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: 28/2011

DATE OF HEARING: 7 AUGUST 2011

LE ROUX **COMPLAINANT**

vs

HEART 104.9 FM **RESPONDENT**

TRIBUNAL: **Prof Kobus van Rooyen SC (Chairperson)**
Prof Henning Viljoen (Deputy Chairperson)
Dr Lynda Gilfillan
Dr Linda Venter
Ms Zenobia Africa (Co-Opted)

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

For the Respondent: Mr Gavin Meiring, Managing Director and Mr Vernon Adams, Programme Manager of *Heart 104.9FM*.

---

*Alleged abusive, vulgar and demeaning language (words such as **bitch** and **whore**) used against a woman and furthermore at a time when children could be exposed to it – Tribunal held that most children would have been in school by 08h30 and that this was not a time when a large number of children would be likely to have been part of the audience – Tribunal also held that since the ex-girlfriend did not lodge a complaint based on impairment of her dignity, the matter could not be decided by the Tribunal because the complainant did not have* locus standi *to lodge such a complaint, only the girlfriend may lodge such a complaint – Further held that it would have been acceptable for the presenter to discuss the topic in general, but the personal remarks about, and insults directed at the mother of his child, were unacceptable in law – His words and the tone in enunciating them were scornful, derisive and denigrating – Tribunal held that the Broadcaster transgressed Clause 4(1) of the Broadcasting Code when the presenter sent out the message that it is acceptable to use abusive language against women – The insults could also be construed as advocating violence or, at least, unlawful conduct in the form*

of crimen iniuria *against women – **Complaint upheld** – Broadcaster and complainant granted opportunity to file argument on sanction – Only Broadcaster responded and pleaded that a reprimand would suffice as there was no intention to malice or hatred – Tribunal concluded that the contravention was serious since equality and dignity are Constitutionally crucial and there was no doubt that the references were calculated to further the deplorable, alternatively unlawful conduct - The argument that the matter is not sufficiently serious to warrant a fine because the presenter did not act with malice is unfounded - Even if malice was not present, a reasonable listener would have regarded the remarks as so seriously in disregard of the said rights that a broadcaster cannot escape a heavy sanction by merely arguing absence of malice - Intention to promote is sufficient, whether it is motivated by malice or not - The Broadcaster is responsible for the conduct of its presenters and the broadcast took place in flagrant disregard of the Broadcasting Code - **A fine of R15 000 was imposed.** Le Roux vs Heart 104.9FM, Case no: 28/2011 (BCTSA).*

SUMMARY

A complaint was lodged regarding alleged abusive, vulgar and demeaning language (words such as *bitch* and *whore*) used against a woman, and furthermore at a time when children could be exposed to it in a broadcast by the Respondent. Respondent argued that the context of discussion was a scientific study which found that swearing releases stress and that this was demonstrated on air by the presenter. Tribunal held that this was not a time when a large number of children would be likely to have been part of the audience and that the contravention did not fall within this category.Tribunal also held that since the ex-girlfriend did not lodge a complaint based on impairment of her dignity, the matter could not be decided by the Tribunal because the complainant did not have *locus standi* to lodge such a complaint; only the girlfriend could do so. Further held that it would have been acceptable for the presenter to discuss the topic in general, but that the personal remarks about, and insults directed at the mother of his child, were unacceptable in law. Held that his words and the tone in enunciating them were scornful, derisive and denigrating and went well beyond the contemporary standard of tolerance in South Africa. Tribunal held that the Broadcaster transgressed Clause 4(1) of the Broadcasting Code when the presenter conveyed the message that it is acceptable to use abusive language against women. The broadcast amounted to the advocating of violence or, at least, unlawful conduct in the form of *crimen iniuria* against women. Complaint upheld. Complainant and Broadcaster were granted opportunity to file argument on sanction. Only Broadcaster responded and pleaded that a reprimand would suffice as there was no intention to malice or hatred. Tribunal concluded that the contravention was a serious one since equality and dignity are Constitutionally crucial and there was no doubt that the references were calculated to further the deplorable, alternatively unlawful conduct. The argument that the matter is not sufficiently serious to warrant a fine because the presenter did not act with malice is unfounded. Even if malice was not present, a reasonable listener would have regarded the remarks as so seriously in disregard of the said rights that a broadcaster cannot escape a heavy sanction by merely arguing absence of malice. Intention to promote is sufficient, whether it is motivated by malice or not. The

Broadcaster is responsible for the conduct of its presenters and the broadcast took place in flagrant disregard of the Broadcasting Code. A fine of R15 000 was imposed.

