BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA

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Case Number: 19/2004

Date of Hearing: 27 May 2004

CORNERSTONE CHURCH & OTHERS **COMPLAINANTS**

vs

SABC1 **RESPONDENT**

TRIBUNAL: Prof Kobus van Rooyen SC (Chairperson)
Prof Willem de Klerk
Prof G Olivier (Co-Opted)

Complainant: Mr Reg Joubert on behalf of the Church

Respondent: Mr Fakir Hassen, Manager: Broadcast Compliance Policy with him Mrs Dorothy van Tonder, Consultant, Regulatory Affairs, SABC.

Religion – making a mockery of Jesus by way of an insert related to the Passion of the Christ by Mel Gibson found to amount to hate speech based on religion in the circumstances. Cornerstone Church and Others vs SABC1, Case No: 19/2004.

SUMMARY

The Phat Joe show on the 24th of April 2004 at about 10pm included an insert which clearly related to the Mel Gibson film *The Passion of the Christ*. An actor dressed up as Jesus was place in the position of an actor with a crown of thorns getting phone calls and performing a miracle. Insert meant to be satirical but inclusion of

elements associated with the passion of Christ led to Jesus, as such, also being mocked. Such material amounting to hate speech based on religion.

JUDGMENT

Prof Kobus van Rooyen SC

[1] The Phat Joe Show, a magazine programme which is broadcast on Saturday evenings at 22:00, included an insert relating to the Mel Gibson film, "The Passion of the Christ". Complaints were received from several viewers, notably Cornerstone Church. On behalf of the Church Mr Joubert argued as follows: "The SABC presented a scene where a man was dressed with a robe and wearing a crown of thorns portraying Jesus Christ. He would casually dip his finger into a wine goblet and turn water into wine and have a discussion with a 'marketing manager of sorts' about doing a sequel to the Passion of Christ and doing it in comedy because this is the way everyone goes these days."

[2] Mr Joubert argued that Christian faith is centred on the death and resurrection of Jesus Christ, which is a historic fact. Christianity means faith in Jesus who was crucified. He was resurrected and is the Saviour. He is sacred. The portrayal of Jesus Christ in this scene was offensive to the religious convictions of Christians. He is portrayed as a weakling concerned about his image and trying to use marketing tactics such as comedy to make himself popular. The actor is casually wearing the crown of thorns as if it was nothing, whilst in reality it brought about agony and suffering since it was thrust upon his head and He was beaten with rods on this crown. This minimizing of his suffering, Mr Joubert argued, is offensive to the Christian conviction that his suffering was tremendous and that he died of his wounds for the sake of all. Mr Joubert conceded that, as a Christian, he would not wish to impose his belief onto others. But the said scene is regarded as an attack on what Christians believe about Jesus Christ and any portrayal of him in this fashion is uncalled for and offensive.

[3] The SABC responded by arguing that the insert amounted to a satire on those who were involved in the production and acting in the film "The Passion of the Christ". The sketch was entirely about films, film making and Hollywood; and was in no way an attempt to satirise the life of Jesus Christ, as is suggested by the complainants. There was also no intention whatsoever to disparage Christians or Christianity. It was about a film, a very controversial film, not about a religion. The SABC is cognisant of religious sensitivity in South-Africa and that cultural, religious and linguistic disparities are bound to lead to a lack of appreciation of satire and irony. The SABC therefore regrets any offence that may have been caused. However, the sketch did not amount to a contravention of the Broadcasting Code, since it was just another satirical piece not targeting Jesus, Christianity or Christians.

[4] In this Commission's judgment concerning an interview which the presenter Gareth Cliff had with *"Jesus"* on SABC's 5FM, it was held that the interview, on analysis, did amount to satire. It was, however, held that the *"interview"* was not appropriate for a drive show in the afternoon.[1] In the present matter, of course, the sketch formed part of a programme which was broadcast about an hour after the commencement of the watershed at 22:00. This Tribunal will now have to decide whether the broadcast after the watershed could save this sketch, which was obviously offensive to a large number of Christians.

