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CASE NUMBER: 23/2014

DATE OF HEARING: 24 JULY 2014
JUDGMENT RELEASE DATE: 04 AUGUST 2014

REYNEKE, MOODLEY AND VAN HEERDEN

COMPLAINANTS

vs

94.7 HIGHVELD STEREO

RESPONDENT

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
 DR NANA MAKAULA-NTSEBEZA
 MS ZALI MBOMBO
 MR ALAN MELVILLE
 MS SHAMILA SINGH
 DR LINDA VENTER

FOR THE COMPLAINANT: The Complainants were unable to attend.

RESPONDENT: Ms Khahliso Mochaba: Group Human Capital and Regulatory Affairs Executive, Primedia Broadcasting.

Religion – words used in broadcast regarded as in severely questionable taste but not as amounting to hate speech based on religion. Reyneke and Others vs 94.7 Highveld Stereo, Case: 23/2014(BCCSA).

SUMMARY

Complaints were received arguing that profane language used by a radio anchor during a broadcast at 06:20 on 9 June 2014 was unacceptable and in conflict with the Broadcasting Code.

The Tribunal held that although the words used were in severely questionable taste, they did not amount to hate speech, which requires advocacy and incitement. Harm was present, but that was not sufficient.

The Complaints were, accordingly, not upheld.

JUDGMENT

JCW VAN ROOYEN

[1] Complaints were received from listeners who argued that a profane joke made by a radio anchor during a broadcast at 06:20 on 9 June 2014 was unacceptable and in conflict with the Broadcasting Code. I referred the matter to a Tribunal.

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

Reyneke: “I would like to hereby lodge an official complaint against Primedia – who owns Highveld Stereo 94.7 – for a distasteful, blasphemous joke made on air today by Darren (Wackhead) Simpson. The details are as follows:

...

In the offensive broadcast, Mr. Simpson makes a joke where he asks the question whether, when they say that when God closes a door he opens a window, if He really wasn't simply taking a poo! As many Christians, I am completely shocked and offended by the fact that a huge broadcaster such as Highveld could air this live with an audience of millions of people listening.

I implore you to take this matter as seriously as I do. I am a run-of-the-mill businessman who doesn't have time to complain over every little issue. However, the God that mr. Simpson is making jokes about is my Father in heaven and he is not only offending me, but thousands of Christians out there who cherish the same beliefs I do. In previous decisions made by the BCC, it was concluded that it was distasteful to make jokes about Allah in a newspaper comic strip. For the same token and by the same measure, I am asking on behalf of all Christians that the BCC investigate this matter urgently and make a just and fair finding. Please do not hesitate to contact me should you require any additional information.”

Moodley: “I found Darren Simpson to be very blasphemous and in very bad taste during his “Senseless Survey” this morning, 9 June 2014 between 06:05 and 06:20. I was extremely offended by the last question posed to the recipient of his prank in which he made crude and vulgar reference to the saying “When God closes a door, He opens a window.” He posed the question: “Do you think that when God closes a door and opens a window it is because He is taking a poo?”

Irrespective of what his religious convictions or beliefs are, he should be respectful of those viewers that actually do believe in God and hold Him in reverence. We should be able to listen to any station that we choose without being subjected to disgusting jokes of this nature which infringes on and is insulting to our religious beliefs. Darren Simpson should be made to apologise for his words this morning and refrain from mentioning or referring to God if he is unable to do so in an appropriately respectful manner.”

Jak van Heerden: "I am aggrieved by the above presenter's show Monday 9 June 2014. During the senseless survey which happens at +- 07h18 in the morning he asked a couple of silly questions which we all understand are stupid, but still listen to get a good giggle. This morning however he wanted to know from the respondent whether: (not the exact words but you can surely get it)."When they say God closes a door he opens a window - isn't he merely taking a poo?" This is in VERY POOR TASTE and blasphemy as far as I am concerned! The respondent immediately put the phone down - I personally changed the radio station immediately. It should be borne in mind that the majority of South Africans are Christians and should not be subjected to blasphemy like this. I request that this matter be reviewed and the presenter be taken off air. Please feel free to contact me if you require more information."

- [3] Ms Mochaba, on behalf of the Respondent, conceded that the words used were in particularly questionable taste and were probably offensive to many listeners on religious grounds. She argued, however, that the words did not amount to hate speech based on religion, since the words did not amount to the advocacy of hatred based on religion, inciting to harm, as required by the Broadcasting Code – the wording of which, in this respect, is based on section 16(2)(c) of the Constitution of the Republic of South Africa 1996.

EVALUATION

- [4] Clause 6 of the Broadcasting Code, inter alia provides as follows:

6. Children

- (1) Broadcasting service licensees must not broadcast material which is harmful or disturbing to children at times when a large number of children are likely to be part of the audience.
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- (10) Offensive language, including profanity and other religiously insensitive material, must not be broadcast in programmes specially designed for children.
- (11) No excessively or grossly offensive language should be used before the watershed period on television or at times when a large number of children is likely to be part of the audience on television or radio.

There was undoubtedly a large number of children in the listening audience at that time of the morning (06:20). However, sub-clause (10) is the only clause that prohibits profanity, and the programme complained about was not, as the Code requires, *specially* designed for children. The other sub-clauses indeed refer to offensive material, but since the word "profanity" is explicitly used in sub-clause 9(10), it must

be accepted that the notion of profanity is not included in the term “offensive” in sub clause (1).¹ The same argument would apply to sub-clause (11).

[5] Clause 4(2) of the Code provides as follows:

- (2) 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.

