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CASE NUMBER: 11/2004

DATE OF HEARING: 08 APRIL 2004

L HARRIS, C ALEXANDER, BARNARD, BUYS & OTHERS **COMPLAINANTS**

vs

SABC (5FM) **RESPONDENT**

TRIBUNAL: Prof Kobus van Rooyen SC (Chairperson)
Prof Henning Viljoen (Listener Representative)
Rev Danie du Toit (Broadcasting Representative)

Complainant: Ms L Harris in person

Respondent: Mrs Dorothy van Tonder, Consultant: Broadcast and Compliance, Policy and Regulatory Affairs and with her Mr Nick Grubb, Station Manager, 5fm

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Art – satire attacking commoditization of religion – not hate speech

Hate speech – since there was no attack on religion no hate speech found in interview with "Jesus".

"Interview" with "Jesus", however, being held to have been inappropriate for an afternoon Drive Show as a result of its having been offensive to a substantial number of likely Christian listeners – Broadcasting Code contravened

Constitutional law – Code developed in terms of section 39(2) of the Constitution as part of common law so as to protect religious feelings of likely listeners

Constitutional law – art not absolutely protected by Broadcasting Code – Broadcasting Code granting more protection than Constitution – Code being developed so as to grant protection compatible with Constitution – in this case by requiring appropriate time of broadcast after watershed. L Harris, Alexander & Others vs SABC (5fm), Case No: 11/2004.

SUMMARY

5FM is one of the radio stations of the SABC, the public broadcaster in terms of the Broadcasting Act 1999. It broadcasts a weekday *Drive Show* that starts at 15:00. Gareth Cliff, who has built up quite a following, and is known for his jokes, sketches and, at times, sharp social criticism, recently surprised his own CEO, the Respondent, as well as many listeners, when he broadcast an interview with "Jesus". The background was the recently released Mel Gibson film, *The passion of the Christ.* Complaints were received from listeners and other members of the public.

It was held

(1) **that the interview amounted to satire which satirized the commoditization of religion and not religion itself;**

(2) **that the interview did not purport to be with the real Jesus Christ but with a hypothetical Jesus who had acted in the film;**

(3) **that the interview did not amount to hate speech;**

(4) **that the interview, which was likely to have offended a substantial number of Christian listeners, should not have been broadcast as part of an afternoon Drive Show which reached a varied and wide audience, which would not have had the opportunity to analyse the interview in depth and who were likely to have been offended by the mere fact that the interview was said to have been with Jesus;**

(5) **that the broadcast contravened the Broadcasting Code, as developed in terms of section 39(2) of the Constitution, by having included the "interview"in the Drive Show;**

(6) **that such an interview might have been included in a programme with a sophisticated audience after the broadcasting watershed, but that was a question for the SABC to be decided upon and which might not suit its internal policy;and**

(7) **that since the SABC was unaware that the presenter planned to broadcast the "interview" and had since suspended him for a few days, and because the presenter had apologized on air, the contravention was noted and no sanction was imposed. It was also noted that the SABC regarded the interview as being in conflict with its internal policy.**

JUDGMENT

VAN ROOYEN (Chairperson):

[1] 5FM is one of the radio stations of the SABC, the public broadcaster, in terms of the Broadcasting Act 1999. It broadcasts a weekday *Drive Show* that starts at 15:00. Gareth Cliff, who has built up a fair niche listener group and is known for his jokes, sketches and, at times, sharp social criticism, recently surprised his own CEO and many listeners when he broadcast an interview with "Jesus". The background was the recently released Mel Gibson film, *The passion of the Christ.* Several complaints were filed with the Registrar. The transcription of the "interview" reads as follows:

