Hate Speech - the use of the words “ma o dakiwe uno molomo” (when you are drunk you talk too much) used by Judas to refer to in a joke does not amount to advocating hatred based on religion. Moya vs YFM, Case No: 10/2008 (BCCSA)

Children - joke did not constitute material that was unsuitable for children. Moya vs YFM, Case No: 10/2008 (BCCSA).
SUMMARY

YFM radio station, on the 16 April 2008, during the afternoon drive show called Essential Rush, broadcast a joke from a listener which says that Jesus, after breaking bread and drinking wine with his disciples during the last supper, said to them that “one of you is going to betray me” and Judas replied by saying that, when JESUS is drunk, he likes talking nonsense (“ma o dakiwe uno molomo”). A complaint was lodged with the Registrar claiming that the Broadcasting Code had been contravened.

The Tribunal considered the joke in the light of clause 16(3)(c) of the BCCSA Code, which prohibits broadcasting of any material which amounts to the advocacy of hatred that is based on religion and that constitutes incitement to cause harm, and clause 17 of the BCCSA Code which makes exceptions to clause 16 in a case of bona fide opinion on the matter based on religion.

The Tribunal held that although the complainant strongly felt that the use of the words “ma o dakiwe uno molomo” (when you are drunk you talk too much) used by Judas to refer to Jesus are offensive to him and to some members of the Christian faith, the general effect of the joke does not amount to advocating hatred based on religion.

The Tribunal held that the tolerance test comes into play here in that offence to the listener is not enough. The issue is whether what is said advocates hatred based on religion and constitutes incitement to cause harm.

The Tribunal also considered whether the joke contravened clause 18.1 of the BCCSA Code. It held that the joke did not constitute material that was unsuitable for children.

The complaint was not upheld.

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JUDGMENT

BRIAN MAKEKETA

[1] Mr. Vukani “Chilli M” Masinga, a presenter at YFM radio station, on the 16th April 2008, during his afternoon drive show called Essential Rush, read out a joke from a listener which says that Jesus, after breaking bread and drinking wine with his disciples during the last supper, said to them that “one of you is going to
betray me” and Judas responded saying when JESUS is drunk, he likes talking nonsense (“ma o dakiwe uno molomo”). A complaint was lodged with the Registrar claiming that the Broadcasting Code had been contravened in that the joke amounted to a contravention of clause 16(3)(c) of the Broadcasting Code.

[2] An audio excerpt from the show with the joke was played two times during the hearing, as the last part of the joke is in Zulu, to ensure that we all have the same understanding of it. The tribunal limited itself to the joke played on air rather than the Gospel truth of the events of the last supper, as the complaint to the registrar was about the joke and nothing else.

[3] The Complainant said that:

“On the 16 April 2008 during Chili-M’s show, on YFM, the presenter invited listeners to share jokes with the masses. It was around 15:50 when a joke about our LORD and SAVIOR- JESUS CHRIST was made. Chili M said he received an e-mail from a listener and it said that; ‘JESUS said to HIS disciples, one of you is going to betray me some day. One of HIS disciples (Judas) replied by saying that, when JESUS is drunk, he likes talking nonsense’ (ma o dakiwe uno molomo). And he (Chili M) made that loud silly annoying laughter after reading it. It left a very bad taste in our mouths. We demand an unreserved apology from the presenter at once. We also demand that he or any presenter(s), must NOT make any joke(s) about GOD, JESUS and THE HOLY GOST and invite such joke(s) verbally and nonverbally. We trust that this won’t happen again.”

[4] YFM responded as follows:

“The joke that the complainant has reservations about was broadcast as part of a feature, on YFM’s afternoon drive show the ‘Essential Rush’, called the ‘Wednesday Windups’. This is a feature where listeners email or call the presenter Mr Vukani ‘Chilli M’ Masinga with their jokes for the day. The Essential Rush is full of tongue and cheek humour, has hints of satire, is controversial, has high energy levels, is full of laughter and pokes fun unreservedly at all members of society, this sets it apart from all other afternoon drive show.
The joke in question was not made with the intention of advocating hatred based on religion or with the intention of inciting harm. The very essence of the feature is light-heartedness and laughter, which the complainant has noted as well. Nevertheless, YFM has always pioneered the promotion of progressive attitudes towards race, ethnicity, religious choice and sexual orientation, which is in line with a truly democratic and free-speaking society, and continues to do so. YFM therefore, accordingly apologizes for offending the complainant and assures the complainant that this is never the intention of YFM. YFM thanks the client for bringing this issue to our attention and in doing so assisting us in creating programming that is pleasing to all our listeners.

