BEFORE THE FINAL APPEAL COMMITTEE OF THE ADVERTISING STANDARDS AUTHORITY OF SOUTH AFRICA

In the matter of:

CHRIST EMBASSY CHURCH — Appellant

v

TREATMENT ACTION CAMPAIGN — Respondent
(Represented by Nathan Geffen)

FINAL APPEAL COMMITTEE RULING

1.1. It is convenient to set out the timeline of events in this matter which are common cause and have been chronicled in the Respondent's Heads of Argument.

1.2. In May 2009 e-TV and B and B promotions, on behalf of the Appellant, concluded an agreement in terms of which B and B promotions would pay e-TV a fee of R2,600 000 for the broadcast of various programmes. These programmes would constitute 24 minute religious programmes which had to be flighted on Sundays, at 07h30 over a 52 week period, commencing on 28 June 2009.

1.3. These programmes were in fact flighted and on 22 November 2009 one Nathan Geffen lodged a complaint with the ASA. He complained as follows: "An infomercial run by

Christ Embassy Healing School has appeared on e-TV at 07h30 am on 22 November 2009. The advertisement claims to be able to use faith/healing to treat several diseases including heart disease. The claims are unsupported and the advert is in breach of appendix F of the ASA code. I request that the ASA bans this advert." The conjunctive is important clearly setting out the complaint in two parts -- namely the claims of faith/healing for, inter alia, heart disease was unsupported and that the programme was in breach of Appendix F.

1.4. On 1 June 2010, the ASA directorate ruled that the programme did not constitute an advertisement against which ruling Geffen lodged an appeal.

1.5. e-TV,, after a communication from the ASA directorate advised Geffen that it had inserted a disclaimer before, during and after the programme to read: "This programme is an advertorial,opinions and views expressed in this production are not necessarily the same as those held by e-TV."

1.6. The appeal to the Advertising Standards Committee (ASC) was heard. It upheld the appeal, concluding that the programme was in fact an advertisement as defined in the Code. It further held that the advertisement promoted the Appellant as a place to go to in order to receive blessings that would lead to curing illness or disease. This the ASC held was in violation of appendix F of the Code and directed that the advertisement had to be withdrawn and the Appellant could not repeat the claims set out in the advertisement unless they had been substantiated in terms of clause 4.1 of Section II of the Code and it was in compliance with appendix F.

1.7. The ASC recorded: "During the hearing it was submitted that the programme complained of has run its contract. It would therefore be academic to impose any of the sanctions in terms of clause 14 of the Procedural Guide. Such an approach would be a narrow interpretation of the sanction clause and interpretation of what is being ruled against. An adverse ruling prohibits an advertiser from continuing to advertise or from repeating the

offending material. The ruling will therefore apply in respect of the actual content of the programme complained of, or the repetition thereof in subsequent programmes and even in terms of a new programming contract."

1.8. On 2 March 2011 the Appellant lodged the present appeal.

2. In its Heads of Argument before this committee, the Appellant submitted that Geffen did not disclose that he was acting on behalf of the Respondent. This point was raised for the first time in the Appellant's Heads of Argument. Ms Jansen SC, who appeared for the Appellant, did not raise this matter in argument before us. In any event it lacks merit because both Geffen and the TAC had *locus standi* to bring the complaint. On 4 July 2010, Geffen disclosed that he was representing the Respondent.

3. The issues arising in this appeal are whether the programme constitutes an advertisement as defined in the Code; was the complaint of the claims being unsupported too widely stated so that there was a failure of natural justice; was appendix F applicable; would an ASA sanction breach the right of freedom of religion and whether the Appellant's tender not to flight the programme again met the substance of the Respondent's complaint.

4.1. The Appellant's tender contained in the Appellant's Heads of Argument was stated as "This particular programme and the specific claims that are associated with this programme will not be aired again." During argument, Ms Jansen amended the tender to read "This particular programme will not be flighted again." Ms Cowen, who appeared for the Respondent, stated that the tender was not sufficient as there was no undertaking not to make the claims associated with the programme. She argued that it would not cover the substance of the complaint, namely the claims made in the programme to the

effect that by joining the Appellant's church, associating with it or attending its faith healing sessions, its Pastors would transfer God's healing powers to anyone who suffers from the list of diseases that were announced in the programme, including heart disease. Further, that this would lead to healing of such diseases and the receipt of miracles from God.

