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CASE NUMBER: 02/2020

DATE OF HEARING: 19 FEBRUARY 2020
JUDGMENT RELEASE DATE: 06 MARCH 2020

THE CHINESE ASSOCIATION, GAUTENG ("TCA")

COMPLAINANT

vs

SABC2

RESPONDENT

TRIBUNAL: PROF HP VILJOEN (CHAIRPERSON)
PROF S LÖTTER (DEPUTY CHAIRPERSON)
MS N FAKUDE

For the Complainant: Adv Duncan Wild instructed by Nam-Ford Inc Attorneys assisted by Ms Joyce Nam-Ford, Attorney and Mr Pon, Chairperson of the Chinese Association, Gauteng.

For the Broadcaster: Mr Nyiko Shibambo, Acting Manager and Ms Refilwe Timana, Acting Compliance Officer of the Broadcast Compliance of the SABC.

Complaint that the words “Ching-Chong-Cha” chanted in a scene in the Afrikaans soapie “7 de Laan” were offensive to people of Chinese origin – the Tribunal finding that the words did not constitute hate speech because they did not advocate hatred, neither did they constitute incitement to cause harm – they also did not objectively impair the dignity of Chinese people – no contravention of the Code found and complaint not upheld - The Chinese Association, Gauteng (“TCA”) vs SABC2, Case No: 02/2020 (BCCSA).

SUMMARY

This is a complaint about a scene in the Afrikaans soapie “7 de Laan” where young people

acted out a game known as rock-paper-scissors and where the words “Ching-Chong-Cha” were chanted. We were informed by the complainant that these words were offensive to people of Chinese origin. The complaint was based on the hate speech clause (4.2) and the dignity clause (15). The Tribunal found that the words did not constitute hate speech because there was no advocacy of hatred based on race or ethnicity, neither did they constitute incitement to cause harm. The Tribunal also considered clause 15 pertaining to dignity. There are two requirements for this contravention: a subjective and an objective element. Although the Complainants were subjectively offended and their dignity impaired, objectively judged no reasonable viewer would regard the alleged offending words as impairing the dignity of Chinese people as they were not mentioned or referred to. No contravention of the Code was found and the complaint was not upheld.

JUDGMENT

HP VILJOEN

[1] On the 27th August 2019 the Registrar received a complaint concerning an episode of “7de Laan” that was broadcast on 30th July 2019. The complaint before us is that the words “Ching-Chong-Cha” were repeatedly spoken by the young people acting out a scene in this Afrikaans soap opera on SABC2 at about 18:00 on 30 July 2019. The reason why the complaint has only now come before us is because it was postponed for the unavailability of the Complainant.

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

“RE: THE CHINESE ASSOCIATION, GAUTENG (“TCA”)

1. We act on behalf of The Chinese Association of Gauteng (hereinafter referred to as “our client”).
2. Since its founding in 1903, our client has since been engaged in efforts to promote harmony and goodwill within and towards the Chinese community in South Africa.
3. It was brought to our client's attention by a member of the Chinese community, Ms Shaungnaleen Ming, that on 30 July 2019 at approximately 18:00, the free-to-air television channel SABC 2 broadcast an episode of the programme 7de Laan, during which the phrase “Ching-Chong-Cha” was used, at least six times, to refer to the game universally known as “Rock-Paper-Scissors”. We attach screenshots of the relevant scene.
4. Our client is well aware that many South Africans have, for many years, used the phrase “Ching-Chong-Cha” refer to the game “Rock-Paper-Scissors”, without any offence or prejudice intended. However, the use of that phrase has a deeply hurtful and alienating effect on people of Chinese racial origin, who have been a part of South African society for

many generations (and who, like all other people of colour, endured severe systemic racial discrimination under the colonial and apartheid regimes).

- Specifically, "Ching Chong" is a pejorative phrase that has been used for over a century across the English-speaking world (including South Africa) to demean and mock Chinese people, their language and heritage. For example, as early as 1886, the American academic Henry Bolton observed that the nursery rhyme "Ching Chong Chineeman" (sic) was being recited by children who had been "brought up to believe the 'Chinese must go'". In John Steinbeck's 1945 novel *Cannery Row*, a young boy mocks a Chinese man by reciting the following rhyme:

Ching Chong, Chinaman, Sitting on a rail.
Along came a white man,
And chopped off his tail.

