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CASE NUMBER: 18/2013

DATE OF HEARING: 18 JUNE 2013
JUDGMENT RELEASE DATE: 03 JULY 2013

ODENDAAL & DE JONGH

COMPLAINANTS

vs

JACARANDA 94.2 FM

RESPONDENT

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
 DR LYNDA GILFILLAN
 MR ALAN MELVILLE
 PROF SUNETTE LÖTTER

Complainant: The Complainants were invited but could not attend.

For the Respondent: Mr Nick Grubb, Managing Director accompanied by Mr Brendon Lombard, Producer.

Joke involving “midgets” – not amounting to the promotion of unlawful conduct or violence; impairment of dignity not decided upon since complainants do not have locus standi to complain on behalf of the persons involved – term “midget” however not in conformity with standards of equality and non-discrimination: Odendaal and De Jongh vs Jacaranda 94.2 FM, Case no: 18/2013(BCCSA).

SUMMARY

Complaints were received regarding a joke concerning a “midget” being bathed in a wash basin; these remarks were made by a presenter during a morning show on Jacaranda 94.2.

The Tribunal held:

1. that the joke did not amount to the promotion of unlawful conduct since it did not imply that the the bathing would take place without the permission of the person involved or that the person would be a minor; and
2. that, since no complaint was received from a person falling within that category of persons, the question of impairment of dignity could not be considered without first establishing how such a person might respond to the joke.
3. that, generally, within a Constitutional democracy which guarantees equality and non-discrimination, the term “midget” should be avoided by broadcasters and, for that matter, anyone else.

JUDGMENT

JCW VAN ROOYEN SC

[1] Complaints were received regarding a joke relating to the bathing of a “midget” in a washbasin, that was made by a presenter during a morning show on Jacaranda 94.2. I referred the matter to a Tribunal

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

Odendaal: “I am deeply shocked by the comment made on the radio by Rian. He made a rude comment with regards to "washing a midget in a basin". He is vulgar and insensitive. I am not sure where to direct the complaint to.

I am not sure of the exact time, it must have been between 7:00 and 8:00 this morning (2 May 2013). He said, I would die happy if I could bath a midget - Something to that extent. I am not certain if this was meant in a sexual nature but I am sure it was. One of his fellow commentators even said "this is a family show"

He was extremely insensitive and discriminatory, what an example for children? Most in a car on their way to school at this time, if their is children mocking dwarfism out their today he would be the reason.”

De Jongh: “I would like to report a comment made by Riaan on the breakfast show. "My life would be complete if I can wash a ‘midget’ in a basin.”

This is a very offensive comment and extremely insensitive. Riaan has no respect for other people and this is clear from the vulgar content of his show. As it is a family program this open encouragement of discrimination should not be allowed on public radio. The comment was made during the breakfast show between 7am and 8am. Unfortunately I cannot provide the exact time.

I do not want to enter into an argument, but felt that the open encouragement for discrimination does not comply with the Broadcasting Act and wanted to bring it to your attention.”

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

“Thank you for the opportunity to respond here.

We have reviewed the audio attached and as a station that has a desire to entertain its diverse listener base, we are sensitive to content which they may find offensive.

We believe this piece to be in questionable taste, when listened to by someone not familiar with the context of the show. Our success as a business ultimately depends on audiences continuing to listen to us, so we have no desire to make our audience uncomfortable with the content.

That said, we contend (and there is precedent in other cases heard before the BCCSA in respect to Rian van Heerden and other morning show anchors like Gareth Cliff) that the context of the personality and their long-running “themes” of humour are relevant in mitigation here – to the extent that we do not believe the piece to have transgressed the code, which states:

Clause 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.

Rian has many times over the years referred to “midgets” and has used these people in various ways to create content for his shows and events. He has done so with the full enthusiastic participation of the people in question, and in his regular interactions we believe there is enough evidence to demonstrate that Rian is not deliberately setting out to infringe their dignity. In fact, by including them in the show as regular characters, audiences have gotten to know their personalities (in particular “Lodie”), which takes him from a two-dimensional clichéd character to a more real and relatable participant. It could be argued that this positively builds understanding in the community.

It is not legally relevant perhaps, but still instructive to note that despite what may seem to have been a shocking statement, the number of complaints received has been minimal, because people who listen regularly know that this is a tongue-in-cheek and consistent theme for Rian, and through frequent use and associated context over time his reference to “midgets” has eroded any perception that it is done out of a lack of respect to the dignity of this group of people.

We would compare Rian’s reference to midgets to Gareth Cliff’s frequent reference to lesbians. In isolation one could see it as pejorative, but in context it is a thematic strand that occasionally may step on the bounds of good taste, but not on the dignity necessarily

of any particular group or individual, because it is too simplistic to be taken seriously and there are many associated examples elsewhere in the show to build confidence that Rian means no harm by his comments. Please contact us should you have any further questions in this regards.”

