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CASE NUMBER: 38/2014

DATE OF HEARING: 30 OCTOBER 2014
JUDGMENT RELEASE DATE: 23 JANUARY 2015¹

HAMID

COMPLAINANT

vs

CHAIFM

RESPONDENT

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
 PROF VICTORIA BRONSTEIN
 DR NANA MAKAULA-NTSEBEZA
 MR ALAN MELVILLE
 PROF SUNNET LÖTTER (ACTING COMMISSIONER)

FOR THE COMPLAINANT: The Complainant was unable to attend.

FOR THE RESPONDENT: Ms Kathy Kaler, Manager Chaifm.

*Hate speech found in regard to broadcast relating to the Gaza conflict – Hamid vs ChaiFM ,
Case: 38/2014(BCCSA)*

SUMMARY

Three items, each a separate broadcast by a community broadcaster serving the Jewish community in South Africa, were complained about. In one case, balance was provided; in another, an aspect of a commentary was found to contain elements of hate speech but

¹ The late issue of the judgment followed upon a request of the Respondent to file argument as to sanction only by 15 January. This was acceded to.

judged to not amount to a contravention of the Code, when judged as a whole. In the third case an insert from a Canadian broadcaster was held to amount to hate speech based on religion and ethnicity.

As a sanction the Tribunal issued a firm reprimand, cautioning the broadcaster that if a similar finding is made in future, a fine will be considered. One Commissioner, as an alternative, proposed that an apology be broadcast. The Constitution of the BCCSA, however, does not provide for the ordering of an apology. It does, however, permit an order that a summary of the decision be broadcast. The latter was not regarded as appropriate in this case.

JUDGMENT

JCW VAN ROOYEN

[1] A Complaint was received from a listener in regard to three broadcasts by ChaiFM, a broadcaster serving a part of the South African Jewish community. I referred the matters to a Tribunal for a hearing and a decision.

[2] The complaints read as follows:

First complaint: "This afternoon chai fm 101.9 once again violated the rights given to radio stations to be on air. You are urged to listen to the broadcast of today's show that was on air between 3 and 5 this evening. A caller wanted to throw pork chops at the Muslims."

Second complaint: "In another instance, later between 6 and 7 a guest on the show commented that the Muslims are barbarians, slaves to their religion, and basically just promoting hate speech of another race on air. Surely this is unconstitutional and against the code of ethics they are supposed to abide to in order to be on air. Thank you.

Thank you for your quick response. With regards to the exact time- the first incident was mentioned at precisely 16:47. The second incident was mentioned on the show between 18:00-19:00. The entire show was based on hate speech, propaganda, and incorrect reporting. I trust the above will suffice as required and some action will be taken against the mentioned radio station. Thank you"

Third complaint: I have a complaint about the radio station Chai fm 101.9khz the show is called " the morning mayhem " at approximately 08.22am a guest speaker was delivering a speech on the radio which was nothing but propaganda hatred for the Palestinians and in general the Muslim world associating the Palestinians with Hitler's Nazi party, labelling them barbarians which I found to be extremely offensive."

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

“I have consulted with the BCCSA Code of Conduct by which ChaiFM abides, along with our own station policies. We have looked into each case and find the presenters referred to in the complaint were not engaging in hate speech.

In the first case, the Chai Drive with Steve Marks which refers to throwing pork chops at Muslims, it was in fact a caller to the station who made the comment and the presenter clearly states that the caller should email and communicate with the store. We have edited out the songs, news bulletins and sports bulletins to shorten the 2 hours for you to listen. These were the 2 hours you requested we submit to you. In the third hour of the show though, the topic comes up again and the presenter clearly states that throwing pork chops at people is not acceptable behaviour or the way to behave. It was during this hour of the show that Mohamed send in an sms stating that Jews are pigs. Please let me know if you would like a copy of that hour.

In the second case, The Morning Mayhem, where a clip was played from Sun TV in Canada, the presenters engaged afterwards about the holocaust and the over arching question was whether the writing is on the wall regarding antisemitism. The one presenter said it was, the other said it wasn't.

As a station we are very aware of sensitivities, especially amid the growing tensions between the Jewish and Muslim communities , fuelled by global tensions.