- As a consequence of the deeply offensive, hurtful and alienating effect it has on Chinese people to hear the phrase "Ching Chong", the same offence, hurt and alienation is felt upon hearing the phrase "Ching-Chong-Cha". For this reason, during 2018 our client's chairperson, Mr Erwin Pon, started an initiative of speaking to schoolteachers and principals about the harmful effects of the phrase, and encouraging its replacement with the name "Rock-Paper-Scissors". The response to this initiative has been overwhelmingly positive, with fellow South Africans expressing regret for having unknowingly used the phrase, as well as gratitude to Mr Pon for bringing the harmful effects of the phrase to their attention.
- For Chinese people, the phrase "Ching-Chong-Cha" has similar effects as the term "Chinaman", which the BCCSA has previously found "amounts to hate speech as a result of its likely serious impact on the dignity of a Chinese person", and is thus prohibited by the BCCSA Codes (*Tam v SABC 3*, BCCSA Case No 15/2004, 13 May 2004)
- Our client accordingly requests that SABC 2 be directed to broadcast an apology during another episode of *7de Laan*, explaining the harmful effects of the phrase and encouraging its viewers to replace it with "Rock-Paper-Scissors". We believe that such a public acknowledgement on of South Africa's most loved television programmes would go a long way to educating people about the pain they may unintentionally be causing to their fellow South Africans.
- We look forward to your response."

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

"BCCSA COMPLAINT: THE CHINESE ASSOCIATION, GAUTENG (TCA) - SABC 2 - 7DE LAAN - 30.07.2019 - 18:00

In respect of the above-mentioned complaint, we submit an electronic copy of the segment. Please find our comments as follows:

- In the letter of complaint it is stated: **"Or client is well aware that many South Africans, for many years, used the phrase 'Ching-Chong-Cha' to refer to the game 'Rock-paper-scissors', without any offence or prejudice intended."** This is indeed the spirit in which these words were used in *7de Laan*. No offence or prejudice was intended. It had nothing to do with people of Chinese origin and their prejudices.

2. The delightful game of Rock-Paper-Scissors is generally played by children and young people the world over. With this game they manage to make decisions based on its outcome – Who will get the biggest slice of cake? Who will start a game? Who can choose the first bar of chocolate? etc. Paper is stronger than rock, rock is stronger than scissors and scissors are stronger than paper.
3. All over the world the exact name of the game can vary. Non-English speakers may know the game by their local words for "rock, paper, scissors", although it is also known as Janken or Yakyuken in Japan, Kawi Bawi Bo in Korea, Pierre-Papier-Ciseaux in France, Ca-Chi-Pun in Chile, and in South Africa as Ching-Chong-Cha, the words used:

<https://simple.wikipedia.org/wiki/Rock%E2%80%93paper%E2%80%93scissors>
4. In the storyline (referred to in the complaint) the ‘young bunch’ in the series (Kopano, Gabby, Khethiwe, Romeo) are vying for a flat in The Heights. They start bickering a fight, but then Kopano gets the idea to play the game, in order to settle the matter once and for all without any further conflict.
5. The complainant will appreciate that context is very important in determining whether there was a contravention or not. In this instance the SABC respectfully submits that there has been no contravention of the Code.”

EVALUATION

- [4] This complaint illustrates how we as South Africans are still learning about each other’s culture and customs. In this case the Tribunal was alerted to the fact that the words “Ching Chong Cha” which are regularly used by South Africans when playing the game ‘rock- paper-scissors”, are deeply offensive to people of Chinese origin. The chairperson of the Chinese Association, Gauteng [*the complainant*], Mr Pon, testified that he is a fourth generation Chinese person living in South Africa and has suffered discrimination, not only because of the apartheid system in general but also at school where he was mocked by other schoolboys because, as a Chinese person, he was seen as different – he looked different, had a different culture and spoke differently. According to Mr Pon, the words “Ching-Chong” have been used in the English-speaking world as far back as the 19th century to mock and demean Chinese people.
- [5] On the face of it, the scene complained about was an innocent situation where young people decided to settle the rivalry about a flat in the Heights by playing the game known

as “rock-paper-scissors.” A search on Wikipedia produced the following information about this game:

