



P.O.Box 412365 • Craighall • Tel (011) 325-5755 • Fax (011) 325-5736 • e-mail: bccsa@nabsa.co.za
No 2 Albury Park • Magalieszicht Ave • Dunkeld West • 2196 • www.bccsa.co.za

CASE NUMBER: 02/2005

DATE OF HEARING: 11 JANUARY 2005, Cape Town

ROY FISHER

COMPLAINANT

vs

567 CAPE TALK

RESPONDENT

**TRIBUNAL: Prof Kobus van Rooyen SC (Chairperson)
Rev Danie du Toit (Broadcasting Representative)
Dr Lynda Gilfillan (Co-Opted)**

Complainant: The Complainant in person

For the Respondent: Ms P Gwangwa – (Regulatory Affairs Manager) and Mr C Cullis (Operations Manager)

Controversial issues of public importance – Complainant accusing a presenter of not according him the opportunity to respond and engage a caller who accused him of being a racist. R Fisher vs 567 Cape Talk, Case No: 02/2005.

SUMMARY

On Thursday night, the 30th September 2004 the complainant called the presenter Mr Vernon Adams of 567 Cape Talk after a caller accused the complainant of being a racist during the apartheid years by stating that his job entitled preventing Blacks from boarding busses, classified and restricted for the use of whites only.

JUDGMENT

L Gilfillan

[1] The complaint concerns an exchange between Mr Roy Fisher, a regular caller to Capetalk, and another caller, “Ali from Mogale City”, on a late-night talk show hosted by presenter Mr Vernon Adams on 30/09/2004 between 23h00 and 24h00.

[2] **The complaint reads as follows:**

“On Thursday night, 30 September, I phoned in to the Straight Talk Show which was being hosted by Vernon Adams. Shortly afterwards a caller phoned in and said words to the effect that I had done nothing during the apartheid years to counter it.

I immediately phoned in and informed the call screener that I wished to engage the caller, which he allowed me to do. I then asked the caller how he knew what I had done during the apartheid years. As far as I am aware the caller does not know me at all. In any case, if he did know me, I’m sure he would not have made that statement. To my surprise Adams kept butting in to our conversation and when it appeared that he was not being impartial, I replaced my receiver. However, worse was to follow.

A few minutes later, another caller phone in and accused me of being a racist, simply because part of my duties as a Bus Inspector was not to allow people of colour to board Whites only busses. I again phoned in and informed the call screener that I wished to defend myself. He informed me that Adams was not prepared to take my call! I was very annoyed as you will appreciate that being branded a racist in South .Africa is both slanderous and libelous.

Yet worse was to follow! The next day I phoned Colin Cullis and related to him my experiences of the previous night and requested that he instruct Adams to broadcast an apology for not allowing me to defend myself. To my utter amazement, he agreed that I was a racist because I should have changed my job. Needless to say, if I do not receive a broadcast apology for Adam’s actions, I will have no alternative but to take this matter further. Also, needless to say, I would much prefer to have this matter settled amicably.”

[3] **The broadcaster’s response :**

“Cape Talk received a complaint from one Roy Fisher regarding the broadcast of 30 September 2004 between 23h00 and 24h00. The Show is a late night talkshow, and at the particular hour it was an open line, where callers were invited to talk about anything on their mind.

Mr Roy Fisher called at abut 23h25; he was defending the American invasion of Iraq and decrying the situation in Zimbabwe and Sudan. This resulted in a lively debate between Mr. Fisher and the presenter, Mr. Vernon Adams. A few other callers were put on air, who defended Saddam Hussein(the erstwhile ruler of Iraq), or in essence countering what Mr. Fisher had said.

A certain caller, named ‘Ali from Mogale City’ had quite strong sentiments that were contrary to those of Mr Fisher. At this stage, Mr Fisher called back and he was put on air and a debate, Mr Fischer made a remark that suggested that he played a part in the attainment of freedom in South

Africa and he angrily put the phone down. It was then that another caller was put on air who made certain unsavoury remarks about Mr Fisher, namely that he was racist and that he used to chase people away from the busses in his previous job as a bus inspector under the apartheid regime. At this point, the presenter, Mr Vernon Adams admonished the caller a number of times that he should not “make it personal” and appealed to the caller to have “respect for each other”.

