

SACHS J ABRIDGED JUDGMENT

Laugh It Off Promotions CC v South African Breweries International

71. Does the law have a sense of humour? This question is raised whenever the irresistible force of free expression, in the form of parody, meets the immovable object of property rights, in the form of trademark protection. And if international experience is anything to go by, it would seem that far from providing clear guidance court decisions on the topic have been as variable as judicial humour itself.
72. In the present matter a graduate of a course in journalism decided to do battle with a number of corporate giants, calling his enterprise Laugh it Off and arming himself with T-shirts bearing parodied images and words brazenly pilfered from his opponents. One of his victims, South African Breweries [SAB], saw one of its well-known trademarks reproduced on T-shirts for public sale. The words 'Black Label' and 'Carling Beer', which accompanied the logo were transformed into 'Black Labour' and 'White Guilt'. In smaller lettering the slogans, 'America's Lusty Lively Beer' and 'Brewed in South Africa' were converted into 'Africa's Lusty Lively Exploitation Since 1652, No Regard Given Worldwide'. SAB did not laugh. Instead it went to the Cape High Court and sought, and obtained, an interdict restraining distribution of the T-shirts.
73. On appeal, the Supreme Court of Appeal [SCA] was equally un-amused, holding that it was unfairly detrimental to SAB to link its protected imagery with imputation of racial exploitation, particularly if the objective was to sell T-shirts. Accordingly, the future sale of the T-shirts was, and remains, interdicted. The result of this double forensic defeat was paradoxically that while the tradename Laugh it Off achieved

national and international fame, Laugh it Off itself faced looming insolvency. The joke now being on it, it appeals to this Court.

74. The facts are well traversed and the broad issues set out with clarity and precision in the judgment of Moseneke J. I agree with the order it makes and with its central proposition, namely, that in the context of our country's free speech values, SAB have failed to prove the likelihood of any appreciable detriment to the marketability of their beer. I feel, however, that something more needs to be said.
75. It would in my opinion be unfortunate if SAB [and the others targeted by the T-shirts] were left with the impression that their case failed simply because they did not back it up with clip-board evidence to prove a measure of detriment. I believe the appeal should be upheld on more substantial grounds. Although the SCA judgment was thoughtfully crafted and raised all the basic considerations in what Moseneke J aptly describes as a novel if not vexed area of our law, I believe that when balancing the different interests involved it failed to appreciate why the parodic use of the trademark in the milieu in which Laugh it Off operated was central to its critical project. By de-contextualising both the nature of the mockery contained in the image and the context in which it was deployed, the SCA over-emphasised the fact that the T-shirts were sold at a profit, and attributed undue weight to the literal meaning of the words used. At the same time it gave far too little regard to the uniquely expressive weight of the parodic form used. The result was inappropriately to allow what were tenuous property interests to outweigh substantial expression rights.
76. At the heart of this matter lies the legal dilemma posed by the fact that Laugh it Off utilised the SAB brand, not adventitiously, but deliberately and precisely in order to challenge SAB's use of branding. It went further. It employed the enemy's brand to denounce the power of branding in general, and to confront the employment of trademark law, in our country as elsewhere, to suppress free speech. It was a

calculatedly risky activity, with the sense of irreverence and provocation being intrinsic to the enterprise. If parody does not prickle it does not work. The issue before us, however, is not whether it rubs us up the wrong way or whether Laugh it Off's provocations were brave or foolhardy, funny or silly. The question we have to consider is whether they were legally and constitutionally permissible. I believe they were eminently so, and give my reasons.

The paradox of parody

77. Parody is inherently paradoxical. Good parody is both original and parasitic, simultaneously creative and derivative. The relationship between the trademark and the parody is that if the parody does not take enough from the original trademark, the audience will not be able to recognise the trademark and therefore not be able to understand the humour. Conversely, if the parody takes too much it could be considered infringing, based upon the fact that there is too much theft and too little originality, regardless of how funny the parody is.
78. Parody is appropriation and imitation, but of a kind involving a deliberate dislocation. Above all, parody presumes the authority and currency of the object work or form. It keeps the image of the original in the eye of the beholder and relies on the ability of the audience to recognise, with whatever degree of precision, the parodied work or text, and to interpret or 'decode' the allusion; in this sense the audience shares in a variety of ways the creation of the parody with the parodist. Unlike the plagiarist whose intention is to deceive, the parodist relies on the audience's awareness of the target work or genre; in turn, the complicity of the audience is a sine qua non of its enjoyment.