> "Well, we didn't get to interview Charlize Theron. But Gillman did speak to her this morning. I went out and found the biggest star I could in showbiz for the Drive Show today: Jesus. That's right. He's just in time to promote his new movie, *The Passion of the Christ*, which is coming here soon. We are going to interview Jesus, the star and pal of Mel Gibson.
> Jesus, thanks so much for talking to us today – *It's a pleasure. I am just so excited about my new movie.*
> I believe that George W Bush was so impressed by your movie – *I believe yes* - that he is learning Aramaic – *Yes. Maybe he will be as useless at Aramaic as he is at English.*
> Some people say that the movie is boring because there are no miracles – *Vell, I don't know. Put it this way. A film in Aramaic which is selling more tickets than "Lord of the Rings" on opening night, what do you call that? – I call that a miracle.*
> Jesus, why weren't you at the Oscars –*I was terrified I would bump into more Jews. Mel Gibson warned me about them.*
> Allright, just in case people haven't heard about this, Mel Gibson paid for the entire movie himself because he really believed in it – *Yes. The studios they said they would pay for it, but they wanted a more upbeat ending.*
> I believe that they also serve special snacks at your movie – *Vel, one small bag of popcorn. It is enough to feed a crowd.*
> Well I've got to congratulate you. It's the third biggest opening on a Wednesday in history. It made 26 million dollars on its first day at the box office – *This is good. It was so big, it was so big that now they are talking about turning it into a book.*
> President Bush says he was really anxious to see the film – *Yes – but he was a bit upset when he heard that it was in Aramaic and Latin –*

President Bush said: "Why make a movie – I can't do the accent – Why make a movie only Arams and Latinos will understand.
It is a very intense film. Like this, there is one scene where Jesus – that's you – *Yes* – you endure a forty-five minute beating at the hands of the Roman guards – *Oy, now the organizers of Camp Staaldraad defending the Roman guards, they're saying it's team building.*
Yes. Well one group of people were really really upset with Mel Gibson, would you tell us about that Jesus? – *Weiz mir. The Satanists. Oy, they are claiming that Satan seemed really bad in this movie. They are accusing my pal Mel Gibson, they're accusing Mel Gibson of being anti-Satanic.*
And finally, this is the question everybody wants to ask you, who killed you, Jesus? – *Vel, there's been a lot of talk about this film and who is responsible. But if you watch the movie Mel is trying to say that we all, all of us, killed me, all, all of us, we all killed me. And today, this is what I heard, OJ Simpson said "Wait a minute, I was at the News Café, I was having a bagel with lots of cream cheese and a diet coke, I have nothing to do with this!"*
Thank you so much for popping over here and for talking to us. It is such a pleasure to have you on our show. I hope we will have you here again soon. No second comings you are going to surprise us with right? - *Vel, the truth is we do still have miracles today, like Felicia being on the TV for so long. Is there a bigger miracle?* – Thank you very much, thank you, sir – *Thank you, it is a pleasure to be on such a great radio station with so many lovely listeners - except for that one man in Parkmore in Johannesburg. I can see what you are doing when the curtains are closed, stop it, it is filthy! Thank you.*
No, thank you - *Bless you I hope we will talk again soon*
Have a safe trip – *Thank you, and may my father bless you."*

I have italicized the answers in the interview. "Jesus" speaks with a Yiddish accent of sorts.

The Broadcasting Code

[2] This Commission has held that section 16(2) of the Constitution of the Republic, which is quoted in the preamble of the Broadcasting Code, forms part of the Code itself.[1] The question would, accordingly, be whether the interview amounted to the advocacy of hatred based on religion, that constitutes incitement to cause harm. Before one gets to hate speech, it must first be determined whether the interview does not amount to *bona fide* satire. The term "bona fide" is not foreign to our law within this context. The Publications and Entertainments Act 1963 as

well as the Publications Act 1974 (the latter for a period of three years) excluded from its ambit any matter in a publication of a technical, scientific or professional nature that was intended for *bona fide* advancement, or for use in any particular profession or branch of arts, literature or science; or of any matter in any publication of a *bona fide* religious character. The test for *bona fides* is an objective one and obviously requires that the material should amount to genuine satire. In *Publications Control Board v Gallo (Africa)*[2] it was held that the soundtrack of the film *Jesus Christ Superstar* was not a *bona fide* religious publication. In *Publications Control Board v Central News Agency*[3] it was held in a majority judgment that *Naked Yoga*, a publication with illustrations of naked women in various yoga poses, was a scientific publication. Soon thereafter Parliament repealed the said exemptions, obviously rejecting the *Naked Yoga* judgment. However, on the advice of the *Ministerial Task Group: Films and Publications Control* (1994)[4], Parliament wisely reintroduced art, drama and religious exemptions in the 1996 Films and Publications Act. The first two exemptions are much wider than the previous exemptions, since they exempt bona fide art and drama themselves. The recognition of these exemptions is of particular significance in our adjudication of the present matter.

