

Chapter III – Advertising and freedom of expression

Given that the regulation of offensive advertising as well as 'censorship legislation' is in place in Canada, South Africa, the United Kingdom and the United States, the next question to consider is whether advertising amounts to a protected form of freedom of expression. Thereafter, the question whether the South African advertising code constitutes "law of general application" that may limit freedom of expression, needs to be answered before it can be critically discussed whether the regulation of offensive advertising, as administered by the South African advertising regulator, is a permissible limitation on freedom of expression.

1. Introduction

In determining whether advertising can be considered a protected form of freedom of expression, it is suggested that the meaning and interpretation of the right to freedom of expression and the right to free speech must firstly be established.

In its first judgment dealing with freedom of expression, a unanimous South African Constitutional Court articulated the values underlying the guarantee of freedom of expression in the following way:¹

Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally.

Freedom of expression lies at the heart of democracy and facilitates the search for truth and self-fulfilment by individuals and society generally.² In this sense, freedom

¹ *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) para 8.

² Davies "Freedom of expression" in Cheadle, Davis & Haysom *South African constitutional law: the bill of rights* (2002) 219. See also *Wingrove v The United Kingdom* (1997) 24 EHRR 1; *SANDU v Minister of Defence* para 7; *R v Zundel* [1992] 2 SCR 731; *Open Door Counselling and Dublin Well Woman v Ireland*

Chapter III

Advertising and Freedom of Expression

of expression promotes the ideals of pluralism, tolerance, and broad-mindedness, which are seen as central to the democratic process and to the personal development of individuals.³ As freedom of expression is seen as indispensable to democracy, the importance of this right in a democratic society is emphasised in many jurisdictions,⁴ and given 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",⁵ freedom of expression is no less important in South Africa than it is in, for example, the United States of America.⁶ In the absence of freedom of communication, there is no democracy.⁷ Moreover, as the value system of the *Constitution of the Republic of South Africa, 1996* is premised on the values of an open and democratic society based on human dignity, equality, and freedom,⁸ these values have been elaborated by the courts and extended to include values such as *ubuntu* and reconciliation.⁹

(1993) 15 EHRR 244; *Gay News Ltd and Lemon v United Kingdom* (1982) 5 EHRR 123; *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Handyside v The United Kingdom* (1976) 1 EHRR 737 at 754.

³ Coppel *The Human Rights Act 1998: enforcing the European Convention in the domestic courts* (1998) 327.

⁴ Refer, for example, Burns "The regulation of telecommunications in South Africa" *Comparative and international journal of South Africa* (1999) 301-316, 303; Davis *Freedom of expression* 218; *Handyside* at 754; *Sunday Times*; *Gay News*; and *Zundel*.

⁵ *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) para 26.

⁶ *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 para 37. See also, for example, Woker "Legitimate protection of the public or censorship? Advertising controls and the right to freedom of speech" *SA mercantile law journal* (1997) 292-309; and Van der Westhuizen "Freedom of expression" in Van Wyk *et al* (eds) *Rights and constitutionalism: the new South African legal order* (1994) 288.

⁷ Jacq & Teitgen "The press" in Delmas-Marty (ed) *The European Convention for the protection of human rights. International protection versus national restrictions* (1992) 59.

⁸ Section 36(1) and s 39(1) of the *Constitution, 1996*.

⁹ Cheadle "Limitation of rights" in Cheadle, Davis & Haysom *South African constitutional law: the bill of rights* (2002) 373-3 with reference to *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) par 185.

Chapter III

Advertising and Freedom of Expression

It has been said that in a democracy, individual adult members of society are responsible moral agents.¹⁰ This means that in a democracy it is recognised that adults have a capacity for making moral judgments and responding accordingly.¹¹ Accordingly, in a democratic South Africa, society at large and individuals personally, need to hear, form and express opinions and views freely on a wide range of matters, even where those views are controversial and shock, offend or disturb the population or any sector thereof,¹² since freedom of expression is an implementation of the individual freedom of thought.¹³ Thus, in *Handyside* the European Court of Human Rights emphasised the importance of the right to freedom of expression, which, it said, “constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man”.¹⁴

Given the importance of freedom of expression in a democratic society, advertisers do not hesitate to rely on freedom of expression to justify controversial advertising campaigns.¹⁵ However, the constitutional protection of freedom of expression was not originally designed for the benefit of advertising or commercial expression,¹⁶ as this form of expression primarily relates to the promotion of goods or services for

¹⁰ *SANDU v Minister of Defence* para 7. See also Davis *Freedom of expression* 219.

¹¹ Refer, for example, Holmgren “Self-forgiveness and responsible moral agency” *The journal of value inquiry* (March 1998) 75-91.

¹² See, for example, *SANDU v Minister of Defence* para 8-9; and *Mamabolo* para 37; *Government of the RSA v Sunday Times* 1995 (2) SA 221 (W); 1995 (2) BCLR 182 (T) at 226H.

¹³ Naidu “The right to freedom of thought and religion and to freedom of expression and opinion” *Obiter* (1987) 59-73, 68.

¹⁴ *Handyside* para 48.

¹⁵ See, for example, *Teazers v M Huckle & Others* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2006; and Van der Westhuizen *Freedom of expression* 290.

¹⁶ Van der Westhuizen *Freedom of expression* 289-90; Marcus “Freedom of expression under the Constitution” *SA journal on human rights* (1994) 140-148, 147-148.

Chapter III

Advertising and Freedom of Expression

profit.¹⁷ For example, free political debate, which is necessary to enable people to make informed choices, is different from the explicit portrayal of sexual intimacy,¹⁸ raising the question as to whether the ambit of freedom of expression in South African law includes advertising as protected expression within the ambit of s 16 of the *Constitution, 1996*.¹⁹

2. Freedom of expression and advertising

2.1. Scope of freedom of expression

Section 16 of the *Constitution, 1996* guarantees freedom of expression. The right to freedom of expression is two-sided in nature: not only is it the right to impart information but also the right to receive information.²⁰ In *Laugh It Off*, Moseneke J, writing for the Constitutional Court, noted that, “unless an expressive act is excluded by s 16(2) it is protected expression”.²¹ Given this potentially wide scope of expression, Sachs J, in a separate but concurring judgment in the matter of *Laugh It Off*, pointed out in relation to commercial activity that “whether the activity is primarily communicative in character”²² would determine its expressive content. The approach adopted by the Constitutional Court in this matter is in line with the

¹⁷ See also *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC); 2005 (5) BCLR 743 (CC) para 84 where Sachs J quotes Codero “Cocaine-Cola, the velvet Elvis, anti-Barbie: defending the trademark and publicity rights to cultural icons” (1997-1998) 8 *Fordham intellectual property media & entertainment law journal* 599, 650.

¹⁸ Davis *Freedom of expression* 218.

¹⁹ As to the sanctity of freedom of expression, and the arguments that have been presented to explain the rationale behind the high ranking afforded to free expression by human rights advocates, see in general Van der Westhuizen *Freedom of expression* 267-71; and Milo, Penfold & Stein “Freedom of expression” in Woolman Roux & Bishop (eds) *Constitutional law of South Africa* (2008) 42.

²⁰ Section 16(1)(b) of the *Constitution, 1996*. See also *Stanley v Georgia* 394 US 557 (1969) 564.

²¹ *Laugh It Off* para 47. Moseneke J referred with approval to *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) paras 14-15; and *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) para 51.

²² *Laugh It Off* para 85.

Chapter III

Advertising and Freedom of Expression

approach in Canadian law:²³ Activity that does not convey or attempt to convey a meaning and thus has no content of expression should not be protected.

Unless expression falls into one or more of the three categories of expressive activity set out in s 16(2) of the *Constitution, 1996*, namely “propaganda for war”;²⁴ “incitement of imminent violence”;²⁵ and what is commonly referred to as “hate speech”,²⁶ it constitutes protected expression.²⁷ Section 16(2) is therefore defining the boundaries beyond which the right to freedom of expression does not extend, and is serving as an internal limitation to the general right to freedom of expression in s 16(1) by removing an entire area of speech beyond the ambit of the right to freedom of expression.²⁸ For example, child pornography and nude dancing, as a point of departure, are constitutionally protected.²⁹ The balancing and limitation of rights are not conducted within s 16 of the *Constitution, 1996*.³⁰

This definitional approach adopted in s 16(2) of the *Constitution, 1996* is similar to the “licensing” provision in article 10(1) of the *European Convention for the Protection of*

²³ Hogg “Interpreting the charter of rights: generosity and justification” (1990) 28 *Osgood Hall law journal* 817; *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927; *R v Keegstra* [1990] 3 SCR 697.

