



A Curated Conspectus of the Life, Love, Law,
Literature and Laughter of Albie Sachs

THE LAUGH IT OFF CASE – VIDEO TRANSCRIPT

CHAPTER: DOES THE LAW HAVE A SENSE OF HUMOUR?

THANDI MATTHEWS

A very interesting case was the Laugh It Off matter. It had to do with the violation of Intellectual Property rights. Could you talk to us about that case?

JUSTICE ALBIE SACHS

I love talking about that case. I actually opened my judgment by saying, *'does the law have a sense of humour?'* And it opened up possibilities of imagination, storytelling, but also quite rich, deep themes about freedom of expression in the country. And it was brought by a young graduate of the School of Journalism at the University of Rhodes. Justin Nurse had read Naomi Klein's book on logos - *No Logo*. And the main theme of the book was that logos are now colonising the minds of people in the developed world and occupying space that could better be used with intellectual, challenging, fun. And they weren't advertising. They were selling dreams and using the logos and the slogans to market goods in ways that had nothing to do with intrinsic worth of the goods. And she felt this was an abuse of freedom of expression and that it should be challenged. So, this was a challenge then for the young graduate and he decided to make T-shirts that would pick up some of the logos of some of the biggest selling brands in South Africa and parody them.

He sells mainly to students like himself. Not kind of a big deal. And for the most part, the parodied organisations laughed. I think Standard Bank, he said, *Standard Wank. Bigger, Faster, Better*. So, Standard Bank bought a hundred and gave it to their workers. One was for Carling Black Label Beer, and the manufacturers of Carling Black Label, I think in Belgium, were not amused because the slogan had been *Carling Black Label Beer*. Something like *America's Lusty, Lively Beer...* So, he changed *Black Label* to *Black Labour* and instead of *America's Lusty, Lively Beer*, he said something about exploitation...300 years of exploitation. So, they were not amused. And they said it's disparaging their brand.

CHAPTER: FROM HIGH COURT TO CONSTITUTIONAL COURT

And they went to the High Court and the High Court agreed. Freedom of speech. That's okay. You can picket it, you can denounce it, but you can't use the intellectual property of Carling to sell your products. It goes on appeal to the Supreme Court of Appeal and Justice Harms - he was a great specialist in Intellectual Property law - he writes a very solemn, serious judgment emphasising, of course, freedom of speech... You can picket *Carling Black Label*, you can protest, you can hold up banners outside their front gates, but you can't use their property to sell your T-shirts. It comes on appeal to us in the Constitutional Court. To be candid, I can't wait for it to come. If ever there was a kind of total misapplication of legal principles, not reading the situation in a realistic, meaningful way at all.

Heavy, clunky, it was in this case-- from the proprietors of *Carling Black Label* through their counsel, and I'm sorry to say, my colleagues, the judges, who are fine craftspeople and serious thinkers. But it was the frame of mind that was so out of touch with ongoing realities and debates and arguments about freedom of speech as to cry out for a response.

So, we hear the argument. I notice that my friend Peter Hodes, who's arguing for Justin Nurse, he keeps away from all this Naomi Klein stuff. He doesn't want to get into this thing of selling dreams. Very simple thing he said, *'There are freedom of speech issues here that outweigh the commercial interests that are involved.'* And he just stops there.

He just doesn't want to touch the wider issues. None of my colleagues seem to be particularly interested. But for me, that's what it's really about. It's about the way commercial power can be used to dominate and colonise people's minds and how you can respond. And number one, it's about the importance of satire, the importance of parody, of laughter in society.

So, it's not as though Justin Nurse was going out and tearing up all their T-shirts saying that you're selling dreams. And the theory that he advanced was you do a kind of jiu jitsu with the promoter of the logos. You trip them up with their own weight, and so you appropriate the image, in order to mock it and jeer at it.

And the parody was central to the whole project. It wasn't just that he fortuitously happened to use - that was the very point of it. And that's the point of satire and the point of parody.

CHAPTER: AMUSING RESEARCH

So, I do a lot of international research, and it was very amusing. And I commented that the judicial responses were as varied as judicial humour itself.

There was one American case that went up to the US Supreme Court that was very relevant. It's commonly known as the *Pretty Woman* case, and you might have seen the film with Julia Roberts and she's a streetwalker, a prostitute, a sex worker, whatever term you use. And who does she meet? Richard Gere, this good looking, handsome, wealthy businessman. And you can guess how the story ends. And there's a lovely soundtrack - *Pretty Woman* - and in a sense, it's a nice rags to riches story where Julia Roberts falls into the arms of Richard Gere. And there's an African American singer - and that's relevant - who's angry. The life of most streetwalkers in America, many of whom are black, is horrible. It's not pretty. You don't end up in bed with Richard Gere. You're abused by the police, you're abused by the clients, you're abused by the pimps. Your health is at stake. You're put onto drugs. So, he uses the lovely soundtrack *Pretty Woman* to tell the story of the real lives of real people. And the makers of the record are furious. *'You're using our music, our title, to sell your music.'* And they go to court to try and get an injunction to stop him, and they try and claim damages from him. And it reaches the Supreme Court, and the majority says, *'Freedom of Speech, First Amendment. It's making a point, a strong, powerful, valid point. It's permissible. It's not simply hijacking the trademark, the name to sell the product. It's challenging the character of the product.'* And another American judge in one of their high courts, I think, put it very, very well. And he said, *'Is it a take-off, which is permissible or is it a rip off? Are you simply appropriating the brand, the name, the logo, the title, to get publicity and a feeling of liking for the product? Or are you genuinely making a serious point in terms of parody?'*

CHAPTER: THE POINT OF PARODY

And that puts me onto the whole point of parody. The point of parody is the appropriation. It's using the image, which is recognisable, but dislocating it. That's the very point of it. So, you can't say, it's an opportunistic thing to sell your product, if it's seriously done.