As Gredley and Maniatis write:

“The effect on the audience of parodic dislocation is often comic, provoking laughter, not necessarily at the expense of the parodied work or its author, but at the dislocation itself. Other reactions can include shock, disgust, anger or even simply intellectual pleasure at the recognition of the object work and at the skill and imagination of the parodist. . . . [It may be suggested] that the courts are prepared to tolerate genuine parody, especially in cases where the sole or primary injury to the copyright owner is to his *amour propre*.”

78. In a society driven by consumerism and material symbols, trademarks have become important marketing and commercial tools that occupy a prominent place in the public mind. Consequently, companies and producers of consumer goods invest substantial sums of money to develop, publicise and protect the distinctive nature of their trademarks; in the process, well-known trademarks become targets for parody. Parodists may then have varying motivations for their artistic work; some hope to entertain, while others engage in social commentary, and finally others may have duplicitous commercial aspirations. Rutz states that “[o]ften laughter is provoked not at the expense of the original work and its author, but at the dislocation itself. The public may find pleasure in recognising the parody’s object; on the other hand, reactions may be anger or shock, depending on the context in which the parody is set.”
79. The closer the object of the parody is to the parody itself, the more intense will the paradox be. ‘Target’ parodies seek to comment upon the text itself or its creator or owner, while ‘weapon’ parodies involve the use of that text to comment on something quite different. Jurists such as Posner and Kennedy J have suggested that weapon parodies involving the hijacking of a well-known image to attack something entirely unrelated, should not enjoy free speech protection. Another view is that whether the parody of a trademark targets the mark directly or uses it to hit at another target should not be decisive in itself, but merely one of the factors to enter the scales when

free speech and property rights are balanced against each other. In either event some degree of paradox will exist to trouble the law.

Trademark protection

80. The importance of trademark protection needs to be emphasised. In the words of Frankfurter J,

“The protection of trade-marks is the law’s recognition of the psychological function of symbols. . . . A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value.”

From the producer’s side, trademarks promote invention, protect investment and enhance market-share by securely identifying a product or service. From the consumer’s point of view, they facilitate choice by identifying the product and guaranteeing its provenance and presumed quality. Furthermore, although this case has been presented as a David and Goliath contest, it is not only the Goliaths of this world who need trademark protection. Small entrepreneurs fighting to increase their share of the market against the Goliaths strive energetically to identify their uniqueness and that of their products and services. Confusion, dilution or tarnishing of their trademarks can be as harmful to them as to any of the major companies, indeed more so, because their capacity to mitigate any detriment will be attenuated.

81. There is nothing in our law to suggest that parody is a separate defence. Rather, it should be considered as an element in the overall analysis. As a United States court put it:

“Some parodies will constitute an infringement, some will not. But the cry of ‘parody!’ does not magically fend off otherwise legitimate claims of trademark infringement or dilution. There are confusing parodies and non-confusing parodies. All they have in common is an attempt at humor through the use of someone else’s trademark. A non-infringing parody is merely amusing, not confusing.”

The issue in that matter was confusion, not detriment, but the principle is the same: there are parodies that cause unfair detriment and parodies that do not. Everything will depend on the context. Thus, the fact that the trademark image is central to the parody does not make it automatically or even presumptively liable for restraint. Nor, on the other hand, does the fact that it is offered as humour automatically or even presumptively render it immune from restraint. Parody, like any other use, has to work its way through the relevant factors and be judged case by case, in light of the ends of trademark law and the free speech values of the Constitution. Given the importance of trademark protection on the one hand and free speech on the other it becomes necessary to balance the one against the other.

Balancing free speech and trade mark protection

82. The question to be asked is whether, looking at the facts as a whole, and analysing them in their specific context, an independent observer who is sensitive to both the free speech values of the Constitution and the property protection objectives of trademark law, would say that the harm done by the parody to the property interests of the trademark owner outweighs the free speech interests involved. The balancing of interests must be based on the evidence on record, supplemented by such knowledge

of how the world works as every judge may be presumed to have. Furthermore, although the parody will be evaluated in the austere atmosphere of the court, the text concerned [whether visual or verbal or both] should be analysed in terms of its significance and impact it had [or was likely to have], in the actual setting in which it was communicated.

