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CASE NUMBER: 10/2015

In the matter between

MAHAMED **APPLICANT**

and

TALK RADIO 702 **RESPONDENT**

Appeal – application for leave to appeal turned down – not likely that Appeal Tribunal would find that the first Tribunal was clearly wrong – Mahamed vs Talk Radio 702, Case No: 10/2015 (BCCSA);

SUMMARY

A Tribunal held that the opinion expressed by a radio presenter, that the Applicant's sexual assistance to his son amounts to "incest", was not in contravention of the Broadcasting Code. It was an opinion expressed in a debate on the subject initiated by the Applicant. The latter has now applied to the Chairman for leave to appeal.

The Chairman held that an Appeal Tribunal was not likely to find that the first Tribunal had been clearly wrong. Although technically incorrect of the presenter to have described the act as incest, this was a mere opinion and, given the existence of a statutory contravention, which the assistance could (objectively) amount to, it was, in any case, in the public interest for the presenter to have cautioned the Applicant.

Thus, in summary:
Firstly, the Applicant had broached a controversial subject on air and has to live with the *bona fide* reaction of Dr Eve; secondly, public interest demanded that Dr Eve be critical of the situation, as clearly follows from the third point; and thirdly, what is more, this kind of sexual conduct could (objectively) fall within section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, depending on whether there was legally permitted consent on the part of the son. Dr Eve's disapproval regarding the sexual act in question was, in other words, also objectively supported by section 5.

Note: Mr Mahamed's bona fides in his endeavours are not doubted.

The conclusion was, accordingly, that the comment fell within the category of protected comment within the ambit of the Constitution of the Republic of South Africa.

The application for leave to appeal was dismissed.

JUDGMENT

JCW VAN ROOYEN SC

[1] In April, the BCCSA Tribunal held that the broadcast on Talk Radio 702, about which Mr Mahamed complained, did not amount to a legally relevant impairment of his or his son's dignity, nor, therefore did it amount to a contravention of the Broadcasting Code.[1] Mr Mahamed has now applied to me for leave to appeal to the Appeal Tribunal of the BCCSA. Although I am no longer the Chairman of the BCCSA, I am seized with this application, since I chaired the Tribunal. The test is whether I am of the view that the Appeal Tribunal is likely to find that the Tribunal's decision was clearly wrong. In exercising this discretion I am led by the rule which Judges apply in these cases: do I, as a Judicial Officer *objectively* believe that there is a reasonable prospect of success on appeal? In this process I must ignore the fact that I, with three colleagues, had come to a certain conclusion in the first hearing. I need only deal with Mr Mahamed's grounds, in the light of the conclusion I arrived at subsequent to reading and considering them. I have not regarded it as necessary to read the response to the application by Radio 702.

[2] In short, the facts are as follows: The Applicant phoned in to a programme broadcast by the Respondent. Dr Eve, who is a well-known adviser on sexuality, was the host, answering calls and giving advice. The Applicant explained to her that his twenty-nine-year-old son suffered from severe cerebral palsy and that he regularly masturbates his son on the basis that disabled people also have sexual needs. He explained that he had, unsuccessfully, attempted to convince two tertiary institutions and "government" that they should also support his argument, but without success. Dr

[1] My colleague, Prof Viljoen, filed a dissenting opinion.

Eve, who had on a previous occasion discussed the matter with the Applicant on air, advised that the latter should rather engage the services of a male sex-worker than be involved in the masturbation himself. She reasoned that the father-son relationship was problematic in such a case, and that it amounted to incest. The Applicant answered that he did not agree with her approach and that he saw no reason why he had to engage the services of a sex-worker. His son saw him in the role of a caregiver, and accordingly the father-son relationship was not involved.