²⁴ Section 16(2)(a) of the *Constitution, 1996*.

²⁵ Section 16(2)(b) of the *Constitution, 1996*.

²⁶ Section 16(2)(c) of the *Constitution, 1996*.

²⁷ *Laugh It Off* para 47.

²⁸ *Islamic Unity Convention v Independent Broadcasting Authority* NO 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 para 10; Johannessen “A critical view of the constitutional hate speech provision” *SA journal on human rights* (1997) 135-150, 139; Milo, Penfold & Stein *Freedom of expression* 42-6; and Marcus & Spitz *Expression* 20-58. This is not expressly stated in Woolman, Roux & Bishop (eds) *Constitutional law* (2008).

²⁹ Milo, Penfold & Stein *Freedom of expression* 42-6 – 42-8 with reference to *De Reuck v Director of Prosecutions* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) para 47 and *Phillips v DPP, Witwatersrand Local Division* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) para 17.

³⁰ Milo, Penfold & Stein *Freedom of expression* 42-9.

Chapter III

Advertising and Freedom of Expression

Human Rights and Fundamental Freedoms.³¹ In that this article states that the right to freedom of expression as set out in article 10(1) “shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises”, article 10(1) also provides an internal limitation of the primary article 10(1) right to freedom of expression. A licensing system, as a manner in which freedom of expression can be limited, is therefore not restricted to those grounds set out in article 10(2), which provides for the criteria which makes the limitation of freedom of expression permissible.³² The “licensing” provision in article 10(1) does not, however, extend to content requirements relating to licences,³³ which must meet the limitation requirements provided for in article 10(2) of the *European Convention* to constitute a permissible limitation of freedom of expression.

2.2. Broad interpretation of freedom of expression

“Expression” is a wider concept than “speech”.³⁴ Whereas “speech” arguably relates to utterances with some intelligible content intended to inform, ask, or persuade, “expression” may include appeals to the emotions or the senses, through, for example, sound or colour.³⁵ Moseneke J further commented in *Laugh It Off* that the phrase “freedom of expression” in itself is indicative of an expansive approach to the constitutional protection of expression.³⁶ Thus, freedom of expression should be “delineated generously”.³⁷

³¹ 213 UNTS 222, entered into force on 3 September 1953, as amended by Protocols No's 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

³² Fenwick H *Civil liberties and human rights* (2007) 277.

³³ Fenwick *Civil Liberties* 278; and *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321, 338-9.

³⁴ Milo, Penfold & Stein *Freedom of expression* 42-32.

³⁵ Van der Westhuizen *Freedom of expression* 264.

³⁶ At para 47. See further *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 48; Milo, Penfold & Stein *Freedom of expression* 42-32; Davis *Freedom of expression* 220, 228; Burns *Telecommunications* 304.

³⁷ *Laugh It Off* para 47. Moseneke J referred with approval to *Zuma* paras 14-15; and *Williams* para 51.

Chapter III

Advertising and Freedom of Expression

Freedom of speech, as protected in the *First Amendment* of the United States,³⁸ provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

Freedom of expression, as protected in South Africa, Canada, and in the *European Convention*, embraces within its ambit a wider range of expressive activities than does the *First Amendment*.³⁹ The European Court of Human Rights has repeatedly emphasised that article 10 of the *European Convention* protects not only information and ideas, which are received favourably or with indifference, but also those that shock, offend or disturb.⁴⁰ Equally, in the United Kingdom it is accepted that article 10 protects in substance and in form a right to freedom of expression which others may find insulting.⁴¹ For example, in *O'Shea v MGN Ltd*,⁴² the Divisional Court held that a pornographic advertisement, which may have been regarded by many as lacking in dignity and moral value, and degrading to women, was a form of protected expression. Also, in Canada the Federal Court of Appeal held in *Weisfeld v Canada*⁴³ that "[e]xpression is not limited to words, oral or written, but encompasses myriad forms of communication, including music, art, dance, postering, physical movements, marching with banners, etc as long as the activity conveys or attempts to convey a meaning".⁴⁴

³⁸ *First Amendment to the United States Constitution of 1787*.

³⁹ Woolman, Roux & Bishop (eds) *Constitutional law of South Africa – student edition* (2007) 362.

⁴⁰ See for example, *Handyside* at 754; *Coppel Human rights* 328.

⁴¹ *Amos Human rights law* (2006) 417 with reference to *Percy v DPP* (2002) Crim LR 835.

⁴² (2001) All ER (D) 65 para 37.

⁴³ [1995] 1 FC 68.

⁴⁴ See also *Davis Freedom of expression* 220.

Chapter III

Advertising and Freedom of Expression

2.3. Commercial freedom of expression

Commercial freedom of expression primarily relates to the advertising of goods or services for profit.⁴⁵ Sachs J, in a separate but concurring judgment in *Laugh It Off*, commented that the fact that expressive activity has a commercial element should not in itself determine whether such expressive activity is protected.⁴⁶ The Cape High Court in *City of Cape Town v Ad Outpost (Pty) Ltd and Others*,⁴⁷ where it was found that advertising constitutes protected expression, echoed the reservations expressed by Sachs J in *Laugh It Off*.⁴⁸ An analysis, which focuses on the distinction between commercial and non-commercial expression, is thus rejected in South African law.⁴⁹

This distinction has its origin in the United States. In the Supreme Court decision of *Central Hudson Gas and Electric Corp v Public Service Commission of New York*⁵⁰ it was found that the *First Amendment* accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.⁵¹ The rationale for this distinction relates to the fact that the *First Amendment* is cast in absolute terms and is not subject to textual limitation, resulting in a clear line being drawn between protected and unprotected speech. Consequently, relatively large classes of speech, such as commercial speech, have been defined as “non-speech” and have received no constitutional protection at all.⁵²

⁴⁵ Marcus & Spitz *Expression* 20-50. This is not expressly stated in Woolman Roux & Bishop (eds) *Constitutional law* (2008).

⁴⁶ *Laugh It Off* para 84.

⁴⁷ 2000 (2) SA 733 (C); 2000 (2) BCLR 130 (C).

⁴⁸ Sachs J in *Laugh It Off* para 84. See also Illsley “How to tell a take-off from a rip-off: trade mark parody and freedom of expression in South Africa” Notes and comments, *SA journal on human rights* (2006) 119-125, 123-4.

⁴⁹ Illsley *Trade mark parody* 123-4.

⁵⁰ 447 US 557 (1980).

⁵¹ At 561 – 566. Refer also Janis, Kay & Bradley *European human rights law* (2000) 200.

⁵² Milo, Penfold & Stein *Freedom of expression* 42-6; Marcus & Spitz *Expression* 20-12.

Chapter III

Advertising and Freedom of Expression

It was not until the case of *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*⁵³ that the United States Supreme Court extended *First Amendment* protection to pure commercial advertising, which did no more than propose a commercial transaction at a particular price. Since the *Virginia State Board* decision, the United States courts voided several restrictions on free speech in accepting that *First Amendment* protection could be extended to advertising.⁵⁴ Thus, in *United Reporting Publishing Corporation v California Highway Patrol*,⁵⁵ it was said, “[t]he current debate centers not on whether commercial speech is a form of expression entitled to constitutional protection, but on the validity of the distinction between commercial and non-commercial speech”.⁵⁶ To the extent that the commercial speech doctrine might be evolving, it appears to be moving in the direction of providing greater - rather than less - protection for commercial speech.⁵⁷

Sachs J's rejection of the distinction between commercial and non-commercial expression in *Laugh It Off*⁵⁸ is also in line with the approach in Canada. In *Ford v Quebec (Attorney-General)*⁵⁹ the Supreme Court of Canada rejected an argument that commercial expression was not included in the protection of s 2(b) of the *Canadian Charter*.⁶⁰ Moreover, in *Rocket v Royal College of Dental Surgeons of*

⁵³ 425 US 748 (1976) 762.

