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CASE NUMBER: 32/2010

DATE OF HEARING: 03 DECEMBER 2010

PA DE WAAL **COMPLAINANT**

vs.

TALK RADIO 702 **RESPONDENT**

TRIBUNAL: **PROF JCW VAN ROOYEN SC (CHAIRPERSON)**
DR LYNDA GILFILLAN
DR LINDA VENTER
MR ED LININGTON

COMPLAINANT: **THE COMPLAINANT WAS PRESENT.**

FOR THE RESPONDENT: MS KHAHLISO MOCHABA, HUMAN CAPITAL & REGULATORY AFFAIRS MANAGER OF PRIMEDIA (PROPRIETARY) LIMITED.

Radio Presenter- verbal attack on persons holding Calvinistic beliefs and who are allegedly hypocritical in their behaviour - not upheld. De Waal vs Talk Radio 702, Case No:32/2010(BCTSA)

SUMMARY

A complaint that a remark by a radio presenter about hypocritical conduct of people holding Calvinistic beliefs amounts to impairment of the dignity of the Complainant in that

such persons are among those "who are found in brothels", held not to amount to speech which is prohibited by the clause in the Broadcasting Code which protects dignity. Also held that religious feelings are only protected by the hate speech clause.

However, that in any case, freedom of speech permits a broadcaster to hold a view such as the one expressed in the programme. However, labelling, as in the comment by the presenter, tends to carry the seeds of its own destruction in the marketplace of ideas.

Complaint not upheld.

JUDGMENT

JCW VAN ROOYEN SC

[1] The Registrar of the Commission received a complaint against Radio 702 based on remarks made by a radio presenter at 23:30 on the 23rd July 2010. After having sought the response of the broadcaster, the Registrar decided not to entertain the complaint since, in her view, a prima facie case of a contravention of the Code had not been made out. The Complainant appealed to me against this decision and I decided that since the arguments put forward by the Complaint would be worth considering, it would be in the interests of justice to grant him an opportunity to argue before a Tribunal why he thought that the Code had been transgressed. The Complainant's initial complaint is reproduced hereunder as well as the response by the broadcaster. It is not necessary to repeat what the Complainant said in his appeal to me, since he addressed the issues raised in his appeal before us at the hearing.

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

> "**Complaint: Religious Discrimination on Radio 702, Friday 23 July 2010, 23:30**
>
> On Friday 23 July 2010 at approximately 23:30, Mr. Kieno Kammies on Talk Radio 702, made a specific reference to Calvinists being found in house of "ill repute", referring to brothels.
>
> In terms of our law, prostitution is a criminal offence and by singling out Calvinists, this discriminatory statement was clearly aimed at creating the impression that either:
>
> - All Calvinists are guilty of this offence; or
> - Only Calvinists partake in this criminal activity

Calvinism is generally accepted in our society to refer to protestant and/or reformed religious doctrine and includes all reformed Christian beliefs.

As a practicing Christian of Calvinistic belief, I am deeply offended by Mr. Kammies' statement.

Mr Kammies' statement was clearly intended to create journalistic controversy at the expense of one specific religious doctrine. In terms of the Bill of Rights of the Constitution of the Republic of South Africa, Act 108 of 1996 I am protected against this type of discrimination rendering Mr. Kammies' statement a criminal act.

I respectfully request that the BCCSA, as an independent judicial tribunal exercise its authority to impose the maximum penalty on Mr. Kieno Kammies and Talk Radio 702 and to withdraw any broadcasting license granted to Mr. Kammies to prevent Mr. Kammies from breaching this very essence of the Constitution."

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

"We have listened to the recordings of the show in question. At about 23h33, the presenter made a comment that "some people can be very Calvinistic…"

We submit that the presenter used the term "Calvinistic" as a figure of speech and not necessarily referring to those who strictly adhere to Calvinism. This becomes clear when one looks at the phrase in the context of what was said before. Before the presenter made the statement in question, he and the listeners were having a discussion on people who would tell others not to do something but then would contrary to their advice do that which they advise others not to. It was in this context that the presenter then made the statement that some people "can be very calvinistic,… people with the squeaky clean exterior because people think they are saints". It is very clear when one listens to the broadcast that the comment was an honest expression of the presenter's views and was presented as such."

