

SUBMISSIONS

by

Talk Radio 702 and 94.7 Highveld Stereo

to the

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

**In respect of its public hearing relating to the Forum of Black
Journalists and the issue of exclusive organisations**

INTRODUCTION

1. On Friday 22 February 2008, Ms Katy Katopodis, the News Editor of Talk Radio 702 and 94.7 Highveld Stereo lodged a complaint with the HRC. This complaint was lodged on behalf of the said Radio stations. Ms Katopodis submitted that the refusal by the Forum of Black Journalists (FBJ) to allow White journalists to attend a lunch which had been scheduled with ANC President Mr Jacob Zuma was based on racism and that such exclusion went against the spirit of our Constitution. She added that whilst she had no objection to the existence of such an organisation, the organisers appeared to have chosen “this high profile event to make a political statement on racial grounds”.
2. On Monday 25 February 2008 a complaint was directed to the South African Human Rights Commission (HRC) by Messrs Y Abramjee and K Kammies. Both Messrs Abramjee and Kammies are journalists employed at Talk Radio 702 (Radio 702), the former as Group Head News and Talk Programming and the latter as a talk-show host. The complaint was lodged in their personal capacities.
3. The nub of the above complaints is that Messrs Abramjee and Kammies were referred to as “coconuts” by various attendees present at a meeting of the FBJ on Friday 22 February 2008. Messrs Abramjee and Kammies regard the use of the word “coconuts” in the context in which it occurred to suggest that they are Black persons on the outside only but are White on the

inside. They regard such term to be insulting and discriminatory. In their complaint they add that the term “was clearly used in a racial context and this is totally unacceptable and is meant to demean”.

4. Although two separate complaints were lodged, Messrs Abramjee and Kammies aligned themselves with the complaint lodged by Ms Katopodis and *vice versa*. Accordingly, this submission is made jointly by all the complainants.
5. In this submission, we have refrained from quoting from legal textbooks or from case law except where, in order to make a point clearly, it is unavoidable to do so.

THE FACTS

6. The ANC President, Mr Jacob Zuma, was invited to lunch by the FBJ, on 22 February 2008. A discussion was to have been held between Mr Zuma and the FBJ. Although we are not aware if a formal agenda was prepared, we believe that one of the reasons for the meeting could have been to canvass current developments within South African politics. As such, and given Mr Zuma's position as President of the ANC and the announcement by the ANC that he is their candidate for the presidency of the Republic of South Africa, the meeting was clearly to discuss matters of national, if not international, interest.

7. On 21 February 2008, one of Talk Radio 702's journalists, Mr Stephen Grootes, enquired of the Chairperson of the FBJ, Mr Abbey Makoe, whether he could attend the lunch. Makoe informed him that he could not since the lunch was for Black journalists only. Grootes asked whether he could attend as an observer and not as a participant but Makoe declined this request as well.
8. On 21 February 2008 Mr David O'Sullivan of Radio 702 asked Makoe on air if he could attend the lunch. Makoe declined the request. Although Makoe was driven to admit that this was because O'Sullivan was White, Makoe added that the matter was not simply a race issue since there were "other factors" that were relevant. Makoe did not elaborate on these other factors.
9. Also on 21 February 2008, Abramjee telephoned Makoe to enquire about the persons who would be eligible to attend the lunch. Makoe informed him that Indians were also allowed to attend because they are regarded as previously disadvantaged "You are most welcome my brother." During this conversation, Makoe explained at length the thinking behind why White journalists were excluded.
10. On 22 February 2008 Mr John Robbie of Talk Radio 702 interviewed Makoe, who confirmed that the FBJ was for Black journalists only as was the lunch scheduled with Mr Zuma.
11. The lunch was attended by Abramjee, Kammies, Udo Carelse and also by Talk Radio 702 journalists, Sheldon Morais and Nomsa Maseko, all of whom

fall under the generic description of Black persons. Grootes also attended but, within a short while of his presence becoming known, was asked to leave the lunch by Makoe on the basis that he was not welcome (presumably because he is White). Two other White journalists from other media organisations were also asked to leave the venue in which the lunch was being held.

