



CHAIRPERSON'S ANNUAL REPORT 1 JANUARY 2001 TO 11 APRIL 2002

1.

INTRODUCTION:

The challenges facing freedom of speech application within the broadcasting sphere are part and parcel of the new Constitutional dispensation. On the one hand there is a fear that freedom of expression could ultimately lead to license. On the other hand it has been clearly stated by our Courts that fundamental rights do not stand in an hierarchical position towards each other. Yet one cannot escape the impression that given the pre-constitutional era in which freedom of expression was unjustifiably limited, freedom of speech, in reaction to this era, is a core right. We have accepted this challenge and our records in which we have recognised this core value as well as the fact that freedom of expression lies at the heart of democracy, is a very good one. Yet, in practice limits have been found to exist and privacy, dignity and absence of truth have, for example, limited this right.

We have also been confronted with the fact that aspects of our Code are simply too vague to be applied with justification within a democracy based on the Rule of law. The Rule of law, as has been stated by the Constitutional Court, requires that law must be reasonably precise. We are addressing this aspect today in the light of a recent Constitutional Court judgment handed down on the 11th of April 2002, in which doubt would seem to be expressed as to the validity of the whole of clause 7.1, which deals with indecency, offence to religion, and State Security. The Court has in fact invalidated the part, which deals with relations between sections as being too general in character. For the time being the Court has, however, declared that the promotion of war and violence and the advocacy of hatred based on race, ethnicity, gender or religion must be regarded as prohibited in terms of the IBA Act. Although this Commission applies a Code agreed upon, we will also abide by the Court's judgment and limit the application of the said sub-clause. We will also, urgently, have to look into the other sub-clauses of clause 7.

2.

THE MIDDLE EAST: VIOLENCE

Reportage on the violent confrontation between Israel and the Palestinians drew numerous complaints. The complaints emanated from South African organisations or groups within the Muslim and the Jewish

community. From both sides the accusation was made that the SABC, Radio 702 and M-Net had either favoured the one or the other side and that balance, as required by the Broadcasting Code, was absent. The Tribunal of the Commission approached these complaints with great sensitivity, but accentuated that balance in comment was only required according to the Code when a matter of public importance within the South African sphere was commented on. Whether a matter was one of public importance would depend on the facts. Generally, however, public importance would be present when an internal matter is commented on. That is why, when M-Net broadcast a documentary by Kevin Harris, *Judgment Day*, the tribunal held that given the time of the broadcast (22.30) the mature likely viewers would have identified certain possible biases. Furthermore, that although the matter was of great interest it was not, in terms of the Broadcasting Code, a matter of public importance. A similar approach was followed when members of the Muslim community complained that the SABC, in *Special Assignment*, had not portrayed the role of the Taliban fairly in the Afghanistan war.

3.

RELIGION

Although the Broadcasting Code provides that the electronic media shall not broadcast material, which is offensive to the religious convictions or

feelings of a section of the community, the Commission has approached this clause in the light of section 16(2)(c) of the Constitution of the Republic. The Commission, in its judgment, has required that the material broadcast must amount to the advocacy of hatred based on religion that incites to harm. This test is a particularly lenient one, which also allows for freedom within the documentary and dramatic sphere. When SABC TV 2 broadcast a song by Stef Bos and Koos Kombuis which, in cabaret form, attempted to show the "bond" between God and the Devil in the sense of good and bad, the Tribunal held that the song was not blasphemous since it had not, within that context, denigrated God. The Tribunal, however, held that a later time slot in a more analytical programme than the programme in which it was broadcast, would have been more appropriate for this broadcast. When, accordingly, this song was inadvertently re-broadcast at 18.30 on SABC TV2, the SABC was reprimanded for its error.

When, however, during a talk show on Radio 702 a talk show host referred to the Bible as "pornography", it was regarded as a contravention of the code. The same talk show host was, however, given leeway insofar as he criticised the Bible as having been racially discriminatory and used as such by the Apartheid government.

4.

A matter closely related to religion had to do with the question whether two programmes broadcast by the SABC had dealt in a balanced manner with the Muslim faith in Nigeria and the Sudan. The complaint was that the accent had unnecessarily been placed on the amputation of limbs as part of the criminal procedure. It was argued that the set of rules which governed the lives of Muslims, *Shari'a*, is a large set of rules which does not concentrate on only this one aspect and that the programme had unjustifiably done so. The Tribunal held that this had not been the case and that a balanced view had been given in the two programmes judged as a whole.

