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CHAIRMAN'S REVIEW: BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA 1 JULY 2014 – 30 APRIL 2015

INTRODUCTION

On 20 August 2014, the BCCSA turned twenty-one. This makes the Annual General Meeting in 2015 the BCCSA's first step into maturity. Since this meeting is also the last AGM being attended by me, in fact as a guest, as a result of my having stepped down on 30 April 2015, it would be fitting to not only provide an overview of what took place during the last ten months, but also to provide an overview of what we have achieved in these two decades. While last year's report may be said to have set out the goals which the Commission has achieved, I believe that in the last ten months we have moved forward in a few important respects. I will, however, commence by stating certain important principles which must apply to a body such as the BCCSA. Thereafter, I will provide an overview of principles which we hold dear in regard to the manner in which the BCCSA exercises its powers.

In 1993 the National Association of Broadcasters set up this Commission. In order to ensure that the Independent Broadcasting Authority (IBA) would not also have jurisdiction over complaints concerning broadcast content, we had to obtain recognition from the IBA (now the Independent Communications Authority of South Africa – ICASA). This recognition was obtained in November 1995.

To understand the legal nature and independence of the BCCSA, it is necessary to take note of the legislation which made it possible for the BCCSA to become an independent recognised domestic administrative Tribunal.

Section 192 of the Constitution of the Republic of South Africa provides that broadcasting must be regulated by an independent body set up by legislation. The IBA Act, and thereafter the Electronic Communications Act 2005, created the possibility for broadcasters to set up a body which would deal with complaints from the public. This body would then exclude, with certain exceptions concerning elections, the jurisdiction of the IBA. The IBA (now ICASA) had to approve the Constitution and the Code applied by the body. The BCCSA commenced functioning in 1993, even before the IBA Act became operative. After 1 April 1993 the IBA Council requested the BCCSA to function as the *de facto* complaints body for the broadcasters under its jurisdiction by consent and via the National Association of Broadcasters. And in November 1995, after hearings were held, the BCCSA was formally recognised by the IBA in terms of the IBA Act. The IBA was adamant that there should be no representatives from the industry on the BCCSA, that it would have full control over its Constitution, and that only the BCCSA had the power to dissolve the BCCSA. Given the fact that section 192 of the Constitution requires an independent regulator over broadcasters, it was of particular importance that the BCCSA should, indirectly, enjoy the independence which section 192 requires from a body that regulates broadcasting. In terms of section 192 it could not have a lesser standing than the Regulator in so far as independence is concerned. The National Association of Broadcasters would provide the financing. A panel chaired by an independent person who would add two persons of his or her choice to the panel, would appoint Commissioners every five years. The Chair of the BCCSA and the Chair of NABSA or his or her representative would also sit on the panel. The IBA also resolved that the BCCSA would elect its own Chairperson and that it would be in order if that Chairperson was not one of the Commissioners. The Registrar would be appointed by the BCCSA. In 2004 the BCCSA decided to provide for an appeal body, and this was approved by ICASA. Closer legal examination of the nature of the BCCSA has demonstrated that it is a domestic tribunal the decisions of which must be rational,¹ in contrast to that of a statutory body, the decisions

¹ *National Horseracing Authority of SA v Naidoo* 2010 (3) SA 182 (N).

of which must be reasonable in terms of the Promotion of Administrative Justice Act 2000. Nevertheless, the BCCSA has striven to deal with matters according to the standard of reasonableness. Over a period of 21 years there were two applications to take the BCCSA on review to a Court, and both were withdrawn after the BCCSA filed its answering affidavit. Importantly, in 2014 we had to make a ruling that the Human Rights Commission does not have jurisdiction to deal with complaints against the content of broadcasters. The matter concerned the inclusion in Carte Blanche of a photograph of the murdered daughter of the Complainant. The Human Rights Commission issued an order that an apology be broadcast and that the BCCSA must take steps to amend its Code so as to address the dignity of family members of victims, which are shown on television. The Chairperson ruled that the Human Rights Commission is not mandated by the Constitution of the RSA to issue orders of this nature and that it could only take steps to secure appropriate redress, which clearly does not include the authority to *order* redress or order that the BCCSA amends its Code. It was also pointed out that the Human Rights Commission had filed a complaint with the BCCSA against the broadcaster – a complaint which was dismissed since it was filed 18 months too late. A complainant could not, it was pointed out, then decide to deal with a complaint itself, which it was, in any case, not mandated by law to issue an order on.

Ultimately, the principle of independence of the BCCSA is closely related to the principle that members of the public and broadcasters must be at an equal level when appearing before a BCCSA Tribunal.

