BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA

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CASE NUMBER: 21/2003

Date of Hearing: 25 April 2003

T Labuschagne **COMPLAINANT**

vs

YFM **RESPONDENT**

TRIBUNAL: **Prof. Kobus van Rooyen SC**
Mr. Ratha Mokgoatlheng
Rev. Danie du Toit
Prof. Henning Viljoen

For the Complainant: The Complainant in person assisted by attorney WJ Grobler, Pretoria

For the Respondent: Mr. Greg Moloka (Station Manager)

Hate speech – degrading observation about Afrikaners as "pigs" in light of press item on forced bestiality performed on a young woman – Code applicable – Code transgressed. Labuschagne v YFM 21/2003

SUMMARY

A presenter at the Respondent radio station commented, in crude racial terms, on a news item which had received wide coverage in the press: denouncing Afrikaners as "pigs". It turned out that the presenter was misinformed on the facts of the matter. The news item alleged that men had subjected a young black woman to bestiality.

The station manager conceded that the presenter had been mistaken and that, in any case, this kind of derogatory language was unacceptable on his station. The CEO of the station sent an e-mail to the complainant conceding that the remarks were racist, and apologized to the complainant. The presenter also apologized. The Tribunal held that the words amounted to hate speech based on race that constituted incitement to cause harm. As a result of the seriousness of the hate speech, a fine was imposed on the Respondent.

JUDGMENT

JCW van Rooyen

[1] A presenter at the Respondent radio station commented, in crude racial terms, on a news item that had received wide coverage in the press: denouncing Afrikaners as "pigs". It turned out that the presenter was misinformed on the facts of the matter. The news item alleged that a group of men had subjected a young black woman to an act of bestiality performed by a dog, which allegedly had sex with her *per vaginam* and *per anum*. I have added the words "alleged" and "allegedly" since it is not for this Tribunal to decide on whether the act indeed took place, since this is a matter for the Criminal Courts. Nevertheless, the item was described on air and the reaction of the presenter was to state in an emotional manner that Afrikaners treated Blacks[1] as "varke".

[2] The Complainant filed the following complaint with the Registrar of this Commission:

> "I would like to lodge a complaint against the radio station called YFM.
>
> The horrible molestation of a 15 -year old girl in Kempton Park was discussed in detail over the air by the presenters (a lady and a gentleman). That was not however what offended me. The gentleman went ahead and implied that it was "Afrikaners" that treated Blacks[2] as "Varke".
>
> I think it is unfair to imply that it was only Afrikaans speaking people that treat what he called "Kaffers" in that way. I understand through the press that the people who were arrested were indeed not "Afrikaners".

[1] The derogatory word "kaffirs" was used.
[2] The word "kaffirs" was also quoted in the letter.

I think when making statements over the air like that, more care must be taken not to offend or imply certain classes or groups. The comment was made on YFM Radio on 09/04/2003 at about 9h40 AM."

[3] The station manager of the Respondent conceded that the language amounted to unacceptable racist speech, and apologized. The station manager had also discussed the matter with the presenter in a critical manner. The CEO of the Respondent wrote an e-mail to the complainant, which reads as follows:

"My name is Dirk Hartford. I am the CEO of Yfm. I heard the show and the remarks you are objecting too and agree with you completely. They were unacceptable and frankly racist. The hosts of the show Khabzela and Dre were warned that similar thoughtless remarks would result in their being taken off air. Our aim as Yfm is is to promote positivity and unity among young Gautengers irrespective of their background and remarks like theirs does exactly the opposite. Please accept my apologies on behalf of Yfm and I hope you continue to listen and support the station in spite of this."

[4] The presenter also added his apology, which reads as follows:

"I apologise if comments attributed to me (9:40, 10 April) offended any of my listeners. The context in which it was said was that of anger at South Africans who have still not adapted to the change in the country. As the racial groups I mentioned were most polarised during Apartheid, my utterings were meant to highlight the fact that these 2 groups need to work especially hard at entrenching the change still sweeping the country. Once again my sincere apologies if any harm was caused or offence taken..."

[5] Since the broadcast took place after 7 March 2003, the date on which the new Broadcasting Code took effect, the broadcast is governed by that Code. Clause 16(1) and 17 are applicable to the broadcast. The two provisions provide as follows:

Violence against specific groups

16.1 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.

