BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA

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CASE NUMBER: 29/2007

APPEAL ON CASE NUMBER: 17/2007

DATE OF HEARING: October 4, 2007

e-tv **APPELLANT**

vs

WESLEYAN CHURCH **RESPONDENT**

APPEAL TRIBUNAL: **REV DANIE DU TOIT (CHAIRPERSON)**
PROF WILLEM DE KLERK
DR LINDA VENTER
PROF WILHELM JORDAAN
MR ED LININGTON

FOR THE APPELLANT: **MR MARK ROSIN OF ROSIN, WRIGHT & ROSENGARTEN**

FOR THE RESPONDENT: **REV FE STANLEY**

Religion – film including 'last temptation' of Christ not amounting to hate speech – also bona fide drama: e-tv vs *Rev FE Stanley & Others, Case no: 29/2007(BCTSA)*

SUMMARY

A Tribunal held, by way of a majority judgment, that the Scorcese film, Last Temptation of Christ, amounted to hate speech based on religion and that the exemption in favour of bona fide drama also did not apply. The minority was of the view that the film did not amount to hate speech. On appeal the Appeal Tribunal

held that the judgment of the Tribunal was clearly wrong for the following reasons: (1). the Tribunal did not interpret the film correctly in that it based its reasoning on the premise that the temptation was succumbed to, even if only on an imaginary basis; (2) in any case, the Tribunal should have attributed special weight to the overwhelming aesthetical value of the film and have held it to be bona fide drama; and (3) the Tribunal impermissibly delved into factors extrinsic to the film in so far as "bona fide/s" was concerned. The Appeal Tribunal was, accordingly, of the view that it did not only differ in its conclusion as to the question whether the Broadcasting Code was contravened, but that the errors made were so fundamental that it could, with confidence, conclude that the Tribunal's judgment was clearly wrong in terms of the Rules. The Appeal against the finding of the Tribunal was, accordingly, upheld and its decision set aside. e-tv did not contravene the Broadcasting Code by broadcasting the film as from 23:15 with due classification and an age restriction

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FIRST TRIBUNAL'S JUDGMENT

[1] Judgment was handed down on August 22, 2007. The Tribunal held that the screening of the film *The last temptation of Christ* contravened clause 16.3(c) of the Code in that it amounted to the" advocacy of hatred based on religion and constituted incitement to cause harm." The Tribunal held that the way in which Jesus is portrayed, is so contrary to the basic tenets of the Christian faith and so contemptuous of the religion that it amounts to hate speech.

[2] The Tribunal, furthermore, held that the film could not be classified as bona fide drama and, as a result, the exception to hate speech contained in rule 17(i) of the Code was inapplicable. It was held that the "mortifying way in which the film deals with the crucial aspects of the Christian faith takes it beyond the requirement of bona fides in the sense of honesty and sincerity." It was also held that the film maker "was not bona fide in that he knew or must have known that in

making a film in which Christ is portrayed as a sinful man, is such a flagrant attack on the basic tenets of the Christian faith that the film and its maker cannot satisfy the test of bona fides."

[3] The Tribunal imposed a reprimand on the broadcaster in terms of rule 14 of the BCCSA Constitution.

MINORITY FINDING

[4] In a minority finding Chairperson, Prof J van Rooyen, stated that he was not in agreement with the finding of the Tribunal concerning both clause 16.3 and clause 17 of the BCCSA Code, and that he would not have upheld the complaint.

APPEAL

[5] On September 3, 2007, the appellant applied for leave to appeal against the findings of the Tribunal. The respondent (the initial complainant) argued against the application. On September 4, 2007, the Chairperson of the BCCSA granted leave to appeal. It is not necessary to repeat the arguments on both sides. It is sufficient to say that appellant contested the finding that a) the screening of the film *The last temptation of Christ* amounted to the "advocacy of hatred based on religion and constituted incitement to cause harm," and b) that the film was not a bona fide product and that the aesthetical value was not sufficient to save the film. The Respondent argued that the film denigrated Jesus to a sinful person and that such a portrayal went against the heart of Christianity, namely that Jesus was a man but free of sin. "We have taken strong offence and revulsion against the showing of this film, irrespective of the time slot, for it is a blatant and vicious attempt to denigrate the Person of Jesus Christ, whom Christians revere, and love, and a deliberate attempt to discredit the Deity of Jesus Christ." The respondents

also questioned the bona fides of both the producer and the writer of the novel on which it is based.

