



## **CHAIRPERSON'S REPORT**

**2007 – 2008**

### **1. INTRODUCTION**

With fourteen years of democracy behind us, an important question is whether the BCCSA has lived up to the ideals of the Constitution of the Republic of South Africa. Three main questions emerge: is the BCCSA an independent judicial body, is fairness a cornerstone of its procedure and its application of the Broadcasting Code, and finally, does it protect fundamental human rights?

### **2. INDEPENDENCE**

The BCCSA was established by the National Association of Broadcasters (NAB) in 1993. According to the BCCSA's Constitution, it is a body corporate, capable of suing and being sued in its corporate name, and of performing all such acts as are necessary for or incidental to the carrying out of its objects, and for the performance of its functions and duties under its Constitution.

The BCCSA was recognised by the Independent Broadcasting Authority in 1995 in terms of section 56(2) of the IBA Act 1993. During the hearings before the IBA in 1995,

the IBA emphasised that the BCCSA should be an independent judicial tribunal so that it could, without fear or favour, adjudicate complaints from the public against the broadcasters, which are members of the NAB. The recognition remains valid in terms of the Electronic Communications Act and the ICASA Act.

Although the NAB funds the BCCSA, the BCCSA is, as a body corporate, entirely independent of the NAB. The BCCSA has an enforceable ongoing contract with the NAB to provide the BCCSA with its reasonable expenses. If the NAB does not provide such reasonable expenses, the BCCSA may take the matter to an independent arbitrator who would enforce the contract. It has, fortunately, never been necessary to do so.

Other features of the Constitution that uphold the BCCSA's character as an independent judicial tribunal in terms of section 34 of the Constitution of the Republic, are the following:

- (1) The commissioners are appointed by a panel chaired by an independent person (until now, a retired judge of appeal, JJ Trengove). Although initially it was believed that half the commissioners would be appointed from among persons nominated by the NAB, the Constitution was amended at the insistence of the IBA so that all candidates are now nominated by members of the public.
- (2) The chair is elected at an AGM without any intervention from the appointment panel or the NAB.

- (3) The BCCSA is not, in any manner, accountable or answerable to the NAB.
- (4) Only the BCCSA may, at an AGM or SGM, amend its Constitution.
- (5) The BCCSA may only be dissolved at an AGM of the BCCSA.
- (6) The BCCSA appoints its own registrar. The chair manages the office and appoints staff members, including the accountant.
- (7) All salaries or fees are paid by the BCCSA, which has its own bank account and appoints an auditor annually.
- (8) The BCCSA may impose sanctions, which include fines. It has an internal appeal procedure.
- (9) In sum, the BCCSA is an independent judicial tribunal which must reach its decisions on complaints in terms of the Broadcasting Code independently and in line with the precepts of fair administrative justice, as required by the Constitution of the Republic and legislation that governs fair administrative justice. Although initially set up by the Broadcasting Industry, it is entirely independent from that industry, and it would be in conflict with its corporate and judicial independence to be called an "industry body".

### **3. FAIRNESS**

A cornerstone of administrative justice is the principle of considering points of view from the disputing parties (*audi alteram partem*). This principle is applied throughout the procedure of the BCCSA, from the receipt of a complaint by the Registrar. Once the Registrar determines that a complaint is not *mala fide*, anonymous or vexatious she must determine whether there is a *prima facie* contravention of the Broadcasting Code.

To determine this she obtains the view of the broadcaster and, where there is doubt, the complainant is approached again. If a complaint is not entertained, the complainant has the right to appeal to the Chair, stating full grounds why the complaint should be entertained. Once entertained, the Chair decides whether to refer the matter to one of the Commissioners for an adjudication or whether the matter justifies a reference to a Tribunal with a full hearing. Thereafter there is the possibility of an internal appeal with the permission of the Chair of the first Tribunal. If the Chair dismisses the application for an appeal, a designated commissioner considers the application. If granted, an Appeal Tribunal hears the matter. Once again, the parties are heard.

