Race – derogatory terms for different races used in programme where the idea of clubs for specific racial groups was discussed in a jocular context. Complaint upheld. Choonara vs Jacaranda 94.2 FM, Case No: 28/2006.

SUMMARY

A complaint regarding certain derogatory references to different racial groups made by a presenter on Jacaranda Radio was received by the Registrar. The insert discussed the recent establishment of the “Native Club”, and listeners were invited to call in and suggest names for other clubs based on race. Several proposals were made. The Tribunal, however, concentrated on the use of the terms “Coon Club” and “Coolie Club”, arguing that the other names mentioned were not as
problematic within the context of the programme as the said terms. Coloureds and persons of Indian descent were part of the historically disadvantaged groups mentioned in section 9 of the Constitution of the Republic and deserved more protection than groups which were not so disadvantaged.

The Tribunal was of the view that insofar as the programme included references to groups that are not included among the historically disadvantaged groups, the jocular references were in questionable taste in the context of this programme, and did not amount to a contravention. It cannot be disputed that South African persons who are Coloureds or of Indian descent were part of historically disadvantaged groups to which section 9 of the Constitution refers. The terms “coon” and “coolie” are derogatory terms and are widely recognized as being hurtful to the groups concerned. The terms amount to negative stereotyping, and unfairly and crudely categorize such persons by denigrating them and relegating them to the status of being of a low or despicable class. The said stereotyping is unfair in that it does not rectify the negative image, but instead assaults the right that members of these groups have to equality, and also the right not to be unfairly discriminated against. This right is also protected in clause 38 of the Broadcasting Code. The public airwaves may not be abused for the purpose of unfair discrimination or the denigration of persons. It might be said, and it has indeed been argued, that after 10 years of democracy we should be able to laugh at each other and also at ourselves. But broadcasting does not necessarily lead to a healthy mutual laughing “at each other”; instead, it may offer the opportunity for the derisive language and/or laughter of the studio presenter and his invited audience to be directed at a specific group in the audience – which in this case, is persons of Indian descent. The attempt by the presenter to correct the references by saying that he was not being racist and that this was merely an attempt at joking at the notion of clubs for different races, was neither effective nor convincing. By no stretch of the imagination could the use of the expressions “coon” or “coolie” be said to have been used in the interest of free speech. The Complaint was upheld.

JUDGMENT

VAN ROOYEN (Chairperson)

[1] A complaint about derogatory references to different racial groups by a presenter on Jacaranda Radio was received by the Registrar. I decided to have the matter adjudicated by a Tribunal as a result of possible hate speech or a possible assault of the dignity of the racial groups involved in the broadcast.

[2] The Complaint reads as follows:

“On the morning of the 30/05/2006 between 6:45 am and 7:15 am, the DJ’s (Keano and the angels) remarked about a column by David Bullard which appeared in the Sunday Times of the
29/05/2006. Keano then commented about the fact that perhaps just as mentioned by David Bullard, all race groups should form their own clubs to emulate the so called Native Club. He then asked listeners to call in to say which clubs they would like to join and why. The options as mentioned by him were: The Coon club (for coloureds); The Soutie club (for English people); The Coolie club (for Indians). After a while some listeners phoned in with their choices, and gave their reasons based on derogatory stereotypes. Upon realising that he had opened a can of worms, Keano tried to make light of his statements, and used the excuse that we South Africans can laugh at ourselves. I feel that the use of these antiquated and derogatory names for the different race groups is insulting and are relics of apartheid South Africa, and their use should be condemned in the strongest manner. Although the intention of the DJ was not borne out of malice, his total ignorance of the nature of his descriptions was shocking. I think that anyone who is given a platform to express his views on a radio station should be educated about our history and made aware of the sensitivities of others. Jakaranda FM and their morning show should in my view be reprimanded for this incident, as they are responsible for promoting the use of insulting hate speech. I trust that you will take all necessary actions to punish those responsible and thereby prevent incidences of this nature in the future.”