12. At the outset Abramjee introduced himself and stated that:-

- 12.1. they had no objection to the existence of the FBJ *per se*;
- 12.2. they did, however, have a problem with White journalists being excluded from the lunch purely on the basis of their colour;
- 12.3. this amounted to racial discrimination and was inconsistent with the Constitution of the Republic of South Africa; and
- 12.4. the meeting should therefore be open to all journalists, regardless of race.

13. There was some heckling in response to Abramjee's and Kammies's comments, with a journalist from the SABC (whose identity is unknown) stating that Abramjee was wrong and that Indians and Coloureds (being a reference to Abramjee and Kammies respectively) should also be excluded from the lunch. Kammies then addressed the gathering, raising his objection to the Black journalists only meeting and Abramjee, Kammies and Maseko

then decided to leave the room in protest. We learnt that shortly after they left, they were referred to as “coconuts”. According to Morais the person who used this description was one Mr Jon Qwelane who used the term a number of times. The use of the word “coconut” was also confirmed in a report in and also according to The Citizen newspaper, on Monday 25 February 2008.

14. The above events led to the relevant complaints being filed with the HRC.

THE CONSTITUTION

15. In terms of Section 1 of Chapter 1, the Constitution proclaims that the Republic of South Africa is founded on several core values, including "human dignity, the achievement of equality and the advancement of human rights and freedoms, as well as the values of non-racialism and non-sexism".

16. Section 9 of Chapter 2 is the Equality clause. Amongst other things, it provides that:-

16.1. everyone is equal before the law;

16.2. equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken;

- 16.3. the State may not unfairly discriminate directly or indirectly against anyone on certain grounds, including race;
- 16.4. no person may unfairly discriminate, directly or indirectly, against anyone on one or more grounds including race. National legislation must be enacted to prevent or prohibit unfair discrimination (Section 9(4));
- 16.5. discrimination on the basis of, amongst other things, race "is unfair unless it is established that the discrimination is fair."
17. Section 10 provides that everyone has inherent dignity and the right to have that dignity respected and protected.
18. Section 16 provides for the right of freedom of expression. Whilst it allows everyone the right to freedom of expression, such right does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.
19. Section 18 of the Constitution entrenches the right of everyone to freedom of association.
20. Section 36 contains a mechanism for the limitation of the rights contained in the Bill of Rights. Limitations may only be in terms of laws of general application "to the extent that the limitation is reasonable and justifiable in an

open and democratic society based on human dignity, equality and freedom...."

21. The legislation promulgated pursuant to Section 9(4) of the Constitution is the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 ("the Equality Act"). The following sections of this Act are relevant:-

21.1. Section 6, which provides that neither the State nor any person may unfairly discriminate against any person;

21.2. Section 7, which prohibits unfair discrimination by one person against another on the ground of race. This section prohibits, amongst other things, a person engaging in any activity which is intended to promote, or has the effect of promoting, exclusivity based on race, as well as the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;

21.3. Section 10, which prohibits hate speech based on, amongst other things, race, where such speech could reasonably be construed to demonstrate a clear intention to be hurtful, harmful, to incite harm or to promote or propagate hatred;

21.4. Section 13 refers to the burden of proof in instances where a *prima facie* case of discrimination is established;

- 21.5. Section 14 deals with the determination of fairness or unfairness insofar as discrimination is concerned. It provides that it would not be unfair discrimination where measures are designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination.
22. South Africa has ratified the International Convention on the Elimination of All Forms of Racial Discrimination. We do not intend to deal in any detail with this Convention. It is generally known that this Convention seeks to enjoin countries to take measures to eliminate all forms of racial discrimination.
23. In making these submissions, we are mindful of the fact that the HRC is not a court of law. As such, we do not see the HRC as adjudicating a legal dispute between the complainants on the one hand and the FBJ (or any of its members) on the other. We acknowledge that the Equality Act has its own enforcement mechanisms. However we have made reference to the Constitution, the Equality Act as well as the said International Convention so as to provide the necessary context and framework which we submit is relevant to your investigation and to the examination of the validity of our complaint.
24. We submit that it is clear, from a proper consideration of the Constitution, the Equality Act and the above Covenant, that all persons in South Africa, whether natural or legal (including an association of persons) must conduct

themselves, including organizing themselves, on the basis that they do not discriminate against anyone on the basis of race and that if they do discriminate on the basis of race, they ought to be able to justify such discrimination on the basis that it is fair. There is much legal authority on the topic which the HRC will no doubt have regard to. We will not deal with such authority in any detail.