[3] It should, however, be noted that section 16 of the Constitution does not grant an absolute exemption to artistic creativity, since section 16(2) limits the rights in section 16(1) and would, accordingly also exclude the products of artistic creativity that amount to hate speech. The Films and Publications Act 1996, however, grants such an absolute exemption to *bona fide* art, drama, scientific and documentary publications and films.[5] Clause 17 of the Broadcasting Code also

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[1] Labuschagne v YFM(1) case 21/2003; the decision on the facts was reversed after a re-opening of the case – see Labuschagne v YFM(2) case 21(2)/2003.
[2] 1975(3) SA 665(A).
[3] 1977(1) SA 717(A)
[4] Published by the Government Printer on 3 March 1995.
[5] Except in the case of child pornography. Interestingly, the Constitutional Court (CC) has now held in *De Reuck v Director of Public Prosecutions* 2004(1) SA 406(CC) that material which predominantly stimulates aesthetic feelings is not covered by the definition of "child pornography" in section 1 of the Films and Publications Act 1996. In this case, the CC went further than Parliament, which has determined in Schedules 5 and 9 that the argument that material amounts to "art" would not be a defence in cases of

grants such an absolute protection to *bona fide* drama, art and science.[6] Clause 16 of the Code prohibits material which goes even further than hate speech and in fact glamorizes violence.[7] Within the parameters of the Broadcasting Code, it would, accordingly, seem as if a full exemption to *bona fide* drama, art and science, in determining whether the Broadcasting Code has been transgressed, would apply. Of course, the requirements as to age restrictions, warnings and timing would remain applicable.

[4] The question, however, arises whether an absolute exemption of this kind of material is compatible with the Constitution, and whether the Code, as applied by this Commission, should not be developed in accordance with section 39(2) of the Constitution of the Republic. Although the Broadcasting Code currently finds its origin in regulations published by the Independent Communications Authority on 7th March 2003, the Code in relation to the Broadcasters under our jurisdiction, nevertheless finds its origin in a contract with them as foreseen by section 56(2) of the Independent Broadcasting Authority Act 1993. The Code is, accordingly, based on common law. Where fundamental rights are involved, the Code must accordingly be developed so as to promote the spirit, purport and objects of the

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child pornography. Moreover, the CC did not follow the advice of the Task Team (1999) that argument relating to context, or a product being art or science, not be exempted in these cases at all. The Task Group 1994 did, however, advise that the argument that material amounts to art should always be a defence. In effect the Task Group's advice has now been supported and read in by the CC.

[6] The abovementioned prohibitions shall not apply to –

(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 amount to a bona fide discussion, argument or opinion on a matter of public interest.

[7] Licensees shall not broadcast material which, judged within context sanctions, promotes or glamorizes violence based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability.

Bill of Rights.[8] It is self evident that several fundamental rights are involved in the Code.

