Date of Hearing: 31 AUGUST 2006

L STEENKAMP                  COMPLAINANT

vs

TALK RADIO 702                RESPONDENT

TRIBUNAL: PROF JCW VAN ROOYEN SC (CHAIRPERSON)
         DR WILLEM DE KLERK
         PROF SUNETTE LÖTTER
         MS T RAMANYIMI

FOR THE COMPLAINANT: The Complainant did not attend.

FOR THE RESPONDENT: Ms Khahliso Mochaba, Group Regulatory Affairs Manager.

Hate speech – talk show – presenter requesting a caller to expand on his view as to the cause of farm murders. Presenter placing onus on caller and caller’s answer then placed under pressure; answer having its own limitations and acting as corrective to initial bland statement. Steenkamp vs Talk Radio 702, Case No: 34/2006

SUMMARY

The issue in this matter is whether a talk show host on Radio 702 facilitated hate speech during his talk show when he permitted a caller to express a racist view as to farm murders. The issue before the Tribunal was whether a reasonable presenter in the position of Mr. Tim Modise in this matter, would have responded more critically to the bland statement of the caller. Mr Modise, however, asked him to expand. The request of Mr. Modise placed an onus on the caller to explain and acted as a corrective to the bland accusation. Whilst it remains this Tribunal’s view that an anchor to a talk show must at least question controversial views expressed by
callers, we are of the view that in the present case there were sufficient countering factors and that a more active role was not required from Tim Modise. The explanation of the caller had its own limitations, which placed the opinion under pressure. The public could decide for itself in the light of the further explanation, which carried its own inherent defects. The complaint was dismissed.

JUDGMENT

PROF JCW VAN ROOYEN SC

[1] The issue in this matter is whether a talk show host on Radio 702 facilitated hate speech during his talk show when he permitted a caller to express the view that farm murders were caused by racist factors.

[2] The complaint reads as follows:

“Radio 702: Tim Modise Show: Friday 21 July 2007 Approximately 09:45 am. I wish to lodge a complaint against Mr. Tim Modise, who I believe is facilitating “hate speech” on his daily programme. At a time when many of us, regardless of race, cultural or religious grouping, are endeavouring to deal with the past and striving to achieve conciliation, Mr. Modise undoes this by allowing radicals and extremists to express their distorted views over the radio. To the uninformed this fuels the fire of racism and religious or cultural intolerance. I enjoy freedom of speech and debate but I am of the opinion that Mr. Modise oversteps the mark. A clear example was on the above programme when he not only allowed a caller to express extreme racist views about murdered farmers but he in fact encouraged the caller to elaborate thereon. The “debate” ended inconclusively and left simmering to control the upsurge of my past racial prejudices. Mr. Modise has on many occasions in the past indulged in causing religious and cultural intolerance between Jews, Christians and Muslims. Mr. Modise, in my opinion, contributes towards intolerance and division of the peoples of this Country. To illustrate that the issue is not an isolated incident, I refer to Mr. Tim Modise’s programme on Radio 702 on 24 July 2006 at 10:50 am when I happened to tune in he entertained misguided radicals which is even more deplorable than that of my previous referral. I suggest that the Commission obtains further information hereon.”

[3] As appears from the above, there are two complaints. The Commission cannot deal with the second complaint because no details were made available. It is not the task of the BCCSA to do its own inquiry as to what could have been a contravention of the Code. The BCCSA reacts upon complaints which are formulated with reasonable certainty as to what the material was and when such
material was broadcast. The registrar would need the title of the programme as well as the date and time when the alleged contravention took place.