When other callers started a discussion about Mr Fisher, either to justify or decry what he did, the presenter reprimanded them time and again and redirected the debate to world events. It should be noted that Mr Fischer is a regular caller to the station and he often expresses strong sentiments on a number of issues, and we believe that it is for that reason that a number of callers wanted to discuss him.

We submit that the presenter had handled the debate fairly; that he provided the requisite balance on the issue by defending Mr Fisher and by reprimanding people from discussing Mr Fisher in his personal capacity and what he did or stood for. There was therefore no need to put Mr Fisher’s call to air again as the presenter wanted to avoid a discussion about Mr Fisher and he redirected the debate to world events.

[2] **The complainants reply to the Respondent:**

“In reply to Cape Talk’s correspondence: It is factually incorrect in parts. In my letter to Cape Talk dated 4th October I wrote that a caller “Ali” had said that I had done nothing to counter apartheid. I at no time mentioned that I had played a part in attaining freedom in South Africa.

My gripe with Ali was that he did not know me at all and therefore he was not qualified to make a statement on the matter one way or the other. I replaced the phone because Adams was not being impartial. Also, how does one put the phone down ‘angrily’?

‘Unsavoury’ does not adequately describe the innuendo of being called a racist, especially in our country. The cursory admonishment of the caller by Adams barely addressed the seriousness of the slur. I worked with, among and for people of colour on the busses for 25years and to brand me a racist merely because part of my job was to enforce the law of the land and the rules of the company for which I worked is grossly intimidating and unjustified. Even people of colour were obliged to enforce the despicable apartheid laws. Were they all racists?

In conclusion, if Adams had allowed me to personally rebut the slur, it would have not been necessary to ‘reprimand callers time and again’. I thank you for your interest and efficiency in this matter and would like to address your tribunal at your convenience.”

[4] Mr Fisher’s complaint is that he was publicly “branded a racist” on air on the basis of the job he did as a bus conductor during the apartheid era, a job which necessitated the enforcement of apartheid laws. Mr Fisher goes on to complain that he was not given the right to reply. Furthermore, Mr Fisher regards the slur of being described as racist as “slanderous and libellous” and suggests that it is an especially serious one in the South African context.

[5] Capetalk claims that the programme presenter reprimanded callers regarding the casting of personal slurs on air; that the issue of racism was not the focus of the programme (it was, in fact, current global issues); and that the presenter therefore

deflected further discussion regarding Mr Fisher's personal views, thereby sparing him further insult. Further discussion on the latter would, according to Capetalk, have "opened a can of worms", implying that the debate regarding Mr Fisher's culpability – and that of other white people with similar histories - may have taken an ugly bent and got out of hand.

[6] **Section 36.2 of the ICASA Code of Conduct states that**

"A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance shall be given a right to reply to such criticism on the same programme. If this is impracticable however, opportunity for response to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned."

[7] What muddies the waters somewhat in Mr Fisher's case is that his views were not per se described as "racist", but rather inferences regarding his alleged racism were made on the basis of listeners' prior knowledge of Mr Fisher's occupation as a bus conductor during the apartheid era, which apparently led Ali and others to claim that he enforced racist legislation.

