



P.O.Box 412365 • Craighall • Tel (011) 325-5755 • Fax (011) 325-5736 • e-mail: bcesa@nabsa.co.za
No 2 Albury Park • Magalieszicht Ave • Dunkeld West • 2196 • www.bcesa.co.za

Case Number: 16/2004

Date of Hearing: 10 June 2004

High Commissioner of the Federal Republic of Nigeria First Complainant

President of the Republic of South Africa Second Complainant

vs

94.7 Highveld Stereo

Respondent

**TRIBUNAL: Prof Kobus van Rooyen SC
Mr Barnard Mokwena
Prof Henning Viljoen
Prof Gerrit Olivier (Co-opted member)**

For Complainant: No appearance

For Respondent: Ms Justine White from Edward Nathan & Friedland Attorneys, accompanied by Mr Ravi Naidoo, 94.7 Highveld Stereo, Station Manager and Ms Pheladi Gwangwa (Regulatory Affairs Manager, Primedia.

*Disparaging remarks made about the President of the Federal Republic of Nigeria bringing cocaine into the country on his visit to attend the inauguration of President Mbeki – remarks of presenters, judged in context, not amounting to hate speech – words, however, constituting comment, which were not based on facts truly stated or fairly indicated and referred to – untrue remarks therefore amounting to contravention of clause 35 of Code – High Commissioner of the Federal Republic of Nigeria **and** The President of the Republic of South Africa v 94.7 Highveld Stereo, Case No: 16/2004*

SUMMARY

Two presenters of the Respondent made disparaging remarks about the President of the Federal Republic of Nigeria as having brought cocaine into the country on his visit to attend the inauguration of President Thabo Mbeki. Such remarks, judged in context, found not to satisfy the strict requirements of hate speech. However, held that the remarks amounted to comment which was not based on facts truly stated or fairly indicated and referred to. Broadcast of such untruthful material found to amount to a serious contravention of Clause 35 of the Broadcasting Code. Respondent directed to apologize again in two newscasts for this serious contravention of the Code. The Complaints of the President of the RSA and the Nigerian High Commissioner were, accordingly, upheld by the Commission. The Commission directed Highveld Stereo to broadcast the decision of the Commission on two of its newscasts and also repeat its apology to the President of Nigeria. Had Highveld Stereo not taken internal and external steps to rectify and apologise for the error, a substantial fine would have been imposed.

JUDGMENT

HP Viljoen

[1] On 28 April 2004 at about 19:15 two presenters, Messrs Revin John and Lloyd de Bruin, of the Respondent radio station, discussed on air the inauguration of President Thabo Mbeki the previous day. The programme on which this took place is a music programme with some light-hearted, jocular discussion and remarks made in-between the songs. The discussion turned to the President of the Federal Republic of Nigeria, H.E. Chief Olusegun Obasanjo and proceeded as follows:

John: Oh and there's Nigerian President Olos...um...Olusegun Obasanjo.

De Bruin: Oh! Was he here?

John: Ja! He arrived as well. There he is, there. Looking good in his suit.

De Bruin: I am sure he's looking good.

John: Looking sharp.

De Bruin: He must be one of the wealthiest presidents in the world.

John: Absolutely! Nigerian President Obasanjo came. Do you...How many kilograms of cocaine do you think he managed to bring in?

De Bruin: Whatever his bag could take.

John: I reckon.

De Bruin: Ja.

John: Do you think he paid a visit to the Nigerian embassy at Ponte Tower?

De Bruin: You mean the little Republic that is...

John: Nigeria in South Africa.

De Bruin: Ja.

John: I have no doubt! I have no doubt he paid them a quick visit".

- [2] The Nigerian High Commissioner in South Africa, took grave exception to these remarks and formally lodged a complaint with the Broadcasting Complaints Commission of South Africa. In the complaint it was stated, *inter alia*, that the Government of Nigeria was shocked at the disparaging remarks made in regard to its President. The remark had caused enormous damage to the person and integrity of their President.
- [3] The President of the Republic of South Africa also lodged a complaint against the Respondent about the same broadcast. The complaint, as formulated by adv Mojanku Gumbi, legal advisor to the President, *inter alia* states that "President Obasanjo came to our country at the invitation and as a special guest of President Mbeki. Accordingly, President Mbeki carried the responsibility of ensuring that he is not exposed to any form of abuse, physical or otherwise."
- [4] Ms Justine White brought to our attention that the Respondent, after an internal investigation, suspended both presenters for one week without pay. The Station Manager and the Regulatory Affairs Manager of Highveld Stereo personally conveyed the radio station's apology to the Nigerian High Commission. The apology was also contained in a press statement that was carried by SAPA and published in the "Citizen" and "Beeld" newspapers. Finally, the above-mentioned

two representatives of the radio station, as well as the Executive Chairman and the CEO of Pri-Media Broadcasting, the owners of the radio station, met with the High Commissioner and personally conveyed their apologies. In its written response to the complaint that was lodged with the Registrar, the Respondent asserted that it is not their policy to sanction such tasteless remarks.