Radio 702, summarized, responded as follows;
In respect of the broadcast of 21 July 2006, the complainant states he wishes “to lodge a complaint against Mr Modise who I believe is facilitating “hate speech”….” and goes on to state that Mr Modise does this: “by allowing radicals and extremists to express their distorted views over the radio. To the uninformed this fuels the fire of racism and religious or cultural intolerance. I enjoy freedom of speech and debate but I am of the opinion that Mr. Modise oversteps the mark. A clear example was on the above programme when he not only allowed a caller to express extreme racist views about murdered farmers but he in fact encouraged the caller to elaborate thereon”:

Radio 702 is of the firm view that context is of paramount importance when judging speech. Consequently, before engaging in an in-depth analysis of clause 16.3 of the Code, Radio 702 sets out a brief background of its format and programming as well as the context within which the statements alleged to constitute hate speech were made.

Radio 702 is a talk-formatted radio station. It provides its listeners with a platform for debate more so on issues of public importance, often controversial. Its target audience is in the LSMs 6 to 10, between the ages of 35 and 50. Thus, a substantial number of its listeners is adults who are mature and broadminded.

Radio 702 has been in operation for over twenty five years and in all the years, it has not been afraid to challenge certain traditions and to break new ground. In the 80’s and throughout the 90’s, Radio 702 broke the convention and reported on news events as they were happening in the country, in spite of the huge risk to its existence and to the safety of its reporters and presenters.

The statements were made on Tim Modise’s Network, which is a talk show. In line with the nature of the two stations as discussed above, the show discusses issues of public interest as well as those issues that are of public interest and are sometimes controversial and the show is well known for its nature. A guest is normally invited to the studio to give his/her opinion on a given topic which normally, would be on an issue of public interest and which in addition is sometimes controversial. After the guest has been given an opportunity to put forth his/her views, listeners then call into the show to comment on the topic. In commenting on the topic, some listeners will agree with while others will challenge the guest’s views. All in all, the guest’s views will be debated by the guest and the listeners. Tim Modise who is the host of the show, acts as a facilitator between the guests and the listeners who call in. It is not his views or that of the station that are discussed but, as we have already stated, it is the views of the guest and Tim Modise is merely a moderator. We wish to reiterate that he
is there to provide a platform for and facilitate the debate between the guest and the listeners.

During the course of the open line, some callers started talking about the brutalities suffered by farm-workers and it is one of the callers’ statements that appear to have given rise to the complaint. Important to note is the point that the caller in question’s statements were questioned and responded to by another caller who had a different view. In addition, on the topic, Mr Modise *inter alia* advised that the matter of a boy killed by a farmer who mistook him for a dog was an unfortunate incident and should be left to the courts.

Clause 16.3 of the Code provides as follows:

Licensees shall 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, gender or religion, and that constitutes incitement to cause harm.”

It is clear that propaganda for war was not in issue. However, clause 16.3(b) prohibits broadcast of material which, when judged within context, amounts to “incitement of imminent violence”. In this regard, the wording makes it clear that there are two elements that a broadcast has to meet in order to fall within the ambit of this clause, namely that there has to be “incitement” to violence and the violence has to be “imminent”. From the Dictionary definitions of the words “incitement” and “imminent”, it is clear that the statements are caught by the provisions of clause 16.3(b) of the Code, when they were likely to have encouraged or stirred up or urged on or provoked violence. In addition, the broadcast should not have just ended at incitement of violence, but the violence incited to must have been imminent and should have been real in the sense that it should have been immediate and/or should have been about to happen at the time of the incitement. The Tribunal is of the view that the statements did not in any way urge or provoke or stir up violence and were not likely to have resulted in any immediate violence to anyone. The statements, accordingly, did not contravene clause 16.3(b) of the Code.