⁵⁴ See, for example, *Peel v Illinois Attorney Registration and Disciplinary Commission* 496 US 91 (1990); *Shapiro v Kentucky Bar Association* 486 US 466 (1988); *Posados de Puerto Rico Associates v Tourism Co of Puerto Rico* 106 SCT 2968 (1986); *Bates v State Bar of Arizona* 433 US 350 (1977); and *Linmark Association v Township of Willingboro* 431 US 85 (1977).

⁵⁵ 146 F 3d 1133, 1136 (CA) 1998).

⁵⁶ At para 6254.

⁵⁷ Ogletree, Miller & Jessamy “Utility affiliates: why restrict use of names and logos?” *Public utilities fortnightly Arlington* (1999) 34-9.

⁵⁸ *Laugh It Off* para 84; *Illsley Trade mark parody* 123-4.

⁵⁹ [1988] 2 SCR 712.

⁶⁰ *Canadian Charter of Rights and Freedoms*.

Chapter III

Advertising and Freedom of Expression

*Ontario*⁶¹ it was held that freedom of expression as protected by s 2(b) includes commercial speech such as advertising.

While the European Court of Human Rights, as illustrated by its judgment in *Markt Intern and Beermann v Germany*,⁶² has been reluctant to find a violation of the *European Convention*, when mere commercial speech is at issue, the European Court of Justice of the European Union requires that expression have a commercial aspect if its restriction is to raise a question under the mainly economic treaties under which it operates.⁶³ The conflict in the approach of these two courts is highlighted in the reactions of these Courts to an Irish prohibition on publication in Ireland of information on abortion services available in the United Kingdom. In *Society for the Protection of Unborn Children v Grogan*⁶⁴ the European Court of Justice refused to find this prohibition incompatible with European Community law. Although the Court agreed that it had the power to assess the compatibility of national legislation with fundamental rights, and particularly those laid down in the *European Convention*, it could do so only with respect to legislation within the scope of Community law. The European Court of Justice believed that the absence of an economic aspect to the case at hand precluded it from pronouncing on the application of article 10 of the *European Convention*.⁶⁵ When the same restriction came before the European Court of Human Rights in *Open Door*, however, a violation of article 10 of the *European Convention* was found. The Court noted that the information suppressed was, information about services lawful in Britain, and Irish law does not deny women access thereto. The European Court of Human Rights believed that the restriction on

⁶¹ [1990] 2 SCR 232.

⁶² (1990) 12 EHRR 161.

⁶³ Janis, Kay & Bradley *European human rights* 202.

⁶⁴ [1991] 11 3 CMLR 849.

⁶⁵ Janis, Kay & Bradley *European human rights* 202-3.

Chapter III

Advertising and Freedom of Expression

this information created a risk to the health of women seeking abortions,⁶⁶ and accordingly embraced commercial speech as protected expression.⁶⁷

Accordingly, the rejection of the distinction between commercial and non-commercial expression in South African law is in line with the approach presently adopted in Canada and by the European Union. Furthermore, as stated earlier, it appears as if the commercial speech doctrine in the United States is also moving in the direction of providing greater protection for commercial speech.⁶⁸

In determining whether an activity constitutes protected expression, said Sachs J in *Laugh It Off*, one should reject the simple distinction between commercial and non-commercial expression, rather asking, “whether the activity is primarily communicative in character or primarily commercial”.⁶⁹ Adopting this stance, it means that an advertisement that is primarily commercial, rather than primarily communicative, is not likely to constitute protected expression. This is in line with the approach in Canadian law. In considering the scope of freedom of expression as contained in the *Canadian Charter* activity, which does not convey or attempt to convey a meaning and thus has no content of expression, or which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct.⁷⁰ To this extent, one can take note of the judgment of the United States Supreme Court in *Virginia State Board*,⁷¹ where the Supreme Court pointed out that advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason and for what price. Similarly, the European Court of Human Rights has recognised that advertising performs a useful function in society, namely to provide

⁶⁶ Janis, Kay & Bradley *European human rights* 203.

⁶⁷ Quinn “Comparative commercial speech” in Heffernan (ed) *Human rights - a European perspective* (1994) 241.

⁶⁸ Ogletree, Miller & Jessamy *Names and logos* 34-9.

⁶⁹ *Laugh It Off* para 85.

⁷⁰ Hogg *Charter rights* 817; *Irwin Toy* 927; *Keegstra* 218.

⁷¹ At 765.

Chapter III

Advertising and Freedom of Expression

individuals with the means of discovering the characteristics of services and goods on offer.⁷²

2.4. Subordinate position of commercial freedom of expression

In the decision of *Northern Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and Others*⁷³ the Durban and Coast Local Division of the High Court held that advertising as a protected right “occupies a subordinate position in the scale of constitutional rights values”.⁷⁴ In that s 16(1) read with s 36 of the *Constitution, 1996* does not explicitly distinguish between different levels of constitutional protection, a judicial distinction must be drawn between expression which forms part of the core of freedom of expression and expression which is “at some remove from this core”, as there are elements of a right that constitute its core values and others that are at the periphery of protection.⁷⁵ Commercial expression is, however, not necessarily removed from the core of freedom of expression and is therefore best positioned within the protected fringe of the guarantee of freedom of expression.⁷⁶ Woolman Roux & Bishop correctly point out that this judicial distinction should not occur at the stage of determining what forms of expression are protected by the *Constitution, 1996* but at the limitation stage.⁷⁷

⁷² *Casado Coca v Spain* (1994) 18 EHRR 1 para 51.

⁷³ 2002 (2) SA 625 (D) 633.

⁷⁴ *Roundabout Outdoor* 635.

⁷⁵ In this respect, Milo, Penfold & Stein *Freedom of expression* 42-13, footnote 1, argue that South African freedom of expression jurisprudence is likely to share common features with Canadian freedom of expression jurisprudence. See also Marcus & Spitz *Expression* 20-57, footnote 2; *Khumalo v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 BCLR para 21; *Roundabout Outdoor* 634; and *Bernstein and Others v Bester and Others* 1996 (2) SA 751; 1996 (4) BCLR 449 where core and peripheral values to the right to privacy were considered and the protection afforded each distinguished.

⁷⁶ *Roundabout Outdoor* 634.

⁷⁷ *Constitutional law – student edition* 362.

Chapter III

Advertising and Freedom of Expression

The *Canadian Charter* adopts a content-neutral approach to defining expression.⁷⁸ In the absence of an express content-based distinction between levels of protection afforded to expression, the Canadian courts have developed a distinction between expression at the core of the guarantee, and that, which is further removed from the core. The Canadian courts believe that not all expression is equally worthy of protection and that not all infringements of free expression are equally serious.⁷⁹ This distinction has been considered an important factor, and has arisen particularly when the justifiability of limitations on free expression has been at issue.⁸⁰

The European Court of Human Rights consistently affords a higher level of protection to publications and speech that contribute towards social and political debate, criticism, and information – in the broadest sense. Artistic and commercial expressions, in contrast, receive a lower level of protection.⁸¹

In a South African context, to the extent that the value of freedom of commercial expression may count for less than other forms of expression, an evaluation can only be made at the limitation enquiry as envisaged in s 36 of the *Constitution, 1996*.⁸² This approach would accord with the approach adopted by the courts in terms of the *Canadian Charter* and the *European Convention*.

2.5. Concluding comments

Laugh It Off dealt with the use of parodied trademarks on t-shirts, and not advertising. Thus, whilst the Constitutional Court has not, to date, expressly determined whether advertising as a form of commercial speech is an entrenched

⁷⁸ Marcus & Spitz *Expression* 20-51. This is not expressly stated in Woolman, Roux & Bishop (eds) *Constitutional law* (2008).

⁷⁹ *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326.

⁸⁰ Currie & De Waal *The bill of rights handbook* (2005) 179. See also Keegstra; *Ross v New Brunswick School District No 15* [1996] 1 SCR 825; and *Canadian Broadcasting Corp v New Brunswick (Attorney-General)* [1996] 3 SCR 480.

⁸¹ Ovey & White *Jacobs & White - the European Convention on human rights* (2006) 320 with reference to *Vgt Verein gegen Tierfabriken v Switzerland* (2002) 34 EHRR 159 para 71.

⁸² *Ad Outpost*.