Generally one of the objectives was also to deliver judgments of a high standard in which the Constitution of the RSA would be a dominant force. With that came the guiding force, in section 39 of the Constitution, to also learn from foreign systems in so far as human rights are concerned. We, accordingly, consistently referred to Canadian, German, United States constitutional law as well as to the judgments of the European Court of Human Rights in Strasbourg – in a sense, their constitutional mandates are very similar to ours.² And, of course, there has been abundant references also to our own Constitutional Court judgments.³

² Compare our judgment in *Human Rights Commission v SABC* 2003(1) Butterworth Constitutional Reports (BCCSA) in which the matter of hate speech was decided upon. There are references to Canadian, United States, German and European Court of Human Rights judgments in it.

³ The latest: *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC).

As basic background there was also the objective to never return to the abominable censorship rules of apartheid. Freedom of expression would be a primary force and exceptions would only follow where other constitutional interests weighed heavier. All rights would, however, as prescribed by our Constitutional court lie at the same level before balancing commences.⁴

And, of course, this would all have been meaningless if we had not kept contact with the public. The more than 34000 advertisements that went out per year made the “BCCSA” an institution known to millions.

PRINCIPLES THAT UNDERLIE THE BROADCASTING CODE AND ITS APPLICATION

When it comes to the application of the Broadcasting Code, certain legal principles have been developed by the BCCSA. Of course, these principles must be based on law.⁵

1. **Freedom of Speech** lies at the heart of our democracy – a good example of this may be found in our judgment concerning certain reckless statements made by a group of criminals about their intentions vis à vis international visitors at the World Cup in 2010: “We will rob them and, if necessary, shoot our way out”, they said (to the annoyance of the then Commissioner of Police, who was the Complainant). We held the broadcast of their plans to be in the public interest, constituting part of the fundamental right of South Africans to have access to threats made to the community.⁶ The judgment was based on a judgment of the European Court of Human Rights in the *Jersild* matter. Three years ago we were privileged to have Mr Jersild as a speaker at our Annual General Meeting. Prominent lawyers have also addressed our AGM’s. They all emphasised the crucial importance of freedom of expression in our democracy. The balancing of interests was, however, also held to be constitutionally important within our diverse and complex society. An important facet of freedom of

⁴ Cf *De Reuck v Director of Public Prosecutions and Others* 2004(1) SA 407(CC) at para [55].

⁵ Whilst some of the principles in the Code find their origin in the ethical rules of journalism, these principles have developed into legal principles based on contract and official recognition in the case of the BCCSA, and on statute in the case of the Complaints and Compliance Committee at ICASA.

⁶ *National Commissioner of Police & Others v e.tv* [2010] Judgments Online 25644; case 5/2010.

expression is the recognition of editorial independence. Thus, when an ex employee of the SABC complained in 2002 that the SABC was guilty of censoring its news service, as it had done in the apartheid past, by not reporting on an investigation into the affairs of the Deputy President at the time, we held that there was no duty on the SABC to have broadcast a particular news item relating to the matter on the same day that the event took place. It had the editorial right and duty to wait for the return of the Deputy President from abroad in order to interview him personally – which was indeed done 14 days later. Recently, a Complainant argued that the SABC, in its English SABC2 news service at 18:30 should have included the reply that day of the leader of the Parliamentary Opposition to the State of the Nation address by the President.⁷ The SABC argued that it had erroneously omitted to include the reply. The Complainant argued that it was censored out in the light of the critical comment by the leader of the opposition. The BCCSA held, however, that the SABC's *bona fides* was supported by its inclusion of the core of the reply in its 19:00 news programme, in its DSTV coverage at 19:00, and also by its inclusion of the comment the next morning at 06:00 in the SABC2 news service. The judgment concluded as follows:

“An oversight had taken place, but that is, in this case, not sufficient to intervene. Were this Commission and its Code, in any case, to become a sword of *Damocles*, freedom of expression would suffer, as would our new constitutional dispensation.⁸ Our finding is, accordingly, that there had been no material omission in terms of the Broadcasting Code.”

Most importantly, the BCCSA also held in a recent judgment⁹ that, since it operates within the sphere of public law – especially in the light of the fact that it may impose a fine – a Constitutional Court judgment of Justice Cameron was of special importance. It was held that within the scope of the Electoral Act the Electoral Court should have applied a much more open-minded approach in regard to the opposition party's wording in an SMS which might, in the ordinary course, have been

⁷ *Abel v SABC (Case 5/2015)*.

⁸ *Cf. Mokgoro J in Case v Minister of Safety & Security; Curtis v Minister of Safety & Security 1996 (3) SA 617 (CC) at para [55]*.