17. The abovementioned prohibitions shall not apply to

(i) a *bona fide* scientific, documentary, dramatic, artistic, or religious broadcast, which judged within context, is of such nature;

(ii) broadcasts which amount to discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or

(iii) broadcasts which amount to a bona fide discussion, argument or opinion on a matter of public interest.

[6] In interpreting the Code, it is of importance that the preamble quotes section 16 of the Constitution of the Republic, which reads as follows:

(1) "Everyone has the right to freedom of expression, which includes
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity;
(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to -

(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

[7] Section 39(1) of the Constitution of the Republic provides that when a court, tribunal or forum interprets the Bill of Rights it (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. Section 39(2) provides that when interpreting any legislation and when developing the common law, every court, tribunal or forum must promote the spirit and objectives of the Bill of Rights. This Tribunal has often held that it is, as a tribunal, also bound by section 39 of the Constitution.

[8] I have specifically referred to section 39 of the Constitution since it might be argued that clause 16 of the Broadcasting Code only refers to material which sanctions, promotes or glamorizes *violence* based on race, national or ethnic origin, colour, and so forth. Although hate speech, as defined in section 16(2)(c) of the Constitution, does not explicitly mention violence, our interpretation is that clause 16.1 of the Code, by necessary implication, includes section 16(2) of the Constitution. The Preamble of the Code amounts to the foundational set of values that underlie the Code, and the Preamble explicitly quotes section 16 of the Constitution. Lest there be any doubt amo ng broadcasters as to the ambit of clause 16.1 of the Code, we now hold that section 16(1) and (2) of the Constitution form part of the Code, and that clause 16.1 of the Code must be read with it. The defences mentioned in clause 17 are also applicable, even if section 16(2) of the Constitution does not refer to those defences. Parliament has, in any case, subjected television to section 29 of the Films and Publications Act 1996. That section 29 is based on section 16(2) of the Constitution is clear. There is no reason why the same principles should not also apply to radio.[3] Clause 16 of the Code, read together with the Preamble is, in any case, applicable to radio and television. This Commission also consulted, in 2002, with the Executive of the National Association of Broadcasters as to the acceptability of the hate speech rules, and we received its support. The defences set out in clause 17 of the new Code were also consulted. Although the Constitutional Court did not express an opinion on the matter of defences, Parliament has already indicated in section 29 of the Films and Publications Act 1996 that the defences of bona fide science, documentary, drama, art, religion and public interest would apply.

[9] Although the phrase "public interest" may seem rather vague, and although it might be the opinion of some broadcasters or members of the public that the term is unconstitutional due to its vagueness, the term is nevertheless firmly embedded

[3] The reason why section 29 of the Films and Publications Act does not explicitly refer to radio is obvious: the Act is, in the main, directed at visual material. There are some references to written material in the Act (Schedules 1(2) and 10 and Schedule 3, which make it possible to impose an age restriction on the sales of written material). Section 29 also applies to the written word, but radio broadcasting is not mentioned explicitly – it simply does not fit into the mould of the Act, which is directed at visual and written material.

in our law[4], and it is of such a nature that if all the other defences were not applicable, public interest would be a final point to argue. This Commission has, in fact, held a news item informing the public in explicit terms as to the hate speech used by a song group,[5] as not being in contravention of the Broadcasting Code. This approach was based on a significant judgment of the European Court of Human Rights. In *Jersild v Denmark*[6] the European Court of Human Rights held that a journalist, Jersild, had been wrongly convicted by Danish courts for furthering racial hostility by broadcasting an interview with racists. The interview included racially derogatory language of the worst kind – coarse language and terminology that also directly accused immigrants from Africa of being intellectually inferior. The Court held that it had been in the public interest to reveal the shocking attitude of the group interviewed, and that the public had the right to be informed thereof.[7]

[10] That section 16(2) of the Constitution amounts to a constitutionally justifiable limitation on broadcasters, was confirmed by the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority*.[8] The Court held that the provision of the previous Broadcasting Code, which dealt with relations between sections of the population, stated the position too vaguely[9] and widely in