5.

In another matter, *God, the Devil and Bob*, the question was raised whether an after-watershed cartoon series in which God was portrayed as an ordinary person, drinking beer, meeting up with people and advising them to do good, was possibly offensive. M-Net, the subscription channel, argued that the series was not blasphemous and did not in any manner denigrate God, although it did portray Him as an ordinary person. The Tribunal held that M-Net's argument was correct and that there had been no contravention of the Code. The fact that the film was screened after the watershed was held to be an extenuating factor.

6.

CHILDREN

The Constitution of the Republic places a particularly high value on the protection of children. The Broadcasting Code and the BCCSA policy confirm this approach. Not only has the Commission developed a system of age restrictions and a watershed rule, but it has also looked into children's programmes as well as family programming. In the first category, complaints were received as to the *Pokémon* series. It was alleged that the series had led to copycat situations where children had attempted to do what *Pokémon* and his friends did in the cartoon series. The Commission held that there was no reasonable basis on which one could find that the series promoted violence in children in any way and that where incidents had allegedly taken place, a reasonable causal connection between the series and the alleged conduct had not been established.

7.

Many members of the public complained to the SABC and the BCCSA about the sex scenes in a *Yizo Yizo* episode. The BCCSA held that a parental guidance classification was entirely insufficient for the particular episode: scenes of sex (heterosexual and homosexual) were shown in a

manner far too explicit for a PG and the episode should have been shown entirely after the watershed. A 16-age guidance should have been conveyed to parents both in publicity material and before commencement and after advertisement breaks. The series, however, had an important and justifiable purpose, in that it amounted to a “wake up” call to parents and teenagers about issues such as rape, problems in schools, and that prison was no garden party.

8.

HATE SPEECH

Section 16(2)(c) of the Constitution of the Republic provides that the advocacy of hatred based on race, religion, gender or ethnicity and that constitutes incitement to cause harm, is not protected by the fundamental right of freedom of speech. When *Radio 702* broadcast an audio copy of a show in which racially derogatory language of the worst kind was used in the songs, the Tribunal of the Commission held that although such material was generally unacceptable in terms of the Code, *Radio 702* had a duty to inform the public of this unacceptable and deplorable conduct. The 1995 *Jersild* judgment of the European Court of Human Rights was quoted in support of this approach. Instances where the context, however, clearly indicated that the derogatory language was gratuitous, the general rule was applied and a Radio station was fined for

having used the words "house Nigger" in regard to the USA Secretary of State.

Insofar as racial identification of persons is concerned, the general rule is that such identification is not acceptable. Where, however, there are compelling circumstances which make such identification necessary, there is no contravention. Such circumstances would, for example, be found to exist when it is necessary to arrest a suspect who had committed a crime. At times it is also absolutely necessary to identify the race of a person where a broadcast needs to be contextualized so as to convey the truth.

9.

PRIVACY

Privacy and dignity have often been held to be core constitutional rights. The Broadcasting Code protects privacy and dignity. Where, on two occasions, television had shown the faces of a person in an audience, who had nothing to do with the allegedly illegal activities portrayed, it was held that the broadcasts had been in contravention of the Code.

10.

In another instance when, on St Valentines-day, *Highveld Stereo* re-broadcast an interview during which a man was thought to be proposing to his girlfriend whilst he then, in fact, notified her on air that he was

breaking off the relationship since he was gay, had been in contravention of the Code. The contravention was based on the fact that the matter had been re-broadcast intentionally. The initial broadcast was, obviously, not in contravention of the Code, since the questionable conduct of the man was not foreseen.

11.

AIDS

The controversy about the cause of AIDS has led to several complaints. The most important one was against the Tim Modise Show on SAfm, which was alleged to have been in contravention of the Code by having "rebelled" against Government Policy insofar as the provision of Nevirapine was concerned. Complainant accused the SABC and its presenter of sedition. The Tribunal held that the talk show had been balanced - insofar as talk shows can reach that level - and that it was perfectly legitimate for a broadcaster to have a point of view and to criticise Government policy, as long as it was done fairly.

12.

