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: 31/2006

DATE OF HEARING: 27 JULY 2006

N TIMM, M HOWELL, J CRONJE, J BURKE, 1ST COMPLAINANT

C BAYLEY 2ND COMPLAINANT

vs

5FM RESPONDENT

TRIBUNAL: **Prof Kobus van Rooyen SC (Chairperson)**
Dr Linda Venter
Ms Refiloe Mokoena-Msiza

Complainant: **The Complainants did not attend.**

Respondent: Mr Fakir Hassen, Manager: Broadcast and Compliance, accompanied by Ms Veronica Barnard of the SABC and Mr Nick Grubb, Programme Manager, 5fm

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Offensive language – alleged offensive lyrics in songs played by 5FM – judged within context no contravention of Code found. Complaints dismissed. N Timm & Others, C Bayley &Others vs 5fm, Case No: 31 /2006.

SUMMARY

Complaints about explicit and graphic lyrics contained in songs played by 5FM on 29 and 30 May 2006 at 9:30 and 10:15 respectively. The Tribunal held that it must be taken into account that sexually suggestive lyrics are common to many forms of popular music, that the songs are by major international artists and played on top

40 radio programmes worldwide. Furthermore, it was the radio edit or 'clean versions' of the songs, where all forbidden swear words were edited out, that were broadcast. It was also taken into account that the target market of 5FM is 20-30 year old urban listeners who most probably would appreciate the kind of social comment that is made in hip-hop songs. These kinds of songs form part of a very widespread hip-hop culture and way of living.

The only clause in the BCCSA Code regarding the use of offensive language relates to television broadcasts and to programmes specially designed for children. Since the songs were aired at 9:30 and 10:15 respectively on a Monday and Tuesday, most children would have been in school anyway. 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, the relevant words could not be judged to have exceeded the limits of the broadcaster's freedom of expression. The broadcaster, however, was urged to always ensure that only 'clean' copies of songs of this nature are broadcast. The complaints are not upheld.

JUDGMENT

Dr Linda Venter

[1] The Registrar of the BCCSA received four complaints about the new song by Eminem entitled *Shake That*, played by 5FM on 30 May 2006 at 09:30. A further complaint was also received about a song by R. Kelly that was played by 5FM on 29 May 2006 at 10:15. **Because of the similarity of the two cases, it was agreed that they would be considered together.**

[2] **The main points of complaints regarding the Eminem song read as follows:**

Timm: "I feel that this song is not appropriate for radio broadcast as the song blatantly, explicitly and graphically sings of sexual activities, drugs and violence. There is an attempt to edit out all the swear words but it is still obvious as to what words they are. I do not feel it is fit for radio play on 5FM or any other radio station where family or children may be listing."

Cronje is of the opinion that it may lead to innocent girls being victims of sexual abuse …. and that the youth should not be encouraged towards irresponsible sexual activities leading to the spread of AIDS.

Burke: "I am a high school teacher and often see the desensitisation that occurs due to the explicit lyrics of song like this."

C Bayley: "I find the words to this song offensive, it is sexually explicit, It is played on all major stations, R Kelly and I heard it most recently on 5FM at 10:15 May 29, 2006."

[3] **The SABC responded as follows:**

"We agree that the lyrics are sexually suggestive. These are major international artists and songs that are played on top 40 radio worldwide.
We feel that sexually suggestive lyrics are common to many forms of popular music, from the Rolling Stones in the 60's to rock, dance and hip-hop bands of today, and ultimately the question is whether a listener who interprets these lyrics in his own mind then has a right to impose those views on all others?

The radio edits or 'clean versions' are the ones being played on 5FM, and as such there are no expressly forbidden swear words on air. This is in fact acknowledged by one of the complainants with his comments that 'there is an attempt to edit out all the swear words but it is still obvious as to what words they are."

[4] The tribunal agrees that the lyrics of the songs are graphic and sexually suggestive, however, the target market of 5FM is 20-30 year old urban listeners who most probably would appreciate the kind of social comment that is made in hip-hop songs. These kinds of songs form part of a very widespread hip-hop culture and way of living. The Tribunal is not convinced that a large number of younger children were part of the audience. Since the songs were aired at 9:30 and 10:15 respectively on a Monday and Tuesday, most children would have been in school anyway. Bearing in mind that the versions which were played were the versions as specially edited for the airwaves by the distributors, the edited version was, in any case, suggestive but not blatantly explicit.

[5] The complainants have a constitutional right to their views. However, it must be taken into account that there are other conflicting and competing views and tastes in the public market. 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.

[6] The Respondents, in terms of Section 16 of the Constitution of the Republic of South Africa Act No 108/1996, are guaranteed freedom of expression, which includes artistic freedom as is manifested in the songs. 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. Freedom of expression is a condition indispensable to the attainment of all other freedoms. The premium our Constitution attaches to freedom of expression is not novel, it is an article of faith, in the democracies of the kind we are venturing to create".

[7] The Constitutional Court has, in several judgments, accentuated the role of freedom of speech and commented as follows on this right:

> In the context of this country's history relating to the suppression of this right, this right must be 'zealously guarded'. (Philips and another v the Director of Public Prosecutions and Others 2003 (4) BCLR 357 CC);
> **and:**
> A society which truly respects freedom of expression, must of necessity, afford protection to views which may be regarded as 'unpopular' and 'controversial'. (South African National Defence Union v Minister of Defence and Another 1999 (5) BCLR 615 CC).

[8] Furthermore, the Constitutional Court has held that freedom of speech includes the right to air offensive material. In this regard, the BCCSA has repeatedly quoted the following judgment of the European Court of Human Rights in the case Jersild v Denmark (36/1993/431/510). The Court found that Jersild, a journalist, had been wrongly convicted by Danish courts for furthering racial hostility by broadcasting an interview with extremely outspoken racists. The interview included racially derogatory language of the worst kind and terminology that directly accused immigrants from Africa as being intellectually inferior. The Court held that it had been in the public interest to reveal the

shocking attitudes of the group interviewed and that the public had the right to be informed thereof. Although the Jersild case relates to racially derogatory language, the salient point is that the public has a right to be exposed to current trends in society, regardless whether they are regarded as offensive by some people. The test is not whether this Tribunal would regard the possible offensive language used in these songs as appropriate, the question to be addressed is whether the songs have exceeded the limits of the broadcaster's freedom of expression.

[9] The Tribunal understands and respects the sentiments of sens itive members of the audience. Nonetheless, it is concluded that the relevant words cannot be judged to have exceeded the limits of the broadcaster's freedom of expression. The broadcaster, however, is urged to always ensure that only 'clean' copies of songs of this nature are broadcast. The edited versions received from distributors would usually be acceptable to broadcast in times when a large group of younger children are not likely to be part of the audience.

The complaints are not upheld.

DR HL VENTER

The Chairperson, Van Rooyen SC and Ad Hoc member Mokoena-Msiza concurred with the judgment