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[4] Compare e.g. *Neethling v Du Preez; Neethling v The Weekly Mail* 1994(1) SA 708(A) at 779-84*; Financial Mail (Pty) Ltd v Sage Holdings Ltd 1993*(2) SA 451(A) at 465D ; also compare Prof Johan Neethling *Persoonlikheidsreg(4th ed) 294-9.* In quoting the judgment in *Sage*, I expressly refrain from expressing an opinion on the "*rara avis*" approach to public interest in *Sage* .In fact, given section 16 of the Constitution, the *rara avis* approach, seems, with respect, to be too limiting. Once it is established that the publication of a matter is in the public interest, this should be a defence, whatever the nature of the right involved. In establishing whether publication is in the public interest, due recognition should, however, be afforded to the right of a person to his or her dignity (which includes the right to reputation and privacy – *Khumalo* v *Holomisa* 2002(5) SA 401(CC)) and the right of a person to be presumed innocent until found to be guilty - see *Rogers v SABC, Case: 05/ 2002(BCCSA).* Of course, when a person holds public office, his or her rights are usually subject to less protection. This approach does not, however, make the holders of public office fair game to items which are simply not true. The requirement of balance by obtaining the official's view or affording him or her a right to reply should, in any case, be constantly abided by.

[5] *AJB Myburgh & S Ingelby vs Radio 702, BCCSA Case No: 04/2001*

[6] 36/1993/431/510

[7] Compare Johanessen 1995 South African Journal of Human Rights 123.

[8] *2002(4) SA 294(CC).*

[9] Compare as to the requirement of reasonable precision *Investigating Directorate: Serious EconomicOffences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at paragraph [24]; *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of*

the light of section 16(2) of the Constitution. Langa DCJ, writing for the Court, held that the exemption from the fundamental right of freedom of expression should be limited for broadcasters to what section 16(2) of the Constitution provides. This means that freedom of expression would not extend to:

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Any further limitation on racial speech in the Broadcasting Code, so the Court held, would have to be made by Parliament in such a manner that it would, as an exemption to section 16(1) of the Constitution, be justifiable in terms of section 36 of the Constitution.

Applying the Code to the facts

[11] Whatever the personally held feelings of the presenter with regard to Afrikaners might be, the press news item referred to by him did not include Afrikaners or South Africans at all. He was clearly misinformed as to the item commented on. The remarks made were expressive of hatred and were of such a degrading nature that they incited to harm. In our judgment in *SAHR v SABC*[10] we held that the test is "harm", which might lie in the degradation that a reasonable member of the group against whom hatred is expressed, might experience. It has to be serious. The statement must, of course, also be based on race or ethnicity. The remarks referred to Afrikaners as a whole, and were sweeping and categorical. They also amounted to incitement to cause harm: we have no doubt that the unfounded accusation that Afrikaners were involved in this extremely crude and degrading

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Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) at paragraph [47].

[10] Human Rights Commission vs SABC, BCCSA Case No: 31/2002

incident would incite grave feelings of shock and indignation. Even though the accusation was clearly not true, nevertheless, even if it were true, a sweeping statement based on ethnicity or race is not acceptable in terms of the Code. Simply put, freedom of speech cannot justify this kind of conduct – as was already held by the Constitutional Court. The remarks amount to hate speech, which is clearly not conducive to a new South Africa where dignity is a foundational and central constitutional value.

[12] The Respondent has, accordingly, through its presenter, contravened the Broadcasting Code. We have noted the apology by the CEO and the station manager and believe that this is of a mitigating nature. The Respondent also has a clean record with us. The maximum penalty that we may impose is R40 000. We believe that a R20 000 fine, of which R10 000 is suspended for three years subject to the condition that the station is not found guilty of hate speech by this Commission during this term, will be reasonable in the circumstances. The finding of the Tribunal must also be broadcast before 10 June 2003 on two news broadcasts on one day between 06:30 and 18:30, an audio copy of which must be submitted to the Registrar after the broadcast.. It is directed that the following wording be broadcast:

> "In April one of our presenters unjustifiably referred to Afrikaners in extremely derogatory terms in connection with an alleged abhorrent deed. A complaint was lodged with the Broadcasting Complaints Commission. We conceded that the remarks were racist, and apologized. This apology was noted by the Commission. The Commission unanimously held that this station, by way of one of its presenters, had contravened the Broadcasting Code. (If the station so chooses, it may add an apology).[11]

JCW VAN ROOYEN
CHAIRPERSON

[11] We are not authorized to order an apology.

Commissioners Mokgoatlheng, Du Toit and Viljoen concurred with the judgment of the chairperson.