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Case no: 19/2002

Date of Hearing: 17 April 2002

D Prinsloo & P Venter **Complainant**

vs

Rippel 90.5 FM **Respondent**

TRIBUNAL: **Prof Kobus van Rooyen SC (Chairman)**
Prof Sunette Lötter
Prof Henning Viljoen

Complainants in person

For the Respondent: **Mr Kobus Rudolph, Managing Director**

Registrar of the BCCSA: **Ms Shouneez Martin**

Reference in morning chat show to Miss Gay South Africa as "dit" (Afrikaans word meaning "it") - Tribunal considering the question of hate speech -Code interpreted in the light of recent Constitutional Court judgment - complainants conceding that remark complained of not amounting to hate speech - no breach of Code found - complaint dismissed *- Prinsloo & Venter v Rippel 90.5 FM.*

SUMMARY

In a morning chat show, reference was made to Miss Gay South Africa as "dit" (Afrikaans word for "it"). Complaint of affront to the dignity of the gay community.

Tribunal considering whether remark likely to harm relations between sections of the population. This part of the Code interpreted in the light of recent Constitutional Court judgment. Complainants conceding that remark complained of not amounting to hate speech. No breach of Code found. Complaint dismissed.

JUDGMENT

Prof Henning Viljoen

Radio Rippel, a community radio station based in Pretoria, broadcasts a "Morning Show" in which music is played, news is broadcast and comments are made on topical matters, all in a light vein. On Monday 28 January 2002 certain things were said on the Morning Show, giving rise to the following complaint:

"To launch this complaint took some serious consideration, but as people who believe there is a place in the sun for each and every one of us, we felt the need to stand up for what we believe in and stand for.

Section 9(3) of the Constitution of the Republic of South Africa provides that the state may not unfairly discriminate directly of indirectly against anyone on one or more grounds, including race, gender, religion, conscience and belief. This is clear and needs no discussion. Any form of discrimination, including sexual discrimination is not welcome in the new South Africa.

*The **Code of Conduct for Broadcasters** states that broadcasters may not broadcast any material that is indecent or offensive to the religion or morals of any section of the South African public. It also requires broadcasters to provide balanced and impartial news coverage, and to allow parties that are criticised on its programs the right to reply to that criticism. Broadcasters are also compelled to air different views when broadcasting matters of controversial public importance.*

During the morning show on Radio Rippel the newspaper headlines are discussed. After reading the article on the New Miss Gay South Africa who was crowned in Welkom, Mrs. Anne Boys again decided to share some thoughts on air, making clear her disrespect not only for this event, but also against the gay community, specially guys in "drag". Mrs. Boys referred to Miss Gay South Africa not as a man or a woman but a "dit" (Afrikaans word), meaning an "it", someone / something with no identity in other words. Mrs. Boys also asked what "drags" should then be classified as. Since when are we to be classified? What utter nonsense.

Remarks like this were made on air before and really leaves a bad taste in the mouth to think that this radio Station is calling themselves a community radio station. In many ways they are just that and it's appreciated what they are doing for the community, but this discrimination and debase of the part of the community who are gay, cannot be tolerated anymore. Making jokes and silly and childish remarks about gay people and

or certain groups within the gay community is unnecessary and portrays a very immature broadcasting character."

In reaction to this complaint, the representative of the Respondent merely rejected the complaint and stated that, to his mind, the Code of Conduct had not been violated.

During the hearing before this Tribunal, both parties had the opportunity to state their respective cases. The Complainants elaborated on their letter of complaint. The only ground, to our minds, on which the Complainants could seriously base their complaint, is that part of the Code which prohibits the broadcast of material which ".. is likely to harm relations between sections of the population .." (see paragraph 7.1.1 of the Code). This prohibition, like all the others contained in the Code, must be balanced with the right to freedom of expression, contained in section 16(a) of the Constitution. This right is qualified in the Constitution itself by section 16(2)(c) which states that the right to freedom of expression does not extend to, *inter alia*, "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" (commonly referred to as hate speech).

In this context we have taken note of a recent judgment by the Constitutional Court in the case of *The Islamic Unity Convention v The Independent Broadcasting Authority and Others*, Case CCT 36/01 (unreported), in which judicial interpretation was given to that part of clause 2(a) of the "Code of Conduct for Broadcasting Services" which prohibits the broadcasting of material which is "likely to prejudice…relations between sections of the population". As can be seen, this part of the (now defunct) IBA's Code corresponds with the Code of the BCCSA. The only difference between these parts of the two Codes, is that the word "harm" in the BCCSA's Code is replaced by the word "prejudice" in the other Code. It is our view that these words could be used as synonyms.

In the judgment referred to, the Constitutional Court found that the prohibition is *"..so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. It would deny both broadcasters and their audience the right to hear, form and freely express and disseminate their opinions and views on a wide range of subjects."* (at paragraph 44). As a result, the Constitutional Court found that the relevant portion of clause 2(a) impermissibly limits the right to freedom of expression and is accordingly unconstitutional. (at paragraph 51).

This judgment has severe consequences for the BCCSA. Although the BCCSA was not a party in this case and the Constitutional Court accordingly did not deal with the Code of the BCCSA, we are bound, like all courts and tribunals similar to ours in South Africa, by the judgments of the Constitutional Court. As that part of the IBA's Code which was declared unconstitutional reads almost identical to the part of paragraph 7.1.1 of our Code quoted above, we have here a legal precedent which compels us to take urgent steps to amend our Code. In the interim, we should be guided by section 16 of the Constitution, read with its qualification.

Turning to the present complaint, the matter which we have to decide is whether the remark complained of amounted to the "advocacy of hatred … based on … gender … and that constitutes incitement to harm". During the hearing the Complainants conceded that the remark in question did not amount to hate speech. That is our view too and results in our finding that with the remark complained of, the Respondent did not violate the Code of the BCCSA. References to other parts of the Code, as argued by Complainants, are not relevant. The language used is either hate speech or is not in contravention of the Code.

Although this finding concludes the matter, we would like to sensitise the Respondent to the following. We realise that the Morning Show is conducted in light vein and that fun is poked at everyone, but we would expect the Respondent, and all other broadcasters, to respect the dignity of everyone in South Africa, also those people whose ways and ideas do not correspond with those of presenters.

BCCSA COMMISSIONER
The other Commissioners concurred in the above judgment.