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CASE NUMBER: 14/2007

DATE OF HEARING: 02 JULY 2007

T TIMILE

COMPLAINANT

vs

RADIO 702

RESPONDENT

TRIBUNAL: **PROF. KOBUS VAN ROOYEN SC (CHAIRPERSON)**
 PROF. HENNING VILJOEN
 PROF. SUNETTE LOTTER
 PROF. GERRIT OLIVIER (AD HOC COMMISSIONER)

THE COMPLAINANT IN PERSON.

FOR THE RESPONDENT: MS KHAHLISO MOCHABA, GROUP REGULATORY AFFAIRS MANAGER, PRIMEDIA BROADCASTING (PTY) LTD.

Complaint that issue of canning of film by broadcaster was of public importance, thus bringing it within ambit of clause 36.1 of Code of Conduct – that balance was not obtained in presentation of debate – Tribunal finding that matter is not of public importance and clause 36.1 not applicable – even if it is applicable, that Complainant and other persons of similar viewpoints had the opportunity to phone in and air their views, as had been done – sufficient balance had been obtained and there was no

SUMMARY

A complaint was lodged concerning the debate that followed the so-called canning of a controversial film by the broadcaster. The complaint was that the withholding of the broadcast of the film was of public importance, thus bringing the debate within the ambit of clause 36.1 of the Code of Conduct. The complaint was further that balance was not obtained in presentation of debate. The Tribunal found that the matter might be of public interest but that it is not of public importance and clause 36.1 is therefore not applicable. The Tribunal found that even if clause 36.1 were to be applicable, that the Complainant and other persons of similar viewpoints had the opportunity to phone in and air their views, as had been the case. It was found that sufficient balance had been obtained and that there was no contravention of the Code. The complaint was dismissed.

JUDGMENT

HP VILJOEN

- [1] On 16 April 2007 the Respondent broadcast a program known as the weekly “commentator’s slot”. In this program the accent falls on stories making news. In this particular case the discussion turned around freedom of expression and the Films and Publications Amendment Bill. The program started at about 9:52 when listeners phoned in. Just after 10:00 two guests, Jane Duncan, executive director of the Freedom of Expression Institute and Professor Anton Harber, Caxton Professor of Journalism and Media Studies at the University of the Witwatersrand, joined the discussion and gave their views on the subject. One of the topics that came up for discussion was the fact that the SABC decided some time before the discussion not to broadcast a film in which gay love between two black men was portrayed – the so-called “canning” of the film. The apparent one-sidedness of the discussion between the host and

the two guests gave rise to the complaint that is set out “ipsissima verba” hereunder.

[2] The complaint reads as follows:

“I would like to lodge my complaint concerning the unbalanced and clearly biased views aired by Talk Radio 702 through its host Reddie Direko.

Programme Title: Talk Show aired between 19-11:00 am; Subject: Discussion centered around the recent canning of a controversial SABC film depicting a love scene between two black gay men.

COMPLAINT: Redi Direko had invited two guests Professor Harber and a lady from the Freedom of Expression Institute. It was clear from the onset that both her guests were biased towards one viewpoint which unfortunately was also the same viewpoint shared and vigorously propounded by the host of the programme. A sensitive and indeed controversial matter such as the one under discussion should surely have included an alternative viewpoint as opposed to being stage managed by the host so as to present one side. What further compounded an already sad state of affairs was the fact that Redi Direko confessed on air that she was one of the producers of the controversial film thus explaining why she tended to be abrasive, rude and attempted to muzzle any voice or comment that was contrary to what she wanted to hear. I believe with all sincerity that the host displayed shocking immaturity and was clearly not the best person to facilitate this dialogue. She appears to relish hearing the sound of her own voice as opposed to the public to whom the show is ostensibly for. I look forward to your valued assistance and intervention in this matter.”

[3] The Broadcaster’s response included the following:

Before addressing the complaint in terms of the provisions of the Code, Talk Radio 702 wishes to point out that the complaint contains some factual inaccuracies and these are pointed out below:

The slot referred to was the weekly commentators' slot, and this usually concentrates on stories making news. The particular slot focused on freedom of expression and the Films and Publications Amendment Bill and the slot started at about 09h52.