[3] The Applicant filed a complaint with this Commission based on the allegation that not only his own dignity but also that of his son was impaired by the reference to incest. Legally, the said sexual act was, of course, not one of incest, which requires sexual penetration as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The complaint was dismissed on the basis that the Applicant had raised a controversial matter and should then not have been surprised if he was criticised. The reaction of Dr Eve was reasonable in the circumstances. The majority judgment stated that the word that was used was not "incest" but "incestuous". That was incorrect, since the word used was "incest". The main points raised by the Applicant are the following: firstly, the test for *iniuria* was not correctly stated and applied by the Tribunal – he quoted South African case law on the matter as well as United States judgments that have set aside crimes which were too vaguely defined and were subject to arbitrary decision-making. Secondly, the Applicant referred to Canadian judgments that deal with the question of what might be regarded as fair. Thirdly, he argued that the majority (in the Tribunal) incorrectly – as conceded above – misheard the word "incest". Apart from that, he argued that Dr Eve was not honest in her answer; that we were not justified in finding that *iniuria* had not been committed against him and his son; and that there was a bias in favour of Radio 702.

[4] My approach would be to state the law and our finding on the facts, and then to decide whether there is a reasonable prospect that an Appeal Tribunal is likely to conclude that we were clearly wrong.

[5] The Broadcasting Code protects the reputation and dignity of persons unless it is in the public interest to have broadcast the material complained of. It is, of course, true that the sexual relief provided by the Applicant to his son did not amount to incest,

which requires sexual penetration[2] between persons related within certain degrees. However, although the act did not in law amount to incest, it was held that, in this particular case, the Code did not protect his dignity, since the impairment to dignity was not legally unreasonable, given the fact that the Applicant had broached a controversial subject where the kind of reaction that was forthcoming was reasonable, given the nature of the view expressed by him. Dr Eve, not holding herself out as a legal expert, obviously provided her opinion regarding the conduct of the Applicant. Throughout the exchange she was courteous towards the Applicant and there was no evidence that she was motivated by ill-will or, as contended by the Applicant, not honest.

[6] I do not believe that there is a reasonable prospect that an Appeal Tribunal would find that we were clearly wrong by not finding that the word used impaired the dignity of either party in a legally unjustifiable manner. It would not, in my view, matter that we misheard the word as "incestuous." The core of the matter is that the opinion expressed hurt the Applicant, even if the word had been "incestuous." However one describes the sexual conduct, it is – at least from the perspective of Dr Eve – not acceptable. Moreover, as will be explained hereunder, the masturbation could possibly (objectively) amount to a statutory offence which, in my view, is even more problematic than incest, which implies consent.

[7] The question is whether the Applicant is justified in arguing that we applied the law incorrectly. In this regard it should be pointed out that our Constitutional Court has, in the same manner as the US Supreme Court, held legislation and common law to be unconstitutional on several grounds and also on grounds of vagueness. The Applicant's argument as to vagueness, accordingly, states nothing new.[3] The reference to Canadian law is also informative, but what counts is what *our* Constitutional Court has held in this regard. That Court has clearly stated the legal position as to *iniuria*. Brand AJ (writing for the majority) in *Le Roux v Dey (Freedom of Expression Institute & Restorative Justice Centre as Amici Curiae)*[4] stated as follows:

[2] As defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[3] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC).
[4] 2011 (3) SA 274 (CC).

[143]…Broadly stated, the claim for impairment of dignity comprises both a subjective and an objective element. The subjective element requires that the plaintiff must in fact feel insulted. To satisfy the objective element our law requires that a reasonable person would feel insulted by the same conduct.

[144] As to the subjective element, Dr Dey testified that he was deeply hurt by the applicants' conduct; that he felt belittled and humiliated; that in his perception he had lost the image he had worked so hard to achieve as the upholder of values at the school; that in his mind, the majority of the children saw him as a laughing stock; and that he had therefore lost the respect of the schoolchildren which was vital for his continued functioning as a teacher at the school. No one suggests that this evidence should not be believed or that his feelings were not genuine. In this light the subjective element of the dignity claim was clearly established.

