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Case Number: 24/2004

Date of Hearing: 17 JUNE 2004

FREE STATE AGRICULTURE **Complainant**

vs

LESEDI FM **Respondent**

TRIBUNAL: **Prof Kobus van Rooyen SC (Chairperson)**
Prof Sunette Lötter (Viewer Listener Representative)
Rev Danie Du Toit (Broadcasting Representative)

Complainant: **Mr DJ Nortier from Naudes Attorneys on behalf of the Complainants**

Respondent: **Mr Fakir Hassen, Manager: Broadcast Compliance, Policy and Mrs Dorothy van Tonder, Consultant, Regulatory Affairs, SABC.**

Comment – unfair allegations in interviews – reply so as to ensure balance should have been obtained. Free State Agricultural vs Lesedi FM, Case No: 24/2004

SUMMARY

A complaint was received from Free State Agriculture. The complaint concerned a programme on Radio Lesedi which contained interviews with farm workers. The farm workers seriously attacked the conduct of a farmer without identifying him. The response from at least organized agriculture should have been sought by the

Respondent. Sanction: broadcast of summary of the BCCSA's judgment plus opportunity to Free State Agriculture to a five minute response.

JUDGMENT

JCW van Rooyen, Chairperson

[1] On the 28 February 2004 Radio Lesedi, one of the Radio stations which falls under the umbrella of the public broadcaster in terms of the Broadcasting Act 1999, broadcast a programme in Sesotho under the title *A Life of Harassment: Life on Farms.* The theme, according to the introduction, was "What have I done? Where have I erred?" Interviews were conducted and broadcast without any comment from those criticized or from organized Agriculture.

[2] The Registrar received a complaint from Free State Agriculture, an organization acting in the interests of its members. Since the matters raised in the programme dealt with life on farms, this organization clearly has an interest in this matter.

[3] The initial complaint which the Registrar received reads as follows:

> "Vrystaat Landbou wil hiermee 'n amptelike klag teen Radio Lesedi lê weens die gebruik van ongeverifieerde inligting wat volgens dié organisasie grens aan haatspraak.
>
> …….
> Ek sal dit waardeer indien u 'n deeglike ondersoek na die voorval sal loods en ons van die bevindinge sal verwittig. Ek vertrou dat hierdie saak u dringende aandag sal geniet."
>
> "MOONTLIKE HAATSPRAAK" RADIO LESEDI
>
> Ons telefoniese gesprek vandag verwys. Die betrokke program is Sondagaand, 22 Februarie 2004 op Radio Lesedi uitgesaai tussen 18:00 and 18:30, die omroeper is ene F Mohape.

Van die beskuldigings wat teen die xxx[1] broers gemaak is, is onder meer dat plaaswerkers se meel word van hulle weggevat as hulle sou fouteer; hulle word na die dorp gery om inkopies te doen, maar hulle goedere word afgevat wanneer hulle by die plaas arriveer en die boer gebruik dit dan vir himself; werkers word in bome gejaag en word selfs op geskiet terwyl hulle in die bome sit.

Na bewering is verskeie onderhoude gedurende die program uitgesaai en die program is Maandag en Dinsdag weer herhaal.

Die bandjie is van die radio aangevra. Daar is R100 daarvoor betaal en 'n kwitansie daarvoor uitgereik maar na 'n halfuur is die betrokke persoon wat die band moes afhaal meegedeel dat die kasset weggeraak het.

Vrystaat Landbou beskou hierdie saak in 'n baie ernstige lig en sal graag die voorvalle wil verifieer om verdere optrede te regverdig."

[4] The Response from the SABC reads as follows:

"The programme was broadcast on 28 February 2004, and not on 22 February 2004 as claimed by the Complainant. There was also no repeat broadcast on the Monday and Tuesday as claimed by the Complainant.

The Documentary programme was designed to reflect the suffering of farm workers even after a decade of freedom in South Africa. Lesedi FM's objective was to highlight the reality of the plight of farm workers, and not to defame or to degrade any person, which is contrary to station policy.

The producer of the programme, Mosololi Mohapi, is well experienced in documentary productions, with no vested interest in farmers or their operations. In fact, he confirmed that even he does not know the names of any farmers that the interviewees were talking about in the programme.