⁹ *Phillip vs Talk Radio 702, Case 02/2015(BCCSA)*.

defamatory. The Complaint of the ANC was, accordingly, dismissed.¹⁰ In the said recent judgment of the BCCSA the complaint was that a presenter on Radio 702 had referred to an alleged perpetrator (accused of arranging a murder, and then applying for his discharge after the close of the State case) as “guilty as hell”. This was held by the BCCSA to have amounted to a permissible comment in the light of the new, more enlightened, approach to the *sub judice* rule in a Supreme Court of Appeal judgment¹¹ and the majority approach of Justice Cameron in the Constitutional Court. Generally, there must be reasonable certainty, so that broadcasters are not confronted with rules which are thrust upon them at random.

But the constitutional guarantee of freedom of expression goes much further: art, science, drama and documentaries have all, based on the Constitution of the Republic, been declared to be free of the usual restrictions on freedom of speech. We have, indeed, found strong support for the recognition of these special rights in German law – the reference to which is promoted by section 39 of the Constitution of the Republic.¹² Furthermore, and to illustrate the scope of that freedom, it should be noted that this principle applies even where a broadcast may at first glance seem to fall into the category of child pornography. If, on closer examination, such a work is shown to have genuinely artistic qualities, the Constitutional Court has declared such material free of the usual restrictions.¹³

2. **Dignity** is a crucial constitutional right, given South Africa’s history of oppression. Here, minorities, including people afflicted with various conditions, or children attending special schools, are protected against derisory comments on air. However, two requirements must be met before dignity and reputation are protected. There must

¹⁰ *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC).

¹¹ *Midi v Director of Public Prosecutions* 2007(5) SA 540(SCA).

¹² Compare *Human Rights Commission v SABC* 2003(1) *Butterworths Constitutional Reports* 92 (BCCSA) where reference is made to *Kulczak Strafrechtliche Einbruchstellen in den Lebensbereich* “bildende Kunst” (1993) at 233; Fischer *Die Strafrechtliche Beurteilung von Werken der Kunst* (1996) 112; Beisel *Die Kunstfreiheitsgarantie des Grundgesetzes und ihre strafrechtlichen Grenzen* (1997); *The Story of “O”*, a Sado-masochistic film broadcast during the midnight slot, produced by Just Jaeckin, was found not to have been in contravention of the Code as a result of its dramatic merits - *Brett and Another v etv* [2006] *Judgments Online* 18392 (BCTSA).

¹³ *De Reuck v DPP and Others* 2004(1) SA 404(CC).

be clear evidence of harm, and the complaint should be reasonable.¹⁴ Generally only the person¹⁵ whose dignity or reputation has been impaired may file a complaint. Thus, when outrageous sexual jokes were repeatedly made about women from a certain region of the country, the broadcaster was fined. The broadcaster also extended a personal apology to the woman who had in fact travelled all the way from Venda to argue her complaint before the Commission. Reputation is, of course, also of particular importance. This was illustrated well in *Diamond v M-Net*, where Mr Diamond, a prominent City Councillor, was implied to have breached the law, while the facts available to the broadcaster demonstrated the converse.¹⁶ An apology was broadcast. However, where it is in the public interest, and where material is based on truth, a broadcaster has a right – even a duty – to inform the public. Nevertheless, great care must be taken in this regard to ensure that not only the right to reply but also relevant information is included in a broadcast. In fact, professional conduct of the highest order must always be displayed and, where necessary, expert advice should be sought when a decision is taken to broadcast material that requires expert input.¹⁷

3. **Hate speech** based on race, ethnicity, gender and religion, has formed the focus of much of our work. However, in judgment after judgment, we have stated that that which is offensive does not necessarily amount to hate speech. To qualify as hate speech, language must go beyond mere offensiveness and include *advocacy* of hatred and *incitement* to harm. We have also issued the caution that the hatred expressed must be related to either or all of the four categories named in the Code. Legislation that has broadened the categories beyond section 16(2) of the Constitution is probably unconstitutional, unless further protection is provided by section 36 of the Constitution in a specific case. What is important about hate speech is that it has also widened the ambit of protection of religion beyond the traditional notion of blasphemy, which in the past protected only Judaeo-Christian beliefs. However, since all religions are now constitutionally equal, they should get equal protection. This means that blasphemy, in

¹⁴ *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC); *Mahamed v Radio 702* (Case 8 /2015).

¹⁵ Exceptions are made when children are involved – see *New Hope School & Others v Jacaranda* 94.2 [2012] *Judgments Online* 28656 (BCCSA)(case 5/2012).

¹⁶ *Diamond v Mnet* (Case 18/201).