#### **4. CONSTITUTIONAL INTERPRETATION**

The BCCSA, as a judicial tribunal, is bound by section 39 of the Constitution to interpret the Broadcasting Code so as to promote the spirit of the Bill of Rights. In this process it is led by judgments of the Constitutional Court, which have set a new paradigm within which freedom of speech must be interpreted and applied. A few facets of this paradigm are discussed here.

(1) The opinion of a majority of South Africans does not necessarily decide what is constitutionally compatible. The rights of minorities and individuals are also protected in appropriate cases. It is true that Parliament represents the electorate and that the Constitutional Court has held that Parliament has the right to protect morality. But the Constitutional Court goes on to define that morality in terms of *constitutional* morality. The Court has thus moved away from necessarily holding itself bound by the perceived moral beliefs of the majority of voters. What counts is the Bill of Rights, which is sovereign.

That is why the Court, for example, rejected the pro-death sentence view that, it conceded, was held by the majority of South Africans in serious cases involving murder. The individual's right to life and not to be subjected to arbitrary punishment was a dominant consideration. There is also little doubt that same-sex marriages are not supported by the majority in Parliament or by the majority of South Africans; yet Parliament was ordered by the Constitutional Court to provide for such unions in legislation. Unreasonable discrimination against same-sex partners was at the heart of the order. In the same matter, the Court also rejected religious doctrine as a source for the interpretation of the Constitution, emphasising instead freedom of choice. Since, according to our Constitution, the South African State is a secular State where freedom of religion and opinion is a fundamental right, this approach is, with respect, correct. Of course, it is true that religion plays an important role in structuring society, but given the basic differences between religions, which should nevertheless *constitutionally* be regarded as equal, it would be impossible to permit religious doctrine or principles to guide interpretation of the Constitution. Freedom of religion is guaranteed and, insofar as the freedom to express a particular religious belief is concerned, this freedom finds its only limitation in section 16(2)(c) of the Constitution. Offensive religious speech is, accordingly, permitted, as long as such speech does not amount to the advocacy of hatred based on religion and which constitutes incitement to cause harm.

(2) The importance of the protection of minorities has also been a recurring theme in judgments of the Constitutional Court. When the Broadcasting Complaints Tribunal held the broadcast of the song 'Amandiya', written by well-known songwriter, Mbongeni Ngema, to be in contravention of the Broadcasting Code, it accentuated the right to security of the minority Indian community in Durban.

(3) An important aspect of Constitutional Court doctrine is that freedom of expression includes the right to express offensive ideas. The limitation of section 36 of the Constitution would, of course, apply. Nevertheless, the starting point is of particular significance. Under pre-1996 publications and films legislation, "offensive" to public morals or religious convictions or feelings of a section of the population, was an important basis for imposing a ban on material. The Appellate Division banned the Gallo edition of the gramophone record, *Jesus Christ Superstar*, in 1975 on the grounds of its being offensive to the religious convictions of Christians. Before the 1980s, the novels *Lady Chatterley's Lover* and *Magersfontein, O! Magersfontein* were rejected purely on the grounds of the language contained therein being offensive to public morals and, in certain respects, offensive to the religious convictions or feelings of the Christian section of the population. In 1974 the Cape Supreme Court banned André Brink's novel, *Kennis van die Aand*, finding it to be offensive to the religious convictions or feelings of the Christian section of the population. In the 1980s, these novels were

unbanned by the Publications Appeal Board with reference to literary merit, likely readership and context.

(4) Freedom of speech must be awarded a generous interpretation and be fully invoked at the outset when testing the facts in terms of clause 16 of the Code.

(5) Freedom of choice is an important facet of freedom of expression, and is supported by the fundamental right to see or hear material, which includes material in the form of drama. The decision to thwart the right of an adult to choose to see a film must be based on much more than one's personal experience of the film being offensive. The question is whether the *reasonable* viewer would tolerate another adult exercising his or her freedom of choice to watch a film after the watershed (the latter being applied on a sliding scale).