[145] As to the objective element I have already found the picture defamatory because in the eyes of the reasonable observer it was likely to make Dr Dey look foolish and ridiculous. By the same token, the reasonable observer would, in my view, also have felt humiliated and belittled if his or her face were to substitute that of Dr Dey. After all, the applicants themselves admitted that they would not like to see their own faces or those of their parents in the same position. And their friend, Ms Griesel, gave the reason: it would humiliate them. (footnotes omitted and italics added)

Since intention (*dolus*) is not a requirement for legal responsibility of the media, I will not include knowledge of unlawfulness (which is the third element, stated by Brand AJ) as a requirement in this judgment. *Dey's* case, of course, did not deal with the liability of the media. In the case of the media negligence suffices.[5] I have no doubt that Dr Eve was not negligent. She expressed an opinion which was not correct in so far as incest is concerned. But it was a genuine opinion, which was, in any case, not far off the mark, given section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 section 5(1), which is discussed hereunder.

[8] Although it dealt with fair comment as a defence to *defamation*, the following passages from the Constitutional Court's judgment in *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)*[6] are particularly appropriate when it comes to a general approach as to freedom of expression and are also relevant for the present matter, especially since the Court ultimately states that fair comment must rather be dubbed "protected comment", which has wider implications than merely being applicable to defamation. Justice Cameron, writing for the majority of the Court, said the following:

[81] Nearly a century ago, in the judgment that firmly authenticated the defence in South African law, Innes CJ remarked that the use of the term 'fair' to describe the defence is 'not very fortunate'. 88 He was right. As he explained, the criticism sought to be protected need not 'commend itself' to the court. Nor need it be 'impartial or well-balanced'. In fact, 'fair' in the defence means merely that the opinion must be one that a fair person, however extreme, might honestly hold, even if the views are 'extravagant, exaggerated, or even prejudiced'. The comment need be fair only in the sense that

[5] *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA).
[6] 2011 (4) SA 191 (CC).

objectively speaking it qualifies 'as an honest, genuine (though possibly exaggerated or prejudiced) expression of opinion relevant to the facts upon which it was based, and not disclosing malice'.

[82] So to dub the defence 'fair comment' is misleading. If, to be protected, comment has to be 'fair', the law would require expressions of opinion on matters of fact to be just, equitable, reasonable, level-headed and balanced. That is not so. An important rationale for the defence of protected or 'fair' comment is to ensure that divergent views are aired in public and subjected to scrutiny and debate. Through open contest, these views may be challenged in argument. By contrast, if views we consider wrong-headed and unacceptable are repressed, they may never be exposed as unpersuasive. Untrammelled debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.

[83] Protected comment need thus not be 'fair or just at all' in any sense in which these terms are commonly understood. Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true. In the succinct words of Innes CJ, the defendant must 'justify the facts; but he need not justify the comment'.

[84] *Perhaps it would be clearer, and helpful in the understanding of the law, if the defence were known rather as 'protected comment'*. A new name would not change the requirements. At common law it was rightly held that 'fairness' in fair comment must draw on the general legal criterion of reasonableness. In our constitutional State, comment on matters of public interest receives protection under the guarantee of freedom of expression. Hence the values and norms of the Constitution determine the boundaries of what is protected. To call the defence 'protected comment' may illuminate the constitutional source and extent of the protection. (footnotes omitted and emphasis added)

[9] Judicial officers are required to evaluate facts and then decide whether the facts fit the law. The Applicant argued that there was a bias in favour of the broadcaster. He did not explain this. If he has based this argument on the mere fact that we decided in favour of the broadcaster, the following words of the Constitutional Court[7] come to mind:

"We also agree with a further observation made by Mason J in the same case that: It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party."