Although the slot only started at after the 10h00 news bulletin, the listeners had started calling in and engaging in the discussion on the SABC canned show much earlier, at about 09h10. Therefore, it is incorrect that the discussion was aired

between 10h00 and 11h00 as it in fact started almost 50 minutes before the complainant heard the alleged “unbalanced and bias views”.

The listeners called with different views, some agreeing with and other opposing the SABC’s canning of the film. In this regard, different views were aired.

The show had two guests, Jane Duncan, the executive director at Freedom of Expression Institute and Professor Anton Harber who is Caxton Professor of Journalism and Media Studies at Wits University. The two guests offered their opinion and comment on the listeners’ views on the SABC's decision to drop the 'gay kiss', which was a news story at the time.

It is incorrect that the midmorning show’s host is the producer of the film that was discussed on the commentators’ slot. She did however, produce a film that the SABC commissioned and then later banned, something that made national headlines at the time.

Clause 36 of the Code

Clause 36.1 of the Code provides that:

In presenting a programme in which controversial issues of public importance are discussed, a licensee shall 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

Talk Radio 702 respectfully submits that the issue of the SABC canning films that it has commissioned is an issue of public importance as it touches on freedom of expression, a right that is constitutionally enshrined.

While the complainant may have only tuned into the station at 10h00 and only heard the discussion between the show’s host and the two guests, it is important to note that the debate/discussion had started almost an hour earlier than 10h00, namely at 09h10 when listeners started calling in with their views. Consequently, it is the station’s submission that the guests’ opinions should not be looked at in isolation but should be looked at in context of the show on the particular day and all the debates and discussions that has already happened.

We respectfully submit that looking at the discussion in its totality and not only that part that is alleged to be “unbalanced and biased”, the discussion/debate was indeed balanced as the guests were not the only ones who provided their views. In fact, the guests only came onto the show some fifty minutes into the discussion/debate.

It is important to note that in addition to commenting on the listeners’ views, the guests were also giving their expert opinion in particular on editorial decisions as

well as some provisions of the Films and Publications Amendment Bill. Thus, it is the station's respectful submission that the part of the discussion in question should not be looked at in isolation from the rest of the discussion. We submit that when looking at the part of the discussion complained of in context, there has been no contravention of the provisions of clause 36.1 of the Code. The balance was in fact established early in the show through the various listeners' views.

Furthermore, the host's mention of the fact that she had also been involved in the production of one of the films that the SABC had canned, did not in any way constitute or contribute towards the alleged "biased and unbalanced views". Neither the guests nor the host dwelled on the particular issue – that of the host's film also being canned. Furthermore, it is public knowledge that the show's host had produced a documentary for the SABC that was subsequently canned. At the time, this had been covered in the media –both electronic and print media. At the end of the show, the host read out a listener's sms asking about the host's canned film and she responded in about two lines but once more did not channel the discussion to her own film.

We submit that, the fact that both guests seemed to hold a similar view did not mean that the programme was biased and the fact that the opinions of the guests in question are found questionable by some people also does not indicate bias and unbalance. The Tribunal has held that:

“Our reaction is; accordingly, to tread with utter care when opinion is expressed – even opinion which is based on erroneous assumption or error. The well-known approach of Holmes J in *Abrams v The United States* 250 US 616(1919) that unjustified opinion should rather be left for the market place of ideas to counter it, also carries special weight in the opinion of the Commission. It is also important to bear in mind that the documentary is not intended to be a scientific treatise and that one should not analyze it as such a treatise would have to be analyzed. It tells a story in images and words – a story which might not be scientifically correct, but nevertheless takes part in the debate.”¹

Consequently, Talk Radio 702 as a broadcaster and watchdog of the public, found it to be in the public interest to provide a platform for debate on this controversial issue and one that is of public interest.

Furthermore, the Tribunal has on numerous occasions held that even unpopular views have a right to be expressed.

“The Constitution guarantees freedom of expression which includes the right to hear and receive unpopular and even shocking, disturbing and offensive views.”² [Underlining own emphasis];

¹ *Dinur & Others v MNet*

² *Kevin Allan v SAfm* Case No: 2004/18 at paragraphs 8

“The value of freedom of speech is put to its ultimate test when speech is employed in an outrageous and shocking manner – a manner often unacceptable to many, but which is, nevertheless, protected in law”.³

The Tribunal has further held that one of the demands of a democratic society is that one be tolerant of:

“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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.”⁴

In this regard, it is Talk Radio 702’s respectful submission that there has been no contravention of clause 36.1 of the Code.”