Chapter III

Advertising and Freedom of Expression

right in terms of the *Constitution, 1996*, it certainly paved the way for such acceptance. The High Court decisions of *Roundabout Outdoor* and *Ad Outpost* have, however, answered this question in the affirmative.⁸³

Milo, Penfold & Stein suggest that in terms of s 16(1)(c), which protects freedom of artistic creativity, no distinction should be drawn between *art* as a product, and the process of creating art, and also that the term *art* should be broadly defined to include, for example, the making of films and music.⁸⁴ It is submitted that such a broad interpretation of *art* should therefore also be inclusive of the making of advertisements.

Furthermore, given the wide interpretation given to expression by South African courts, all forms of commercial speech are likely to be considered protected 'expression', with any differentiation between their treatment and that of other forms of expression occurring at the limitations stage of analysis, to accept advertising as expression that is protected in terms of the *Constitution, 1996*, would be in line with international jurisprudence:⁸⁵ As has been pointed out, in Canada, advertising as a form of commercial expression is entitled to the protection granted by the *Canadian Charter*,⁸⁶ And the European Court of Human Rights has also accepted that commercial advertising cannot be excluded from the scope of the *European Convention*.⁸⁷ The term "expression" also included advertisements in the United

⁸³ *Ad Outpost; Roundabout Outdoor*.

⁸⁴ *Freedom of expression* 42-52 and 42-57 – 42-58.

⁸⁵ Currie & De Waal *Handbook* 379-380; Woolman Roux & Bishop *Constitutional law – student edition* 379-380.

⁸⁶ Section 2(b) of the *Canadian Charter* states that everyone has the fundamental "freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication". See, for example, *Ford v Quebec; Irwin Toy; Rocket v Royal College; Ramsden v Corporation of the City of Peterborough* [1993] 2 SCR 1084; *RJR McDonald Inc v Attorney General, Canada* [1994] 1 SCR 311. See further Whyte, Lederman & Bur *Canadian constitutional law - cases, notes and materials* (1992) 19-28, 22-51; Hogg *Constitutional law of Canada* (2000) 31, 40; Woker *Legitimate protection* 299.

⁸⁷ Schermers "Freedom of expression" in Heffernan L (ed) *Human rights - a European perspective* (1994) 208-9.

Chapter III

Advertising and Freedom of Expression

Kingdom jurisprudence,⁸⁸ and advertising is also seen as protected speech under the *First Amendment*.⁸⁹

Not only can inoffensive advertising be considered as a protected form of freedom of expression. Offensive advertising can also be regarded as protected.⁹⁰ The focus of this thesis now needs to shift to the question whether the South African advertising code, as administered by the South African advertising regulator, constitutes a “law of general application” which may limit a right in the South African Bill of Rights.⁹¹

3. Limiting freedom of expression

3.1. General

Limitations ought to be the exception and not the rule.⁹² The existence of a general limitation section does not mean that the rights in the Bill of Rights can be limited for any reason.⁹³ Thus the Constitutional Court warned in *Dawood; Shalabi; Thomas v Minister of Home Affairs*⁹⁴ that, “[w]e must not lose sight of the fact that rights enshrined in the Bill must be protected and may not be unjustifiably infringed”,⁹⁵ and commented in *Islamic Unity as follows*:

It is in the public interest that people be free to speak their minds openly and robustly, and, in turn, to receive information, views and ideas. It is also in the

⁸⁸ *Amos Human rights law* 417 with reference to *Smithkline Beecham plc v Advertising Standards Authority* [2001] EMLR 23.

⁸⁹ Refer, for example, *Virginia State Board* 762.

⁹⁰ Woolman Roux & Bishop *Constitutional law – student edition* 369.

⁹¹ Section 36(1) of the *Constitution, 1996*. Refer also Cheadle *Limitation of rights* 360.

⁹² Erasmus “Limitation and suspension” in Van Wyk et al (eds) *Rights and constitutionalism: the new South African legal order* (1994) 642.

⁹³ Currie & De Waal *Handbook* 164.

⁹⁴ 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

⁹⁵ At para 54.

Chapter III

Advertising and Freedom of Expression

public interest that reasonable limitations be applied, provided that they are consistent with the Constitution.⁹⁶

In a South African context, persons should not have an absolute right to stand anywhere and say whatever they want without having regard to the Constitution's value system of an open and democratic society based on human dignity, equality and freedom, *ubuntu* and reconciliation.⁹⁷ It is clear from the above that freedom of expression is not regarded as an absolute right in South Africa.⁹⁸ Van der Schyff suggests that the s 36 limitation provisions in the *Constitution, 1996* can be seen as instruments that stimulate an honest and open debate in a democracy.⁹⁹ To accommodate the conflict between entrenched rights and social interests, every democratic society imposes its own restrictions on freedom of expression having regard to factors such as culture, history and tradition. These views may change with time, depending on developments in society, as well as changes in attitude in other jurisdictions.¹⁰⁰

Each right has a history.¹⁰¹ Thus constitutional protection and limitation of freedom of expression has to be interpreted within the context of appreciating where South African society comes from and where it wants to go. South African society has a history of denial of the values of equality, freedom, openness, reconciliation, and tolerance; of race discrimination, sexism; and an obsession with secrecy in the face of perceived onslaughts. It is also a society that is conscious of a history of state censorship which especially related to sex, nudity, bad language, violence, and

⁹⁶ At para 15. See also Woolman, Roux & Bishop *Constitutional law – student edition* 369.

⁹⁷ Section 36(1) and s 39(1) of the *Constitution, 1996*. Refer also Naidu *Freedom 72; Cheadle Limitation of rights* 373-3 with reference to *Makwanyane* par 185.

⁹⁸ Refer, for example, *Islamic Unity* para 15; and Currie & De Waal *Handbook* 163. See also Sharpe & Swinton "Limitation of charter rights" in Sharpe & Swinton *The charter of rights and freedoms* (1998) 42.

⁹⁹ Van der Schyff *Limitation of rights – a study of the European Convention and the South African bill of rights* (2005) 239.

¹⁰⁰ Van der Westhuizen *Freedom of expression* 264; Cheadle *Limitation of rights* 358.

¹⁰¹ Cheadle *Limitation of rights* 363.

Chapter III

Advertising and Freedom of Expression

religion,¹⁰² and which was aimed not only at preserving white minority rule but also at enforcing the morality of a small group by the instrument of the law.¹⁰³ The Constitutional Court in the matter of *Islamic Unity* recognised that:

The regulation of material that is indecent, obscene or offensive to public morals, offensive to religious convictions or feelings of sections of the population ... are important areas with which the government, or the relevant regulatory authority, might be expected to concern itself [provided that] the regulatory provisions are in line with the Constitution.¹⁰⁴

This expectation also finds application in, for example, the United States: The Supreme Court in *Ginsberg v New York*¹⁰⁵ dealt with a matter in which the Appellant was convicted of selling adult magazines to a 16-year-old boy. The Supreme Court acknowledged that “[t]he wellbeing of its children is, of course, a subject within the State's constitutional power to regulate”.¹⁰⁶

With the introduction of the interim Bill of Rights in South Africa in 1994, it became apparent that the continued regulation of offensive material, based on the previous rationale and application, would be contrary to the rights to privacy and freedom of expression as entrenched in ss 13 and 15 of Chapter 3 of the *interim Constitution, 1993*.¹⁰⁷ These rights were also entrenched in the *Constitution, 1996* in ss 14 and 16 respectively. Although the same grounds of restriction such as defamation, obscenity, and contempt of court may be invoked today, as in the past, the crucial difference is, or ought to be, that such restriction is now exercised in the application

¹⁰² See, for example, Van der Westhuizen “Do we have to be Calvinist puritans to enter the new South Africa? (A review of current trends in the Publications Appeal Board)” *SA journal on human rights* (1990) 425-439, 425.

¹⁰³ Van der Westhuizen *Freedom of expression* 273; Bohler-Müller “The discourse of pornography: a feminist perspective” *Obiter* (2000) 167-176, 167.

¹⁰⁴ *Islamic Unity* para 30.

¹⁰⁵ 390 US 629 (1968).

¹⁰⁶ At 639. Also see, for example, *Sable Communications, Inc v FCC* 492 US 115 (1989).

¹⁰⁷ Constitution of the Republic of South Africa (Act 209 of 1993).

