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CASE NO: 47/2002

DATE OF HEARING: 06 SEPTEMBER 2002

VAN RENSBURG AND BARNARD **COMPLAINANTS**

VS

TUKS FM **RESPONDENT**

TRIBUNAL: PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)
PROF WILLEM DE KLERK
PROF SUNETTE LÖTTER

FOR THE RESPONDENT: MR. RIAN VAN HEERDEN, MANAGER AND MR. SIMON DINGLE, PRODUCTION MANAGER

THE COMPLAINANTS WERE NOT REPRESENTED

Language – disgusting references in jokes to rape and cancer – contravention of Code. Van Rensburg and Barnard v Tuks FM 47/2002.

SUMMARY

Presenters making derogatory references to breast cancer and rape in jokes during broadcasts. Attempt at being humorous. BCCSA holding references to be serious contraventions of Code. Respondent, however, apologizing and dismissing one presenter and warning the other presenter. BCCSA issuing a reprimand.

JUDGMENT

JCW VAN ROOYEN

[1] Tuks FM is a community broadcaster. It serves the student population at the University of Pretoria. Of necessity, it also reaches other members of the public. During August two presenters allegedly contravened the Broadcasting Code by, in one instance, making derogatory references on Women's Day about women with breast cancer and resulting mastectomies and in the other instance, stating that if listeners did not keep on listening to the broadcast, the presenter would take his pistol, hijack the listener's car and rape his/her little girl.

The Registrar received two complaints, which read as follows:

[2] **D BARNARD:**
"I am reporting an incident that took place on Radio Tuks on 9 August 2002. On the day in question, I was listening to the lunch time show which was presented by "Joe Man". A lady listener called in requesting a song. When asked to whom it was dedicated, she said that seeing it was Woman's Day, the song should go out to all women suffering from breast cancer. "Joe Man" then proceeded to make a joke about women walking around with only one breast under their t-shirts and how funny that looks. He laughed heartily at his own "joke" and seemed to find the whole concept very amusing.I called into the radio station and confronted him. He tried to defend himself but after I had my say, he apologized. I insisted that he do so on air, which he then did. I found his comments offensive, insensitive, degrading and unprofessional. People with a big mouth, no brain and even less integrity should not be awarded the privilege of being on air. I demand that he be relieved of his duties."

J VAN RENSBURG:
"Ek het Sondagaand in Pretoria geluister na die bg. radiostasie en dj waar hy 'n 'grappie' probeer maak het ,wat my geskok het. Hy het die uitlating gemaak dat as die publiek nie na hom bly luister nie: sy presiese woorde: "Ek gaan my 9mil pistool haal ,jou kar hijack en jou dogterjie verkrag" en hy het gelag daarna.Dit het my en my meisie geskok en ek dink hy hoort nie op die lug nie."

[3] The Respondent's management apologized profusely for what had happened and indicated that the "jokes" did not conform to the policy of Tuks FM at all. It stated that the presenters were young and inexperienced and apologized for what had happened. An apology on air was also broadcast for both transgressions. In the case

of the breast cancer "joke" the presenter was issued with a final warning and in the other case, the presenter was dismissed.

[4] The Broadcasting Code provides that the electronic media shall not broadcast material which is likely to harm relations between section of the community. Recently the Constitutional Court held in *Islamic Unity Convention v The Independent Broadcasting Authority and Others* 2002(4) SA 294(CC) *that* the said Code provision stated the position too vaguely and widely in the light of section 16(2) of the Constitution. Langa DCJ, writing for the Court, held that the exemption from the freedom of expression fundamental right should be limited for broadcasters to what section 16(2) of the Constitution provides. That means that freedom of expression would not extend to:

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Any further limitation on racial speech in the Broadcasting Code, so the Court held, would have to be made by Parliament in such a manner that it would, as exemption to section 16(1) of the Constitution, be justifiable in terms of section 36 of the Constitution.

[5] In both matters before us, we believe that an affront based on gender is present. The question is, accordingly, whether the broadcasts amounted to the advocacy of hatred based on gender that constitutes incitement to cause harm.

It could possibly be argued that both incidents amounted to meaningless abuse. The intention was obviously to be funny and not to harm. Nevertheless, it should be borne in mind that broadcasts reach a wide spectrum of people. Insofar as the first complaint is concerned, some female listeners may have breast cancer or a relative might be inflicted with this very serious condition. Other listeners may

themselves have had a mastectomy or have a close relative who has had a mastectomy. But even where the female listener is not affected herself or has no contact with someone so affected, the mastectomy joke touches upon the dignity of woman. There is, accordingly, no excuse for this kind of "joke". It amounts to the advocacy of hatred based on gender that constitutes incitement to cause harm. The harm caused by this kind of observation need not be physical and can lie in a feeling of severe degradation in a woman. This Tribunal has opted for this approach to "harm", which is based on the Canadian Supreme Court's approach to hate speech – an approach dealt with hereunder in par 7. Hate speech does not only lie in the emotional speech of a person who incites others to visible action, but also in the, much more down-toned, though venomous statement which incites to harm of a degrading kind. The reaction could be solely of a personal emotional nature. The reaction must, however, be of a severe nature so that freedom of speech would not be restricted unduly in such cases. The test is an objective one, similar to the test applied in the case of *iniuria.* Compare Goldstein J in *Sokhulu v New Africa Publications & Others 2001(4) SA 1357(W) at par 11*.