¹⁷ *Rhino Force v SABC2* (Case 3/2014).

terms of section 39 of the Constitution, may only be prohibited where it fits the requirements of hate speech in section 16(2) of the Constitution. In practice, this means that the scope of blasphemy has been limited to material that amounts to hate speech in terms of the Constitution. Thus, in April 2015 the BCCSA Tribunal held that where a character in a film dreamt that she was in a church and that Jesus Christ came from the cross and made sexual advances to her, this was insufficient to amount to hate speech. The dramatic context was also important. When this judgment is compared to a 1936 judgment¹⁸ of our Appellate Division, where a similar dream was held to amount to blasphemy, the change in the law, brought about by the Constitution, is clearly substantial.¹⁹ In fact, a few years ago a BCCSA Appeal Tribunal held that e.tv had not breached the Code by having broadcast *The Last Temptation of Christ* – a film based on a novel where Jesus is depicted as imagining himself in the role of a married man. However, as found by the Appeal Tribunal, the figure of Jesus did not give in to the temptation. The BCCSA has, in the process of applying its hate speech rules, stressed that mere harm or offensiveness is not sufficient for a finding of hate speech. It has done so in certain cases where Muslims, Christians and Hindus have complained. Where Rastafarians complained that they were offended by jokes made about their conception of God, we resolved the matter by not attending to the merits of the complaint but rather by finding that the broadcaster had apologised in a sincere manner, despite the objections of the Rastafarians in this regard. In so far as hate speech is concerned, we have been very aware of the importance of news that included elements of hate speech: thus, where ANC cadres sang *Kill the Boer, Kill the farmer* at the graveside of a deceased comrade, and the SABC broadcast this scene with the song being sung in a news bulletin, we found that, within the context of news, and from a historical and cultural perspective, it was important to allow the broadcast. In fact, there is no finding of the BCCSA against the song. Broadcasters have, however, demonstrated sensitivity towards farmers in this regard. When in 2000 we found the Mbongeni Ngema song *AmaNdiya*, which targets the Indian community in Durban, to amount to hate speech, we stressed the fact that the Indian sector is a minority and that special protection should be extended to them.²⁰ This judgment has been included in the official Constitutional Reports published by Butterworth and has, in Parliament,

¹⁸ *R v Webb* 1934 AD 493.

¹⁹ *Naidoo v SABC 3 (Case 6/2015)*.

²⁰ *Human Rights Commission of SA v SABC* 2003(1) BCLR 92(BCCSA).

been praised as a *locus classicus* within judgments on hate speech and has also been quoted by counsel in court cases in this regard. The secret, I would suggest, lies in not readily limiting free speech. Each time there is a finding of hate speech, free speech itself is whittled away – until it becomes a mere spectre of what it should be: robust, honest opinion which, in the words of Mr Justice Oliver Wendell Holmes Junior,²¹ should be dealt with in the marketplace of ideas. But here it should be borne in mind that minorities do not necessarily have access to this “marketplace” and that they therefore deserve more protection than others. Thus, the blatant ridicule of the Muslim *adhan* and making the Muslim faith out to be heathen in a radio discussion programme was regarded as so serious that it amounted to hate speech based on religion.²² Another broadcast was also regarded as hate speech based on ethnicity.²³ The policy in Gaza in regard to Israel and Jews was made out, in a graphic manner to be comparable to Nazi plans to destroy Jews by means of incineration.

4. **Balance in international coverage** has been a bone of contention. Our Code requires balanced reporting and comment when it comes to matters of public importance. We live in a globalised world where the boundaries between one country and another, and therefore the events that take place in certain areas, seem increasingly blurred. *Gaza* and the Isis conflict have made us very aware of this, with the effects of both conflicts being felt world-wide. But how does one, from a *legal* perspective, establish balance when reports are broadcast? We were criticised in a 2014 article in the *Mail & Guardian* newspaper for not necessarily regarding international events – e.g. the confrontations in the Middle East, politics in the United States, and the clash in the Ukraine – as matters of public importance in the local arena. There is, however, a very good legal reason for this. Firstly, the intention of the relevant clause, i.e. clause 12 of the Free-to-Air Code, is to ensure fair debate on matters of public importance *within* the boundaries of South Africa. Secondly, it is generally impossible for the BCCSA to establish what “balance” amounts to in a foreign context. No court or administrative tribunal should come to conclusions on vague perceptions of what balance is within a foreign context. We simply do not know what such “balance” might be. And that is

²¹ Associate Justice of the Supreme Court of the USA (1902-1932).

²² *Van der Merwe v Radio Rosestad (2014) Judgments Online 3157 (case 4/2014)*.

²³ *Hamid v Chaijm (case 38/2014) – prof Bronstein voting in the minority, finding that the broadcast did not reach the level of hate speech, but that the absence of balance did amount to a contravention.*

what fair administrative justice means: decisions must be rational and based on facts or fair perceptions of facts. To simply guess at what balance means within a foreign context is inadmissible in a fair judicial process based on facts. Where the facts are readily available and not open to doubt, we will, however, require balance. At times a complainant, as we found in *Radionov v Talk Radio 702*,²⁴ would simply have a totally wrong perception of the structures involved in monitoring a foreign crisis, in this case in the Ukraine. The complaint was, accordingly, not upheld.