[5] The Bill of Rights grants less protection to satire than the Broadcasting Code and the Films and Publications Act do. That hate speech overrides even art, appears clearly from *Islamic Convention Unity v IBA and Others* 2002(4) SA 294(CC). So as to ensure that fundamental rights are not unduly invaded upon, the seemingly absolute protection of *bona fide* drama, art and scientific material, must be developed in terms of section 39(2). As happened in the *Carmichele* matter, the lesser protection afforded by the common law was enlarged by the fundamental rights to life, human dignity, and freedom and security of the person. The German *Grundgesetz* grants an absolute protection to art. Compare *Kulczak Strafrechtliche Einbruchstellen in den Lebensbereich* "bildende Kunst" (1993) at 233; Fischer *Die Strafrectliche Beurteilung von Werken der Kunst* (1996) 112; Beisel *Die Kunstfreiheitsgarantie des Grundgesetzes und ihre strafrecthlichen Grenzen* (1997). 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 BVerGe 67,213 at 228 – *Anachronistische Zug* judgment of the *Bundesverfassungsgericht*. Taking a lead from this approach, I am of the opinion that where art, judged as a whole, leads to serious harm (as described hereunder) as a result of the violation of feelings relating to race, ethnicity, gender or religion *and* the material does not amount to hate speech, the Broadcasting Code must be developed so as to offer maximum protection to such feelings by requiring broadcasters to limit broadcasts which are likely to violate such feelings to post-watershed broadcasts. Such an approach would both protect children and inform adults that sensitive material was about to be broadcast – such material probably being offensive, in the sense of being repugnant, and not merely displeasing, to a substantial number of reasonable adult listeners.[9] For the

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[8] Compare *Carmichele v Minister of Safety and Security(Centre for Applied Legal Studies intervening)* 2001(4) SA 938(CC)*; Khumalo and Others v Holomisa* 2002(5) SA SA 401(CC).

[9] Compare *S Pienaar, J Reiners, S Oerkel & Andere v SABC 04/2002/K van den Berg,Serfontein; van Rensburg; Lombard, van Heerden v SABC27/2002*

present case, it is not necessary to discuss whether the serious invasion of dignity should be added to the list. I have limited the matter to the four interests protected by section 16(2)(c) of the Constitution. The development accordingly lies in the widening of the protection of the said feelings of adults as well, whilst the Broadcasting Code is directed at the protection of children. It should, however, be borne in mind that such development is not directed at protecting reactions that are unreasonable. This Commission has also often held hat news bulletins and commentary often, of necessity, have to include material that is offensive. This ruling, in no way, affects those judgments.

Satire and the Broadcast

[6] Satire is the use of irony or sarcasm to attack some form of human behaviour. It occurs in various genres, including literature, film and even a radio "interview" such as the one under consideration. The intention of the satirist is to expose and reform human weaknesses such as greed or vanity – and it usually involves ridicule. It is, by its very nature, irreverent.

The object of attack in the radio interview is the *character,* Jesus, who is portrayed in Mel Gibson's film, *The Passion of the Christ*. It should be clear, however, that this "Jesus" is not necessarily identical to the actual historical figure, Jesus Christ. The "Jesus" of the interview is a particular construct of a particular cinematic portrayal. I feel, therefore, that there is a subtle distinction between the two, and that the presenter set out to satirize the Jesus of Gibson's film, in particular. This is a crucial distinction, since not all Christians would approve of or accept the authenticity or manner of portrayal of the Jesus of the Gibson film.

What the presenter is satirizing here is the commoditization of Jesus, by turning him into a film icon whose suffering ("passion") is exploited to make money, and, in the process turn Jesus into a modern celebrity figure. It is not therefore (the historical) Jesus who is being satirized, but rather Mel Gibson's filmic construct –

and, in a telling sideswipe, the director, Gibson himself, as well as various people who might support Gibson's version of the suffering of Jesus, and, indeed, approve his use of the story of this suffering to make a box-office hit (for it is a fact that the film broke box-office records).
Such groups might include fundamentalist Christians, and the so-called Bible-belt of the USA, whose politics are, at times, associated with George Bush. The presenter suggests that there is a link between the violence of the film and the violence perpetrated by the Bush government, which the latter has been known, at times, to defend, *inter alia*, on Christian grounds, and by using a form of political discourse which separates humanity into camps of good and evil.

The "interview" draws on a number of contemporary socio-political strands, such as that described above, but it also focuses on the cult of celebrity in our society (evidenced by the reference to Charlize Theron, whom Cliff himself failed to access for an interview). He ridicules the vanity of those who bask in the limelight.