83. It seems to me that what is in issue is not the limitation of a right, but the balancing of competing rights. The present case does not require us to make any determinations on that matter. But it would appear once all the relevant facts are established, it should not make any difference in principle whether the case is seen as a property rights limitation on free speech, or a free speech limitation on property rights. At the end of the day this will be an area where nuanced and proportionate balancing in a context-specific and fact-sensitive character will be decisive, and not formal classification based on bright lines.

84. The mere fact that the expressive activity has a commercial element should not be determinative itself. As the US Supreme Court observed in connection with an analogous copyright question:

“If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble . . . including news reporting, comment, criticism, teaching, scholarship, and research, since these activities ‘are generally conducted for profit in this country’. . . . Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that ‘[n]o man but a blockhead ever wrote, except for money.’”

Codero explains further:

“Both artists and advertisers have used the image or representation of cultural icons to comment on society, criticize the symbol, or sell merchandise. In our pop culture where salesmanship must be entertaining and entertainment must sell, the line between commercial and non-commercial speech has disappeared.”

86. Of more significance is whether the activity is primarily communicative in character or primarily commercial. Thus, some degree of commerce should not in itself exclude the activity from free speech protection. Nor, however, should an element of social criticism on its own save an inherently commercial activity from a charge of unfairly causing detriment.
87. Similarly, the fact that the message could have been conveyed by means other than parody should not be decisive or even significant, again depending on the facts. If this were not so there would be no scope at all for trademark parody, because the message could always be conveyed more directly, if less convincingly, by production of a leaflet or else a letter to the editor. In our consumerist society where branding occupies a prominent space in public culture, one does not have to be a ‘cultural jammer’ to recognise that there is a legitimate place for criticism of a particular trademark, or of the influence of branding in general or of the overzealous use of trademark law to stifle public debate. In such circumstances the medium could well be the message, and the more the trademark itself is both directly the target and the instrument, the more justifiable will its parodic incorporation be. Conversely, the more the trademark is used in arbitrary fashion and simply as a mere attention-seeking device for the lazy or the deceitful, the less justifiable will it be.
88. Another relevant factor to be placed on the scales would be the medium used and the context of its use. Thus, parodic illustrations in satirical columns, or editorial cartoons in newspapers or magazines, or a satirical programme on TV, are likely in any open

society to enjoy a large measure of protection. The very same images in another context could be regarded as unfair. Thus, the fact that lampoons appear on T-shirts to be worn by young irreverent people who enjoy the idea of being gadflies, could be highly relevant.

89. Then there is the more vexed question of whether the fact that the parody is deemed unsavoury should deprive it of any serious degree of free speech protection. Siegrun Kane interprets the courts' focus on a parody's unsavouriness as follows:

“The less [the] redeeming social value in the use [of the parody], the greater the chances for injunctive relief. If, for example, the entertainment is lewd, lascivious, pornographic, disparaging or tasteless, watch out!”

At the same time it has frequently been emphasised that the courts should be extremely reluctant to evaluate a parody on the basis of whether they consider it to be funny or feeble. As the US Supreme Court said in *Campbell*:

“Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. . . . First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”

89. I have mentioned factors which I believe will be relevant to the balancing exercise.

The list is by no means exhaustive. Nor should they be seen as a series of discrete hoops through which the litigants must pass in order to succeed. Rather, they are illustrations of the kind of considerations to be evaluated in a fact-sensitive and

contextual manner and against the backdrop of the values of an open and democratic society. With these considerations in mind I turn to the facts of this case.

