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CASE NUMBER: 16/2005

DATE OF HEARING: 22 FEBRUARY 2005

T RAMASIKE **COMPLAINANT**

vs

94.7 HIGHVELD STEREO **RESPONDENT**

TRIBUNAL: **Prof Henning Viljoen (Acting Chairperson)**
Ms Refiloe Mokoena-Msiza (Co-Opted member)
Prof Gerrit Olivier (Co-Opted member)

Complainant: The Complainant did not attend.

For the Respondent: Ms P Gwangwa – Regulatory Affairs Manager, Primedia

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Complaint of objectionable broadcast where it was stated that the Deputy President should "have his penis cut off" in a controversial programme known for its irreverent character – limits to freedom of expression – material that is "utterly obscene", "highly insensitive", "extremely offensive" and "unfair" not normally evidence of contravention of the Code of Conduct, only when used in programmes specially designed for children or where large numbers of children likely to be part of the audience – even if Complainant complained that dignity of the Deputy President was infringed could no finding be made because the Deputy President did not himself complain – complaint not upheld - T Ramasike vs 94.7 Highveld Stereo Case No: 16/2005.

SUMMARY

Complaint of objectionable broadcast where it was stated that the Deputy President should "have his penis cut off" in a controversial programme known for its irreverent character. Complainant complained that the words were "utterly obscene", "highly insensitive", "extremely offensive" and "unfair". Limits to freedom of expression discussed. Such material not normally in contravention of the Code of Conduct, only when used in programmes specially designed for children or where large numbers of children are likely to be part of the audience. Infringement of dignity discussed. Even if Complainant had complained that the dignity of the Deputy President had been infringed, could Tribunal not make a finding because the Deputy President did not himself complain. Complaint not upheld.

JUDGMENT

H P Viljoen

[1] The "Revin John Show" runs from 19:00 to 22:00 in the evenings on the Respondent radio station. This is a controversial show known for its irreverent style. Politicians often have to bear the brunt of the wit thrown around by the presenter. So it was that on the evening of 3 November 2004 reference was made to a news report of an Indian politician who, as a mark of penitence for his sins, took a vow of celibacy. As could be expected of this show, the discussion soon reverted to the South African situation and suggestions as to what our politicians should do to cleanse themselves of their wrongdoing. The presenter then turned his attention to the Deputy President, Mr Jacob Zuma, who has for quite a time been in the news concerning the Shaik prosecution, and suggested that "he should have his penis cut off". This offended the Complainant who lodged the following complaint with the BCCSA.

[2] **The complaint reads as follows:**

"**COMPLAINT AGAINST MR RAVEN JOHN HIGHVELD RADIO DISC JOCKEY**

It is with great regret, dismay and grave disappointment that I am writing this complaint. The complaint is linked to the statements and comments made at the Top 8 at 8 programme: The statements were made at around 19h47; Date: Wednesday, 03 November 2004; Comments made by Mr Raven John. The abovementioned DJ made comments relating to a male politician in India, who is said to be opting for celibacy in order to be cleansed for his sins. The DJ and is an on-air assistance then made reference to how all the politicians in SA will have to go on celibacy. Mr Raven John then made a statement to effect that the Deputy President, Mr Jacob Zuma, is so corrupt that for him to be cleansed he will have ***"to have his penis cut off***" in order for him to pay for his political sins." The latter statement objectionable on the following basis: It is utterly obscene, it is highly insensitive, it is extremely offensive, it is unfair.

The radio station moves from the basis that all politicians are corrupt and that the Deputy President Mr Jacob Zuma, is corrupt. There is no evidence to these 2 assumptions. As a regular listener of Highveld Stereo as knowing very well that this is family Radio Station, it is highly probable that there might have been under-age listeners at that time who were also exposed to similar comments with a warning that the Radio Station is for adults. For the record I wish to state that I am neither Deputy President Jacob Zuma's supporter, nor am I an ANC member of supporter.

There is no doubt that MR Raven John and his partner are very popular DJ's. The fact thought is that Mr John has been proven to be highly volatile and insensitive on air. The fact that he had to apologise for recently calling the current President of Nigeria "a drug lord", indicates that this statement made on the evening and show in question were not a mistake. I am also quite convinced that given an opportunity and same tools his behaviour will continue. The right of expression of expression has to be balanced with fairness, sensitivity, lack of obscenity and obscene of offensiveness. For the record, I have contacted the Radio Station in question and they are fully aware of my sentiments and will be sending them a copy of this complaint. I therefore submit to you Sir to make a ruling on this matter as to whether the BCC code was violated or not."

[3] **The broadcaster's response:**

1. Highveld Stereo is in receipt of a complaint from Mr. Thabiso Ramasike regarding a broadcast in which the presenter, Mr. Revin John, in discussing an article about an Indian politician's vow of celibacy in penance for his sins, remarked that the Deputy President Jacob Zuma ought to "have his penis cut-off". Mr. Ramasike's complaint is that the remarks were "utterly obscene", "highly insensitive", "extremely offensive" and "unfair".

