



P.O.Box 412365 • Craighall • Tel (011) 326 3130 • Fax (011) 326 3198 • email: bccsa@nabsa.co.za
Block No 8 • Burnside Island Office Park • 410 Jan Smuts Avenue • Craighall Park • 2196 • www.bccsa.co.za

CASE NUMBER: 08/2016

DATE OF HEARING: 17 MAY 2016
JUDGMENT RELEASE DATE: 09 JUNE 2016

DE KLERK AND VÖLKEL

COMPLAINANTS

vs

TALK RADIO 702

RESPONDENT

TRIBUNAL: **JUDGE RATHA MOKGOATLHENG (CHAIRPERSON)**
 PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)
 DR NONANDI NANA MAKAULA-NTSEBEZA
 ADV ROBIN SEWLAL

FOR THE COMPLAINANTS: Mr De Klerk in person. Mr Völkel was invited but was unable to attend the Tribunal.

FOR THE RESPONDENT: Ms Kahliso Mochaba, Group Human Capital and Regulatory Affairs Executive, Primedia Broadcasting, accompanied by Mr Tebogo Mokoena, Regulatory Affairs Officer.

Complaint about guest presenter on talk show making derogatory remarks about White people in such provoking way that it amounted to hate speech - presenter explaining how his boyhood dream of becoming a train driver came to naught because of the apartheid system - this was the context in which the derogatory remarks were made - Tribunal finding that presenter did not go as far as advocating hatred based on race and neither did he incite people to cause harm - broadcast also did not contravene clause requiring balance in programme on controversial issue of public importance - De Klerk and Völkel vs Talk Radio 702, Case 08/2016(BCCSA).

SUMMARY

The complaint is about a guest presenter on a talk show who made derogatory remarks about White people in such provoking way that it is alleged it amounted to hate speech. The context of the "diatribe" as one of the complainants described it, is that the presenter had his boyhood dream of becoming a train driver thwarted because of the apartheid system. The Tribunal found that the presenter did not go as far as advocating hatred based on race and neither did he incite people to cause harm to Whites. The broadcast also did not contravene the clause of the Code requiring balance in a programme on a controversial issue of public importance. The complaints were not upheld.

JUDGMENT

[1] A complaint was received from two listeners in regard to certain statements made and opinions expressed in the "Friday Stand-In" show on Talk Radio 702 on 15 April 2016. The "Friday Stand-In" show is a talk show in which persons who are, according to the Broadcaster, "... a select group of diverse, inspiring thought leaders ..." invited to be guest presenters. The guest presenter during this particular broadcast was a certain Muzi Kuzwayo who, as a child, apparently suffered under the the system of job reservation in the apartheid era in the sense that he had wanted to be a train driver, but could not become one because of his race. This background history caused him to lash out at Whites in quite derogatory terms. His statements and opinions, mentioned in the complaints below, offended the two complainants because of the alleged racial nature thereof.

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

De Klerk: "The offending remarks where broadcast on 15th April around 9:36 on " The Friday stand in show " , guest was Muzi Kuzwayo (available on the 702 pod cast on the 702 web site) . My concern is the constant hate speech against Whites and his refusal to address white callers by demanding his producers cut off the calls , as he did with an older white lady Jeneen , his vitriol against whites was because the in his words " White people who suntan", "White people who irrigate gardens", "White boys in Johannesburg ". This constant reference to WHITES wasn't freedom of speech but a blatant hatred of other south africans , who pay taxes and thus can suntan , water gardens and live in JHB. Im sure that this has taken the code of ethics 702 purports to hold in high regard as far as the BCCSA are concerned is worrying , not to mention unproductive in nation building .Looking at your clause 4.2 this is hatred based on race or am i being overly sensitive " because I'm White "If i need to supply more detail please advise."

Vöikel: “I would like to lay a complaint about the broadcast of a program on radio by 702/Cape Talk. The broadcast occurred on Friday, 15 April, between 09h30 and 10h30. I have the material, but have been told by the broadcaster not to publish the material. You can request the material from the broadcaster. The broadcast was racist and defamatory and there were many comments posted on Facebook to agree with my sentiment. Herewith examples of what was said.