[6] The same line of reasoning was pursued before this Appeal Tribunal.

[7] The appeal succeeds. The ruling of the Tribunal is set aside. The Appeal Tribunal holds, with respect, that the Tribunal erred in at least two mutually inclusive ways:

1. By failing to provide convincing arguments in support of the conclusion that clause 16.3 (c) of the Broadcasting Code had been contravened.

1.1 The conclusion that the broadcast of the film amounts to hate speech is based on various miss readings of the film.

1.2 The analogous arguments (based on other cases) to consider the matter are not comparable to the facts of this case.

2. Secondly, by failing to provide convincing arguments for concluding that the film *The Last temptation of Christ* (hereafter abbreviated as LTOC) could not be seen as bona fide drama, and that, therefore, the exception to hate speech contained in the rule 17(i) of the Code is inapplicable.

JUDGEMENT OF THE APPEAL TRIBUNAL

DSR DU TOIT & WJ JORDAAN

[1] **Clause 16.3(c) of the Code**

This is an appeal from a decision of a Tribunal of this Commission that held the broadcast of the film, The Last Temptation of Christ ("LTOC"), by the appellant to have been in contravention of the Broadcasting Code.

The Appeal Tribunal agrees with the Tribunal that "offensiveness" is not regarded as a sufficient ground for a contravention of the Code. This approach is also in accord with that of the Constitutional Court that freedom of expression includes the right to express offensive ideas. Of course this right, as other fundamental rights, also finds its limits in section 36 of the Constitution. The Appeal Tribunal is of the view that the limits of section 36 of the Constitution have not been overstepped for the reasons which follow hereunder.

[2] The Appeal Tribunal, with respect, is of the view that the Tribunal erred in finding that the broadcast of LTOC amounts to the advocacy of hatred based on religion, and that this constitutes incitement to cause harm.

[3] The Appeal Tribunal agrees with the Tribunal on its position that religion plays an important role in many people's lives. The Appeal Tribunal found, however, that Sachs J's exposition (quoted by the Tribunal from the Constitutional Court case of The Minister of Home Affairs v Fourie) does not translate into anything that can justifiably be used to demonstrate that the broadcast of LTOC amounted to a contravention of the Code.

[4] The Appeal Tribunal is of the view that all Christians will not react in the same way to the film. In this regard the Appeal Tribunal, in principle, agrees with the statement of the Canadian Broadcast Standards Council (CBSC Decision 95/96-0011) that it is possible that the film (LTOC) may not be a "representation of the perspective or understanding of all or even many Christians regarding Christ."

[5] Furthermore, the Appeal Tribunal concurs with the CBSC's conclusion that "(this) fact does not, however, make the perspective abusive, discriminatory or hateful."

[6] In applying the test for hate speech, the Tribunal referred to various court cases and BCCSA judgments. As will be demonstrated below with reference to some of the analogies used by the Tribunal, the Appeal Tribunal, with respect, is of the opinion that the Tribunal's application of analogous examples from other cases to LTOC is contestable and therefore not relevant to LTOC.

[7] Firstly, the *Jyllands-Posten* Muhammad cartoons (published in the Danish newspaper *Jyllands-Posten* on September 30, 2005). The Tribunal reasoned, inter alia, that "although there was no direct or blatant incitement to cause harm, the violent outburst that the publications caused is clear evidence that the author and publisher incited the readers of the cartoons, even if this was not done with deliberate intent."

