BROADCASTING COMPLAINTS
COMMISSION OF SOUTH AFRICA

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CASE NUMBER: 37/2013

DATE OF HEARING: 20 NOVEMBER 2013
JUDGMENT RELEASE DATE: 23 DECEMBER 2013

KHAN **COMPLAINANT**

vs

HEART 104.9FM **RESPONDENT**

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
PROF HENNING VILJOEN (DEPUTY CHAIRERSON)
DR LINDA VENTER
REV DANIE DU TOIT (CO-OPTED)

THE COMPLAINANT WAS INVITED BUT WAS UNABLE TO ATTEND.

FOR THE RESPONDENT: GARY PETERSEN: MANAGING DIRECTOR ACCOMPANIED BY DENVER APOLLUS PROGRAMME MANAGER OF HEART 104.9FM.

Gender – derogatory statement - no advocacy, therefore no hate speech – however harmful to children -Khan vs Heart 104.9FM, Case No: 37/2013(BCCSA)

SUMMARY

Words derogatory of women held to not amount to hate speech since the element of promotion was absent.

Words, however, held to have been harmful to children in that it would tend to lessen their respect for women.

JUDGMENT

PROF KOBUS VAN ROOYEN SC

[1] The Registrar received a complaint concerning a broadcast which included a derogatory statement made in jest. I referred the matter to a Tribunal for a hearing and judgment.

[2] **The complaint was formulated as follows:**

"Nick fineburg on air;
"Jou ma se paw paw"
Yesterday @ aprox. 5:50 pm

This is distasteful to say the least with his female colleague commenting 'he finally gets it right'.

Then @ the end the female announcer repeating that!

Women have been oppressed for centuries and fighting sexism inter alia whilst continuously working hard @ trying to change mindsets to get respect and minimise and/or eradicate abuse of women and children.

It is common in many communities to use 'jou ma se p..s' (sorry about having to say it outright or spell it) Or other vulgarity involving the mother); 'mother f.cker', 'lmimp' and 'lmimmp' (laugh me in my p..s and laugh me in my mother's p..s!) Used by some freely in bbm or mixit or whatsup etc!

This is a direct attack on women per se and their dignity!

Yet here Heart 104.9 fm radio presenters jump on this very band wagon and in so doing encourage sexists attacks on women however 'differently' intended!

Shameful. I hereby demand that henceforth they refrain from the use of that phrase or similar such language, failing to I shall lodge a complaint in the equality court against the radio station. In addition a public apology would do. Thanking you in anticipation."

[3] The Complainant, having been unable to attend the hearing, filed further motivation for her point of view. She accentuated the seriousness of the matter for her as a woman and for women generally. Since we agree with her point of view on the degrading nature of the words, we need not include her full additional argument. The question is, however, whether the words reached the point of advocacy of hatred that amounted to incitement to cause harm.

[4] The Respondent argued that the station was attempting to build a strong sense of propriety amongst its listeners and agreed that the words complained of were objectionable in the extreme and went against the basic principles for which the radio station stood. Steps were, indeed, taken to, once again, ensure that this kind of language – in fact all offensive language – should not be part of the vocabulary used by presenters of the station and, in any case, in all material which is broadcast.

EVALUATION

[5] The advocacy of hatred based on gender that constitutes incitement to cause harm amounts to a contravention of the Broadcasting Code, unless exceptions such as public interest and documentary matters apply. The exceptions obviously do not apply to the words broadcast. Four requirements must, however, be present: advocacy, hatred, incitement and harm.

[6] In the present matter the Complainant argued and confirmed that she was deeply hurt in her dignity as a woman to have heard the words. That dignity is a core Constitutional value has been emphasised by our Courts.

In *Khumalo and Others v Holomisa*[1] O'Regan J sated the following as to *iniuria*:

> [27] In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*. *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human

[1] 2002 (5) SA 401 (CC).

> dignity. No sharp lines then can be drawn between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution. No argument was addressed to this Court on the relevance of the right to privacy to this case and I shall not consider it further. (footnotes omitted)

In the same judgment O'Regan J also emphasises the importance of freedom of expression and the important role that the media plays in a democracy:

> [24] In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. *As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society.* If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. *If they vacillate in the performance of their duties, the constitutional goals will be imperilled.* The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16.
>
> [25] *However, although freedom of expression is fundamental to our democratic society, it is not a paramount value*. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality. (footnotes omitted and emphasis added)

We have no doubt that the dignity of the Complainant was impaired seriously. The harm requirement has, accordingly, been met. The words amounted to more than mere disrespect, they debased the femininity of women seriously.

[7] The next question is whether the words amounted to the *advocacy* of hatred. Although the words were denigrating, they did not amount to *advocacy* for which Heart FM could be held responsible. Before a finding of advocacy may be made, the words must, at least, amount to a *promotion* of hatred. Although it was stated by the Complainant that the sentence was repeated by one of the female presenters, such repetition was not part of the material provided to us. We will accept, without deciding, in favour of the complainant that there was, indeed, a repetition of the words by one of the female presenters. The female presenters, however, would seem to have enjoyed the joke, judged by their laughing. There was, accordingly, no criticism expressed or any corrective. Although the words used did not correspond to the original derogatory expression, which is much more problematic, everyone who knows the original phrase, would have been reminded of the original by hearing the softer surrogate. Weighing the ease with which the words were said

by the male presenter and the laughter it evoked from the female presenters against the indignity suffered by the complainant and, most certainly also by many other women, we agree that the words were ill-chosen and did not fit the high standards which are expected from, especially, presenters. We, accordingly agree with the station manager, that this kind of language is not acceptable on Heart FM. However, in *law*, they did not, in the circumstances, meet the test of advocacy. If they were to be repeated in future, an inference of promotion of this kind of language might well be found. In fact, repetition of a derogatory joke about Venda women was held to have led to a finding of hate speech based on gender in *Sixholo v Metro FM*.[2]

[8] We have, however, come to the conclusion that since a large number of children were likely to have been present during the broadcast, there was a contravention of the Code on the basis that clause 6(11) had been transgressed. The sub-clause provides as follows:

> No excessively or grossly offensive language should be used before the watershed period on television or at times when a large number of children is likely to be part of the audience on television or radio.

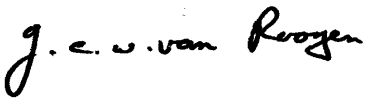
The words "Jou ma se paw-paw" are grossly offensive within the South African context. They strongly remind of the seriously derogatory original phrase, which need not be repeated here. The words are also, within the same context of children, harmful to children in terms of clause 6(1), which provides as follows:

> Broadcasting service licensees must not broadcast material which is harmful or disturbing to children at times when a large number of children are likely to be part of the audience.

[2] Case 22/2012; Judgments Online Lexis Nexis 29047(BCCSA).

This is not the kind of language one would wish to be heard or used by children. The words have the capacity of being repeated just for the fun. It is not an excuse to argue that many older children know the words. The test in law is not whether the words would indeed lead to an increased use of the words, but whether they have the tendency of leading to increased use. In any case, the words also have the tendency to harm the respect which children (in fact, everyone) should have for women.

The complaint is, accordingly, upheld on this ground. However, in the light of the Respondent's apology for what happened and its sincerity in stating that the use of the words are totally against station policy, we have decided to merely reprimand the broadcaster and not consider the imposition of a fine.



JCW VAN ROOYEN SC
CHAIRPERSON

Commissioners Viljoen and Venter and Co-opted Commisioner du Toit concurred in the above judgment.