Our internal investigations have resulted in our believing that there has been no breach in either the BCCSA Code of Conduct or ChaiFM's internal code, policies and procedures. I have attached the two clips herewith for you.”

EVALUATION

- [4] In so far as the first complaint concerning the “pork chops” is concerned, we agree with the Respondent. A presenter at ChaiFM clearly dismissed any such proposal and any such conduct as unacceptable.
- [5] The second complaint relates to news commentary by, we were told, a well-respected member of the Jewish community. The speaker claims that anti-Semitic views such as those propagated by the Islamic State are "everywhere", and that the influence of such views is spreading throughout the world. The tone of the speaker is more measured than in the Canadian clip (dealt with hereunder), but the sense of threat is equally powerful. The speaker condemns the media for its silence on the Middle East conflict, where a "barbarian with a Kalashnikov in one hand and a baby in the other", according to him, threatens the people of Israel. The speaker refers to Palestine as "a strip of land that has been subject to a diet of hatred of Jews and the USA". Palestinians are portrayed as being burdened with a terrible task: they must "sacrifice themselves for what is a “higher good” and are subjected to what he regards as the pernicious strains of Islam. The speaker uses the term "barbarity" to describe Palestine, a place where human life is portrayed as having no value, where agreements

are worthless, and a ceasefire is merely an opportunity to "re-arm in order to wipe Jews off the face of the earth". He remarks on the "massive number of rockets sent to Israel". As with the first clip, there is no attempt to contextualise the position of Hamas, with no reference whatsoever to the long and complex history pre-1948, or of the Balfour Declaration. In this sense, the views lack balance and may well border on hate speech. The reference to "barbarian", and the words that accompany it, can hardly be excused on the basis of idiomatic language. Had this word been uttered in a more provocative manner, the words might have amounted to hate speech. However, we find the sentence "barbarian with a Kalashnikov in one hand and a baby in the other" to be in conflict with clause 12 of the Code. There is no reasonable basis in fact for such a generalisation. However, despite our finding on the phrase relating to "barbarian" as quoted above, we have come to the conclusion that it would amount to an overly strict approach, were we to find this broadcast, judged as a whole, to be in conflict with the Broadcasting Code. Comment is often offensive, but offensiveness is not sufficient reason to justify a finding that the Code has been contravened. *It would, however, be advisable for broadcaster to inform guest speakers of the requirements and obligations of the Broadcasting Code, and to remind them that they are on the public airwaves.*

- [6] In so far as the broadcast repeated from a Canadian programme is concerned (hereinafter referred to as the "Canadian clip"), the speaker is a clear propagandist. The background to the clip is the recent conflict between Israel and Gaza, where Israel took steps to counter the use of tunnels as a means of attack against Israel, and rockets were fired from Gaza into Israel. The listener is subjected to a torrent of information, by a speaker whose tone of voice is excitable and clearly outraged. The entire programme comprises a tirade against the Hamas government in Gaza. The main thrust of the speaker's argument is to equate Hamas with the Nazis. There is a complete absence of nuance. Hamas is portrayed as having the same goals as the Nazis, and reference is made to the Hamas Charter (of 1988). It is claimed that the charter aims to eliminate "every Jew from everywhere in Israel".² The speaker refers to a chant: "From the river to the sea, Palestine will be free." He then conjures up an

²Significantly, *Wikipedia* verifies this claim, in quoting article 13 of the Charter: "There is no solution for the Palestinian question except through Jihad. Initiatives, proposals and international conferences are all a waste of time and vain endeavours."

image – the erection of "Jew-burning ovens in Gaza" and indicates that Jews will be led "to the slaughter." Arabs who are, according to the speaker, indifferent to the deaths of fellow Arabs are condemned by the speaker. So, too, those who are, according to the speaker, unconcerned when they kill their own, and only complain "when a Jew kills them". The broadcast is littered with emotional references to gas ovens and the Holocaust. The cumulative effect of this diatribe is powerful. The speaker conjures up an image of a second Holocaust, arguing that, since a Holocaust has already been perpetrated by the Nazis, it could easily be repeated by Hamas. He quotes a supporter of the latter, who declares: "Hitler should have finished the job." Combined with that is the clear undertone of hatred based on the Palestinians as a national group who generally follow a particular religion, i.e. Islam. He associates Hamas and, indirectly, Palestinians who live in Gaza, with Hitler's policy of elimination of the Jews. Judged as a whole, the speaker is propagating nothing other than hatred against Hamas and, indirectly, against the Palestinian people.

