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CASE NUMBER: 04/2012

DATE OF HEARING: 23 FEBRUARY 2012

**A OBERHOLZER
F LIEBENBERG
J HENNING
H LABUSCHANGE
L LOUW**

**1ST COMPLAINANT
2ND COMPLAINANT
3RD COMPLAINANT
4TH COMPLAINANT
5TH COMPLAINANT**

vs

JACARANDA 94.2 FM

RESPONDENT

**TRIBUNAL: PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)
DR LYNDA GILFILLAN
MS GIUSEPPINA HARPER
ADV BOITUMELO MMUSINYANE**

Complainant: The Complainants were invited

For the Respondent: For the Respondent: Mr JD Crawford, Legal Representative accompanied by Mr Neil Johnson: Jacaranda Programme Manager and Mr Rian van Heerden, the Presenter.

Opinion expressed on death of student – permissible opinion, not amounting to pre-judging a possible offence, or defamation, or laying a false charge. Oberholzer and Four Others vs Jacaranda 94.2 FM, Case no: 04/2012(BCTSA).

SUMMARY

Complaints were received about a comment that was made by Rian van Heerden during the breakfast show. The comments concerned the death of a student after apparently having drowned in a swimming pool during a hostel event. Complainants argued, inter alia, that the presenter had accused senior students of murder and that his comment was premature.

The Tribunal found that the insert did not contain any direct criticism of the *senior* students or any reference to “murder” as alleged by two of the complainants. One could also not regard anything that was said as amounting to the presenter’s having made a false charge. Had the presenter accused the students as having committed a crime, that would have amounted to defamation. The comments of the presenter, however, did not go that far.

The Tribunal, in not upholding the complaints, stated as follows:

On the whole it is believed that the presenter acted within the ambit of freedom of expression, which is guaranteed to every citizen, and also that he did not exceed the stricter bounds set for a broadcaster, which has the privilege of addressing a large group of listeners on airwaves, that indeed belong to the public (*res publica*). He was not pre-judging the outcome of the inquiry, nor was he blaming anyone of criminal responsibility. He was expressing a view on a matter of public importance and he was entitled to express his surprise at the fact that the student had not been missed by the group. Whether his surprise was well-founded, is a matter upon which reasonable listeners might differ. But that is the effect of freedom of expression: one need not necessarily express opinions with which everyone agrees. If it is a poor opinion, the marketplace of opinions will take care of it.

JUDGMENT

JCW VAN ROOYEN SC

[1] Complaints were received about a comment which was made by Rian van Heerden during a breakfast show on the radio station Jacaranda 94.2. The comments concerned the death of a student after apparently drowning in a swimming pool during a hostel event in January 2012. I referred the matter to a hearing before a Tribunal of the Commission.

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

Oberholzer: "This is a formal complaint and request for disciplinary action or dismissal of Rian van Heerden as a journalistic figure. As South Africans we have a right to freedom of speech but it is individuals like Rian van Heerden who is jeopardizing this right. Freedom of speech is a right that should be practiced with integrity and truth. To make unfounded accusations on national radio and to use your journalistic profile as a public figure to promote wrongful statements is a gross misuse of rights. He is using his occupation to promote his biased opinions. By doing this he is undermining individuals and organisations' rights to present facts. South Africa can do better without public figures trying to win viewers through misconstrued information and plain hearsay gossip. Thank you for your ear and the opportunity to ask for fair broadcasting.

A recent incident was on the 23rd of January 2012 on the Jacaranda morning show. He accused the management of a boarding house "Ratau" situated at the North West University of being directly responsible for the drowning of a student during the Fruit Festival. This accusation was made before any official information was released on the incident. What about this poor child's family : they lost a child and now they might be tormented by the thought that they sent their child not to further his education but to die. This is only one occurrence out of many."

Liebenberg: "To whom it may concern, I would like to lodge a formal complaint against radio broadcaster Rian van Heerden. In a recent radio show (23 January, 2012) he accused students of the NWU Potchefstroom campus of murder. This is outright false accusation and thus makes him liable to prosecution. I would also like to point out an official petition page on facebook."

Henning:"Rian van Heerden/Ratau Lenone mens hostel - The accusation was made on or about 23 January 2012, between 6am and 7am. (06:20). I'm sad to complain about Rian van Heerden's breakfast show on Jacaranda. It so happens that he offended a great amount of people when he commented about the tragic death of a first year in Ratau Lebone men's hostel on the Potchefstroom campus of the NorthWest University. He blamed the hostel's House committee for the boy's death even though he did not know all the facts. The whole situation discriminated against the name of the hostel and hurt a lot of alumni of the hostel that needed to defend the honour of our house over the past days. I demand that he officially withdraw the comment and restore the good name of the hostel. Please also take notice of the following facebook page, at the time of this email the 'like's' were at the amount of 2 500. It shows that it is a matter of great concern that needs immediate attention."

Labuschagne: “Rian van Heerden has been the topic of much controversy these last couple of weeks and I feel that it's time to act against this man who misuses his right to freedom of speech to deliver negative and false comments about members of the public. Yesterday, he blamed the seniors of a PUK hostel for the death of a first year without any true knowledge of the situation. The police are still investigating. This can be considered as a false accusation and as far as my knowledge stretches, crimen injuria. A while ago, he made a statement that he wished his legs had been blown off so that he could make as much money as disabled athlete Osar Pistorius. I find this to be very offensive towards all disabled people in our community. These are but two occasions of many, in which he directly offended many people. I hope that you would pay attention to these events and thank you for your time”.

