CASE NUMBER: 30/2011

DATE OF HEARING: 8 AUGUST 2011

COX

vs

KFM

COMPLAINANT

RESPONDENT

TRIBUNAL: PROF JCW VAN ROOYEN SC (CHAIRPERSON)
PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)
DR LYNDA GILFILLAN
DR LINDA VENTER
MS ZENOBIA AFRICA (CO-OPTED)

FOR THE COMPLAINANT: THE COMPLAINANT WAS PRESENT.

FOR THE RESPONDENT: MS KHAHLISO MOCHABA, HUMAN CAPITAL & REGULATORY AFFAIRS MANAGER, PRIMEDIA (PROPRIETARY) LIMITED.

News – omission to mention presence of other forces in Pakistan bombing incident – not intentional or negligent. Cox vs KFM, Case No: 30/2011(BCTSA)

SUMMARY

Complaint that the omission of a reference in a news bulletin to the presence of foreign forces in Pakistan amounted to a contravention of the Broadcasting Code not upheld. The Tribunal was not convinced that the broadcaster intentionally omitted to refer to the presence of American or other foreign forces in Pakistan. It was stated that the source was CNN, and in that sense there was no error as to what CNN reported. To infer an
intentional distortion of the whole picture on the basis of the omission to add that there were also other (foreign) forces present in Pakistan, would not be the only reasonable inference to be drawn from the omission in the news broadcast. The intention could just as well have been to simply reiterate what CNN had said in its news item. Indeed, it may have sounded somewhat strange for KFM to have added a rider to the news item and its source. The Tribunal is, accordingly, not convinced that any form of “brainwashing” could be inferred from the omission, as contended by the Complainant.

The next question is whether KFM was not negligent in omitting a reference to the presence of other forces. The criterion against which KFM must be measured is that of the specialist. It is licensed as a broadcaster and a high degree of circumspection must constantly be displayed in the execution of its function as a conveyor of news. Would the reasonable specialist broadcaster have added that there are also other forces in Pakistan? Likely listeners to news broadcasts are generally well informed and would have understood the news item within the CNN context, and that the two movements mentioned were possible suspects in the reported bombing incident. The said listener would have been likely to foresee that there might also be other possibilities. A broadcaster is entitled to assume that its news listeners have a certain level of sophistication which entitles it to omit an obvious fact. The Tribunal, accordingly, came to the conclusion that although there was an omission in the news item, KFM was not negligent in having omitted the possible presence of other forces. Accordingly, although objectively there was an omission, KFM could not be held responsible in law for the omission, since it had not been negligent.

The Complaint was not upheld.

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JUDGMENT

JCW VAN ROOYEN

[1] The Registrar received a complaint from a listener based on the alleged transgression of the news clause of the Broadcasting Code. I referred the matter to a Tribunal in Cape Town, which is where the Complainant resides and from where the Respondent broadcasts.

[2] The complaint reads as follows:

“On the 07h00 news broadcast on KFM on Friday 13 May 2011, it was reported that an area of Pakistan where there had been some bombing type activity was known to be an area in which the Taliban and Al Quaeda operate. This implies and creates in the minds of the listeners the impression that it was necessarily one of those organisations that was responsible for the attacks.”
There was at the time of the news item being broadcast no proof to this effect, which in itself makes the reference to those organisations in that context a type of brainwashing exercise.

In extenuation, it is well known that much of Pakistan, notably those areas where there is activity of a war-like or terrorist-like nature are also areas in which American armed forces are heavily active, but this point was carefully omitted from that news broadcast, lest it implies that America may have had some degree of involvement in this. It is not unknown for a wealthy participant in a war to pay their poorer opposition to perform acts that, when reported superficially, create the impression that the poorer participant performed the act of their own free will.