- [7] The Canadian clip presents a one-sided view, which is that Hamas and the Palestinian people support the extinction of the Jews in the manner of Hitler and the Nazis. The Code, as interpreted by the BCCSA over a period of 21 years, provides for substantial freedom of expression and is not intended to quash opinion, even when such opinion is, to a certain extent, biased. The BCCSA has often held that clauses 12 and 13 of the Code, which require balance in the expression of opinion on matters of public importance, do not require perfect balance, since the latter is probably an unattainable ideal. Public importance has been defined by the BCCSA as, in the main, pertaining to matters which are of public importance within the South African context. Foreign matters are, in the ordinary course, not regarded as falling within the ambit of the Code. There are, of course, cases where mistakes are so blatant and obvious that the BCCSA is compelled to intervene.³ However, generally it is extremely problematic for the BCCSA to judge balance within a foreign context. The BCCSA tribunal is a domestic tribunal which must, according to law, come to *rational* decisions.⁴ Rationality depends on the facts of each case. When disputes based on circumstances in foreign countries come before the Tribunal, it is almost impossible to come to a

³ *Levy vs SABC Lotus FM*, Case 27/2013; [2013] Judgments Online 30792 (BCCSA); *Rodionov vs Talk Radio 702*, Case 22/2014; [2014] Judgments Online 32140 (BCCSA)

⁴ Cf *National Horseracing Authority of Southern Africa v Naidoo and Another* 2010 (3) SA 182 (N) per Levinsohn DJP.

final rational decision. There are usually too many facets which may have impacted on these facts – facets which we do not have first-hand knowledge of, or which could simply escape our attention. The clause 4 hate speech provision of the Code is absolute: it sets out the requirements, and if the content reaches that level, then a finding can be made. Of course, here too one has to step carefully. Furthermore, it should be borne in mind that freedom of expression lies at the heart of our democracy, and before Clause 4 is found to be applicable, it should be remembered that *advocacy* of hatred implies some form of exhortation and cannot simply apply to a critical view expressed during a broadcast. In addition to the advocacy, the broadcast must also amount to *incitement* to harm.⁵ Harm includes serious emotional harm.⁶ The hate speech must also be based on gender, race, ethnicity, religion – as applicable in this case.⁷

[8] Judged as a whole, the insert amounts to propaganda against the inhabitants of Gaza, under the leadership of Hamas. The propaganda rises to the level of the advocacy of hatred based on religion and ethnicity that constitutes incitement to cause harm. It is “advocacy” since it exhorts listeners to hate people on the basis of their religion and ethnicity. It amounts to incitement by way of an unconditional call to hate the inhabitants of Gaza based on ethnicity and religion. In *S v Nkosiyana*⁸ Holmes JA defined “incitement” to a crime as follows:

” Hence it seems to me proper to hold that, in criminal law, an *inciter* is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of a crime.”

⁵ Cf *African National Congress v Harmse and Another: In Re Harmse v Vawda (Afriforum and Another Intervening)* 2011 (5) SA 460 (GSJ).

⁶ *Human Rights Commission of South Africa v SABC* 2003(1) Butterworth Constitutional Reports 92(BCCSA) where the following is stated: “We therefore conclude that the broadcast of the song constitutes incitement to cause harm, in the sense that it violates dignity and places the constitutional right to security of Indians at risk – even if it is limited, as we find, to a distinct sense of fear amongst a substantial number of Indians. The inference of a risk to safety is a reasonable inference, given the content and tone of the demeaning language.”

⁷ In *Islamic Unity Convention v IBA* 2002 (4) SA 294 (CC) at para [34] Langa DCJ states that there may also be other bases, where section 36 of the Constitution would authorise intervention. However, the BCCSA has never moved outside the four categories, since it is important for broadcasters to know what the rules are and, often, quick decisions must be made, for example in the case of News. Other interest groups are, of course, indirectly protected under clauses 12 and 13 of the Code.

⁸ 1966(4) SA 655(A) at 658-9 per Holmes JA.