4.2. While the ASA has a long standing practice that when there is an undertaking not to flight a commercial the matter should not proceed, in casu, the issue was the programme in its current format. In consequence there was no agreement between the parties and we proceeded to hear argument on the above issues.

5. Dealing with the question of freedom of religion, the Constitutional Court, on more than one occasion, has accepted that the right to freedom of religion entails the right to entertain such religious beliefs that a person chooses, the right to declare religious beliefs openly and without fear or reprisal and the right to manifest belief by worship and practice or by teaching or dissemination. Implicit in this right is the absence of coercion.

5.1. The Code constitutes a contract between the Appellant and the Respondent. The agreement between them is that neither would advertise in a manner which breaches the provisions of that agreement, namely the Code. If the programme is an advertisement, and is in breach of any of the provisions of the code, and this committee were to sanction that breach it would not result in the Appellant not being able to entertain its religious beliefs, it would not be a reprisal and the Appellant could continue to manifest such beliefs by worship and practice, Reprisal connotes the forcible seizure

of a person's property in retaliation of some act. A sanction to stop advertising in breach of the Code would not amount to a reprisal.

5.2. The ASA and its committees are subject to the Constitution as the supreme law of the Republic. The Constitution provides that when interpreting any legislation and when developing the common law or customary law, it should be done so as to promote the spirit and purport of the Bill of Rights. The Constitutional Court has held that any judicial officer, and in our view, any tribunal such as the ASA, where possible, should read legislation or self regulatory provisions in a manner which gives effect to the fundamental values of the Constitution. While none of the rights in the Bill of Rights is absolute, and the rights are subject to limitation, this limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In order to do this different interests must be balanced and weighed up. On the one hand there is the right infringed and on the other hand there is the importance of the purpose of the limitation. "In the balancing process and in the valuation of proportionality one is enjoined to consider the relation between the limitation and this purpose." Vide National Coalition for Gay and Lesbian Equality and another vs. the Minister of Justice and Others, 1998 (12) (BCLR) 1517 (CC) at paragraph 34. Further, the onus of proving that the limit on the fundamental right is permissible in terms of the limitations clause, rests upon the party seeking to uphold the limitation. Vide S. vs. Zuma and Others, 1995 (2) SA 642 (CC) at paragraphs 35 to 38.

5.3. This committee has held that the Code, which is in line with international advertising Codes is a justifiable limitation to ensure that advertising is "legal, decent, honest and truthful." A sanction against the Appellant for a breach of the Code would not amount to prescribing "to the plethora of nationalities in South Africa what their religious orientation or beliefs should be", as submitted in the Appellant's heads.

6.1. Ms Jansen submitted that the programme was not an advertisement. She argued that the guidance given under the broadcast legislation of a programme in excess of 2 minutes not being an advertorial should be a guide for interpreting an advertisement as defined in the Code.

6.2. In Section 1 advertising is defined as follows: "In this Code unless the context otherwise indicates, advertisement means any visual or aural communication, representation, reference or notification of any kind, which is tendered to promote the sale leasing or use of any goods or services, or which appeals or promotes the support of any cause."

6.3. Product is defined in 4.23 of Section 1 of the Code as including goods, services, activities and facilities. Ms Jansen argued that the reasonable viewer would see the programme as promoting a relationship with God, with faith healing being a core manifestation of such belief in order to create hope and faith in the Lord Jesus Christ and not as an advertisement.

6.4. The Code also provides that an advertisement does not apply to programming publicity. Programming publicity has been held by this committee to mean publicity given to a programme. This relates to publicity as to the time place or venue when a programme would be shown.

6.5. The ASA Directorate held that the programme was not an advertisement as it was 22 minutes long. eTV had clarified that the material is a religious programme classified as an advertiser-funded programme and consequently the material complained of is programming material .

6.6. We agree with Ms Cowen's submission that the length of the broadcast does not determine whether it is an advertisement or not. The probabilities are that an advertiser-funded programme is likely to be an advertisement or to contain advertisements. In this regard it is common cause between the parties that a portion of the programme promoting the Rhapsody of Realities Bible is an advertisement as defined in the Code.

