "Is posthumous semen retrieval ethically permissible? J Med Ethics 2002; 28:299 – 303 at 300

*granted, then that will be the gravest disrespect to the deceased and also violate his family's right to dignity as well as interfere with their religious rights and freedom. It will also result in the gravest injustice to his family and community at large (own emphasis).*³⁴

10.11.2. In *Nkosi & Another v Buhrmann*,³⁵ the court stated that [f]uneral and burial rituals, after all, serve to express final acknowledgement by the bereaved of the human dignity of the deceased (own emphasis).³⁶ From this statement, it would appear that there may well be instances where a "person's dignity might receive posthumous protection".³⁷

10.12. Although it would appear that South African law does not afford firm legal protection to deceased persons, this **does not seem to be a decisively answered** legal question as yet. A great deal of room exists for the consideration of expanding protections and increased significance when the diverse cultural and religious traditions honouring the deceased in our country are considered in context. Despite the lack of clear precedent by our courts in this regard, it could however be argued that a trend towards the recognition of posthumous protection may be developing.

10.13. Based on the above, and in keeping with the development of our Common Law, it cannot therefore be said at this stage that the deceased's right to privacy, her right to dignity or her right to freedom and security of her person were violated.

The transmissibility of the deceased's rights (if any)

10.14. If it is argued that the law does not recognise the deceased as the bearer of rights, it follows then that her next-of-kin have **no right to claim protection of her privacy, dignity or freedom and security of her person.**

³⁴Crossley and others v National Commissioner of South African Police Service and others [2004] 3 All SA 436 (T) at para 20

³⁵2002 (1) SA 372 (SCA).

³⁶Id at para 55 (emphasis added).

³⁷Henk Botha "Human dignity in comparative perspective, 2009 Stell LR 171 at 210

10.15. In addition, non-patrimonial claims for the infringement of personality rights are **neither transmissible nor inheritable**. South African common law no longer recognizes *iniuria per consequentias* – that is, *iniuria* automatically arising from injury to another person and by virtue solely of the plaintiff's special relationship with the injured person. In the past, our common law recognised certain forms of *iniuria per consequentias* – for example, allowing a father to claim *iniuria* where the dignity of his wife or child was injured. However, the Court rejected the *iniuria per consequentias* approach in *Meyer v Van Niekerk*.³⁸ Since then, the **Courts have refused to accept that an "indirect *iniuria*" is automatically committed against a person involved in a special relationship with another who is injured**. What is required is evidence of actual injury to the plaintiff, whether caused directly or indirectly.³⁹

10.16. On this basis, it would appear that the family **cannot seek to enforce any rights on behalf of the deceased nor can they claim injury on the basis of an infringement of her rights**. This question is however not before the Commission nor would it be appropriate for the Commission to address it. As such, this aspect is not accorded any particular detail. However, it suffices to state that **the next-of-kin must establish that their own rights were infringed, whether directly or indirectly, by the broadcast of images of the deceased's body**.

B. The rights of the deceased's next-of-kin

At this stage, questions relating to the application of the Constitution and statutory frameworks directly ascribing certain rights to deceased persons have been rendered to the realm of philosophy for the most part. However, in considering the rights of the next-of-kin, **the Commission has sought to be guided by the Constitution, the Code and comparable foreign codes, decisions of both the domestic and those of the international broadcasting tribunals**.

³⁸1976 (1) SA 252 (T) 256.

³⁹For a general discussion, see Neethling's Law of Personality at pp. 61-63.

Privacy

10.17. The right to privacy as enshrined under section 14 of the Constitution has to some extent been defined by the Constitutional Court in *Bernstein v Bester* where the court adopted a two-part 'reasonable expectation of privacy test'.⁴⁰ The first part of the test aims to establish whether there is a **subjective expectation of privacy** and the second part considers whether the expectation is *objectively reasonable*.⁴¹ Notwithstanding its partly subjective nature, the right to privacy at the very least embraces the right to be free from intrusions and interference in one's personal life and to be **protected from the publication of private facts**.