5. **The introduction of an Appeal Tribunal** in 2004 has been successful. The Appeal Tribunal may only interfere with the first judgment where it has been *clearly* wrong. Since 2004 there have been fewer than 24 such sessions. Important judgments have been the setting aside of the first Tribunal's decision that the late-night broadcast of the *Last Temptation of Christ* was in conflict with the Code, and a lessening of the fines imposed in regard to the screening of the Muammar Gaddafi death scenes without proper warning. The confirmation of the first Tribunal's judgment in a matter which related to fair news reporting in the so-called *Sunday Rapist* matter, was significant in 2013.²⁵ The accent was on the high standards of fairness required in news reporting, in contrast to comment in discussion programmes.

6. **Our judgments** have all been published on our website, and in more than 400 matters, they have also been published in *LexisNexis*, an online service provided by Butterworth. We have also been permitted, as an associate member, to join the Allied Independent Press Councils of Europe. The latter organisation holds annual conferences in Europe, and between conferences there is regular contact between the more than 40 member states. Questions are asked via email regarding matters such as jurisdiction, procedure, policy and Codes, and a lively debate *frequently* ensues. The overall emphasis is on freedom from government control, which was recently confirmed in a question which I put by direct internet contact to the member media councils. I have been privileged to attend conferences in Antwerpen, Tel Aviv and Brussels in the last three years, whilst Deputy Chair Makeketa, represented us in Seoul in November 2014. The BCCSA also organised two international conferences in 1995

²⁴ [2014] *Judgments Online* 32140 Case 22/2014.

²⁵ *Gericke v Talk Radio 702* [2013] *Judgments Online* 30248(BCCSA); *Talk Radio 702 v Gericke* [2013] *Judgments Online* 30239(BCCSA Appeal Tribunal) confirming the first decision.

and 2005. We had presenters from the US, the UK, France, Canada, Slovakia, Germany, Australia, Zambia and New Zealand. The 2005 conference was opened by Deputy Chief Justice Moseneke and the 1995 Conference by the Minister of Communications, Mr Naidoo. The conferences placed us solidly on the international map. We have also been privileged to have had various prominent experts address us at our AGMs: Floyd Abrams from New York, Jens Olaf Jersild from Denmark (he had his conviction based on racial hate speech set aside by the International Court of Human Rights in Strasbourg), Archbishop Makgoba, Justice Kate O'Regan (formerly from the Constitutional Court), Reverend Danie du Toit (on art), Judge President Mlambo from the Gauteng High Court, and on this occasion Justice Edwin Cameron from the Constitutional Court.

7. **The protection of children** has been a priority for the BCCSA. Once digitisation has been fully implemented, probably before the end of this decade, the airwaves will be able to accommodate many more broadcasters. We will then also encourage free-to-air television broadcasters to make available continuous advisories as to content and age restriction by means of parental block-out mechanisms. Currently, television broadcasters are required, where relevant, to include an advisory for the first 90 seconds at the commencement of a broadcast, and to repeat this after each advertisement break for a period of 30 seconds. In some instances, the advisory is required to be continuous, e.g. for some of the more explicit midnight movies. DSTV provides continuous on-air information (i.e. *age* restrictions and a synopsis of the programme) on many channels through the Electronic Programme Guide (EPG), *as well as* a parental block-out mechanism. In addition, DSTV provides a mechanism for “family viewing”. Of course, this mechanism is only applied to films that are broadcast from South Africa, where DSTV has direct control. The BBC has, via DSTV, taken special steps to improve its information regarding possibly offensive material by posting a warning at the beginning of a programme. ODM has introduced a novel procedure to protect children from films rated 18 and R18: the films are blocked out and are only accessible by way of a subscriber’s PIN. Although this is not a requirement, the BCCSA recognises the value of this approach. ODM has been permitted by ICASA to broadcast pornography. The channels are, however, blocked, and can only be activated by way of a PIN. In the interim, however, the ICASA

decision has been set aside by a Court. Thereafter a complaint was lodged with the BCCSA against ODM for having kept on broadcasting the channels pending the lodging of an appeal.²⁶ ODM conceded a contravention. Since the service was only provided to 284 subscribers, this was regarded as an extenuating circumstance and a fine of R25 000 was imposed (the maximum fine was, at the time, R60 000).²⁷ The BCCSA has emphasised the importance of subscription channels ensuring that age restrictions are indeed effective in so far as the parental control mechanism is concerned. In all cases where complaints were upheld, it was found that administrative error was to blame. DSTV and M-Net have both taken steps to address problems. Of course, it should be borne in mind that whenever there is a direct feed from a foreign country, there is the risk of an age-restricted film being shown outside of the watershed in South Africa. Subscription broadcasters are aware of this problem, and they constantly address this matter with their foreign sources. If such a problem persists, however, the only solution seems to be for the subscription broadcaster to cut ties with the offending source. Subscribers should, of course, also bear in mind that this kind of risk exists when they subscribe to a broadcaster with foreign sources. The subscription system is working exceedingly well, and local efforts to protect children may be held up as an example within the international sphere. It is important that I repeat the following statement which was included in the Annual Report of 2014:

