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CASE NUMBER: 40/2013

DATE OF HEARING: 27 NOVEMBER 2013
JUDGMENT RELEASE DATE: 23 JANUARY 2014

BAIOCCHI

COMPLAINANT

VS

CLASSIC FM

RESPONDENT

TRIBUNAL: PROF HP VILJOEN (DEPUTY CHAIRPERSON)
DR N MAKAULA-NTSEBEZA
ADV R SEWLAL

The Complainant in person, accompanied by Fr S'milo Mngadi, Roman Catholic Church.

For the Respondent: Mr Dan Rosengarten, Attorney: Rosin Wright Rosengarten accompanied by Mr Quintin Hawthorne, Acting Station Manager, Ms Susan Cock, Music Programmer and Mr Deano Maduramuthu of Classic FM.

Complaint that the broadcasting of a song titled "Vatican Rag" was totally derogatory to the beliefs of millions of Catholics in the world - complaint not passing the test of advocacy of hatred based on religion and constituting incitement to cause harm - no contravention of clause 4(2) of the Code of Conduct - complaint not upheld - Baiocchi vs Classic FM, Case No: 40/2013(BCCSA)

SUMMARY

Complaint that the broadcasting of a song titled "Vatican Rag" was totally derogatory to the beliefs of millions of Catholics in the world. Song dating from the 1960's by satirist Tom Lehrer making mockery of beliefs, rituals and things sacred

to Roman Catholics. No mention is made of God in the song. Complaint to be treated as hate speech based on religion. Complaint not passing the test of advocacy of hatred based on religion and constituting incitement to cause harm. No contravention of clause 4(2) of the Code of Conduct was found and the complaint was not upheld.

JUDGMENT

PROF HENNING VILJOEN

[1] The Registrar received a complaint concerning the broadcasting of a song called "Vatican Rag" during a time slot identified for "classical comedy" on 13 September 2013. The song was written and performed by satirist Tom Lehrer in the early 1960's. The music dates from 1910 and was then known as the "Spaghetti Rag". The broadcast gave offense to the Complainant as he regarded it to be totally derogatory to the beliefs of millions of Catholics in the world and he lodged a complaint with the BCCSA. The Complainant also took offense to the amusement of the presenter in announcing the song.

[2] **The complaint was formulated as follows:**

"The Vatican Rag"

I wish to lodge a formal complaint against broadcaster, Deano Maduramuthu.

On Friday 13th September, 2013 at approx 7.45 a.m., he aired a recording entitled. "The Vatican Rag." Clearly this amused him, but it is totally derogatory to the beliefs of the millions of Catholics in the world.

It is not the function of a broadcaster to publicise any matter which is defamatory to any religious group and in my opinion disciplinary action should be taken against him. Also there obviously is the need for a public apology.

In response to your reply, I submit the following:

1. The broadcaster is: Classic FM Radio (SA) (Pty) Ltd, broadcasting on 102.7.
2. The reason for describing the item as "totally" derogatory is that, that is what it was: Every aspect of it, but 3 items do come to mind: "kneel and genuflect" or words to that effect "go to confession and find out if your sins are original" "eat the wafer, drink the wine."

This is an attack on the beliefs and practices of the Catholic Faith; not a humorous production.

I have given you the name of the presenter and time of the broadcast. If there is any further information you require I shall be happy to oblige. Thanking you for your trouble.”

[3] **The Respondent’s argument included the following:**

It was denied that there was any intention with the broadcasting of this song to offer any comment on the beliefs of Roman Catholics. The amusement of the presenter was as a result of him enjoying a good piece of musical comedy. It was further denied that there was advocacy of hatred based on religion or incitement to cause harm to Catholics.

EVALUATION

- [4] The song in question is sung on music in the ragtime genre and reminds one of the music of Scott Joplin. It has a foot tapping beat, the words of the song are well articulated and what impresses, as the presenter stated in his response to the complaint, is the deft use of rhyming couplets by the lyricist. The Complainant found the lyrics offensive, such as:

Bow your head with great respect,

And genuflect, genuflect, genuflect!

and

Step into that small confessional,

There, the man who's got religion 'll

Tell you if your sin's original.

If it is, try playin' it safer,

Drink the wine and chew the wafer.

