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: 11/2009

DATE OF HEARING: 21 MAY 2009

F MAHAMED **APPELLANT**

vs

TALK RADIO 702 **RESPONDENT**

APPEAL TRIBUNAL: **PROF S LÖTTER (ACTING CHAIRPERSON)**
MR B MAKEKETA
MR Z NTUKWANA

FOR THE APPELLANT:

FOR THE RESPONDENT: MS KHAHLISO MOCHABA, HUMAN CAPITAL & REGULATORY AFFAIRS MANAGER PRIMEDIA (PROPRIETARY) LIMITED ACCOMPANIED BY MR ALASTAIR TEELING-SMITH, PROGRAMME MANAGER AND MS LAURA CLANCY, PROGRAMMING CO-ORDINATOR OF TALK RADIO 702

Dignity - Appeal against BCCSA Adjudication: F Mahamed vs Talk Radio 702, Adjudication No: 18/A/2009 – Mahamed vs Talk Radio 702, Case No: 11/2009 (BCTSA); complaint of invasion of dignity by broadcaster not upheld.

SUMMARY

The complainant appealed against an adjudication by Commissioner Gilfillan. Commissioner Gilfillan came to the conclusion that cause 38 of the Code was not contravened when the presenter did not question a statement by a caller describing the complainant as a paedophile. The Tribunal held that by re-opening the subject with the

caller, the matter could have developed into a worsening of the situation. Accordingly, that by not getting into a debate with the caller, the presenter contained the matter in a reasonable manner and excluded further discussion on the accusation. The Broadcasting Code was not contravened and the complaint is, accordingly, not upheld.

JUDGMENT

Prof S Lötter

[1] Mr Mahamed complained about an incident which happened on the 5th of February 2009 during a phone-in programme. Mr Mahamed phoned to express his views on morality. According to him he could do anything he wanted to do sexually as long as it does not "harm the next person". He also named some acts of a sexual nature that he could not only do, but more importantly, could mention in public as a result of his right to freedom of speech. The caller whose call was taken immediately after Mr Mahamed's, started by saying that Mr Mahamed was a paedophile and then proceeded to discuss a totally unrelated topic. The presenter did not comment on her statement that the previous caller was a paedophile.

[2] Mr Mahamed's complaint was referred for adjudication. Commissioner Gilfillan came to the conclusion that while it was not impossible that some listeners might have read the presenter's silence on the matter as acquiescence, the reasonable listener would have regarded the presenter's omission as an oversight in the circumstances, in other words, would not have concluded that the complainant was a paedophile.

[3] The Complaint read as follows:

> "On Thursday the 5th of February, 2009 at approximately 12-15am, I phoned talk radio Radio 702 "Overnight Live" program and spoke to broadcaster / presenter Simon Dingle to give my opinion on the topic of "morality".
>
> Immediately after my phone call another lady phoned Simon Dingle to present her views on another unrelated topic. However, before the said lady presented her views to Simon Dingle, she stated on air that I am a pedophile. This accusation that I am a pedophile was done without any reason or justification, or any provocation from me in my previous call to Simon Dingle.
>
> What concerns me most is that Simon Dingle, Radio 702's presenter on "Overnight Live" allowed this statement that I am a pedophile to be aired without even questioning the validity of such a claim. Simon Dingle did not ask the lady caller to clarify why she called me a

pedophile, nor refuted such a claim made on Radio 702. Simon Dingle merely kept quiet, giving the impression to the listeners of Radio 702 that he agreed or acquiesced to such a claim or at the very least his silence meant that there could be a veracity of truth to the claim that I am a pedophile.

I implore the Broadcasting Complaints to look into my allegations that a serious personal insult was hurled against me on Radio 702 casting a slur on my character and worst still giving the impression that I have committed a serious criminal offence. I repeat that the caller did not at any stage of her insult towards me justify why she called me a pedophile. The fact that Simon Dingle did not ask her to verify why the lady caller would call me a pedophile or refuted or distanced Radio 702 from such a claim allows me to claim that Radio 702 is a party to the insults hurled against me.

I would like the Broadcasting Complaints Commission of South Africa to look into my complaint and if it is true and my complaint is justified than I would like the Broadcasting Complaints Commission of South Africa to:

1.) Instruct Radio 702 to issue a public apology for airing claims that I am a pedophile without any justification
2.) Allow me an hour on any Radio 702 talk show program to dispel the notion that I am a pedophile with the listeners of Radio 702.
3.) Fine Radio 702 appropriately so as they learn that insults hurled by callers without any justification should be repudiated by the presenter of Radio 702 on behalf of the radio station.

Kindly investigate my complaint against Radio 702 as a matter of urgency."