There is no reason why the same definition would not be applicable to “incitement to harm” as in the hate speech definition in the Broadcasting Code and section 16(2) of the Constitution of the Republic. The question is, accordingly, not whether the incitement was necessarily effective, but whether the commentator in the Canadian clip sought to influence the minds of the listeners towards hating the inhabitants of Gaza, inhabitants who have, at least ethnic and religious ties to a large number of South Africans, although they are a minority. Minorities, in any case, deserve special protection according to the Constitutional Court.⁹

[9] The sting of the attack lies in the identification of Gaza’s aims and methods used against Israel with those of Hitler against the Jews. Clause 4(2) of the Broadcasting Code provides as follows:

(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.

Clause 4(2)(c) is applicable to the insert from Canada.

[10] The Code, however, provides for exemptions in this regard, and these are set out in clause 5 of the Broadcasting Code, which provides as follows:

5. Exclusions

Clauses 3 and 4 do not apply to:

- (1) a broadcast which, judged within context, amounts to a *bona fide* scientific, documentary, dramatic, artistic or religious broadcast;
- (2) a broadcast which amounts to a discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or
- (3) a broadcast which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.

⁹ Compare *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *Prince v President Cape Law Society, and Others* 2002 (2) SA 794 (CC) at par 112 where the majority states:

“The fact that they are a very small group within the larger South African community [the Court was referring to members of the Rastafarian religion] is no reason to deprive them of the protection to which they are entitled under the Bill of Rights. On the contrary their vulnerability as a small and marginalised group means that the Bill of Rights has particular significance for them. The interest protected [in that case by s 15(1) and s 31 of the Constitution] is ‘not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity’.”

I have referred to these judgments, not to equate the relevant communities with any marginalised group, which they are not, but to accentuate the importance of the recognition of diversity and the protection of a minority in the pursuit of national unity and reconciliation. The dignity and vulnerability of members of any minority must, at all times, be protected against explicit and (*in casu*) implied threats and/ or derogatory language. Inherent in dignity also lies the right to security of the person. Security of the person is explicitly protected by section 14 of the Bill of Rights, where the right to privacy is stated to include “to be free from all forms of violence from either public or private sources.”

Sub-clause 5(3) is the only sub-clause of clause 5 which might be applicable to the Canadian insert. *Bona fides* in this instance means “genuine”, i.e. as judged by an objective standard.¹⁰ Although the guarantee of freedom of expression in section 16(1) of the Constitution of the Republic of South Africa lies at the heart of our democracy, a respect for race, ethnicity and religion is also of special importance, and it lies at an equal level with the right to freedom of expression when balancing of the relevant rights commences.¹¹ In the interests of democracy, listeners are expected to tolerate material that might be regarded as offensive. However, in the present instance the limits of tolerance have been grossly overstepped. The persistent tone of derision in the Canadian insert is overwhelming, with the speaker spreading and advocating hatred based on religion as well as ethnicity. Such material cannot be regarded as a *bona fide* discussion, argument or opinion. These aspects are, indeed, entirely absent from the broadcast. Everything that is said is stated in absolute terms, leaving no room whatsoever for discussion or argument of any kind. While the views may well be the honest expression of opinion, the “facts” are distorted, presented in a manner that is bald, selective and uncontextualised, and as such their cumulative effect amounts to incitement to cause harm.

The listener is subjected to a torrent of information by a speaker whose tone of voice is excitable, clearly outraged and calculated to generate hatred of Hamas and its supporters. The information provided consists largely of isolated facts that are neither contextualised nor dealt with in a measured way. The entire programme is a sensationalised tirade against Hamas. This is the kind of speech which could possibly be tolerated within a closed meeting. *However, when it is broadcast to thousands of listeners, it moves into the field of irresponsible, one-sided advocacy of hatred, that constitutes incitement to cause harm.* Our conclusion is, accordingly, that the insert

¹⁰ Compare *Publications Control Board v Central News Agency Ltd* 1977 (1) SA 717 (A).

¹¹ Compare *De Reuck v Director of Public Prosecutions and Others* 2004(1) Sa 406(CC) where the Court states that all rights lie at an equal level before balancing commences. See para [55] where Langa DCJ (as he then was) states the following: “[55] In the High Court judgment, the view is expressed that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, and that s 28(2) of the Constitution ‘trumps’ other provisions of the Bill of Rights. I do not agree. This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36.”

amounted to a contravention of the Broadcasting Code in the sense of the advocacy of hatred based on religion, and ethnicity that constitutes incitement to cause harm.

