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## THE CHAIRMAN'S ANNUAL REPORT JUNE 2003 – MAY 2004

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### I. INTRODUCTION

The reliability and responsibility of the media was put to the test nationally and internationally during the last 12 months: The Hutton Report in the United Kingdom held that the BBC had been in error in regard to the so-called “sexed up” report used by the British government to justify the country’s entrance into the war in Iraq; the *Daily Mirror* recently had to apologize to readers for publishing fake shots of prisoner abuse by British soldiers in Iraq; and locally the Hefer Commission found that an allegation in a newspaper that the National Director of Public Prosecutions had been an apartheid spy, was not proved to be so. Several other incidents questioned the integrity of the media, including a widely publicised case of plagiarism. I am, nevertheless, pleased to be able to report that the broadcasting media which fall under our jurisdiction – and that would mean all local television plus the vast majority of radio stations – have had a good year. For this Commission’s Tribunal the accent was on the interpretation of the new Broadcasting Code, which became operative on the 7<sup>th</sup> of March 2003. Four problematic decisions had to be taken in this regard: Is hate speech as is to be found in s 16(2)(c) of the Constitution part of the Broadcasting Code?; What are the ambits of privacy?; How should the omission of “dignity” from the Code influence our decisions in this regard?; Lastly, could the broadcast of material which is offensive to religious convictions or feelings be found to be in contravention of the Code.

The internecine conflict in the Middle East was also the source of complaints from supporters of both sides of the conflict. Procedurally the introduction of an appeal from the Tribunal to an Appeal Tribunal on the 1<sup>st</sup> of September 2003, was significant. Proposed amendments to the Films and Publications Act which, according to the National Association of Broadcasters, impinged upon the independence of the broadcasting media, were also opposed before the Home Affairs Portfolio Committee by the National Association of Broadcasters. Currently, a discussion paper which could lead to the introduction of legislation in regard to hate speech, will also be the subject of comment from the National Association of Broadcasters. The Commission has made inputs in this regard.

## **II. HATE SPEECH**

Clause 16 of the New Broadcasting Code focuses on hate speech, especially where its use could promote violence. Hate speech based on race, ethnicity, religion or gender would fall within the ambit of Section 16(2) of the Constitution but would not necessarily fall within the said clause. Therefore, the Tribunal of the Commission had to decide whether Section 16(2)(c) of the Constitution could be read into the Code. Section 16(2) of the Constitution is part of the Preamble of the new Code. In this light it was decided that the advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm, should be read into clause 16 of the Code. This decision was based on the authority of the Commission, as a tribunal in terms of Section 39 of the Constitution of the Republic, to develop the common law in the light of the Fundamental Rights chapter of the Constitution.

In the light of this approach YFM was found not guilty of hate speech when a presenter falsely accused Afrikaners of having been involved in a shocking act of bestiality with a young girl. The remarks were, however, regarded as a contravention of the Code in that comment which was not based on facts or reasonably based on facts, was broadcast.

When a presenter from East Coast Radio made derogatory remarks against the Sri-Lankan cricket team which took part in a series in South Africa, it was held that these remarks did not amount to hate speech. The remarks were not based on race, ethnicity, gender or religion but on the alleged absence of sportsmanship on the side of the said team. The tribunal, however, held that the remarks were in particularly questionable taste and were rightly not regarded as in accordance with the station policy.

When a presenter from Cape Talk attacked the South African Rugby Management as being run by “thick Dutchmen” and when he repeated this derogatory statement in a later broadcast, the Tribunal held that the repetition had clearly amounted to hate speech based on race. When presenters at Highveld Stereo made a mockery of Yom Kippur and, on another occasion, made a mockery of the Christian belief that the taking in vain of the Lord’s name is a sin, the remarks were also held to amount to hate speech based on religion. This matter is presently subject to an application for leave to appeal.

## **III. PRIVACY:**

The Broadcasting Code protects privacy except in cases where such an invasion would be in the public interest. “Public interest” is, of course, a legal concept, but should not be confused with material which would be of interest to the public. The question arose whether an SABC radio programme’s reference to a press columnist as an “ageing Western Cape Columnist” amounted to an invasion of the columnist’s privacy, when taken together with a clear innuendo that, because of his age, the columnist was guilty of inaccurate reporting. The Tribunal found in favour of the complainant in that this comment had been an invasion of his privacy, also that the SABC had erred in not allowing the complainant the right to reply. In another matter, a panelist alleged that his ex-wife’s boyfriend had sexually abused their children. The SABC presenter did not react, as she should have, to this remark by saying immediately that such an observation was unacceptable. When the programme was repeated the next morning, the producer had

not taken steps to remove the said allegation. It was held that these remarks had violated the complainant's privacy. The Tribunal held that allegations that his dignity was also intruded upon could not be decided upon since dignity was no longer a protected interest in terms of the Code. This would seem to have been an unintended omission. The Annual General Meeting has attended to this omission and will now consult with the broadcasters within its jurisdiction before possible modification of the Code.