2. The Broadcasting Code of Conduct ("the Code") provides in clause 26 thereof that offensive language shall not be used in programmes *specially designed* (our emphasis) for children and in clause 27 that no *excessively*

and grossly (our emphasis) offensive language should be used at a time when a greater number of children are likely to be part of the audience. It is our submission that the language used was not excessively or grossly offensive and that none of Highveld Stereo's programmes are designed for children, nor are a large number of children likely to be in the audience.

3. Should it be Mr. Ramasike's contention that the word "penis" should not be used on air, we submit that it is a clinical term and that forbidding its use on air would amount to a sanitisation of the airwaves in a way that is unacceptable in a democratic country with the right to freedom of speech. Free speech entails being tolerant to views, as the European Court of Human Rights said, "that are not only displeasing, but that could often shock or offend"[1]. This was echoed by the Constitutional Court which further stated that "freedom of expression 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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society"[2]. The Broadcasting Monitoring Complaints Committee of ICASA has, in accordance with the Constitutional Court's jurisprudence, ruled that freedom of speech does not only protect unpopular views and speech, but that "the articulation of criticism and the expression of opinions which incense the sensibility of others who hold the contrary opinions must be endured with forbearance in the interests of freedom of speech"[3]. The US Supreme Court also held that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"[4].

4. Politicians and public servants ought to be put to the highest scrutiny with regards to their conduct, by virtue of the office that they hold. It was keeping with this scrutiny that the remarks were made. Further, it was clear from the broadcast that the remarks were the presenters' personal opinions, and that they were based on the media reports that are in abundance, about the Deputy President's involvement in the arms deal and the allegations of bribery that are ascribed to him in Mr. Scabir Shaik's trial on fraud and corruption charges.

5. In addition, in adjudicating on complaints relating to "offensiveness" or even "bad taste", the BCCSA should apply the legal test to such complaints. The test that should be applied should be an objective standard of a reasonable listener who is broadminded and not the subjective standard of a particular listener who complains. The BCCSA has

[1] Handyside v The United Kingdom. 1 EHRR (1979) at paragraph 49
[2] Quoted by the Commission in J Katz vs Highveld Stereo, July 2003
[3] South African Jewish Board of Deputies vs Radio 786 at http://www.radio786.co.za
[4] Terminiello vs City of Chicago 377 U.S 1 (1949)

> acknowledged this much, when it said "our Courts have held, … that the test is that of the reasonable likely viewer…. the legal standard of reasonableness is based on the fictional, balanced viewer who is not overly sensitive[5]". Therefore, in evaluating whether the broadcast material was offensive, the above is the legal test that the BCCSA should apply, and we respectfully submit that in our view, the test has not been satisfied.
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> 6. We look forward to the Commission's ruling on this matter. A recording of the programme is being provided to you together with this response.

[4] Ms Gwangwa, representing the Respondent, prepared an excellent exposition of the legal position in writing, supplemented by her oral submissions at the hearing. We will not repeat all her arguments and the case law to which she has referred, but her arguments are all sound. She started her argument by stating that this is the classical example of free speech. We have to agree, but with the proviso that the right to freedom of expression is not absolute. The limits of free speech are exceeded when, for instance, hatred against people of a certain race group or of a certain religion is advocated, with incitement to cause harm (section 16 of the Constitution of South Africa). The Code of Conduct that is applied by the BCCSA and that has been signed by the Respondent, also contains some limitations on free speech, especially as far as the protection of children is concerned.

[5] The Complainant uses words like "utterly obscene", "highly insensitive", "extremely offensive" and "unfair". There are probably many listeners who had heard the words complained of who feel the same as the Complainant. However, these words in themselves cannot be used as yardstick to determine whether there has been a contravention. Freedom of expression is guaranteed in our Constitution and therefore also in our Code, and this means that the Tribunal must be convinced that the broadcaster exceeded the limits of this freedom before we can make a finding that the Code had been contravened. The test for this is an objective one and the personal view of the members of the Tribunal is irrelevant. The Tribunal can only decide after taking all the facts and arguments into

[5] JE Glibbery, N Obel, J Swanepoel & Others vs SABC, 2000

consideration. Broadcasting material that is "utterly obscene", "highly insensitive", and "extremely offensive" will only constitute a contravention of the Code if it is broadcast in a programme specially designed for children or when large numbers of children are likely to be part of the audience (see clauses 26 and 27 of the Code of Conduct). The programme complained of is clearly not such a programme.

[6] As for the complaint of unfairness, one has to judge the words complained of in the context in which they were used. This was a lighthearted discussion in which fun was poked at politicians in general. The reference to the Deputy President was an aside and there was no further dwelling on this subject. People working in the proverbial political kitchen, must endure much more in the field of mud slinging and must take the heat. The post of Deputy President is a typical example of such an office. We do not think that the complaint of unfairness should be upheld.

[7] Although no reference was made in the complaint to the dignity of the Deputy President, I think it is important to mention that the dignity of people is not protected in our Code. It is protected in section 10 of the Constitution of South Africa, though, and the Deputy President is free to take the Respondent to court if he so wishes. This is a matter that falls outside our jurisdiction.

In the result the complaint is not upheld.

Henning Viljoen (acting chairman)

Commissioners: Mokoena-Msiza and Olivier concurred