



P.O.Box 412365 • Craighall • Tel (011) 325-5755 • Fax (011) 325-5736 • e-mail: bccsa@nabsa.co.za
No 2 Albury Park • Magalieszicht Ave • Dunkeld West • 2196 • www.bccsa.co.za

CASE NUMBER: 24/2010

DATE OF HEARING: 01 OCTOBER 2010

S NAIDOO

COMPLAINANT

vs

94.7 HIGHVELD STEREO

RESPONDENT

TRIBUNAL: **PROF JCW VAN ROOYEN SC (CHAIRPERSON)**
 PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)
 MR BRIAN MAKEKETA
 MR ROBIN SEWLAL

Complainant: **The Complainant did not attend.**

Respondent: **Ms Khahliso Mochaba, Human Capital & Regulatory Affairs
Manager of Primedia (Proprietary) Limited.**

Hate speech – broadcast insert with comedian including the repetitive use of “coolie” – the use of which is found to amount to hate speech – which, in this instance is not saved by the dramatic quality of the insert – serious invasion of dignity trumping satire. Naidoo vs 94.7 Highveld Stereo, Case No: 24/2010(BCTSA)

SUMMARY

A broadcast by the Respondent included a satirical sketch by a stand- up comedian with an audience. The sketch included jokes which included the term “coolie”. The Tribunal held that the word “coolie”, given its historical apartheid context, amounted to a serious invasion of dignity by way of hate speech based on race and that this result trumped the dramatic value of the insert. The Tribunal stated that the *broadcast* of the word “coolie” flies in the face of Constitutional values of dignity

and equality. The satire, although quite splendid, cannot trump these values.

Observation: No view is expressed as to the CD or DVD, which falls under the Films and Publications Act. Different considerations, in any case, apply there. Public entertainment does not fall under the Films and Publications Act and, once again, the milieu is totally different from a broadcast.

The complaint was upheld and the Broadcaster reprimanded. The Broadcaster was cautioned that if a similar broadcast were to take place in future, this contravention would be taken into consideration in deciding on a sanction, which could include a fine.

JUDGMENT

JCW VAN ROOYEN

[1] The Registrar received a complaint from Mr. S Naidoo about the broadcast of an insert in which Riyad Moosa, a comedian, repeatedly used the word “coolie” in referring to the manner in which some people refer to Indians. I referred the matter to a Tribunal of the Commission.

[2] The complaint reads as follows:

“I refer to Alex Jay’s morning comedy on the 16/08/2010 at approximately 10:15. Riyad Moosa was the featured comedian. Mr Jay played a snippet of one of his comedy stints. In this particular stint he used the word "coolie". This is a derogatory word that belittles Indians in South Africa. It is used in a context exactly to that of the word "Kaffir". It has exactly the same negative connotations based on years of history. These words in definition are fairly innocuous with “Kaffir” meaning non-believer and “Coolie” meaning Eastern porter, but not so within the South African context.

This comedy act like many other acts uses derogatory words and is treated as “funny” (which most of them are), BUT for private events or in the confines of a comedy club or same sorts in which people are expecting this type of humour. This is certainly NOT for public consumption. People that say it's only a joke or he's just joking or "Please be advised that there is a parental guidance here" are not the brunt of this demeaning term and are ignorant, uncompassionate or just plain arrogant. This just fuels the speculation by many that certain individuals have yet to accept wrongs committed in this country's history.

I can only imagine people, particularly Indians, sitting in open plan offices (such as my wife) and having to listen to this publicly offensive material with work colleagues sniggering and laughing around the corner or next cubicle. Just as in the United States or any other civilized country, material that mentions "nigger" or "kike" etc. would not be used or aired for that matter. Comedians are known to use words depicting their OWN

ethnicity in a derogatory fashion and this has been deemed as acceptable, yet again, for PRIVATE CONSUMPTION. David Kau himself uses racist terminology in his stand-up. What makes Mr Jay (The Legend) immune to take that right of dignity for individuals away?

I had immense respect for Mr Jay until this moment. I would pose a question to him and all the staff of Highveld and others around the country: Would he or a stint played on public TV/radio use the word "Kaffir" or have a comedian say it on air. I doubt it, since the word is always alluded to as "The K word" by black and white alike on 94.7 especially. I feel that the inherent conservative, docile nature of Indians make them ripe for the picking for the likes of My Jay and Co. To make it out of the social indecencies in this country we need to CONSIDER yet leave the past behind, yet "small", "innocent" events like this cause considerable (and sometimes irreparable) damage to reconciliation and acceptance."

