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ADJUDICATION NO: 05/A/2017

NAME OF PROGRAMME: PHAT JOE SHOW BROADCAST ON 15 FEBRUARY
AT 17:15 AND
20 FEBRUARY BETWEEN 15:00 16:30
RESPECTIVELY

BROADCASTER: EAST COAST RADIO

COMPLAINANTS: DOWN SYNDROME SOUTH AFRICA, SHEASBY,
SWART, JO-ANNE HORN, JANUS HORN,
PASSMOOR AND PATEL

COMPLAINT

Thirteen complaints about radio presenter's alleged discriminatory, denigrating and unacceptable reference to people who have Down Syndrome.

APPLICABLE RULE

Clause 15 (3) of the Broadcasting Code:

In the protection of privacy, dignity and reputation special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled.

ADJUDICATION

- [1] Thirteen complaints were lodged with the BCCSA against East Coast Radio (ECR) regarding a comment made by a presenter, Phat Joe, during his show on 15th February at 17:15 and again on 20 February. The Registrar decided to entertain only seven of the

complaints since it contained specific information as required by our Rules.

[2] **The complaints read as follows:**

Down Syndrome South Africa: “Re: Complaint - East Coast Radio Station KZN

On Wednesday 15th February 2017 at approximately 17h15 during the Phat Joe show on East Coast Radio Station, the presenter had a brief moment where he forgot his lines and then justified it by saying “ I’m feeling Down Syndromish” to his listeners.

Whilst we as the listening public, surely understand that these things happen and is a natural occurrence, we cannot justify and allow people to associate their forgetfulness to a certain and unique group of individuals, in this case the Down syndrome community.

In response to the outcry from parents, the broadcaster, in my opinion without an appropriate public apology justifies by stating that the presenter could have used a number of similar colloquialism, without it being directed at any particular individual. This adds further insult to an already marginalised community. Not informing themselves about the facts of Down syndrome prior to making a statement on Facebook, further shows a lack of professionalism by the broadcaster.

Parents have fought a long and hard battle for the constitutional rights of their children with Down syndrome, everyday is a struggle for a parent to access proper healthcare, schools and employment for their child with a disability. The Down syndrome community has fought hard against discrimination and derogatory terminology being made against their children. Our children deserve their dignity and respect as equal citizens of South Africa. We trust that this matter will receive a hearing and the appropriate action.

Thanks for your prompt response I do not wish to withdraw the compliant with the Commission in fact I would like immediate action be taken against the removal of Phat Joe as is evident from social media comments after his show yesterday, where he was meant to have shown remorse for his chosen words but went on to say that he could have used the word “retard or stupid”. This man just does not get it.”

Sheasby: “Imagine my horror when listening to ECR via streaming audio in JHB yesterday and hearing Phat Joe use the term “having a down Syndromeish moment”

This is completely unacceptable as a mother with a 3 year old son who has mosaic down Syndrome I find this Comment very discriminatory and in broke my heart to hear that this is what a well-known radio personality puts out there about my child.

ECR should try and raise awareness about Down Syndrome not paint it in a bad light. The comment was made on the Phat Joe drive show between 15:00 and 18:00 Im not sure on the time date was 15 Feb 2017. After 4:30 is the best I can do so sorry never really noted the time.....

Phat Joe stumbled on his words and then said something along the lines “sorry im having a down syndomeish moment”. This type of phrase doesn’t simply get made up it must something he says often or his friends use while they around him you don’t simply come up with a phrase like that.

Today’s show (20/02) had so many more negative phrases. He said “I could have said I’m having a retard moment” or a “slow moment” implying people with Down Syndrome are retards or Slow. He then said he used the phrase to mock himself, implying it’s okay to mock yourself with someone else’s disability. I’m glad his co-worker called him out as well as the resident comedian.

Lets see how the rest of the slow plays out.”

Swart: “I have a complaint against the drive team Phat Joe think he can say what he wants he makes sexist and racial remarks on air. Well Yesterday afternoon at about 17h15 he made a remark that he is having a DOWN SYNDROME MOMENT. Hell no he might get away with a lot but to go around and mock such special precious persons is unacceptable.

More than 60 000 ppl signed a petition to get rid of the drive team but ecr did not bother to listen to us now the team think they are untouchable. NO NO NO NO NO NO NO NO not allowed.”

Jo-Ann Horn: “I would like to lodge a complaint about a comment made by Phat Joe on the East Coast Radio Drive Show. On 15 February 2017 at about 17:15 he commented that he was having a "down syndromish moment" because he made a mess of his lines. It is not funny to make fun of disabilities. It is discriminatory and (surely) unacceptable in this day and age.”

Janus Horn: “On Wednesday, 15 February at around 17h15 on the Phat Joe show on East Coast Radio, Phat Joe mumbled and then when he could not find his words, said that he was having a Down Syndromish moment.

In your code of conduct 15.3. In the protection of privacy, dignity and reputation special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled.

It clearly states that the dignity of physical and mentally disabled should be respected.

Having a child with special needs, my son has Trisomy 21 (Down Syndrome) it has become more and more difficult to find a school to place him regarding the stigma attached to Down Syndrome.

It is my view that Phat Joe offended all people with Down Syndrome mocking them and insulting their level of intelligence. I further feel that this happened during Peak Hour traffic and that he showed no remorse in his following show.

I believe that comments like these should be classified the same as hate speech as they are derogatory and demeaning!

It is tough enough for parents to deal with children with Down Syndrome, the physical, medical, mental and other aspects involved. The cost raising these special children etc etc. We do not need such comments on air!

I am sure the station will say that it was Phat Joe and that he is known to provoke listeners. This was unacceptable!

In this case he did not provoke, but rather insult the intelligence levels of my child and all people that have Down Syndrome!