And I look at parody, and how it's been treated, in different courts, in different parts of the world, and I come back to the South African situation. And I remember how Peter Hodes wouldn't go near the Naomi Klein stuff. In a long affidavit, his client had made about using intellectual jiu jitsu, you take the force of your opponent to trip up your opponent.

That's the whole point. And he said, *'Take Nike shoes. Nike shoes, don't advertise by saying good, strong, robust shoes, good materials. They don't even say, beautiful design. They don't say it's got more spring. It helps you to win the race. It says "Just Do It" you put on Nike's, and you can do anything.'* And that's what Naomi Klein's objecting to, that's what he's objecting to. And he's doing it in the form of parody. It's humour, and he feels that he's protected.

CHAPTER: THE JUDGMENT

So, Dikgang Moseneke the then Deputy Chief Justice, is asked to write the judgment, very lovely judgment, good writer, focused, comfortable in his expression. And he said, *'Here we have, two competing constitutional interests involved. There is the protection of the intellectual property of the designers of the logo and the sellers of the product on the one hand, and freedom of speech on the other. And in the circumstances, is the freedom of speech interest, strong enough to override the intellectual property use?'*

And there are technical terms about fair use being permissible. And he puts it, a little bit into notions like fair use of the trademark, in this case of the logo. And I agree with it, up to a point, he said, *'there's been no evidence from Carling Black Label that their sales suffered in any way, as a result.'* And I agreed with that.

And it made it easy to reject the injunction and to uphold the appeal. But I felt there was a deeper point involved, and that is the role of humour in a democracy, it's importance... the importance not simply to allow people to be funny. Humour, enables people to deal with harsh contradictions and tensions, that if they play themselves out, one side, winning and the other losing, it can be very destructive and give rise to cycles of discontent and retaliation.

It enables people to release bottled up sources of anger and so on to come out in humour. You can get on with life.

CHAPTER: HUMOUR, A SOLVENT OF DEMOCRACY

It's more than just a nice thing that's allowable. I said, *'It's actually one of the solvents of democracy.'* And I might say, when I went to the Canadian Supreme Court some years later and I was invited into the chambers of the Chief Justice, across the front door of the chambers was that quote from Albie Sachs, *'Humour is one of the solvents of democracy.'* Very exciting. I liked to see it there. And I think the law clerk had spotted it and liked it, and she liked the idea that some of that solemnity that goes with the judicial function should give way to a more gracious, more warm, more connecting kind of approach.

And so, I wrote a separate judgment, beginning with the words, *Does the law have a sense of humour?* And I was prompted a little bit by Desmond Tutu, the Archbishop. He said, *'Does God, does the Lord have a sense of humour?'* and he said, *'...and the Lord has a sense of humour.'* And he said, *'You go to parliament today, that all white parliament, only men, and you see everybody there ... and God is laughing.'* So, I think, well if the Lord can have a sense of humour, then the law can have a sense of humour. But, with a similar objective to his objective - to reduce that intense solemnity that

almost becomes inhuman in legal expression. It's not to puff it up with false fun and energy and so on.

But to humanise the nature of the relationships that are involved and the language that's used to articulate. So, this case, you know, gave a brilliant opportunity for doing that. And the satirical weekly called *Noseweek* published it almost in full. Very popular as you can imagine with the satirists and the cartoonists.

And it's certainly, for me, a landmark. The amusing thing is it went around the world. And you would have thought that capitalism is threatened. If only, if only, they were discussing it seriously in Germany, in the United States. *What are the implications of this kind of case?* And of course, it could never have had that disruptive implications at all. It wasn't disruptive of commerce. It was disruptive of a fairly narrow view of a form of intellectual property.

THANDI MATTHEWS

And I think also, you know, just reflecting on your point about using your freedom responsibly, but at the same time, to critique institutions of power is also important. And so corporate capital is an institution of power. And if you have power, you should be able to take a bit of a punch.

CHAPTER: INFUSING FLAVOUR IN COMMON LAW AND STATUTES

JUSTICE ALBIE SACHS

There'd been a tendency in earlier years to see constitutional law as only dealing with limits on state action. And one of the major features of our Constitution was to make it applicable to the common law, to interpreting statutes, and generally to infuse a flavour in all the work that the judiciary does, whether it's in the public or the private sphere. The *Laugh It Off* case was an example now, where so much of speech is not just from government, it's hugely from commerce. It's not simply speaking about public events and so on. It's affecting the minds, the thinking, the habits, the tastes of people. And the courts can't refrain and say, *'it's none of our business.'*

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