[4] At the hearing of the matter the Complainant conceded that although the words spoken were offensive, they did not qualify as hate speech in terms of the Code. Although the mere use of words may, in certain circumstances, amount to hate speech as a result of their inherently shocking and inciting nature [1] – the mere broadcast of which mostly[2] implies that the continued use of such demeaning terminology is permissible in our new democracy, which is built on principles of equality and human dignity - I do not believe that the use of the term "Calvinist" carries a similar historical burden. Fierce debate on

[1].Compare the judgments of the BCTSA in regard to the words "Kaffir", "Nigger" and "Coolie" - Naidoo vs 94.7 Highveld Stereo, Case No: 24/2010; Choonara vs Jacaranda 94.2FM,Case No: 28/2006; 5FM vs Baudach & Others, Case No: 04/2009; Janse Van Rensburg vs 5FM, Case No: 36/2007; S Mminele vs Metro FM, Case No 13/2007; V Ndaba vs YFM, Case No: 03/2007, M Hart vs Talk Radio 702,Case No: 48/2001.

[2] . Exceptions have been made where the broadcast was in the public interest – e.g. where a box promoter used the words as part of a news item which demonstrated his racial bias. See Donkin vs SABC, Case No: 05/1998. Also see Myburgh and Ingelby v Radio 702 Case No 04/2001 where a song group degraded Presidents Mbeki and Mandela by using racial expressions Radio 702 broadcast it as a news item.

religion, whether rational or irrational, forms part of a society which is built on freedom of expression and religion. However, when hatred based on religion is propagated, the limits of free speech are exceeded if the words spoken also amount to incitement to cause harm. "Harm" includes the serious impairment of dignity. However, the mere fact that there is a serious impairment of dignity will not, on its own, be sufficient to meet the requirements of hate speech as prohibited by section 16 of the Constitution and, in identical terms, in the Broadcasting Code.

[5] The Complainant argued that the Broadcasting Code had, in any case, been contravened in that he, as a Calvinist, had suffered serious harm to his dignity in terms of clause 38 of the Broadcasting Code which protects the dignity of persons. To attack people who are Calvinistic as "the same persons whom you find in brothels" was, according, the Complainant, deeply harmful to his dignity as a Calvinist. *Wikipedia* defines Calvinism as follows:

> **Calvinism** (also called the **Reformed tradition**, the **Reformed faith**, or **Reformed theology**) is a theological system and an approach to the Christian life. The Reformed tradition was advanced by several theologians such as Martin Bucer, Heinrich Bullinger, Peter Martyr Vermigli, and Huldrych Zwingli, but this branch of Christianity bears the name of the French reformer John Calvin (**Jean Cauvin** in old French) because of his prominent influence on it and because of his role in the confessional and ecclesiastical debates throughout the 16th century. Today, this term also refers to the doctrines and practices of the Reformed churches of which Calvin was an early leader. Less commonly, it can refer to the individual teaching of Calvin himself. The system is often summarized in the Five Points of Calvinism and is best known for its doctrines of predestination and total depravity, stressing the absolute sovereignty of God. (footnotes omitted)

[6] From the above it may be accepted that Calvinism does amount to a particular Christian belief. It can also be accepted that Calvinism is regarded by South Africans as a conservative approach to life in matters such as morality. Several protestant churches in South Africa are built on Calvinism. The question before us is whether a person's religious beliefs form part of dignity as protected in law. That dignity is an all-important constitutional right, was emphasised by O'Regan J in *Khumalo and Others v Holomisa.*[3] The learned Justice said the following regarding dignity:

> [27] In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*. *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but

[3] 2002 (5) SA 401 (CC) at para [22].

constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.