There seems to be a general misunderstanding as to the meaning of PG. The classification PG, which stands for parental guidance, means that the broadcast is of such a nature that children who are either under 10 years old or under 13 may watch a programme in the presence of their parents or other caregivers. Programmes often carry an advisory of PG 13 LV, which means that the broadcast contains some crude language and violence. This advisory seems inappropriate, except where the crudity and violence is mild. Such a film should rather be classified 13 LV, since it seems incomprehensible how a mere PG 13 might counter the language and especially the violence. In any case, as pointed out in our 2013 Report, a mere PG is not acceptable. It must be accompanied by either a 10 or a 13. Ultimately a broadcaster must decide: if it is PG, it means that parents are advised to watch with their children under 10 or 13.

²⁶ Which suspended the decision of the Court. However, the Supreme Court of Appeal turned down an application for leave to appeal. The broadcasts were then stopped.

²⁷ As from 1 May 2015 the maximum fine is R80 000.

If a film is harmful to children under 13, it must be classified as 13 with or without classification symbols. PG would then not be acceptable.

In March 2015, in an episode of *Sewende Laan*, the SABC included a scene of a violent attack on a coffee shop; the programme is broadcast between 18:30 and 19:00 on weekdays. The inclusion of this material was regarded as harmful to children under 12 and the SABC was directed to broadcast a summary of the BCCSA's decision before the broadcast of an episode of *Sewende Laan*.

8. **Certificate of Compliance to ICASA.** In ICASA's recognition of the BCCSA it is required that the Regulator be informed annually whether broadcasters have complied with the BCCSA's orders. It may be stated with confidence that all the broadcasters that are subject to the jurisdiction of the BCCSA, as a consequence of their membership of NABSA or the Association of Christian Broadcasters – both of which have consented to the jurisdiction of the BCCSA – have given effect to all rulings of the BCCSA and have abided by the procedures applied by the BCCSA. Where they were directed to pay a fine, they did so within the stipulated time, and where a correction or the summary of a decision had to be broadcast, this was done. A list of these broadcasters is attached. Between 33 000 and 34 500 BCCSA advertisements are broadcast each year by member broadcasters. The President's Office has given recognition to this publicity and, a few years ago, awarded the BCCSA a Bronze Medal for this achievement.
9. In the past twelve months a total of 1 643 complaints were received. Of these, 515 were complaints which the Registrar considered, but did not entertain, 1 074 were matters not within our jurisdiction e.g advertisements, television licences, the choice and scheduling of programmes, and complaints which were too vague to accept. In the current year so far, Commissioners have sat on 10 occasions when Tribunals were called. In the period of report, 31 judgments of the Tribunals have been handed down. A total of 23 adjudications were written by Commissioners. Adjudicators are appointed by the Chairperson where it is felt that a matter does not justify a full hearing by a Tribunal. There is, however, a right of appeal to a Tribunal against decisions of adjudicators. All judgments of the Tribunal are sent to all broadcasters

under our jurisdiction and also to the Press. As a domestic tribunal, our judgments must comply with the requirements of fairness and rationality. In 21 years, no judgment has been reviewed by the Courts. There have been two applications for review, but they were not proceeded with after the BCCSA's Answering Affidavit was filed.

10. On this occasion, we were honoured by a talk by Justice Edwin Cameron from our Constitutional Court on the level of protection of free speech in South Africa. The dangers of free speech in many parts of the world were referred to by him in contrast to the broad protection which it is given in South Africa. A recent judgment of his, has assisted the BCCSA Tribunal in broadening the width of free speech.²⁸
11. **In conclusion, I wish to thank the Commissioners** for their diligent support and valuable contributions in our discussions. Deputy Chair Professor Viljoen has provided me with considerable assistance by reading all adjudications, and he has also provided help with certain administrative tasks. Deputy Chair Makeketa has played an important role in his additional function as Chair of the Finance Committee – an important task which he has performed with diligence, assisted by Commissioner Venter. Dr Gilfillan has been kind enough to edit my judgments and has played a substantial role in improving the language and the content of many of my judgments – which total more than 1 500 over a period of 22 years. Commissioners have also written judgments and adjudications, and I would like to thank them for their well-motivated and speedy work.
12. On this occasion, I wish to sincerely thank my colleagues for the splendid spirit of collegiality which they have consistently displayed not only towards me but also towards each other. It was a grand privilege for me to serve with them. We have worked for a constitutionally justified approach to our judgments and I am proud to say – and I do so with confidence – that we have achieved this aim. However, as the late Nelson Mandela urges in *The Long Walk to Freedom*, one should never be content with

²⁸ *Phillip vs Talk Radio 702*, Case: 02/2015(BCCSA); 2015 *Judgments Online* 33148(BCCSA).

the status quo, but instead be constantly alert to inroads into freedom so that it is not whittled away by dictatorial elements.