[4] The Broadcaster responded as follows:

"**FAYZAL MAHAMED / TALK RADIO 702 – CLAUSE 38 OF THE CODE - DIGNITY**

1. Talk Radio 702 has received a complaint from Fayzal Mahamed ("the complainant") about a statement made by a caller into the station who referred to t he complainant as a pedophile. The complainant states that:

> *"What concerns me the most is that [the presenter] on Overnight Live allowed this statement that I am a pedophile to be aired without even questioning the validity of such a claim. [The presenter] did not ask the lady caller to clarify why she called me a pedophile, nor refuted such a claim made on Radio 702. [The presenter] merely kept quiet, giving the impression to listeners of Radio 702 that he agreed or acquiesced to such a claim or that at the very least his silence meant that there could be a veracity of truth to the claim that I am a pedophile*."

2. The Registrar has advised the station to address the complaint in terms of clause 38 of the BCCSA Code of Conduct ("the Code").

3. Clause 38 of the Code is titled privacy and provides that:

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

4. Talk Radio 702 is of the firm view that context is of paramount importance when judging speech. Therefore, we give the context in which the comment in question was made below.

   4.1 The complainant is a regular late night caller known to regular listeners;

   4.2 The complainant once appeared on a show a few years ago claiming that he masturbates his handicapped son to provide him with 'relief'. Regular listeners would remember that interview which provoked much controversy at the time; and

   4.3 Before the listener in question called into the station with her comment, the complainant had called the station and provided his definition of morality which he stated as "do not harm the next person". He went further to state *inter* alia that based on his philosophy, *"it allows me to come on air and say that I fornicate, it allows me to come on air to tell people that I masturbate, it allows me to come on air and tell people that I visit prostitutes on a regular basis. … It also allows me to state that I would also give an option to my daughter to be a prostitute…as a career option … on a simple philosophy that do not harm the next person…"* and it was to these statements that comment in question was made.

5. The test as to what constitutes impairment of dignity was clearly set out by the Appellate Division in *Delange v Costa*[a]. The court laid out the test as made up of two elements namely: the plaintiff's self esteem must actually be impaired; and a person of ordinary sensibilities would have regarded the conduct as offensive.

6. The abovementioned two-pronged test was subsequently affirmed by the Constitutional Court in *Khumalo v Holomisa* where the court held that:

   "*The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings shared by all people as well as the individual reputation of each person built on his or her own individual achievements. <u>The value of</u> human dignity in our Constitution therefore values both the personal sense of <u>self-worth as well as the public's estimation of the worth or value of an individual</u>.*"[b] [Underlining own emphasis].

7. In deciding whether or not the statement in question has in fact impaired the complainant's dignity, we submit that the law requires the Tribunal to not only look at it subjectively from the complainant's perspective but also has to look at it objectively. Indeed this is clearly set out by the Supreme Court of Appeal in where it states that
   "*In determining whether or not the act complained of is wrongful the Court applies the criterion of reasonableness – the "algemene redelikheidsmaatstaf" (Marais v*

[a] 1989 (2) SA 857 A.
[b] 2002 (5) SA 401 (CC) at para 27

Richard en 'n Ander 1981 (1) SA 1157 (A) at 1168C). This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (ie the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for injuria. (Walker v Van Wezel (supra) at 68.)'"[c] [Underlining own emphasis]

8. The listener who made the comment in question called in after the complainant had made the statement referred to in paragraph 6.3 above. Before making her statement, she stated that the complainant had told them before what he and his son do and subsequent to this; she made the statement in question.

9. It is Talk Radio 702's respectful submission that while the complainant's self esteem may have been subjectively impaired, looking at the complaint objectively and taking into account the context in which the statement was made, a reasonable person would not have considered the statement in question as offensive but would have seen it as a statement made in response to the complainant's own statements. In this regard, it is the station's respectful submission that there has been no contravention of clause 3.8 of the Code."

[5] Mr Mahamed argued his own case. His opening statement was that he values the freedom of expression that talk radio provides. He stated that while the right to freedom of expression is acknowledged, he experiences the printed media and television as limiting the freedom of expression due to the fact that some editing can always be done. However, with talk radio one cannot be limited because nobody knows what the caller is going to say.

[6] Mr Mahamed proceeded by re-iterating his grounds of appeal and started to quote from the adjudication to prove a point he repeatedly made. As the Tribunal was already in possession of not only the adjudication, but also his grounds of appeal in which he quoted extensively from the adjudication to prove the same point, it was not deemed necessary to repeat what was already known to the Tribunal.

[7] When members of the Tribunal asked Mr Mahamed how he thought the incident should have been dealt with, he repeated many of the arguments and sentiments already expressed. Mr Mahamed argued strongly for the protection of his rights. He was of the opinion that the BCCSA had a duty to protect him in this specific instance

[c] Mervyn *Dendy and University of the Witwatersrand,Neil Garrod and Andrew St Quintin Skeen* Supreme Court of Appeal, Case number: 597/05(Reportable)

- a duty, it appears, which would only be discharged in his view, if the finding was in his favour.

[8] The respondent repeated the argument that the test to determine whether the complainant's dignity was impaired should not only be judged within the context explained above, but also by applying the standard of the reasonable listener.