YFM has a core market of between 16 and 24; we do accept that a substantial number of children between 12 and 16 are likely to be part of Chilli M’s audience purely due to the time slot the show falls in. The BCCSA Code describes children as persons under the age of 16, one can maybe assume that that they would show some interest in a feature like the Wednesday Windups as it is a fun and humorous feature. As I had indicated, in the first comment on this complaint, the Essential Rush is full of tongue in cheek humour, has hints of satire, is controversial, has high energy levels, is full of laughter and pokes fun unreservedly at all members of society. Although the joke made falls within an area that may be sensitive to some listeners, one cannot describe it as explicit, offensive or immoral to such an extent that it could be regarded as ‘unsuitable’ in terms of clause 18.1. Of course, we would have a case if the joke viciously attacked another religion and its very foundation or compared one religion to another at the expense of the other, but one can hardly say that this is the case in this regard.

The South African society, children included, is very open minded and will, at the most, take offence to a joke of this nature, if at all. One cannot dare take the assumption that the majority of these children come from Christian background as we live in a vastly pluralistic society. It is therefore very hard to see where or how the harmfulness may occur to children in this regard."

[5] Clause 16.(3)(c) of the Broadcasting Code provides as follows:

“Licensees shall not broadcast advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

[6] Clause 17 provides for an exception to clause 16 and reads as follows:
(i) “The abovementioned prohibitions shall not apply to —a bona fide scientific, documentary, dramatic, artistic, or religious broadcast, which judged within context, is of such nature;

(ii) broadcasts which amount to discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or

(iii) broadcasts which amounts to a bona fide discussion, argument or opinion on a matter of public interest.”

[7] A crucial question is whether the broadcast of the joke falls within the ambit of the fundamental right to freedom of expression, or whether the broadcast amounted to advocacy of hatred based on religion. This right may, in accordance with section 36 of the Constitution of the Republic of South Africa, only be limited where the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account, inter alia, several relevant factors which are set out in the section. The right is also directly limited by section 16(2) of the Constitution of the Republic of South Africa.

[8] Freedom of speech must be awarded a generous interpretation and be fully invoked at the outset when testing the facts against clause 16(3)(c) of the Broadcasting Code. In *Islamic Unity Convention v The Independent Broadcasting Authority and Others,* Langa DCJ (as he then was) convincingly contrasted the current state of freedom of expression with that of the restrictive 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, 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

1 *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

2 *Islamic Unity Convention v Independent Broadcasting Authority* 2002(4) SA 294 (CC)
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. As such it is protected in almost every international human rights instrument.

In *Handyside v The United Kingdom* 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’.”

[9] The Tribunal held that the words “ma o dakiwe uno molomo” (when you are drunk you talk too much) Judas used to refer to Jesus are indeed offensive to some members of the Christian faith and have left a bad taste in the complainant’s mouth, but the tolerance test is whether the words of the joke advocated hatred. This is very important as the BCCSA Code prescribes that it is only when such advocacy is found to be present that the possibility of the joke qualifying for an exemption as a *bona fide* artistic broadcast becomes operational.

[10] The Constitutional Court case of *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) is a proper example to cite as it emphasizes that whether the listener has been offended in his or her religious convictions or not is no longer the test, but rather whether the broadcast amounted to advocacy of hatred based on religion. This is the central issue in this case. The joke in question was a *bona fide* joke which did not cross that fine line between an artistic expression within the context of freedom of speech and propagation of hatred that is based on religion.

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3 (1976) 1 EHRR 737 at 754.
The issue of whether the broadcast contravened clause 18.1 of the BCCSA Code was also raised. Clause 18.1 provides as follows:

“Broadcasters shall not broadcast material unsuitable for children at times when large numbers of children may be expected to be part of the audience.”

In this regard, the Tribunal agreed with the broadcaster that the joke was not “offensive or immoral to such an extent that it could be regarded as unsuitable in terms of clause 18.1”.

The complaint is not upheld.

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BRIAN MAKEKETA

The Chairperson Van Rooyen and Commissioners Viljoen and Heaton concurred with the judgment