Interviews were done randomly with farm workers in Eastern Free State. The purpose was not to target any farmer in particular. During the recordings the producer was accompanied by the speaker of the Mantsopa Municipality, Mr Dan Molangwanyane. He took Mohapi to various farms. Unfortunately they did not find any farmer who could be interviewed. Later, when he phoned other farmers, Mr Dan Molangwanyane was not prepared to talk about the plight of farm workers in general. Mohapi then proceeded to produce and edit the documentary.

The allegation by the Complainant that accusations were leveled at the xxx brothers (presumably farmers and members of the Union) in the programme is unjustified as there is no reference to them anywhere in the programme. There is also no negative reference to any farm that might be owned by the xxx brothers or anyone else in the programme. The only farm mentioned in the programme is Van Sula which is in fact referred to as one that workers fled to and found work at after suffering abuse elsewhere.

[1] For the sake of privacy the name of the farmer attacked is omitted.

All the allegations against farmers made in the programme are done in a generic way without reference to any particular farmers. The allegations listed in the complaint as being made against the xxx brothers is therefore without basis.

The claim that various interviews were conducted during the programme is quite correct, but we do not know what the complaint in this regard is, if any. As is standard procedure in any documentary programme, there will always be a number of interviews contained in such a programme.

The final allegation about someone (it is unclear in the complaint who exactly did this) paying for a copy of the programme and then being told that it had disappeared from the shelf seems rather confusing. On checking with the responsible persons in Bloemfontein, where Lesedi FM is based, we discovered that the procedure is for a buyer to make a direct deposit into the SABC account with the Programme Sales Department, after which the tape would be sent to him/her. It would be unusual for the tape to have "disappeared off the shelves" as a copy is in fact attached hereto. It would also go against the repeated announcements during programmes, including the one now being investigated, that the programmes can be purchased from the SABC. Since the date of the broadcast indicated in the complainant's letter is wrong, it could well be possible that after payment, the tape could not be supplied because the requested programme did not exist for that day.

There was no advocacy of hate speech in the programme. We therefore submit that this broadcast was not in contravention of any clause of the Code."

[5] Clauses 35 and 36 of the Broadcasting Code provide as follows:

35 Comment

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.

36 Controversial issues of public importance

36.1 In presenting a programme in which controversial issues of public importance are discussed, a licensee shall make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.

36.2 A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance shall be given a right to reply to such criticism on the same programme. If this is impracticable, however, opportunity for response to the programme should be provided

> where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.

[6] The Tribunal has no doubt that the programme concerned a matter of public importance in terms of clause 35, as well as a matter which could be regarded as a controversial issue of public importance in terms of clause 36. The accent in clause 35 is on fairness and in clause 36 on the fair representation of opposing points of view, with an inbuilt right of reply. For the purposes of the present adjudication the two clauses overlap, except in so far as the right of reply is built into clause 36.

[7] When approaching a matter such as the present one, it remains important to fall back on the fundamental right of freedom of expression as a starting point. This Tribunal has accentuated the pivotal role which freedom of expression plays within our constitutional democracy. Emphasis has been placed on the importance of information, even where such information shocks or offends listeners. The reasoning has been that shock or offence is, at times, necessary to create awareness of social issues and abuse. Although apartheid in South Africa was formally abandoned in the 1994 and 1996 Constitutions, it cannot be said with confidence that all white South Africans have abandoned or completely abandoned the oppressive and discriminatory style of the past. Therefore, it is of the utmost importance that programmes such as the one under discussion be broadcast.

[8] In *South African National Defence Union v Minister of Defence and Another*,[2] O'Regan J stated as follows:

> 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), paragraphs 7 and 8.

[9] In *Clarke and Others vs East Coast Radio*[3] this Tribunal stated the following:

> 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.

The Constitutional Court has also held that the fundamental right to freedom of expression includes the right to impart information that offends – of course, subject to reasonable limitations as set out in section 36 of the Constitution.[4]

[10] While the statement "[f]*reedom of expression lies at the heart of a democracy"* could 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 might 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 forms part of the Preamble of the Broadcasting Code. Further limitations are to be found in the Code itself.