[5] It must now be decided whether the remarks complained of constitute a contravention of the Code of Conduct for Broadcasters. Two possible clauses of the Code in terms of which the matter could be decided, deal with (1) hate speech and (2) comment that must be based on facts truly stated or fairly indicated and referred to. The Tribunal will deal with these clauses in detail below.

[6] Clause 16.1 of the Code provides:

Licensees shall not broadcast material which, judged within context, sanctions, promotes, or glamorizes violence based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability.

Since the coming into operation on 7 March 2003 of the revised Code of Conduct, this Tribunal has had opportunity to interpret and apply this clause¹. The Tribunal was of the view that the clause, as it stands, does not adequately deal with the problem of hate speech. The Tribunal accordingly read section 16(2)(c) of the Constitution of the Republic, which is part of the Preamble to the Code, into the main body of the Code.

[7] In *Labuschagne v Yfm*, referred to in footnote 1, in paragraph 2 thereof, the Chairperson, Prof JCW Van Rooyen, writing for an unanimous Tribunal, stated as follows:

The new Broadcasting Code has become effective on the 7th March 2003 and we had to interpret the Code in such a manner that a section of the Preamble, which embodies section 16 of the Constitution of the RSA, would become part of the

¹ See for example *T Labuschagne v Yfm*, case number 21(2)/2003.

body of the Code. Having accepted section 16 of the Constitution in the Preamble and, as it were, regarding this as being at the very heart of the Code, it could never have been the intention of the Independent Communications Authority to replace the hate speech provision in section 16(2)(c) with a provision which required that the glamorizing of violence should result from the material broadcast. Section 16(2) of the Constitution should, accordingly, be added to clause 16 of the Code. Thus, violence, or the glamorizing thereof, would not necessarily be part of section 16(2)(c), which provides as follows: “The right to freedom of expression does not extend to ... (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”.

Freedom of expression versus hate speech

[8] The first question that must be addressed is whether the broadcast complained of overstepped the limits of freedom of expression to the extent that it constituted hate speech. It is the task of this Tribunal, like a court of law, to seek and find the point of balance where the basic right ends and the limitation starts. Ms White referred us to the following quotation from the judgment of the Constitutional Court in *South African National Defence Union v Minister of Defence and Another*², a quotation that has often been referred to in judgments of this Tribunal:

Freedom of expression lies at the heart of a democracy.... The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.... The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.

² *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC), at paragraphs 7 and 8.

[9] The Tribunal was also referred to its judgment in *Clarke and Others vs East Coast Radio*³ where the following was said:

*The value of freedom of speech is put to its ultimate test when speech is employed in an outrageous and shocking manner – a manner often unacceptable to many, but which is, nevertheless, protected in law.*⁴

[10] Whilst the words “[f]reedom of expression lies at the heart of a democracy” can create the impression that there are no limitations to this right, the drafters of the SA Constitution resolved that checks and balances had to be built into the Constitution, especially in the light of South Africa’s history. This new freedom could have been abused to the extent that the mischief of racism, chauvinism and intolerance could be perpetuated under the guise of freedom of expression. This could not be permitted; therefore, the limitation contained in section 16(2)(c) of the Constitution was also read into our Code.

Applying the hate speech test

[11] The test for applying the limitation is a fairly strict one. Not only must it be clear that there was *advocacy* of hatred based on race, ethnicity, gender or religion, but it must also be established that such advocacy constituted *incitement* to cause *harm*. As to the advocacy of hatred requirement, the context in which the words were spoken is of utmost importance. As stated above, the programme in which the remarks complained of were made, is mainly a music one, interspersed with light-hearted, jocular banter between the two presenters. If it were a serious discussion of the drug problem in South Africa and mention was made of the President of Nigeria bringing a bag full of drugs into our country, it would have been a completely different matter. In the present case the Tribunal is clearly dealing with off-the-cuff, light-hearted interplay. This can be compared with the