A special word of thanks is also due to Mrs Shouneez Martin, the Registrar, who has done an excellent job, often working from home over weekends and even during her holidays. Our secretary, Ms Kim Erentzen, has also made a tireless contribution in the handling of complaints. Ms Erentzen also acts as our financial administrator. She has also been re-appointed for 2015 as the Chairperson's Personal Assistant. Mr Kyle Erentzen was appointed as a Complaints Officer in 2011, and he has played a dynamic role in the systematic processing of complaints, and has also provided technical and other assistance during hearings. Ms Marion Mansfield, our accountant, has ensured that we continue to receive an unqualified audit. We are indebted to her for her fine work. Ms Karen Willenberg recently stepped down from her position as Chairperson of NABSA. We wish to thank her sincerely for her splendid work over a number of years and her unique capacity to understand the role of the BCCSA as an independent administrative judicial tribunal. Thanks are also due to the Executive Director of NABSA, Ms Nadia Bulbulia, and the Deputy, Ms Dimakatso Qocha, as well as to the Executive and Council of NABSA for their support. We have noted the election of Ms Pheladi Gangwa as the new chairperson of NABSA and we wish her well in her task.

[13] **Finally**, a word of gratitude to the 60 broadcasters under our jurisdiction. We are proud of the high standards pursued by them, and we are grateful for their co-operation in working towards the success of a voluntary complaints system under the jurisdiction of an independent BCCSA. I should mention that Mr Kwezi Mtengiye from DSTV and Mr Fakir Hassen from the SABC attended the occasion on which I read this Report at Mount Grace. Mr Bruce Mkize could, as a result of family illness, not attend. All three, over many years, have represented their broadcasters with finesse and dedication. The same applies to Bob Tshweu, who represents e.tv and, likewise, Khahliso Mochaba who represents Primedia. Then there are representatives from broadcasters in Cape Town, Port Elizabeth and Durban who were consistently available to argue their cases with special ability: Mr Gavin Meiring, Mr Denver Apollus, Mr Alfie Jay and Mr Naveen Singh, who represented East Coast Radio and now represents Jacaranda FM. In the earlier years of the BCCSA Malan Otto and later, Dorothy van Tonder, represented the SABC with distinction. Many advocates and attorneys as well as other representatives from broadcasters have also assisted us in presenting cases. In so far as advocates and attorneys are

concerned, amongst others, I should mention the names of Henri Viljoen SC, Gilbert Marcus SC, Piet Meyer SC, Piet Louw SC, Frank Snyckers SC, D Berger SC, Adv Steven Budlender, Mark Rosin, Dan Rosengarten, Dr Dario Milo, Ms Justine Limpitlaw, Mr Andrew Boerner, Mr Barry Ashman, Mr Jeremy Crawford, Adv Anton Alberts, Mr Willie Spies, Mr Kallie Kriel, Mr Martin Bey, Ms Nicqui Galaktiou, Adv Margaretha Engelbrecht, Adv Kirsty McLean, Adv Goolam Ameer, Ms Dinesha Deeplal, Member of Parliament Mfundisi, Adv Vanitha Gounden, Senator Dr Ruth Rabinowitz, Dr GR Oriani Ambrosini, Mr Leander Gaum, Dr CL van den Berg, Mr David Dison, Adv SK Hassim, Laura Pollecutt, Adv D Spitz, Mr Ismail Ayob, Adv LJ Morison, Mr Glen Penfold and Ms Charisse Zeifert.

I also remember the finesse with which Mr Prince, a few years ago, put the case for the Rastafarians, of which he is a prominent member, in Cape Town. We found that an apology by Heart Fm was a genuine apology and thereby regarded the matter to be settled. It is hard to forget the remarkable hearing where the High Priest of the Starwolves, Mr J Magee-Ferreira, personally complained about the negative stereotyping of pagan witches. We recognised their right to freedom of religion. They, however, did not succeed in convincing us that there had been hate speech against them by SABC2.²⁹

