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CASE NUMBER: 05/2012

DATE OF HEARING: 23 FEBRUARY 2012

**NEW HOPE SCHOOL
PACSEN
NATIONAL YOUTH DEVELOPMENT TRUST
& OTHERS**

**1st COMPLAINANT
2ND COMPLAINANT
3RD COMPLAINANT**

vs

JACARANDA 94.2 FM

RESPONDENT

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

**For the Complainants: D Brits, Chairperson, New Hope School, J Hoff, PACSEN
National Chief Executive Officer, AS Meyer, Nation Youth Development.**

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

*Dignity – impaired by false remark concerning learners at New Hope School. PACSEN
& Several Others vs Jacaranda 94.2 FM ,Case no: 05/2012(BCTSA).*

SUMMARY

**A false observation concerning learners at New Hope School in Pretoria was made.
A presenter referred to a caller who had criticised him for playing a song from**

which obscene words had been bleeped out, as “brain dead”, and then added that he should book himself into the New Hope School. The New Hope School in Pretoria is a school that provides specialised education and caters to learners who are afflicted with cerebral palsy and experience severe specific learning disabilities. Complaints were received that the presenter’s remark had seriously impaired the dignity of the learners at the school by equating them with people who are “brain dead”. The Tribunal held that the impairment of the learners’ dignity was serious, and upheld the complaints.

Since the broadcaster has shown remorse, the maximum fine of R60 000 was not imposed. It was also taken into consideration that the presenter’s slur was indeed firstly directed at the caller who had complained about the song, and that there was no malice present when he included New Hope School in the slur. A fine of R30 000 was regarded as fair in the light of the remorse demonstrated.

JUDGMENT

JCW VAN ROOYEN SC

[1] Complaints were received with regard to a derogatory remark pertaining to the New Hope School and its learners, which a presenter on Jacaranda Radio 94.2 made during a morning programme on 7 January 2012. I referred the matter to a Tribunal for a hearing.

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

New Hope School: “Complaint against Radio Jacaranda 94.2: In terms of the BCCSA Code of Conduct: Comment made by Rian van Heerden on 7 February 2012

A derogatory comment was made by Rian van Heerden on Radio Jacaranda on 7 February 2012 at 07:10.

He referred to an individual as being “brain dead” and indicated that he should be booked into New Hope School.

Background Information

New Hope School is a school for specialised education, catering for learners with Cerebral palsy and severe Specific Learning Disabilities. It is an embarrassment for the communities serving the needs of learners with disabilities and the learners themselves to hear live radio comments about things the announcer clearly has no idea about. I hope that the BCCSA will look into this as the character and integrity of our people with disabilities is at stake. We need to protect them and not allow them to be verbally abused.”

PACSEN:¹ “APOLOGIES AND REDRESS OF DEROGATORY COMMENT - On behalf of PACSEN Executive Committee and our Parents of New Hope School. PACSEN is one of the largest lobby and advocacy groups in the country. The membership consists of parents that have children with Special Educational needs. These are children who are blind, deaf, physically disabled, cognitively disabled and who suffer from various diseases and or learning disabled. We have 97, 000 children that are in our Special Schools.

As a radio station that structures are to uplift a community and work with a community, and not to degrade and insult our children and the schools they attend. As the largest parents group in the country, we also represent the parents whose children attend New Hope School. Our children’s rights according to the Bill of Rights chapter 2 point 28 (2) are being violated, which could lead to a major violation of the Children Protection Law as well.

Riaan’s comments need to be investigated without delay. It would also be appreciated if your Radio Station give use a time to be interviewed and perhaps join us on a visit to New Hope School so that you can see what our disabled children are taught, so that they can take their rightful place in society.”

National Youth Development Trust: “I respectfully wish to register a formal complaint against the Jacaranda 94.2 Management Team, and specifically against Mr Rian van Heerden who is a senior staff member of The Complimentary Breakfast Programme.

Yesterday morning [7 February, 2012], during the Complimentary Breakfast Show Mr van Heerden made direct reference to New Hope School for children living with disability, calling the school a place for “*brainless*” people.

Instead of issuing a sincere apology this morning [08 February] Mr Van Heerden presented a half-hearted, unconvincing explanation, apparently his “first apology”.

My organization has been trying for years to design opportunities for children living with affected ability, including students from New Hope School. Two of the students at New Hope School – in fact - won a National Gold medal at the annual ESKOM Expo for Young Scientists, something that can be described as pioneering and benchmarking.

Calling children of schools, such as New Hope School, who live and learn at disadvantage, “brainless” is a serious insult to [the children] themselves. It also is an insult to parents for whom having and bringing up children with affected ability is a life-long commitment. It is an insult for the wonderful staff at those schools for whom working with such children is not only a ‘job’, but a way of life.