He is creating a stereotype for Down Syndrome on air with a few thousand listeners and this is a major problem!

I would like to see him apologize on air and assist the Down Syndrome association with the Big Walk or another fundraising event to get a better understanding of people with down Syndrome.

Yesterday (20/02) Phat Joe had his show from 3-6 pm and he was going to give an apology about his remarks he made. He actually made a mockery of people with Down Syndrome. Zaba, his co-presenter told him on numerous occasions that he offended her and many others. He then went on to say should he rather have said retard or retarded and then went further stating that he has

no problem using the word kaffir on air!! Come now please! This is getting out of hand. My kids have to listen to this and then ask me what is a kaffir?? This is unacceptable!”

Passmoor: “On Wednesday, 15th of February, at about 17h15 on the Phat Joe Show, he was stumbling over his words and then excused it by saying he was having a Down syndromish moment. This is inexcusable and derogatory to people with Down syndrome. There is already so much stigma attached to Down syndrome and we do our utmost to create awareness at every opportunity. This man is a public figure and what he says can have huge repercussions on the Down syndrome community. I believe he is in violation of section 15.3 of the broadcasting act. I look forward to your response.”

Patel: “I wish to Lodge a complaint regarding the comment made on a popular radio station East Coast Radio by their equally popular presenter Phat Joe (Real Name: Majota Khambule). The comments relate to people with Down syndrome.

I have a son of 1 year who has Down syndrome and even I don't know what the feeling is to be "Down Syndromish".

It is appalling that such an utterance can be made in this regard. Have we got to a state where we are insensitive to others around us and can freely say what we feel?

The BCCSA has an obligation to keep these broadcasters in check and honest and also meter out punishment for infringement on over stepping their boundaries.

I can write an essay of my grievance but would not like to waste time on an uneducated person with no morals.

I will be also writing to the Human Rights commission to bring such injustices to book.

In trust the commission will bring a speedy decision and hold responsible the Station for their lack of apology and the presenter for his lack of compassion.”

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

“It is our view that while what Joe said may have been insensitive and in poor taste, he was not intentionally trying to hurt or offend anyone. He could have said a number of similar colloquialisms such as, “I am having a senior moment or an ‘Alzheimeric’ moment”. The intention is not to denigrate seniors, people suffering from Alzheimer's or Downs Syndrome, but rather to be self-denigrating for having trouble remembering – in this case the particular name of the show segment.

We further don't believe that any particular individual's dignity, privacy or reputation was damaged by this comment as is required by Section 15 of the BCCSA Code.

However, because we care about the views of our listeners and in a good faith attempt to sensitise the presenter and our listeners to people living with Down Syndrome, the station has set up an interview with the General Manager of the KZN Down Syndrome Association on Joe's show. This interview goes out at 3pm on Monday 20 February.

We would like to formally apologise for any offense that was taken due to the comments made by Joe.”

[4] **The Complainants replied as follows:**

Sheasby: “This reply is totally unacceptable. Although what Joe said might not have been intentionally said to hurt or offend anyone the fact remains that it offended an entire community of individuals and their families.

Saying you had a senior moment is a colloquialism that I have heard before but never have I or anyone I have spoken to heard of having a “Alzheimeric or Down Syndromish moment” that is poking fun at two different groups of people one with a mental health problem and one with a Disability, to me that is unacceptable and we have to stand up for those who might not be able to speak for themselves. Using any condition as a way to explain memory loss of a healthy individual should never be acceptable or normalized.

They further say “The intention is not to denigrate seniors, people suffering from Alzheimer’s or Downs Syndrome, but rather to be self-denigrating for having trouble remembering” the definition of denigrate is To speak damagingly of; criticize in a derogatory manner; sully;defame: to denigrate someone’s character.

to treat or represent as lacking in value or importance; belittle; disparage: does this mean Joe and ERC see people with down syndrome as lesser people as they can use to “self-denigrate” themselves?

Most people with down syndrome do not have trouble remembering. Some people with Down syndrome have an intellectual disability which in essence means it takes them longer to process some information and are visual learners. The range of complications that Down Syndrome brings is so vast and not everyone has the same conditions, difficulties or traits So that makes his comment inappropriate as well as ignorant.

For years we have worked and advocated for people with Down syndrome. Advocated so that people, like them, who do not have people with Down syndrome in their lives can get a better understanding of what Down syndrome is. We advocate for equality, for inclusion in schools and the work place. We advocate for understanding that people with Down syndrome are people first and foremost with needs, wants and dreams. It is not the need, nor want nor dream to have their condition used as a colloquialism or for jokes. It is their want and need to be accepted as contributing members of society who do nothing but enrich the lives of those around them. This comment could have been heard by potential employers and cost someone with Down Syndrome a job as the employer might think they suffer with memory loss.

In the BCCSA code of conduct Section 15 is states **(3) In the protection of privacy, dignity and reputation special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled.**

So even in their response they are violating this code by referring to the aged, physically and mentally disabled. They cannot justify that no one’s dignity or reputation was damaged, the show is broadcast not only in KZN but can be streamed anywhere in the world.

As a mother of a 3 year old boy with Mosaic Down Syndrome I am offended by his comments Joe didn’t even have the decency to give an on air apology the following day even after numerous people wrote on ECR Facebook page, on Phat Joes personal page and sent complaints to BCCSA. In the past 3 years this is the second time I have had to stand up for my sons rights and I will continue doing this till my last breath.”

Swart: “Thank you for the fast response if he did say anything else like an althimer moment exetra he would have gotten the same response from me i dnt listen to them anymore at all think they are in poor taste.”