[11] Even if – in contradistinction to the argument above – it were to be accepted in favour of the broadcaster, *without deciding this point*, that the broadcast fell short of hate speech, there is still clause 13(1) of the Code, which provides as follows:

(1) In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within reasonable period of time of the original broadcast and within substantially the same time slot.

[12] The manager of Chaifm, Ms Kathy Kaler, was requested after the hearing to provide us with argument as to why this clause was not abided by. The following argument was received:

“While ChaiFM does its best, as a rule, to offer opposing views on controversial matters, in this instance an "opposing view" on the clip would entail interviewing either:1. A member of Hamas (or) 2. A neo-Nazi / Nazi currently involved with anti-semitic activities

Neither of these individuals should be given air time on any radio station, let alone a Jewish one. To invite an anti-semite to 'give an opposing view' would serve no purpose at all other than to give credibility to a racist ideologue. To invite a member of Hamas, an organisation whose charter clearly calls for the annihilation of the Jews, would be tantamount to ChaiFM interviewing a Nazi or Holocaust denier - something that is not an option for responsible radio and conscientious broadcasting. While ChaiFM always has and always will seek to give voice for dissenting views, in this case it is clearly unthinkable. The cases quoted in the clip are blatant anti-semitic acts and any form of racist ideology should not be broadcast. This is in fact specified in the code under section 2 (c) of the code which specifies that broadcasts should not be used for "Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm". By interviewing someone offering an "opposing view" on this clip, ChaiFM would be in clear contravention of this particular clause.”

It should, of course, be pointed out that clause 13(1) does not require that an interview be conducted with the persons mentioned by the manager. The radio presenters should, at the very least, have raised the possibility that other views may exist. However, the observations made by the presenters after the broadcast did not serve, in any manner whatsoever, to alleviate the position. Not one presenter went so far as to even raise the possibility that there might be a different perspective on the matter.

[13] The manager of Chaifm argues that it is unthinkable that a representative of Hamas should be allowed to answer on a South African radio station. This argument is understandable from the broadcaster’s perspective, but that being true, the broadcaster should not have broadcast the one-sided Canadian clip which goes far beyond what is permissible for a

radio to broadcast in South Africa – even on a community radio station that serves the particular interests of a community, in this case Jewish listeners within the frequency allotted to it in South Africa. I need not sum up the Canadian clip again in order to illustrate how contentious and one-sided it was, and that it clearly also affected South Africans who have ethnic and religious ties to the citizens of Gaza.

While it may be accepted that the broadcast of the Canadian insert was not done with malicious intent, it was clearly an error to have broadcast it on South African airwaves since it was likely to also reach listeners outside of the Jewish community. Accordingly, the moment that the broadcast took place, clause 13(1) became operative. Ms Kaler mentioned that, on occasion, the Palestinian ambassador to South Africa has been invited to speak on the station, and that he has accepted such invitations. One does not know whether the ambassador would have accepted an invitation in this case, but that would in any case have made good sense.

Thus, even if we were to have accepted in favour of the broadcaster that the clip did not amount to hate speech, the broadcast would have amounted to a contravention of clause 13. However, our decision is that the broadcast amounted to hate speech.

PROF VICTORIA BRONSTEIN

[14] I agree that the Canadian clip contravenes the Code, although on a different basis. The listener is indeed subjected to a torrent of information by a speaker whose tone of voice is outraged. The main thrust of the speaker's argument is to equate Hamas with the Nazis. The information, as pointed out by the Chairman, consists largely of isolated facts that are neither contextualised nor dealt with in a measured way. The entire programme is a sensationalised tirade against Hamas. The clip is undisguised propaganda.