In the present time there is just no room for utterances like that, whether as a joke or not, degrading defenseless groups in the South African society that include a significant number of children from previously disadvantaged communities.

Children who live and learn with affected ability do not deserve to be the victims of Mr Van Heerden’s particular brand of humour, and we urge both your organizations to take Mr Van Heerden’s utterance seriously, to protect the children of New Hope School, and other similar schools, against future actions by irresponsible broadcasters.

The Jacaranda Management Team are just as guilty as Mr Van Heerden, as (i) they had been well aware of his controversial record in public broadcasting when appointing him in

¹ Parents for Children with Special Educational Needs. PACSEN, is a national organisation which acts for the benefit of more than 90,000 children who are in similar schools or centres.

this position, and (ii) have defended him publicly in January [2012] after a significant number of complaints have been received by them, within weeks after Mr Van Heerden started broadcasts on the Complimentary Breakfast Show.

Mr Van Heerden apparently prides himself in being controversial, so his utterances should be seen as meant to shock people: To allow such insulting behavior just to boost the number of Jacaranda listeners is unethical in every professional sense of the word and the Jacaranda Management Team should take responsibility for that.”

- [3] Although Mr van Heerden’s name is, as a matter of course, mentioned in these complaints, Mr van Heerden himself is not the respondent in this matter. The radio station is the respondent. It is held responsible for what is said by its presenters.
- [4] Radio Jacaranda did not submit a written response, but explained at the hearing of this matter that an apology had been broadcast, and that it had never been the intention to degrade the learners or their parents or their teachers. The observation had followed upon a complaint from a listener about a song that had been sung by a “child”, in which obscene words were bleeped out. The epithet “brain dead” was directed at the listener for not having understood that the song was only purported to have been sung by a child, whilst in reality it had been sung by an adult whose voice sounded like that of a child. It was part of a fun competition that had been organised during Mr van Heerden’s morning show, where a pot-pourri of public and social matters are discussed in typical talk-show fashion. The “brain dead” epithet was aimed at the caller who had complained about the song, and not at the school or its learners. It was uttered in a tone of disgust. It was furthermore argued that, unfortunately, further unintended words had slipped out, without the presenter having considered what he was saying. Mr Crawford, who appeared for Jacaranda, built his argument in favour of Jacaranda on this ground: there was no malicious intent, and what was said in regard to the learners and the school was never intended to degrade the school or its learners.
- [5] It cannot, however, be denied that the words were uttered and that thousands of listeners must have heard the broadcast.

- [6] Although the New Hope School had initially been established as a private school in 1950, its status altered when it operated under the auspices of the government in 1971. The New Hope School offers specialised education, catering to learners who are afflicted with cerebral palsy and severe specific learning disabilities. It has more than 300 learners. As appears from the introduction to this judgment, complaints were lodged not only by the school but also by two parents' associations. Whatever "brain dead" means as a scientific term or colloquialism, the learners at the school do not fall within that category. The scientific meaning of brain death is "irreversible coma; irreversible brain damage as manifested by absolute unresponsiveness to all stimuli, absence of all spontaneous muscle activity, and an isoelectric electroencephalogram for 30 minutes, all in the absence of hypothermia or intoxication by central nervous system depressants".²
- [7] The complaints emphasise the impairment of dignity suffered by the learners. Although the learners have not lodged complaints themselves, complaints were lodged on their behalf by the School, PACSEN, the National Youth Development Trust, and some parents, I have no doubt that the complaints so filed for the benefit of the learners by interested parties are valid in law. Both defamation and the impairment of dignity are prohibited by the Broadcasting Code.³ Although the reputation of the learners is also relevant in a matter such as the present one, the core of the complaints deals with the learners' dignity, which was impaired by the broadcast. It should be mentioned that since dignity and reputation are closely related rights, one act cannot lead to two contraventions. That would amount to what is known in our law as "splitting of charges".⁴ In so far as the *school* itself is concerned, the complaint only deals with the dignity of the learners. The school would, in any case, not have been permitted to file a complaint based on the impairment of its dignity, since the school falls within the category of a legal person that does not have feelings and accordingly cannot be said to have dignity that is protected in law. The school did not refer to the harming of its reputation,

² See *Wikipedia*.

³ Clause 15 of the Code.

⁴ *S v Grobler en 'n Ander* 1966 (1) SA 507 (A) at 523B; *S v Davids* 1998 (2) SA 313 (C) at 316B.)

which, indeed, is a right that the school enjoys. Accordingly, I will not deal with the school's reputation, and instead I shall limit the judgment to the dignity of the learners. I will also not deal with the dignity of parents and teachers. Their dignity was only indirectly referred to, and it would be unfair to also reach a decision on this aspect without its having been addressed fully within the parameters of this case.