4(2)(c) The presenter said:

“White people In South Africa who go sun tanning, throw away food and leave the sprinklers on while they go sun tanning...”. This is a blatant racist comment.

“My name is spelt with a ‘z’, not an ‘s’ like Musi Maimane, because I am not an Ass”. I find this defamatory.

“...yes I am a Kaffir...” Even if he is a black man, the use of Kaffir has no place on a public broadcast and is an incitement to hate speech.

Hope this fits in as a Prima Facie case in terms of your Code of Conduct.”

[3] **The Broadcaster responded as follows:**

Billy De Klerk vs 702– Hate Speech

1. Background

1.1 702 acknowledges receipt of a complaint dated 15 April 2016 from Mr. Billy De Klerk (“the Complainant”), about statements made by a guest presenter on the Friday Stand-In broadcast on the 15 April 2016.

1.2 The complaint reads as follows:

“...The offending remarks were broadcast on 15th April around 9:36 on “The Friday stand in show”, guest was Muzi Kuzwayo...

My concern is the constant hate speech against Whites and his refusal to address white callers by demanding his producers cut off the calls , as he did with an older white lady Jeneen , his vitriol against whites was because of his words " White people who suntan" , "White people who irrigate gardens " , " White boys in Johannesburg " . This constant reference to WHITES wasn't freedom of speech but a blatant hatred of other south Africans, who pay taxes and thus can suntan, water gardens and live in JHB.

Im sure that this has taken the code of ethics 702 purports to hold in high regard as far as the BCCSA are concerned is worrying , not to mention unproductive in nation building .

Looking at your clause 4.2 this is hatred based on race or am i being overly sensitive "because I'm White"

1.3 The Complainant has filed a complaint with the Broadcasting Complaints Commission of South Africa (“the BCCSA”) and the BCCSA has requested that 702 responds in terms of clause 4(2)(c) of the BCCSA Free to Air Code of Conduct (“the Code”) which prohibits hate speech and clause 13(1) which provides for balance in presenting a show.

2. Broadcaster’s Response

2.1 Before we discuss the provisions of clause 4(2)(c) of the Code, we deem it necessary that we provide some background on the Friday Stand In. 702 has taken an opportunity to invite a select group of diverse, inspiring thought leaders to be guest presenters on Fridays between 09h00 and 12h00. These are

individuals who are interested in interacting and engaging with 702's diverse audience. The presenter opened the segment of the show which led to the statement about race by acknowledging the need to celebrate the notion of the rainbow nation and that each small community forms part of this rainbow nation. The presenter then went on to express his views on race in South Africa. He narrated his personal story of growing up wanting to be a train driver but could not be because of the laws that existed then. We also want to highlight that the presenter did not only express his views about white South Africans but did so with other race groups as well. He pointed out that Africans also need to take responsibility for some of the issues we are faced with. Throughout the segment the presenter was expressing his personal opinions based on what he had experienced.

Hate Speech

2.2 Clause 4(2)(c) of the Code, prohibits broadcasters from broadcasting material that when judged within context amounts to "*advocacy of hatred that is based on race, ethnicity, religion or gender, and that constitutes incitement to cause harm*"¹.

2.2.1 For the above mentioned provision to fall within the ambit of clause 4(2)(c), the broadcast when judged within the context in which it is broadcast has to advocate hatred based on any of the listed grounds. Furthermore, the statement in question must also constitute incitement to cause harm¹.

2.2.2 For there to have been advocacy of hatred, the statement ought to have publicly supported action against people based on any of the listed grounds, and the statement must not just stop at advocating a cause but it must go further and instil an intense dislike of someone based on the listed grounds. The BCCSA in *Siguaque and Mathebula v Metro FM*² referred to and applied Cory JA's definition of hatred in *R v Andrews*³ wherein the court held that:

"Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies..." [Underlining own emphasis].

2.2.3 In context of the statement in question, the presenter did not advocate for any form of detestation, enmity, ill-will or malevolence in another based on the listed grounds. We therefore submit that the statement in question has/did not meet the first part of clause 4(2)(c).