(6) *Bona fide* drama, documentaries and art are only subject to age restrictions and possible watershed rules, and may not be found to be in conflict with the Code. "The Story of O" and "The Last Temptation of Christ" were both saved by this exemption.

(7) Threats of violence if a finding is made in favour of a film that may be problematic in religious terms, are irrelevant in the adjudication. Of course, if

the material itself advocates violence, that would place it in the category of hate speech. When Jajbhay J in 2006 interdicted newspapers from publishing cartoons of the prophet Mohamed, he based the interdict on the protection of the dignity of Muslims regarding their religious adherence to the teachings of the Prophet. There was, rightly, no reference to threats of possible violence in the conclusion reached by the Court, in spite of this aspect having been raised by the applicant in its papers before the Court. It would seem, however, that the Court was, with respect, not correct in basing its decision on the dignity of Muslims. Once dignity is introduced as a criterion when deciding on speech, it once again introduces the debate on “offensiveness”, which is no longer a constitutionally permitted criterion, except when it could be explained rationally in terms of section 36 of the Constitution of the RSA, for example, in the case of the protection of children against child pornography and, I might add, other emotionally disturbing or morally harmful material shown on television, before the watershed. In so far as Jajbhay J’s judgment is concerned, the learned Judge also based his judgment on the hatred which the cartoons demonstrated and, in that sense, he rightly brought the matter within the realm of hate speech.

On freedom of speech, the following dictum from a judgment of the Tribunal sets the general tone:

“It has constantly been our approach to clause 35 that only where it is unequivocally clear that there was an unfair comment on a matter of public importance, would we find against a broadcaster under this clause. Balance and



fairness are difficult aims to meet and so as not to stifle freedom of expression, we would in a case of doubt, rather find a programme to have not contravened his clause of the Code than chill necessary speech, though it might not have been that sensitive or balanced. Freedom of expression is too precious an asset in our new democracy to chip away at its core without a very good reason.”

## **5. PRIVACY AND DIGNITY**

Before 2008, dignity in clause 38 of the Code was interpreted as including the dignity of a group. Where material did not qualify as hate speech, the dignity of a group was protected. Thus, in cases where people in a certain area were called “white trash” and when Indians were called “liars”, clause 38 was held to have been contravened when the infringement of dignity was serious. Recently, however, the Appeal Tribunal of the BCCSA held that the clause only protected the dignity of individuals. The clause was, accordingly, not susceptible to a wider interpretation. This would, however, not necessarily mean that scathing remarks such as those referred to above would necessarily be acceptable. Such remarks might yet amount to hate speech, depending on the context. In certain instances such language could also fall foul of clauses which protect children.

In 2006 it was also held that only the person whose dignity or privacy was allegedly infringed could legitimately file a complaint. This approach is based on the fairness principle. If a third party complains about the infringement of the dignity or privacy of a person, any decision which is reached without that person’s having been involved in the hearing before the BCCSA, would be unfair

to that person in cases where it is held that privacy or dignity had not been infringed.

## **6. VOLUME OF COMPLAINTS**

It should not be inferred from the above examples that broadcasters have been in frequent contravention of the Code. About 20% of complaints are entertained, some complaints are mediated, many complaints do not, on a *prima facie* basis, fall within the Code, and others are dismissed because they are either frivolous or vexatious or orchestrated. It might safely be said that 10% of complaints were adjudicated against broadcasters under our jurisdiction: this includes all television and commercial radio stations and also a few community broadcasters. Community broadcasters mostly fall under the direct control of the Complaints and Compliance Committee of ICASA. Complainants are required to state whether they saw or heard the broadcast themselves, otherwise the complaint is not regarded as a *bona fide* complaint. The complainant must also state why the Code was transgressed, and details are required. Since few members of the public are lawyers, it is the task of the Registrar to identify a clause which has been contravened on a *prima facie* basis.