10.18. In the case of *NM v Smith*,⁴² the Constitutional Court defined "private facts" as "*those matters the disclosure of which will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances and in respect of which there is a will to keep them private*".⁴³ On this definition, it is certainly arguable that there was a breach of the right to privacy of the deceased's next-of-kin as the **disclosure of images of the deceased's body caused her family mental distress, thereby satisfying the subjective leg** of the enquiry.

10.19. The more difficult question is **whether this distress was objectively reasonable**, taking into account conflicting rights such as the right to freedom of expression.⁴⁴ Whether there was an infringement of the constitutional right to complete privacy is thus informed by the determination of whether the **broadcast of the images were justified in the public interest** (see below).

10.20. Another important consideration at the second leg of the enquiry is the importance of individual independence and the extension of the right to privacy to protect personal

⁴⁰*Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC), para 16.

⁴¹*Centre for Social Accountability v Secretary of Parliament and Others* 2011 (5) SA 279 (ECG), para 71.

⁴²*NM and Others v Smith and Others* 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC).

⁴³*NM v Smith*, para 34.

⁴⁴Section 16(1) of the Constitution provides: "*Everyone has the right to freedom of expression, which includes –*
(a) *freedom of the press and other media;*
(b) *freedom to receive or impart information or ideas;*
(c) *freedom of artistic creativity; and*
(d) *academic freedom and freedom of scientific research*".

autonomy, including the entitlement of persons to make decisions about such matters as their family, home and body, and controlling the distribution and use of information in respect of these matters.⁴⁵In this respect, the jurisprudence suggests that the **parents' subjective expectation of control over the images of the deceased's body was objectively reasonable and should therefore have been protected under the right to privacy.**

10.21. This position has also been confirmed in foreign jurisprudence where the family's right to privacy in respect of the images relating to the death of a family member was considered. In *National Archives and Records v Favish*,⁴⁶ the US Supreme Court held that the Freedom of Information Act "**recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images**" and that "**[the] Court has little difficulty in finding in case law and traditions the right of family members to direct and control disposition of a deceased's body and to limit attempts to exploit pictures of the deceased's remains for public purposes. The well-established cultural tradition of acknowledging a family's control over the body and the deceased's death images has long been recognized at common law**". In *Catsouras*,⁴⁷ the Californian Court of Appeals relied on a four part enquiry to test invasion of privacy: "**(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.**" The Court held that "**on issue of first impression, the deceased's family members had sufficient privacy interest in the accident scene photographs to maintain invasion of privacy action**".

10.22. Unlike under the Common Law action for infringement of privacy (the *action iniuriarium*), **there is no fault requirement for a breach of the constitutional right to privacy.**⁴⁸

⁴⁵See, for example, *Case and Curtis v Minister of Safety & Security* 1996 (2) SA 617 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *De Reuck v Director of Public Prosecutions*, WLD 2004 (1) SA 406 (CC). See also *Rautenbach* (2001) TSAR 117-8; *McQuoid-Mason* 2000 ActaJuridica 248-9.

⁴⁶(2004) 541 U.S. 157 at para 1

⁴⁷*Catsouras v State of California Highway Patrol et al.* 181 Cal. App.4th 856 (2010) 104 Cal. Rptr. 3d 352 (Cal. App. 4 Dist. 2010), Court of Appeals for the State of California, 29 January 2010.

⁴⁸See D McQuoid Mason, 'Privacy' In *Constitutional Law of South Africa* 2ed (Juta, 2012), 3834 – 38-35.

10.23. The only remaining consideration is whether the infringement of the family's right to privacy was justified in terms of **section 36** of the Constitution⁴⁹. In this respect, the first requirement under the limitations clause is that only a "*law of general application*" can validly limit a right in the Bill of the Rights. In this case, the limitation was occasioned by an isolated practice i.e. Carte Blanche's broadcast and as such, not a law of general application?. The infringement of the right is thus not justifiable under Section 36 of the Constitution and a further analysis of the limitations clause is not required.