There is no confirmed proof of what exactly happened in the attack referred to in that news broadcast, thus it is not possible to draw RESPONSIBLE conclusions. KFM’s approach to refer to certain parties when reporting certain activities creates an irresponsible and potentially grossly inaccurate impression of the reality. In so doing, KFM conducted themselves in a manner not aligned with the following sections of the Code of Conduct that became effective in January 2011:

a) 11.1, due to it being not fair because inference rather than fact is used to create an impression of a matter of global importance
b) 11.2, due to it not being fair as in a) above and also due to negligence due to it being misrepresentative of the organisations that at that stage had not claimed responsibility for the actions and also due to the fact that other parties are also actively militant in the area and could conceivably have been responsible for the act being reported thus constituting item b) being a “material omission” from that report
c) 11.3, due to it being sourced from an American-aligned news source and thus heavily biased in their own favour
d) 11.4, due to the plethora of rumours (unsubstantiated opinion distributed by such “news” reports) that only those organisations and not the American armed forces could possibly ever act in a destructive, aggressive, or civilian-targeted-war manner
e) 11.5, due to the fact that there was no confirmed verification at the time of the report being broadcast that either of the two organisations referred to had actually accepted responsibility for the attacks being reported
f) 13.1, due to the fact that American war and war-like activities in Pakistan and anywhere else in the world is of public importance and the view of the opposition to America being Pakistan was not broadcast thus further distorting the opinions of the listeners

Please note that the problem is due to the manner in which this report was constructed. The fact is that KFM use inference in their news reports to suggest and subconsciously align their listeners’ opinions to their own opinions on matters for which they have no confirmed proof.

[3] The broadcaster responded as follows:

"Your office has instructed us to respond to the complaint in terms of clauses 11(1) and (2) of the BCCSA Code.

The station respectfully submits that it has not contravened the provisions of clause 11 of the Code. The statement which is alleged to have contravened the provisions of clause 11 of the Code, was correctly attributed to a CNN reporter in that region. At no point did the station misrepresent or even attempt to misrepresent the facts. It is also important to note that shortly after the news bulletin, the Taliban issued a statement claiming responsibility for the attack in revenge for Osama Bin Laden’s death.

We therefore respectfully submit that there has been no contravention of the provisions of clause 11 of the Code.

1 Replacing the 2003 Code, which replaced the 1994 Code.
The Complainant replied as follows:

“The station has clearly not fully understood the content of the concern, and is trying to mislead you as well.

The fact that the report originated with CNN (an American medium, and thus inherently heavily biased on matters such as this) is additional and compelling reason to apply due care in assessing the level of bias! At the time of broadcast, the subsequent report about the Taliban to which the station has referred below was not yet available. The report in question must be evaluated in terms of what had happened until that point. There is no listener of whom I am aware who is able to see the future. The station’s mention of this subsequent report from the Taliban, as true as it may be, is a red herring designed to mitigate their glaring error.

The fact is that they used this news item to effect subtle and globally and locally damaging impressions that Muslims are terrorists. In Cape Town in particular, we have an enormous Muslim population, and this kind of suggestive and biased reporting is destructive to community unity! Of course there are extremists, that’s boldly obvious, but the reference to them in the context of war without similar mention of their aggressor constitutes the contravention of the Code Of Conduct. The fact that an extremist is likely to be responsible for the attack does not give the station the right to presuppose such and to suggest such to their listeners, especially in the subtle suggestive manner that was used.

It is indeed true that the Taliban and Al Quaeda are active in the area, but so is the American military, and reference to the one side without mention of the other side amounts to misleading, inaccurate, and biased reporting which is in contravention to the Code Of Conduct. Responsible reporting requires mention of either both sides in exactly the same list and context, or neither side. Anything else is bias.

Therefore I submit that the station’s statement in their email to you below “At no point did the station misrepresent or even attempt to misrepresent the facts” is untrue. Material omissions amount to misrepresentation of the facts. The report in question remains biased and the station in question remains in contravention of the Code Of Conduct.”