In addition, Cliff satirizes the view that the Gibson film is anti-Semitic, when "Jesus" expresses misgiving that he might encounter Jews at the Oscar ceremony. But Cliff directs his satire far more widely: at prejudice (in the figure of Bush) against Latino and Arab citizens; at the inarticulacy of the American President; at Hollywood's inane desire to produce "happy ending" movies, and the consumer's infantile demand for them; at the (seeming) hypocrisy of public figures such as OJ Simpson, and the vanity, according to some viewers, of a certain local talk show host. In what is tantamount to a shotgun approach, many are caught in Cliff's line of fire.

There is, indeed, a Python-esque touch in the image of the miracle of the popcorn, and in the omniscience of an interviewee who can "see" his listeners – as far away as Parkmore – in the act of sinning.

At best, this is a sharp little satirical piece that focuses on a range of current socio-cultural concerns, and at worst, it is a rather light-weight little interview in poor taste, rather crudely put together, and its level is not much above that of student humour. I am more inclined to support the latter view.

Hate speech based on religion?

[7] I am of the view that once the above analysis is applied, even if it is satire at its lowest level, one cannot conclude that the material advocated hatred based on religion in the sense that it attempted to debase Jesus Christ. It amounted to an attack on vanity, unjustified prejudice and the commoditization of religion.

Character of Programme and Timing

[8] The next question is, however, whether the interview as broadcast was likely to have offended a substantial number of likely listeners. The main reason for offence would be that the listener was not in a position to analyse the interview by re-listening or, as we have done, re-reading the transcription time and again. Rumpff JA (as he then was) rightly observed in *SAUK v O'Malley*[10] that the radio listener cannot, as is the case with the reader of a newspaper or poem, re-read material that is broadcast so as to analyse it in depth. The first impression is most often the last impression. Had the interview been of a shorter duration, the opportunity for in-depth analysis would have been much more substantial. What the listener hears is a character, called Jesus, being interviewed on a popular programme, and who is, on first consideration, characterized as a buffoonish character. The Canadian Supreme Court[11] has held that when art is judged, it must not be judged according to standards of the community but against an objective standard. Although I support this approach when a work of art is studied analytically and there is an opportunity to do so at leisure, this approach would not necessarily be applicable to all instances involving the reception by an audience of a broadcast. I am, accordingly, of the view that the interview was

[10] 1977(3) SA 394(A) at 408.
[11] *Regina v Sharpe* (2001) 194 DLR (4th) 1 (SCC).

most certainly inappropriate to the *Drive Show*, which is well known for the broadcast of jokes, whether they be clever or crude. The programme does, at times, include social comment of value but it is simply not suited for an interview with a hypothetical "Jesus" which is moreover devoid of deeper artistic thought. For many reasonable listeners, as would appear from many of the complaints, the interview amounted to a mockery of Jesus Christ. As I have indicated above, this perception is incorrect.. But, where aspects such as timing, type of programme and likely listeners are concerned, the potential for misunderstanding is significant. I am, furthermore, of the view that serious harm resulted in the form of shock and pain experienced by a substantial number of likely Christian listeners, who are reasonable in their approach to protection of their rights.

[9] The above approach regarding emotional shock is supported by the Canadian and German approaches to hate speech. In Canada the Constitution has been held to grant far greater protection to the rights of persons threatened than US Courts would allow. In *R v Keegstra*[12] the Supreme Court considered the constitutionality of the Criminal Code provision, which criminalizes wilfully and publicly promoting hatred against an identifiable group. The accused, who was a schoolteacher, was charged for having spread hateful, anti-Semitic messages to his students regarding the Holocaust. The Court held unanimously that such expression conveyed meaning in a non-violent manner and, therefore, the law was in conflict with section 2(b) of the Charter. However, by way of a majority of four to three, the Court held that the law amounted to a reasonable limit demonstrably justified in a free and democratic society, in terms of section 1 of the Charter. The majority accentuated the potential emotional and psychological harm as well as the threat to dignity resulting from racist speech. The aim of such legislation was also to eliminate the racial, religious and cultural animosity created by such speech. Hate propaganda, in its view, was inimical to the aim of the promotion of multiculturalism and equality. The value of hate speech was also - like obscenity -