6.7. The ASC found that the programme was an advertisement.

6.8. We agree with the reasoning of the ASC that the programme promotes that joining the Appellant will realize the healing of one's diseases and its school is promoted as a place to receive miracles from God. This is a service or product offered to the viewer. This included the healing of heart disease which was the focus of the programme.

6.9. Further, the Code provides that the test to be applied in assessing conformity with the Code is "the probable impact of the advertisement as a whole upon those who are likely to see or hear it, Due regard will be paid to each part of its contents, visual and aural, and to the nature of the medium through which it is conveyed."

6.10. The agreement concluded between the Appellant and B and B Promotions, an advertising company, in its express terms intended to advertise the Appellant.

6.11. Clause 12 of Section 2 of the Code provides: "In electronic media particular care should be taken to clearly distinguish between programme content and advertising. Where there is a possibility of confusion, advertising should be clearly identified in a manner acceptable to the ASA." In this regard, it is common cause that part of the programme is in fact an advertisement. The Appellant took no steps to clearly distinguish between what it contended was programme content and advertising. At the very least it must have known that there was a possibility of confusion but took no steps to distinguish between what it contends to be programme content and what it agrees is advertising.

6.12. We have concluded that the probable impact of the programme as a whole is an advertisement within the meaning of that term as defined in the Code.

7.1. It was submitted that Appendix F was not applicable.

7.2. Clause 4 of the preface to the Code provides that: "This Code is supplemented by individual Codes which are determined by the various member organizations or negotiated with governmental institutions. These individual Codes are reflected in the

appendices to the Code. All such Codes conform to the general principles laid down by this Code and differ only in detail where the individual needs are to be met." The Code further provides that: "The individual Codes contained in the appendices are administered on behalf of the owner identified at the top of the first page of each appendix."

7.3. The owner at the top of Appendix F is said to be the Medicines Control Council (MCC).

7.4. Ms Jansen argued that the contractual provisions of Appendix F need to be interpreted and applied in accordance with the provisions of the Medicines and Related Substances Control Act, 101 of 1965. She submitted that a conflicting interpretation would mean that the MCC negotiated and agreed to provisions in Appendix F, *ultra vires* its statutory mandate and such agreement could not contractually impose requirements that legally cannot be met. She further argued that section 18 C of the Medicines Amendment Act had not been complied with, as there had been no regulation relating to the marketing of medicines.

7.5. We do not agree with this submission. Assuming for the purposes of this matter that there is no regulation, and Appendix F is *ultra vires,* in the context of this matter these two issues are legally irrelevant. The appendix became a term of the contract between interested parties to the Code being a supplement to the Code.

7.6. That which is contained in Appendix F is therefore part of the Code and there has to be compliance with these terms by interested parties such as the parties in casu.

8.1. Appendix F provides that advertisements should not make or offer products, treatments or advice for several diseases which include heart troubles, cardiac symptoms. The focus of the advertisement was a 17 year old girl lying breathless on a bed on a stage. She says that she has been suffering from certain heart trouble for several years and a certificate which she says is from a doctor, points out that she is breathless and cannot

carry on normal activities. One of the Pastors of the Appellant lays his hand on her. She suddenly jumps up and runs around the stage – healed. This is clearly a treatment on the ordinary meaning of the word and such treatment was not accorded a full product registration by the MCC.

8.2. We have concluded that the Code is clear as supplemented by Appendix F. One may not advertise a product or offer treatment or advice for heart trouble unless this accords with the full product registration by the MCC. It was common cause between the parties that this requirement was not met.

9.1. The focus of the programme was on the young 17 year old girl suffering from heart trouble where a medical certificate is displayed in the programme saying she is suffering from heart trouble. She says she is breathless and unable to carry on normal activities and then is healed. This is the focus or core of the advertisement. In the original complaint it is said: "The advert claims to treat various diseases using faith healing. In particular the advert makes reference to heart and cardiac problems. The claim to be able to treat these diseases using faith healing is unsupported. Claiming to be able to treat heart diseases is in breach of Appendix F of the ASA Code." It is clear from a reading of this complaint to the reasonable reader that the complainant is asserting that the treating of heart problems in particular is an unsupported claim in the advertisement.