#### **IV. OFFENCE BASED ON RELIGIOUS FEELINGS:**

The Reverend Jannie Pelsner, who is a leading figure in a campaign against the taking in vain of the Lord's Name in feature films and elsewhere, put his case before a Tribunal. He argued that the present rules in this regard were inadequate. He requested that the Commission consider the imposition of a "D"-symbol whenever films contain profanities. In response to a similar request, the Films and Publications Board decided not to add this "D"-symbol. The "L"-symbol (Language) is held to be sufficient. Where necessary the "P"-symbol could be used – a "P" indicating prejudice in a film, whether such prejudice is based on gender, race or religion.

The rules referred to earlier comprise the following:

1. In children's broadcasting time no profanities are acceptable; in family time they should be removed as far as possible; in family time terms such as "Jesus" and "Jesus Christ" and "Christ", when used as profanities, are unacceptable. After the watershed times much leeway is given and only in exceptional circumstances would it be expected that cuts be made. Bona fide drama and documentaries would, in any case, be exempted from the requirements of cuts.

When Garrett Cliff in his afternoon programme on 5FM did an "interview" with "Jesus" the Tribunal held that it did not amount to hate speech since the interview satirised the commercialisation of religion inherent in the film *The Passion of the Christ*, and not Jesus as such. The "interview" was found to have been offensive as analysis of the meaning of the satire was well nigh impossible in the broadcast programme as such. The "interview" should not have formed part of such a programme and should have been broadcast at a post-watershed time, where its level of satire would be likely to be understood by more sophisticated listeners.

#### **V. LOW PERCENTAGE OF CONTRAVENTIONS:**

The above examples might create the impression that the broadcasters have been contravening the Code frequently. This would not be correct. Of all the complaints received by the BCCSA only some 12% of the complaints are referred to adjudication or a Tribunal. Other complaints are arbitrated between complainants and broadcasters, or not entertained, since they do not, on a prima facie basis, fall within the scope of the Code.

- VI. The Registrar of the Commission, Mrs Shouneez Martin, who is assisted by the BCCSA's secretary, Ms Donna Mohamed, have managed our offices extremely well. As Registrar, Mrs Martin deals directly with complaints from the public and then, with the

assistance of her secretary, has to liaise with broadcasters, as well as the Commissioners. When she decides to entertain a complaint, the matter is referred to the Chairperson, who then decides whether an adjudicator (one of the Commissioners) should be appointed, or whether the complaint justifies a direct hearing by a Tribunal of the Commission. Once a decision has been taken by an adjudicator an appeal lies to the Tribunal. As stated earlier, an appeal also now lies to an Appeal Tribunal. But there is no entrenched right to appeal. The Chairperson of the first Tribunal hears the application for leave to appeal and, if he or she dismisses this application, then an application may be brought to the Deputy Chairperson or another Commissioner designated by the Annual General Meeting.

## **VII. CERTIFICATION OF COMPLIANCE:**

This Commission can certify that all the broadcasters, which are subject to its jurisdiction and which are listed in an Annexure to this report, 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. The Chief Executive Officer, Mr Johann Koster, has been of great assistance to the Commission and our sincere gratitude to him is expressed. It should be mentioned that there are some broadcasters which do not fall under the jurisdiction of the BCCSA. These broadcasters fall under the jurisdiction of the Independent Communications Authority of South Africa which has, as one of its committees, a Broadcasting Monitoring and Complaints Committee, chaired by Jules Browde SC. It should, furthermore, be noted that all complaints concerning political broadcasting during the month preceding elections are dealt with by the said committee of the Authority.

## **VIII. WEBSITE AND REPORTS:**

The BCCSA set up a website early in 1999. We have in fact been complimented on the quality of this website, which is also accessible from the website of the Canadian Broadcasting Standards Council. We have now reached the stage where the administrative staff of the Commission are able to place judgments of the Commission directly on the website.

The renowned legal publisher, Butterworth, has also commenced publishing our most important judgments. Up to this stage about 70 judgments of the Commission have been published since 2002. Two of our judgments (one concerning the song Amandiya and the other concerning the question whether a broadcaster has a duty to broadcast news) were also published in the Butterworth Constitutional Law Reports.

Press coverage of our judgments has been frequent. These judgments are released to SAPA as well as to a number of media practitioners. Our judgments also reach British and Canadian authorities active within our field.