## **7. INCITEMENT TO VIOLENCE**

Section 16(2)(a) of the Constitution of the RSA prohibits speech which incites to imminent violence. The Broadcasting Code has a similar clause. This clause was

applied for the first time in South Africa when a BCCSA Tribunal held that the broadcast of a Rap song, titled “Get Out”, fell foul of the clause.

## **8. THE WATERSHED CRISIS.**

Most broadcasting codes provide for a television watershed in the evenings. The policy is that after the watershed – on a sliding scale – increasingly explicit material may be broadcast. Of course, it is a reality that large numbers of children are often still part of the audience after 21:00. However, it is the approach of the BCCSA that it is the duty of parents and other custodians of children to take the necessary precautions at that time of night. This does not mean that any material whatsoever is permissible after the 21:00 watershed. Not only the BCCSA, but also regulators in Australia, New Zealand, the UK and Canada, have held that the watershed is not a “waterfall”: therefore it would be unacceptable, for example, to screen explicit sex immediately after the commencement of the watershed. These films commence around midnight. As a result of problematic schedules, free-to-air television has, on occasion, broadcast films with an 18 age restriction from 20:00 onwards. The Commission has held such broadcasts to be impermissible. Eight o’clock in the evenings is simply too close to family time. Although the watershed commences at 20:00 for subscription television, the sliding scale should, at that time of the evening, be applied with due sensitivity. Of course, subscription television provides the subscribers with parental control mechanisms. In practice, however, subscribers are not always sensitive to the issue. M-Net has, accordingly, taken steps to

ensure that there is a consistent and constant flow of information to subscribers regarding the manner in which parental-control mechanisms operate. One very real problem is the fact that children usually know more about these mechanisms than their parents do! The so-called V-chip, which acts as a censor, has not been successful. M-Net's approach of using a green and a red channel seems to work more effectively: on the green channel a substantially sanitised dialogue may be heard, whilst on the red channel the viewer may legitimately listen to whatever is broadcast – apart from hate speech, that is. But even hate speech may form part of *bona fide* drama and relevant news, and thus not amount to a contravention of the Code.

## **9. OMITTING CONTRASTING VIEWS**

Clauses 34, 35 and 36 of the Code require that news and programmes concerning matters of public importance should be balanced. Where a person or entity is criticised, the BCCSA has often emphasised that the view of that person or entity must also be broadcast. Where such a person or entity has stated that there would be no response, it is imperative that this decision not to respond should also be broadcast.

## **10. INTERNATIONAL CONTACT**

We have kept contact with colleagues in France, the Netherlands, the UK, Ireland, New Zealand, Australia, Canada and the USA, and have made new contacts in Russia. In July 2008 Prof Lötter paid a four-day visit, on behalf of the

BCCSA, to Regulators and other relevant entities in the UK (including, inter alia, the Commonwealth Broadcasting Association, the British Board of Film Classification, Ofcom and the complaint divisions of the BBC and Channel 4.) Our new website is almost ready for public access. It has, moreover, been a time-consuming task converting all the judgments (as from 1993) into PDF format.

## **11. COMPLIANCE BY BROADCASTERS**

It may be stated with confidence that all the broadcasters that, as a consequence of their membership of the National Association of Broadcasters, are subject to the jurisdiction of the BCCSA in terms of section 54(3) of the Electronic Communications Act 2005, have given effect to all rulings of the BCCSA and have abided by the procedures applied by the BCCSA. A list of these broadcasters is attached. Where they were directed to pay a fine they did so within the stipulated time, and where a correction had to be published, this was also done.

## **12. MOTION OF GRATITUDE**

In conclusion, I wish to thank the Commissioners for their diligent support. Although three Commissioners were re-appointed, seven new Commissioners joined us as from 2008. The three Deputy Chairs (Professors Viljoen, Lötter and Heaton) have assisted me considerably in writing judgments and with certain

administrative tasks. The new Commissioners have introduced new views, which have been refreshing and constitutionally sound.

