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CASE NUMBER: 08/2015

DATE OF HEARING: 16 APRIL 2015
JUDGMENT RELEASE DATE: 4 MAY 2015

MAHAMED

COMPLAINANT

vs

TALK RADIO 702

RESPONDENT

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
 PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)
 PROF VICTORIA BRONSTEIN
 MS SHAMILA SINGH
 DR LINDA VENTER

FOR THE COMPLAINANT: The complainant was present.

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

Dignity - not legally impaired – right of reply not justified - Mahamed vs Talk Radio 702, Case: 03/2015(BCCSA)

SUMMARY

During a programme the Complainant called in to promote his idea of sexuality and persons who suffer from cerebral palsy. After having explained his view and approach to the matter, the presenter, Dr Eve, answered that she regarded what he did as

incestuous. The Complainant argued that this amounted to an impairment of his dignity and that, in any case, he should have been afforded a right of reply.

It was held that although it was accepted that the Complainant felt injured in his dignity by the remark, the remark fell within the category of legitimate opinion. He was also not entitled to a right of reply, since he had made his position clear initially.

The Complaint was not upheld.

Prof Viljoen filed a minority view, finding that the Code had been contravened.

JUDGMENT

JCW VAN ROOYEN

- [1] A complaint was received from a listener that Dr Eve had, during her show, which essentially deals with sexuality and relationships injured his and his son's dignity by calling the masturbating of his cerebral palsy son of 29 regularly so as to address the son's sexual needs, incestuous. He also complains that thereafter she had not granted him a right of reply to which he was, in his view, entitled to in accordance with the Free-to-Air Broadcasting Code.
- [2] The answer of the Respondent broadcaster was that it is true that the Code protects dignity and grants a right to reply on a matter of public importance, but the test for liability in regard to an impairment of dignity is twofold: firstly whether the Complainant was seriously hurt by what was said and, secondly, whether his reaction was objectively reasonable in the circumstances. In the present matter, the Complainant's reaction is understandable, but not reasonable according to the Respondent. As to the right of reply, the Respondent's view was that Dr Eve's reaction was sympathetic but honest in giving her view on the conduct of the Complainant. The view of the Complainant was also clear and did not need any further discussion.
- [3] In so far as the Complainant said that he was also acting for his son, it is impossible to come to any conclusion on the dignity of the son. Dignity is a very personal matter and, in this case, it would amount to speculation to come to a finding. In any case, if

we have to make a finding in regard to his dignity, the same reasoning would apply as the reasoning hereunder. In any case, no reasonable listener would even have related the answer of Dr Eve to the son. It was the father who was addressed and not the son.

The Complainant says the following:

1. I am a father of a twenty nine year old son who has been diagnosed with severe cerebral palsy, a medical disorder that manifests in a severely physical disability and sever intellectual development disorder (IDD).
2. As a father involved in the daily care of my disabled son I am intricately aware of the physical, mental and sexual needs of my son.
3. Although my son has a low IQ and cannot express himself by any language, my son does express his feelings of pain, joy, sadness, hunger etc. by various sounds, laughter, crying and smiling.
4. In addition to the daily feeding and physical physiotherapy as well as mental stimulation that I provide my son, I am also aware of the sexual feelings of my son, indicated to me by my son's various behavioural means.
5. To provide for the sexual health, sexual wellbeing and sexual therapy of my son I decided to masturbate my son.
6. Masturbation is well documented in medical health journals to provide a good exercise for the heart and body thereby leading to healthy lives as well as sexual health and happiness. Wikipedia notes "Various medical and psychological benefits have been attributed to a healthy attitude toward sexual activity in general and to masturbation in particular....amongst those are a decline in prostate cancer and less depression.

Ultimately the Complainant argues as follows:

"Since my radio interview with Radio 702 (with Redi Thlabi) I have been trying to engage the academia to acknowledge the sexual health rights of persons with severe cerebral palsy and other similar disabilities. My campaign is to try and get qualified, professional physiotherapist to be specifically trained to provide sexual therapy for patients with severe disabilities. My engagement thus far has been unsuccessful with my call being unheeded and ignored. I hope that in the event that the BCCSA finds in my favour it will sanction Radio 702 by allowing me a right of reply in a prearranged discussion program with Dr. Eve. In the event that the first prayer is not possible than Radio 702 air my open letter on the same programming time. In the event that both prayers are not possible than the BCCSA sanction Radio 702 with an appropriate penalty for violating the BCCSA's Constitution."

EVALUATION

[4] Clause 15(1) of the Code provides as follows:

“Broadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest.”

In *Delange v Costa*¹ Smalberger JA stated as follows:

“In order to determine whether the terms of the reply constitute an actionable injuria regard must be had to the relevant factual background against which the exchange of letters took place”.