[15] It is important for freedom of expression that clauses that limit speech are not simply extended to embrace unpalatable or offensive speech. The decision about whether speech amounts to hate speech is a highly contextual evaluation. In my view, the speech in this Canadian insert did not meet the required level for hate speech when it was broadcast on Chai FM. For one thing it did not meet the requirement of

constituting ‘incitement to cause harm’ as required by clause 4(2) of the Code. The complaint does not give a clear account of what particular harm is incited by the speech. The majority judgment states that the broadcast ‘amounts to incitement by way of an unconditional call to hate the inhabitants of Gaza’. Even if that were true the clause of the Broadcasting Code requires us to identify the actual harm ‘incited’ by the speech. That harm is not identified in the majority judgment. In my view ‘incitement to cause harm’ requires that there be some level of threat to the target group caused by the speech. The target group would have to be adversely affected by what is being said. This broadcast by Chai FM is simply too remote from the plight of Palestinians in Gaza to fulfil the legal requirement of constituting ‘incitement to cause harm’ in the context in which it was broadcast.

- [16] In my view this judgment coheres with the view expressed in S. Woolman and M. Bishop *Constitutional Law of South Africa* about the meaning of the same words in s 16(2)(c) of the Constitution of the Republic of South Africa 1996. The wording of that provision is echoed in the BCCSA code. The authors state:

‘If ‘incitement’ bears its ordinary meaning, as we suggest it does, the harms contemplated in FC s 16(2)(c) must be concrete. This does not mean, on the one hand, that ‘harm’ is confined to physical harm or, on the other hand, that ‘harm’ extends to expression which merely stirs up feelings of hatred in the audience. The harm contemplated in FC s 16(2)(c) includes various forms of serious harm that are capable of incitement in an audience, including incitement of violence (whether against persons or property), discrimination, harassment and verbal abuse. It covers, for example, not only hateful statements at a neighbourhood meeting that call for the lynching of blacks, but extends to the instigation of harassing phone calls to black neighbours or encouraging the conclusion of agreements not to sell houses in the neighbourhood to black persons. If this interpretation is correct, the harm ultimately caused to the target group extends to serious psychological or emotional harm, but it must be harm that is *incited* by speech.¹²

- [17] Although I do not make a hate speech finding in the context of this case, I do, agree that the broadcast does not meet the Code’s requirement of balance. There are many diverse views about the matters raised in the broadcast within the Jewish community itself. These voices are vocal in South Africa, in Israel and in the rest of the World. Chai FM could easily have engaged other voices in order to balance the content. It had an obligation to do so under the Broadcasting Code and it failed to meet this obligation. The Manager of Chaifm argues that it is unthinkable that a representative

¹²Dario Milo, Glenn Penfold & Anthony Stein ‘Freedom of Expression’ in S. Woolman and M. Bishop *Constitutional Law of South Africa* Second Edition (2014) ch42-p83.

of Hamas should be allowed to answer on a South African radio station. I am not certain why it is unthinkable. Hamas representatives frequently gave their views in the news media generally during this period and there are clips taken from Hamas in the broadcast complained about. On the other hand, balance is, in the first instance, a question of editorial discretion. There were various *bona fide* ways to balance this content and none were attempted. This insert should not have been broadcast on South African airwaves without an honest attempt to balance the content. I, accordingly, am of the view that clause 13(1) of the Broadcasting Code has been contravened.

[18] In so far as the second complaint is concerned, I wish to add that this broadcast also may have violated the balance requirements laid down by clause 13 of the Code on the same basis as the Canadian Clip. There is, however, not enough evidence about the general content that surrounded this broadcast for me to come to this conclusion. I, accordingly, agree with the finding of my colleagues that there was no contravention. I also agree with the finding on the “pork chops” insert.

SANCTION

[19] Attorneys, Cyril Zima & Associates, acting on behalf of the Respondent, filed the following heads of argument as to sanction.

- “1. We have been consulted by our abovenamed client and have been requested to act further on its behalf in regard to the above matter.
2. At the outset, our client once again expresses its gratitude for your Tribunal's extension of time to lodge argument on sanction.
3. Before advancing our client's submissions, we record, with the greatest of respect, that we do so under reservation of our client's rights to appeal the Judgment, which are not to be regarded as having been preempted.
4.
 - 4.1 Our client's response to the subjects matter of Complaints 1 and 2 is indicative of the responsible manner in which our client entertains and responds to matter that is broadcast by it.
 - 4.2 Our client should, with respect, be excused for entertaining the belief that the speaker in the Canadian clip was engaging in a discussion in which he ventured an opinion relating to his beliefs concerning the rights and wrongs of the Hamas Government in Gaza.
 - 4.3 It is further respectfully submitted that the Canadian speaker did not conduct himself in a manner so different to that in which, for example, presenters and interviewees have very recently expressed condemnation of the occurrences in France with equal enthusiasm, warning of dire consequences not only to Jews but to anybody not allied to Jihad beliefs and intentions.