In *Sokhulu v New Africa Publications Ltd t/a 'The Sowetan Sunday World' and Others*[4] Goldstein J stated as follows at 259C-D:

> [10] The right to an unimpaired dignity is protected by the *actio iniuriarum*. Such can be invoked when a person is subjected to offensive and degrading treatment or is exposed to ill-will, ridicule, disesteem or contempt (Minister of Police v Mbilini 1983 (3)
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> SA 705 (A) at 715G - 716A). G In Brenner v Botha 1956 (3) SA 257 (T) Boshoff AJ (as he then was) said at 261 in fin - 262: "In cases of verbal injury, otherwise than in cases of defamation, the words complained of must impair the plaintiff's dignity and must be insulting in the sense that they must amount to degrading, humiliating or ignominious treatment.
>
> [11] There cannot be an impairment of *dignitas* without unlawfulness and the question whether this requirement is satisfied or not is an objective one answered by having regard to the prevailing norms of society (*Delange v Costa* 1989 (2) SA 857 (A) at 862B - G). . ." .'

Also compare what Pickering J recently said in *Ryan v Petrus* 2010(1) SA 169 (ECG), where the above dictum, as well as other related dicta, were quoted with approval.

[7] The first question is whether religion may also be accommodated under the dignity clause, i.e. clause 38 of the Broadcasting Code.[5] Is clause 16, in its protection against hate speech based on religion, not the only clause that protects religion against freedom of expression?[6] Would one not always resort to dignity as soon as the stringent requirements of the hate speech clause 16 have not been met? I am not convinced that the protection of dignity, within the context of the Broadcasting Code is a permissible limitation to speech that is regarded as offensive on religious grounds. Section 16(2)(c) of the Constitution of

[4] [2002] 1 All SA 255 (W)

[5] "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."

[6] Of course, section 15 of the Constitution of the RSA protects freedom of religion.

the Republic of South Africa explicitly states that hate speech based on *religion* is not permitted. Clause 16.3(c) of the Broadcasting Code repeats section 16(2)(c). That is the only limit to free speech in the case of religion. If the infringement of the right to dignity were to be the test, recourse would always be had to this in unsuccessful complaints relating to hate speech. The unlawful infringement of the right to dignity could then be based on mere offensiveness to the complainant, without a hate speech component to it. This would make clause 16.3(c) meaningless. Where dignity is impaired, there could be compliance with the "harm" requirement in the hate speech definition. However, to that the "advocacy of hatred" would have to be added, which is absent in the present broadcast. The infringement of the right to dignity alone is, accordingly, not a sufficient ground to impose a limitation on offensive religious speech. At the heart of freedom of religion lies the right to express views which could be offensive to adherents of the faith that is being criticised or attacked. I, accordingly, with respect, do not agree with the approach in the *Jamiat-Ul-Ulama*[7] judgment in so far as the finding would seem to be based only on the infringement of the right to dignity of adherents of the Islamic faith. Although not fully discussed, the learned Judge does, however, also find that there was advocacy of hatred and, combined with the infringement of the right to dignity, the Court ultimately, in my view, did base its conclusion on the advocacy of hatred plus the infringement of the right to dignity. Of course, it should then be accepted that the hate speech also constituted *incitement* to cause harm in terms of section 16(2) of the Constitution. The judgment, in any case, provides no grounds to limit the right of a broadcaster, through a presenter, to express a view on the hypocrisy of "Calvinistic" people. While this sweeping statement was highly censorious, it did not satisfy the requirement of advocacy of hatred.

[8] Even if the dignity of adherents to Calvinism were to be protected in the case of attacks against Calvinism, I do not believe that the core of dignity, i.e. self respect, was, judged from the perspective of reasonableness in law, sufficiently impaired to justify the limitation of the right of the presenter to have said what he said in terms of the Broadcasting Code. Of course, the Complainant said that he had been deeply hurt by

[7] *Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Ltd and Others,* Case No. 1127/06 (WLD)

what was said and there is no reason to doubt his sincerity in stating this. However, ultimately the test is a legal test, which introduces the element of objective reasonableness. Since the application of the Broadcasting Code amounts to the application of a disciplinary system, which distinguishes it from private law and places it closer to criminal law, the following reasoning of Nicholas J in *S v Tanteli*[8] is particularly relevant to the present matter:

> In my view, however, there was in the present case no basis for a finding that the complainant's *dignitas* (his proper pride in himself) was impaired at all. The attack was not, and was not understood as being, an attack against the complainant personally. It was an attack upon his language. Undoubtedly, the complainant found that to be hurtful and offensive in a general sense; but it did not, in relation to the person of the complainant, have that degrading, insulting or ignominious character which is a requisite of an *injuria*.
>
> In our mixed society there are, apart from language, a number of areas, such as race, religion, colour and national feeling, in which an individual may be exceptionally sensitive to disparaging remarks and over the years there must unhappily have been innumerable instances in which an individual has felt himself affronted by offensive remarks in one or other of these areas. The fact that it appears that there is not on record any case of a prosecution for *criminal injuria* arising out of such remarks, points strongly to the conclusion that conduct such as that now in question has never been regarded as supporting a criminal charge. In the case of *R. v Umfaan*,1908 TS 62 at p. 68, INNES, C. J., said:
>
> 'I come to the conclusion that a threat to kill is not an *injuria*. For two reasons. One is that there is a significant absence of any direct authority on the point. That is specially remarkable when we consider the care and particularity with which Voet and other writers have given examples of *injuriae*. They have gone to the trouble of giving instances which could very seldom arise in real life. Here is an incident which must frequently arise in real life; yet none of the books mention it as constituting an *injuria*.'
>
> And in *R. v Terblanche*, 1933 O. P. D. 65 at p. 71, DE VILLIERS, J. P., said:
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> 'Bearing in mind the past history of criminal administration in this country, the position seems to me to be correctly stated in Gardiner and Lansdown, S. A. Criminal Law and Procedure, pp. 1028 - 9, viz. that *criminal injuria* has a narrower denotation in this country than *injuria* had in the Roman-Dutch law, and that, even if conduct falls within the Roman-Dutch definition of *injuria*, the Courts of this country will not treat it as a criminal injury if it is not of a reprehensible character which in the interests of society should be punished, or *if there has for a long period been a practice by which such conduct has been regarded as not constituting a contravention of the criminal law.'*(My emphasis).
>
> There may, of course, be cases in which an insult to a person's language, or race or religious persuasion or national group may, in the circumstances, constitute also an impairment of his *dignitas*, but this is not such a one.

[9] Although the term "Calvinistic", as used by the presenter in the broadcast, might conceivably also strike at any adherent of Calvinism, the use of the word "Calvinistic" in

[8] 1975(2) SA 772(T) where the following words were said by Tanteli to the complainant (an Afrikaans speaking person who wished to be served in Afrikaans): "Whatever you are speaking, speak to the Kaffir"

this context clearly denotes people who behave in a hypocritical manner and yet outwardly profess to adhere to the strict principles of the Calvinistic faith. It is unlikely that the presenter intended to include all adherents of Calvinism. The presenter's use of the word "Calvinistic" is, of course, questionable, since hypocrisy is not necessarily confined to Calvinists. In fact, hypocrisy may be found to be present among people who profess to be supporters of liberty and, in fact, in any group which professes to hold a view that they believe to be incontrovertible. In any case, labeling always carries the seed of destruction in the marketplace of ideas. Yet labeling, questionable as the practice may be, is not sufficient in this case to limit the right to freedom expression. Every person has the right to publish comment even if the comment is fraught with controversy, is in questionable taste, and is likely to be rejected by persons with a different view. At the very least, the presenter's discussion did deal with the topic of hypocrisy, which made the remark relevant. The fact that the comment was of a questionable nature, given the widespread societal presence of hypocrisy (far beyond those who are adherents of Calvinism), is irrelevant. The Tribunal's task is not to judge the value or truth of comment in a case such as the present, but to establish whether the words used amounted to hate speech or the alternative, if we are wrong in limiting the test to hate speech as explained above: a serious and legally unreasonable impairment of the dignity of the complainant.

[10] Although the complainant was particularly hurt by what was said, the Code does not protect religious views via dignity in a matter such as the present – compare the *Tanteli* judgment. Of course, facts may in future come before this Tribunal which could qualify as an unreasonable invasion of dignity. We would then, once again, have to reconsider whether the alternative reference to dignity would be permissible in law. However, this is not such a case.

[11] The outcome of this matter should not be regarded as reflecting on the integrity and sincerity of the Complainant. Had this been the test in law, the matter might well have been decided in his favour.

In the result, the complaint is not upheld.

JCW VAN ROOYEN SC

22 December 2010

Commissioners Gilfillan, Venter and co-opted Commissioner Linington concurred in the judgment of the Chairperson.