[6] Section 16(2)(c) of the Constitution, which is now also part of the Broadcasting Code, is particularly lenient. It is not, however, as tolerant as the **US Supreme Court's** approach, as evidenced in *Brandenburg v Ohio 395 US 444(1969), R.A.V. v City of St Paul 112 S.Ct 2538(1992)* and other US cases. In the first case the right of the Ku Klux Klan to publicly call for the expulsion of African Americans and Jews from the United States, and the right to suggest the desirability of violence (in veiled but unmistakable terms) were upheld, unless the speech was intended to cause violence and had a high likelihood of producing such a result imminently. The words used by the Klansmen illustrate how far the US Constitution allowed them to go: they said that " It's possible that there might have to be some revengeance taken," that the "nigger should be returned to Africa, the Jew returned to Israel" that we should "[bury] the niggers", as well as other equally offensive statements. The Court required that before a State could prohibit such language, it must amount to "advocacy which is directed at inciting

or producing imminent lawless action and is likely to incite or produce such action". The Court held that the conduct of the Ku Klux Klan had not gone that far. Floyd Abrams argues that this test is almost impossible to meet. Compare Abrams 1992 *Villanova Law Review* 743 at 747.

[7] In Canada the Constitution has been held to grant much more protection to the rights of the persons threatened than the US Courts would allow. In *R v Keegstra (1990), 61 CCC (3rd) 1 (SCC)* the Supreme Court considered the constitutionality of the Criminal Code provision which criminalises willfully and publicly promoting hatred against an identifiable group. The accused, who was a schoolteacher, was charged for having spread hateful, anti-Semitic *messages* to his students. The Court held unanimously that such expression conveyed meaning in a non-violent manner and, therefore, the law was in conflict with s.2 (b) of the Charter. However, by way of a majority of four to three the Court held that the law amounted to a reasonable limit demonstrably justified in a free and democratic society, in terms of section 1 of the Charter. The majority accentuated the potential emotional and psychological harm as well as the threat to dignity resulting from racist speech. The aim of such legislation was also to eliminate the racial, religious and cultural animosity created by such speech. Hate propaganda, in its view, was inimical to the aim of promotion of multiculturalism and equality. The value of hate speech was also, like obscenity, of limited importance in the furthering of the quest for truth, individual fulfillment or democracy. See John Sopinka in Duncan (ed.) Between *Speech and Silence* (1996) 129 from 145.

[8] Insofar as the second complaint is concerned, the words, once again, amount to hate speech. The rape figure is particularly high in our society. The terribly degrading nature of rape to a woman need not be dwelt upon, it is too well known. In *S v Chapman 1997(3) SA 341(A) at 344J-345B per Mahomed CJ, Van Heerden and Olivier JJA* the Supreme Court of Appeal emphasized the humiliating nature of rape:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights."

The Constitutional Court, in *Carmichele v Minister of Safety and Security and Another 2001(4) SA 938(CC) at par 29* quoted the above passage with obvious approval.

[9] The "joke" involves a daughter of tender years ("dogtertjie"). To simply state, albeit by way of a joke, that if you stop listening to me on radio I will take my pistol, hijack your car and rape your daughter (of tender years) amounts to conduct of the most shocking kind. It is impossible to even find some form of extenuation in the obvious attempt at a joke. Parents whose daughters have been raped have been put through one of the most severe traumas and for them to hear this glib reference to rape, would be shocking in the extreme. The same applies to adult or teenage females who were raped as a child. Of course, if a child who has been raped hears this kind of "joke" and understands it, the consequences are even more traumatic. There is, accordingly, no extenuation. The joke amounted to hate speech of the worst kind and it struck at the heart of society – its children.

[10] The complaints are accordingly upheld. Had Tuks FM management not taken the steps referred to earlier and apologized on air, we would have imposed the maximum fine of R30, 000. Apology is not always extenuating, but Tuks FM has a clean record and management took immediate and appropriate steps, for which we give due recognition. Ultimately management must, however, take responsibility for the conduct of their presenters. We accordingly reprimand Tuks FM.

JCW VAN ROOYEN SC.
CHAIRPERSON

20 SEPTEMBER 2002

The other two Commissioners concurred in the judgment of the Chairperson