Jo-Ann Horn: “What he said was not self-denigrating, it was blatantly mocking people with Down's Syndrome. By saying it was self-denigrating you are saying that people with Down's syndrome are somehow inferior. He was lowering himself to the standard of people with Down's syndrome. Which, in my opinion, is absolutely unacceptable. Whether he was intentionally trying to hurt or offend people is irrelevant because his comment WAS both hurtful and offensive. The outcome remains the same regardless of his intentions - it was extremely offensive and, in my opinion, utterly disgusting. He is equating Down's syndrome to stupidity. If someone messed up their lines and said "I'm having a black moment" would that be ok? No, it wouldn't. It is never ok to denigrate and belittle a group of people for any reason.

Had he said "Alzheimeric moment" it would not have been any less hurtful, offensive or disgusting. Alzheimer's is an awful disease to deal with, and the sufferers and their families would be just as offended.

Has ECR really stooped so low that they are defending this indefensible comment? IT IS NOT FUNNY TO MOCK THE DISABLED. EVER. You are right - an individual's dignity was not damaged, a whole group of people's dignity was damaged. That is even worse. I wish ECR had just agreed that it is a terrible thing to have said, and perhaps disciplined Phat Joe. Instead they say it wasn't that bad.”

Janus Horn: “I feel that 15.3 in your code of conduct is pretty clear. In society we have certain moral and ethical boundaries. As the BCCSA you have to enforce these. Why would someone say that he is feeling Down Syndromish when he forgets his lines and mumbles?? Out of everything he could have said, he said this. He could have said he forgot his lines, he is stupid, he suffered a brain fart etc etc... Instead he chose to target people living with Down Syndrome! They have speech and learning problems and do forget what they going to say with times. He made a mockery of all people living with Down Syndrome on prime traffic radio time. Clearly he thinks little of people with Down Syndrome and to mock them and break them down on Radio is not acceptable!”

Passmoor: “Thank you for your email. The fact that you see the use of Down syndrome as a colloquialism shows that you too are in need of enlightenment of what Down syndrome is. The fact that you choose to see it as acceptable as a way to use it to be 'self- denigrating for having trouble remembering' just reiterates my point.

Firstly, people with Down syndrome do not have trouble remembering. People with Down syndrome have an intellectual disability which in essence means it takes them longer to process some information and they are visual learners. It has nothing to do with memory what so ever! So that makes his comment inappropriate as well as ignorant.

Using any condition as a way to explain memory loss of a healthy individual should never be acceptable or normalized.

I further do believe that All people who have Down syndrome's dignity has been attacked by the mere fact that you and he feel it's appropriate to use Down syndrome as a colloquialism.

Whilst I appreciate your attempt at understanding I feel my message has been lost along the wayside.

For years we have worked and advocated for people with Down syndrome. Advocated so that people, like you and Joe, who do not have people with Down syndrome in their lives can get a better understanding of what Down syndrome is. We advocate for equality, for inclusion in schools and the work place. We advocate for understanding that people with Down syndrome are people first and foremost with needs, wants and dreams. It is not the need, want nor dream to have their condition used as a colloquialism or for jokes. It is their want and need to be accepted as contributing members of society who do nothing but enrich the lives of those around them.

Furthermore, having listened to his comments yesterday 20 February 2017, I believe he is not understanding his transgression nor is he remorseful. He continued to be degrading and even tried to justify his comments by saying that we are fighting for a cause that does not need fighting. He also decided to use synonyms such as stupid for what he meant which is distasteful as he was now saying that he was trying to say he was having a stupid moment and used Down syndrome to describe that stupid moment!

He was not sincere in his apology nor did he even try to take the time to understand why we, parents of children with Down syndrome, the Down syndrome community and many of the general public found his comment offensive. He even went so far as to mention the K word on radio to explain how it can be seen in a positive light!

His comments on Wednesday and yesterday are in clear violation of section 15.3 of the broadcasting code of conduct and as such he needs to face the consequences of his actions. I look forward to your response."

Patel: "ECR response is as expected. They have defended this particular presenter Phat Joe on many previous occasions which were brought before the commission. So, I highly doubt any apology from them as being sincere.

In their first paragraph they mention:

"He could have said a number of similar colloquialisms such as, "I am having a senior moment or an 'Alzheimeric' moment".

In my response he shouldn't have said anything about any disability or sickness in the first place unless he was bringing awareness to it in good spirits.

He could have said " I am having a forgetful day etc". This free reign he has been given to attract listeners by ECR should not go unpunished. Acceptability and responsibilities to the public should be the main focus. These utterances he makes is not about stirring debate but a cheap shot at comedy which hopefully goes unnoticed from their side.

In response to their second paragraph:

Yes, My son's dignity has been damaged for being a down syndrome candidate. I will not stay quiet while ignorance prevails on a few individuals who have no idea what being a down syndrome person is.

In response to their third paragraph:

I waited in anticipation for the segment to air and all I felt was disappointment. A mere 7 minutes was given to the topic and a half hearted apology from Phat Joe. This in no way makes up for the words he spoke a week ago.

Whilst I believe in freedom of speech I also believe in freedom not to offend. Being the personality he is, surely more effort should be taken in making sure what he says is not insensitive. He is a seasoned presenter and has absolutely no defense or excuses for his clumsiness with words.

A stronger stance and action needs to be taken against anyone or company that transgress the basic rights of humans. Maybe then only will they not be so casual in their speech.

If any representative of ECR or Phat Joe appears before the Commission kindly pass on one message:

" My son has a Down Syndromish day everyday of his life, and we will never know how that feels" And I'm sure every parent with a down syndrome child will agree with me.

I trust the commission will be fair in coming to a conclusion on this matter. Thank you for affording me this opportunity to respond."