Dignity

10.24. Under the common law, injury to dignity (as opposed to the broader concept of dignitas) is limited to insult or injury to a person's feelings of self-worth.⁵⁰ There is no allegation of insult on the part of the deceased's parents. However, they claim **emotional trauma and distress** as a result of viewing the images of their daughter's dead body.

10.25. Neethling, Potgieter and Visser observe that there is little indication in South African case law that the *action iniuriarum* extends to claims for wounded feelings. However, they advocate for the common law recognition of such claims, where **the conduct not only infringes subjective feelings, but where the violation is contra bonos mores (or contrary to the legal convictions of the community)**. They contend that such a development has been indirectly recognised under the common law under *iniuria* (such as privacy or defamation).⁵¹

10.26. However, over and above the common law analysis, it is probable that such injuries would **constitute a violation of the broader concept of human dignity** as set out

⁴⁹Section 36 – Limitation of rights

"(1) The rights in the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) The nature of the right;
(b) The importance and the purpose of the limitation;
(c) The nature and extent of the limitation;
(d) The relation between the limitation and its purpose; and
(e) Less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights"

⁵⁰Le Roux and Others v Dey 2011 (3) SA 274 (CC), para 138.

⁵¹See Neethling's Law of Personality Rights, pp. 199-201.

in the Constitution.⁵² This has been confirmed by the Constitutional Court in *C and Others v Department of Health and Social Development, Gauteng and Others* where the Court held that human dignity is associated with "*the dignity of family life*."⁵³ The Court has also held that family relationships "*have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others*."⁵⁴

10.27. In assessing whether the Respondents actions constituted a violation of human dignity of the family members of the deceased, regard has been made both to section 36 and the facts of the complaint. In this respect, the application of section 36 is dispensed with on the basis that the violation cannot be said to be justifiable in terms of section 36 of the Constitution as the **conduct in question was not in terms of a law of general application (see paragraph 10.23 above)**.

PUBLIC INTEREST AND MITIGATION ANALYSIS

10.28. Guided by the rulings of tribunals in comparative mandates and at the domestic level, it would appear that a **general rule against broadcasting the bodies of deceased persons exists** for the purposes of protecting the next-of-kin from trauma, protecting their dignity and privacy and respecting the dignity of the body of a deceased person. The rule is also applied more vigorously where such images are also deemed to be sensationalist and distasteful. The **rule however, does not apply to exclude such content in every instance**. In general, exceptions allowing such content are permissible where:

10.28.1. It is in the **public interest to receive such information**; and

10.28.2. **Mitigating measures are adopted to minimise negative impact on next-of-kin and sensitive viewers.**

⁵²Section 10 of the Constitution provides:

"Everyone has inherent dignity and the right to have their dignity respected and protected".

⁵³*C and Others v Department of Health and Social Development, Gauteng, and Others* 2012 (2) SA 208 (CC), para 23.

⁵⁴*Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), para 30.

10.29. On this basis, central to the present consideration is an analysis of the Code, other comparable standards in foreign mandates and the abovementioned rulings of various tribunals and forums as against the specific contextual and factual background of the matter at hand. Part of such assessment entailed a consideration of the following:

10.29.1. The **purpose of the broadcast** and the need for displaying the images in relation thereto. This analysis included an interrogation of the **actual value of displaying the images and whether omitting the images** would have amounted to non-disclosure **due to its material nature** in relation to the purpose of the broadcast:

