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: 19/2011

DATE OF HEARING: 09 JUNE 2011

VERMEULEN **COMPLAINANT**

vs

TUKS FM **RESPONDENT**

TRIBUNAL: **PROF JCW VAN ROOYEN (CHAIRPERSON)**
MR BRIAN MAKEKETA
MS MODJADJI NKWANE
MS KOEKIE MDLULWA
MR ED LINNINGTON

COMPLAINANT: **The Complainant was invited but was unable to attend.**

For the Respondent: Mr Loutjie van der Merwe, Station Manager.

Glamorising unlawful conduct – no measures from the part of the broadcaster were taken to discourage people from imitating what they hear- complaint upheld. Vermeulen vs TUKS FM, Case No: 19/2011(BCTSA)

SUMMARY

The broadcaster opened the lines for listeners to give a detailed account of how they got away with no fine by bribing the police. The broadcaster encouraged the listeners to share their stories by promising to give the best bribe story a R200.00 voucher. The complainant alleged that such practice glamorises unlawful conduct.

There was an omission of a warning to listeners not to try and repeat the bribery stories they heard on air. The incentive of giving a R200.00 voucher to the best bribe story led to the contravention of clause 14(ii) of the BCCSA Code by the broadcaster. The sanction imposed was a reprimand.

JUDGMENT

BRIAN MAKEKETA

[1] Mr. Vermeulen lodged a complaint against Tuks FM, a radio broadcaster which, by agreement, falls under the jurisdiction of the BCCSA in terms of section 54(3) of the Electronic Communications Act 2005.

[2] **The complaint reads as follows:**

> **"**TUKS FM 107.2 DRIVE SHOW, 9 MAY 2011, PROMOTING CRIMINAL ACTIVITY
>
> Today, 9 May 2011, during my drive home the student radio station Tuks FM ran a competition some time between 16:30 and 17:30 where people were asked to phone or text in the least amount they have ever gotten away with bribing a metro police officer with. This for the chance to be rewarded with a R200 drinking voucher. Some bragged that they had gotten fines squashed by using just a cigarette, much to the delight of the presenters.
>
> I found it shocking, that in a society like South Africa, where crime is rampant and corruption a huge problem, a public broadcaster would not only encourage bribery of officers, but reward such behaviour. Surely public broadcasters cannot turn criminal activity and participation into a fun game that wins you money?
>
> I am myself a young person, and I listen to the radio station involved regularly, but I cannot support them when they make light of crime. It smacks of arrogance and leaves a bad taste in the mouth.
>
> Admittedly, I have read through the code of conduct and couldn't find anything in specific that prohibits a radio station from promoting, enjoying or encouraging crime, but I thought I would voice my opinion on the matter anyway.
>
> I would like the add the following:
>
> ***pro·mote*/prəˈmōt/Verb**
>
> 1. Further the progress of (something, esp. a cause, venture, or aim); support or actively encourage.
> 2. Give publicity to (a product, organization, or venture) so as to increase sales or public awareness.

Definition two above applies.

The broadcaster was clearly giving publicity to the act of bribery, giving individuals who partake in such activity a platform to voice their disregard for the law and furthermore rewarding, and thereby at least indirectly, encouraging the act of bribery.

The tone of the show was hardly serious, informative or constructive moral debate on the subject of corruption in law enforcement. At one point the presenter requested that female listeners who had used their breasts to escape a fine contact them. Does that encourage the perception that bribery is socially acceptable and funny? I leave that to the tribunal to decide.

Rewarding bribery is a form of operant conditioning, whether the broadcaster intended it or not. There is a difference between "edgy content" and handing a prize to a person who committed a crime the most successfully. In my opinion rewarding behaviour encourages it. Thank you again for considering my complaint"

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

"As a community station broadcasting from the University of Pretoria, Tuks FM prides ourselves on providing a high quality broadcasting service to the community associated with the University. Our style is often associated with an element of irreverence and edgy content.

The item was broadcast on the Tuks FM Drive show on the 9th of May by Jacques du Preez. In the course of the broadcast, in order to stimulate debate and as a hot talk topic, the issue of bribery was discussed.

In terms of section 3 of the code:

Violence and Hate speech

Broadcasting service licensees must not broadcast material which, judged within context

(a) contains violence which does not play an integral role in developing the plot, character or theme of the material as a whole; or

(b) sanctions, promotes or glamorises violence or unlawful conduct.

In the course of the broadcast as well as during the feedback from the listeners unlawful conduct was in no way sanctioned, promoted or glamorized. The feedback from the audience was based on acts that had already taken place, new acts were not encouraged. Unlawful acts were not glamorized but merely highlighted and relayed. When and where possible in order to get more feedback, Tuks FM, does offer spot prizes to the audience. In our experience we get better feedback when the audience are incentivised to share their story and experiences."

[4] The People's Law Dictionary[1] describes, in lay terms, bribery as *the crime of giving or taking money or some other valuable item in order to influence a public official (any governmental employee) in the performance of his/her duties. Bribery includes paying to get government contracts (cutting in the roads commissioner for a secret percentage of the profit), giving a bottle of liquor to a building inspector to ignore a violation or grant a permit, or selling stock to a Congressman at a cut-rate price.* Also see Snyman *Criminal Law* (2002)376 et seq. for the legal definition.

[5] Even though the broadcaster could argue that by highlighting the problem of bribery it was not intending to give listeners some wrong ideas, the broadcaster should be cautious of the unintended consequences of such a broadcast. An example of this is found in English law. According to *R v Creamer* [2], a person is guilty of involuntary manslaughter when he or she intends an unlawful act that is likely to do harm to the person, and death results which was neither foreseen nor intended. The alternative name for this crime is *constructive manslaughter*. Although the accused did not intend to cause serious harm or foresee the risk of doing so, and although an objective observer would not necessarily have predicted that serious harm would result, the accused's responsibility for causing death is *constructed* from the fault in committing what might have been a minor criminal act.