[5] **The legal representative of East Coast Radio responded on the above as follows:**

1. “We act on behalf of East Coast Radio (ECR), a commercial sound broadcasting service which has an adult contemporary format in accordance with clause 4 of its licence issued by the Independent Communications Authority of South Africa (ICASA).
2. ECR is a member of the National Association of Broadcasters and is bound by the Code of Conduct for Free to Air Broadcasters (2011) (the Code) as developed and administered by the Broadcasting Complaints Commission of South Africa (the BCCSA).
3. This letter addresses the complaints received from:
 - 3.1. Ms Hannah Swart and others on the ECR presenter Phat Joe’s reference to his “having a Downs Syndrome moment” on-air;
 - 3.2. Mr Janus Horn on the ECR presenter Phat Joe’s use of the word “kaffir” (“the K-word”) on-air; and
 - 3.3. Mr Janus Horn and another on the ECR presenter Phat Joe’s use of the word “retard” on-air.
4. On behalf of East Coast Radio we think it is vital to communicate our client’s concerns to the BCCSA over the behaviour of its presenter, Phat Joe, in relation to these three complaints.
5. On Friday 17 February, ECR attempted to explain the context in which the presenter made the remarks about having a “Downs Syndrome moment” was not intentionally trying to disparage groups of people but was being self-disparaging in the context of his inability to remember the name of the segment of his show. Nevertheless, ECR made a commitment that the presenter would apologise for the use of the term and would host an interview with an expert on Downs Syndrome to increase public awareness of the condition. ECR management was clear with the presenter as to why an apology was necessary and discussed the wording to be used to ensure that the station’s position on this would be made clear to the public.
6. Unfortunately, the segment of the show containing the apology and the interview which took place on Monday 20 February, 2017, was not made in a manner that accorded with the positions of ECR’s station management. In this regard:
 - 6.1. ECR is not satisfied with the apology made by Phat Joe in respect of the Downs Syndrome remark;
 - 6.2. ECR management is of the view that the effective non-apology referred to above was compounded by the use of the derogatory term “retard”, the use of which is entirely unacceptable when referring to mentally disabled people; and
 - 6.3. the use of the K-word by Phat Joe to demonstrate his distaste of so-called “censorship” is entirely unacceptable to ECR. This is particularly so in the light of the recent Constitutional Court judgment of *SARS v CCMA and Others*¹ in which the Chief Justice cogently sets out the egregious nature of this racial slur.
7. As the BCCSA is aware from previous complaints regarding this presenter, ECR is in the process of determining where the appropriate lines are to be drawn between “edgy” radio

¹ CCT Case: 19/16 available at <http://www.saflii.org/za/cases/ZACC/2016/38.pdf>

that causes controversy and builds audiences, particularly younger ones, as a result; and unacceptable radio that continuously violates the BCCSA Code of Conduct for broadcasters that ECR supports and has undertaken to uphold, and that undermines the values of human rights and basic respect that the station holds as foundational to its service.

8. ECR, is, frankly, alarmed at the statements made by its presenter, Phat Joe, yesterday (20 February 2017). As a result, and in order to protect the public interest and its own reputation as a serious broadcaster, ECR has decided to take Phat Joe off air with immediate effect and has informed him of this today. His time off air will be reviewed once the station has an opportunity to engage fully with Phat Joe on his past and future conduct on-air.
9. We will be responding, on behalf of ECR, to the specific complaints in writing, and where necessary, in oral argument but we thought it essential to bring our client's response to these recent on-air utterances to the BCCSA's attention as a matter of urgency.
10. We trust that you find the above to be in order. Please do not hesitate to contact us should you have any queries or require any further information.

[6] Following on this, on 27 February, the presenter (who returned to the Show after four days of absence) again apologised for the statements that he made on air, this time in a more appropriate format.

[7] On 28 February, the BCCSA received the following additional response from the broadcaster:

ECR'S WRITTEN RESPONSES TO COMPLAINTS TO THE BCCSA BY VARIOUS COMPLAINANTS ON THREE MATTERS PERTAINING TO: DOWNS SYNDROME ISSUE, AND THE USE OF THE WORDS "RETARD" AND THE "K" WORD ON AIR BY AN ECR PRESENTER

1. PREAMBLE

- 1.1. We act on behalf of East Coast Radio (ECR), a commercial sound broadcasting service which broadcasts in an adult contemporary format in accordance with clause 4 of its licence issued by the Independent Communications Authority of South Africa (ICASA).
- 1.2. Before setting out our client's formal written responses in respect of the above complaints, we wish to take the unprecedented and vital step of explaining how ECR sees its role in the Kwa-Zulu Natal community.
- 1.3. While ECR has an adult contemporary format, it sees itself as a station catering to a broad base of people living in the greater Durban area;
- 1.4. ECR respects the jurisdiction of the BCCSA and considers itself bound to comply with the provisions of the BCCSA Code of Conduct for Broadcasters. But even before these obligations, ECR considers itself to be bound by something even more important, the relationship of trust that it has with its audience which is based on the standards of broadcasting that its audience has come expect from ECR.

- 1.5. ECR's audience has been built, over decades, on an appreciation of ECR's values and on its mission as a force for good and for social cohesion, in KZN.
- 1.6. ECR's brand relationship is not something that ECR would want to damage in any way.
- 1.7. Consequently, in the event that one of ECR's presenters transgresses ECR's internal values, content filters and standards of probity to the extent that the station considers that damage has been done to the relationship it has with its audience, this is taken extremely seriously.
- 1.8. In relation to the complaints responded to in this submission, ECR is of the view that each of the on-air statements made was offensive, in poor taste and did indeed constitute a violation of the station's own values and content standards and violated the relationship of trust that it has with its audiences.
- 1.9. To this end, strong measures have been taken against the presenter in question as is set out more fully below.
- 1.10. However, the fact that the station's own internal content standards were not met by the presenter in question, does not necessarily mean that there has been a violation of the BCCSA Code of Conduct, as it more fully set out below.
- 1.11. Nevertheless, ECR wishes to assure the BCCSA that the fact that there may not have been a contravention of the Code in any instance relating to these complaints, does not negate the damage that has been done to ECR's brand and does not negate the seriousness with which ECR has chosen to respond internally to the violations of the station's own values and internal standards.

