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CASE NUMBER: 01/2012

DATE OF HEARING: 23 FEBRUARY 2012

A DE NECKER — **1ST COMPLAINANT**
J BOTHA — **2ND COMPLAINANT**

vs

MULTICHOICE CHANNEL 122 — **RESPONDENT**

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
DR LYNDA GILFILLAN
MS GIUSEPPINA HARPER
ADV BOITUMELO MMUSINYANE

Respondent: Mr Bruce Mkhize, Regulatory Compliance Manager, Regulatory Affairs.

Allegedly racist and derogatory remarks directed at whites, including reference to genitalia – Tribunal held that offensiveness is not a test – also, while the remarks may be in poor taste they do not infringe the Code – De Necker & Botha vs Multichoice Channel 122, Case No: 01/2012(BCTSA)

SUMMARY

Two complaints were lodged regarding a song aired on DSTV Channel 122. The first alleged that a song contained racist remarks aimed specifically at whites, and that derogatory reference was made to genitalia, that the song is offensive, demeaning and in poor taste. The Tribunal held that the song is a satire that relies on racial stereotypes for its impact, and that these stereotypes are not calculated to advocate harm or incite to violence. The Tribunal also held that mere offensiveness is not a test, and concluded that the song does not fall into the hate speech category. The complaints were not upheld.

JUDGMENT

DR LYNDA GILFILLAN

[1] Two complaints were lodged with the Registrar of the BCCSA concerning remarks made in a song aired on DSTV Channel 122. The first complaint relates to a broadcast aired at "around 21:00" and again at 21:13 on 8 December 2011, and the second complaint relates to the broadcast of the same song at 01:30 on 16 December 2011.

[2] **The complaints read as follows:**

De Necker: "Tonight on DSTV Channel 122 during the John Steward Show at around 21:00 and again during the Steven Colbert show at 21:13 there is a so called quicky comedy featuring an Indian???? man making blatantly and shocking racist remarks aimed specifically at whites. Examples of his so called comedy is as follows: " I have small genitalia cause I'm white and immigrate to Australia cause I'm white etc. and many more such comments relating to whites and also for some bizarre reason the DA – cause they're whites????. I find this unacceptable and derogatory. There is no place for racism on television. I trust you will investigate this matter and provide feedback."

Botha: "At 1:30 am on December 16th 2011on Comedy Central channel an utterly offensive clip aired that can only be described as racist. A man plays a guitar singing a song about stereotypical things a white person does. I am a very open minded person and embrace all the wonderful cultures of our fantastic country, however am very offended by the blatant reference to the size of a white person's genitalia in this clip. I'm sorry but this reference made me view this entire clip in a demeaning and racist light. I sincerely hope that you will manage to get rid of it and I hope the channel will apologise to all the inhabitants of our wonderful country for making such remarks about a single race group. It is in poor taste and undermines all the good that has been achieved in our beautiful country in the last 17 years. Thank you and kind regards"

[3] **The Respondent's argument included the following:**

2.1 Deep Fried Man (real name Daniel Friedman) is a white South African comedian who is very well known and is considered to be amongst the top 10 comedians in South Africa.

2.2 The song was broadcast as a filler which was actually a promotion of the new channel "Comedy Central."

2.3 Comedy Central is a new channel broadcast from the United States and is dedicated to comedy based programming, including stand-up comedy, sitcoms, etc.

2.4 Deep Fried Man in his song pokes fun at some commonly held South African stereotypes as is usually the case with most comedians these days.

…

3.4 In its previous rulings regarding the complaints relating to hate speech, the Commission stated that broadcasters enjoy the freedom of expression as enshrined in the Constitution of the Republic of South Africa as long as the expression does not amount to hate speech.

…

3.7 We submit that the song can be described as a satire which pokes fun at some commonly believed South African stereotypes. Its main intent is to be funny only but one could say that its greater purpose is also constructive social criticism, using wit s a weapon.

3.8 We submit that most South Africans have a well-developed sense of humour and welcome good humored mockery (consider Shapiro for instance). In fact it has become a common occurrence for a number of comedians to use South African stereotypes in their material and in most instances those jokes hardly evoke any sense of harm or prejudice. The song was in no way produced with malice intent and it was not meant as a serious criticism of the subject matter, it does not intend to harm the subject matters morality, ideologies or cultural dimensions.

3.9 Furthermore the song was broadcast well after the watershed period had commenced.

Evaluation

[4] The first Complainant states that a performer in a comedy feature made "racist remarks aimed specifically at whites", and that these were "derogatory". The second Complainant alleges that the song that was sung was "offensive" and "racist" and made "demeaning and racist" remarks relating to "the size of a white person's genitalia", which were in "poor taste".

[5] At the hearing, Mr Mkhize, for the Respondent, explained that the offending song by popular South African comedian Daniel Friedman, a.k.a. Deep Fried Man, was a filler promoting the new channel, "Comedy Central", which is broadcast from the United States. The song was alleged to "poke fun at commonly held South African stereotypes", as is typical of the genre of stand-up comedy. The Respondent referred to Clause 10 of the Subscription Code, the "hate speech" clause. During the course of his argument, the Respondent cited the constitutional right to freedom of expression, as recognised by the BCCSA, and also provided a comprehensive definition of hate speech. The Respondent also contended that the song is "a satire which pokes fun at some commonly believed South African

stereotypes", and that, as such, its purpose is to "offer constructive social criticism, using wit as a weapon". It was suggested, furthermore, that South African audiences have "a well-developed sense of humour", that comedians frequently resort to "stereotypes", and that the song had no malicious or harmful intent. Moreover, the song was broadcast after the watershed, and the Respondent concluded that the song did not "advocate hatred against the white community".

