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

CASE NUMBER: 22/2005

DATE OF HEARING: 29 MARCH 2005

J BRINK **COMPLAINANT**

vs

5FM **RESPONDENT**

TRIBUNAL: Prof Kobus van Rooyen SC (Chairperson)
Prof Ravi Nayagar (Viewer/Listener Representative)
Dr Linda Venter (Co-Opted)

Complainant: The Complainant did not appear

Respondent: Mr Fakir Hassen, Manager Broadcast and Compliance, Policy and Regulatory Affairs of the SABC accompanied by Mr Nick Grubb, 5fm, Programme Manager.

Privacy – prank call by presenter suggesting that a bribe will solve his problems – in the circumstances not amounting to a contravention of the Code. J Brink vs 5fm, Case No: 22/2005.

SUMMARY

The Registrar of the Commission received a complaint concerning a prank call which was made by a 5 FM presenter to a student. The question arises whether it might not have been invasive of privacy. Of course, listeners knew that the call was a prank call. In the end this is one of those cases where there is doubt as to whether the Code has been contravened. The Tribunal believes that the contents of the call was in particularly questionable taste. However, since the Tribunal could not unequivocally come to the conclusion that privacy had been invaded upon unreasonably, given the fact that the person called was soon told that it was a fake call and he did not complain to the BCCSA himself, the complaint is not upheld.

Broadcasters are, however, cautioned to tread with particular caution in this area of fake calls. If the person called complains, the Tribunal will regard the matter in a serious light and possibly come to a different conclusion, depending on the facts. At times such a complaint would not even be necessary, depending on the degree of the invasion. The complaint was not upheld

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JUDGMENT

JCW VAN ROOYEN (Chairperson)

[1] The Registrar of the Commission received a complaint concerning a prank call which was made by a 5 FM presenter to a student.

[2] The complaint reads as follows:

> **"**I wish to lodge a complaint against 5 FM relating to a comment made by the dj at around 05:45 on Monday morning, 7 February 05. The dj was "Koula" on the morning programme from 04:00-06:00. She has a slot at around 05:45 every morning, during which she surprises someone by giving him/her a "wake-up call", usually pretending to be someone else. These calls normally are quite harmless, but the call on Monday, I felt, was in bad taste and highly unprofessional. What happened was that she pretended to be a lecturer from UNISA phoning a student who had just finished writing his exams, and she told him that some of the papers had gone lost and that he would have to re-write three papers. This was still in order, but then she suggested that he pay a bribe not to have to re-write the exams.
>
> By doing so, not only did she create a risk of that person embarrassing himself over the radio, but it was tasteless and given the recent scandals about irregularities in schools, the constant accusations of corruption and bribery and what a huge problem it is causing for the SA economy, I should expect that a radio station would be more responsible than to make a proposition like that over the air. I would appreciate if you could investigate this and take the necessary steps if you are of the view that there are any merits in my complaint."

[3] The SABC responded as follows:

> "1. While we understand the complainant's concern, certainly neither the presenter nor the station condones the promotion of illegal activity in the education sector.

2. This segment is clearly a light-hearted "prank" call that draws on the recent publicity surrounding these irregularities to create some innocent entertainment.

3. The offer of the "bribe" is so blatant that it could not really be taken seriously, and whilst the UNISA name is used, the caller is informed of the "prank" before the conversation is ended.

4. There is therefore almost no probability of listeners being misled to the extent that it could impact on UNISA's good reputation. On the contrary, it could well create the impression that the participant's refusal to consider the bribe and rewrite the exam instead is how a student at UNISA or another institution should react – with integrity and dignity. We do not regard this as a contravention of the Code."

[4] Although clause 35, which deals with fairness on matters of public concern, could possibly be applicable to such phone calls, the Tribunal does not believe that the present matter fell within the ambit of a matter of public importance. In any case, listeners were in on the fake call and would have known that the call did not represent the SABC's comment on corruption. It might have been different if the University involved, according to the fake call, complained to the Commission. The person called also did not complain. The complainant, however, explained to us that she was involved in the anti-corruption drive in Gauteng and that it was most disconcerting to have made light of such a serious problem.

[5] The next question which arises is whether there had not been an invasion into the privacy of the student. *Prima facie* every fake call invades upon the privacy of the person called. A broadcaster does not have the right to phone a person and convey a fake message to that person. Had the person called complained about such an invasion, we might have come to a different conclusion after having heard his view on the matter. As matters however presently stand, we would be speculating as to how he felt. Of course, privacy may be interfered with independent from

what the person whose privacy was interfered with thought. Nevertheless it would have been useful to hear his views.

Clause 38 of the Broadcasting Code provides as follows:

Insofar as both news and comment are concerned, broadcasting licensees shall exercise exceptional care and consideration in matters involving the private lives, private concerns of individuals, bearing in mind that the right to privacy may be overridden by a legitimate public interest.

[6] The question arises whether it might not have been invasive of privacy. Of course, listeners knew that the call was a prank call. In the end this is one of those cases where there is doubt as to whether the Code has been contravened. The Tribunal believes that the contents of the call, was in particularly questionable taste. However, since the Tribunal could not unequivocally come to the conclusion that privacy had been invaded upon unreasonably, given the fact that the person called was soon told that it was a fake call and he did not complain to the BCCSA himself, the complaint is not upheld. Broadcasters are, however, cautioned to tread with particular caution in this area of fake calls. If the person called complains, the Tribunal will regard the matter in a serious light and possibly come to a different conclusion, depending on the facts. At times such a complaint would not even be necessary, depending on the degree of the invasion.

The complaint is not upheld.

JCW VAN ROOYEN SC
CHAIRPERSON

Commissioners Nayagar and Venter concurred