- [5] Broadcasts in which adherents of a particular faith and/or their beliefs are ridiculed or made the subject of jest, mostly touch a sensitive nerve and the BCCSA is then asked to act against the broadcaster. Our function is limited to applying the Code of Conduct which has been signed by the broadcasters, including Classic FM, and to determine whether the Code has been transgressed.

Only when we find that the broadcaster has contravened one or more of the clauses in the Code, can we act against the broadcaster by, *inter alia*, reprimanding the broadcaster or imposing a fine of up to R 60 000.

[6] In this instance there is no doubt that fun is being poked at the beliefs, rituals and other things sacred to Roman Catholics. It is understandable that emotions are stirred up every time that things holy and sacred are being treated in such irreverent manner. This goes for all religions in South Africa. We were reminded by the representative of the Church that in the past people have been killed for blaspheming. Many people have also been killed in religious wars. So strong is the emotional element as far as religion is concerned.

[7] Blasphemy in Roman-Dutch law comprised the cursing or damning of God. In our law in present day South Africa the subject is treated as a form of hate speech based on religion. The Code of Conduct, in line with section 16 of the Constitution of South Africa, determines in clause 4(2) thereof that broadcasters must not broadcast material that amounts to the advocacy of hatred based on (*inter alia*) religion and that incites to cause harm. This puts a limitation on the right to freedom of expression of the broadcaster.

[8] In an adjudication of a complaint on the same topic, 14/A/2013 *De Vos v DSTV Trace Channel*, the complaint pertained to a music video that allegedly contained blasphemy and promoted promiscuity. The following was stated in that adjudication and we think it is equally applicable to this case:

[5]The task of this Commission is to balance the right of listeners and viewers not to be offended (in this case in their religious convictions) with the right of broadcasters to their freedom of expression. One should keep in mind that we now live in a democratic, secular state where the highest law is the Constitution which guarantees basic freedoms and human rights. Although freedom of expression is not a limitless right, the Constitutional Court has, on more than one occasion, stressed the fact that freedom of speech and expression must be given a

generous interpretation. The Court has also declared that freedom of expression allows broadcasters to broadcast material that is offensive, shocking or disturbing. The only limitation placed on this freedom, is the one mentioned in section 16(2) of the Constitution and repeated in the Code mentioned above, namely so-called hate speech.

In the adjudication it was found that the second requirement, incitement to cause harm to Christians, was not present and the complaint was not upheld.

- [9] It should be remembered that in deciding whether the provisions of the Code have been transgressed, the context in which the material was broadcast should be considered in every case. Another example of decisions of this Commission on complaints of hate speech based on religion is *Schutte v Multichoice Channel 126* [2010] JOL 25572, (BCCSA) Case 10/2010. This case concerned a complaint about a scene in a programme in which a banner with the words “Jesus sucks” was pulled by a light aeroplane. The Respondent argued that the publication of the words did not constitute the advocacy of hatred based on religion and with the incitement to cause harm. The Tribunal found that the words complained of were so defiant to the deity of Jesus that it constituted the advocacy of hatred, but that the context in which it was published did not amount to the incitement to cause harm - the context being a competition between Kenny and Spenny that was ridiculous, stupid, bizarre and immature, according to the broadcaster. No contravention of the Code was found and the complaint was not upheld.

- [10] In the present matter, however painful the ridiculing of things sacred to many Roman Catholics might be, we cannot find in favour of the complainant. First of all, there is no reference to God in the lyrics. Even if blasphemy were mentioned in the Code, there would have been no finding of a contravention of the Code in this respect. Applying the hate speech test, we cannot find that there was advocacy of hatred based on religion. To advocate means to support or

recommend a cause. There was nothing of this in the broadcast. Neither do we think that there was any incitement to cause harm to Roman Catholics. The complaint failed in both tests for hate speech. We can therefore not find that the broadcasting of the song "Vatican Rag" constituted a contravention of clause 4(2) of the Free-to-air Code of Conduct for Broadcasting Service Licensees.

- [11] As for the complaint that the presenter of the programme was amused in announcing the song, the presenter denies that he offered comment on the song and states that he was amused because he was about to play a good piece of musical comedy. We accept this statement and do not find it necessary to consider whether clause 12 of the Code, relating to comment, was contravened.

In the result the complaint is not upheld.



**HP VILJOEN
DEPUTY CHAIRPERSON**

Commissioners Makaula-Ntsebeza and Sewlal concurred in the above judgment.