To simply state that there was a bias in favour of the broadcaster is not a ground on which an application for leave to appeal can be allowed: it is not motivated. The mere fact that we decided in favour of the broadcaster cannot, as evidenced by the above cited judgment, be sufficient to justify an allegation of bias. We weighed the facts and came to the conclusion that Dr Eve did not unreasonably impair the dignity of the Applicant or his son. Of course, she was legally wrong that the act was one of incest. Judged as a whole, however, it was within the ambit of the on-air discussion that Dr Eve had with the Applicant, not unreasonable to have referred to the act as incest. Her view was, in any case, also justified by the "public interest" defence, as defined by

[7] *President of the RSA v SARFU* 1999 (4) SA 147 (CC) at para [46].

our Courts.[8] That public interest is most relevant, finds support in section 5(1) of the Criminal Law (Sexual Offence and related matters) Amendment Act 2007, which is discussed hereunder.

[10] There is also another angle from which this case should be approached: one that lends weight to my view that there is no likelihood that an Appeal Tribunal is likely to find in favour of the Applicant. The Legislature has declared the type of act within which the conduct of the Applicant (objectively) falls, to be an offence. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 section 5(1) read with section 1 provides as follows:

"A person ('"A") who unlawfully and intentionally sexually violates a complainant ("B"), without the consent of B, is guilty of the offence of sexual assault."

"Sexual violation" is defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 to include the masturbation of one person by another without his (or her) consent.

Since the Applicant's son is a severely disabled person with a low IQ[9] the question could reasonably arise whether there is not in fact, judged *objectively*, a contravention of the said section 5. Of course, I am not saying that Mr Mahamed had the knowledge of unlawfulness which is required for a conviction. In fact, given his open discussion of the matter, I do not believe that it has even crossed his mind that he may, objectively, be contravening section 5(1). Even if the son were to seemingly to consent to the said act, the question is whether the son's consent would be regarded as *legally* relevant. In fact, given the low IQ of the son, it is highly unlikely that his consent would be valid in law. There is more to consent than mere gratitude expressed by a person who has a low IQ. Thus Mojapelo J (as he then was) said the following in *Christian Lawyers Assoc v Minister of Health (Reproductive Health Alliance as Amicus Curiae)*[10] in regard to what true consent means:

> "The concept is, however, not alien to our common law. It forms the basis of the doctrine of *volenti non fit injuria* that justifies conduct that would otherwise have constituted a delict or crime if it took place without the victim's informed consent. More particularly, day to day invasive medical treatment,

[8] See note 12 hereunder.
[9] As pointed out by Mr Mahamed in his complaint
[10] 2005 (1) SA 509 (T).

which would otherwise have constituted a violation of a patient's right to privacy and personal integrity, is justified and is lawful only because as a requirement of the law, it is performed with the patient's informed consent. See *Van Wyk v Lewis 1924 AD 438 at 451; Castell v De Greef 1994 (4) SA 408 (C) at 425; C v Minister of Correctional Services 1996 (4) SA 292 (T) at 300,* Neethling, Potgieter and Visser *Law of Delict* 3rd ed at 100 - 1; Neethling *Persoonlikheidsreg* 4th ed at 121 - 2. ***It has come to be settled in our law that in this context, the informed consent requirement rests on three independent legs of knowledge, appreciation and consent****."(*emphasis added)

When this test is applied to the facts, the question arises whether the Applicant can be certain that true consent has been forthcoming in this matter. If there is any doubt about that, he would find himself in a legally questionable position in terms of the said Act. The seriousness of the offence that could be involved is accentuated by the fact that the Act places an obligation on anyone who is aware of such an offence to report this to the authorities – see section 54 of the said Act.

[11] I am not convinced that there are reasonable prospects that an Appeal Tribunal is likely to find that the conclusion reached, as expanded above, was clearly wrong: firstly, the Applicant had broached a controversial subject on air and has to live with the *bona fide* reaction of Dr Eve; secondly, public interest demanded that Dr Eve be critical of the situation, as clearly follows from the third point; and thirdly, what is more, this kind of sexual conduct could (objectively) fall within section 5, depending on whether there was true consent or not. Dr Eve's disapproval regarding the sexual act in question is, in other words, also indirectly supported by section 5.