It would also be fitting to thank past Commissioners who all contributed to our standing as an independent Administrative Tribunal. Deputy Chairs Lauren Jacobson, Sunette Lötter, Ratha Mokgoathheng and Danie du Toit should be mentioned by name. Lauren Jacobson assisted me in obtaining the recognition of the BCCSA from the Independent Broadcasting Authority in 1995. She now lives in London. Ratha Mokgoathheng has become a Judge and heads our Appointment Panel. Rev Danie du Toit, who now lives in the Cape and Prof Sunette Lötter still assist us as Acting Commissioners. Ed Linington, past Ombudsman of the Press Council and earlier Commissioner Gerrit Olivier, past Ambassador to Russia, have also been Acting Commissioners. Kgomotso Moroka SC and Refiloe Mokoena both assisted us as Commissioners in the first years. Refiloe has also often sat as an Acting Commissioner. Cobus Scholtz from Mnet and DSTV also played a prominent role as Commissioner and planner of the BCCSA. Prof Fanie van Jaarsveld has assisted me with legal advice and has sat as an Acting Commissioner, also on appeal. Prof Nina de Klerk, well known media expert, served on our appointment panel and, on occasion, sat as a co-opted member. Other persons who

²⁹ Magee-Ferreira (High Priest of the Starwolves Coven) v SABC2 (2010) *Judgments Online* 25813(BCCSA).

have sat as co-opted members of the Appeal Tribunal are Mr Justice Antoni Gildenhuys, Prof Marinus Wiechers and Prof Wilhelm Jordaan, prominent author and psychologist – all adding to the standing of the Tribunal.

And then, there was the prominent, orator, theologian and author Prof Willem De Klerk, a founding member of the Commission, who served with distinction as a Deputy Chair for many years. His contribution in freeing South Africa from apartheid is part of our history.

I should also mention Stan Katz, who was the Chair of NABSA when we set up the BCCSA. His strong plea for an independent BCCSA has borne the fruits of success. Lastly, and importantly, the prominent lawyer, Mr Justice John Trengove QC, who appointed the first Commission in 1993 and remained the Chair of the Appointment Panel up to 2011, contributed immensely to our standing.

I thank them all!



PROF JCW VAN ROOYEN SC

CHAIRMAN

30 April 2015.

BCCSA COMMISSIONERS

- Prof Victoria Bronstein
- Dr Lynda Gilfillan
- Mr Brian Makeketa (Deputy Chairperson)
- Mr Alan Melville
- Adv Robin Sewlal
- Dr Linda Venter

- Ms Giuseppina Harper
- Dr Nana Makaula-Ntsebeza
- Ms Zali Mbombo
- Adv Boitumelo Mmusinyane
- Ms Shamila Singh
- Prof Henning Viljoen (Deputy Chairperson)

BCCSA SIGNATORIES

TELEVISION BROADCASTERS

- e-tv
- M-Net
- Multichoice
- SABC1
- SABC2
- SABC3
- Trinity Broadcasting Network
- StarSat

RADIO BROADCASTERS

COMMERCIAL RADIO

- Algoa FM
- Cape Talk
- Capricorn FM
- Classic FM
- East Coast Radio
- Gagasi 99.5FM
- Heart 104.9 FM
- 94.7 Highveld Stereo
- Jacaranda 94.2 FM
- Kaya FM
- KFM
- OFM
- PowerFM
- Smile 90.4 FM
- Talk Radio 702

- YFM
- SABC RADIO BROADCASTERS:
 - Radio Sunshine
 - Ligwalagwala FM
 - Munghana Lonene FM
 - Radio Metro
 - Ukhozi FM
 - CKI Stereo
 - Good Hope FM
 - Radio 2000
 - Motsweding FM
 - PhalaPhala FM
 - RadioSonderGrens
 - SAFM
 - 5FM Radio
 - Lotus
 - Thobela FM
 - Ikwewezi FM
 - Lesedi FM
 - Umhlobo Wenene FM

COMMUNITY RADIO

- Bush Radio
- Bay FM (BFM)
- Bok Radio
- Chai FM
- Fine Music Radio
- HOT 91.9FM
- Kovsie FM
- Med FM (Alkara 40)
- MFM
- Motheo FM
- Radio Islam
- Radio Pretoria
- Radio Puk
- Radio Pulpit
- Radio Rosestad
- Radio Today
- Rhodes Music Radio
- Rippel 90.5fm

- Transworld Radio
- Tuks FM
- Tshwane University of Technology (Top Stereo)
- University of Johannesburg UJFM (UJFM Radio)
- Voice of Wits

ASSOCIATION OF CHRISTIAN BROADCASTERS

- CCFM
 - East Rand Stereo 93.9
 - Good News Community Radio
 - Highway Radio
 - Impact Radio
 - Link FM
 - Radio Alpha
 - Radio Khwezi
 - Radio Kingfisher
 - Radio Namakwaland
 - Radio Pulpit
 - Rippel 90.5 FM
 - Radio Tygerberg
 - Rainbow FM 90.7
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