SEX AND NUDITY

After the BCCSA in 2000 held that a version of *Emmanuelle* (from the 1970's) screened by e-tv was in contravention of the Code since it supported the view that women should first be raped before they could

enjoy sex and that, under circumstances, gang rape was part and parcel of this procedure, it did however pass a version of *Emmanuelle* in which these aspects were absent. The latter was screened at 12:30. In 2002, however, e-Tv broadcast two, more recent, versions of *Emmanuelle*. The adjudicators came to the conclusion that since the films supported random sex and it was presented in a semi-explicit manner without a significant storyline, it amounted to a form of soft pornography, which was indecent or obscene in terms of the Code. *E-tv* has appealed to a full tribunal against this decision. *E-tv, inter alia*, argued that since the Constitutional Court would seem to have questioned the validity of the provision which deals with indecency or obscenity as a result of its vagueness, that the tribunal should not apply a provision which was clearly Constitutionally invalid. The matter is still pending at the time of writing of this report.

13.

THE FILMS AND PUBLICATIONS BOARD AND THE BCCSA

The Film and Publication Act 1996 distinguishes between television on the one hand and cinema and video distribution on the other hand. The Task Group which drafted the Act based this difference on the fact that television broadcasting is licensed by the ICASA, while cinema and video distributors are registered entities. Registration is a mere administrative act

in contrast to licensing. The film and video industry also indicated that it would prefer pre-control so as to gain commercial certainty. Furthermore it was felt that the Apartheid government's introduction of censorship for television in 1984, encroached upon the independence which broadcasters should have. Television (and radio) should, accordingly, not be subject to pre-control. Parliament accepted these proposals. However, any film prohibited as XX by the new Film and Publication Board may not be screened by a broadcaster and, furthermore, a broadcaster could be prosecuted if it were to broadcast XX material and material which amounts to the advocacy of hatred based on race, ethnicity, gender or religion that incites to harm.

14.

Presently the content of TV, by consent of the broadcasters and as a result of a ruling by the IBA (now ICASA), insofar as protection of children, privacy, dignity, indecency, obscenity, truth and balance are concerned, falls under the jurisdiction of the BCCSA. The index of judgments published by the BCCSA in 2001 illustrates how active this control has been. For the sake of consistency, broadcasters base classification of feature films on the certificates of the FPB and its predecessors. Since a mass audience is involved, TV usually adds to the age and classification of those respective bodies. The approach which the BCCSA follows is that, unless special

circumstances are present, broadcasters should adhere to those age restrictions and classifications or even add to such age restrictions and classifications.

15.

A problem does, however, arise in the case of a series such as *Vetkoek Paleis*, *Isidingo* and *Yizo-Yizo*. These films are not submitted for certification by the FPB. Yet the broadcasters are at pains to follow the guidelines of the FPB and the BCCSA, who have held several workshops with broadcasters. At times, mistakes will be made, but this is a most problematic area. Hard and fast rules are impossible to lay down. The solution does not lie in more control, according to the BCCSA, but in workshops of the broadcasters with the FPB, ICASA and the BCCSA. In this manner democracy, freedom and the public will be served best.

16.

WEBSITES AND REPORTS

The BCCSA set up a website early in 1999. We have been complimented for the quality of this website, which is also accessible from the website of the Canadian Broadcasting Standards Council. Detailed reports of how complaints were dealt with are also distributed every four months. The full judgments of the tribunal, as well as the shorter judgments of adjudicators,

are also distributed. The number of tribunal judgments now number more than 500, and they illustrate how the Commission has been at pains to balance the viewers' and broadcasters' rights in such a fashion that it would be constitutionally justifiable.

17.

CONTACT WITH OTHER BODIES

This commission has, since its inception, maintained contact with overseas regulators. Locally contact has also been established with local media organisations and workshops. In this fashion the BCCSA was represented at a conference held by the South African National Editors Forum, made inputs as to the setting up of the Media Council for Children, took part in media workshops for radio broadcasters, at the SABC and CSIR and the Chairperson, the Deputy Chairperson and Prof. Lötter took part in radio interviews. All judgments of the tribunal are regularly published via SAPA and newspapers carry reports of our judgments on a regular scale.

18.

Insofar as public debates are concerned, it should be borne in mind that the BCCSA is a judicial body which should not be seen to be taking part in debates on the media. All publicity must concentrate on information to the public. And this is also what our website does.

19.