Chapter III

Advertising and Freedom of Expression

of law based on a democratic mandate, and within principles that recognise the role of freedom of expression in sustaining a democracy.¹⁰⁸ Thus, in *JT Publishing (Pty) Ltd and another v Minister of Safety and Security and others*¹⁰⁹ the Constitutional Court stressed that censorship in general is not constitutionally unacceptable.¹¹⁰ It is rather a question of whether the nature and range of a particular restriction is reasonable and justifiable, held the Constitutional Court, as long as such regulation would “ensure fairness and a diversity of views broadly representing South African society”.¹¹¹

3.2. Two-stage analysis

The exercise of the right to freedom of expression is subject to s 36 of the *Constitution, 1996*, which provides for a two-stage analysis in determining whether there has been an infringement of a constitutional right.¹¹² The first stage of the analysis involves a determination of the scope of the right. Accordingly, if a “law of general application” restricts an activity that falls within the protected scope of the right, is a second stage justification analysis triggered, drawing on the factors listed in s 36(1) to determine whether the infringement of the right is justifiable in an open and democratic society based on human dignity, equality and freedom.¹¹³ This two-stage analysis therefore allows the courts to interpret rights generously and broadly at the first stage and reserve any qualification of the right for the second stage of the analysis.¹¹⁴

¹⁰⁸ Boyle “Freedom of expression and democracy” in Heffernan L (ed) *Human Rights: a European perspective* (1994) 211.

¹⁰⁹ 1997 (3) SA 514; 1996 (12) BCLR 1599 para 2.

¹¹⁰ *Islamic Unity* para 23.

¹¹¹ *Islamic Unity* para 23.

¹¹² See, for example, *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and Others* 2002 (2) SA 625 (D) at 633; and *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) para 21. See also Motala & Ramaphosa *Constitutional law – analysis and cases* (2002) 34-3.

¹¹³ Iles “A fresh look at limitations: unpacking section 36” *SA journal on human rights* (2007) 68-93, 71; Cheadle *Limitation of rights* 360.

¹¹⁴ Iles *Unpacking section 36* 71 with reference to *Zuma* para 21; Currie & De Waal *Handbook* 166.

Chapter III

Advertising and Freedom of Expression

3.2.1. First stage

At the first stage of the inquiry, a court is required to examine only the values that underlie the right and the practices that serve those values. There should be no balancing of competing values.¹¹⁵ The first stage of the two-stage approach should therefore be confined to defining the content and boundaries of the right.¹¹⁶

Accordingly, if the expressive activity in issue falls within the ambit of s 16(1) of the *Constitution, 1996*, and if there has been a restriction or interference with the means of communication, whatever form it may take, a *prima facie* infringement of the right to freedom of expression will be regarded as having occurred.¹¹⁷ This right needs to be given as broad a construction as the language of s 16 permits, and must be interpreted so as to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.¹¹⁸

As discussed earlier,¹¹⁹ in the context of restrictions on the content of advertising, only advertising, as Sachs J put in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*,¹²⁰ that is "primarily communicative in character [rather than] primarily commercial", will pass the hurdle of the first stage of the inquiry in terms of s 36. Where the scope of regulation is extended beyond expression envisaged in s 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in s 36 of the *Constitution, 1996*.¹²¹ In the *Canadian Charter of Rights and*

¹¹⁵ Iles *Unpacking* section 36 72.

¹¹⁶ Iles *Unpacking* section 36 75; Currie & De Waal *Handbook* 166.

¹¹⁷ Cheadle *Limitation of rights* 367.

¹¹⁸ Section 1 of the *Constitution, 1996*. See further Zuma at paras 17 and 18; *Roundabout Outdoor* 633; Van der Westhuizen "Freedom of expression" in Van Wyk et al *Rights and constitutionalism: the new South African legal order* (1994) 272.

¹¹⁹ Refer Chapter III, para 2.

¹²⁰ 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) para 85.

¹²¹ *Islamic Unity* para 12; Burns "The regulation of telecommunications in South Africa" *Comparative and international law journal of South Africa* (1999) 301-316, 308.

Chapter III

Advertising and Freedom of Expression

Freedoms it is also specifically stated that if the restriction violates any of the guarantees contained in the *Canadian Charter*, the next step is to examine whether the restriction is acceptable in terms of s 1 of the *Canadian Charter* (the Canadian limitation clause).¹²²

3.2.2. Second stage

The second stage of the enquiry concerns the justification for the limitation in accordance with the requirements of s 36. This only becomes necessary where a *prima facie* infringement has been demonstrated.¹²³ Although it is often said that the factors in s 36(1) of the *Constitution, 1996* borrow from *Makwanyane*,¹²⁴ the fact is that *Makwanyane* borrows from the factors used in Canadian jurisprudence,¹²⁵ as a comparison between s 36(1) and s 1 of the *Canadian Charter* indicate that they are very similar in content.¹²⁶ The general test is the same: he who imposes the limitation must illustrate that such limitation is reasonable and justifiable in a democratic society.

There are, however, also differences between the Canadian and South African texts: The values specified in the *Constitution, 1996* include not just democracy and freedom but equality and dignity too. In this regard, the Canadian courts have held that the values of freedom and democracy also embody the “inherent dignity of the human person, commitment to social justice and equality”.¹²⁷ The *Constitution, 1996* furthermore spells out the factors to be taken into account, while the Canadian text does not. This is a difference in form only, because many of the factors listed in s

¹²² Hogg *Constitutional law* 817.

¹²³ *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2003 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) para 48; *Cheadle Limitation of rights* 361.

¹²⁴ *Currie & De Waal Handbook* 17 with reference to *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388; 1995 (12) BCLR 1579 para 18.

¹²⁵ *Cheadle Limitation of rights* 370; *Iles Unpacking section 36 69* with reference to *Zuma* paras 21-22 and *Makwanyane* paras 105-107, 110, 134.

¹²⁶ *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C); 2000 (2) BCLR 151 (C) at para 71.

¹²⁷ *R v Oakes* [1986] 1 SCR 103, 200.

Chapter III

Advertising and Freedom of Expression

36(1) owe their origins to Canadian jurisprudence,¹²⁸ albeit filtered through the decisions of the South African courts.¹²⁹ Section 36(1) of the *Constitution, 1996* does not, however, demand a number of requirements to be met before a limitation is regarded as reasonable and justifiable.¹³⁰ Although s 36 specified various factors, which may be taken into consideration when deciding whether a right may be limited, these factors do not constitute a closed list and other relevant factors may also be taken into account.¹³¹

The generality of the limitation clauses of the *Canadian Charter* and the *Constitution, 1996* furthermore distinguishes these constitutions from those constitutions which have individualised limitation clauses operating within particular rights and freedoms clauses, such as the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,¹³² and those constitutions which have no limitation clause at all, such as the *First Amendment to the United States Constitution of 1787 (First Amendment)*.

The *First Amendment* is cast in absolute terms and is not subject to textual limitation. This results in a definite line being drawn between protected and unprotected rights. Consequently, relatively large classes of speech, such as commercial speech, are defined as “non-speech” and receive no constitutional protection at all.¹³³

The *European Convention* does not contain a single approach to limiting the scope of the right it protects: Some of the articles themselves define conduct as outside the protection of such article when it might otherwise be viewed to be within. Furthermore, within the boundaries of articles 8 to 11 provision is made for limitations

¹²⁸ *Oakes* 200.

¹²⁹ *Makwanyane* para 85.

¹³⁰ *Woker Advertising law in South Africa (1999)* note 78 at 211. See also *S v Makwanyane* para 185.

¹³¹ *Iles Unpacking* section 36 77.

¹³² 213 UNTS 222.

¹³³ *Marcus & Spitz Expression* 20-12. This is not expressly dealt with in *Milo, Penfold & Stein Freedom of expression*.