[11] In *Jersild v Denmark*[5] the European Court of Human Rights held that a journalist, Jersild, had been wrongly convicted by Danish Courts for furthering racial hostility by broadcasting, in a condensed item, parts of an interview with extremely outspoken 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 was in fact in the public interest to reveal the shocking attitude of the group interviewed and that the public had the right to be informed thereof.[6] This judgment has often been quoted with approval by this Tribunal in the matters

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[3] *GA Clark, C Jourdan, A Mudaly, S Govender & Others vs East Coast Radio, Case 6/2003.*
[4] See *De Reuck v Director of Public Prosecutions and Others* 2004(1) SA 406(CC) at para [49].
[5] 36/1993/431/510.
[6] Compare Johanessen 1995 *South African Journal of Human Rights* 123.

whether to allow offensive racial utterances to be broadcast if these are regarded as being in the public interest.

[12] Central to the present adjudication is the question whether the alleged abuse in the interviews that were broadcast is of sufficient magnitude and whether its impact may possibly have been lost in a "balanced" programme, that is, one that afforded organized agriculture an opportunity to respond. The programme deals with the harassment (sexually and otherwise) to which an unidentified farmer(s) is said to have subjected his employees. Assault, fraud, theft, unacceptably long work hours and the non-payment of wages are also included in the charges. Certain accounts in the interview that deal with conduct reminiscent of slavery are also referred to.

[13] The accusations are, indeed, shocking and it is important that they be broadcast. Nevertheless, lest the impression be created, as argued by the complainant, that the conduct of the accused person is of a general nature – if, indeed, it is true. Even in this instance - a broadcaster cannot simply portray individual employees' views and that of others interviewees (who clearly base their views on mere hearsay) without affording the employer, the farmer, an opportunity to answer. Of course, the farmer is not identified and, assuming that he does indeed exist, it is highly unlikely that he would have been available to reply. The producer of the programme said at the hearing that he was at the time unaware of the existence of Free State Agriculture, and that had he known of it, he would have tried to obtain a response from the organization. This suggests gross negligence on the part of the producer. However, the station manager stated that he himself was aware of the existence of organized agriculture.

[14] The complainant argued that this kind of one-sided programme has the effect of spreading hate against white farmers and their families, and puts their safety at risk. The possibility that there might be truth in this claim cannot be excluded. The Broadcasting Code does not, however, contain a provision which deals

directly with this issue, and we will therefore not pursue this part of the complaint. It is, nevertheless, abundantly clear to us that the programme was blatantly one-sided and that it was not in the public interest to have broadcast it without having at least obtained the view of the Complainant.

[15 We are, accordingly, of the view that the Respondent has contravened either clause 35 or 36.

[16] This is not the kind of case where a broadcaster might simply be reprimanded for its contravention of the Code. The harm which this programme has caused, witout obtaining a response, is incalculable, and the following order is therefore made:

(1) Radio Lesedi must broadcast the following in Sesotho before 1 September: "The Broadcasting Complaints Commission of South Africa has held that our programme, "A life of Harrassment – Life on Farms", was one-sided in that it did not attempt to obtain, at the very least, the view of Free State Agriculture – an organization representing farmers in the Free State. The Broadcasting Code does not allow broadcasters to broadcast a programme which deals with controversial issues of public importance without also obtaining the view of the person accused. Where he or she cannot be identified or is not available (in this case the farmer concerned),then the view of a representative organization should be sought and broadcast instead. The Commission has reprimanded Radio Lesedi for not having complied with the Code."

(2) The Commission also directs the station to provide the Complainant with a five minute slot during which it might have the opportunity to put its view in Sesotho with regard to the programme that was broadcast. This must be broadcast before 20 September 2004, and at the same time of day when

the initial programme was broadcast. The view of the Complainant must be broadcast in the language of the original broadcast, and must be taped beforehand. If the broadcaster has a problem with the content of the statement, it may approach the Chairperson of this Commission, who will decide whether the reply has remained within reasonable bounds of a response to the programme.

The Complaint is accordingly upheld and the sanction is as ordered above. The request by the Complainant that the producer's services be terminated as a result of this programme, is not a matter which falls within our jurisdiction. *Broadcasters* and not the producers fall under our jurisdiction.

JCW VAN ROOYEN SC
CHAIRPERSON

Commissioners Du Toit and Lötter concurred.