[8] For various reasons outlined below the Appeal Tribunal finds this reference to and the reasoning concerning the cartoons problematic:

(1). The cartoons and LTOC belong to totally different genres which brings to bear the issue of relevance. No convincing arguments attesting to relevance were provided, other than mentioning the reaction of a particular religious group to the cartoons.

(2). The argument with reference to this reaction, fails to provide sufficient grounds to infer that LTOC, by analogy, constitutes hate speech. The Appeal Tribunal is of the opinion that the reaction of a particular group cannot be an objective test whether a work amounts to hate speech or not. There could have been be a variety of reasons to explain particular groups' reactions to the cartoons, which makes the inference of "clear evidence" of "incitement" in that case somewhat spurious. For instance, in the case of LTOC the Tribunal noted that many of the complaints seemed to be orchestrated. Given the possibility of orchestration particular groups' reaction can, in the view of the Appeal Tribunal, never be regarded as an

objective indication of clear evidence that a film would have the tendency to incite. To bring to bear, by way of argument, the believers of various religions and their reactions (*inter alia* to "perceived attack") is, in the view of the Appeal Tribunal, not relevant. For example, the interaction between religions and /or the way in which some religious groups appear to be more/less tolerant than others never was, and never can be, the test whether a film can be found to constitute hate speech.

* Similarly the Appeal Tribunal cannot find any basis for the relevance of some other analogical examples/cases dealt with in the Tribunal's finding.

For example, a complaint about a joke (E Lakhi & Others vs 94.7 Highveld Stereo, case no. 2004/41) and other similar objections are so different from the case under discussion, that arguments to support a finding of hate speech can hardly be based, and convincingly argued, on them.

[9] It is clear that the Tribunal was very much aware of the problem of relevance vis-à-vis analogical cases and attempted to show relevance by arguing justifiable analogies between such cases and LTOC. For example, the Tribunal - with reference to the judgment of the BCCSA Tribunal in Cornerstone Church & Others vs SABC1 (case number 19/2004) where complaints were lodged against the broadcaster for broadcasting the "Phat Joe Show" on the grounds that it amounted to a "mockery of Jesus" (after the screening the film The Passion of the Christ) - argued as follows: "Although this programme is of a different genre to that of the film under discussion, the subject, namely Jesus Christ, was the same." Then, after comparing the two completely different genres in this manner and concluding that, in the light of the fact that the "subject" in both cases was the same (namely Jesus Christ), the Tribunal drew, with respect, a contestable inference: "… we think that the effect on the religious feelings of a substantial part of the population was also the same." This assumed link between the

"sameness" of subject matter and the "sameness" of the effect on the religious feelings of a substantial part of the population, was, with respect, not substantiated by convincing argument by the Tribunal. Indeed, the subject matter of the film and the Phat Joe Show was not the same at all. Phat Joe amounts to a seemingly puerile attempt at comedy which lasts only a few minutes, whilst LTOC is serious drama with a plot developed over three hours.

[10] In considering the case of LTOC the Tribunal took the position of seeking "a balance between freedom of expression and freedom of religion" where the latter freedom entails "protection against one's religion being ridiculed or attacked." The Tribunal found that LTOC ridicules and attacks Christianity, and that, therefore, the broadcast of LTOC was in breach of the Code.

The Appeal Tribunal, with respect, differs from this conclusion and is of the view that the Tribunal failed to convincingly demonstrate in what way LTOC ridicules Christianity and what the attack on Christianity actually consists of.

[11] The Tribunal found that the manner in which Jesus is portrayed as a sinful man in LTOC – "despite it being merely by way of his imagination"– is so contrary to the basic tenets of the Christian faith, and so contemptuous of the faith, that it amounts to hate speech. The phrase "despite it being merely by way of his imagination" illustrates the Tribunal's understanding that this particular sequence in LTOC does not portray reality, and can be regarded as a dream sequence, or imagined events. The Appeal Tribunal is of the opinion that this aspect is crucial to understanding what LTOC as a dramatic film is about, and that the Tribunal should have scrutinized this aspect in more depth and detail.