25. In essence, what we are saying is that an association such as the FBJ, which limits its membership on a racial basis, and which excludes persons from any of its activities on a racial basis, has to be able to justify such exclusion since discrimination on the basis of race "is unfair unless it is established that the discrimination is fair" (Section 9(5) of the Constitution). Any derogation from the non-racialism espoused by the Constitution has to be justified by *inter-alia* the objective thereof and must be limited in extent. We appreciate that in order to redress the inequalities of the past, which past was categorized by racial discrimination and exploitation, it is necessary, at this stage of our democracy, to introduce measures to combat the legacies left by racial discrimination and racial exploitation. In this regard, we fully support affirmative action and other corrective and empowerment policies introduced by the State and also by other sectors of civil society which, although operating to create advantages and opportunities for Black persons only, are nevertheless specifically envisaged in our Constitution and the Equality Act. Accordingly, we do not in this submission address the question as to whether the FBJ can justifiably limit its membership to Black persons only. This is for the FBJ to do. In this regard, Section 14 of the Equality Act refers to various criteria and factors

which both the HRC and the FBJ should have regard to in connection with this enquiry. Without in any way limiting the matters which have to be considered, we draw attention to the following:-

- 25.1. There can be little doubt that the effects of the discriminatory policies of the past still reverberate within every trade, profession, calling or career, including journalism.
- 25.2. Black journalists could well still be facing challenges in the industry which their White counterparts do not face and it might be necessary to have measures specifically directed at alleviating the challenges faced by Black journalists.
- 25.3. However, the question which has to be posed is whether only Black journalists can advance their cause or whether such cause can be advanced by *any* journalist – who is committed to the achievement of equality and is committed to the elimination of such vestiges as remain of the discriminatory policies of the past, notwithstanding his/her race or ethnic or cultural origin. The question is rhetorical and the answer, it seems, is obvious. For example, should Justice Albie Sachs, the late Joe Slovo or Advocate George Bizos have been journalists, would they too – despite their beliefs and ideals – have been excluded from the FBJ simply because they are White? It does not follow axiomatically that every Black journalist necessarily espouses the foundational values of our Constitution, including the values of non-racism, non-sexism, the achievement of

equality and the advancement of human rights and freedoms etc and that every White journalist is, by virtue of his/her race alone, opposed to the achievement of such ideals. Accordingly, it would appear that the exclusion of persons on the basis of race alone, might well be arbitrary and unjustifiable.

25.4. Having said that, we raise only the more obvious matters that come to mind and do not thereby wish to pre-empt such finding as the HRC might make or such submissions as the FBJ might submit.

26. There has been talk in the media about the existence of organizations such as the Black Lawyers Association (BLA) and The Foundation of African Business and Consumer Services (Fabcos). It has been suggested that these organizations cater exclusively for Black persons and that on this basis, there should be no objection to the existence of the FBJ. Reiterating what we have said in paragraph 25.3 above, we point out that although both these organizations are directed towards the upliftment of only their Black constituents, they do not limit membership on the basis of race. A White person is therefore free to join these organizations provided that he/she subscribes to the objectives of assisting Black lawyers and Black businesspersons respectively. We understand that the FBJ limits its membership only to Black journalists. The comparison between these organizations is therefore inaccurate.