[9] The test to determine whether clause 38 has been contravened is two fold. The first question to be answered is whether the complainant's dignity has been impaired. If the answer is affirmative, the next question is if the presenter took exceptional care and consideration concerning the complainant's dignity. If the answer to the first question is negative, there is no need to enquire whether the broadcaster exercised its duty. There would be no contravention.

[10] The duty of the broadcaster to exercise exceptional care only comes into play when an individual's dignity is impaired or his privacy infringed. Once it is found that the complainant's dignity was impaired or privacy infringed, the Tribunal has to enquire whether the broadcaster took any steps to discharge the duty of exceptional care, in other words, whether steps were taken to protect the complainant against the infringement of privacy or impairment of dignity caused by a broadcast.

[11] If the Tribunal is satisfied that the steps taken by the broadcaster comply with the requirement of exceptional care, the finding would be that although an infringement or impairment had taken place, steps were consequently taken to comply with this duty with the result that the interests of the complainant were protected.

[12] The respondent is correct in stating that the comment should be evaluated within context. However, they are wrong in arguing that Mr Mahamed's previous phone call should be included in the context. The caller's comment should be evaluated within the context of the specific broadcast.

[13] According to the respondent it was a phone–in programme without any specific topic. Callers could talk about any topic they wanted. Calls were not screened. The programme was broadcast between 12:00 and 02:00.

[14] Complainant phoned and stated that the right to freedom of expression gives him the freedom to express his particular view on morality on air. He then continued to describe sexual acts which he performs and concluded by saying that he can do anything as long as it does not harm the next person.

[15] The next caller's referred to comments made by Mr Mahamed about another DJ and then she continued to say that Mr Mahamed had already told them what he and his son do. She then said "Fazel you are a paedophile and you should be in prison for it". Thereafter she launched into discussing her topic which was unrelated to Mr Mahamed's comments. The presenter did not comment on her statement that the complainant is a paedophile, save to say "OK" while she was already talking about her topic. He did not ask her to clarify the statement. The question is how much value should be given to the caller's statement. The following factors should be taken into consideration to determine the answer:

- The caller referred to a comment made by Mr Mahamed which classified him as a paedophile in her eyes. As most of the listeners did not know what was said, it would be difficult for them to accept this statement as the truth. They have no idea on which facts it was based
- However controversial some listeners might have found the complainant's statements about morality, nothing in the statement justifies an inference that he is a paedophile
- Complainant's argument is that he can do whatever he wants as long as there is **no harm to the next person**. That clearly excludes any notion that he molests children
- Although not everybody knows the scientific definition of a paedophile, everybody is aware that it is someone who molests children. Mr Mahamed never referred to any interaction with children. There is thus no basis for any listener to think that he is a paedophile

? The woman participated in the same programme as he did. There is no indication that she knows him. How much value could be attached to a statement about a person she does not know based on the individual's own comments that do not bear her allegation out, remains a question.

[16] In view of the above-mentioned factors I am of the opinion that the reasonable listener would not have formed the impression that the complainant is a paedophile. The finding is therefore that the complainant's dignity had not been impaired.

[17] However, should the position be that the requirement in the clause is not that the individual's dignity had indeed been impaired, but that there should only be a possibility that the comment could impair his dignity, the question will be what steps the presenter had to take to comply with the requirement of exceptional care. *In casu* the presenter did not comment on the statement except to say "OK" while she was already on another topic. He did not correct the caller or tell her to be circumspect when making allegations of such nature. He did not allude to it at all.

[18] As this was a programme where the topic was not pre-determined and the calls not screened, it is difficult to determine which steps should have been taken to protect individuals against the impairment of their dignity. The complainant himself stated that he enjoys the freedom of expression talk programmes allow callers as a result of there being no editing. In circumstances such as the present, the presenter can only interrupt the caller once an unacceptable comment is made or admonish or correct the caller afterwards.

[19] *In casu* the presenter could not ask the caller what she meant or why she had made the statement, as it would only have elicited a discussion on whether the complainant was indeed a paedophile and worsened the situation. When he said "OK" the interpretation is not "OK" Mr Mahamed is a paedophile", but rather "OK, continue with what you want to say". He therefore did not validate the statement by commenting or expanding on it.

[20] We are of the view that the requirement of exceptional care in clause 38 had been met. The presenter contained the damage by not opening a debate on the veracity of the statement. At most he could have admonished the caller not to make allegations of such a nature on radio. However, by not commenting, he underscored the fact that the statement was unsubstantiated. Clause 38 had therefore not been contravened.

[21] The complainant emphasized his expectation that the Code and the BCCSA should protect his rights. As has been pointed out many times before, the protection of rights involves the balancing of competing rights. The BCCSA cannot protect rights *in vacuo*. The protection provided to individuals therefore lies in the provision of a fair procedure based on the principles set out in the Code in terms of which the individual can put his case and be heard by an independent tribunal.

The complaint is dismissed for the reasons set out above.

S LÖTTER
ACTING CHAIRPERSON

Commissioners Makeketa and Ntukwana concurred in the judgment.