At the outset, I wish to mention that the Complainant’s reasoning makes for compelling reading. The reference to the strong presence of Muslims in Cape Town also demonstrates a holistic approach, which is important from a constitutional point of view. The Constitutional Court has emphasised that the protection of the rights of minorities is an integral part of our democracy. Minorities are entitled to equal protection in terms of the Constitution, as emphasised by the Constitutional Court.² The right to freedom of expression accentuates not only the right to convey facts or opinions, but also the right of

² Compare Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC); Prince v President Cape Law Society, and Others 2002 (2) SA 794 (CC) at par 112 where the majority states: “The fact that they are a very small group within the larger South African community [the Court was referring to members of the Rastafarian religion] is no reason to deprive them of the protection to which they are entitled under the Bill of Rights. On the contrary their vulnerability as a small and marginalised group means that the Bill of Rights has particular significance for them. The interest protected [in that case by s 15(1) and s 31 of the Constitution] is ‘not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity’.”
the public to be truthfully informed. Section 22 of the Constitution bolsters this right by guaranteeing the right of the public to have access to information. Moseneke DCJ has also emphasised that a generous interpretation must be given to the right to freedom of expression, and that the first task of a Court, and also of this Tribunal – whose daily task it is to apply section 16 of the Constitution – is to determine whether the facts conveyed might be accommodated by the freedom of expression guarantee. Ngcobo J (as he then was) also said the following in Brümmer v Minister for Social Development and Others 2009(6) SA 323(CC):

“The importance of this right . . . in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information.” (emphasis added).

[6] Clause 11 of the Broadcasting Code provides as follows:

2. News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by:
   a. Distortion, exaggeration or misrepresentation.
   b. Material omissions; or
   c. Summarisation
3. Only that which may reasonably be true, having reasonable regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with reasonable regard to context and importance.

[7] I have emphasised the phrase “intentional or negligent” in the above clause because I am not convinced that the broadcaster intentionally omitted to refer to the presence of American or other foreign forces in Pakistan. In the present matter it was clearly stated that the news source was CNN, and there was, in that sense, no error as to what CNN reported. The inference that there was an intentional departure from the truth, based on the omission regarding the presence of other forces in Pakistan, would not be the only reasonable inference to be drawn from said omission. The intention might just as well have been to simply reiterate what CNN had said. It would indeed have sounded strange for KFM to

3 Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae) 2006 (1) SA 144 (CC).
have added a rider to the news item and its source. I am, accordingly, not convinced that any form of “brainwashing” might be inferred from the omission, as contended by the Complainant.

[8] The next question is whether KFM was not negligent in omitting a reference to the presence of other forces in Pakistan. The criterion against which KFM must be measured is that of the specialist. It is licensed as a broadcaster, and a high degree of circumspection must constantly be displayed in the execution of its function as a conveyor of news.⁴ Would the reasonable specialist broadcaster necessarily have added information regarding the presence of other forces in Pakistan? Likely listeners to news broadcasts are generally well informed, and would have understood the news item within the CNN context, with the understanding that the two movements mentioned by CNN were possible suspects in the bombing episode. The said listener was likely to have foreseen that there might also be other possibilities as to responsibility for the bombing. A broadcaster is entitled to assume that its news listeners enjoy a level of sophistication which entitles the broadcaster to omit what may be regarded as an obvious fact. We have, accordingly, come to the conclusion that although there was an omission in the news, KFM was not negligent in having omitted to acknowledge the presence of other forces. Accordingly, although objectively there was an omission, KFM cannot be held responsible in law for the omission, since it had not been negligent.

The complaint is, accordingly, not upheld.

JCW VAN ROOYEN SC

24 August 2011

Commissioners Gilfillan, Venter, Viljoen and co-opted Commissioner Africa concurred in the judgment of the Chairperson.

⁴ See S v Hosiosky 1961(1) SA 84(W); S v Van As 1976(2) SA 921(A) at 928E.