The Sketch

[5] The starting point would be to establish whether the sketch amounted to the advocacy of hatred based on religion that constitutes incitement to cause harm. The transcript of the sketch reads as follows:

> *Mr Weinstein: "Well I am telling you this is going to be bigger than 'Brave Heart'"*

[1] L Harris, Alexander, Barnard, Buys, & Others vs SABC (5fm), Case No: 11/2004

Secretary: "Mr Christ, Mr Weinstein, is here to see you"
Christ: "Send him in"
Mr Weinstein: "Jesus baby"
Christ: "Talk to me"
Mr Weinstein: "The movie is a hit, you haven't been this big since you walked on water."
Christ: "What can I get for you."
Mr Weinstein: "Some wine will be great. That is just water baby"
("Jesus" dips his finger into the glass of water, which turns to wine)
Mr Weinstein: "One time, the chicks must love that, not bad, great, great. Listen the guys at the studio want to make a sequel, you interested."
Christ: "Do you have a script?"
Mr Weinstein: "We have a few ideas, how about this, 'Passion of Christ Two – Jesus Reloaded'"
Christ: "aah, aah"
Mr Weinstein: "No, No, Okay, how about 'Passion of the Christ – Oh Shucks it's Jesus'"
Christ: "Very tacky"
Secretary: "Comedy is the way to go, sir."
Mr Weinstein: "I'll get Leon Schuster on the line, we'll set up a meeting. You, you going to be big, baby."
Secretary: "Mr Christ, St Peter, is on line two"
Christ: "I'm going to have to take this. My assistant will show you out. Howzit baby! Hi Peter, my disciple, what is happening, my honey
Dinner tonight, I don't know, you remember the last time I had supper with you." END

Freedom of Speech

[6] Before inquiring into the question whether the material amounted to a contravention of the hate speech provision in the Broadcasting Code, it is

necessary to first accentuate the importance of freedom of speech in the new South Africa with its censorious Apartheid past. Our Constitutional Court has, in several judgments, accentuated the role of freedom of speech. In *S v Mamabolo*[2] Kriegler J stated in regard to the value of freedom of expression in our present society, in contrast to the Apartheid history of censorship and thought control:

> "Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed."

In *South African National Defence Union v Minister of Defence and Another* [3] O'Regan J stated:

> "Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental functions as a guarantor of demo cracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters . . ." [footnotes omitted.]

[7] In *Islamic Unity Convention v The Independent Broadcasting Authority and Others*[4] Langa DCJ convincingly contrasted the present state of freedom of expression and the past state of freedom of expression, as follows:

> "Notwithstanding the fact that the right to freedom of expression and speech has always been recognized in the South African common law,[5] 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

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[2] 2001(3) SA 409 (CC) para [37]

[3] 1999 (4) SA 469 (CC) para [7].

[4] 2002(4) SA 294(CC) at paragraph 27

[5] 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) – Ed); *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.

> 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'

However, the Deputy Chief Justice also emphasized that there is a limit to this freedom when certain values are, for example, subjected to hate speech.

> "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 "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.*[6] *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).

[8] In *Human Rights Commission v SABC*[7] this Commission said the following:

> "When judging whether material broadcast contravenes the Broadcasting Code, it is important to bear in mind that freedom of expression as guaranteed in our Constitution, is the result of an arduous and century-old struggle against the tyranny of the State and often, the Church. One only needs to page through *Censorship: 500 Years of Conflict*, which was published for the 1984 exhibition at the New York Public Library, to realise the gruesome deeds which were done by the Church and State against those who dared to disagree with them during the preceding five centuries. One is struck by the burning at the stake of William Tyndale in the 16th Century for his (unacceptable to the Catholic Church) translation of the Bible; the same treatment to Servet under the orders of Calvin for denying the Trinity; the imposition of prior restraint by Henry VIII and Elizabeth I (abolished in 1695); seditious libel in 18th Century England which did not allow an accused to plead truth; the tyranny of Louis XIV and his ministers up to the King's death in 1715; the pre-revolution censorship in 18th Century France against those who dared to differ from official doctrine and thinking; the placing on the *Index Librorum* of some of the works of Copernicus, Galileo and Milton. The 1735 trial of the publisher John Peter Zenger, the editor of the *New York Weekly Journal*, at least introduced a new era in America for publishers. The jury's finding that he had not committed seditious libel, effectively put an end to common law seditious libel in the colonies – see Lieberman *The Enduring Constitution* (1987) 217–9."

Protection of Religious feelings

[9] Although religious sections of our population have, on average, developed much

[6] 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).

