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CASE NUMBER: 33/2011

DATE OF HEARING: 7 OCTOBER 2011

COLLINS **1st COMPLAINANT**
GULE **2nd COMPLAINANT**

vs

5FM **RESPONDENT**

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
DR L GILFILLAN
MR B MAKEKETA
MS Z MBOMBO
PROF G OLIVIER
MR L VAN WYK

FOR THE COMPLAINANT: The Complainants were unable to attend.

FOR THE RESPONDENT: Ms Veronica Barnard, Broadcasting Compliance SABC: Legal Services, Policy and Regulatory Affairs assisted by the Station Manager and Mr Gareth Cliff, the Presenter.

Hate speech – allegedly based on gender – not present since complainants mistakenly referred to "girls" or "women" while there was no reference to girls or women in the alleged hate speech which was broadcast – Collins and Gule vs5FM, Case 33/2011.

SUMMARY

The first complaint read as follows:

"On the morning of 8th September during the airing of the Gareth Cliff Show Mr. Cliff had occasion to interview a young woman about her humanitarian activities. It transpired that this young woman now 27 years old had started her humanitarian programme as a 22 year old. During the course of discussion Mr. Cliff made mention of her very young age and remarked that to have started her programme at such an early age was commendable because as he stated "girls of 22 usually do nothing but lie on their backs with their legs open"

The second complaint was in the same vein.

The main question which the BCCSA Tribunal considered was whether the statement amounted to the advocacy of hatred based on *gender* and constituted incitement to cause harm, which is prohibited by the Constitution of the Republic and clause 4 of the Broadcasting Code.

The Tribunal concluded as follows:

1. **The reference to "girls" or "women" by the complainants may possibly have been inspired by at least eight newspaper articles where the term "girls" was incorrectly substituted for "most 22-year-olds". Whatever the presenter said, he did not make a sexist reference. One might infer that he referred to females since the person interviewed, Ms Larkan, is a female. But that is not the only reasonable inference that may be drawn from the facts, judged as a whole. It would amount to a stereotyping of sexual activity if one were to draw only one inference from the remark and conclude that it must have referred to women. The phrase, "*most 22 year olds are laying [sic] on their backs with their legs open at 22, or else they are drinking*", is nothing more than an outrageous, probably ill-chosen, comparison. Yet however outrageous the phrase may be, it is not gender insensitive, and nor does it even amount to discrimination based on gender.**

2. **The words, in any case, do not even come close to hate speech as defined in the Broadcasting Code and section 16(2)(c) of the Constitution of the Republic. For a finding of hate speech, there must be language that objectively advocates hatred based on gender, which constitutes incitement to cause harm. There is no suggestion of harm being directed at a specific gender, nor of discrimination based on gender, in the current instance. All 22-year-olds, of whatever gender, are included. The hyperbole implicitly included men and women in its sweeping declaration.**

   To interpret the presenter's verbal image of young people engaged in sexual activity (or drinking) as constituting hate speech would be a gross overreaction. Indeed, to do so would trivialise the very notion of hate speech. If the hate

speech alarm is sounded indiscriminately, it will lose its efficacy and power in cases where hate speech genuinely exists, and where it needs to be dealt with according to the Broadcasting Code, section 16(2)(c) of the Constitution of the Republic and the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000. In this instance, advocacy of hatred based on *gender* is not present. The complaint already fails on the gender requirement. In fact, there is also no advocacy, but simply an opinion which is aired.

The Complaints were accordingly not upheld.

JUDGMENT

JCW van Rooyen SC

[1] Two complaints were received concerning a remark which was made by a presenter, Mr. Gareth Cliff, on SABC's 5 FM Radio station. After the Registrar decided to entertain the complaint, I decided to appoint a Tribunal to hear the matter. It should be pointed out that the Respondent is the SABC, who accepts responsibility for what its presenters say in broadcasts. It follows from this that it is not the presenter who is the Respondent, and it is, accordingly, not against him that a decision is taken, if that were to be the outcome, but against the SABC. Of necessity, the Tribunal must, of course, evaluate what the presenter said in order to take a decision regarding the responsibility of the SABC.

[2] The complaints read as follows:

Collins: Re: Complaint *Gareth* Cliff Morning Show Five FM Radio

''On the morning of 8th September during the airing of the Gareth Cliff Show Mr Cliff had occasion to interview a young woman about her humanitarian activities. It transpired that this young woman now 27 years old had started her humanitarian programme as a 22 year old. During the course of discussion Mr. Cliff made mention of her very young age and remarked that to have started her programme at such an early age was commendable because as he stated "girls of 22 usually do nothing but lie on their backs with their legs open"

This comment is most offensive and insulting to all young women and is extremely sexist. Mr. Cliff has no evidence to substantiate such claims and his remarks are completely unacceptable and should be condemned in the strongest terms. Even the other female members of his team on the show expressed concern at his remarks, yet he brushed them off and continued with the interview.