- 4.4 Reference is respectfully made in this particular regard to recent calls that have been made in the media for Muslims who support a Palestinian cause to engage in public demonstrations, displaying outrage, against the recent terrorist attacks in France, to no avail.
- 4.5 Taken in context, it is respectfully submitted that our client's conduct can hardly be said to be deserving of a penalty more severe than a reprimand.
- 4.6 It would, with respect, be unrealistic to expect of our client that it should have extended an invitation to groups who support Hamas, to agree to participate in an interview on a Jewish broadcast station such as our client is.
- 4.7 It is accordingly respectfully submitted that a reprimand of our client would constitute a penalty which would serve the purpose of appeasing those likeminded persons who might have been offended by the Canadian clip and conveying the message that the Broadcasting Complaints Commission of South Africa does and will not countenance breaches of its Code."

[20] **The complainant argued as follows:**

"I'm not sure if this is the correct way to submit my sanction for the code that has been contravened by the broadcaster Chai Fm 101.9kh and which was upheld by the panel of the Tribunal. I therefore recommend a fine of R250000-00 to be imposed on the broadcaster Chai Fm 101.9kh together with a public apology to the Muslim community especially the Palestinians Thank you Regards Mohamed Hamid."

[21] At the hearing of this matter we gained the impression that the Respondent experienced a certain amount of regret at having broadcast the Canadian clip. This is, of course, an extenuating circumstance. In fact, it would seem that management was not involved in the decision to broadcast the clip.

[22] The argument, by the attorneys, that reaction to the recent murders in Paris was at the same level as the Canadian clip was deemed irrelevant, particularly since many Western leaders were at pains not to blame Islam as such for the murders. Although political speech often is, and should be permitted to be, strident, in this case the utterances entered the sphere of hate based on religion and ethnicity. The focus of the vehement attack is on Islam and the inhabitants of Gaza, with whom a substantial number of South Africans have religious and ethnic ties. This is, indeed, a serious contravention. The Complainant has argued for a fine of R250 000 plus an apology. The maximum fine provided for by the Constitution of the BCCSA is R60 000. In practice R30 000 is the highest fine which we have imposed in a few cases of defamation. The fine proposed by Mr Mohammed is, however, too high, compared to the fine of R10 000 for a comparable contravention by *Radio Rosestad* – see hereunder.

[23] As to sanction Commissioner Melville proposed that we order that an apology be broadcast, thereby eliminating the need for a fine. Although we have followed this route when a broadcaster has offered to broadcast an apology, no such offer was made by the Respondent in this case. The Constitution of the BCCSA does not provide for an apology as a sanction. We may order a correction, or order that a short summary of our judgment be broadcast, but that is as far as it goes. In the light of the approach which we took in *Van der Merwe v Rosestad*,¹³ where hate speech was based on religion, a fine was considered. On reconsideration, however, we decided that in the latter judgment the hate speech attack on the Muslim faith was undiluted, while in the present matter the hate speech does at least have a political angle to it, which makes it less blatant than the *Rosestad* matter. Moreover, in the present matter there is a minority judgment, whilst that judgment was taken unanimously. It would, accordingly, seem fair to deal with the sanction as follows:

Issue a firm reprimand and caution the broadcaster that if a finding of hate speech is made against it in future, a fine will be considered.

In the result (1) the first two complaints are dismissed; (2) the third complaint is upheld as having amounted to hate speech; and (3) a firm reprimand is issued, cautioning the broadcaster that if a similar finding is again made against it, a fine will be considered.



JCW VAN ROOYEN SC

Commissioners Makaula-Ntsebeza, Melville and Acting Commissioner Lötter concurred with the judgment of the Chairperson. Commissioner Bronstein upheld the third complaint on the basis of a contravention of clause 13, in contrast to the other Commissioners who upheld it in terms of clause 4(2). The Commissioners were, after debate on the matter, in agreement about the sanction.

¹³ Case 4/2014; 2014 (LexisNexis) Judgments Online 31578(BCCSA).