JUDGMENT

HL VENTER

[1] A complaint was lodged with the BCCSA concerning swear words used on air by *Heart FM's* morning show host, Phat Joe, on 19 April 2011 at about 08h30.

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

> "I decided to give Heart morning show a try today and was greatly disgusted in the lack of substance in their discussion as well as the content plus vulgarity. The Radio station says that the audience is adults, yet Julian Naidoo was swearing with beeps that hardly disguised the words before 8am. Both Nick Feinberg and Phat Joe were using vulgar language thinking they are amusing the audience.
>
> There are children in the cars even after 8am as lots of schools commence at 08h15 or even 08h30. So if they think their audience comprises of only adults, perhaps they are right, although I am not sure how they determine this or whether they thumb suck but it leads to the question -what defines their audience? Do they take their target market to be the stereotype 'no or low mentality coloureds'? Phat Joe calls the mother of his son a whore on radio, Julian thinks we all stupid when he talks about his girlfriend and a dress and calls the assistant a f** bitch, Nick calls autopage a f** bastard, shit, etc.
>
> The previous complaint against Phat Joe was resolved in the way that the caller's outburst was beyond the control of the presenter. Could someone then justify who was in 'control' of controlling the team this morning? The presenter encouraged and participated in vulgarity and offensive language and called the MOTHER of his child a whore??????????????
>
> It is also the code of the BCCSA that excessively or grossly offensive language not be used. It was excessive this morning. It is also the code of conduct not to use this language when children form part of the audience. How does Heart know that there were no children in the audience. What defines a child is someone under the age of 18. My child was with me in the car this morning as their school does not commence at 08h00.
>
> And since I am cc'ing in the radio station as well, allow to me to raise some issues. Does the station undermine the intelligence of the public to think that we believe the 'little arguments, etc'. It has gone on so long by now that we all know its role-playing and has become quite tedious. Parents deal enough with children and sibling rivalry to still listen to crap like this every morning. Give us a break! Your staff are DJ's, they are not qualified entertainers, actors so please can you guys stop with your little fake skits? The staff portray to be experienced about life yet its mere self opinionated comments, and will reiterate that they lack substance, as if standing around a galley.
>
> Please jack up your station, let them play music and read news if they do not know how to debate, raise awareness, make people think, entertain, amuse amongst other constructive things I could mention."

[3] **In defence, the Respondent replied as follows:**

"In response to the Phat Joe complainant Le Roux concerning Phat Joe's statements about the mother of his son during the morning show broadcast of 19 April 2011.

In terms of clauses

4.(1) Broadcasting service licensees must not broadcast material which, judged within context, sanctions, promotes or glamorises violence or unlawful conduct based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability.

Heart contends that the presenter in no way sanctioned, promoted or glamorised violence or unlawful conduct towards a gender. The statement was not gender specific and was completely personal in nature and relevant to the content theme as heard in the audio.

6.(1) Broadcasting service licensees must not broadcast material which is harmful or disturbing to children at times when a large number of children is likely to be part of the audience.

Heart contends that this content moment was well after 08:20am and large amounts of children would not be listening, any reasonable listener would have deduced throughout the program that the upcoming moment might be not be suitable for young listeners. Furthermore the presenter's speech contained bleeped words to protect sensitive ears.

6.(11) No excessively or grossly offensive language should be used before the watershed period on television or at times when a large number of children is likely to be part of the audience on television or radio.

As per the above response, the program content was aired during a period when large numbers of children would not be listening and the content had "bleeps" placed over any possibly offensive words.