This particular radio show enjoys an extensive audience and it follows that his remark was widely heard. I therefore formally lodge a complaint against Mr. Cliff and request that action be taken against him for his completely off colour remarks."

Gule**:** "I wish to lodge a complaint on behalf of all mothers, grannies, sisters and aunts of all the 22 yr olds who were humiliated and insulted by the sexist comments made by Gareth Cliff on Friday 9/9/2011 during an interview on his program on 5fm. Cliff told Aids activist Angela Larkan she should be proud of herself having started her work as a 22yr old since most women at that age "do nothing but lie on their backs with their legs open."

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

1. "The allegation by the complainant is a misquote of what was actually said by the presenter:

2. What was actually said, as can be confirmed from the recording supplied, was the following:

"At 22, you started a nonprofit organization, most 22 year olds are laying on their backs with their legs open at 22, or else they are drinking…."

3. It is unclear what the presenter tries to say next as his team intervenes, but the allegation that he "brushes off" his team members is not correct, as the presenter then goes on to give his direct interpretation of what he is trying to say.

"I know, I mean, I am being sarcastic, not all but, I mean a lot of 22 year olds are couldn't care less about the state of humanity or the, the spread of HIV/Aids among local communities…. This, these are things that mostly older people get involved in."

4. In view of the above, we believe that the complainant did not consider the full context of what was said by the presenter.

5. The BCCSA has requested that the SABC respond to the complaint in terms of clauses 4(2) and 12 of the BCCSA Code which reads as follow:

4(2) Broadcasting service licensees must not broadcast material which, judged within context, amounts to (a) propaganda for war; (b) incitement of imminent violence; or (c) the advocacy of hatred that is based on race, ethnicity, religion or gender and that constitutes incitement to cause harm.

12 (1)Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance.(2)Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.(3) Where a person has stated that he or she is not available for comment or such a person could not reasonably be reached, it must be stated in the programme.

6. When addressing the complaint, we have to take into consideration the context in which the comments were made. We are therefore of the opinion that the comments made by the presenter were not made in terms of hate speech towards women. At no point during the presenter's comments did he advocate, promote and/or incite imminent violence or hatred towards women that could cause harm. Taking the context of the segment and all the relevant factors into consideration, we are convinced that there has been no contravention in terms of clause 4(2) of the BCCSA Code.

7. In terms of clause 12 of the BCCSA Code we believe that the issue of HIV/AIDS and the promiscuity amongst youth, which has been highlighted by health workers on a number of occasions, squarely puts this issue in the public domain. The subject of the interview was also related to this, in that the project started by her at the age of 22 had direct relevance to this. The presenter therefore had every right to make a comment, albeit in his flippant style that his audience is accustomed to. The presenter

is known to his audience to express himself openly, honestly and sometimes even insensitively and unsympathetically.

8. Freedom of expression permits all kinds of views to be expressed. Although freedom of expression must be limited when it sanctions, promotes or glamorises violence based on gender, we believe no traces of this could be found in the segment. There is therefore no contravention of Clause 12 of the Code.

We submit that there has been no contravention of the Code at all in respect of this complaint."

Evaluation

[4] The Complainant states that the presenter's actual words were: "girls of 22 usually do nothing but lie on their backs with their legs open". He further states that the comment is "insulting to all young women and … extremely sexist".

[5] The second Complainant complains "on behalf of all mothers, grannies, sisters and aunts of all the 22 year olds who were humiliated and insulted by the sexist comments made by Gareth Cliff". It may be inferred from this that the Complainant is a woman, who apparently also misheard or misinterpreted the remark as applying to "most *women*" rather than "most *22 year olds*".

[6] The reference to "girls" or "women" by the complainants may possibly have been inspired by at least eight newspaper articles where the term "girls" was incorrectly substituted for "most 22-year-olds". Whatever the presenter said, he did not make a sexist reference. One might infer that he was referring to females since the person interviewed, Ms Larkan, is a female. But that is not the only reasonable inference that may be drawn from the facts, judged as a whole. It would amount to a stereotyping of sexual activity if one were to draw only one inference from the description "laying (sic) on their backs", and conclude that the remark must have referred to women in the missionary position during sexual intercourse. The phrase, "*most 22 year olds are laying [sic] on their backs with their legs open at 22, or else they are drinking*", is nothing more than an outrageous, probably ill-chosen, comparison. Yet however outrageous the phrase may be, it is not gender insensitive, and nor does it even amount to discrimination based on gender. The reference to "drinking", about which no complaint was lodged, demonstrates the scope of the remark, as well as its absurdity, if it is to be taken literally. It is nothing more than hyperbole, a broad, exaggerated description, that includes all 22-year olds, both male and female. This

hyperbolic statement would clearly have been considered to be unfounded by most listeners.