EVALUATION

[4] Clause 4 (1) of the Broadcasting Code provides as follows:

Broadcasting service licensees must not broadcast material which, judged within context, sanctions, promotes or glamorises violence or unlawful conduct based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability.

A “midget” is defined as an “extremely small person” by the *Oxford English Dictionary*. A midget is, accordingly, not a person who suffers from a physical disability as such, although this might be considered to be the case in some instances.¹ In so far as the term is used with regard to people who are of an unusually short stature, the term, as such, is pejorative, as indicated by Wikipedia and the Little People of America, who in 2009, complained to the Federal Communications Commission that the reference was “just as offensive as a racial slur”. Thus, even if the act of bathing a midget – without the consent of the midget, that is – amounts to unlawful conduct, the joke complained about is not covered by the above clause since there is no indication that it was intended that the midget would be bathed without his or her consent or that the midget in the

¹ *Wikipedia* provides the following background to the word: “*Midget* (from *midge*, a sand fly) is a term that is widely considered pejorative for a person of unusually short stature, often one with the medical condition dwarfism, particularly proportionate dwarfism. When applied as an adjective, it can also refer to anything of much smaller than normal size, as a synonym for “miniature,” or to sports leagues, such as hockey, for young players. *Merriam-Webster* dictionary states that the first use of the term “midget” was in 1816. The term “midget” came into prominence in the mid-19th century after Harriet Beecher Stowe used it in her novels *Sunny Memories of Foreign Lands* and *Old Town Folks* where she described children and an extremely short man, respectively. P T Barnum indirectly helped popularize the term “midget” when he began featuring General Tom Thumb in his circus. “Midget” became linked to referencing short people put on public display for curiosity and sport. Such performances continued to be widespread through the mid part of the twentieth century, with Hermine Midgets brought from their performances in Paris to appear at the 1939 New York World’s Fair. When interviewed for a 1999 piece, performers engaged in ongoing “Midget Wrestling” events stated that they did not view the term “Midget Wrestling” as derogatory, but merely descriptive of their small size; however, others responding to the piece disagreed, with one stating that the performances perpetuated an outdated and demeaning image. (footnotes omitted)

joke would be a minor. A contravention of the above clause is, accordingly, not found.

[5] The only other clause of the Code that could be applicable is clause 15(1), which provides as follows:

- (1) Broadcasting 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.

[6] It is of interest to note that OFCOM, the UK Broadcasting Regulator, has held that *“Comments or jokes at the expense of people's disabilities are likely to cause widespread offence and be unacceptable. Such humour can be offensive to many, even where no malice is present. Unless editorially justified, patronising or outdated derogatory expressions relating to disability, for example cripple, spastic, midget should also be avoided and replaced with more neutral terms, for example disabled person, person with cerebral palsy, dwarf.”* Furthermore, It was conceded by a broadcaster in a hearing before the Australian Communications and Media Authority that calling the ex-President of Indonesia “that little midget woman” amounted to “an unnecessarily rude reference to height.” In 2009 the LPA (Little People of America) complained to the Federal Communications Authority about Joan Rivers having referred to “washing midgets and hanging them on a line to dry”. They argued, as pointed out above, that the reference was “just as offensive as a racial slur”. The FCC data base does not include a decision on the matter - probably since the words do not fall within their rule against “indecent, obscene or profane speech.”²

[7] The use of the term “midget” would not seem to be appropriate within a community which strives to move away from discrimination. Of course, where actors in a circus are described as “midgets”, this would probably be done with their consent. But, generally, broadcasters should not use the term. Making fun of persons who fall within this category has the effect of isolating such people from the broader community – an isolation which they do not deserve.

² Information supplied by top US Broadcast lawyer, Erwin Krasnow, Washington DC.

[8] However, since the complainants have not indicated that they fall within this category of persons, we have decided not to uphold the complaint. As has often been pointed out by this Tribunal, complaints based on impairment of dignity should emanate from the person or category of persons whose dignity was allegedly impaired. This is so because it is important in matters pertaining to dignity to have evidence as to how the persons involved may have reacted to the reference made to them. This is not a case where minors are directly involved and where it would be permissible for their parents or other care-givers to file a complaint. Accordingly, we do not know how persons who fall within this category would have reacted to the joke that was broadcast.

The complaints are accordingly not upheld, on the basis that the Complainants do not have *locus standi* to complain on behalf of the persons who fall within this category. In so far as they do have *locus standi* in terms of clause 4(1), we have already indicated that the clause was not contravened.

The Complaints are not upheld.



**PROF KOBUS VAN ROOYEN SC
CHAIRPERSON**

Commissioners Gilfillan, Melville and Lötter concurred with the above judgment.