9.2. The Appellant contended that the complaint was expressed too widely and did not comply with clause 3.1.3 of the Procedural Guide, in which a complaint must be clearly stated, and if possible the sections of the Code identified. The section goes on to say that should the complainant not do so, the ASA will consider the complaint in terms of the sections it regards as relevant and deal with the complaint as if it had been lodged in terms of those sections.

9.3. The ASC and the Appellant dealt with Clause 4.1 of Section II at the ASC hearing and the Appellant did so without demur.

9.4. It is a fundamental principle of justice that a person affected by a decision should be given an opportunity to be heard or to defend himself or herself before such decision is taken. The corollary of the right to be heard is the right of the affected person to be given reasons, that is, to be informed of the substance of allegations relied upon so that he or she can have an opportunity to controvert such allegations. Without reasons being given the right to be heard may be illusory.See Kloppenburg N O v Minister of Justice 1964 (1) SA 813 (D&CLD) at 818B; Arapee Industries Ltd v CIR 1993 (2) SA 216 (N) at 220F-I.

9.5. The Appellant submitted that there was a failure of natural justice in that sufficient particularity of the complaint was not furnished. We do not agree because read in the context as a whole, the core of the programme was the young girl suffering from heart trouble and being cured of her heart trouble. The substance of the complaint was set out by the Respondent: "In particular the advert makes reference to heart and cardiac problems ..... claiming to be able to treat heart disease is in breach of Appendix F of the ASA Code."

9.6. We have consequently concluded that there was nothing procedurally unfair by the ASC referring to Clause 4.1 of Section II. The ASC recorded that apostle Karen Victor said both in the programme and in oral submissions during the hearing before the ASC, that substantiation was available by means of medical records of people who had received miraculous healing from the Appellant

9.7. In the hearing before us Ms Jansen advised from the Bar that the Appellant had consulted a medical practioner who was unable to substantiate that the positive progression of the young girl's heart trouble was as a result of the healing process or was a natural improvement in her condition..

9.8. The Appellant knew before the flighting of the advertisement that it had no substantiation for the claim made in the advertisement, that the young girl's heart trouble was cured by faith healing.

9.9. Even if it is contended that Clause 29 is applicable in this matter, which provides for products with unproved supernatural properties, products are defined as set out above, as including services and activities.

9.10. Section 29 of the Code provides: "Advertisements for lucky charms or products with unproven supernatural properties including those for achieving health, should not imply that these products can affect the users circumstances unless such statements are substantiated."

9.11. It is common cause that the claim in regard to the improvement of the young girl's heart trouble has not been substantiated.

10.1. It was submitted by the Appellant that the order granted by the ASC was too wide in its terms and included a prohibition on advertising in the future. The ASC stated: "The programme complained of has run its contract, the ruling will apply in respect of the actual content of the programme complained of, or the repetition thereof in subsequent programmes and even in terms of a new programming contract."

10.2. The ASA, in terms of the Code, can only apply a sanction to the advertisement complained of, and cannot give pre-publication advice or any pre-publication constraints. A pre-publication sanction arises in the Code as a power vested in this committee for a breach of a prior order.

10.3. The ASC cannot expressly rule on future advertising.

10.4. In this regard, the Appellant is entitled to have this overbroad part of the ruling set aside.

11. We have concluded:

11.1. The programme is an advertisement.

11.2. The advertisement is in breach of Clauses 4.1 of Section II of the Code and Appendix F of the Code.

11.3. The order granted by the ASC effectively dealt with a pre-publication constraint which it did not have the power to do.

11.4. The correct order would have been an order in terms of Clause 14.1 of the Procedural Guide which effectively amounts to an acceptance by this committee of the tender by the Appellant to withdraw the advertisement but in its current format and not merely a focus on the episode itself, namely the young girl.

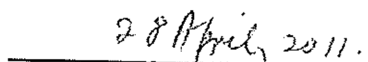
12. We expressly record that this ruling in no way impinges on or is intended to restrict the Appellant's right to entertain its religious beliefs, to announce its religious beliefs or to manifest such beliefs by worship or practice.

13. Counsel were agreed that whatever the outcome there should be no order as to costs.

14. We consequently make the following order:

14.1. The advertisement in its current format must be withdrawn.

14.2. No order as to costs.



Mervyn E.King S.C.

Date

President