[12] With regard to "imaginary events" the Appeal Tribunal aligns itself with a widely recognised aesthetic principle that experiencing, and evaluating, a work of art (such as a film) often appeals to a suspension of disbelief on the part of the audience. This entails that patrons willingly engage with a construction (e.g. a

film, a novel, a play) and repress their knowledge that it is a construct and respond to it as though it is real. This mental process implies that viewers should play a game of "what if" - to set aside whatever their preconceived notions, opinions and feelings about the topic; to accept the premise of a work of fiction as plausible (in the context of the construction) even if such premise is fantastic, impossible, or contradictory to widely accepted "truths" about the topic addressed in the construction.

[13] It is the Appeal Tribunal's view that LTOC as a dramatic work of art, and the way in which the film was constructed in its various sequences, appeals to a suspension of disbelief and that the film cannot be evaluated independently from this aspect. It is, with respect, the opinion of the Appeal Tribunal that the Tribunal's misreading of the text and images of LTOC has arisen from a failure to adequately considering these aspects when coming to its conclusion.

[14] Given the principles outlined above, the Appeal Tribunal is of the view that LTOC should have been evaluated:

- As a fictional work;
- As not based on the four Gospels in the Bible; which is in any case clearly stated at the beginning of the film.

[15] Based on these principles the Appeal Tribunal is of the opinion that a sequence-by-sequence comparison of the text and images of LTOC and biblical passages and images to survey the extent to which LTOC deviates from the actual source (the Bible) and to infer from this LTOC's historical inaccuracy, is inherently flawed and invalid. Moreover, it is inherently flawed and invalid, to infer from such deviations that LTOC ridicules and attacks Christianity.

[16] Against the background of the above exposition, the Appeal Tribunal is of the opinion that a closer reading of the text and images of LTOC will reveal to what

extent the Tribunal, with respect, misread/misunderstood LTOC's text, images and sequences. In this regard a few pertinent examples:

* The Respondent made much of the issue of the historical inaccuracy of LTOC. The Tribunal, on the other hand, and correctly so, stated that complaints about historical inaccuracy must be turned down. However, the Tribunal, then proceeded, with respect, to contradict and undermine its own position on this issue in the following way: the Tribunal pointed out that the Jesus-figure becomes (historically) known through the Gospels and then cites a number of dogma statements about Jesus, implying that these statements should have been adhered to, or accommodated in LTOC. The disconcerting implication of this point of view is that a work of art (such as a film, book or play) which, for example, deals with a particular religious faith must in all respects correctly represent that faith's history, dogmas and creeds in order to be acceptable for viewers belonging to this particular faith. The further implication is that art, then, becomes nothing but dogma masquerading as art.

* Still on the issue of (historical) accuracy the Tribunal asserted that Jesus was portrayed in LTOC as weak of spirit, confused, and as having had lustful thoughts. The Tribunal linked its argument concerning "lustful thoughts" to the "dream sequence" subsequent to Jesus' leaving the cross. To arrive at a conclusion about the question whether Jesus was portrayed as a sinner and adulterer the Tribunal deemed it necessary to regard Jesus' behaviour in this sequence of LTOC as the proper benchmark against which the meaning of Jesus' teaching "that anyone who so much as looks lustfully at a woman has already committed adultery in his heart" should be evaluated. Pursuing this line of thinking the Tribunal then found that "logically, the Jesus as portrayed in the film did indeed commit adultery."

[17] Contrary to this the Appeal Tribunal has no doubt that the Christian debate about this issue is, historically and contemporaneously, much more nuanced than the way in which the Tribunal dealt with it. For example, the Christian debate about

the expressions *Posse non peccare* (ability not to sin) versus *Non posse peccare* (inability to sin), as applied to Jesus, goes back many centuries and is still a point of serious debate in present-day theological circles. This very debate features implicitly in a nuanced way in LTOC. Understanding this aspect is central to a proper appreciation of what the "last temptation", as portrayed in LTOC, actually means.