[3] 94.7 Highveld responded as follows (response shortened)

1. "94.7 Highveld Stereo has received a complaint about use of a term "coolie" by Riyad Moosa" an Indian comedian in one of his comedy stints. The comedy stint was broadcast on the station.
2. The office of the Registrar at the BCCSA has directed 94.7 Highveld Stereo to address the complaint in terms of clauses 16.3(c) of the BCCSA Code of Conduct ("the Code") – the hate speech clause.
3. 94.7 Highveld Stereo is of the firm view that context is of paramount importance when judging speech. Consequently, the station respectfully submits that even where an undesirable term has been used, it is important that the term be looked at in context. In this regard, the station submits that in assessing the complaint and the use of the term coolie in relation to the present complaint, the entire comedy stint has to be looked at. While it is acknowledged that the comedian uses the term "coolie", he then provides the history of the term coolie "*derogatory term used for Indians in South Africa – they used to use the word all the time...*" The station respectfully submits that the term as used in the comedy stint did not constitute hate speech. The submission finds support in the analysis of the provisions of clause 16.3 of the Code which follows below.

[4] The Complainant replied as follows:

"Would the word "Kaffir" be used on 94.7 Highveld Stereo in the same light" If not, why not. The word "coolie" is on the same parallel as the word Kaffir. Why have other highveld DJ's (namely Jeremy Mansfield) been disciplined and suspended previously for using the word Kaffir as that was also their own opinions and expressions and not eliciting hate speech. As I said, this material is NOT for public consumption. Making people feel out of place in this country is what landed us in this political and socio-political turmoil at present and acts such as these are propagating the effect and nurchering an environment of ethno-prejudice and hatred. If the word "Kaffir" is not looked at at being politically correct to be publicly broadcast in any respect then the same should be for the word "coolie" and others like it, regardless of the speaker or source. Highveld Stereo, especially Alex Jay, need to apologize for this broadcast and refrain from any like it in the future. The docile nature of blacks, Indians et al in this country make for ripe picking for

the media bullies such as Highveld and Alex Jay who hide behind technicalities and procedures written to PROTECT the people of this country.

Evaluation

- [5] Clause 16.3(c) of the Broadcasting Code prohibits the broadcasting of the advocacy of hatred based on race that constitutes incitement to cause harm. Apartheid led to an abominable categorization of human beings into classes where White was regarded as supreme and Black, Indian and Coloured were regarded as signifying the races which would serve the Whites and never be equal to Whites. This led to legislation which ensured that Blacks, Indians and Coloureds would not have a vote and not be in Parliament. The political voice of Blacks, Indians and Coloureds was censored out and men and women who dared to challenge the régime were often incarcerated without a trial. One of the results of Apartheid was that derogatory terms were used in referring to Blacks, Indians and Coloureds. Although the term “coolie” would seem to have not been used in India in a derogatory manner but as describing persons who did some manual work, the word “Coolie” gained a derogatory meaning in Apartheid South Africa.
- [6] As a result of this history the BCCSA has, over the years, only found the use of racially derogatory terms in regards to Blacks, Indians and Coloureds to have been permissible where the use was justified by the newsworthy nature of the use of the words. In dealing with these complaints, the decision of the European Court of Human Rights in *Jersild v Denmark*¹ is particularly relevant. Section 39 of the Constitution of the Republic of South Africa permits this Tribunal to consider foreign law. Of course, when referring to such a matter, one may never simply ignore the difference in the social environment in Denmark and South Africa. Yet, the principles enunciated by the Court are of particular importance. The facts before the European Court concerned a Danish journalist working for a respected television news programme. He reported on a group of extremist youths who had made racist comments during the programme and boasted about their crimes against (especially Black) immigrants, whom they described in despicable hate

¹ (1994) 19 EHRR 1.

speech; also that Denmark was for Danes and not for these immigrants. The youths, the journalist and the news chief were prosecuted and convicted in Denmark. On appeal, the European Court of Human Rights ruled that the Danish limits imposed on the media violated Article 10 of the European Convention, which protects freedom of expression. In this regard, it was stressed that the news item was not intended to engender racist views, but to expand on an issue that was already of considerable public interest.

Clause 17 of the Broadcasting Code exempts the following from clause 16.3(c)'s hate speech provision:

- (i) *a bona fide* scientific, documentary, dramatic, artistic, or religious broadcast, which judged within context, is of such nature;
- (ii) broadcasts which amount to discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or
- (iii) broadcasts which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.

[7] The word “Coolie” in its derogatory form, was deeply imbedded in Apartheid South Africa. Many Whites readily referred to Indians as Coolies and thereby relegated them to the sphere of unwanted, third grade South Africans. The mere use of the word has an all-encompassing derogatory tone to it and, even the mere mention of it, within the South African context, advocates and thus projects the idea of hatred based on race. It incites to harm in the sense that at least psychologically it debases and thus harms the Indian section of the South African community. The Constitutional Court has, in several of its judgments, accentuated the need for the protection of minority groups. Although the Indian section of the South African community is quite large, it is a minority which is entitled to special protection. Compare *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *Prince v President Cape Law Society, and Others* 2002 (2) SA 794 (CC) at par [112] where the majority states:

“The fact that they are a very small group within the larger South African community [the Court was referring to members of the Rastafarian religion] is no reason to deprive them of the protection to which they are entitled under the Bill of Rights. On the contrary their vulnerability as a small and marginalised group means that the Bill of Rights has particular significance for them. The interest protected [in that case

by s 15(1) and s 31 of the Constitution] is ‘not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity’.”