2. INTRODUCTION

- 2.1. ECR is a member of the National Association of Broadcasters and is bound by the Code of Conduct for Free to Air Broadcasters (2011) (the Code) as developed and administered by the Broadcasting Complaints Commission of South Africa (the BCCSA).
- 2.2. This letter is a composite written response to a number of different complaints received by the BCCSA from:
 - 2.2.1. Ms Hannah Swart, Ms Ramjas, Mr Janus Horn and others identified as Sheasby, Swart, Jo-Ann Horn, Passmoor, Patel, and others on the ECR presenter Phat Joe's reference to his "having a Downs Syndrome moment" on-air (complaint 1) – in this regard some of the complainants referred to clause 15 of the BCCSA Code;
 - 2.2.2. Mr Janus Horn and Ms Ramjas on the ECR presenter Phat Joe's use of the word "retard" on-air (complaint 2) – in this regard neither of the complainants referred to a specific clause of the BCCSA Code; and
 - 2.2.3. Mr Janus Horn on the ECR presenter Phat Joe's use of the word "kaffir" ("the K-word") on-air (complaint 3) – in this regard the complainant did not refer to a specific clause of the BCCSA Code.
- 2.3. On behalf of East Coast Radio we set out below our client's written responses to these three complaints, all of which are related.

3. THE FACTUAL BACKGROUND

- 3.1. On Wednesday 15 February 2017 [Client to confirm] during his afternoon drive time show, ECR Presenter Phat Joe was having trouble remembering the title of a particular segment of his show, namely, the Afternoon Tea with Zee Hour, [Client to confirm]. He flippantly described himself as being “Down Syndromish”, after his co-presenter commented that he was lucky to have remembered the title.**
- 3.2. The BCCSA received complaints in regard to the comment from Ms Hannah Swart, Ms Ramjas, Mr Janus Horn and others identified as Sheasby, Swart, Jo-Ann Horn, Passmoor, and Patel.**
- 3.3. On Friday 17 February 2017 , ECR responded by explaining that Phat Joe was engaging in self-denigration by using what he thought was a colloquial term akin to having a so-called “a senior moment” and did not intentionally set out to hurt or offend anyone. Nevertheless, the station realized that serious offence has been taken by numerous listeners. The station apologised for the offence taken and also arranged for an interview with the General Manager of the KZN Down Syndrome Association to take place during Phat Joe’s next show which was to take place on Monday 20 February “as a good faith attempt to sensitise the presenter and our listeners to people living with Downs Syndrome”.**
- 3.4. In the lead up to the interview and apology, ECR management was clear with the presenter as to why an apology was necessary and discussed the wording to be used to ensure that the station’s position on this would be made clear to the public.**
- 3.5. Unfortunately, the segment of the show containing the apology and the interview which took place on Monday 20 February, 2017, was not made in a manner that accorded with the positions of ECR’s station management. In this regard:**
 - 3.5.1. ECR was not satisfied with the apology made by Phat Joe in respect of the Downs Syndrome remark and entirely understands why so many of the complainants in complaint 1 also felt that the apology was not sufficient;**
 - 3.5.2. complaint 2 arose out of the apology segment when Phat Joe compounded the offence given in complaint 1 by using the derogatory term “retard” on air, albeit in the form of a question as to whether or not terms of speech are necessarily offensive and as part of a discussion on language, context etc;**
 - 3.5.3. complaint 3 also arose out of the apology segment when Phat Joe compounded the offence given in complaints 1 and 2 by using the derogatory “K-word” on air, albeit as part of a discussion as to whether or not terms of speech are necessarily offensive and in which he said that he personally did not have an issue with people using the term.**

4. THE MERITS OF THE COMPLAINTS

- 4.1. Complaint 1:**

- 4.1.1. Phat Joe's use of the term "Downs Syndromish" to describe himself was clearly offensive to many listeners.
- 4.1.2. That ECR recognised this was clearly evidenced in its apology for the offence caused and its arrangement of an interview with the General Manager of the KZN Down Syndrome Association "as a good faith attempt to sensitise the presenter and our listeners to people living with Downs Syndrome".
- 4.1.3. However, the BCCSA has jurisdiction only to enforce the provisions of the BCCSA Code of Conduct and ECR respectfully submits that:
 - 4.1.3.1. clause 15(3) of the BCCSA Code which provides that in the protection of privacy, dignity and reputation, "special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled", is, like clause 15(2) before it, a qualifying or clarifying clause related to clause 15(1) which provides that "[b]roadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and protection of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest" (our emphasis);
 - 4.1.3.2. outside of the hate speech provisions in the BCCSA Code, the Code contains no general provision to protect the dignity of groups of persons *per se*. The provisions of clause 15 pertain to individuals, that is, actual individual persons, not to groups of people based on an identifiable characteristic. This is clear from the BCCSA judgment in the matter of *J v Heart 104.9 FM*².
- 4.1.4. As complaint 1 did not relate to an actual individual person (aside from Phat Joe himself), the complainants cannot rely on the provisions of clause 15, and in particular, clause 15.3 of the BCCSA Code.
- 4.1.5. Consequently, ECR is of the respectful view that the broadcast in question did not violate the provisions of clause 15 of the BCCSA Code.
- 4.2. Complaint 2:
 - 4.2.1. Phat Joe's use of the term "retard" during the apology segment of the broadcast was clearly offensive to the two listeners who were the complainants in complaint 2 and to ECR itself. However, we respectfully submit that Phat Joe's use of the term, while not in line with the values of ECR and therefore unacceptable to it, none-the-less did not violate the provisions of the current BCCSA Code of Conduct. In this regard, the BCCSA has jurisdiction only to enforce the provisions of the BCCSA Code of Conduct and ECR respectfully submits that:
 - 4.2.1.1. clause 15(3) of the BCCSA Code which provides that in the protection of privacy, dignity and reputation, "special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled", is, like clause 15(2) before it, a qualifying or clarifying clause