- i. The broadcast was aired more than **three years after** the deceased's murder. The public interest value in showing the **specific images of the deceased** is therefore questionable although related on-going formal civil based legal processes were receiving some attention from the media. On the other hand, the period of time that had elapsed since the event, could be deemed to have increased the **objective documentary value** of the images and **to have lessened the shock factor**.⁵⁵
- ii. The **primary subject** of the broadcast did not appear to be the murder of the deceased but the quality of the investigation and the **investigative methods employed by the SAPS Forensic Unit**. Displays of the **images relating to the deceased were therefore not material** to the broadcast and editing out the photographic image of the deceased was therefore an option open to a sensitive editor/producer.
- iii. The efficiency of the SAPS has however always been of particular public interest, given high crime rates in the country. The programme content, detailing the technical process of forensic investigations appear therefore to be of a documentary nature with a **focus on the**

⁵⁵ In Visser, the Tribunal did not consider the period of time that had elapsed between the murder and the broadcast.

quality of the forensic evidence gathering as opposed to the deceased herself.⁵⁶

10.29.2. Details of the **actual images** displayed, including **content, length of time** that the images were displayed for and **time of the broadcast** were also considered as **mitigating measures** that had to be borne in mind. These were:

- i. The body of the deceased was **covered**, with only her feet and leg visible;
- ii. **Two visuals** were aired
- iii. The shots in question were **brief and were not a central feature** of the programme;

10.30. Balancing the circumstances set out above against previous rulings of the Tribunal, it is possible that the **display of the images in question** may be deemed to have been unwarranted and not in the public interest. As a result, there would be **no justifiable basis for a departure from the degree of care** required in terms of Clause 28.4 of the Code.

10.31. However, even if it is argued that the broadcast was in the public interest, it would appear from comparative standards that Carte Blanche ought to have at least **informed the family that the images would be displayed** during the broadcast to protect them from suffering any trauma and / or emotional distress. In this regard, it is noted that the **whereabouts of the Complainant were known** to the Respondent and such a step would therefore **not have constituted an undue burden or unreasonable on the Respondent**. While the Code does not expressly require that such steps be taken, the obligation is arguably implicit in clause 28.4, which provides that "broadcasting licensees must exercise **exceptional care and consideration in matters involving the private lives, private concerns and dignity of individuals**" (own emphasis). Exceptional in this instance implies **a standard beyond that which is**

⁵⁶ However, an indirect linkage may be possible based on allegations of a problematic forensic investigation into the deceased's murder

reasonably necessary. This interpretation is supported not only by a common understanding of the **ordinary meaning** of the word⁵⁷, but in the context of the Constitution and potential for negative impacts on the existing rights of others. The standard is also one which appears to have been crafted in broad terms, allowing **broadcasters maximum control in relation to the means through which “exceptional care and consideration” is to be affected.** Indeed this level of obligation is articulated in various forms of the foreign broadcasting standards described above.

The relevance of the source or ownership of the images

10.32. In his complaint, the Complainant specifically requested information about the Respondent’s source of information. In this regard, the Commission has been guided in its considerations by **established judicial precedent and media practice** regarding **non-disclosure of journalistic sources** which are central protections to the independence of the media and its ability to provide information to the public.

10.33. Nonetheless, the Commission notes that although the material used was not the property of the deceased or the property of the deceased’s next of kin, an analysis of the Code and Tribunal findings (as well as comparable foreign codes and findings) appears to indicate that the **source of the images in this case is largely immaterial to the final ruling**, save for perhaps being one of many factors to consider from a contextual point of view.

10.34. In this respect, the source of the images may have a bearing on whether the subjective feelings of distress experienced by the family of the deceased are objectively reasonable and / or whether the broadcast of the images is justified in the public interest. In respect of the former question, it may be of particular relevance if the images had **already been disclosed in the public domain.**

⁵⁷Note 12 above

11. **FINDINGS**

In arriving at its finding, the Commission has specifically borne the following in mind:

- 11.1 The Commission has been especially **mindful of the mandate authority of the BCCSA** in complaints of this nature. While to a large extent the Commission has sought to draw on and be guided by the considerations of the BCCSA, it has attempted to **contribute to the valuable body of precedence** created by the BCCSA. In this instance the Commission has relied heavily on its vision "*to transform society and restore dignity*" and its constitutional mandate to promote respect for human rights and provide redress where appropriate. At this point in our development as a society governed by the rule of law, the complaint before the Commission **provided an important platform through which to encourage good corporate citizenship, respectful of basic rights** without unduly compromising hard earned freedoms like the freedom of expression.
- 11.2 While the question as to whether the right to privacy or dignity in South African law attaches to a deceased person has not been definitively pronounced on, the rights of her living family members remain relevant. Having considered the jurisprudence of our courts, comparative mandates and valuable philosophical theories around this complex question, the Commission recognises the need to approach this issue on a **case by case basis** at this stage and to lean towards a subjective test for this purpose. Given the complexity of the question posed and lack of clear precedent, the Commission has elected to limit its findings on the basis of the alleged violation of rights of the deceased's next-of-kin.

Based on the above considerations, the Commission finds as follows:

- 11.3. Guided by decisions of domestic and comparative bodies, the broadcasting of the images could be deemed to have contravened clause 28.4 of the Code in that the degree of "***exceptional care and consideration***" that is required in terms of that provision was not exercised. Carte Blanche's broadcast of the images of the deceased's

body **violated the rights to privacy and dignity of the Complainant and his wife**. The violation is apparent when considered both in the context of constitutional protections for privacy and dignity, and against the Code to which the Respondent voluntarily ascribes in that:

11.3.1. The broadcast of **the particular images of the deceased** was not justified in the public interest, given the subject-matter of the programme and the timing of the broadcast, nor is the public nature of the photographs relevant to the enquiry as it does not exclude the obligation placed on the Respondent in terms of Clause 28.4 of the Code; and further;

11.3.2. Even if the inclusion of the images was justified in the public interest, the Respondent **ought to have exercised a certain degree of care and informed the family** of the broadcast prior to its airing.

11.4. Although **prior consent from the next-of-kin may not have been necessary, prior notification at the very least was required** to mitigate the impact on the next-of-kin allowing them the opportunity to avoid the broadcast at the times in question and / or to **psychologically prepare them** for its airing. This would have constituted a minimum standard of care for the next-of-kin as required in terms of the standard of exceptional care as set out in the Code.

12. **RECOMMENDATIONS**

Taking into consideration the findings set out above, the Commission makes the following recommendations:

12.1 That the Respondent tender **an unconditional apology to the Complainant within 6 (six) weeks from date of receipt of the Commission's report**. In considering the form of apology and the issuing thereof, the Commission is mindful of the **need to limit unwarranted negative impact on the integrity of the Respondents reporting**, the need to recognize and affirm the experience of the Complainant and the **need to**

increase awareness of the duty of exceptional care required of the Respondent. In the circumstances, the Commission is of the view that the **apology to the Complainant be tendered by the Respondent through the Commission as a constitutional body.** The terms of such apology are to be settled by the Commission and Respondent within **4 (four) weeks** hereof.

12.2 That the **Respondent puts in place measures** to ensure that all future matters of a similar nature are dealt with in a manner that gives **maximum regard to the level of care required in terms of Clause 28.4. of the Code** i.e. that next of kin are provided with reasonable prior notification of any broadcast of images which have the potential of causing them trauma or emotional distress. The Respondent is to **provide the Commission with written confirmation that such steps will be implemented within 6 (six) weeks** from date of receipt of the Commission's report; and

12.3 That the **BCCSA consider codifying and providing best practice guidelines** in consultation with its membership with regard to the content of 28.4 of the Code, particularly in regard to deceased persons; and provide the Commission with **confirmation of such undertaking within 4 (four) weeks** from date of receipt of the Commission's report.

13. APPEAL

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

**The Chairperson
South African Human Rights Commission
Private Bag X2700
Houghton
2041**

SIGNED ON THIS THE 10th DAY OF November 2014.

A handwritten signature in black ink, appearing to be 'M.L. Mushwana', written over a horizontal line.

Commissioner Adv M.L. Mushwana

Chairperson

South African Human Rights Commission