CHILDREN

[8] The rights of children is central to South Africa's Bill of Rights where, in section 28, numerous protective duties are set out. Section 28(1)(d), inter alia, states that every child has the right to be protected against degradation. This protection is placed in the same subsection as protection against maltreatment, neglect and abuse. Of course, the dignity of a child is, in any case, also protected by section 10 of the Constitution.

[9] Furthermore, the Childrens Act 2005 contains numerous protective measures for children. The United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance.⁵ The need to extend particular care to a child has been stated in the Geneva Declaration on the Rights of the Child,⁶ in the United Nations Declaration on the Rights of the Child,⁷ in the Convention on the Rights of the Child,⁸ in the African Charter on the Rights and Welfare of the Child,⁹ and is recognised in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children.

⁵ Article 25 (2) of the Universal Declaration of Human Rights (hereafter UDHR), Adopted and proclaimed by the United Nations General Assembly, Resolution 217A (III) of 10 December 1948).

⁶ Geneva Declaration of the Rights of the Child, Adopted 26 September, 1924, League of Nations

⁷ Principle 4-6 of the United Nations Declaration on the Rights of the Child, Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959.

⁸ Article 12 (2) and 23 of the Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989
Entry into force 2 September 1990, in accordance with article 49.

⁹ Article 16 of the African Charter on the Rights and Welfare of the Child, OAU Doc.CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

[10] Nothing more than this needs to be said about the special weight that is attached to the rights of a child in our Constitutional democracy. It is self-evident that the rights of children such as those who attend the New Hope School require even more protection.¹⁰ Dignity as a core value has been emphasised by our Courts.

In *Khumalo and Others v Holomisa*¹¹ O'Regan J sated the following as to *iniuria*:

[27] In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*. *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution. No argument was addressed to this Court on the relevance of the right to privacy to this case and I shall not consider it further. (footnotes omitted)

In the same judgment O'Regan J also emphasises the importance of freedom of expression and the important role that the media plays in a democracy:

[24] In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. *As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society.* If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. *If they vacillate in the performance of their duties, the constitutional goals will be imperilled.* The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16.

[25] *However, although freedom of expression is fundamental to our democratic society, it is not a paramount value.* It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality. (footnotes omitted and emphasis added)

¹⁰ J Sloth-Nielsen 'The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: some Conclusions in the aftermath of *Grootboom*' *S. Afr. J. on Hum. Rts.* (17), 2001, 210 at 212, 217, 218.

¹¹ 2002 (5) SA 401 (CC).

[11] In *Le Roux and Others v Dey* 2010(4) SA 210(SCA) Harms DP states at para [23]:

“The right to an unimpaired dignity is protected by the *actio iniuriarum*. Such can be invoked when a person is subjected to offensive and degrading treatment or is exposed to ill-will, ridicule, disesteem or contempt. *Minister of Police v E Mbilini* 1983 (3) SA 705 (A) at 715G - 716A. In *Brenner v Botha* 1956 (3) SA 257 (T) Boshoff AJ (as he then was) said at 261 *in fin* - 262: ‘In cases of verbal injury, otherwise than in cases of defamation, the words complained of must impair the plaintiff’s dignity and must be insulting in the sense that they must amount to degrading, humiliating or ignominious treatment.’

The suggestion that they are at a school for “brain dead” children, could only have been devastating to the New Hope learners and their parents who are already struggling to deal and accept the challenge they have to endure due to their children’s disabilities. The word “brain dead” fits the criterion of “degrading treatment or being exposed to ill-will, ridicule, disesteem or contempt” as mentioned in the *Le Roux* judgment quoted above.

[12] The conclusion is, accordingly, that the dignity of the learners was seriously impaired and that the Broadcasting Code was contravened by the radio station.

SANCTION

[13] In so far as sanction is concerned, we do not believe that it would be appropriate to order the radio station to broadcast an apology. The whole issue and the concomitant injury would, in such a case, be rekindled. It was argued that since the Respondent had already made an apology on air and also at the school, and had in addition raised a donation for the school, enough had been done to “compensate” for the contravention. We are, however, of the view that the only extenuating circumstance which is relevant in such a matter is the remorse which has been shown. Bestowing benefits on the school is not a matter which is legally relevant. We have also taken into consideration that the presenter’s slur was indeed firstly directed at the caller who had complained about a song and that there had been no malice present when he included New Hope School in the slur.

[14] The maximum prescribed fine is R60 000. We believe that it would be fair to order that the radio station pay a fine of R30 000 to the BCCSA on or before 30 April 2012. PACSEN argued that an apology to the parents was also required. As pointed out above, the complaints did not include the parents. We realise that the slur obviously also led to great sadness and annoyance on the part of the parents, and if the Respondent chooses to do so, it may write a letter of apology to PACSEN. A broadcast would, once again, not be fitting.



PROF KOBUS VAN ROOYEN SC
28 March 2012

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