Although the words “when God closes a door He opens a window” are often based on Biblical texts in sermons or writings about the manner in which God leads his people, these actual words do not appear in the Bible. The addition of “poo” in the sense of defecation, of course, pokes fun at this pastoral approach by means of which believers are given hope by some pastors and other – often religiously inclined – people. The legal question is, however, whether the words broadcast are limited by way of section 16(2)(c) of the Constitution, which prohibits the advocacy of hatred based on religion, which constitutes incitement to cause harm.

The words complained of do not fall foul of clause 4(2). Although there is, most certainly, severe disrespect, there is no advocacy in the sense of exhortation or promotion. The element of “incitement” is also not present. “Harm” is most certainly present, but that is not sufficient to sustain a complaint of hate speech. All three elements must be present: “advocacy”, “incitement” as well as “harm”.²

[6] Before the 1994 Constitution came into effect, the words might possibly have amounted to blasphemy. The essence of blasphemy was, in that era, described as

¹ Based on the rule of interpretation “*inclusio unius est exclusio alterius*”. In applying this rule of interpretation I have approached the matter with the same caution as Rogers AJ in *Intercape Ferreira Mainliner (Pty) Ltd v Minister of Home Affairs* 2010 (5) SA 367 (WCC) where the learned Judge states the following: “It may be said that the absence of the words ‘including the State’ in s 39(2) indicate that the latter provision does not apply to the State. This would rest on the logic of the maxim *inclusio unius est exclusio alterius*, which has never been regarded as a particularly powerful aid to construction. In *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21(A) it was referred to somewhat dismissively as ‘that last refuge’, a maxim at all times to be applied ‘with great caution’ (at 37G – H); see also *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 16E - 17A). I do not regard the case for applying the maxim in the present matter to be strong.”; also compare Steyn *Uitleg van Wette* (1963) at 50.

² Compare *African National Congress v Harmse and Another: In Re Harmse v Vawda (Afriforum and Another Intervening)* 2011 (5) SA 460 (GSJ).

degrading God.³ However, the common law crime of blasphemy must be brought into conformity with section 16(2)(c) of the 1996 Constitution.⁴ This is so since section 39(2) of the Constitution requires that common law must be brought into conformity with the Constitution.⁵ The wording of section 16(2) (c) protects all religions, at the same level.⁶ The disrespect for religion, when published, must amount to the advocacy of hatred based on religion, which constitutes incitement to cause harm. Clause 4(2) of the Broadcasting Code is based on section 16(2)(c) of the Constitution.

[7] The first Complainant has, indirectly, referred to the interdict issued by the Johannesburg High Court against the publication of the Danish cartoons of the Prophet Mohammed. Although the Court referred to the dignity of the Prophet and the dignity of Muslims in coming to its conclusion, the Court ultimately based its decision

³ See Milton *South African Criminal Law and Procedure* (1996), Vol 2 page 293: "Blasphemy consists in unlawfully, intentionally and publicly acting contemptuously towards God." Also see Snyman *Criminal law* (2002) Second Edition 399. In the fourth edition the crime is no longer included; also see *R. v Webb*, 1934 A. D. 493 at 496, where the following definition of blasphemy was approved: "Now the definition of blasphemy in our law is to be found in Moorman and van der Linden. Blasphemy according to these writers consists either in the denial of the existence of God or in slandering God." It should be added that the "denial" part of the definition was not applied to the facts in *R v Webb*. It is unlikely that, even in those times, a denial would have constituted blasphemy in the light of the basic principle of freedom of religion, which was part of the common law – compare *Simonlanga v Masinga* 1976 (2) SA 732 (W) at 740 as per Van Wyk De Vries J. It is of interest to note that the story in *Webb* which was found to amount to blasphemy, was written by the well known writer, Herman Charles Bosman. Webb was the editor of the newspaper in which the story was published. I have no doubt that the said story would not, in these times, have been found to amount to hate speech or possibly even blasphemy.

⁴ Which, in this respect, repeats what the 1994 Constitution provided.

⁵ The Constitutional Court has stated the following in regard to this subsection in *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* 2007(6) SA 350(CC): 'A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common-law or customary law. *In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common-law or customary law.* The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common-law or customary law.' (emphasis added). In *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005(4) SA 1 (CC) Yacoob J said the following in regard to the scope within which s 39(2) is permitted to be applied:[54] Fourthly, the High Court misconceived the extent of its power to construe a legislative provision consistently with the Constitution. A Court's power to do so is not unqualified; a Court cannot give a meaning to the provision which it regards as consistent with the Constitution without more. The provision concerned must be reasonably capable of the preferred construction without undue strain to the language of the provision.⁵ The words 'liable to be surrendered', in their context, are incapable of bearing the meaning contended for." (emphasis added)

In the present matter it is, however, clear that all religions must be protected at the same level and that the common law protection by way of the crime of blasphemy should be adjusted in accordance with section 39(2) read with 16(2)(c) of the Constitution.

⁶ See Van Rooyen "Does the offence of blasphemy have a future under the South African Constitution?" 1995 *Reformed Theological Studies* 1127.

on the element of hatred, and thereby also gave effect to section 16(2)(c) of the Constitution of the Republic.⁷

[8] Our conclusion is, accordingly, that although the remark was in particularly questionable taste, it did not amount to a contravention of the Broadcasting Code. The propriety of this kind of remark is a matter which could, more appropriately, be discussed internally at the broadcaster, if it deems it necessary to do so.

The complaints are, accordingly, not upheld.



**JCW VAN ROOYEN SC
CHAIRPERSON**

Commissioner Makaula-Ntsebeza, Mbombo, Melville, Singh and Venter concurred with the judgment of the Chairperson.

⁷ See *Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Ltd and Others* WLD case 1127/06; also compare *De Waal v Talk Radio 702*, Case No: 32/2010,[2011] JOL 26610 (BCCSA) for a discussion of the said *Johncom* case by the BCCSA Tribunal.