The court also held that the test for establishing whether *iniuria* was present involved two elements. Firstly the plaintiff’s self-esteem must actually be impaired; and secondly whether a person of ordinary sensibilities would have regarded the conduct as offensive. The said two-pronged test was subsequently affirmed by the Constitutional Court in *Khumalo v Holomisa* where the court held that:

“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 shared by all people as well as the individual reputation of each person built on 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 (emphasis added)”²

In deciding whether or not the statement in question has in fact impaired the complainant’s dignity, the Tribunal, accordingly, does not only judge the matter subjectively from the complainant’s perspective, but also looks at it objectively. This is clearly set out by the Supreme Court of Appeal in *Delange v Costa*³ where it states that:

“In determining whether or not the act complained of is wrongful the Court applies the criterion of reasonableness – the “algemene redelikeidsmaatstaf” (*Marais v Richard en ‘n Ander* 1981 (1) SA 1157 (A) at 1168C). This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (ie the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for injuria. (*Walker v Van Wezel* (supra) at 68.)”

[5] In applying the criterion of reasonableness in the present matter, the Tribunal has to take into consideration the discussion that took place between the complainant and Dr Eve, which clearly sets out the unique circumstances of the complainant and which circumstances Dr Eve expressly acknowledges. Considered within this context, a

¹ 1989 (2) SA 857(A)

² 1989 (2) SA 857(A)

³ 1989 (2) SA 857(A)

reasonable 702 listener would have understood the comment complained of as nothing else than a permissible criticism and not one that impaired another's dignity. Smalberger JA deals with legitimate criticism in *Delange v Costa*:

"There is no such thing as an absolute right not to be criticised. A person must be prepared to tolerate legitimate criticism i e criticism which is fair and honest. Put differently, an act done in the exercise of a right is not a wrongful act, and can therefore not constitute an injuria. Honest criticism is such an act."⁴

[6] Taking the above into consideration, we are of the view that, although we accept that the complainant's self-esteem was impaired, looking at the complaint objectively and taking into account the context in which the statement in question was made, a reasonable 702 listener would have not considered the statement by Dr Eve as having impaired the dignity of the complainant. The Complainant introduced a sensitive matter in his call and he should have been prepared to be criticized for it by an honest answer. Whilst we do not wish to become involved in the debate and decide whether the act of the Complainant with his son is "incestuous", Dr Eve was, most definitely entitled to give her honest view of what she thought of the situation. Dr Eve also did not say that it was incest, but that it was "incestuous", which has a wider meaning than "incest". Although stated within the context of defamation, the following words of Davis AJ (as he then was) in *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C) at 92-3 come to mind:

Were criticism of the kind raised by the defendant in his circular to be considered defamatory, the boundary between a legitimate difference of professional opinion and defamation would be skewed in a manner too heavily against deliberation, transparency and openness. It follows that, in my view, the criticism of the report in the words employed by the defendant does not so attack the reputation of the plaintiff as a valuer so as to be defamatory of him. Professionals disagree, often robustly. Valuers disagree, for such is the nature of the enterprise. A disagreement does not reduce a reputation to be classified inevitably as defamation.

[7] Our conclusion is, accordingly, that within the context, the view expressed by Dr Eve did not, from a legal perspective, amount to iniuria. The words of Dr Eve were directed at the Complainant and not at his son. The son is clearly the ward of the Complainant and the Complainant's approach to the matter was the object of her words. She was accusing his approach to the problem as being "incestuous" and that

⁴ 1989 (2) SA 857(A)

is as far as we can take this case. Of course, incest always has two partners, in the normal course. But that is irrelevant in this case. The accusation was against the Complainant in his approach to his son's condition and not against the son. It was the Complainant's act which was regarded as "incestuous". It could never have been the intention of Dr Eve to have criticized the son, given his condition and obvious dependence on his father. And, in any case, she merely expressed an opinion that his act with his son was of an "incestuous" nature. That is a permissible opinion for the Complainant within the ambit of the constitutional guarantee of freedom of expression and the morally debatable approach of the Complainant to his adult son's sexual needs.

[8] As to the right of reply, we agree with the Respondent that the Complainant has had his opportunity to put his view. In fact, he initiated the subject and received an answer. The intention of the programme was not to get involved in a debate with one caller.

In the result the complaint is not upheld.

My Colleague, Prof Viljoen, has filed a minority judgment, which follows directly upon the main judgment.



**JCW VAN ROOYEN SC
CHAIRPERSON
30 April 2015**

Commissioners Bronstein, Singh and Venter concurred with the judgment of the Chairperson.

