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CASE NUMBER: 19/2007

Date of Hearing: 6 AUGUST 2007

L BOTHA **COMPLAINANT**

vs

JACARANDA 94.2 FM **RESPONDENT**

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
DR WILLEM DE KLERK
DR LINDA VENTER

For the Complainant: The Complainant did not attend

For the Respondent: Ms Pamela Stein from Webber Wentzel Bowens on behalf of Jacaranda 94.2 FM.

Offensive, harmful use of language during a time when small children might form part of the audience – judged within context no contravention of Code found. Complaint dismissed. L Botha v Jacaranda FM, case no. 19 /2007.

SUMMARY

Complaint about use of the word "doos' during the morning show on Jacaranda FM during a time when small children might form part of the audience. The Tribunal held that judged within the context in which the word was used, it might have been in questionable taste, but could hardly be considered to be excessively and grossly offensive. The word is a disparaging reference to someone's lack of intelligence or untactful behaviour. Since it was an "off the cuff" remark referring to the name of an actual show during a music festival, it could also not have been approved in advance by the broadcaster. Moreover, the target market of the morning show on

Jacaranda FM is not small children and it is doubtful whether children who might have been in the audience at this time and not in school, would be able to understand the possible sexual connotation of the word. It is believed that not even a very young child would have been harmed by having heard the word. Furthermore, the presenter commented on air that the word should not be used. The Tribunal held that in the light of the guarantee of freedom of expression and the finding by the Constitutional Court that freedom of speech includes the right to air offensive material within reasonable limits, the relevant word should not be 'licensed' for use on air, but judged in context, it could also not be regarded to have exceeded the limits of the broadcaster's freedom of expression. The complaint was not upheld.

JUDGMENT

H.L. Venter

[1] The Registrar of the BCCSA received a complaint about some remarks made during the morning show with Kieno Kammies and Rian van Heerden on Jacaranda FM on 28 June 2007.

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

"During an interview with Smokie around about 7:24, (2007/06/28) they were referring to the word "Doos" and its different meanings, and that the guests should not use the word. I am just wondering if talk like this is allowed during a time that small children might be listening. I hope you could possibly do something about this kind of talk on public stations."

[3] **The Broadcaster's response reads as follows:**

"The presenter Rian van Heerden made reference to his new stand up comedy showing @ the Innibos festival in Nelspruit called "Doos is waarheid". Our morning show host Kieno Kammies commented on the word "Doos" being a derogatory term to our international on-air guests "Smokie" who is also performing at the Innibos festival, stating it is a word they shouldn't use. Jacaranda 94.2 believes we did not breach the BCCSA code of conduct. However we do aplogize to Ludi Botha for allegedly creating an uncomfortable situation for her."

[4] ***Clause 27 of the Broadcasting Code reads as follows:***

No excessively and grossly offensive language should be used before the watershed period on television or at times when large numbers of children are likely to be part of the audience on television or radio. Its use during the

periods referred to above should, where practicable, be approved in advance by the licensee's most senior programme executive or the designated alternate.

[5] The Tribunal believes that although use of the word "Doos" may be in questionable taste, it can hardly be considered to be excessively and grossly offensive. The word is a disparaging reference to someone's lack of intelligence or untactful behaviour. Since it was an "off the cuff" remark referring to the name of an actual show during a music festival, it could also not have been approved in advance by the broadcaster. Moreover, the target market of the morning show on Jacaranda FM is not small children and it is doubtful whether children who might have been in the audience at this time and not in school, would have been able to understand the possible sexual connotation of the word. It is believed that not even a very young child would be harmed by having heard the word. Furthermore, the presenter commented on air that the word should not be used.

[6] The complainant has a constitutional right to her views, but we must take into account that other conflicting and competing views may also exist. The legal test in determining whether the material broadcast is permissible is not what is offensive to specific individuals or whether members of a community themselves might be offended by being exposed to it, but what the community would not allow other members of the community to be exposed to, because it would be beyond the contemporary South African standard of tolerance to allow them to be exposed to it. The test that should be applied should be an objective standard of a reasonable viewer who is broadminded, balanced and not overly sensitive.

[7] Broadcasters, in terms of Section 16 of the Constitution of the Republic of South Africa, are guaranteed freedom of expression. The Preamble of the Broadcasting Code of Conduct also states that "freedom of expression lies at the foundation of a democratic South Africa and is one of the basic pre-requisites for this country's progress and the development in liberty of every person." Furthermore, the

Constitutional Court has held that freedom of speech includes the right to air offensive material within reasonable limits.

[8] The test is not whether this Tribunal would regard the use of the relevant word as appropriate, the question to be addressed is whether use of the word has exceeded the limits of the broadcaster's freedom of expression. It is concluded that the relevant word cannot be 'licensed' for use on air, but judged in context, it also cannot be regarded to have exceeded the limits of the broadcaster's freedom of expression.

The complaint is not upheld.

DR LINDA VENTER

Chairperson, Van Rooyen SC and Commissioner De Klerk concurred with the judgment.