[12] (1990) 61 CCC (3rd) 1 (SCC).

of limited importance in the furthering of the quest for truth, individual fulfilment or democracy.[13]

Freedom of Speech

[10] In *Islamic Unity Convention v The Independent Broadcasting Authority and Others*[14] Langa DCJ convincingly contrasted the current state of freedom of expression with that of the past, as follows:

> "Notwithstanding the fact that the right to freedom of expression and speech has always been recognized in the South African common law,[15] we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a 'constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours'.
> South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members . . .[16] As such it is protected in almost every international human rights instrument. In *Handyside v The United Kingdom*[17] the European Court of Human Rights pointed out that this approach to the right to freedom of expression is –
> "applicable 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 that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."[18]
> *The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of*

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[13] See the late John Sopinka (Judge of Canadian Supreme Court) Duncan (ed.) *Between Speech and Silence* (1996) 129 from 145.

[14] (*supra*) at paragraph [27].

[15] See *Publications Control Board v William Heinemann, Ltd and Others* 1965 (4) SA 137 (A) at 160E–G; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 585B–E; *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (SCA) at 400H–J (also reported at [1996] 4 All SA 675 (A)); *S v Turrell and Others* 1973 (1) SA 248 (C) at 256G; *United Democratic Front and Another v Acting Chief Magistrate, Johannesburg* 1987 (1) SA 413 (W) at 416C–G.

[16] Sieghart *The International Law of Human Rights* (1983) at 330. See also art 19 of the Universal Declaration of Human Rights; art IV of the American Declaration of the Rights and Duties of Man; art 19 of the International Covenant on Civil and Political Rights; art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art 13 of the American Convention on Human Rights; art 9 of the African Charter on Human and Peoples' Rights.

[17] (1976) 1 EHRR 737 at 754.

[18] See also *R v Zundel* (1992) 10 CRR (2d) 193 (SCC).

> *"human dignity, the achievement of equality and the advancement of human rights and freedoms." Thus, open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself.*[19] *Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere."* (my emphasis in italics).

[11] I agree with the approach of the Constitutional Court that the right to inform also includes the right to offend.[20] However, there must be some limit to this, if such limit is reasonable. In the present case the slight value of the "interview" is outweighed by the harm to religious tranquillity and the violation of religious sensitivity. The following summary of Rumpff CJ in *Publications Control Board v Gallo (Africa) Ltd*[21] of the picture which Christians have of Christ, is still valid today:

> "Reading the Gospels as a whole, the composite picture of Christ that presents itself is that of a man of authority, constantly aware of the purpose of his divine mission, attacking with sharp words and in no uncertain terms those whose principles he disliked, a man with great love and compassion for his fellow human beings, a man subject at times to spiritual conflict and anguish and being visibly affected by such conflict, but also a man who, whatever his mood, displayed dignity and demanded awe and, to the devout Christian, a man surrounded by an aura of divinity."

For a vast number of Christians there would, in any case, be a taboo on this kind of satire. Respect must be shown for these convictions and feelings. The harm lies in the psychological shock, mortification or pain[22] which a substantial number of Christians were likely to have suffered when listening to the "interview". In *South African Human Rights Commission v SABC*[23] we stated as follows:

> "We support the Canadian Supreme Court's accent on the invasion of dignity in cases of hate speech and also that of the *Bundesverfassungsgericht*, which regards material which amounts to hate speech as a serious violation of rights of personality. The US approach is, of course, an interesting one but, to our minds, too lenient within our young democracy, where we are still building unity amongst diverse groupings: a unity, the

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[19] 5 See the case of *United Communist Party of Turkey and Others v Turkey* (1998) 26 EHRR 121 paras 38–48 and the as yet unreported judgment of the European Court of Human Rights in *Refah Partisi and Others v Turkey* (App nos. 41340/98, 41342/98, 41343/98 and 41344/98). See also the judgments of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) cited in Currie *The Constitution of the Federal Republic of Germany* (The University of Chicago Press, Chicago 1994) at 213–215 and the minority judgment of Cory J in *R v Zundel* (above fn 25).

