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CASE NO: 26/2017

Date of Hearing: 29 NOVEMBER 2017

JUDGMENT RELEASE DATE: 21 DECEMBER 2017

BESTER

APPELLANT

vs

JACARANDA 94.2 FM

RESPONDENT

**APPEAL TRIBUNAL: PROF HENNING VILJOEN (CHAIRPERSON)
MR RUFUS KHARIDZHA
ADV BOITUMELO TLHAKUNG**

FOR APPELLANT: MR BESTER IN PERSON

**FOR RESPONDENT: MR GAVIN MEIRING, PROGRAMME MANAGER,
JACARANDA 94.2 FM**

Appeal against a decision by a Commissioner that a broadcast was not in contravention of the Code – Appellant not filing grounds of appeal – in fairness to Appellant, Tribunal considering adjudication by Commissioner – Tribunal finding that Commissioner was correct in her finding that there was no contravention – appeal not upheld - Bester vs Jacaranda FM - Case Number: 26/2017

SUMMARY

This is an appeal against a decision by a Commissioner that a broadcast was not in contravention of the Code. The Appellant did not comply with the Procedure of the BCCSA by not filing grounds of appeal. He merely repeated his original grounds of complaint and added a new ground based on clause 15 of the Code. Adding another ground, not decided upon in the first instance, not allowed in the appeal process. In fairness to Appellant the Tribunal considered the adjudication by the Commissioner and stressed that every complaint should be judged in context. The jocular and light-hearted manner in which comments were made about cultural practices relating to

funerals of the different racial and ethnic groups placed this discussion outside the ambit of hate speech. The comments were also made on facts truly stated or fairly indicated and referred to. The Tribunal found that the Commissioner was correct in her finding that there was no contravention of the Code and the appeal was not upheld.

JUDGMENT

HP VILJOEN

[1] This is an appeal by the Complainant in this matter against an adjudication by Dr Linda Venter, one of the Commissioners of the BCCSA. In her adjudication, she found that the Broadcaster did not contravene the Code of Conduct for Free-to-Air broadcasting. The complaint and the Broadcaster's response are set out in the adjudication. To put this appeal in perspective, the finding by the Commissioner is repeated here:

[2] **The Adjudicator's finding was as follows:**

*As far as the material in question can be viewed as comment, it should be noted that presenters are permitted to have opinions and express them. The lighthearted remarks by the presenter were clearly comment, made on facts truly stated or fairly indicated and referred to. Although the BCCSA is well-aware of the sensitivities that exist in the area of race, after consideration of the facts before me, **I find that there was no infringement of the Code and the complaint is not upheld.***

[3] **The appeal against the finding of the Adjudicator and the Broadcaster's response are as follows:**

Appeal: "Herewith my objection to the Commissioners outcome with regards to my complaint of Jacaranda FM broadcast on 21 August 2017:

- 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.
- *Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.*
- *In the protection of privacy, dignity and reputation special weight must be afforded to South African cultural customs concerning the privacy and dignity of people who are bereaved and their respect for those who have passed away.*

Looking at the above extracts from the Code of Conduct, it is clear that Tumi Morake referred to one specific Race (group), being White People as not crying out of their Hearts when attending or grieving funerals and the passing of loved ones. That is undeniable, and was stated as is.

Tumi made these comments without, I refer to the Code of Conduct, True facts. Tumi failed to show dignity, respect and concern within her comments about the passing of loved ones within the referred Race group (White people as she stated). As a White person I am shocked that a person can be allowed to merely state left and right, that Whites do not cry out of their Hearts when bereaving loved ones that passed away. This is undisputable, Tumi Morake contravened numerous clauses within the BCCSA Code of Conduct.

By referring and directing her (Tumi) comment towards one specific Race group (White people), Tumi made sure to categorizing this Race group, and promoting hatred towards Whites, as she can make unfounded comments about these "Heartless Racial Group". This is unacceptable and far away from opinion and context discussions.

Furthermore, it should be noted the "Race" and "Culture practice" is not the same, what does race or colour have to do with funerals? Many humans of different race can practice the same culture practice, thus one can not refer to Race (or in this case to one specific Race [Whites]) as not crying out of their Hearts when practicing funerals or burials.

The conversation should have been in a cultural context, yet it was made clear by Tumi Morake, that she targeted a Racial group. Tumi Morake would not have appreciated the situation if a White person stated that Black people do not cry out of their Hearts, therefore Tumi was blatantly disrespecting dignity of White persons and with that promoting a sense of hatred to the "heartless whites".

I stand by my Complaint and implore the BCCSA and Commission to reconsider their outcome, as Tumi Morake has shown Racism towards a specific minority group. Your feedback is appreciated."

Jacaranda FM: "Our response remains the same on the matter and still feel that this appeal should be dismissed.

Despite complainant having a fair amount to say about what Tumi Morkae said and in this case even exaggerated saying "Heartless racial group" which was not said at all, one needs to consider that presenter Martin Bester (a white male) also referred to the funerals attended by white people as been quite tea parties. Here he was speaking from experience and again it was merely stated as opinion and comment.