Rock paper scissors ... is a hand game usually played between two people, in which each player simultaneously forms one of three shapes with an outstretched hand. These shapes are "rock" (a closed fist), "paper" (a flat hand), and "scissors" (a fist with the index finger and middle finger extended, forming a V). "Scissors" is identical to the two-fingered V sign (also indicating "victory" or "peace") except that it is pointed horizontally instead of being held upright in the air. A simultaneous, zero-sum game, it has only two possible outcomes: a draw, or a win for one player and a loss for the other.

While this game originated in China, it is now played in many countries and is sometimes accompanied with chants like “Hali-hali-hoy” or “Bato-bato-pick”. We could not find any reference in Wikipedia to the chant “Ching-Chong-Cha” and conclude that it is a typical South African chant which is uttered by the two players playing the game.

In our opinion the scene would be understood by the average, reasonable viewer, (not being of Chinese origin) to be an innocent game between the young people to determine who the occupant of the flat in the Heights would be.

- [6] During the whole scene complained about, the name “Chinese” is never mentioned. We were informed that the alleged offending words originated from colonial times and are used to this day to imitate sounds typical of the Chinese language with the intention to mock Chinese people. However, we are of the opinion that there was no indication at all that this scene was intended to mock Chinese people. The chant was not directed at anyone in particular and is probably regarded by most people in South Africa as meaningless words, maybe used to create a kind of rhythm in the game. We must judge the scene by applying the norm of “the average, reasonable viewer”. We have come to the conclusion that, with the exception of Chinese viewers, the average, reasonable viewer would have no idea that the scene that they were watching at that moment was highly offensive to people of Chinese origin as alleged. We can therefore not agree with

Mr Wild, for the Complainant, that by *innuendo* the viewer would discern from these words an intention to mock Chinese people.

[7] Mr Wild based his arguments on Clauses 15(1) and 4(2) of the Code of Conduct. Clause 15(1) protects the privacy, dignity and reputation of the viewers/listeners. We have on a few occasions found a contravention of this clause where a particular person was targeted.¹ In those instances we require that the person who was targeted must lodge the complaint personally; in other words, A cannot complain that B's dignity was impaired. B must lodge the complaint because B must attest that he/she subjectively suffered insult to his/her dignity. Of course, the targeted person(s) can also be part of a group, as in this case where the Chinese Association lodged the complaint on behalf of its members. However, there is also an objective element in testing for impairment of dignity, as correctly argued by Mr Wild². The test is that of the reasonable viewer and how he/she would perceive the alleged impairment of dignity. In this instance we find that although the Chinese viewers subjectively considered their dignity to be impaired, objectively judged there could not have been an impairment of their dignity, as Chinese people were not the subject of discussion in the scene complained about. The reasonable viewer (barring Chinese people) would therefore not even have thought that the words were a reference to people of Chinese origin or that the expression was used to impair Chinese people's dignity. People of Chinese origin were definitely not targeted by what was said during the scene complained about. We find that the scene complained about fails the objective test of impairment of dignity of Chinese people.

[8] As for the argument by the Complainant that the Broadcaster did not exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of Chinese people, Mr Shibambo, for the Broadcaster, denied that Clause 15(1) of the Code had been

¹ Examples are case 18/2013 *Odendaal & De Jongh v Jacaranda FM94.2* where a complaint was lodged against the broadcaster for making a joke about "midgents". Because the complaint was not from a person falling in that category, the complaint was not upheld. In case 15/2014 *Reinhardt's Place & Pretorius v Multi/Choice KykNet Channel* it was found that the dignity of people with Tourette Syndrome was impaired. Because of the nature of people with this syndrome, the complainant was allowed to complain on their behalf and the complaint was upheld. In case 4/2019 *Mackau v MultiChoice Channel 157* the person who was targeted in a promo complained that his dignity was impaired and his complaint was upheld.