[20] *Islamic Convention Unity v IBA and Others* 2002(4) SA 294(CC) at par [28]; *De Reuck v Director of Public Prosecutions and Others Case 2004(1) SA 406(CC) at* par[49].

[21] *Supra* at 677.

[22] Compare *Publications Control Board v Gallo(Africa)* 1975(3) SA 665(A) at 673H.

[23] *Human Rights Commission v SABC* 2003(1) BCLR 92(BCCSA) par[38].

> attainment of which must, of necessity, go through stages of political argument, both emotional and rational. But when resort is taken to demeaning, sweeping racial slurs, a legal limit must be put to such language."

Of course, it might be argued that I am considering the interview far too seriously. But religion is a serious matter, and although some religious word-play on the periphery, and some films which dramatically portray Jesus in new ways have become acceptable,[24] the basic tenets of Christianity focus upon a Godly image of Jesus, which is also protected by the fact that blasphemy is regarded as an offence. Christian feelings are constitutionally protected by the fundamental right of Christians to religious freedom and tranquillity. *As said earlier, such protection would only be justified where the reactions are based on reasonable grounds.*

Conclusion

[12] My conclusion is, accordingly, that, given the protection of religious freedom which the Constitution grants, the necessity for religious tranquillity and the necessity to limit (reasonable) religious offence on the airwaves to its absolute minimum, the broadcast of the programme conflicted with the Code in that it broadcast material at a time of the day and during a programme which reached a wide and varied audience, which was likely to have included a large number of Christians. As found above, the latter are likely to have been seriously offended by the mere fact that the historical Jesus was said to be interviewed. Even if that view, on analysis, was wrong, as I have found, the problem should have been addressed by the broadcaster by broadcasting this interview after the watershed, with due warning and in a programme with a limited, sophisticated audience. Whether the producers of a programme focusing on art and literature might be interested in broadcasting an interview such as the one under discussion is, of course, a matter for the broadcaster to decide. As the matter presently stands, it would seem that the SABC's internal policy would be against its inclusion.

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[24] This Tribunal has also ruled that the taking in vain of the Lord's Name in films does not generally amount to a contravention of the Broadcasting Code – see *Carelsen v Radio 702*, Case No: 15/2003and *Pelser v SABC*, Case No: 31/2003.

Sanction

[13] It is true that, had the station manager of 5fm, Mr. Nick Grubb, known that the presenter would broadcast this "interview", he would, according to his testimony before us, have prohibited the broadcast. In our view a broadcaster should take particular care before it broadcasts material which might be offensive on religious, racial, ethnic or gender grounds. To have included the "interview" in an afternoon Drive Show was, to our minds, grossly negligent. This grossly negligent act of the *presenter*[25] must be regarded as that of the Respondent for purposes of the Broadcasting Code. When sanction is considered, the fact that the Respondent was not informed beforehand by the presenter will be taken into consideration. Since the SABC took immediate steps by suspending the presenter and broadcasting an apology by him, a fine need not be imposed. We have noted that the SABC has warned the presenter and his producer against a recurrence of this nature; also, that the broadcast was in conflict with internal SABC policy. As stated earlier, the SABC was totally unaware that the presenter would broadcast this interview. I accordingly agree with the SABC as to the steps taken within the parameters of its own policy.

[14] The SABC correctly argued that the interview did not amount to hate speech. However, I believe that since the programme was broadcast at a time when a large and varied audience was likely to have listened, the Broadcasting Code was transgressed with regard to timing, since the programme should have been placed well after the watershed. In that sense the SABC was justified, also in terms of the Broadcasting Code, in reacting as it did.

[15] The complaints are upheld on the grounds expressed above. The complaint that the interview amounts to hate speech is, however, dismissed.

JCW VAN ROOYEN SC
CHAIRPERSON

[25] Had the person been a telephone caller or a panelist, the responsibility issue might have been dealt with differently, depending on the circumstances – see *R & M v SABC case 03/2004*

Commissioners Du Toit and Viljoen concurred.