[6] Again in *R v Dawson*[3], a petrol station attendant with a weak heart died of heart failure when the appellant attempted a robbery of the station. In judging whether this act was sufficiently *dangerous*, the Court of Appeal applied a test based on the "sober and reasonable" bystander who could be assumed to know that the use of a replica gun was likely to terrify people and so be a danger to those with a weak heart.

[7] The New Zealand Broadcasting Standard Authority in *Hamilton v TV3 Network Services*[4] and in *Land Transport Safety Authority v Television New Zealand*[5] held that *the 'law and order' standard requires broadcasters to refrain from broadcasting programmes which could reasonably be expected to incite viewers or listeners to commit unlawful acts.*

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[1] The People's Law Dictionary by Gerald and Kathleen Hill, Fine Communications,2005
[2] 1966 1 QB 72
[3] 1985 81 Cr. App R. 150
[4] The New Zealand Broadcasting Standards Authority. Case No. 034 of 2001
[5] The New Zealand broadcasting Standards Authority. Case 102 0f 2003

[8] The test, in this case at hand, is whether the broadcast's aim is to highlight or inform the individual's experiences of bribery or whether a reasonable objective listener would view it as glamorizing unlawful conduct. I want to make it clear that this judgment is not primarily about freedom of speech or freedom of expression, but about whether judged as a whole and in context, this broadcast glamorized unlawful conduct. In other words, freedom of speech, having been awarded a generous approach, is, nevertheless limited when a crime is furthered by speech. For the record, I fully agree with Justice Kriegler when in *S v Mamabolo*[6] the Justice says :

> *Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression "the free and open exchange of ideas" is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.*

[9] In terms of South African law, bribery is illegal and a crime punishable through the courts of law. The crime of corruption is legislated through the relatively new Prevention and Combating of Corrupt Activities Act[7] . The Act also effectively conveys the following message:

- *If you or your business are found guilty of corruption involving contracts or tenders, your name can be put on the **'register for tender defaulters'** and no government department will be allowed to do business with you for between 5 and 10 years. This register will also be open to the public.*
- *'Gratification' **does not have to be money**. It can also be gifts, entertainment, loans, employment, or any other benefit.*
- *You don't actually have to hand over any 'gratification'. If you **merely offer** a bribe you are already guilty of corruption. Of course, this works both ways – someone who simply asks for bribe is also guilty of corruption.*

Thus,issuing or accepting a bribe is a serious crime that may result in heavy fines or several years in prison. Both civil and criminal charges can be levied against those suspected of being involved in kickback schemes.

[10] However, it is important to remember that the BCCSA Code does not require a broadcaster to maintain law and order per se, but standards consistent with law

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[6] 2001 (5) BCLR 449 (CC); 2001 (3) SA 409(CC) para 37
[7] Act No.12 of 2004

and order. The BCCSA is not concerned with the broadcasting of items which merely discuss or depict the contravention of law. Such items are unlikely to amount to a prima facie breach of the BCCSA Code. To find a breach of the Code, the BCCSA will need to be convinced that a broadcast not only implicitly condemns a particular law, but also actively promotes disrespect for it. The same approach is taken with broadcast items which describe or portray particular criminal behavior. Depiction or discussion of criminal behavior is usually acceptable. **The exceptions tend to be** if a broadcast implicitly instructs how to imitate an unusual criminal technique, or suicide, or if it glamorizes a criminal activity. 'Glamorize' is the word which appears in clause 14(ii) of the BCCSA Code. It is the key criterion when the BCCSA considers whether the broadcast breaches the Code. If there is a reasonable doubt as to whether the conduct or language broadcast "glamorizes" crime, the doubt must go in favour of the broadcaster.

[11] I agree that context could justify the fact that there is nothing wrong in talking about one's real experience of bribery. The issue in this case is that contextually there is a not sufficient countering factor included. What exacerbates the problem is the fact that even at the end of the programme the broadcaster did not issue any warning advice or disclaimer to its audience against repeating what they heard on air. Instead the broadcaster promised a reward of R200.00 in a form of a voucher to someone who could come up with the best bribery incident. This, in my view, could be viewed by a reasonable objective person to implicitly be glamorizing unlawful conduct. The station manager, Mr. van der Merwe, conceded this during the hearing.

[12] Stretched further, this leads to a question of how far can one go with this kind of a broadcast. This leaves us with a problem of where does a broadcaster stop with this kind of a broadcast. Does it mean that it is acceptable to run reward competitions as to how to pick up a 15 year old girl for sexual motives, or how to buy an illegal firearm, or how to rob a bank, or how to steal a car, or how to break into someone's household? The fine line the BCCSA jurisprudence has maintained over the years has been for as long as the programme is not a *bona fide* documentary then all the above examples will amount to a contravention of the BCCSA Code.

[13] It is my view that giving normalcy to a crime does not make it right, but is tantamount to glamorizing it. The broadcaster did not issue a warning during or at the end of the broadcast. And again the fact that the broadcaster instead promised a reward of a R200.00 voucher to a listener who could come up with the

recounting of the best bribe incident, leads me to the conclusion that this broadcast glamorized unlawful conduct and thus contravened clause 15.1 of the BCCSA Code. The sanction imposed is a reprimand. If the broadcaster, in future, is found to have contravened the Code in a similar manner, it should not be surprised if a fine is considered by the Tribunal.

BRIAN MAKEKETA
COMMISSIONER

The Chairperson van Rooyen and Commissioners Mdlulwa, Nkwane and Co-Opted Member Linnington concurred in the above judgment.