Jacaranda FM still stands by the fact that we did not -

- Advocate hatred based on race
- Comment was an honest expression and was based on fact related to experience both presenters had encountered.

The dignity of the people of ethnic customs was displayed by Tumi Morake in an honest manner and was in no way insulting or been disrespectful to any ethic group. She was speaking from personal experience and so was co presenter Martin Bester."

EVALUATION

[5] In respect of an appeal against an adjudication, the Procedure of the BCCSA determines as follows:

2.5 *Within 4 days of receipt of the opinion, any one of the parties may appeal to the Tribunal by filing grounds of appeal against the decision of the Adjudicator with the Chairperson (or the Registrar, if appointed).*

The “opinion” referred to here is the adjudication by a Commissioner.

- [6] Under “grounds of appeal” we understand, and we think it is a common understanding, arguments by the Appellant with which he intends to convince the appeal body (in this case this Tribunal) that the adjudicator made a mistake or gave a wrong interpretation to the broadcast or to the applicable clause or clauses of the Code, or erred in some other way. Such arguments would then serve as “grounds of appeal” before us.
- [7] In his appeal document, the Appellant refers to his objections to the Commissioner’s outcome and then he quotes three clauses of the Code, namely clause 4(2) (emphasising the part dealing with hate speech), clause 12(2) (relating to comment and emphasising that comment must be made on facts truly stated or fairly indicated and referred to) and clause 15 (which deals with the privacy, dignity and reputation of people who are bereaved).
- [8] On an analysis of the “Appeal document”, it seems that the Appellant has basically repeated his complaint which he lodged with the BCCSA in the first instance. However, he has added another ground to his original complaint, namely that the privacy, dignity and reputation of Whites have been impaired. We cannot allow this ground because it was not part of his original complaint. In terms of administrative law and procedural law, an appellant is bound by his grounds on which the decision was made in the first instance. He cannot add new grounds to his appeal because they were not decided upon in the first instance and the appeal body can therefore not find whether the body of first instance erred or not in deciding on these grounds. For the edification of the Appellant, we interpret clause 15 to apply to a specific person who may lodge a complaint to the BCCSA to complain that his or her dignity has been impaired by a broadcast. As the Appellant obviously has no mandate from all the White people in South Africa to state that their dignity had been impaired, and many of them might just laugh off the antics of the presenters and not feel insulted, we think that clause 15 is in any case not applicable to this broadcast.

[9] Nowhere does the Appellant present any argument in which he questions the correctness of the Adjudicator's finding. When confronted with his lack of grounds of appeal, the Appellant pleaded that he was not a lawyer and that he did not understand our procedure. Although we have had lawyers occasionally representing complainants before us, we by no means expect of complainants, or appellants, to be lawyers or to be represented by lawyers. That would be contrary to the objects of the BCCSA. Even the most uneducated listeners or viewers are welcome to lodge complaints with the BCCSA, or appeal against adjudications by Commissioners. Returning to the plea of the Appellant, we refer to item 4.9 of our Procedure which reads:

An Appeal Tribunal shall not set aside or amend a decision of the first Tribunal unless it is clearly wrong.

Although this refers to a decision of the first Tribunal, it equally applies to a decision of an adjudicator. But the principle is a general one, applying also to our courts: in an appeal, one has to convince the appeal body that the decision maker in the first instance was wrong. One need not be a lawyer to understand this.

[10] In fairness to the Appellant we will deal with the adjudication and decide whether the Commissioner was wrong or not in her decision that the broadcast was not in contravention of the Code of Conduct. The Commissioner starts off, in paragraph [5] of her adjudication, to refer to the jocular manner in which the discussion of cultural practices of the different racial groups took place. We agree with her that the impression was created that the Black woman was mocking her own group's cultural practices as far as funerals were concerned. We also agree that there was no discernible ill will towards Whites to be sensed in the discussion.

[11] In paragraphs [6] and [7] she discusses in detail the requirements for a finding of a contravention of the Code as far as hate speech is concerned. We agree that there was no evidence of the advocacy of hatred based on race or ethnicity, plus the incitement to cause harm. Both elements have to be present before a contravention could be found. All complaints against broadcasts have to be judged in context. The light-

hearted manner in which this broadcast took place, disqualifies it from the definition of advocacy of hatred.

[12] Clause 12 of the Code allows broadcasters to broadcast comment on and criticism of any actions or events of public importance. The only requirement is that such comment must be an honest expression of opinion and must clearly be comment made on facts truly stated or fairly indicated and referred to. We agree with the Commissioner, as stated in paragraph [8] of the adjudication, that this was indeed the case in this broadcast and there was thus no contravention of the Code.

In the result we find that Commissioner Dr Venter was correct in her finding that the broadcast was not in contravention of the Code and the appeal is therefore not upheld.



**PROF HP VILJOEN
CHAIRPERSON**

Commissioners Kharidzha and Thlakung concurred in the above judgment of the Chairperson.