Louw: “Ek wil graag hierdeur onder die BCCSA se aandag bring die lasterlike dinge wat Rian van Heerden, radio omroeper van Jacaranda FM 94.2, tydens die Breakfast show op Maandag 23 Januarie kwytgeraak het. Die saak handel oor die 19jarige eerstejaar NWU PUK student wat tydens die Ontvangs en Bekendstellings program van die PUK tragies verdrink het. Rian het die NWU PUK asook die seniors van Ratau Lebone manskoshuis van die NWU PUK se goeie naam geskend deur ongegronde aantygings te maak. Sy aantygings was onder andere dat die seniors van Ratau Lebone vir die dood van die oorlede student verantwoordelik gehou moet word, en dat die aksie waartydens die student vermoedelik verdrink het, 'n ontgroenings aksie was. Die PUK se ontvangs en bekendstellingsprogram laat geen ontgroening toe nie en beskerm streng die menseregte van die studente. Hierdie aantygings is ook gemaak nadat 'n persverklaring van die PUK die media gevra het om die sensitiwiteit van die saak te respekteer. Die seniors van Ratau se naam is sleg gemaak op nasionale radio asook die PUK se naam en dit behoort nie geduld te word nie. Ons vra dat die saak asb in alle erns ondersoek sal word. Die tyd van die uitsending was tussen 6 en 7 die oggend. Baie dankie vir u vlugtige reaksie.”

[3] The Respondent commented as follows:

“At no stage in the piece did Rian accuse anyone of murder. The team commented on the fact that a student had drowned during a university house initiation and discussed how the other students did not notice that he was missing. We believe that most of the complainants actually never heard the piece but heard about it second or third hand. We do not believe we are in contravention of clause 12 of the BCCSA code.

12. Comment

- (1) Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance.
- (2) 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.
- (3) Where a person has stated that he or she is not available for comment or such a person could not reasonably be reached, it must be stated in the programme.”

[4] We listened to the broadcast, and the following emerged: Rian van Heerden (“the presenter”) asked his colleague whether she had heard about the death in the swimming pool at the Northwest University’s Potchefstroom campus. He described

the event as part of an initiation ceremony which followed after (or took place during) a watermelon feast. All 77 students of a hostel jumped into a pool. Afterwards, they did not realise that one of the students was missing. It was only two hours later that another group of students discovered the body of a student in the pool. The presenter conceded that the water was “milky” but repeatedly expressed astonishment that the other students – whom he described as not numbering that many students – had not realised that one of their fellow-students was missing.

- [5] The insert did not contain any direct criticism of the *senior* students or any reference to “murder”, as alleged by two of the complainants. One could also not regard anything that was said as amounting to the presenter’s having made a false charge. The laying of a false charge with the police does, of course, amount to an offence.¹ Had the presenter accused the students of having committed a crime, that would have amounted to defamation. The presenter’s comments did not, however, go that far.
- [6] The Complainants did not, in the main, point to errors that were made as to the facts. The core of the complaints was that the presenter was commenting prematurely. The inquiry should first have been finalised. Furthermore, they complained, the presenter expressed his surprise that the students (no reference was made to “seniors”) had not realised that one of the students was missing. There is also criticism by a complainant that since initiation (“ontgroening”) was not permitted at the University, the presenter’s reference to “initiation” was uncalled for.

EVALUATION

- [7] Fair comment is permissible for a presenter. The core of the comment was that the presenter was surprised that the missing student had not been found sooner or, at least, that someone should have taken responsibility for finding him. Of course,

¹ Cf Milton *South African Criminal Law and Procedure* Vol 2 1996 page120-1.

judged from the outside, a reasonable listener might ask whether the presenter was not expecting the impossible; this is the kind of thing that unfortunately happens in life. Probably the main criticism of the presenter is that he is opposed to the organising of events such as this one, which he describes as “One for all and all for one”, which obviously implies initiation or, at least, team building.

[8] On the whole, we believe that the presenter has acted within that freedom of expression which is guaranteed to every citizen, and that he has also not exceeded the stricter bounds set for a broadcaster, which has the privilege of addressing a large group of listeners on the airwaves – which indeed belong to the public (*res publica*).² He was not pre-judging the outcome of the inquiry, nor was he blaming anyone of criminal responsibility. He was expressing a view on a matter of public importance and he was entitled to express his surprise at the fact that the student had not been missed by the group. Whether his surprise was well-founded, is a matter upon which reasonable listeners might differ. But that is the effect of freedom of expression: one need not necessarily express opinions which are supported by everyone. If it is a poor opinion, the marketplace of opinions will take care of it.

The complaints are not upheld.



**PROF KOBUS VAN ROOYEN SC
CHAIRPERSON**

Commissioners Gilfillan, Mmusinyane and Harper concurred with the judgment of the Chairperson.

² See in regards to the seashore as *res publica*: *Consolidated Diamond Mines of SWA Ltd v Administrator*, SWA 1958 (4) SA 572 (A).