The facts

90. The sole member of Laugh it Off, Justin Nurse, states that Laugh it Off is and continues to be a very small concern operating on a shoestring budget. The way it has operated thus far has been to prepare limited runs of T-shirts, to set up a website, and from time to time to hold comedy events where these T-shirts are promoted.
91. Laugh it Off explains the logic behinds its use of T-shirt lampoons as follows. Brands are omnipresent, and invade every aspect of our private and public space. They entrench themselves in modern cultural consciousness by their self-made associations with certain lifestyles, ambitions, appeal to emotion, etc. Branding often has very little to do with the product itself. Thus Black Label beer tastes completely different all over the world, but has a similar brand. In South Africa the branding has nothing to do with actual taste and quality of the beer. It links the consumption of beer and particularly Black Label to manliness, sporting prowess and even sexual prowess:
- Carling Black Label is projected as something that is enjoyed by “men” around the world. This clearly intends to convey that masculinity can be confirmed by drinking Black Label;
 - Carling Black Label is a “lusty, lively beer”;
 - Carling Black Label drinkers have or will acquire, one assumes, “a big one”;
 - Carling Black Label drinkers get more at the end of the day.

Laugh it Off avers that the Black Label man is clearly intended to be a particular type, and if you want to be such a man, you should use your hard-earned money to buy and

drink Black Label beer. The love affair with America, and all things American (for example, township youth are attracted to the hip-hop culture prevalent in American inner cities), is also relied upon – almost as a fallacious “appeal to authority”. The affidavit made in its support claims that

“we live in a society where business and culture occupy the same space. It is here that the debate starts to arise, as the corporates try to make their brands South African culture icons – and yet, when they achieve this and their icon is commented on, they hide behind a set of rules (trademark and copyright laws) that were surely not intended for the purpose of stifling cultural expression. It is fair to say that brands largely affect the way we act, and the decisions that we make. . . . They are powerful, pervasive and persuasive. It is the nature of the brand’s unquestionability that cannot stand”

92. Thus, when resistance to the self-ordained sanctity of the brand comes in the form of satirical T-shirts, corporate reaction is as if a crucifix had been smashed in a monastery in the 14th century. And indeed, Laugh it Off argues, the parallels between the church as an institution that defied any challenge or criticism for centuries, and big business’s banner concept, the brand, defying challenge nowadays, could easily be drawn.

93. The use of the logo on the T-shirt is explained as follows:

“Black Label has the luxury of having the most money, and therefore the most speech. And if I don’t necessarily like what they have to say, and I want my opinion to be heard on as big a platform as their, what am I to do? Write a letter to the editor?. . . It is then that one turns to what could be called ‘ideological jujitsu.’ Jujitsu is a form of martial art that sees a fighter using his opponent’s massive weight against him. In this same way, Laugh it Off has used the force of a massive entity (namely, the Black Label brand) back on itself. . . . Like the political cartoonist scribbles on his inkpad, like the comedian does his interpretations on stage, we put our message on T-shirts. We have accepted that we operate in a capitalist economy and we have found a medium that affords us the opportunity of earning enough money to continue saying

what we want to say. Furthermore, the medium of T-shirts is ideal, as it speaks directly to our target audience: we of the branded generation, who have walked around as advertising billboards for other brands since we were born. It is unavoidable BUT: what you say on your T-shirt says a lot about you. Our T-shirts are sold on campuses to like-minded, freethinking academic students, and in underground clothing stores that attract a young market. Our T-shirts have appeared on display in the National Art Gallery. . . .”

94. Laugh it Off sums up its position by claiming that it uses the vocabulary of our media-rich environment in a statement directed at a media-literate audience. This statement is made the more powerful because the vocabulary of our environment is the brand; in a media-saturated environment, the most evocative and powerful public discussion will use the vocabulary of that environment.
95. I have presented Laugh it Off’s position at some length because it highlights elements of the enquiry which were dealt with in a rather cursory fashion by the SCA. It is clear that Laugh it Off cannot carve out for itself immunity simply by asserting the objective of promoting free speech. Similarly, a claim it makes that it cannot be held accountable for the way its message is interpreted, because that is the nature of art, cannot be sustained. Just as it claims that SAB cannot dissociate itself from the objective impact of its branding message, so Laugh it Off must bear the consequences of the actual effect of its counter-branding statement. Furthermore, the subjective intentions of Laugh it Off are as irrelevant to the judicial enquiry as is the degree of subjective offence its use of the logo may cause to the amour propre of SAB. The subjective intentions of Laugh it Off only became directly relevant when they entered the objective public realm and were interpreted, understood and incorporated into the world-vision of the people who bought, wore and saw the T-shirts. Their significance must accordingly be evaluated not as if they were court exhibits to be scrutinised outside of the context of their use, but according to their actual impact.