[3] Jacaranda responded that although the references might have been in questionable taste, they did not amount to hate speech or an assault upon the dignity of the groups involved. Mr Grealy, for Jacaranda Radio, also argued that the fundamental right to freedom of expression included the right to make such observations. Mr Grealy referred us to several judgments of the Constitutional Court and this Tribunal, and we are indebted to him for the research that he has done.

[4] The Constitutional right to freedom of expression includes freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, and academic freedom and freedom of scientific research. The right does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, which constitutes incitement to cause harm. The Constitutional Court has commented as follows on this right:

In the context of this country’s history relating to the suppression of this right, this right must be “zealously guarded.” (Philips and another v the Director of Public Prosecutions and Other 2003 (4) BCLR 357 CC);

“A society which truly respects freedom of expression must, of necessity, afford protection to the views which may be regarded as ‘unpopular’ and ‘controversial.’” (South African National Defence Union v Minister of Defence and Another 1999 (6) BCLR 615 CC):
“…Freedom to speak one’s mind is now an inherent quality of the type of society contemplated by the Constitution as a whole…” (*S v Mamabolo* 2001 (5) BCLR 449 CC).

[5] Article 16 of the Code states that:

“16.1 Licensees shall not broadcast material which, judged within context sanctions, promotes or glamorizes violence based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age or mental or physical disability.

16.3 Licensees shall not broadcast… (c ) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

[6] The Tribunal does not believe that the expressions, within the context of the broadcast, amounted to hate speech. There was no *advocacy* of hatred, and the presenter constantly reminded listeners that he was not intending to be racist, and that the intention of the invitation to send in names for different clubs was a jocular one.

[7] The next question is, however, whether the dignity of those listeners belonging to the groups involved was not assaulted in an unreasonable manner. Mr Grealy argued that for the purposes of a finding that dignity had been assaulted, there would have to be evidence that the sensitivities of listeners had indeed been offended. The test has, indeed, both subjective and objective elements.

[8] Clause 38 of the Broadcasting Code provides as follows:

Insofar as both news and comment are concerned, broadcasting licensees shall exercise exceptional care and consideration in matters involving the private lives, private concerns and dignity of individuals, bearing in mind that the rights to privacy and dignity may be overridden by a legitimate public interest.

[9] The Tribunal is of the view that insofar as the programme included references to groups that are not historically disadvantaged, the jocular references were in questionable taste in the context of this programme and did not amount to a contravention. It cannot, however, be disputed that South African persons who are known as Coloureds or are of Indian descent were historically disadvantaged, and
belong to the groups to which section 9 of the Constitution refers. The terms “coon” and “cooie” are derogatory terms and are well known to be hurtful to the persons involved. The terms amount to stereotyping, and they unfairly and crudely categorize such persons by denigrating them and relegating them to the status of being of a low or despicable class. The said stereotyping is unfair in that it violates the right which members of these groups have to equality and the right not to be unfairly discriminated against. This right is also protected in clause 38 of the Broadcasting Code. The public airwaves may not be abused for the purpose of unfair discrimination and the denigration of persons unless such denigrating language is used as part of a wider programme that seeks to engage legitimate public interest. It might be said, and it has been argued, that after 10 years of democracy we should be able to laugh at each other and also at ourselves. But broadcasting does not necessarily lead to a healthy laughing “at each other”; instead, it may offer the opportunity for derisive language (in this case, that of the studio presenter and his invited audience) to be directed at a specific group in his audience, in this case, persons of Coloured and Indian descent. The attempt which the presenter made to correct the references by saying that he was not being racist, and that he was merely attempting to joke about the idea of clubs for different races, was neither effective nor convincing. An argument that invokes freedom of expression as a “pillar of democratic society” and as the “heart of democracy” may only be used to excuse the derogatory joke if the joke also informs, or criticizes the negative stereotype.