2.2.4 The clause further provides that the advocacy of hatred in question should be based on race, ethnicity, religion or gender. Therefore, the complaint would have to refer to one of the listed grounds. In the matter at hand the complaint is based on race. It is our understanding that mere reference to race does not constitute hate speech if the other elements of clause 4(2)(c) have not been met. It is therefore, our respectful

¹ In *The Freedom Front and The South African Human Rights Commission (SAHRC) and The Freedom of Expression Institute*, 15 July 2003, the SAHRC held the view that "expression will amount to hate speech if it is advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm. The harm must be caused by the advocacy of hatred on the stipulated grounds"

² *Siguaque and Mathebula vs SABC (Metro FM) BCCSA hearing Case Number 28/2014 at paragraph 6*

³ 43 CCC (3rd) 193 at 211

submission that the statement did not in any way publicly support or plead for any action against any person based on race.

- 2.2.5 The wording of the clause 4(2)(c) goes further to provide that there has to be a link between the hatred based on race which the statement is advocating for and the harm that results from the hatred. It is therefore important to note that in as much as the Complainant has said that the statement by the guest presenter was offensive; in order for the statement in question to fall within the ambit of clause 4(2)(c) of the Code, the statement had to incite harm, as was correctly pointed out by Kriegler J in *S v Mamabolo* that:

“Expression that simply offends segments of the community does not amount to hate speech as defined in section 16(2)(c) [of the Constitution]”⁴.

This is relevant more so when one takes into account that clause 4(2)(c) of the Code resembles section 16(2)(c) of the Constitution.

- 2.3 We are of the respectful view that the statement in question did not in any way incite or encourage or urge on or persuade any person to carry out violence or harmful action or conduct against anyone as a result of that person’s race. Furthermore, we submit that since there was no incitement, there cannot be any link between the statement and harm of any kind as a consequence thereof whether the harm caused was physical or psychological. In *The Freedom Front matter*⁵, the SAHRC held that:

“There must be an adequate nexus between the advocacy of hatred based on race, ethnicity, gender or religion and the harm that is caused as a consequence. There must be a real likelihood that the expression causes harm before it can be deemed to be hate speech”

Therefore, it is our firm opinion that the statement did not contravene clause 4(2)(c) of the Code.

- 2.4 We submit that having discussed provisions of clause 4(2)(c), it is our respectful submission that the statement in question may have been offensive but it certainly did not constitute advocacy of hatred that constitutes incitement to cause harm as prohibited in terms of clause 4(2)(c) of the Code.

Fair Representation of Opposing Views

- 2.5 Clause 13(1) of the code provides:

“In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.”

⁴ 2001 (3) SA 409 at 429 paragraph 49

⁵ Note 1

2.5.1 The intention of clause 13(1) of the Code is that where controversial issues of public importance are discussed, individuals be given an opportunity to present their opinions in a fair manner.

2.5.2 At paragraph 2 of his complaint, the Complainant alleges that the presenter refused to address white callers by demanding that the producer cut off the calls. We submit that the presenter took four calls in the course of the segment complained of. Only one caller identified herself as a white person out of her own free will and the presenter responded by saying that he could not tell that she is white and the caller responded by saying that *"I can tell that you are black"*. It is at this point that the presenter felt that the caller's response was racist and the presenter requested that he be connected to the next caller. The three other callers were given a chance to express their views, which included a caller who was opposed to the presenter's views. At no point during this time did the presenter make a statement that he did not want to speak to white callers. We are therefore of the view that the presenter did present opposing views on the show and thus we have complied with the provisions of clause 13(1) of the code.

2.5.3 Notwithstanding the above, we are of the respectful view that clause 13(1) of the code is not the appropriate clause to apply in this instance. We submit that clause 12(1) and 12(2) are more appropriate in this regard.

2.5.4 Clause 12(1) and provides that: 12(2) provide that:

"Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance."

And Clause 12(2) provides that:

"Comment must be an honest expression of opinion and must be presented in such a manner that it appears clearly to be comment, and must be on facts truly stated or fairly indicated and referred to."

2.5.5 Race in South Africa is a very sensitive issue more so now than ever before.

The code in clause 12(1) makes provision for broadcasters to comment or criticise actions or events of public importance. Race is one such event and therefore broadcasters are entitled to comment on it.