96. There is no suggestion in the present case that Laugh it Off was competing with SAB for a share of the beer market; whether or not the T-shirts can be said to amuse, they do not confuse. Nor does the parody attack the quality of SAB's product. The sale of the T-shirts dilutes neither the beer itself nor its unique position in the consumer imagination.
97. The only possible sting as far as trademark protection is concerned relates to the possible negative impact of the sale of the T-shirts on the image of Carling Black Label. It could be said that the imputation of racist labour practices in the past would tarnish the goodwill associated with the trademark thereby creating unfair detriment. The analogy would be that given by Posner, namely the association of Mickey Mouse with sex, blurring the image of the childish innocence that Walt Disney sought to create for his animated cartoon characters.
98. The Posner example I have given, however, points the other way. If valid, it suggests that a lascivious Mickey Mouse would be incompatible with the product being sold, with negative potential for audience ratings. There is no proof whatsoever that imputations of racist labour practices in the past by SAB would in any way affect the eagerness of present day customers to down another glass of Carling Black Label. Indeed, it is difficult to imagine that black working class drinkers would raise an eyebrow at the suggestion that together with virtually every other enterprise of the time, SAB benefited from the use of cheap black labour produced by the pass laws and lack of trade union and political rights. Even assuming that before the launching of the litigation they would have become aware of the existence of the T-shirts, I have the greatest difficulty in imagining that the manly thirst-quenchers would have taken the lampoon at all seriously, let alone regarded it as constituting hate speech or a racial slur. There is hardly an institution in South Africa that has not in the recent period been accused of being associated in one way or another with racist practices.

99. And as far as the actual and rather small community of media-literate purchasers was concerned, what evidence we have suggests that they acquired the T-shirt precisely because it poked fun at enterprises considered as taking themselves too seriously. The purchasers would have noted that this was just one of a batch of T-shirts; which relied for their effect on a pun. The game in which they participated was one of vivacious word-play, not solemn social history. The seriousness of the campaigning enterprise comes from the challenge to the dominion of the brand. The Laugh it Off campaign was to get them to laugh, not to hate; and laugh, it appears, is what they did.

100. The evidence indicates that everybody concerned with the T-shirts, whether as producer or consumer, knew that they were intended to poke fun at the dominance exercised by brand names in our social and cultural life. What united seller and buyer had nothing to do with beer, but was all about irreverence. The use of the trademark was central to the project. This was not an example of a weapon parody being used exploitatively to “get attention or to avoid the drudgery in working up something fresh”.

101. The rule against trademark tarnishment would accordingly seem to have little if any application in the present matter. Looked at in its context, the T-shirt lampoon hardly touched upon SAB’s prowess as producer of a lusty, lively brew. If it did cause any hurt to the owners of the trademark, such hurt could hardly be classified as detriment to the marketability of the beer. Other non-trademark protection remedies might exist for harm to the repute of the beer producer rather than the beer. As Spence writes in England, intellectual property rights are essentially rights against appropriation, not rights against unfair criticism. Unfair criticism, he observes, is regulated, if at all, by the law of injurious falsehood and defamation. It follows that it might be important not to weaken the tarnishment rule where the owner has legitimate claims of product tarnishment via false factual assertions harmful to the viability of a

product. By way of contrast, however, parody of a trademark, unlike product disparagement and other actions which undermine a product's marketability, is a form of public debate about a public enterprise in the public domain.

102. The balancing exercise in the present matter is therefore easily done. On the detriment side there is virtually no harm, if any at all, to the marketability of Carling Black Label beer. This is a case where the communication was far more significant than the trade. The trade was incidental to the communication. The objective of the enterprise, as clearly understood by all those involved, was to get a message across. The sale of the T-shirts was necessary for sustainability. This was not a commercial activity masquerading as a free speech one. To say that the message could have been conveyed by means other than the use of the trademark is to miss the point of the parody. The message lies precisely in the dislocated use of the trademark. The challenge is to the power of branding in general, as exemplified by the particular trademark. It is not to the particular beer as such. It should be stressed that the question is not whether the parody succeeds in hitting the mark. What matters is that it was part of a genuine attempt to critique the status quo in our society. The scales come down unequivocally on the side of Laugh it Off. In the felicitous phrase of an American judge, the evidence shows that in the present matter the parody was a take-off, not a rip-off, and the interdict should accordingly not have been granted.