Section 16 of the Constitution of the Republic of South Africa guarantees the right to freedom of expression and states that it includes freedom of artistic creativity, academic freedom and scientific research. Section 16(2) explicitly excludes from the protection of free speech propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. That section 16(2) is not the only limitation on freedom of expression is, however, clearly confirmed by O’
Regan J in *Khumalo v Holomisa*. The right to dignity in section 10 of the Constitution is held to include the other rights of personality, which would, under justifiable circumstances, place a further limitation on freedom of expression.

“The value of human dignity in our Constitution is not only concerned with an individual’s sense of self-worth, but constitutes an affirmation of the worth of human beings shared by all people as well as the individual reputation of each person built on his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public’s estimation of the worth or value of an individual.”

[11] Of course, this right must be balanced against the right to freedom of expression, which includes the right to artistic freedom. The South African Constitutional Court has, in several judgments, accentuated the role of freedom of speech. In *S v Mamabolo* Kriegler J stated in regard to the value of freedom of expression in our present society, in contrast to the apartheid history of censorship and thought control:

“Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open marketplace of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed.”

In *South African National Defence Union v Minister of Defence and Another* O’Regan J stated that

“Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental functions as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters…” [footnotes omitted.]

In *Islamic Unity Convention v IBA and Others* at paragraph [27] Langa DCJ (as he then was) convincingly contrasted the current climate of freedom of expression with that which prevailed in the past regime, as follows:

“Notwithstanding the fact that the right to freedom of expression and speech has always been recognized in the South African common law, we have recently emerged from a severely

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1 2002(5) SA 401(CC) at para [27].
2 In *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002(4) SA 294(CC) at para [34] Langa DCJ (as he then was) states that further legislative limitations would be intrusive of section 16(2) and may only place restrictions on s 16(1) where they are shown to be reasonable in terms of s 36.
3 2001 (3) SA 409 (CC) para [37].
4 1999(4) SA 469 (CC) para [7].
5 2002(4) SA 294(CC).
restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a 'constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours'. As pointed out by Kriegler J in Mamabolo—

'... freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15 to 19 of the Bill of Rights.'

South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members . . .

As such it is protected in almost every international human rights instrument. In Handyside v The United Kingdom the European Court of Human Rights pointed out that this approach to the right to freedom of expression is—

‘applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.” The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of “human dignity, the achievement of equality and the advancement of human rights and freedoms.” Thus, open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself. Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere.” (Emphasis in italics added and footnotes omitted)

[12] The function which the use of the words “coon” and “coolie” had in the programme complained about is meagre compared to the fundamental importance which should be attached to the protection of the dignity of Coloureds and people of Indian descent. The Complainant was clearly offended by the reference, and the Tribunal has no doubt that Coloureds and persons of Indian descent were likely to have been offended by these expressions.

[13] In the result, the Tribunal finds that the use of the terms “coon” and “coolie” in the programme complained about amounted to a contravention of clause 38. As to a possible sanction, it was argued that since the complainant conceded that the presenter was not actuated by malice and did not base his case on an infringement of dignity, a reprimand should suffice. Hate speech based on race was also not held to have been present.
[14] It is true that hate speech was not held to have been present. However, the complaint is clearly based on an assault on dignity. The complainant states as follows: “I feel that the use of these antiquated and derogatory names for the different race groups is insulting and are relics of apartheid South Africa, and their use should be condemned in the strongest manner.” An insult amounts to an affront to dignity and, if it is serious enough, it is an infringement in law. Given our racially oppressive past, the reference to “cooie” and “coon” is deeply insulting and amounts to a replay of past injustices. The corrective steps taken by the presenter are regarded as a slightly extenuating circumstance. However, these steps were not sufficient in neutralizing the pain that, in our opinion, must have been suffered by the groups involved. The absence of malice is, however, regarded as an extenuating circumstance. The Tribunal does not believe that a mere reprimand would suffice. The respondent is directed to pay to the Registrar an amount of R5 000 on or before 21 September 2006.

JCW VAN ROOYEN
CHAIRPERSON

Ad hoc Commissioners Venter and Mokoena-Msiza concurred.