At the end of 2007 the terms of Prof Willem De Klerk, Rev Danie du Toit, Ms Lauren Gower, Mr. Barnard Mokwena and Prof Ravi Nayagar came to an end. These Commissioners played a pivotal role in developing our guidelines. Sadly, Prof Nayagar passed away recently, and the BCCSA sent its condolences to his wife and children.

Judge Ratha Mokgoatheng became a full-time Judge in 2007 and was no longer available to sit as Deputy Chair or Commissioner after 2007. He played an immense role in developing freedom of expression on the airwaves. We will miss him for his brilliance in arriving at the essence of a matter, and also for his cordial manner.

A special word of thanks is due to the Chair of the Appointment Committee, the Honourable Mr Justice John Trengove, for again having chaired the committee at the end of 2007. Other members of the committee were Dr Nina de Klerk, adv Soraya Hassim, Mr Johann Koster, executive director of the NAB, and the chair of the BCCSA, Prof Kobus van Rooyen.

A special word of thanks, also, to Mrs Shouneez Martin, the Registrar, who, with the assistance of the newly appointed secretary, Ms Kim Erentzen, has once again done a sterling job. The Registrar's work has become far more demanding

over the past three years, and Mrs Martin has consistently displayed courtesy to the public and insight in the problems which they have. Her balanced approach is an asset to the Commission.

Our special thanks also go to the Executive Director of the National Association of Broadcasters, Johann Koster, as well as to the Executive and Council of the Association for their firm and loyal support.

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Confirmed by the Registrar, Ms Shouneez Martin, to have been approved at the Special General Meeting of the BCCSA on the 6<sup>th</sup> September 2008.

## SIGNATORIES OF THE BCCSA 2008

### TELEVISION BROADCASTERS

- ◆ e-tv
- ◆ M-Net
- ◆ SABC1
- ◆ SABC2
- ◆ SABC3
- ◆ Trinity Broadcasting Network

### RADIO BROADCASTERS

#### COMMERCIAL RADIO

- ◆ Algoa FM
- ◆ Cape Talk
- ◆ Capricorn FM
- ◆ Classic FM
- ◆ East Coast Radio
- ◆ Gagasi 99.5FM (formerly known as P4 Durban)
- ◆ Heart 104.9 FM 9 (formerly known as P4 Cape-Town)
- ◆ 94.7 Highveld Stereo
- ◆ Jacaranda 94.2 FM
- ◆ Kaya FM
- ◆ KFM
- ◆ M Power FM
- ◆ OFM
- ◆ Talk Radio 702
- ◆ YFM
- ◆ SABC:
  - ◆ Radio Sunshine
  - ◆ Munghana Lonene FM
  - ◆ Ukhozi FM
  - ◆ Good Hope FM
  - ◆ Motsweding FM
  - ◆ RadioSonderGrens
  - ◆ 5FM
  - ◆ Thobela FM
  - ◆ Lesedi FM
  - ◆ Ligwalagwala FM
  - ◆ Radio Metro
  - ◆ CKI Stereo
  - ◆ Radio 2000
  - ◆ PhalaPhala FM
  - ◆ SAFM
  - ◆ Radio Lotus
  - ◆ Ikwewezi FM
  - ◆ Umhlobo Wenene FM



## COMMUNITY RADIO

- ◆ Bush Radio
- ◆ Bay FM (BFM)
- ◆ Fine Music Radio
- ◆ IFM 102.2
- ◆ Kovsie FM
- ◆ MFM
- ◆ Radio Islam
- ◆ Radio Pretoria
- ◆ Radio Puk
- ◆ Radio Rosestad
- ◆ Radio Today
- ◆ Rhodes Music Radio
- ◆ Transworld Radio
- ◆ Tuks FM
- ◆ Tshwane University of Technology (Top Stereo)
- ◆ University of Johannesburg UJFM (RAU Radio)
- ◆ Voice of Wits

## ASSOCIATION OF CHRISTIAN BROADCASTERS      ?

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|-----------------------------|-------------------------|
| ◆ 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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