CERTIFICATION OF COMPLIANCE

This Commission can certify that all the broadcasters which are subject to its jurisdiction and as listed hereunder, have complied with all the directives of this Commission, and have given their full support of the procedures before the Commission. The National Association of Broadcasters has also supported the BCCSA well in funding its reasonable costs.

20.

CONCLUSION

I would like to thank all my colleagues for the splendid co-operation given to me and the Deputy Chair as well as the office during the term reported on. Each one of them has a busy life and we are grateful for the expertise, which they have provided to this Commission. My special thanks to the Registrar, Mrs Shouneez Martin for having dealt so efficiently with more than 400 complaints and more than 50 Tribunals during the year. Ms Donna Mohamed, the Secretary of the Commission, has also done excellent work and acted as Registrar during the leave of the Registrar. My special thanks to the NAB and its very efficient Executive Director, Ms Lara Kantor, who has supported us with enthusiasm and understanding.

**KOBUS VAN ROOYEN SC
CHAIRPERSON
20 APRIL 2002**

BCCSA SIGNATORIES AS AT APRIL 2002

- ❖ Association of Christian Broadcasters
- ❖ Abaqulusi Community Radio
- ❖ Bush Radio - 14/08/01
- ❖ Campus Bay FM (CBFM)
- ❖ Can-I Community Radio
- ❖ Cape Talk
- ❖ Classic FM
- ❖ East Coast Radio
- ❖ e-tv
- ❖ Fine Music Radio - 19/09/01
- ❖ 94.7 Highveld Stereo
- ❖ IFM 102.2
- ❖ Jacaranda 94.2 FM
- ❖ KFM
- ❖ M-Net
- ❖ Matie FM
- ❖ OFM
- ❖ P4 Radio Cape Town
- ❖ Radio 702
- ❖ Radio Lusofonia
- ❖ Radio Algoa
- ❖ Radio Islam
- ❖ Radio Pulpit
- ❖ Radio Puk
- ❖ Radio Rippel
- ❖ Radio Rosestad
- ❖ Radio Pretoria 24/08/01
- ❖ Radio Tuks
- ❖ Rainbow Christian Community Radio - 25/08/01
- ❖ The South African Broadcasting Corporation
 - ◆ Radio Sunshine Ligwalagwala FM
 - ◆ Mughana Lonen FM Radio Metro
 - ◆ Ukhozi FM CKI Stereo
 - ◆ Good Hope FM Bop Broadcasting
 - ◆ Motsweding FM Radio 2000
 - ◆ RadioSonderGrense PhalaPhala FM
 - ◆ 5FM SAfm
 - ◆ Thobela FM Radio Lotus
 - ◆ Lesedi FM Ikwewezi FM
 - ◆ Umhlobo Wenene FM SABC TV: 1, 2 & 3
- ❖ Trinity Broadcasting Network

- ❖ Vaal Community Radio
- ❖ Voice of Wits
- ❖ YFM

BCCSA COMMISSIONERS

LISTENER AND VIEWER REPRESENTATIVE

BROADCASTING REPRESENTATIVES

- | | |
|---|---|
| <ul style="list-style-type: none"> ★ MS FADILA LAGADIEN
Disability Consultant ★ PROF SUNETTE LÖTTER
Criminal Law - UNISA ★ MS DOLLY MGOQI
Community Development ★ MR RATHA MOKGOATHLENG
Media Lawyer (Alternate Chair) ★ PROF PRAGASHEN NAYAGAR
Deputy Vice-Chancellor: Technikon
Vaal Triangle -Student Affairs and Marketing ★ PROF HENNING VILJOEN
Attorney, previously Faculty of Law
University of Pretoria | <ul style="list-style-type: none"> ★ MR ARTHUR MAIMANE
Media Consultant ★ DR WILLEM DE KLERK
Consultant & Communication
Expert ★ REV DANIE DU TOIT
Film Expert ★ MS LAUREN GOWER
Clinical Psychologist ★ MR BARNARD MOKWENA
Broadcasting and
Telecommunications Expert ★ ADV LINDI NKOSI-THOMAS
Advocate ★ ADV ROBIN SEWLAL
Public Relations and Journalism |
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PROF KOBUS VAN ROOYEN SC – CHAIRPERSON

SHOUNEEZ MARTIN – REGISTRAR

DONNA MOHAMED – SECRETARY