The next question is whether clause 16.3(c) might have been contravened. The interests set out in clause 16.3 are race, ethnicity, gender or religion. If one bears
in mind how varied political, religious, moral and social views are in our society, almost any controversial expression of an opinion is likely to offend a person or section of society. What counts in the end are the ingredients of the Constitution which has set a single standard as to whether speech has gone too far. Section 36 of the Constitution sets the limits by requiring that rights may only be limited by laws of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, quality and freedom, taking into account all relevant factors. In practice the main limits of freedom of expression are found in some infringements of dignity, privacy, good name, the rights of children, the safety of the State, public order and section 16(3) of the Constitution, as quoted above. Political ideology is not protected by the Constitution. This is so since it is absolutely necessary in a democracy that clashes of views should take place so that an ultimate result in the interest of democracy can be attained. This might take time but, as expressed by Holmes J in the United States Supreme Court, the market-place of ideas should be fully exploited in the interest of truth. Of course, critical references to past injustices might offend some listeners on the basis that the opinion expressed does not give the full picture. However, in *S v Mamabolo*, Kriegler J stated as follows 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.”

[7] This Tribunal has often stated its commitment to the need for freedom of expression on the airwaves and has quoted Constitutional Court judgments in

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1 2001 (3) SA 409(CC) par 37.
which it is stated that freedom of expression lies at the heart of democracy\(^2\) and that the present dispensation, in sharp contrast to the past autocratic regime, has substituted despotism with freedom.\(^3\) The Constitutional Court has also stated that freedom of expression as guaranteed in section 16 of the Constitution of the Republic even includes the right to publish offensive speech – obviously within the limits of section 36 of the Constitution.\(^4\) This Tribunal has often applied this principle to explain to complainants that even if material is offensive, the broadcast thereof would not necessarily amount to a contravention of the Broadcasting Code.

\(^2\) 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].

\(^3\) In *Islamic Unity Convention v The Independent Broadcasting Authority and Others*\(^5\) Langa DCJ (as he then was) convincingly contrasted the current state of freedom of expression with that of the past, as follows:

“Notwithstanding the fact that the right to freedom of expression and speech has always been recognized in the South African common law, 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’.

Also see *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.”

\(^4\) *De Reuck v Director of Public ProsecutionsWitwatersrand Local Division and Others* 2004(1) SA 406(CC) at para [49].
The present complaint cannot be judged without also referring to the requirements of fairness in clauses 35 and 36 of the Code. The Tribunal is only too aware of the onerous duty which clauses 35 and 36 place on broadcasters. Both clauses deal with aspects of fairness. The ideal of absolute fairness and balance is an Utopian one and is probably unattainable in practice. That is why the Tribunal of this Commission has often held that a contravention of the said clauses would only follow where balance or fairness is unequivocally absent. It would, accordingly, be wrong to measure what has been said or not said with a too sensitive gauge. Such an approach would not be compatible with freedom of expression, which needs to be robust to keep democracy and independence of broadcasters alive and versatile.

Whilst it remains this Tribunal’s view that an anchor to a talk show must at least question controversial views expressed by callers, we are of the view that in the present case there were sufficient countering factors and that a more active role was not required from Tim Modise. The style of Tim Modise is, in any case, an active one and one does not get the impression that he simply sat back and let the discussion flow in the direction which the most vociferous callers would wish it to go. The issue before the Tribunal was whether a reasonable presenter in the position of Mr. Tim Modise in this matter, would have responded more critically to the bland statement of the caller. Mr Modise, however, asked him to expand. This request of Mr. Modise placed an onus on the caller to explain and acted as a corrective to the bland accusation made by the caller. The explanation had its own limits which placed the opinion under pressure. The public could decide for itself in the light of the further explanation, which carried its own inherent defects in so far as rationality was concerned.

The conclusion is that the programme, judged as a whole, did not amount to the advocacy of hatred based on race or ethnicity. That parts would have offended some viewers or even have caused concern, is also true. However, the Tribunal is of the view that the requirements of fairness have not unequivocally been
overstepped. The omission of the presenter did not permit hate speech but countered what was said with a request for further particulars, which carried its own defects in reasoning when provided.


JCW VAN ROOYEN SC
CHAIRPERSON

Commissioners De Klerk, Lötter and ad hoc Commissioner Ramanyimi concurred.