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CASE NUMBER: 45/2012

DATE OF HEARING: 11 OCTOBER 2012
DATE OF ISSUE OF JUDGMENT: 15 OCTOBER 2012

TIRY **COMPLAINANT**

vs

LOTUS FM **RESPONDENT**

TRIBUNAL: **PROF JCW VAN ROOYEN SC (CHAIRPERSON)**
DR N MAKAULA
MR A MELVILLE
MR E LININGTON (CO-OPTED)

The Complainant was invited but was unable to attend.

For the Respondent: Mr. Fakir Hassen, Manager: Broadcast Compliance, Policy and Regulatory Affairs and Ms Veronica Barnard, Compliance Officer.

Jurisdiction – where complainant conceded in her reply that there was no contravention of the Code, the BCCSA does not have jurisdiction to decide a matter. Tiry vs LotusFm, Case No:45/2012(BCTSA).

SUMMARY

The Registrar and Chairperson of the BCCSA were under the impression that the Complainant was, indeed, complaining about a contravention of the Code and, accordingly, the matter was referred to a Tribunal. The Complainant's further correspondence, which

the Registrar only received after a Tribunal had heard the matter, however, made it clear that the Complainant was not of the view that the Code had indeed been transgressed. She, however, complained about the presenter's having been insensitive. It was permissible for the BCCSA to take note of the new material, since the initial intention, as conveyed to the Complainant, was to hear the matter ten days later. The Complainant indicated that she would not attend the hearing on the 11th October. However, she added to her written argument on the afternoon after we had already heard the matter, obviously believing that the matter would only proceed on the 11th.

The BCCSA may only deal with complaints that are claimed to amount to a contravention of the Code. Of course, the Registrar is entitled to reject complaints which do not make out a *prima facie* case of a contravention of the Code. Since remarks which are made in regard to pending court cases could amount to a contravention of Clause 12.2 of the Code, she decided to refer the matter to me.

The jurisdiction of the BCCSA is, in fact, dependent on a complaint which alleges that a contravention of the Broadcasting Code has taken place. Where a contravention of the Code is not alleged, the BCCSA cannot simply claim jurisdiction of its own volition. The Tribunal was, accordingly, not permitted in law to come to a decision on the matter.

The matter was removed from the roll of the BCCSA.

JUDGMENT

PROF JCW VAN ROOYEN SC

[1] A complaint was received by the Registrar, which I placed before this Tribunal. It will appear from the judgment that, after the hearing, it emerged that the Complainant was, in fact, not of the view that the Broadcaster had contravened the Code

[2] Any material which reaches the Registrar after a hearing is not accepted as part of the material before the Tribunal. However, in this case, it was most important to do so because, if the Complainant had been present at the hearing, she would have enlightened us to her actual view – which indeed emerged from the email received from her *after* the hearing. The Registrar made this letter available to the SABC, who commented on it after the hearing.

[3] It should be added, that the matter had been set down for 11 October. However, the Registrar came to an arrangement with the representative from the SABC, Mr Hassen, that since he was present at our Offices for two other matters, this matter could also be heard on the 1st, since another matter was postponed from 1 October to 11 October. In the ordinary course, it is impermissible for a complainant to file material after the matter had been heard. But, of course, she was unaware of this since she believed that the case would be heard on the 11th October. That is why I have permitted the Complainant's email, which reached the Registrar after the hearing, to be sent to the SABC's representative. Mr Hassen then also answered the latter email. In the email the Complainant conceded that the Code had not be contravened and accentuated that the use of the word "fishy' in regard to the ongoing trial, was nevertheless insensitive.

[4] **The initial Complaint read as follows:**

"Yesterday, 4/9/12, Faheem passed comments re the Dewani case. It was between 16h00 - 16h30. He said where are all those people who complained about his comments on the Dewani case, "why don't they write now or even better phone in, to say that he was right"…please listen to the recording to get the accurate words. It is clear to me, that Faheem does not understand why he got suspended at the time. People complained about his inappropriate comments. The radio station is not his platform for personal opinions of this nature. Please look into this matter and address him regarding his comments.''

[5] **The broadcaster commented as follows:**

"**BCCSA COMPLAINT: ALLEGED BIASED INFORMATION – GADIJA TIRY – LOTUS FM FAHEEM JAMADAR – 04.09.12 - 16:05**

The news headlines preceding the remarks by the presenter contained an item on the now well-documented Dewani murder case.

At the time of the murder, the presenter had made some remarks that there was something "fishy" about the incident, and this has indeed turned out to be the case as the court case now proceeds.