² Case No. 49/2012. Available at: <http://bccsa.co.za/wp-content/uploads/2015/12/case-no-49-2012.pdf>.

related to clause 15(1) which provides that “[b]roadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest” (our emphasis); and

- 4.2.1.2. outside of the hate speech provisions in the BCCSA Code, the Code contains no general provision to protect the dignity of groups of persons *per se*. The provisions of clause 15 pertain to individuals, that is, actual individual persons, not to groups of people based on an identifiable characteristic. This is clear from the BCCSA judgment in the matter of *J v Heart 104.9 FM*³.
- 4.2.2. As complaint 2 did not relate to an actual individual person, the complainants cannot rely on the provisions of clause 15, and in particular, clause 15.3 of the BCCSA Code.
- 4.2.3. Consequently, ECR is of the respectful view that the broadcast in question did not violate the provisions of clause 15 of the BCCSA Code.
- 4.3. Complaint 3:
- 4.3.1. The casual use of the K-word by Phat Joe to demonstrate his distaste for limiting free speech was unacceptable to ECR. This is particularly so in the light of the recent Constitutional Court judgment of *SARS v CCMA and Others*⁴ in which the Chief Justice cogently sets out the egregious nature of this racial slur.
- 4.3.2. However, it is important to note that the neither the Constitutional Court nor the BCCSA has held that in the use of the K-word will always constitute hate speech or otherwise be unacceptable. Indeed the BCCSA has upheld the broadcast of the K-word⁵ as part of a discussion on the historical roots of the term. In the particular recent case in question, the Adjudicator found that for hate speech to be present there had to be advocacy of hatred constituting “incitement to acts of harm”⁶.
- 4.3.3. We are of the view that Phat Joe’s use of the “K-word” while not in line with the values of ECR and therefore unacceptable to it, none-the-less did not violate the provisions of clause 4(2) of the current BCCSA Code of Conduct as, clearly, Phat Joe was neither advocating hatred nor inciting harm. Both of which elements are required for a finding of the violation of clause 4(2) of the BCCSA Code.
- 4.3.4. In the circumstances, while the use of the term might well have been offensive to the complainant in complaint 3 and also to the station itself, it did not meet the legal elements in the definition of hate speech as set out in clause 4(2) of the BCCSA Code and therefore did not violate the BCCSA Code.

³ Case No. 49/2012. Available at: <http://bccsa.co.za/wp-content/uploads/2015/12/case-no-49-2012.pdf>.

⁴ CCT Case: 19/16 available at <http://www.saflii.org/za/cases/ZACC/2016/38.pdf>.

⁵ SAMNET vs SAFM BCCSA Case No. 30/A/2012 at paragraph [7]. Available at: <http://bccsa.co.za/wp-content/uploads/2016/01/Adj-No-30-A-2012.pdf>

⁶ Ibid at paragraph [8].

5. RESPONSIVE ACTIONS TAKEN BY ECR

- 5.1. As the BCCSA is aware from previous complaints regarding Phat Joe, ECR is in the process of determining where the appropriate lines are to be drawn between “edgy” radio that causes controversy and builds audiences, particularly younger ones, as a result; and unacceptable radio that continuously violates the BCCSA Code of Conduct for broadcasters that ECR supports and has undertaken to uphold, and that undermines the values of human rights and basic respect that the station holds as foundational to its service.
- 5.2. As the BCCSA is also aware, ECR was alarmed at the statements made by its presenter, Phat Joe, during the apology segment broadcast on 20 February 2017, which were out of step with the station’s own values, and in order to protect the public interest and its own reputation as a serious broadcaster, ECR decided to take Phat Joe off air with immediate effect and he remained off air for four days from 21 – 24 February, returning only on Monday 27 February 2017 whereupon Phat Joe made a fulsome on-air apology, an audio version thereof has been sent together with this submission.
- 5.3. ECR also confirms that on 28 February 2017, it held a training session in terms of which all presenters and station producers have been provided with copies of, *inter alia*, the BCCSA Code and Constitution (including the Procedures Annexure) and received training course on these issues.

6. CONCLUSION

- 6.1. In conclusion, ECR agrees with the complainants that all three of the incidents complained of were offensive. However, the BCCSA Code does not outlaw “offensive speech”. It outlaws, *inter alia*: hate speech – clause 4(2); and it requires “exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest” and that, in this regard, “special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled” (our emphasis).
 - 6.2. We reiterate, on behalf of ECR that none of the complaints amounted to hate speech or to the station not protecting the privacy, dignity or reputation of individuals.
 - 6.3. ECR has demonstrated its good faith as a responsible broadcaster by taking Phat Joe off-air for four days and for ensuring that he made an appropriate apology and by providing training on the requirements of the BCCSA Code to all presentations and programme managers.
7. We trust that you find the above to be in order. Please do not hesitate to contact us should you have any queries or require any further information.”

EVALUATION

- [8] I have listened to the original discussion and bantering between the presenter and his co-presenter. They were first discussing the Grammy awards, then Phat Joe said: “*This is the afternoon ‘T with V’ hour*”, on which the co-presenter remarked: “*Congratulations*

for getting that one correct!” Then he replied: *“I had to think about that, I’m a little Down Syndromish”*. After this, the discussion turned to the Weather Service’s forecasts about the tropical cyclone, *Dineo*.