[18] The Tribunal's view, in line with the Respondent's view, that Jesus is portrayed as being "weak of spirit and confused" was linked to scenes in which Jesus seemed uncertain about his calling and about who he is. The Appeal Tribunal asserts, with respect, that a portrayal of Jesus' "weakness" does not imply that Jesus is ridiculed, and cannot be regarded as constituting hate speech. In Isaiah 53 – to which the Respondent referred through Rev Stanley – the suffering servant of the Lord is portrayed in words much more reminiscent of "weakness" than of "strength." ("He had not beauty or majesty to attract us to him, nothing in his appearance that we should desire him. He was despised and rejected by men, a man of sorrows, and familiar with suffering. [NIV])

[19] According to Rev Stanley Jesus was portrayed in LTOC as a weakling while the true hero was Judas. However, what he did not notice with due regard, is that Judas was portrayed as a man with tunnel vision, who was unable to grasp the fact that the Messiah could be called upon to suffer and die. When Jesus explained to Judas in LTOC that the Messiah has to suffer, Judas replied: "I do not understand." This is followed by a dialogue between the two of them:

Jesus: I am the lamb. I am the one who is going to die.

Judas: If you're the Messiah, why do you have to die?

Jesus: At first, I did not understand.

Judas: Every day you have a different plan.
First it is love. Then the axe. Now you have to die.

Jesus: God talks to me a little at a time.
I have to die on the cross, and I have to die willingly.

Judas: What happens then?

Jesus: I come back.

Judas: I don't believe you.

Jesus: You have to.

[20] The Appeal Tribunal wishes to point out that this lack of understanding on the part of Judas is in line with the Gospels' narrative about the disciples' lack of understanding when Jesus predicts his death: "The disciples did not understand any of this. Its meaning was hidden from them, and they did not know what he was talking about." (Luke 18:34, NIV)

[21] When Jesus is nailed to the cross LTOC presents the audience with a key imaginary sequence about an alternative outcome with regard to the path of suffering and crucifixion. Whilst recognising that this sequence is an imaginary representation, the Tribunal interpreted the text and images as indicating LTOC's attempt to show that Jesus had, in fact, sinned. A closer reading of this sequence suggests that what happens in that sequence is actually a "representation" by Satan of how a "last" temptation may have played out if Jesus had succumbed to temptation. From this perspective, the temptation sequence shows what could have been the case *had* Jesus succumbed to temptation. To state it differently: The point of LTOC is *not* that Jesus sinned, or that He made a wrong decision, or that He is not the Messiah. The exact opposite is being shown, specifically in the final sequences: that Jesus is the Messiah; He was the sacrifice; He resisted all temptations (also the "last temptation") to go a different way suggested in Satan's representation.

[22] The sequence portraying Jesus leaving the cross, getting married, having children, growing old, dying ("like a man"), is, as was indicated above, part of the presentation of the temptation by Satan. It is a "what if…" sequence: had He wavered, had He succumbed to temptation, this might have been the way it could have gone. All in all, an ordinary life.

[23] It is quite clear that the film maker tried to emphasise this, e.g. the discussions between Jesus and Judas – just before the suffering – when it dawns on Jesus that the word of the prophet is pointing to a suffering Messiah; one that bears the sickness and sins of others. In one instance Jesus is seen reading from the prophet Isaiah and it dawns on Him that God's way for the Messiah is the way of suffering and sacrifice. In Isaiah the suffering servant of God is portrayed as the lamb that is to be slaughtered. In Judas' presence Jesus quotes from Isaiah 53:

"Last night Isaiah came to me. He had a prophesy.
I saw it written. It said: He has borne our faults,
He was wounded for our transgressions, Yet, he opened not his mouth.
Despised and rejected by all, without resisting, like a lamb unto slaughter…"

[24] Hence it is clear that LTOC stresses the very point that to be the Messiah, Jesus had to suffer, had to be the sacrificial lamb. That Jesus did not succumb, is borne out by His triumphant words when He realised that He was the Messiah who had not succumbed to temptation: "It is accomplished."