In context of the content and the theme of the morning's presentation, we believe the actions of the presenter and his team where undertaken to provoke audience response and participation as is the historic practise of this Breakfast show. The personalized moment was well in context with the overall presentation and related to the content under discussion."

[4] At the hearing, Mr Adams, from the Respondent, explained that the topic of the particular morning's discussion was a scientific university study which found that swearing acts as an effective painkiller. Researchers found that swearing provides an emotional release for stress. The presenter wanted to demonstrate this on air. He invited listeners to call in and swear in order to release their emotional pain. Phat Joe often uses controversial and even provocative material to evoke responses from listeners. On the morning in question, the swear words in the callers' responses were edited out before they were aired. After listening to a recording of the programme, members of the Tribunal were of the opinion that young children would not have been able to pick up on the bleeped out swear

words. However, Phat Joe also participated in the swearing and not all the swear words he used were edited out. He said that his son's mother emotionally blackmails the child because whenever his son speaks to his mother on the phone while he is visiting Phat Joe, his son always ends up crying. Phat Joe has therefore begun to suspect that the mother emotionally blackmails the son, making him feel guilty because he is having a good time with his father. The presenter said that the child's mother makes him sick, and he called her an angry **bitch** and an irritating **whore**. The word *whore* was screamed at the top of his voice. The co-presenter remarked that the woman is lucky to be out of the country. Mr Adams informed the commissioners that this attack on his son's mother was not out of character with Phat Joe, since it is his usual style to discuss his own life experiences on his show. Mr Adams also argued that most of the segment was entertaining and that only a small part seemed to be offensive to some listeners.

[5] *Heart FM's* target audience is adults between 25 and 49 years old, with an average listenership of 30 plus. The station's programmes are not aimed at children and regular listeners would be aware of Phat Joe's style. On this particular morning, a number of advertisements/teasers were broadcast before 08h00 in which Phat Joe explained the university study on swearing, and announced that he would invite listeners to call in and swear. Since the actual swear words that he used were only uttered at about 08h30, listeners were warned beforehand in so far as children are concerned and there was enough time for them to switch to another station. The commissioners were of the opinion that most children would in any case have been at school by 08h30 and that this was not a time when a large number of children would be likely to have formed part of the audience.

[6] Since the ex-girlfriend did not lodge a complaint based on impairment of her dignity, the matter cannot be decided by the Tribunal. The complainant did not have *locus standi* to lodge such a complaint.[1]

[1] *See Steyn v Heart FM Case No 22/2007.*

[7] The final question considered by the Tribunal was whether the presenter's remarks could be regarded as sanctioning or promoting violence against women according to Clause 4 (1) of the Code or, alternatively, promoted unlawful conduct. The word "***sanction"*** means permit, approve endorse, authorise, and the like. Similarly, the word "***promote"*** means to encourage, support and endorse. It would have been acceptable for the presenter to discuss the topic in general, but the personal remarks about, and insults directed at the mother of his child, are unacceptable in law. There is no question that his remarks as broadcast sanctioned and encouraged the use of abusive language towards women, and the insults could also be construed as advocating violence or, at least, unlawful conduct in the form of *crimen iniuria* against women.[2] The words and the tone of the presenter in enunciating them were scornful, derisive and denigrating. In a previous BCCSA judgment, the Chairman of the BCCSA, Prof JCW van Rooyen SC, described a similar situation as follows:

"Section 9 of the Constitution of the Republic guarantees equality to all persons and expressly rejects discrimination based on gender. ..... (A) term such as "bitch" amounts to the stereotyping of females as lewd (see Shorter Oxford Dictionary). ..... (I)t is necessary to stop this kind of derogatory language on the airwaves, even if its use is not intended to insult or offend. Such language dehumanises women and relegates them to an inferior status – they are stereotyped as being lewd creatures. By using such language, women, as previously disadvantaged persons in terms of section 9 of the Constitution, are treated unfairly in terms of clause 35 of the Broadcasting Code. It is a matter of public importance that an end be put to this kind of reference to women: the airwaves are public property and should not be misused to further verbal abuse of this nature. Freedom of speech is no excuse in such a case: the attaining of equality between the sexes is a more important consideration than freedom of expression within this context."[3]

[8] Verbal abuse of women is a particularly sensitive issue in the light of the increasing number of incidents that demean and dehumanise women on the basis of their gender. The members of the Tribunal were of the opinion that the words used by the presenter went well beyond the contemporary standard of tolerance in South Africa.