[7] The words, in any case, do not even come close to hate speech as defined in the Broadcasting Code and section 16(2)(c) of the Constitution of the Republic. For a finding of hate speech, there must be words that objectively[1] advocate hatred based on gender, which constitutes incitement to cause harm. There is no suggestion of harm being directed at a specific gender, nor of discrimination based on gender, in the current instance. All 22-year olds, of whatever gender, are included. The hyperbole included men and women in its sweeping declaration. Gender, accordingly, does not come into play at all.

[8] Ultimately, a closer look at the requirement for a finding of hate speech is necessary. The Broadcasting Code, which repeats section 16(2)(c) of the Constitution, provides as follows: "The advocacy of hatred that is based on race, ethnicity, religion or gender and that constitutes incitement to cause harm". This Constitutional limitation to free speech is clearly drafted in terms that would allow much to be said freely – even that which is offensive. The wide protection which the provision grants to free speech should be seen in the context of the severe restrictions on free speech which the South African community was subjected to by apartheid strictures between 1948 and 1994. Moseneke DCJ [2] has said that the fundamental right itself must be given a generous application, and Mokgoro J[3] and O'Regan J [4] have both stated that freedom of speech lies at the heart of democracy. The 1994 Task Group: Film and Publication Control, which drafted the first legislation after democracy that dealt with freedom of speech, also stated that "the quality of democracy in a country may be judged by the degree of freedom of expression which its people enjoy".[5] To interpret the presenter's verbal image of young people engaged in sexual activity (or drinking) as constituting hate speech would be a gross overreaction. Indeed, to do so would trivialise the very notion of hate speech. The dangers of crying wolf at every opportunity should be

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[1] See this Commission's judgment in *Human Rights Commission v SABC 2003(1) BCLR 92(BCCSA).*

[2] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMARK International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

[3] *Case and Another v Minister of Safety and Security and Others 1996(3) SA 617(CC); also see the Report of the Task Group: Film and Publication Control 1994(Government Printer 3 March 1995).*

[4] *SANDU v Minister of Defence* 1999 (4) SA 469 (CC)

[5] *3 March 1995 Government Printer p15.*

borne in mind, especially in the context of hate speech, which poses very real dangers against women and other groups in our society. If the hate speech alarm is sounded indiscriminately, it will lose its efficacy and power in cases where hate speech genuinely exists, and where it needs to be dealt with according to the Broadcasting Code, section 16(2)(c) of the Constitution of the Republic and the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000. In this instance, advocacy of hatred based on *gender* is not present. The complaint already fails on the gender requirement. In fact, there is also no advocacy, but simply an opinion which is aired.

[9] The alternative complaint, which was put to the broadcaster by the Registrar, in the light of the facts placed before her, was that the Broadcaster may have contravened clause 12 of the Code. Clauses 12 (1) and (2) provide as follows:

> (1) Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance.
>
> (2) Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.

This Commission has time and again stressed the right of the individual to express an opinion. One might not agree with the opinion – as in this case – but that is a far cry from regarding it as being in conflict with the quoted clause, or as hate speech. The SABC should, and has the right, to express an opinion, even if many people might be critical of the opinion, and even if this Commission were to believe that such an opinion were not particularly appropriate. The essence of freedom of expression is to grant people the right to say what they think: the fundamental limits are clear, and lie in the protection against hate speech as defined within the parameters of race, ethnicity, gender and religion; the protection of children;[6] and unreasonable impairment of the dignity or reputation, or invasion of the privacy, of individuals.[7]

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[6] E.g in the case of child pornography – see *De Reuck v Director of Public Prosecutions WLD and Others 2004(1) SA 2004(CC); also see clause 6 of the Broadcasting Code.*

[7] There are, of course, other limits to free speech, e.g. in the case of the national security of the State. These limits will all have to be Constitutionally justifiable in terms of section 36 of the Constitution of the Republic.

[10] If offensive words are restricted without reasonable grounds, as set out in section 36 of the Constitution of the Republic of South Africa, it would quench vibrant debate, which is an essential element of any democracy. It would, in any case, be constitutionally extraordinary if an opinion were to be limited merely because it is offensive. Clause 12 is, accordingly, not applicable in the case of an opinion such as the one expressed in the broadcast. Such an opinion need not be made on facts truly stated or fairly indicated and referred to, as required in the above quoted clause 12. Indeed, hyperbole is the very essence of the opinion under discussion, and hyperbole by its very nature is not based on facts truly stated or fairly indicated and referred to since it is, essentially, an overstatement. The presenter was simply making a hyperbolic and seemingly off-the-cuff generalisation aimed at 22-year-olds, based on a stereotype of that age group's preoccupation with sex and alcohol.

In the result the complaints are not upheld.

JCW VAN ROOYEN SC
CHAIRPERSON
3 November 2011

Commissioners Gilfillan, Makeketa, Mbombo, Olivier and Co-Opted member Van Wyk concurred with the judgment of the Chairperson.