[8] At issue here is the right of Ali to express his view, i.e. that Mr Fisher is a racist because, as a municipal employee, Mr Fisher enforced apartheid legislation. According to Kriegler J in *S v Mamabolo* 2001 (3) SA 409 (CC) paragraph [37] ". . . freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15 to 19 of the Bill of Rights." In this regard, cognisance should be taken of the following judgments regarding freedom of expression:

[9] Our Constitutional Court has, in several judgments, accentuated the role of freedom of speech. In *S v Mamabolo* 2001 (3) SA 409 (CC) paragraph 37 Kriegler J stated in regard to the value of freedom of expression in our present society, in contrast to the Apartheid history of censorship and thought control:

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

In *South African National Defence Union v Minister of Defence and Another*

1999 (4) SA 469 (CC) paragraph [7] O’Regan J stated that

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

In *The Islamic Unity Convention v The Independent Broadcasting Authority and Others* (Case CCT 36/01) at paragraph 27 Langa DCJ convincingly contrasted the present state of freedom of expression and the past state of freedom of expression, as follows:

“Notwithstanding the fact that the right to freedom of expression and speech has always been recognized in the South African common law,¹ we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa’s present commitment to a society based on a ‘constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours’. As pointed out by Kriegler J in *Mamabolo* –

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

South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members . . .² As such it is protected in almost every international human rights instrument. In *Handyside v The United Kingdom*³ the European Court of Human Rights pointed out that this approach to the right to freedom of expression is –

1 See *Publications Control Board v William Heinemann, Ltd and Others* 1965 (4) SA 137 (A) at 160E–G; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 585B–E; *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (SCA) at 400H–J (also reported at [1996] 4 All SA 675 (A) – Ed); *S v Turrell and Others* 1973 (1) SA 248 (C) at 256G; *United Democratic Front and Another v Acting Chief Magistrate, Johannesburg* 1987 (1) SA 413 (W) at 416C–G.

2 Sieghart *The International Law of Human Rights* (1983) at 330. See also art 19 of the Universal Declaration of Human Rights; art IV of the American Declaration of the Rights and Duties of Man; art 19 of the International Covenant on Civil and Political Rights; art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art 13 of the American Convention on Human Rights; art 9 of the African Charter on Human and Peoples’ Rights.

3 (1976) 1 EHRR 737 at 754.

‘applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.’⁴

The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of “human dignity, the achievement of equality and the advancement of human rights and freedoms.” Thus, open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself.⁵ Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere.” (Emphasis in **bold**)

- [10] It is the nature of talk-shows debates that there are robust exchanges between participants. Mr Fisher, as a frequent caller, had seen fit to enter the public domain of radio debate; he had apparently also seen fit to disclose the nature of his previous occupation to a broad listening public, thereby inevitably opening himself to comment and criticism by others. It is acknowledged that the epithet “racist” is an especially harsh and insulting one in contemporary South Africa. As a former white employee of an apartheid structure, Mr Fisher would inevitably perhaps be perceived by previously disadvantaged groups as condoning racist policy. It is a reality that whites – as well as many blacks – were forced to adhere to and even implement apartheid policy during the course of their daily work and lives. In this sense, most South Africans who lived under the apartheid regime were in a similar predicament to that of Mr Fisher.
- [11] At the current moment, the term “racist” is ubiquitous in local discourse – an inevitability, given our history. It is, obviously, a hurtful term, a term of insult and abuse. Mr Fisher’s desire to defend himself is therefore understandable. However, since neither white racism in general, nor Mr Fisher’s alleged racism in particular, were the focus of the radio debate, the verbal skirmish between Ali and himself cannot be said to constitute an especially controversial issue in itself, nor can it be

4 See also *R v Zundel* (1992) 10 CRR (2d) 193 (SCC).

5 See the case of *United Communist Party of Turkey and Others v Turkey* (1998) 26 EHRR 121 paras 38-48 and the as yet unreported judgment of the European Court of Human Rights in *Refah Partisi and Others v Turkey* (App nos. 41340/98, 41342/98, 41343/98 and 41344/98). See also the judgments of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) cited in Currie *The Constitution of the Federal Republic of Germany* (The University of Chicago Press, Chicago 1994) at 213–215 and the minority judgment of Cory J in *R v Zundel* (above fn 25).

viewed as a matter of public importance (see par. 35 of the Code). Ultimately it was a matter of private importance which does not trigger either clause 35 or 36.

The complaint is dismissed.

L Gilfillan

The Chairperson and Commissioner Du Toit concurred