---

[2] *Compare the judgment of the Constitutional Court in Hoho v S 2009 (1) SACR 276 (CC) where it was held that iniuria could, Constitutionally, amount to a crime*.

[3] *Du Toit vs SABC (5fm), BCCSA Case No: 36/2004*

[9] In the final analysis, the commissioners came to the conclusion that the Broadcaster transgressed Clause 4(1) of the Code when the presenter sent out the message on air that it is acceptable to use abusive language against women. Such unduly negative, stereotypical and abusive comments promote violence against women or, alternatively, at least unlawful conduct in the form of *crimen iniuria* against women. **In the result, the complaint is upheld.**

[10] The Complainant and the Broadcaster were granted an opportunity to file argument on sanction. The Complainant did not respond, but **the following submission was received from the Broadcaster:**

"In response to the complaint against Phat Joe [Le Roux vs Heart104.9FM] we accept the decision of the commission and would propose that the best sanction be a reprimand. The presenter and his team were engaged in a produced content theme which in the respect of the non-allowed words became a momentary oversight and the station and the presenter acknowledge that these terms will not be used in future.

The judgment states that it is in fact acceptable to discuss the topic in general however it held that the insults directed to the mother of the presenter's child are not acceptable in law and have the effect of advocating violence and unlawful conduct of crimen iniura against women. Accordingly we submit that the best sanction in this matter would be a reprimand and wish to use the following to support this opinion.

- *The intention of the broadcast was not to advocate hatred or to incite people to cause harm, it was an exercise based on a study which had the effect of relieving emotional Stress and Severe pain;*
- *In the matter of the Jewish Defence League v Radio 702, Case No 26/1998, the presenter invited callers to tell "Jewish" jokes. The Commission found in favour of the respondent but held that in the event that presenters wish to delve into a risqué area such as this in future, the matter should be debated beforehand with the station manager and the necessary precautions should take place such as the screening of callers and word shopping. Heart FM has taken similar precautionary measures.*
- *It is also worth noting that in this case, the presenter had provided the listeners with sufficient warning before hand about the discussion and most of the swear words had been blocked.*

The matter is not sufficiently serious to warrant a fine as the presenter did not act with malice and cannot be said to have been grossly negligent as in the case of Naidoo v 94.7 Highveld Stereo, Case No 24/2010, where the presenter in that case had broadcast a satirical sketch which included jokes containing the term "coolie". The complaint was upheld and the respondent was reprimanded.

We trust that the commission will consider the above submission and rule in favour of a reprimand for upheld complaint."

[11] The Commissioners considered the above submission and came to the conclusion that the contravention was a most serious one. Equality and dignity are Constitutionally crucial - see sections 9 and 10 of the Constitution of the Republic

of South Africa. There is no doubt that the references were calculated to further the deplorable, alternatively unlawful conduct described and were also in flagrant disregard of the said two fundamental rights. The argument that "*the matter is not sufficiently serious to warrant a fine as the presenter did not act with malice ...*" is, accordingly, unfounded. Even if it is accepted in favour of the broadcaster that malice was not present, a reasonable listener would have regarded the remarks as so seriously in disregard of the said rights that a broadcaster cannot escape a heavy sanction by merely arguing absence of malice. Intention to promote is sufficient, whether it is motivated by malice or not. The Broadcaster is vicariously responsible for the acts and omissions of its presenters during broadcasts by such presenters. The broadcast took place in flagrant disregard of the Broadcasting Code.

Accordingly, a fine of R15 000 is imposed as sanction, which must be paid to the Registrar of the BCCSA within 21 days after date of this judgment.

PROF KOBUS VAN ROOYEN SC
CHAIRPERSON
6 September 2011

The Chairperson and Commissioners Gilfillan, Viljoen and co-opted Member Africa concurred with the judgment of Dr Venter.