³ Case no: 2003/06

⁴ At paragraph 10

finding of this Tribunal in the case of Ngema,⁵ a case which dealt with a song composed by a Zulu who severely criticised the Indians involved in commerce in Durban and their exploitation of the Zulu people. Although the medium was only a song, the Tribunal found that the tenor of the song amounted to the advocacy of hatred which was likely to instil substantial fear in the minds of the minority Indian community. The Respondent, however, was found not to have violated the Code because of the context in which it was broadcast, namely as part of a news programme. The mere playing of the song would, however, have amounted to a contravention. The Tribunal finds that the words complained of in the programme presently under consideration, judged in context, do not constitute hate speech. No “advocacy” was present. Neither do the words sanction, promote or glamorize violence based on race, national or ethnic origin. Because of this finding, it is not necessary to consider the requirement of incitement to cause harm.

Comment made on facts truly stated or fairly indicated and referred to

- [12] The second possible clause of the Code that could have been violated, is clause 35 which reads:

35.1 Licensees shall be entitled to broadcast comment on and criticism of any actions or events of public importance.

35.2 Comment shall be an honest expression of opinion and shall be presented in such manner that it appears clearly to be comment, and shall be made on facts truly stated or fairly indicated and referred to.

- [13] Ms White argued that what was said by the two presenters did not amount to comment in the strict sense of the word. She quoted dictionary definitions of the meaning of “comment”. Although the said definitions would seem to attribute a certain degree of seriousness to the word “comment”, the word “comment”, as used in clause 35 of the Code could not have been intended to be restricted in this

⁵ *Human Rights Commission of South Africa vs SABC, Case No: 31/2002*

manner. It can also be interpreted to include satirical or jocular comment. It is, accordingly, held that the remarks did amount to “comment”.

- [14] Comment must firstly be based on facts truly stated. In her written response to the complaint, the Regulatory Affairs Manager of the Respondent broadcaster admitted in paragraph 5 of her letter to the BCCSA that there was no basis for the “tasteless remarks”. In other words the remarks were not based on facts truly stated. A second, alternative requirement, is that the comment must be based on facts fairly indicated and referred to. It is regarded as “alternative” because the two requirements are connected by the word “or”. In the *Yfm* case, referred to above, this Tribunal said the following regarding the requirement of fairness:

What is fair is determined by those objective standards of reasonableness which the modern Constitutional community would tolerate.

- [15] In the present case it is found that the presenters probably based their comment on stereotyping of the following nature: “Because he is Nigerian, he must be involved in drug trafficking”. This is utterly unreasonable, not based on fact at all and a remark that the South African community would not tolerate within the ambit of free speech. It follows that the comment expressed by the two presenters of the Respondent failed to pass both tests contained in clause 35 of the Code of Conduct. **The Tribunal accordingly holds that the Respondent contravened the Code in this respect.**

Sanction

- [16] As stated in paragraph [4] above, the Respondent has already taken action against the two presenters by suspending them each for one week without pay. In the industry this is regarded as severe punishment and it is the first suspension of this duration within the experience and existence of this Commission. The Respondent has also apologised publicly and privately to the First Complainant as

Representative of the Nigerian Government in South Africa. The presenters involved have also apologized on air. Had this not been done by the Respondent, the Tribunal would have imposed a substantial fine. By pro-actively taking these steps, the Respondent, in the view of the Tribunal, has atoned substantially for what is admitted by the Respondent to have been “tasteless” and unfounded remarks. Nevertheless, it is in the public interest that the decision of the Commission be broadcast widely.

The Respondent is directed to broadcast before 30 June 2004 in a formal news broadcast between 18:00 and 20:00 for two consecutive days the following statement as the *first* item in that newscast.

“The Broadcasting Complaints Commission of South Africa has directed this station to repeat its apology to the President of the Republic of Nigeria for statements which were irresponsibly made by our presenters about the President during his visit to South Africa for the inauguration of the South African President, Thabo Mbeki. This station has admitted that these statements were not based on fact at all and we have conveyed this apology to the Nigerian High Commissioner in South Africa. The remarks were made without the management of Highveld Stereo’s permission. We do not agree with these flippant and irresponsible comments made by our presenters and we took internal disciplinary steps against them shortly after the remarks were brought to the notice of management. We, once again, apologize to the President of the Republic of Nigeria, the High Commissioner of the Republic of Nigeria and to the President of the Republic of South Africa, who was the host to the President of Nigeria during the inauguration ”

**HP Viljoen
BCCSA COMMISSIONER**

The Chairperson, Commissioner B Mokwena and ad hoc Commissioner Prof G Olivier, concurred with the judgment.