Prof HP VILJOEN (Deputy Chairperson)

[9] I respectfully disagree with my learned fellow commissioners on this matter. The facts of this case have been set out in the majority judgment and it is not necessary for me to dwell on them, except in so far as it is necessary for this minority judgment.

Clause 15(1) of the BCCSA Free-to-Air Code of Conduct for Broadcasting Service Licensees states the following:

Broadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest.

[10] The complainant clearly has a genuine concern for the well-being of his severely disabled son of twenty nine years; not only concerning his daily needs of food and shelter and mental well-being, but also concerning his sexual needs. As far as the latter is concerned, he thought it best to help his son by masturbating him. The complainant further seems to be a public spirited person as he gave evidence of his efforts to advocate his ideas on sexual therapy for severely disabled persons.

[11] The facts stated in paragraph [10] above were explained to Dr Eve by the complainant phoning in on the Redi Thlabi Show. The reaction he received from Dr Eve was not exactly what he had expected. The exact wording used by Dr Eve and that was the cause for this complaint, is the following:

"... we do not feel comfortable as a society having a father or a mother masturbate their child whether able bodied or disabled. That is not something that we as a society feel comfortable with, it is called incest and we are kind of feel (sic) that it could be harmful to the child."

The complainant avers that by using the word "incest", the impression was created that he was in an incestuous relationship with his son and because of this his dignity and that of his son had been impaired.

[12] Turning to clause 15(1) of the Code mentioned above, it seems that the complainant forfeited the protection of the Code to his privacy by phoning in and detailing the therapy he administers to his son. However, as far as the protection of his dignity and reputation is concerned, my views differ from those of my fellow commissioners. As stated by the representative of the broadcaster during the hearing, there are two elements regarding dignity to be considered when judging a complaint in terms of clause 15: the one is subjective and the other is objective. As far as the impairment of his dignity was experienced by the complainant, he explained that he sought clarification as to why his act of masturbation could be regarded as incestuous,

alternatively that Dr Eve apologises for giving the impression that there existed an incestuous relationship with his son. This is evidence of his subjective feelings of being branded as the perpetrator of incest and the effect this has on his self esteem.

[13] The other element to be considered is the possible impairment of his dignity, judged objectively. One has to be mindful of the fact that neither Dr Eve, nor we as the Tribunal of the BCCSA are judges in the cause of the relationship between the complainant and his son. The word "incest" was apparently used by Dr Eve without hesitation as if the complainant's situation was a clearcut case of incest. I do not think it is necessary to go into the legal definition of incest because it is not for us to decide whether what the complainant did was committing the crime of incest. The fact remains, however, that incest is a crime in our law.

[14] It is important for purposes of this judgment to note what is generally thought and said about incest. The well-known Wikipedia describes the generally accepted view on incest as follows:

The incest taboo is and has been one of the most widespread of all cultural taboos, both in present and in many past societies.

I think one can safely say that the mere thought or mentioning of incest is repulsive to most civilised people. To be branded a perpetrator of incest would be severely damaging to the reputation of most people in our society.

[15] The instant "finding" by Dr Eve that what the complainant did to his son is called "incest", dealt a severe blow to the reputation of the complainant and I think that, objectively seen, his dignity had been impaired. There was no correction or questioning coming from the presenter of the programme and the suggestion that the complainant was involved in an incestuous relationship with his son probably stuck in the minds of the listeners to the programme.

[16] In my view the broadcaster, in failing to question the remark by Dr Eve and allowing it go unchallenged, impaired the dignity of the complainant and thus contravened clause 15(1) of the Code.

[17] There is another aspect to this case that was not specifically argued before us but which struck me as I again read clause 15(3) of the Code. It is, however, mentioned by the complainant in paragraph 38 of his written complaint where he prays for a finding that his dignity **and that of his son** were impaired. Clause 15(3) reads as follows:

- (3) In the protection of privacy, dignity and reputation special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled.

Although the complainant did not stress this point in his oral argument, I think the fact that special reference is made in the Code to the physically and mentally disabled, must have made the presenter of the programme, and Dr Eve, extra cautious and sensitive to the subject they were dealing with. An incestuous relationship necessarily implies a crime committed by two people and the mere mentioning of the word "incest" must have been damaging to the reputation, not only of the complainant, but also of his son. As far as the latter is concerned, the presenter and Dr Eve must have afforded special weight to the privacy, dignity and reputation of the complainant's son. By implying that he was involved in an incestuous relationship, is evidence that they did not afford such special weight. In my view this substantiates my finding that the broadcaster contravened clause 15 of the Code.

18. As this is a minority judgment I need not say anything about sanction.



PROF HP VILJOEN
DEPUTY CHAIRPERSON