[25] In LTOC there is a discussion between Jesus and Judas in which Jesus predicts that, after being crucified, He would be raised and return. Although His return is not shown in LTOC, it is strongly suggested by the prolonged jubilant sounds of church bells ringing in LTOC's final sequence.

[26] All in all the Appeal Tribunal agrees with the view of Chairperson Van Rooyen (in his minority finding) that LTOC explores a religious theme and comes to a positive conclusion: Jesus resists also the last (fictional) temptation. This view was expressed in Chairperson Van Rooyen's finding that a conclusion that LTOC advocates hatred based on religion cannot be justified.

[27] The Tribunal found that LTOC is contrary to the basic tenets of the Christian faith and contemptuous of the faith. The Appeal Tribunal holds, with respect, that this conclusion amounts to a misreading of LTOC. Moreover, the Appeal Tribunal asserts that LTOC contains clear statements about the call of the Messiah and

Jesus' response to this call. The phrase "last temptation" is inter-textually linked to the well-known temptations of Christ in the desert. In whatever ways these temptations are individually interpreted, it is clear in Christian exegesis that they have a common purpose: to keep Jesus away from the cross, from suffering, thus from God's plan of salvation.

[28] The point is that the temptation to "leave the cross and live a normal life"is not contrary to "basic Christian tenets." It is simply another, and according to the film, a rather obvious temptation. It is quite clear that this, in fact, is what LTOC as a film is all about. Instead of arguing (as the Tribunal did) that basic Christian tenets are undermined, it could be argued that a very basic Christian tenet, namely that it was necessary for the Messiah to go the way of the cross and suffering, is confirmed in the film. Because of the calling of the Messiah, He had to shun the possibility (temptation) of living a "normal human life"

[29] Based on the above analysis the Appeal Tribunal decided to set aside the Tribunal's finding that clause 16.3(c) of the Code was contravened. In the light of this conclusion it is strictly speaking unnecessary to consider clause 17.1(i). In the interests of fairness it was, however, decided to also deal with the question whether clause 17 could have been applicable.

[30] **Clause 17.1(i)**

The Tribunal introduced its finding on Clause 17(i) of the Code as follows:

> "After finding that there is a violation of the Code because the broadcast amounted to the advocacy of hatred based on religion and incitement to cause harm, we now have to consider clause 17(i) of the Code. This clause excludes the hate speech limitation on freedom of expression in the case of, inter alia, bona fide drama. Accordingly, we have to consider whether this film passes the test of bona fide drama. It is certainly drama, but the question is, is the drama bona fide?

[31] The Appeal Tribunal suggests that by rendering LTOC to be "certainly drama" the Tribunal, unwittingly so, already implied that LTOC constitutes "bona fide drama" – at least with regard to the ordinary meaning of "certainly drama".

Nevertheless, the Tribunal posed the question whether LTOC is bona fide drama. In doing so the Tribunal interpreted "bona fide" differently from its ordinary meaning in the context of Clause 17 of the Code. Apart from stating its Latin meaning ("good faith") the Tribunal added dictionary meanings such as "honest" and "sincere" and interpreted these adjectives to refer to the "state of mind of the person who creates a piece of drama or to the nature of the drama itself."

[32] The Appeal Tribunal's view is, with respect, that it is impermissible to use the concept of *bona fide* in this extended manner. The Appeal Tribunal is aware that "bona fide" has many shades of meaning, but to the extent that the application of such shades of meaning shifts the focus of the term bona fide away from the drama to the dramatist, the object of the exercise (to establish a drama's bona fide status in an objective fashion) is undermined.

[33] Accordingly the Appeal Tribunal holds, with respect, that the term "bona fide" can only apply to the drama itself, and should not be converted into an evaluation of the character or mindset of an author or film maker. Applying its extended view of *bona fide* the Tribunal inferred the following about the "bona fides" of the film maker:

> "The film maker knew, or must have known, that by depicting Jesus as a man whose flesh succumbed to temptation in the 'merciless battle between the spirit and the flesh' – even though this occurred in the imagination – he was attempting to erode the entire basis of the Christian faith. Neither the film nor its maker passes the test of bona fides."