[12] We have, on occasion, accepted complaints on behalf of children who are afflicted by cerebral palsy and there is no reason why we should not accept a complaint on behalf of an adult who suffers from the same condition.[11] However, Dr Eve's observation was not directed at the son – that is so, in spite of the fact that incest is an offence where two parties are involved. The criticism was directed at the Applicant as parent or, in the words of the Applicant, as caregiver. In any case, it was in the public interest[12] for the broadcast to be severely critical of the Applicant's approach,

[11] *New Hope School & Others v Jacaranda 94.2* (case 5/2012); taking into consideration that clause 15(3) of the Code provides the following: (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. This special weight was considered, but in the light of the conclusion which I have reached that the word complained of was said without knowledge of unlawfulness, it was not pursued.

[12] See *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) Corbett CJ said in delivering the majority judgment (at 464C-D): "(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known . . .(2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest..." Quoted with approval by Hoexter JA in *Neethling v Du Preez; Neethling v The Weekly*

especially in the light of what section 5, as quoted above, prohibits. Once again, I should state that there is no doubt that the Applicant was *bona fide* in his endeavour.

[13] Regarding the right of reply: the Complainant had a reasonable opportunity, within the ambit of this kind of programme, to discuss the matter, and Dr Eve was entitled to her view. Both had an opportunity to put their view and, given the nature of a call-in programme, there was no obligation on part of the broadcaster to grant the Applicant more time. He had put his case as well as he could within the ambit of the programme. Dr Eve's advice[13] that the services of a sex-worker should rather be considered was offered as an alternative to the approach of the Applicant – an approach with which he did not agree. The Applicant was granted a reasonable opportunity to explain why the proposed solution was inappropriate in the case of his son. The son regarded his father as a caregiver, according to the Applicant. I should mention that, in the light of what has been said about section 5, the proposal regarding the sex worker might also (objectively) amount to an offence. So that is also not a genuine solution.

[14] I have, in the light of what I have said above, come to the conclusion that there is no reasonable prospect that an Appeal Tribunal is likely to come to the conclusion that the first Tribunal was clearly wrong in its finding. What amounts to a defence in Dr Eve's case, also amounts to a defence for the broadcaster.

The application is dismissed.

J. e. s. van Reenen

Mail 1994 (1) SA 708 (A) at 779 and Hefer JA in *National Media Ltd v Bogoshi & Others 1998(4) SA 1196(SCA) at 1212* where reference is made to Asser *Handleiding tot de Beoefening van het Needelands Burgerlijk Recht (9th Ed vol III at 224 para 238:* "Een belangrijke grond ter rechtvaardiging van de uitlatingen, waarop in zaken van aantasting van eer en goede naam veelvuldig een beroep wordt gedaan, is het algemeen belang. . . . In de praktijk wordt zij vooral ingeroepen ter zake van uitlatingen die via de pers en radio en televisie worden verspreid: het algemeen belang is hier uiteraard gelegen in de, door Grondwet en verdragen gewaarborgde, vrijheid van meningsuiting die de pers in staat stelt al dan niet *vermeende misstanden aan de kaak te stellen*. Met name - doch niet alléén - in deze gevallen berust het oordeel omtrent de onrechtmatigheid op een afweging van belangen, waarvan de uitkomst afhankelijk is van alle omstandigheden van het geval."(italics added)Translated the Dutch words mean:"In practice the public interest is especially employed in matters concerning views expressed via die printed media and television: public interest is, within this context, based on freedom of expression, as guaranteed by the Constitution and by treaties, to expose alleged abuse (and or evil in society).In deciding whether the defence of public interest was lawful usually depends on a balancing of interests – the outcome of which is dependent on the facts of each case.

[13] Which is, of course, also legally questionable in the light of the quoted section 5.

JCW VAN ROOYEN SC

CHAIRPERSON OF THE FIRST TRIBUNAL

22 June 2015