103. I would like to add two considerations of special constitutional significance which I believe reinforce the conclusion to which I have come.

104. The first relates to the chilling effect that overzealously applied trademark law could have on the free circulation of ideas. In this respect one must recognise that litigation could be a risky enterprise for a meritorious trademark owner as well as the prankster. Applicants seeking to interdict the abusive use of their trademarks stand to be involved in lengthy litigation in which every manner of accusation could be made

against them by persons from whom no costs could ultimately be recovered.

Furthermore, any businesses seen as trying to block free speech could hardly be surprised if the media tended to champion their opponent's cause. Indeed, the very act of invoking the heavy machinery of the law might be regarded as being in conflict with the image of freedom, liveliness and good cheer associated with their product brand. Thus, in the present matter simply bringing the proceedings against Laugh it Off risked being more tarnishing of Carling Black Label's association with bonhomie and cheerfulness than the sale of 200 hundred T-shirts could ever have done. The principle of litigator beware, however, faces any person contemplating legal action.

105. Of more significance from a constitutional point of view is the manner in which even the threat of litigation can stifle legitimate debate. Large businesses have special access to wealth, the media and government. Like politicians and public figures, their trademarks represent highly visible and immediately recognisable symbols of societal norms and values. The companies that own famous trademarks exert substantial influence over public and political issues, making them and their marks ripe and appropriate targets for parody and criticism.

106. Yet when applied against non-competitor parody artists, the tarnishment theory of trademark dilution may in protecting the reputation of a mark's owner, effectively act as a defamation statute. As such it, could serve as an over-deterrent. It could chill public discourse because trademark law could be used to encourage prospective speakers to engage in undue self-censorship to avoid the negative consequence of speaking— namely, being involved in a ruinous lawsuit. The cost could be inordinately high for an individual faced with a lawsuit aimed at silencing a critic, not only in terms of general litigation expenses, but also through the disruption of families and emotional upheaval. Such protracted vexation can have the effect of discouraging even the hardiest of souls from exercising their free speech rights. As

the US Court of Appeals for the First Circuit explained in *LL Bean*, parodies serve an important public function which should not easily be suppressed:

“The central role which trademarks occupy in public discourse (a role eagerly encouraged by trademark owners), makes them a natural target of parodists. Trademark parodies, even when offensive, do convey a message. The message may be simply that business and product images need not always be taken too seriously; a trademark parody reminds us that we are free to laugh at images and associations linked with the mark. . . . Denying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression.”

107. This brings me to the second consideration of special constitutional import. The Constitution cannot oblige the dour to laugh. It can, however, prevent the cheerless from snuffing out the laughter of the blithe spirits among us. Indeed, if our society became completely solemn because of the exercise of state power at the behest of the worthy, not only would all irrelevant laughter be suppressed, but temperance considerations could end up placing beer-drinking itself in jeopardy. And I can see no reason in principle why a joke against the government can be tolerated, but one at the expense of what used to be called Big Business, cannot.
108. Laughter too has its context. It can be derisory and punitive, imposing indignity on the weak at the hands of the powerful. On the other hand, it can be consolatory, even subversive in the service of the marginalised social critics. What has been relevant in the present matter is that the context was one of laughter being used as a means of challenging economic power, resisting ideological hegemony and advancing human dignity. We are not called upon to be arbiters of the taste displayed or judges of the humour offered. Nor are we required to say how successful Laugh it Off has been in hitting its parodic mark. Whatever our individual sensibilities or personal opinions about the T-shirts might be, we are obliged to interpret the law in a manner which protects the right of bodies such as Laugh it Off to advance subversive

humour. The protection must be there whether the humour is expressed by mimicry in drag, or cartooning in the press, or the production of lampoons on T-shirts. The fact that the comedian is paid and the newspaper and T-shirts are sold, does not in itself convert the expression involved into a mere commodity. Nor does the fact that parodists could have voiced their discontent by phoning into a talk show rather than employ the trademark remove their protection. They chose parody as a means, and invited young acolytes to join their gadfly laughter.

110. A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. It enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an elixir of constitutional health.

111. It follows that I fully support the order made by Moseneke J.