2.5.6 Clause 12(2) of the code goes further to provide that comment must be an honest expression of opinion and must be done in such a manner that it appears to be comment and must be based on facts truly stated or fairly indicated. The presenter made it clear that the views he holds are influenced by his own personal story of wanting to be a train driver, but was unable to because of his race. Therefore his comments were based on facts truly stated or fairly indicated and his views were presented as comment based on what he has experienced.

2.6 It is our submission that the broadcaster did not contravene clause 4(2)(c) and 13(1) of the code."

EVALUATION

- [4] As stated in the heading of this judgment, the complainant De Klerk was present at the hearing and allowed to put his case to the Tribunal. The impression he made was that of a reasonable person, and not one who was adamant to get a verdict of contravention of the Code at all costs. His perception of the "diatribe", as he described the statements by the presenter, is that it constituted hatred against the Whites. This, according to him was in contravention of clause 4(2)(c) of the Free-to-Air Broadcasting Code of Conduct. Furthermore, he thought that the programme was one-sided and therefore lacked balance as required by clause 13(1) of the Code.
- [5] The Broadcaster's case, ably presented by Ms Mochaba, was that the intention with the topic of race in this particular programme was not to attract listeners. Her argument was that the debate about race was already "out there" and that the way it was handled could not be regarded as hate speech. As for the requirement of balance, she referred to one of the phone-in callers (Wilson) who pleaded that Blacks should forgive and forget and get on with their lives. She argued that this brought sufficient balance to the programme. She made one concession though: During the programme a White woman phoned in and when she was put on air, the presenter made the remark that he could not tell that the caller is a White person. The woman responded by saying that she could tell that the presenter was Black. The presenter apparently regarded this comment as racist, cut her off and continued to engage the next caller. The Broadcaster admitted that the presenter should have handled this situation better.
- [6] There are some basic principles on which we base our judgments. The first is that freedom of expression is one of the pillars on which this democracy of ours is found. This basic right of all persons (including broadcasters and listeners) is protected in section 16 of the Constitution of South Africa and also in the constitution of the BCCSA. Another principle, which is actually the other side of the coin, as it were, of freedom of expression, is tolerance of the views of others. In support of this principle, we often refer in our judgments to a judgment by the European Court of Human Rights,

namely *Handyside v The United Kingdom*⁶ where the following was said:

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

Other principles to be kept in mind are that it is the broadcaster who is subject to our jurisdiction and not the individual presenter of the programme and furthermore that words must be judged in context. Applying these principles, we will now consider the complaints and the Broadcaster's arguments.

- [7] The "diatribe" by the guest presenter was interspersed with some opinions about a decadent lifestyle by Whites, for instance that they "*throw away food and leave the sprinklers on while they go sun tanning ...*" Of himself he made the remark: "... yes, I am a Kaffir." Had he used this word to describe someone else, it would have landed him in trouble, even possibly in court on a charge of *crimen iniuria*. We accept that he described himself in this way to focus on the humiliation that people of colour had suffered under the apartheid system. The tone of his voice was of such intensity that it should have been clear to the listeners that he was very upset about the way he and people like him were treated in the past. When urged by a listener who phoned in to forgive and forget, his reaction was "*we keep on reminding ourselves*". He clearly harbours a lot of resentment against White people and he clearly intended his broadcast to be provoking.

⁶ 1976 ECHR par. 49. This dictum has been accepted by our Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority* 2002(4) SA 294 (CC) at par. 26

[8] The question we as the Tribunal have to answer is whether the presenter's "diatribe" amounted to hate speech. Clause 4(2)(c) of the Broadcasting Code of Conduct, which echo's section 16 of the Constitution of South Africa, and which is repeated in the Broadcaster's written presentation above, describes hate speech as having two elements: the advocacy of hatred based on, *inter alia*, race (in this case), and the incitement to cause harm, whether physical or psychological. In this connection we would like to quote from a previous case decided by this Tribunal:⁷

The test for hate speech is quite strict and this Tribunal will not lightly accept that anyone's freedom of expression has been overstepped. This Tribunal remarked in one of its decisions⁸:

Hatred is a very strong term. Chief Justice Dickson made a famous attempt to distill the meaning of hatred in the Canadian case of R v Keegstra. He held:

'In my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. As Cory J.A. stated in R. v Andrews...: "Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition...." ... Hatred in this sense is a most extreme emotion that belies reason; an emotion that if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.' [footnotes omitted]

In this case the presenter had harsh things to say about Whites, but did he advocate hatred? Although his words might have offended many White listeners, one should keep in mind that offensiveness is not a valid test for hate speech.⁹ Offensiveness is too subjective a test to use as the norm to decide whether an expression constitutes hate speech.

⁷ *Siguaque and Mathebula v Metro FM*, case 28/2014.

⁸ *Visser & Thomson/94.7 Highveld Stereo*, case 27/2012.

⁹ See *De Necker & Botha v Multichoice Channel 122*, case 01/2012, and *Smith v Radio 702*, case 04/A/2012.

- [9] The test that we have to apply is firstly whether there was advocacy of hatred. We have to decide whether the presenter endeavoured to instil detestation, enmity, ill-will or malevolence towards White people. Sometimes the line between serious criticism and the advocacy of hatred is a thin one, but we must guard against elevating our personal dislike of the words complained about to the conclusion that the legal test of advocating hatred has been complied with. In this instance we understand that some listeners subjectively experienced that the words complained of were an expression of hatred, but viewing the matter objectively, we think that if there was any hatred expressed, it was rather directed against the system that prevented the presenter from fulfilling his boyhood dreams. We conclude therefore that the broadcast failed the first test for hate speech.
- [10] Should our conclusion be wrong in applying the first test, we must then decide whether there was incitement to cause harm, whether physical or psychological. As has been decided by us on many occasions, "incitement to cause harm" means to stir up or to urge others to act in a manner which is likely to cause harm to others¹⁰. As stated above, the presenter had harsh things to say about Whites, but we could not find anything in what he said that meets this standard. The broadcast therefore fails the second test for hate speech as well.
- [11] There was also a complaint that the broadcast was one-sided because the presenter cut off a White woman who phoned in. The reason given for this action was that the White woman, when she came on air and in response to the presenter's remark that he could not tell she was white, said "I can tell that you are black". The presenter regarded this as racist and cut off the call. It is not clear what is racist about those words, but the Broadcaster dealt with this complaint under clause 13(1) of the Code which requires of a broadcaster to present opposing points of view where controversial issues of public importance are discussed. This was a phone-in type of programme and when one listens to the broadcast, it is clear that other listeners' views were allowed to be broadcast. A particular listener by the name of Wilson urged the presenter to forgive and forget. This brought some balance into the programme. This

¹⁰ See for instance *Kriel & Lombard v SABC2*, case 22/A/2014

Tribunal has in the past decided that perfect balance is not attainable in this kind of programme. This refers to the number of opinions for and against the issue and also the minutes of air time allowed for opposing viewpoints. We have also been informed at the hearing that a senior manager of the Broadcaster stepped in to calm the presenter down. All these factors lead us to the conclusion that the requirements of clause 13(1) had been complied with. However, we frown upon the cutting off of a caller even before she could give her opinion on air. This action by the presenter is evidence of a disregard of the requirement of tolerance as stated in paragraph [6] above. As stated above, the representative of the Broadcaster admitted that the presenter could have handled the situation better and we agree with that.

[12] The Broadcaster also based its case on clause 12 of the Code which provides for broadcasters to broadcast comment on and criticism of any actions or events of public importance. As we interpret the complaints, the real issue is that the comments were regarded as advocating hatred, and we have dealt with that issue in terms of clause 4(2)(c). Even if clause 12 were applicable, we do not think it has been contravened.

In the result we find that no clause of the Code of Conduct has been contravened and the Complaints are accordingly not upheld.



**PROF HENNING VILJOEN
DEPUTY CHAIRPERSON
BCCSA**

The Chairperson, Judge Mokgoatheng and Commissioners Dr Makaula-Ntsebeza and Adv Sewlal concurred with the judgment of Prof Viljoen.