Up to the end of 2003, tri-annual reports of all decisions taken, as well as mediations, were published in a separate report with a limited distribution by way of the Internet and traditional publication to broadcasters under our jurisdiction. As from 2004 these reports will only contain summaries of the judgments of the Tribunal and, where applicable, the Appeal Tribunal. It is believed that this more limited content would make the reports

more accessible and be of significance and value to the broadcasters under our jurisdiction. In this way, a summary of the latest judgments can be accessed and studied. All judgments of the Tribunal as well as adjudications are also sent through to the Independent Communications Authority of South Africa for their information.

**IX. A MOVE TO NEW OFFICES:**

In 2003 the offices of the Commission were moved to a new venue. We now have a Board Room which is shared with the National Association of Broadcasters.

**X. ACCESS FOR THE DISABLED:**

During 2003 the Commission was requested by a Government Committee to inform them to what extent the Commission have taken steps to grant access to disabled persons. We could report that in addition to physical access being available at our offices, the Commission also, as an example, traveled to a venue in Pretoria where it heard the complaint of a person who has poor eyesight and could not, on his own, reach the offices of the Commission. Although we have not had complaints of this nature in the last few years, we are aware of the fact that broadcasters under our jurisdiction, as a matter of internal policy, ensure that the disabled are not brought into contempt and, in fact, frequently take steps to alleviate the plight of the disabled by way of programmes.

**XI. SERVING THE PUBLIC:**

The BCCSA serves the public in that each letter is answered (except where complaints have obviously been orchestrated, in which case only the organiser is answered). The broadcasters who fall under the jurisdiction of the BCCSA, give free publicity to the BCCSA and every four months broadcasters are requested to report on this publicity to the Registrar. Judgments of the tribunal are sent out to interested parties and the media and the most prominent judgments are published on our website. Where a complainant is unable to formulate a complaint in writing, the Registrar will assist such a person to do so. All hearings are open to the public, members of which often attend hearings.

**XII. SANCTIONS:**

Annual reports, all judgments and other reports are sent to the Independent Communications Authority of South Africa. Where a broadcaster frequently transgresses the Code, the broadcaster must be reported to the ICASA, according to the ICASA conditions pertaining to the BCCSA. Fortunately this has not occurred. Our experience is that broadcasters abide by our guidelines, procedural measures and sanctions, punctually and voluntarily. On a few occasions broadcasters have been fined. On most occasions on-air corrections are ordered. At times a matter is mediated by a Commissioner.

**XIII. CONCLUSION:**

In conclusion I would like to thank all my colleagues for the splendid cooperation given to me and the Deputy Chair, Mr Ratha Mokgoatlheng. Each one of them has a busy life and we are grateful for the expertise which they have provided to this Commissioner.

My personal thanks also goes to the Registrar and Secretary as well as to the National Association of Broadcasters.

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**KOBUS VAN ROOYEN SC**  
**CHAIRPERSON**  
**22 MAY 2004**

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**BCCSA SIGNATORIES AS AT MAY 2004**

- ❖ 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 -
- ❖ 94.7 Highveld Stereo
- ❖ IFM 102.2
- ❖ Jacaranda 94.2 FM
- ❖ KayaFM
- ❖ KFM
- ❖ M-Net
- ❖ Matie FM
- ❖ O F M
- ❖ P4 Radio Cape Town
- ❖ 702 Talk Radio
- ❖ Radio Lusofonia
- ❖ Radio Algoa
- ❖ Radio Alpha
- ❖ Radio Islam
- ❖ Radio Kingfisher
- ❖ Radio Pulpit
- ❖ Radio Puk
- ❖ Radio Rippel
- ❖ Radio Rosestad
- ❖ Radio Pretoria
- ❖ Radio Tuks
- ❖ Rainbow Christian Community Radio

- ❖ 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                      Ikwekwezi FM
  - ◆ Umhlobo Wenene FM                      SABC TV: 1, 2 & 3
  - ❖ Trinity Broadcasting Network
  - ❖ Vaal Community Radio
  - ❖ Voice of Wits
  - ❖ YFM
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**BCCSA MEMEBRS AS AT MAY 2004**

**BROADCASTING REPRESENTATIVES**

- Dr Willem de Klerk - Consultant and Communication Expert
- Rev Danie du Toit- Film Expert
- Mr Barnard Mokwena - Broadcasting and Telecommunication Expert
- Ms Lindi Nkosi-Thomas - Advocate
- Adv Robert Sewlal - Prof of Public Relations and Journalism

**VIEWER AND LISTENER REPRESENTATIVES**

- Prof Sunette Lötter - Prof in Criminal Law
- Mr Ratha Mokgoatlheng (Deputy Chairperson) - Attorney
- Prof Ravi Nayagar - Educationist
- Prof Henning Viljoen - Attorney, previously Faculty of Law at the University of Pretoria

**CO-OPTED MEMBERS**

- Ms Refiloe Mokoena - Msiza - Attorney
- Dr Linda Venter - Senior Lecturer in Communication
- Prof Gerrit Olivier - Prof of European Studies