- [8] I have referred to these judgments, not to equate the Indian community with any marginalised group, which it is not, but to accentuate the importance of the recognition of diversity and the protection of a minority in the pursuit of national unity and reconciliation. We thus conclude that the repeated use of the word “coolie” in the insert amounted to hate speech as defined in clause 16.3(c) of the Broadcasting Code. We have, of course, taken into consideration that the intention of the use, in this case, was not to harm but in fact to elicit laughter, which was evidenced by the laughter of the audience.
- [9] The next question is whether the dramatic context within which the words were used exempts the use from clause 16.3(c). The insert is taken over from a show (on a recently released DVD) where the said comedian, with applause and laughter, was using the word “coolie”. He started off by referring to people from Pakistan as “Paki’s” and then compared that to the use of “coolie” and stated that, although the word was no longer used in South Africa where he comes from, people might still be referring to him as a “coolie” when he leaves their company. In fact, the audience might, afterwards, be referring to him as a funny “coolie” comedian. The audience in the insert reacted by laughing loudly at every sentence where the comedian used the word “coolie”. So, the show must have been very successful. Even when he supposedly quoted a man with a typical sophisticated English accent: “These bloody coolies, they have so many wives...completely unacceptable by Western standards, as I was saying to my mistress!” The audience roared with laughter.
- [10] I have no doubt that the word “coolie” gave life to the part of the show which was broadcast. There is also no doubt that Riyad Moosa is a very successful comedian and is prepared to laugh at himself. The context also indicates that the jokes were intended to draw laughter and not to denigrate. Of course, even the foulest words could, if used within the context of a show such as the one under consideration, draw laughter. This would include any of the seven words which,

famously, were declared to be impermissible for radio by the US Supreme Court.² The core question is, however, whether the satire can save the broadcast, which reaches a general audience. I have no doubt that the show itself was not problematic from a legal perspective. An audience chooses to see a comedian and must, generally, accept his humour. Stand- up comedians are known to test the waters and this is a risk which audiences take. In the case of a broadcast, however, one deals with the airwaves which are public property (*res publicae*) and where, a listener, has no warning of the impending calumnious language, whatever the context.

[11] The right to artistic expression is part of the right to freedom of expression. The right to dramatic freedom is included in the right to artistic freedom. The BCCSA has often had the opportunity to balance this right against other rights. Against the backdrop of the apartheid oppression of artistic expression, the BCCSA has taken steps to dramatically develop that right into a right where adults would be trusted to take informed decisions on what they choose to view. However, certain limits to this freedom exist. The German *Grundgesetz* grants an absolute protection to art. However, special weight is afforded to the protection of dignity, the serious invasion of which negates or overrides considerations as to artistic merit in hate speech cases. Compare the *Anachronistische Zug* judgment of the German Constitutional Court.³ The word “coolie” represents one of the elements of apartheid which degraded a whole section of already oppressed people. It made them, legally, second rate. People who had, by apartheid legislation, been brought under inhuman laws, the contravention of which could lead to incarceration, not to even mention detention without trial.

[12] Fortunately we now have a new democratic dispensation where equality and dignity are guaranteed by the Constitution of the Republic of South Africa. The *broadcast* of the word “coolie” flies in the face of Constitutional values of dignity and equality. This is so even where people genuinely laugh at the use within the context

² *FCC v Pacifica Foundation* 98 SCt 3026.

³ BVerGe 67,213 at 228.

of a show, which is not on air. The present satire, although quite splendid, cannot trump these core values of dignity and respect, even within the context of satire. There will probably be exceptions, even in broadcasts, but the facts before us do not justify such an exception. Obviously, no view is expressed as to a CD or DVD, which falls under the Films and Publications Act. Different considerations apply there. Public entertainment does not fall under the Films and Publications Act and, once again, the milieu is totally different from a broadcast.

[13] We have requested the parties in the matter to provide us with argument as to sanction. The complainant demands an apology. The Respondent argues that the circumstances do not justify a fine. The Constitution of the BCCSA does not provide for an apology as one of the sanctions. It does provide that the BCCSA may direct the broadcaster to publish the essence of its judgment. We do not think that it would be in the public interest to, once again, repeat the word “coolie” – a word without which the summary of the judgment would be senseless. Such a broadcast is, accordingly, not ordered. Although we regard the contravention as a serious one, we have come to the conclusion that, in the circumstances, the broadcaster was not inspired by malice nor was it grossly negligent in broadcasting the insert. If we had found malice or gross negligence to have been present, we would have considered a high fine, such as R30 000. Of course, the presence of malice or gross negligence is not necessarily a pre-condition for a fine. Each case will be judged on its own facts. If this kind of broadcast takes place again and a contravention is found to have taken place, the present finding against the broadcaster will be taken into consideration when it gets to sanction. A reprimand would, however, suffice in the present matter.



**JCW VAN ROOYEN SC
CHAIRPERSON**

Commissioners Viljoen, Makeketa and Sewlal concurred in the above judgment of the Chairperson.