27. Whether or not the HRC will find that the FBJ is entitled to restrict its membership to Black journalists only, we submit that it is absolutely clear

that White journalists were directly and unfairly discriminated against by the FBJ when they were either excluded from the lunch with Mr Zuma from the outset or when those White journalists who decided to attend the lunch with Mr Zuma were effectively marched out of the venue. In this regard:-

- 27.1. according to the FBJ, the function was not for members only but was open to all Black journalists, whether members or not (we do not here make any comment on whether a members-only lunch would pass constitutional muster);
- 27.2. White journalists were excluded purely on the basis of their colour and not on the basis of any objective and justifiable criteria;
- 27.3. Mr Zuma is a public figure both nationally and internationally. What he has to say is of relevance to all journalists – irrespective of race, even if it is off the record;
- 27.4. in the absence of any cogent explanation as to why White journalists were kept out of the lunch, the only inference we can draw is that such exclusion was arbitrary, irrational and discriminatory. Such conduct therefore violates the foundational values of our Constitution as well as the rights contained in Sections 9 and 10 of the Constitution. Furthermore, such conduct is prohibited by Sections 6, 7 and 12 of the Equality Act. In our view, such conduct constitutes unfair discrimination on the basis contemplated in the Equality Act.

28. As for the label "coconuts", reportedly used by Qwelane, it is relevant to point out the following:-

28.1. the label is discriminatory, harmful, hurtful, derogatory and an attack on the dignity of Abramjee and Kammies, the label being used for such purpose and to such effect;

28.2. the label is not a benign reference to perceived differences between White and Black people. Instead, it is a malignant reference. The underlying proposition is that a person who is Black in appearance – and therefore part of the formerly disenfranchised and disempowered, now supposedly seeking equality and espousing a human rights culture – is White on the inside, supposedly representing the beneficiary of apartheid policies, espousing racism, sexism, etc. The label is derogatory of both White and Black persons;

28.3. neither the FBJ, the attendees at its lunch nor Qwelane has apologised for the use of this racist and derogatory label thereby associating themselves with it. In fact; Qwelane has reportedly and repeatedly publicly stated that he will not apologise for using the label;

28.4. the use of such label violates the foundational values of the Constitution as also the rights of Abramjee and Kammies

entrenched in Sections 9, 10 and 16 of the Constitution (Section 16 having been violated since the use of the label was a response to the views expressed by Abramjee and Kammies that the lunch ought not to be racially exclusive).

29. There are 3 further questions which need to be considered, namely:-
 - 29.1. whether the FBJ can justify its Blacks-only membership policy on the basis that it has the right to freedom of association as envisaged in Section 18 of the Constitution;
 - 29.2. whether it had the right to exclude or expel White journalists from the lunch on the basis of its right to freedom of association; and
 - 29.3. whether the use of the term "coconuts" is an exercise of freedom of expression, as envisaged in Section 16 of the Constitution.
30. Without going into a legal discourse on the matter, we submit that the Constitution requires a balancing of the various rights contained therein, as has been explained by our courts. Clearly no rights exist in isolation and in absolute terms. Rights have limitations which are sometimes in-built (as does Section 9) or they may be subject to the general limitations clause (Section 36). Moreover, the exercise of rights is often attenuated by countervailing rights. Even a cursory reading of the Constitution, of the Equality Act and of the Convention referred to above will lead one to the conclusion that the right to freedom of association or of freedom of

expression cannot be exercised in a manner that is unfairly discriminatory. The exclusion of White journalists purely on the basis of the colour of their skin is unfairly discriminatory as has been indicated above. The use of the term "coconuts" is similarly unfairly discriminatory and furthermore, would constitute a violation of Section 16(2)(c) of the Constitution in that the use of such term advocates hatred based on race and constitutes incitement to cause harm. Therefore, we can see no conceivable basis on which the conduct of the FBJ is justifiable either on the basis of Section 16 or on the basis of Section 18.

31. This submission contains the gravamen of our views and is not exhaustive of such views. We would be happy to expand upon this submission during this hearing should it become necessary to do so.

32. Talk Radio 702 and 94.7 Highveld Stereo are committed to the founding values of our Constitution and to the promotion of human rights. We will use the medium of radio to promote such values and rights. If any person or body in South Africa acts contrary to such values, we see it as our duty to expose such conduct.

33. Thank you for the opportunity of making this submission.