[4] The Complainant replied as follows:

“That the show was “the weekly commentators slots” does not in anyway detract from the fact that the material broadcast was unbalanced. Not only was the presenter, Ms Direko against any views contrary to hers, but also her guests where clearly biased towards one uncritical and biased viewpoint. The weekly commentators slot is an issue that the management of Primedia are best placed to deal with. It hardly has any bearing on what listeners hear broadcast on air. The obvious insinuation is that the “weekly commentator’s” is somehow exempt from being balanced in its broadcasts. I strongly disagree with this.

Again the inference is that because I may have made an error in the timing of the slots, therefore the unbalanced and biased views could not somehow have been aired. Again I find this line of reasoning patently faulty. I believe that listening to the recorded programme will indeed clear any issues regarding time slots. The issue is that the entire discussion was deliberately structured so as to allow the two guests and the presenter to ultimately control the direction and content of the discussion. Had the presenter been interested in a balanced and objective analysis of the subject at hand, then surely she would have ensured that her panel was composed as such.

I agree that different callers called in to give their different views. I was one of them. The manner in which the presenter chose to either ridicule, grossly misrepresent and distort (seeing she ultimately had the final say and not the

³ *Clarke and Others v East Coast Radio* Case No: 2003/06 at paragraph 10.

⁴ *V Stark & M Wycie vs SABC 3* CaseNo: 2005/45 at paragraph 11

callers) is what has led to this complaint. Again I believe that listening to the recorded programme will verify this.

When Ms Direko introduced the show, she did not at any one point mention that the issue under discussion was about the “gay kiss” dropped by SABC. That is factually incorrect. Again listening to the recording will verify this. She did however say the subject matter was SABC’s “canning” of the gay series. To suggest the issue was merely about the so called “gay kiss” is factually incorrect and/or dishonest.

The statement that the show’s presenter (Ms Direko) produced the controversial film that was under discussion does not emanate from the complainant. It was made on air by Ms Direko herself. (Again listen to the recorded programme). **Khahliso Mochaba would be well advised to check with Ms Direko herself and get the facts from her and not from the complainant.**

Naturally I disagree with this preposterous assertion. The highlight of the morning was the presentation by the guests. Indeed in any broadcast this goes without saying. The two guests were specifically invited to lend not just respectability to the show but also to render an expert opinion. That is why they were drawn from their particular areas of expertise and specialisation. My complaint does not center on whether or not callers were allowed to call in and disagree with the guests, but rather on the power to sway public opinion by virtue of their standing and position in society with respect to the matter under discussion. The clause quoted above is instructive:

“The licensee shall 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...”

The point of contention is that a caller with an opposing view calling in and limited by time does not represent a balanced “opposing view”, because his/her view is subject not just to “expert analysis” from the guests in the studio, but tragically to the show’s host standpoint. The controversial subject matter did not have an “expert” opposing view, was not supported by an objective and neutral host and clearly was biased towards projecting one view.

Again I completely disagree with this inaccurate assertion. The suggestion is that the show was running throughout the morning with guests calling in to give opposing views and the guests finally being allowed leeway to “balance” those contrary views at the times indicated. This is blatantly false. As already stated the guests held power over their listeners because:

They were given enough room to air their views without any critical engagement from the host who clearly was in support of this view.

As guests they had a platform which is denied opposing views. One must for the record state that as a caller into the show I was screened and had to state what my view was before being allowed on air. This clearly demonstrates that there is a certain amount of control done by the station to ensure that callers with opposing views do not critically engage guests.