[7] 1993(1) BCLR 92.

more tolerance towards the arts in the last two decades – the acceptance of some films featuring Jesus, being one example from the Christian perspective[8] – it would be unrealistic to unequivocally state that those sections have lost their deep-routed respect for the core precepts of their religions. They would expect others to allow them to enjoy that right in peace and not to make a mockery of those deep-routed convictions, which are also manifested in feelings. We have recognised that these convictions and feelings are protected but that the protection is not absolute – see, for example, the references to the approach to the taking in vain of the Lord's Name in the *Yom Kippur*-judgment.[9]

[10] Returning to the present sketch, the tribunal has no doubt that it had the effect of making a mockery of deeply held religious beliefs and convictions. It is not only the dialogue, but the combination thereof with the comical depiction of Jesus and the prospect of making a comedy with the title "Jesus Reloaded" or "Oh shucks it's Schuster", the latter being a reference to one of the Leon Schuster (the South African producer and comedian) films. It is true, as argued by the SABC, that the Mel Gibson film, "The Passion of the Christ", gave rise to a number of satirical media comments and sketches on the film and its producers. On the other hand, the comical inclusion of sacred elements from the life of Jesus Christ in the sketch, touched upon a particularly sensitive vein. The crown of thorns and the Last Supper lie at the very core of Christ's salvation of sinners by way of his death on the cross and his resurrection, the Last Supper being regarded as the institutionalisation of the sacrament of the Holy Communion, with its particular connection with the Blood and the Body of Christ. In the sketch these sacred elements are used to draw laughs. One could argue that they are included to illustrate how banal an actor, who plays the role of Christ, can be; and that this is

[8] E.g. *Jesus Christ Superstar* in Publications Appeal Board judgment 82/83; contrast *The Last Temptation of Chris t*which was found to be offensive to the religious convictions or feelings of Christians in 1989. In 1999 the present Films and Publications Board passed the film in its video format - obviously since Schedule 10 of the Films an Publications Act 1996 excepts bona fide drama from the Act's purview. Compare the Report of the Ministerial Task Group : Film and Publication Control (published by the Government Printer, Pretoria) para 8.4.9 where the Task Group argues that the test should not depend on what is offensive, since this test is open to subjective interpretation.

[9] JA du Plessis, Pastor CWP Venter & M Orchison - First Complainants ; Wallis, Suskin, Cotton & Byrne-2nd Complainants vs 94.7 Highveld Stereo, Case No: 04/2004

satirized in the sketch. Unfortunately, the sacred is also profaned.

[11] 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.[10] The question would, accordingly, be whether the sketch 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 sketch 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)*[11] 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*[12] 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)[13], 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.

[10] 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.
[11] 1975(3) SA 665(A).
[12] 1977(1) SA 717(A)
[13] Published by the Government Printer on 3 March 1995.

[12] Insofar as the sketch in the Phat Joe Show is concerned, this Tribunal is of the view that the satirical elements in the sketch are minimal. Although the joke is directed at those who were involved in the production, the sketch also flippantly mocks elements which are held to be sacred by millions of Christians in this country. When a mockery is made on the airwaves of these deeply held religious beliefs, it amounts to a promotion of nothing than an expression of hate against these deeply held beliefs, even if not intended, as we accept to be the case in the Phat Joe Show. The sketch also objectively amounts to incitement to shock and pain a substantial number of Christians. The Tribunal has had regard to the mitigating factors brought about by the timing of the sketch well after the start of the watershed and also that the Phat Joe Show draws a more modern-minded, mature viewer. Nevertheless, there must have been a large number of Christians in the tv audience. We have often stated that Christians must also demonstrate tolerance and that the Tribunal would not enforce radical or intolerant views. In the light of the very sensitive and sacred elements included in this comical sketch, the Tribunal has come to the conclusion that the mockery of these very elements in the sketch promoted hate against Christian religion and incited to serious harm. Such mockery was probably not intended, but the test as to mockery, as a form of advocacy of hatred, is an objective one. The Tribunal accordingly holds that the Code was contravened.

[13] The SABC is directed to broadcast an apology at the commencement of one of the Phat Joe programmes in July 2004, which reads as follows:

> *"The SABC wishes to apologise to the Christian viewers who were offended by our sketch which related to the Mel Gibson film, The Passion of the Christ. Our intention with the sketch was to satirize the commercial exploitation of the Scriptures. Unfortunately, the sketch also hurt the religious convictions or feelings of a substantial number of Christian viewers. The Broadcasting Complaints Commission of South Africa has held that, although the sketch intended to satirise those who took part in the production and acting in the film, the sketch also made light of matters held sacred by Christians. In the process, the sketch gave rise to offence."*

JCW VAN ROOYEN SC
CHAIRPERSON

The other Commissioners on the Tribunal agreed with the judgment of the Chairperson.