Chapter III

Advertising and Freedom of Expression

where certain qualifying conditions are satisfied. Each of articles 8 to 11 sets out a Convention right in the first paragraph, but then qualifies it by listing limitations in the second paragraph.¹³⁴

Article 10(2) of the *European Convention* specifies the circumstances under which the right to freedom of expression may be limited:¹³⁵ An interference with the guarantee of freedom of expression can be justified only if it is prescribed by law, if it serves one or more of the legitimate aims listed in article 10(2),¹³⁶ and if it is necessary in a democratic society.¹³⁷ Otherwise, the interference will constitute a violation of the right.¹³⁸

3.3. Law of general application

3.3.1. Law

Section 36(1) of the *Constitution, 1996* stipulates that only law of general application may limit a right in the South African Bill of Rights.¹³⁹ This is a minimum requirement for the limitation of a right.¹⁴⁰ In this regard, the requirement of legality is the first requirement to be satisfied in justifying interference under s 36(1). This is because the courts do not justify interference if it transpires that the interference does not enjoy some or other basis in law.¹⁴¹ The first distinction is between law and conduct.¹⁴² This

¹³⁴ Ovey & White *European Convention* 218.

¹³⁵ Coppel *The Human Rights Act 1998: enforcing the European Convention in the domestic courts* (1998) 327.

¹³⁶ Article 10(2) of the *European Convention* makes reference to “the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

¹³⁷ Fenwick *Civil liberties* 278.

¹³⁸ Coppel *Human Rights Act* 334; Johannessen “Judgment of the European Court of Human Rights, 23 September 1994 – Jersild v Denmark” *SA journal on human rights* (1995) 123, 126.

¹³⁹ See also, for example, Cheadle *Limitation of rights* 360.

¹⁴⁰ Currie & De Waal *Handbook* 168.

¹⁴¹ Van der Schyff *Limitation* 240-241.

Chapter III

Advertising and Freedom of Expression

does not mean that interference need to rely on a legal rule in the strict sense of the word, but that it must be authorised by law.¹⁴³ Kriegler J elaborated on this in *Du Plessis v De Klerk*,¹⁴⁴ saying that it is irrelevant whether a rule is “statutory, regulatory, ... founded on the [common law] or a tribal custom”. “Law” in s 36(1) therefore refers both to statutory and non-statutory law.¹⁴⁵ It was, for example, accepted in *Mamabolo* that the common law offence of contempt of court amounted to “law”;¹⁴⁶ and in *Khumalo v Holomisa*¹⁴⁷ the same conclusion was reached in respect of the common law of delict. It was also confirmed in *S v Thebus NO*,¹⁴⁸ that where a restriction is recognised in common law, it constitutes “law of general application”.¹⁴⁹

Contractual relationship

The South African advertising code, as administered by the South African advertising regulator, arises from the contractual relationship between the South African advertising regulator and its members.¹⁵⁰

Under the constitutional regime mandated by s 8 of the *Constitution, 1996*, freedom of expression has clear horizontal potential.¹⁵¹ In essence, s 8 requires that where the

¹⁴² Motata & Ramaphosa *Constitutional law* 34-47.

¹⁴³ Rautenbach “General introduction to the bill of rights” in *The bill of rights compendium* 1A-53; and Currie & De Waal *Handbook* 147.

¹⁴⁴ 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) para 136.

¹⁴⁵ Van der Schyff *Limitation* 242.

¹⁴⁶ At para 57.

¹⁴⁷ 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) para 37, 41.

¹⁴⁸ 2003 (6) SA 505 (CC); 2003 (2) BCLR 319 (CC) para 65.

¹⁴⁹ See further Currie & De Waal *Handbook* 169.

¹⁵⁰ *Turner v The Jockey Club of South Africa* 1974 (3) SA 633 (AD); and *Rape Crisis ‘Charlize Theron’ v Various Complainants* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1999. See further *Nestle (SA) Pty Ltd v Mars Inc* 2001 (4) SA 542 (SCA).

¹⁵¹ Davis *Freedom of expression* 227; Cheadle & Davis “The application of the 1996 Constitution in the private sphere” *SA journal on human rights* (1997) 44-66, 55; Van der Walt “Progressive indirect horizontal application of the bill of rights: towards a co-operative relation between common-law and

Chapter III

Advertising and Freedom of Expression

rules of the common law limit a right in the Bill of Rights, such limitation must be evaluated in terms of s 36(1). Section 8(2) makes it clear that the Bill of Rights can bind natural or juristic persons. The “Bill of Rights [therefore] applies to all law ...”,¹⁵² including the common law. The common law of contract therefore amounts to “law within the meaning of s 36(1) of the *Constitution, 1996*, which provides that “[t]he rights in the Bill of Rights may be limited only in terms of law of general application ...” The application of fundamental rights should accordingly also cover non-statutory private-law rules such as the South African advertising code, which are determined by the common law of contracts.¹⁵³

In light of the *Constitution, 1996*, no one can draft a contract without a very clear idea of what rights are entrenched in the Bill of Rights.¹⁵⁴ Cameron JA elaborated on the subject as follows:

It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights.¹⁵⁵

Section 1 of the *Canadian Charter* “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The Canadian Supreme Court of Appeal

constitutional jurisprudence” *SA journal on human rights* (2001) 431-363, 343-344, 341 with reference to, amongst others, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

¹⁵² Section 8(1) of the *Constitution, 1996*.

¹⁵³ See, for example, *Jockey Club*; and *Motala & Ramaphosa Constitutional law* 43-51 – 34-53.

¹⁵⁴ See, for example, Bracher “The over-riding power of the Bill of Rights” *Without prejudice* February (2005) 11-12.

¹⁵⁵ *Brisley v Drotsky* 2002 4 SA 1 (SCA); 2002 12 BCLR 1229 (SCA) para 92.

Chapter III

Advertising and Freedom of Expression

said in *R v Orbanski; R v Elias*¹⁵⁶ that the “prescribed by law” requirement in s 1 “is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary”. The meaning of the term, the Court held, “must be expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements”, or “may also result from the application of a common law rule”. The European Court of Human Rights also accepted that the words “prescribed by law” are not necessarily restricted to statute law. The expression also covers unwritten law, subordinate legislation, royal decrees or even international law, if such law is adequately accessible and formulated with sufficient precision to enable the citizen to regulate his or her conduct.¹⁵⁷

It is accordingly clear that common law of contract amounts to “law”, and that the South African advertising code constitutes “law” within the meaning of s 36(1) of the *Constitution, 1996*. The South African advertising regulator itself has consistently held that the *Constitution, 1996* envisages that freedom of expression can be limited by contract,¹⁵⁸ and that it would be necessary to examine the limitations of the code in the context of s 36.¹⁵⁹ Whilst the South African advertising regulator does not give reasons for this finding, its conclusion finds resonance in ss 8(2), 8(3)(b) and 39(2) of the *Constitution, 1996*:

Section 8. Application

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

¹⁵⁶ [2005] 2 SCR 3 para 36 where *R v Therens* [1985] 1 SCR 613 para 60 is quoted with approval.

¹⁵⁷ *Groppera Radio* 340-1; and *Sunday Times* 270-1. Also see Eissen “The principle of proportionality in the case-law of the European Court of Human Rights” in MacDonald, Matscher & Petzold (eds) *The European System for the protection of human rights* (1993) 125; Schermers *Freedom of expression* 203.

¹⁵⁸ *Nandos v Uthingo* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2001.

¹⁵⁹ *The South African Sugar Association v Monsanto* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1998.

Chapter III

Advertising and Freedom of Expression

- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

Section 39. Interpretation of Bill of Rights

- 2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Thus insofar as the South African advertising code, as a contract arising from common law rights and obligations, limits freedom of expression, such limitation must be evaluated in terms of s 36(1) of the *Constitution, 1996*. Milo, Penfold & Stein¹⁶⁰ would appear to concur, commenting that irrespective of whether restrictions on advertising are imposed by statute or through self-regulation, such restrictions have to be examined in terms of s 36.

Empowering legislation

It can furthermore be argued that the South African advertising code constitutes "law" given its underpinning in legislation. In terms of the *Electronic Communications Act*,¹⁶¹ the South African advertising code is the accepted standard to which all broadcast advertising in South Africa must conform. Marcus & Spitz¹⁶² are of the opinion that the resultant effect is that the South African advertising code has the status of delegated legislation. It is likely that the enactment of the *Consumer Protection Act*,¹⁶³ which replaces the *Consumer Affairs Act*,¹⁶⁴ will furthermore

¹⁶⁰ *Freedom of Expression* 42-9. See also Marcus & Spitz *Expression* 20-53.

¹⁶¹ Act 36 of 2005.

¹⁶² *Expression* 20-52A footnote 1. Milo, Penfold & Stein *Freedom of expression* is silent on this issue.