[6] I checked the Internet, and discovered that the song is in fact called "The White Song", and not "Because I am White", as suggested by the Respondent. The singer is a white South African, who makes references to rugby, sosaties, pilates, white-collar crime, organic vegetables – all of which are typically associated with white people – and the last lines of the song are: "I've got small genitalia / And one day I hope to emigrate to Australia". The lyrics feed into typical stereotypes, and may even be traced back to the gentle satire of Jeremy Taylor's 1961 hit song, "Ag Pleez, Daddy", which also relied on certain white stereotypes for its effect. To have accused Taylor's song of hate speech for threatening to "moer all the outjies next door" would have been nonsensical, and in approaching "The White Song" this could perhaps be borne in mind. The matter of genitalia size plays into a common stereotype – however false and unfortunate – that white men have smaller genitalia than black men. While this reference may have offended some viewers, it should be borne in mind that mere offensiveness is not a valid test, as has frequently been argued in judgments and adjudications of the BCCSA.[1]

[7] "The White Song" is a rather simple ditty, which relies for its comic effect on certain stereotypes. It employs a form of comedy that generalises about the characteristics of certain groups of people and pokes fun at them, for example, Irish jokes, Van der Merwe jokes, and even "blonde" jokes. The song is a simple, gentle satire, mocking the preferences and lifestyle (rugby, fitness, organic food) and the anxieties as well as the neuroses of white people (fear of crime, fear of the political future in South Africa). The reference to "genitalia" is clearly an attempt

[1] See, for example, Smith vs 702, Case 04/A/2012.

(undoubtedly crude and perhaps inept) at creating a rhyme with the somewhat inevitable reference, in the context of the song, to the issue of emigration to Australia (the stereotype of white people "packing for Perth" is one that has been prevalent for many years, now). Of course, the reference is to an intimate part of the human body, having to do with sexual prowess, and it cannot be denied that the size of genitalia is a sensitive matter that is of great concern to some people. But the average reasonable person who is not hypersensitive would be unlikely to regard a reference to the size of genitalia as being any more offensive than reference to the size of a person's nose, or brain, for that matter.

[8] The broad context of the song is the introduction of a new comedy channel, and the song itself formed part of the promotional material. In this sense, it seems appropriate, however undesirable and even offensive certain references in it may be to some viewers. It was broadcast on a few occasions, but always after the watershed. Its target audience is quite obviously an adult one, and the humorous lyrics would probably only be understood by an adult audience. The song is sung by a white South African, it consists of a series of "in-jokes" that would best be appreciated by that group, which it gently mocks, apparently in an attempt to point out certain forms of behaviour that are self-destructive ("white-collar crime") and perhaps even counterproductive (emigration). If anything, the song points out the foibles of white South Africans and ridicules them; by doing so, it sets out to make its audience examine themselves and to realise how ridiculous, even ludicrous, some of their modes of behaviour are, and hopefully, to improve such behaviour. If, in the process, the song hurts the sensitivities of some white people, for example by its reference to the supposed size of their genitalia, this is an inevitable aspect of satire, which frequently resorts to exaggeration for effect. The cumulative effect of the images of white people is mildly grotesque, creating an exaggerated picture of white people, presenting them as somewhat hypocritical and over-concerned with their physical well-being (fear of crime, obsession with organic foods) and also perhaps paranoid in their exaggerated fears of crime and the politics in South Africa.

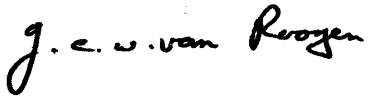
[9] The song is a joke that is told at the expense of white people. People of other races are likely to laugh at the attitudes and behaviours described in the song, many of which are accurate if exaggerated descriptions. Like all stereotypes, the stereotype presented in the song contains some truth. At most, the song incites people to laugh – either at themselves, or at the expense of others. It is not at all clear how the song advocates hatred or in what way it constitutes incitement or rouses people to harm white people. I find nothing in the lyrics that approximates hate speech, whose requirements are the advocacy of hatred that constitutes incitement to cause harm, in this case, to white people.

[10] At issue here is the right of the broadcaster to broadcast material that may annoy or even offend certain people, and the right of South Africans to be exposed to such material. In deciding on a matter such as the present one, it should be borne in mind that the principle of freedom of speech is hard-won, and should be respected, and in this regard Kriegler J has argued as follows in *State v Mamabolo*[2]: "Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America." While it may be argued that some individuals are more sensitive than others, and therefore have lower levels of tolerance, it should at all times be borne in mind that the norm must be set by the average reasonable person who is not hypersensitive.

[2] 2001 (3) SA 409(CC) par 37.

[11] As I have previously argued in relation to spoofs and satirical material,[3] it is important "to guard against losing perspective and losing our sense of humour. To cry 'Hate speech' at the slightest provocation has the effect, in my view, of cheapening the notion, and reducing its potency: it may no longer generate a response when the situation genuinely calls for it, and when our social fabric is genuinely threatened by incitements to cause harm and utterances that really do promote violence."

In the result the complaint is not upheld.



JCW VAN ROOYEN SC
CHAIRPERSON

The Chairperson Van Rooyen SC and Commissioners Harper and Mmusinyane concurred in the above judgment of Dr Gilfillan.

[3] Case Number 33/2010. Regarding this matter, see also Van Rooyen in 33/2010: If the hate speech alarm is sounded indiscriminately, it will lose its efficacy and power in cases where hate speech genuinely exists, and where it needs to be dealt with according to the stipulations of the Broadcasting Code, section 16(2)(c) of the Constitution of the Republic and the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000.