As was argued with reference to Clause 16.3 above, the Appeal Tribunal has come to the conclusion that a close reading of the film clearly shows that the point of the film is that Jesus did not succumb to the "final temptation."

[34] The Tribunal, with respect, erred in finding: "But when the drama goes so far as to undermine, even unintentionally, what is fundamentally important and dear to the religious convictions of a large section of the population, we find that the drama is not bona fide, and that the finding of hate speech stands." The fallacy in

the Tribunal's argument, with respect, is that the meaning of bona fide drama was transformed into something completely different, something it was not intended to be, namely: "drama that does not undermine, challenge, provoke, etcetera."

[35] Furthermore, the Tribunal erred in linking their finding of hate speech *directly* to their finding that the film cannot be regarded as bona fide drama: "A finding of hate speech could not be avoided because the mortifying way in which the film dealt with the crucial aspects of the Christian faith took it beyond the requirement of bona fides in the sense of honesty and sincerity." And to add to this finding that "the film and its maker could not pass the test of bona fides."

[36] This implies that a finding of hate speech can never be "saved" by the exception provided for in clause 17.1(i), if it can be shown that the speech is of such a nature that it takes the material "beyond the requirement of bona fides in the sense of honesty and sincerity" which includes that of the film director.

When considering the dramatic value or the question whether a work can be regarded as "bona fide" drama, a widely recognised art principle applies: only the work at hand should be evaluated, and not the author's character, intent or moral behaviour. This is to ensure objectivity. By focusing on the bona fides of the film director the Tribunal, with respect, ignored the dramatic merits of LTOC itself (elements such as technical aspects, acting, directing, editing, screenplay, musical score, etc) and did not evaluate the work in accordance with objective standards. In the process it introduced an impermissible criterion in its finding that Clause 17.1(i) was not applicable.

Based on the above arguments the Appeal Tribunal found that Clause 17.1(i) applies. This conclusion is in reality not necessary, since the film, according to the view of the Appeal Tribunal, does not amount to hate speech. Clause 17.1(I) was, accordingly, not even triggered in terms of the Appeal Tribunal's approach to the

matter. As pointed out earlier it was, however, deemed to be in the interest of fairness to also deal with the reasoning of the Tribunal as to clause 17.

[37] The Procedural Rules of the BCCSA requires that a finding by the Tribunal may only be set aside if it is clearly wrong. The Appeal Tribunal has no doubt that the judgment was clearly wrong for the following reasons: (1) the Tribunal did not interpret the film correctly in that it based its reasoning on the premise that the temptation was succumbed to, even if only on an imaginary basis; (2) in any case, the Tribunal should have attributed special weight to the overwhelming aesthetical value of the film and have held it to be bona fide drama; and (3) the Tribunal impermissibly delved into factors extrinsic to the film in so far as "bona fide/s" was concerned. The Appeal Tribunal is, accordingly, of the view that it does not only differ in its conclusion as to the question whether the Broadcasting Code was contravened, but that the errors made were so fundamental that it may, with confidence, conclude that the Tribunal's judgment was clearly wrong in terms of the Rules.

The Appeal against the finding of the Tribunal is, accordingly, upheld and its decision set aside. e-tv did not contravene the Broadcasting Code by broadcasting the film as from 23:15 with due classification and an age restriction.

DSR DU TOIT & WJ JORDAAN

Prof Willem de Klerk, Dr Linda Venter and Mr Ed Linington[1] concurred with the judgment.

1 November 2007

[1] Revd Du Toit acted as Chair of the Appeal Tribunal in accordance with rules laid down by the AGM of the BCCSA.Prof De Klerk is a Commissioner of the BCCSA and, in accordance with the general procedural rules, Dr Venter was co-opted so as to achieve a quorum. Revd Du Toit, as mandated by the Appeal Rules, then co-opted a further two members: prof Wilhelm Jordaan and Mr Ed Liningston.