¹⁶³ *Consumer Protection Act* (Act 68 of 2008).

¹⁶⁴ *Consumer Affairs (Harmful Business Practices) Act* (Act 71 of 1988).

Chapter III

Advertising and Freedom of Expression

recognise the South African advertising code by law as the legal standard for non-broadcast advertising.¹⁶⁵

In the United Kingdom, the British broadcast regulator¹⁶⁶ contracted out its statutory responsibility to regulate the content of broadcast advertising to the self-regulatory British advertising regulator. The British broadcast regulator therefore provides a 'legal backstop', enforcing compliance with the broadcast codes and with the decisions of the British advertising regulator through the British broadcast regulator's licensees.¹⁶⁷

Fenwick is of the opinion that bodies such as the British advertising regulator are likely to be classified as functional public bodies on the basis that they are acting in a public capacity.¹⁶⁸ Lawson, however, questions this as he is of the opinion that it is not clear that the British advertising code falls within the permitted restrictions of article 10(2) of the *European Convention*,¹⁶⁹ as he is not convinced that the indirect reference to the British advertising regulator in reg 4(4) means that it is "prescribed by law".¹⁷⁰

The case law in the United Kingdom is instructive on whether the South African advertising code constitutes "law" given its underpinning in legislation. In *R v Advertising Standards Authority Ltd, ex parte Matthias Rath BV*,¹⁷¹ Turner J held that the British advertising code met the requirements that interference be "prescribed by

¹⁶⁵ *Consumer Protection Act*, Chapter 3, Protection of Consumer Rights and Consumers' Voice, Part A (Consumer's right), article 70 dealing with alternative dispute resolution; and Chapter 4, Business Names and Industry Codes of Conduct, Part B (Industry codes of conduct), article 82 dealing with industry codes.

¹⁶⁶ *Office of Communications Act 2002*.

¹⁶⁷ www.cap.org.uk.

¹⁶⁸ Fenwick *Civil liberties* 298.

¹⁶⁹ Lawson "Challenging the Advertising Standards Authority" *New law journal* (2001) 526-527.

¹⁷⁰ Lawson *Challenging the ASA* 526-527.

¹⁷¹ [2001] EMLR 582.

Chapter III

Advertising and Freedom of Expression

law"; and that the British advertising code has an underpinning of subordinate legislation: the *Control of Misleading Advertisements Regulations 1988*. In the absence of a self-regulatory code, which met the implicit approval of the Director General of Fair Trading, direct action against the advertiser could have been taken under the regulations, albeit that they are less specific than the elaborate provisions of the British advertising code.¹⁷²

It was furthermore found in *Matthias Rath* that reg 4(4) of the *Control of Misleading Advertisements Regulations* gave the British advertising code an "underpinning of subordinate legislation", albeit this fell "short of direct statutory effect".

Given that the South African advertising code is expressly recognised in the *Electronic Communications Act* read with s 57 of the *Independent Communications Authority Act*,¹⁷³ and that the *Consumer Protection Act* will in certain instances recognise specific industry bodies, it is submitted that Lawson's critique is not of concern in a South African context, and that the enactment of the *Consumer Protection Act* will have the resultant effect that the South African advertising code has the status of delegated legislation in broadcast and non-broadcast media.

Arguably, the South African advertising code is thus based on empowering legislation.¹⁷⁴ It is therefore submitted that law prescribes the advertising codes of both the South African advertising regulator and the British advertising regulator, even though these codes are still self-regulatory codes.¹⁷⁵

In addition, it has been suggested that article 10(1) of the *European Convention* is also instructive on whether restrictions upon freedom of expression are imposed by a private body, which is exercising functions on behalf of the state. Article 10(1), which

¹⁷² *Matthias Rath* para 26.

¹⁷³ Act 13 of 2000.

¹⁷⁴ *August v Electoral Commission* 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) para 23.

¹⁷⁵ Anonymous "Courts back ASA against human rights attack" *The in-house lawyer* (February 2001) (unnumbered).

Chapter III

Advertising and Freedom of Expression

protects the right to freedom of expression, provides that the right to freedom of expression includes “freedom to hold opinions and to receive and impart information and ideas **without interference by public authority ...**” (my emphasis). Coppel suggested that the term “interference by a public authority” in article 10(1) makes it clear that various regulatory bodies would also fall within the scope of freedom of expression, as provided for in article 10(1) on this basis, and that these would include for example, the British advertising regulator.¹⁷⁶ In *Wingrove*, for example, the distribution of the applicant’s film was restricted by the British Board of Film Classification (BBFC), which refused to grant a certificate to it. The BBFC is formally a private body, but is designated under s 4 of the *Video Recordings Act 1984* as the authority responsible for the issue of certificates to video works. It was accordingly held that the BBFC is a public authority within the meaning of article 10(1).

It is submitted that given the regulatory framework within which the South African advertising regulator operates, and the comparative position of the British advertising regulator as enunciated through the judgments of the European Court of Human Rights and the English courts, the South African advertising code should also be regarded as “law” given its legal underpinning.

Public policy considerations

A further consideration that would point to the submission that the South African advertising code should constitute “law of general application” within the meaning of s 36(1) of the *Constitution, 1996* is that of public policy considerations.¹⁷⁷ As pointed out by Mahomed DP:¹⁷⁸

To leave individuals free to perpetuate advantages, privileges and relations, quite immune from the discipline of Chapter 3, would substantially be to allow the ethos

¹⁷⁶ Coppel *Human Rights Act* 332.

¹⁷⁷ *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) paras 26 and 27.

¹⁷⁸ *Du Plessis v De Klerk* para 75.

Chapter III

Advertising and Freedom of Expression

and pathology of racism effectively to sustain a new life, subverting the gains which the Constitution seeks carefully to consolidate.

Furthermore, the Constitutional Court in the matter of *Islamic Unity* recognised that:

[T]he regulation of material that is indecent, obscene or offensive to public morals, offensive to religious convictions or feelings of sections of the population ... are important areas with which the government, or the relevant regulatory authority [like the South African advertising regulator], might be expected to concern itself [provided that] the regulatory provisions are in line with the Constitution.¹⁷⁹

The Supreme Court of Appeal accepted in *Telematrix* that the South African advertising regulator “is an independent body set up and sponsored by the advertising industry to ensure that the industry’s system of self-regulation works ‘in the public interest’” and that “[t]he main purpose of the [South African advertising] code is to protect consumers and to ensure fair play among advertisers”.¹⁸⁰

The case law in the United Kingdom, where the regulation of advertising content also arises out of contract,¹⁸¹ is instructive in this consideration. In *R v ASA* the Divisional Court recognised that the British advertising regulator exercises a public law function, as, if the British advertising regulator did not exist, its functions would probably, be exercised by the Office of Fair Trading.¹⁸² Furthermore, Turner J held in the *Matthias Rath* case that the decisions of the British advertising regulator are a matter of public interest and that the publication of these is therefore a matter of public rather than private law, saying that the public has an expectation that a public body will publish its opinions in a manner and time that is appropriate.¹⁸³

¹⁷⁹ *Islamic Unity* para 30.

¹⁸⁰ Para 4.

¹⁸¹ *R v Advertising Standards Authority, ex parte Insurance Services plc* (1989) 2 Admin law review 77.

¹⁸² See also *R v Committee of Advertising Practice, ex parte the Bradford Exchange Ltd* (unreported, July 31, 1990)(QB).

¹⁸³ *Matthias Rath* para 30

Chapter III

Advertising and Freedom of Expression

Therefore, given the South African advertising regulator's accepted regulatory role to ensure that the marketing communications industry's system of self-regulation works in the public interest to protect consumers and to ensure fair play among advertisers,¹⁸⁴ and given the Constitutional Court's acceptance that the regulation of *offensive material* is an area of importance,¹⁸⁵ it is further submitted that public policy considerations dictate that the South African advertising code should be subject to limitation in terms of s 36.

It submitted that the South African advertising code accordingly constitute "law" within the meaning of s 36(1) of the *Constitution, 1996*, whether as a contract, as empowering legislation, or due to public policy considerations. The next consideration in terms of s 36(1) is whether the South African advertising code is accessible, clear and precise, and generally applicable in order to constitute "law of general application".¹⁸⁶

These requirements as enunciated by the South African courts on a reading of s 36(1) are in line with the decision in *Barthold v Germany*¹⁸⁷ that article 10(2) of the *European Convention* requires the restrictions imposed on freedom of expression to be "both accessible and formulated with sufficient precision" so as to enable interested parties to regulate their conduct and appreciate the risk of sanction.