Any caller making a contribution contrary to the views expressed by the guests and the host was subject to a serious backlash by the host before being critically “evaluated” by the “experts” in the panel. This I find totally inconsistent with a “balanced show”

Clearly Khahliso Mochaba has certain facts mixed up. Ms Direko did not generalise about having produced “certain films” that had been canned, but was clear that the particular film under discussion was a project in which she was involved. I challenge Khahliso Mochaba to listen to the recording of the show and verify this. I did not conjure up this statement, the show’s host volunteered it to a listening public!! I therefore dismiss the conclusion that this fact (which is stated incorrectly by Khahliso Mochaba) had nothing to do with the bias and unbalanced nature of the show. It precisely proves that the show was biased and unbalanced. It further demonstrates the host’s state of mind as clearly attested by the guests she chose to bring to the show. The inference is that she was in a combative mood and clearly was an injured party who was hitting back in the manner she chose to.

The entire quotation above is not relevant to this complaint at all. The issue is not whether an unpopular or offensive opinion was expressed on air. Neither is the complaint about whether or not an “*opinion which is based on erroneous assumption or error.*” Was expressed or not. The issue is whether or not in expressing that opinion, 702 as the “watchdog of the public” allowed opposing views to be expressed on the same platform or not. That is what the commission must determine. I believe that any casual; listener to the show will agree with the merits of this complaint.

Again the issue is not about the nature of the views expressed but rather the manner in which they were expressed that is contested. Again this issue is not debated. The complainant absolutely supports the right for the expression of alternate, shocking, offensive views. The nature of our democratic society demands that. However I am totally opposed to a respected broadcaster such as 702 using their resources and clout to do exactly the opposite of what they claim to uphold. The state mandate of 702 is to inform and to give comment that is fair. I believe they did not live up to that creed in this particular instance. I respectfully request that a listening session be held to determine the veracity of my claims.

It is with this that I respectfully and humbly submit that the show in question was biased towards forcing a predetermined viewpoint on the listening public and blatantly unbalanced in all material aspects.”

- [5] The relevant clause of the Broadcasting Code of Conduct applicable to this complaint is 36.1 which is quoted by the Respondent above. The Respondent submitted in its response to the complaint that the issue of the SABC canning films is of public importance as it touches on freedom of expression. The question is whether it is really of public importance.
- [6] The issues that were debated during the hearing have to be clearly distinguished. The one issue related to sexual orientation. This is a matter of public importance. (See *A Prinsloo v SABC (5fm)*, case number 34/2004). But this was not the real issue, as conceded by the complainant. The other was the canning of a film by the Respondent. The real issue before this Tribunal is the one-sidedness in the debate on air, whether the broadcaster was entitled to “can” the film concerned. It appears that the host of the programs and the two guests were in favour of the viewpoint that the film should not have been canned. This, the Complainant alleges, was in contravention of clause 36.1 of the Code because the other viewpoint was not sufficiently canvassed.
- [7] This brings us back to the question whether the decision by the broadcaster to can a film is of public importance. We think not. The decision to can a film might be of interest to the public but it is not of public importance so as to bring it within the ambit of clause 36.1. To find otherwise would make every broadcaster accountable for having failed to broadcast certain material that the public might be interested in viewing or hearing. It is the editorial prerogative of every broadcaster to decide what programs it is going to broadcast and what not. We therefore find that the subject of the canning or not of a film by the broadcaster is not a matter of public importance and that clause 36.1 is not applicable to this case.
- [8] Even if we are not correct in our finding that clause 36.1 is not applicable, the matter of balance in the program should also be decided in the favour

of the Respondent. In phone-in programs, there is always the surprise element when you allow the listeners to air their views. Although the Complainant avers that there was some screening of the callers beforehand and this was not denied by the Respondent, it is not possible for the broadcaster to exercise absolute control over what the caller would say. In this way balance is often achieved by one or more callers who would air views in opposition to what the so-called experts would say. On the Complainant's own admission, he was allowed to air his views on this subject. This was part of the process of attaining balance. It was previously stated by this Tribunal that absolute balance in debates of this nature is not possible. This Tribunal would step in when there is no balance at all, but in the present case this is not applicable.

- [9] To recap: We find that the decision by the broadcaster to can the film concerned might have been of interest to the public, but it was not of public importance so as to bring it within the ambit of clause 36.1 of the Code. Even if it was of public importance, we cannot find that there was such lack of balance that the Respondent contravened the Code.

In the result the complaint is not upheld.

**Henning Viljoen
BCCSA Commissioner**

Chairperson JCW van Rooyen SC, Commissioner Lötter and ad hoc Commissioner Olivier concurred in the judgment