In light of that, the presenter mentioned that the same people who had complained about his initial remarks should now acknowledge that his comment then was not unjustified.

This was not intended to be malicious or offensive in any way nor was it a personal attack on anyone. There has been no contravention of the Code whatsoever."

[6] The Complainant replied as follows:

"I will not be able to attend. My feelings are that Faheem received a suspension with his initial remarks about two years ago.It was unnecessary for him to remark recently "why don't they phone in now to say he was right". This clearly shows that he does not understand why he got suspended in the first place. Many thanks for your feedback.

After reading through all the correspondence from yourself to me, I would like to outline once again my reasons for making this complaint to the BCCSA against Mr. Faheem Jamadar of Lotus FM.

The initial letter of complaint was to bring your attention to his insensitive and inappropriate comments, in my opinion, regarding the report of the murder of Anni Dewane in Cape Town. While he is, like everyone else, entitled to his opinion on any matter, I did feel that the comments were insensitive and inappropriate, in the context and at the time, that they were mad
e. The fact that he was suspended for those comments indicated to me that the Commissioner was in agreement with the basis of my complaint. Subsequently, Mr. Jamadar's hunch that there was something "fishy" about the murder has panned out and, as his recent comments have indicated, he is quite chuffed with himself. I am happy for him.

This, in no way, detracts from his insensitive and inappropriate comments. On the contrary, I find it even more disturbing that he seems to have missed the point completely! It brings into question his EQ and what norms and standards are required by the public broadcaster when hiring people to represent them on the public airwaves. The letter by Mr. Fakir Hassen, Man. Broadcast Compliance, Policy and Regulatory Affairs, SABC, also highlights this point. *Mr. Hassen rightly states that "no contravention of the Code whatsoever" has been made and I agree, but that was never the point of the complaint! The point and essence of the initial and subsequent letters of complaint was to question Mr. Jamadar's insensitivity to a very serious matter*. I would assume that the Commissioner agreed with this and based on that, Mr. Jamadar was suspended. Mr. Hassen's comment that "his (Faheem) comment then was not unjustified" seems to indicate that he did not listen to the initial comments made by Mr. Jamadar at the time of the murder. This whole matter is not about acknowledging whether Mr. Jamadar's comments were justified or unjustified, but rather whether they were appropriate or not. I hope that my initial and subsequent complaint will be understood as I intended them." (italics added)

[7] The broadcaster replied as follows:

"*The complainant herself admits that there was no contravention of the Code, but suggests, despite her objectionable comments* about selection of staff, that the presenter's comments were in poor taste at best. That issue was indeed addressed when the first complaint was received. That matter cannot be reopened now and the only issue before the Commission is the current comments, which were a reference to the first remarks about something being "fishy".

We must also remind the Commission that at the time the initial "fishy" remarks were made, there had been no arrest made. This time round, two people have already been convicted of the murder. During their trials facts emerged which clearly justified the presenter's initial remarks of

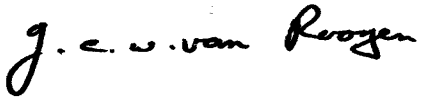
something being “fishy”, which was in no way preemptive of any pending court judgment at the time.

As a closing point, although we do not usually get personal about remarks by complainants, she is completely mistaken in making several assumptions, especially about me not having listened to the original broadcast. We would be foolish to try to present to the BCCSA without having done so.”(emphasis added)

Evaluation

[8] The Registrar and I were under the impression that the Complainant was, indeed, complaining about a contravention of the Code and, accordingly, the matter was referred to a Tribunal. The Complainant’s further correspondence, which the Registrar only received after we had heard the matter, however, made it clear that the Complainant was not of the view that the Code had indeed been transgressed. She complained about the presenter’s having been insensitive. The BCCSA may only deal with complaints that are claimed to amount to a contravention of the Code. Of course, the Registrar is entitled to reject complaints which do not make out a *prima facie* case of a contravention of the Code. Since remarks which are made in regard to pending court cases could amount to a contravention of Clause 12.2 of the Code, she decided to refer the matter to me. The jurisdiction of the BCCSA is, in fact, dependent on a complaint which alleges that a contravention of the Broadcasting Code has taken place. Where a contravention of the Code is not alleged, the BCCSA cannot simply claim jurisdiction of its own volition.

The matter is, accordingly, removed from the roll of the BCCSA, since we did not have jurisdiction in the matter.



PROF JCW VAN ROOYEN SC
CHAIRPERSON

Commissioners Makaula, Melville and Linington concurred in the above judgment.