- [9] Before the merits of the complaints are considered, it needs to be pointed out that none of them came from people who suffer from Down Syndrome themselves. Most of the complaints are from parents of children who have Down Syndrome and one is from the organisation *Down Syndrome South Africa*. In previous cases, BCCSA tribunals found that complaints involving the dignity of a person other than the complainant are difficult to judge since it is unknown what the person's reaction might have been or whether the person is even aware of the broadcast. A Code of Conduct cannot provide for every possible case or situation in future, and therefore legislation is framed in general terms in order to cover most possible scenarios. Although the children concerned have not lodged complaints themselves, complaints were lodged on their behalf by their parents and by *Down Syndrome South Africa*. Children are not in the position to complain for themselves, as one of the complainants states clearly: *We have to stand up for those who might not be able to speak for themselves*. Parents are responsible for the well-being of their children. Minors do not have contractual capacity, and therefore their parents or guardians, by law, are authorised to act on their behalf. There is no doubt that the complaints so filed by interested parties are valid in law. Clearly the parents’ own dignity is also involved indirectly. This is apparent from statements, such as: *Parents have fought a long and hard battle for the constitutional rights of their children; fought hard against discrimination and derogatory terminology being made against their children; it’s derogatory and demeaning*. However, in this adjudication the focus will be on the dignity of the children. Furthermore, parents complained on behalf of individual children, therefore the respondent’s argument regarding the protection of individuals (and not groups) falls away.

- [10] The protection of children is of paramount importance to the BCCSA. South Africa’s Bill of Rights (section 28(1)(d) of the Constitution) states that every child has the right to be protected against degradation. This protection is placed in the same subsection as

protection against maltreatment, neglect and abuse. Section 10 of the Constitution also includes the dignity of children.

- [11] In a similar case (BCCSA Case Nr 05/2012), Van Rooyen elaborated as follows on the international importance of the protection of children:

(T)he Childrens Act 2005 contains numerous protective measures for children. The United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance. The need to extend particular care to a child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child, in the African Charter on the Rights and Welfare of the Child, and is recognised in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children. (footnotes omitted)

- [12] As with all complaints, dignity complaints are always considered in accordance with the context in which the material was used. In this case, the first complaints related to the nature of the bantering regarding the name of a segment of the show and Phat Joe remembering it correctly. The remark referring to Down Syndrome was an off-the-cuff, supposedly jocular remark about his own ability to remember. It is well-known that the afternoon drive show focuses on presenter-driven entertainment and the remark in question was typical of the presenter's personality, style and way of speaking. During the past year, the BCCSA assessed numerous complaints against ECR and the on-air behaviour of this specific presenter, the outcomes of which ranged from warnings to reprimands to fines⁷. In all these cases, the radio station apologised to the complainants and promised that it will not happen again. Often radio stations justify offending remarks by highlighting the goal of talk shows, namely to provoke listener response. In this case listener response was definitely provoked - in the form of serious critique against a specific remark of the presenter.

- [13] In considering dignity complaints, the current contemporary mores of society, and more specifically, the mores of the target audience of a particular programme are taken into consideration. ECR's core audience comprises 25 to 49-year old well-informed,

⁷ Boshoff vs East Coast Radio, Case No: 38/A /2016; Freese vs East Coast Radio, Case No. 39/A /2016; Steyn vs East Coast Radio, Case No: 03/2017.

metropolitan adults. This is precisely the group of people who could have children who have Down Syndrome and they would acutely be aware of the seriousness of Down Syndrome. Although it was a single reference which was not mentioned again and was probably not specifically intended to hurt or offend a section of the community, the right to freedom of expression should be balanced against the right to dignity and the right not to be offended and emotionally hurt by broadcasts. Clearly, the complainants were deeply offended and emotionally hurt by the presenter's remark. One complainant states: ***It broke my heart to hear that this is what a well-known radio personality puts out there about my child.***

- [14] On the one hand the Constitution guarantees freedom of expression to broadcasters and this freedom includes the right to offend within **reasonable** limits. On the other hand, audiences have the right not to be offended or hurt by broadcasts and remarks such as this one, which reinforce incorrect and negative stereotypes and invade the fundamental rights of people. In *Khumalo and Others v Holomisa*⁸, O'Regan J wrote as follows:

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 in our society.

In the same judgment O'Regan J further states:

(A)lthough freedom of expression is fundamental to our democratic society, it is not a paramount value.

In my opinion, off-the-cuff remarks such as the one in question, have no place on the airwaves.

- [15] In their second response ECR declares that they have made a commitment that the presenter himself would apologise for using the term. However, in their first response, they apologised to the complainants (not the presenter), but at the same time the

⁸ 2002 (5) SA 401 (CC).

impression was created that they do not believe that there was a contravention of the Code.

- [16] I have also listened to the first apology by the presenter. Instead of alleviating the situation, his subsequent remarks, including the words *kaffir* and *retard* only aggravated the first contravention. He not only referred to the k-word, but pronounced it fully, in saying that he has no problem in using it on air. From the ensuing discussion with his guest regarding the use of such words, clearly, he still did not understand the situation. This creates serious doubt about the sincerity of his second apology.
- [17] Regarding the complaints concerning the word *kaffir*, I agree with the sentiments of Dr Gabeda Baderoon, (as quoted by the respondent): “(the word) *is offensive in all senses and combinations to the extent of being unspeakable today, its use now constitutes a hate crime in our country and is unpardonably painful and violent*”. However, again, the context must be taken into consideration. The presenter said that he has no problem using the word on air, but when he does, it should be kept in mind that it is coming from a Black person and not from a White person calling a Black person by that name.
- [18] Regarding both the words *kaffir* and *retard*, the context of the discussion during which they were mentioned, saves them from being classified as hate speech, since there was no advocating of hatred or incitement to cause harm. The complaints regarding these two words are thus not upheld. The steps taken by ECR to remedy the situation are noted, as well as the internal measures taken by the broadcaster, especially the fact that Phat Joe was temporarily taken off the air. Apologies are always problematic, since very often the people who hear the apology did not hear the original material. I noticed that in this case, the presenter only apologised for overstepping the boundaries, without mentioning what exactly he is apologising for. In any event, Clause 15 clearly states that the dignity of children and that of the physical and mentally disabled should be respected. Down Syndrome can be classified as a disability and should not be used as a colloquialism or for jokes. This ‘jocular’ remark presented persons who have Down Syndrome as mere objects of humour and ridicule.