In the *Rath* case, Turner J accepted, on the authority of *Barthold*, that the British advertising code meets the purposive intentions of article 10(2) being readily accessible, and sufficiently clear and precise to enable any person, who is minded

¹⁸⁴ *Telematrix* para 4.

¹⁸⁵ *Islamic Unity* para 30.

¹⁸⁶ *Dawood* para 47. Refer also the minority judgment of Mokgoro J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) paras 96-104. The majority expressly refrained from taking a position in this regard (para 50).

¹⁸⁷ (1985) EHRR 383.

Chapter III

Advertising and Freedom of Expression

to place advertisements to know what are likely to be acceptable and to know what the consequences of infringement are.¹⁸⁸

Moreover, in Canada, it is permissible in terms of s 1 of the *Canadian Charter* to argue that an enactment is so vague that it does not satisfy the requirement that a limitation on Charter rights be “prescribed by law”.¹⁸⁹

3.3.2. General application

The *law* must be general in its application. This means that the *law* must be sufficiently clear, accessible and precise that those that are affected by it can ascertain the extent of their rights and obligations. Furthermore, this does not mean that the *law* must apply to everyone, but that the *law* must apply equally to all and it must not be arbitrary in its application.¹⁹⁰

Equal application

A provision that restricts freedom of expression may not provide for a unique set of circumstances or cater for a specific person.¹⁹¹ The South African advertising regulator correctly held in the matter of *Eskort v Enterprise Foods*¹⁹² that the South African advertising code in principle has general application,¹⁹³ Relating to all material falling within its definition of “advertising” and applying to the advertising of

¹⁸⁸ *Matthias Rath* para 26.

¹⁸⁹ Refer, for example, *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76; and *Osborne v Canada (Treasury Board)* [1991] 2 SCR 69.

¹⁹⁰ *Currie & De Waal Handbook* 169-170; and *Motala & Ramaphosa Constitutional law* 34-48 – 34-49.

¹⁹¹ *Van der Schyff Limitation* 244; and *Motala & Ramaphosa Constitutional law* 34-61.

¹⁹² Clause 4.1 of Section I of the South African advertising code.

¹⁹³ Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA 2007 with reliance on the judgment of *National Coalition for Gay and Lesbian Equality NO v Minister of Justice NO* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) para 34.

Chapter III

Advertising and Freedom of Expression

members and non-members alike.¹⁹⁴ The South African advertising code is accordingly generally applicable.

Accessible

A provision, which limits freedom of expression, should be accessible, in the sense that it is publicly available and comprehensible, such that the citizen has an adequate indication of the rules applicable in a particular case. This flows from the need for legal certainty, as laws should be in the public domain and within reach of those affected by them if arbitrary interferences are to be avoided. This does not mean that the law must be publicly promulgated.¹⁹⁵ In the separate opinion of Mokgoro J in *President v Hugo*, “[a] person should be able to know the law”.¹⁹⁶ In addition, in *Dawood* the full court said, “rules must be stated in a clear and accessible manner”.^{197 198}

A limitation provision should simply be clear enough to be comprehended, even if it entails foreseeing or predicting wide powers resulting from such provision.¹⁹⁹ It is assumed, for these purposes, that people act with the benefit of appropriate legal advice and even highly technical, with the result that even complex regulatory laws may be deemed sufficiently comprehensible.²⁰⁰

The South African advertising code, the British advertising codes, and the Canadian advertising code are all based on the same premise as the ICC code. The South African advertising code sets out the rules pertaining to advertising content,²⁰¹ the

¹⁹⁴ Refer, for example, *Telematrix*.

¹⁹⁵ *Van der Schyff Limitation* 245.

¹⁹⁶ At para 102.

¹⁹⁷ At para 47.

¹⁹⁸ *Currie & De Waal Handbook* 171.

¹⁹⁹ *Van der Schyff Limitation* 246.

²⁰⁰ *Gropper Radio* 341-2; *Sunday Times* 245.

²⁰¹ Refer Sections I to V of the South African advertising code.

Chapter III

Advertising and Freedom of Expression

procedures applicable in matters before the South African advertising regulator,²⁰² as well as the sanctions that can be imposed.²⁰³ Furthermore, the South African advertising code is published through a third party publisher in hard copy, as well as being published on the South African advertising regulator's website. Abridged versions of the South African advertising code are furthermore made available to consumers through the Department of Trade and Industry's provincial consumer offices.²⁰⁴

Accordingly, as a public document based on international principles, every person who wishes to place an advertisement has access to the South African advertising code, and is in a position to ascertain the limits applicable to advertising content as well as the consequences should the code's provisions be infringed. The South African advertising code is thus accessible within the meaning of s 36(1) of the *Constitution, 1996*.

Clear and precise

A provision that limits freedom of expression must also be comprehensible in order to allow those affected by it to predict the result of their actions or lack of action under it to an acceptable degree.²⁰⁵ The application of the provision must be foreseeable: rules must be formulated with sufficient precision to enable the citizen to regulate his conduct in accordance with them. There may be no breach of this requirement merely because a legal provision is ambiguous, or because a restriction is based upon a discretionary power, if there is sufficient indication of the circumstances in which the discretion may be exercised.²⁰⁶

²⁰² Refer the Procedural Guide to the South African advertising code.

²⁰³ Refer Clause 14 of the Procedural Guide to the South African advertising code.

²⁰⁴ The *Consumer Code* is a simplified summary of the South African advertising code to guide consumers about advertising rules. This summary does not replace the South African advertising code but provides an easy reference for consumers to better know and understand their rights.

²⁰⁵ Van der Schyff *Limitation* 245.

²⁰⁶ *Sunday Times* 245. See also Currie & De Waal *Handbook* 171-172; and Coppel *Human Rights Act* 337.

Chapter III

Advertising and Freedom of Expression

The apparent problem with regulating advertising on the grounds of unacceptable or offensive standards is that such standards can, to a certain degree, be arbitrary or subjective, and are not necessarily foreseeable as prescribed. The question is thus whether offensive advertising as provided for in Clause 1 of Section II of the South African advertising code, can be regarded as sufficiently clear and precise to constitute "law of general application", or rather whether it constitutes an unconstitutional and unenforceable contract term given its vague terminology.²⁰⁷

Motala & Ramaphosa points out that the definition of *obscenity* in the (then) *Indecent or Obscene Photographic Matter Act* failed the test for law of general application, as it did not enable citizens to conform their behaviour to a discernable standard; and that the Constitutional Court in *Case v Minister of Safety and Security* should not have even engaged in a proportionality analysis.²⁰⁸ Equally, should the offensive advertising clause in the South African advertising code not be regarded as "clear and precise", it would not meet the "law of general application" requirement of s 36(1) of the *Constitution, 1996*, and it would therefore not even be necessary to consider the further criteria listed in s 36(1)(a)-(e).

3.4. Concluding comments

Advertising, and even offensive advertising, is a protected form of freedom of expression. The regulation of advertising should therefore comprise of a comprehensive framework of principles, which function in such a way that advertising is effectively regulated without unreasonably and unjustifiably limiting freedom of expression in a manner inconsistent with the *Constitution, 1996*.

Section 36(1) provides that only a law of general application may limit a right in the South African Bill of Rights.²⁰⁹ Applying this requirement to the South African

²⁰⁷ Le Roux "Does the Constitution have any implications for ordinary contractual relationships?" *Juta's business law* (2002)132-134, 132.

²⁰⁸ *Constitutional law* 34-63.

²⁰⁹ Section 36(1) of the *Constitution, 1996*; *Cheadle Limitation of rights* 360.

Chapter III

Advertising and Freedom of Expression

advertising code, it has been seen that this code constitutes “law” within the meaning of s 36(1) of the *Constitution, 1996*, is readily accessible, and its provisions are generally applicable as “law of general application” within the meaning of s 36(1). The question that will be critically explored in the next chapter is whether the advertising code, and in particular the offensive clause, is “clear and precise” within the meaning of s 36 of the *Constitution, 1996*.