² With reference to *Le Roux v Dey* 2011(3) SA 274 CC.

contravened. In its written response to the complaint, the Broadcaster said: *No offence or prejudice was intended. It had nothing to do with people of Chinese origin and their prejudices.* It was also stated during argument that the Broadcaster would never deliberately offend its viewers/listeners as it would not want to run the risk of losing viewers because of deliberate offensive comments. We accept that the Broadcaster was unaware of the alleged offense caused to its Chinese viewers by this specific scene in “7de Laan”, and under these circumstances we cannot expect of the Broadcaster to have exercised exceptional care and consideration in broadcasting this episode. We cannot find any negligence on the part of the Broadcaster in this regard.

- [9] The second ground of complaint is that Clause 4(2) of the Code was contravened, and especially paragraph (c) thereof, namely that the broadcast advocated hatred based, in this case, on race or ethnicity and that this constituted incitement to cause harm, in other words, that the scene complained about constituted hate speech. The argument by Mr Wild is that the broadcast of the alleged offending term or chant was the promotion of a hateful term and that the incitement arises from the popularization and endorsement of this phrase or term.
- [10] In support of his argument, Mr Wild quotes the case of *Naidoo v Highveld Stereo*³ where the word “Coolie” was mentioned in a broadcast. As was stated in that judgment, the mere mentioning of the word (and one could add, the “K” word) has an all-encompassing derogatory tone to it. Just to mention it advocates hatred, depending on the context, of course. The quoted case must be distinguished from the present one. Objectively judged, the mere mention of the name “Coolie” conjures up the idea of a person of Indian origin. The same cannot be said of the words “Ching-Chong-Cha”. We do not think that the average reasonable viewer would make the mental connection with Chinese people upon hearing these words. People in South Africa, when asked what these words mean, would probably say it is a type of nursery rhyme or playful chant of Japanese, Chinese or other Oriental language origin. We are convinced that hardly any reasonable viewer of the

³ BCCSA Case 24/2010.

programme would have thought that the words advocate hatred towards people of Chinese origin. The words therefore did not constitute hate speech.

[11] Mr Wild also quotes the case of *Afriforum and Another v Malema and Others*⁴ in support of his argument that the broadcast constituted hate speech. In that case the Equality Court found that the respondent (Malema) recited and/or sung and/or chanted certain words which translated *inter alia* to “shoot the Boer/farmer”, “they are rapists/robbers”. He also used the word “ibhunu” which referred to Afrikaners in general. As the insults were directed at a certain population (ethnic) group, the court found that the words and the song known as *Dubula Ibhunu* constituted hate speech, and the respondent was interdicted from using them in future. The facts in the *Afriforum* - case must be distinguished from those in the present case as the content of the chants in the *Afriforum*-case conveyed a specific message addressed at a specific ethnic group. On Mr Pon’s own version the term “Ching Chong Cha” has no meaning but constitutes a repetition of sounds that mock the Chinese language. The judgment in the *Afriforum*- case is not apposite in this instance.

[12] Lastly, Mr Wild refers to the exclusion mentioned in Clause 5(2) of the Code and argues that this clause does not assist the SABC. We agree with this statement. However, it is assumed that he should have referred to Clause 5(1). Clause 5(1) of the Code excludes “a *bona fide* scientific, documentary, dramatic, artistic, or religious broadcast” from the operation of Clauses 3 and 4 of the Code. There can be no doubt that “7de Laan” is a *bona fide* dramatic broadcast. Therefore, even if the scene complained about constituted hate speech (which we do not find) it would be exempted from the operation of Clause 4(2).

[13] We find that the broadcast in question was not in contravention of Clauses 4(2) or 15(1) or any other clause of the Broadcasting Code. Mr Shibambo, for the Broadcaster, graciously invited the Complainant to communicate with the Broadcaster about the possibility of finding a way to address the alleged offending scene in a suitable manner

⁴ 2011(6) SA 240 (EqC).

in a future episode of “7 de Laan”. This was an informal invitation and does not form part of this judgment.

In the result, no contravention of the Broadcasting Code has been found and the complaint is not upheld.



**PROF HENNING VILJOEN
CHAIRPERSON: BROADCASTING COMPLAINTS COMMISSION**

Commissioners Lötter and Fakude concurred in the above judgment.