I came to the conclusion that the Down Syndrome remark was exceptionally and unreasonably insensitive and degrading to the physical and mentally disabled. The fact remains that the words were uttered and thousands of listeners must have heard the broadcast. Therefore, the original complaints are upheld. The complainants and broadcaster were given an opportunity to submit arguments to the Registrar in regard to sanction.

[19] **Submissions regarding sanction from complainants included the following -**

- a reprimand
- a summary of the findings
- ECR to support a Down Syndrome campaign to raise funds and create more awareness
- move Phat Joe to a later time slot
- dismiss Phat Joe
- a fine of R35 000
- maximum fine since ECR has not taken this complaint or any previous complaints seriously
- maximum fine and a written apology from Phat Joe, as well as ECR with no justifications

[20] **The broadcaster's submission included the following:**

“As the BCCSA is aware, “on-air talent”, that is, presenters such as Phat Joe, are not formally employed by a radio station but act as independent contractors. While ECR is obviously responsible for all material broadcast on air, it is obviously not able to entirely control what its contractors do or say on air. This is clear from the factual matrix giving rise to a number of the complaints in this matter when, as is common cause, the apology which ECR demanded Phat Joe give on air, exacerbated the number of complaints received and aggravated the initial complainants.

It goes without saying that a sanction imposed by the BCCSA is imposed on a member broadcaster and is not a punishment imposed on the relevant presenter. The question to be considered therefore is what is the appropriate sanction to be imposed upon ECR in relation to the complaint in question as opposed to what is the appropriate sanction to be imposed upon Phat Joe?

In this regard, ECR respectfully submits that its own conduct in relation to the upheld violation is not such as to warrant the imposition of an overly-punitive sanction on it. As the BCCSA is aware:

ECR immediately understood that the on-air statement made by Phat Joe on 15 February 2017 was offensive and unacceptable and drafted an apology statement to be given by Phat Joe on 20 February:

ECR was horrified at the statements made by its presenter, Phat Joe, during the apology segment broadcast on 20 February 2017, which were out of step with the station's own values and with the draft apology developed by the station, and in order to protect the public interest and its own reputation as a serious broadcaster, ECR decided to take Phat Joe off air with immediate effect and he remained off air for four days from 21 – 24 February;

ECR insisted that, upon Phat Joe's return on Monday 27 February 2017, the presenter make a fulsome on-air apology, again scripted by the station; and

On 28 February 2017, ECR held an in-depth training session in terms of which all presenters and station producers have been provided with copies of, *inter alia*, the BCCSA Code and Constitution (including the Procedures Annexure) as well as ICASA's Code on People with Disabilities and received training on these issues.

In the circumstances, while ECR obviously accepts and assumes responsibility for the statements made by its on-air presenter Phat Joe that gave rise to the violation of the Code, it is of the view that it was not, as a station, cavalier in regard to the complaint(s).

The actions that ECR took as set out in paragraph 0 above are indicative of a station that:

- was aware of the offence caused;
- took immediate steps to try to rectify the situation; and
- when faced with a presenter unable to comply with the station's requirements in relation to the apology it insisted upon, immediately took the presenter off-air.

Further, the station:

- allowed Phat Joe back on air only after obtaining detailed undertakings about how an appropriate apology would be broadcast (which was adhered to); and
- ensured that all its on-air talent and its programme producers received in-depth training on the BCCSA Code and on ICASA's Code on People with Disabilities, specifically seeking to educate its staff and independent-contractors on, *inter alia*, disability issues.

ECR is aware that it has already been fined for violating the Code this year. Further, ECR is also aware that a second Code violation in a matter of months would ordinarily result in a larger fine being imposed. However, ECR is of the view that its responsive conduct in relation to the complaints and to the actions of its presenter demonstrates its good faith as a broadcaster that is at all times sensitive and alert to the needs of all its listeners.

In the circumstances, ECR is of the respectful view that that the appropriate sanction(s) in respect of its conduct would be:

- a reprimand in terms of clause 14.2 of the BCCSA Constitution; and/or
- a direction that a summary of the findings of the Adjudicator be broadcast in a manner to be determined by the Adjudicator."

[21] In so far as the submissions regarding sanction are concerned, I believe that broadcasting a summary of the findings will only refresh the memories of the listeners and rekindle the offence given. For ECR to support a Down Syndrome campaign or to raise funds and create more awareness is not legally relevant. It is also not within the BCCSA's jurisdiction to order dismissal of the presenter or to move him to a later time slot. I have taken into consideration the responsive steps the broadcaster took and their efforts to rectify the situation, but ultimately, they remain responsible for what goes out on air. In my opinion the only relevant mitigating aspect in such a matter might have been sincere remorse shown by the presenter. I am not convinced that this transpired from his apologies. The maximum prescribed fine is R80 000. In light of previous contraventions by the same presenter, I believe that it would be fair to order that the radio station pay a fine of R30 000 to the BCCSA on or before 15 April 2017.

DR. LINDA VENTER
BCCSA COMMISSIONER