



CHAIRPERSON'S REPORT 2006 - 2007

I. INTRODUCTION

When the present Commission was appointed in 2000, the BCCSA had already been functioning for seven years. Looking back at the end of the term of the present Commission, one is inclined to consider what challenges were met and what tools were used to attain the standing we currently enjoy. The main ideal was to establish a body which would be entirely independent, and would function as a judicial body in terms of section 34 of the Constitution of the Republic of South Africa: independence and impartiality would have to lie at the core of the BCCSA.

Since the BCCSA is funded by the National Association of Broadcasters, a question often asked is whether the Commission can be truly independent. A moment's reflection shows that the Commission is, indeed, independent. It would, to my mind, be prudent to, state, once again, why this is so.

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.

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).

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, and may be a person from outside the commission.
- (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, and the NAB has no right to do so or to withdraw its funding of reasonable expenses.
- (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".

II. THE QUALITY OF FREEDOM OF SPEECH

South Africa enjoys a very high level of freedom of expression. Never before has this country been as free from State intervention in freedom of expression as now. Disciplinary bodies set up by the industries involved regulate the content of broadcasts, advertisements and the newspapers. Only in cases where members of the industry have not joined the relevant bodies – certainly fewer than 10% – would the State be involved. Of course, the courts would apply statutory and common law but, once again, the activity in this area is not excessive. The statutory Films and Publications Board certifies films which are intended for public screening or public distribution. Although the latter control amounts to pre-control, the industry opted for this approach in 1994, arguing that it would be too costly to set up their own classification body, and also that it would be a costly exercise to introduce post-distribution regulation by the Films and Publications Board, since they would have to withdraw all copies during distribution

if a cut were to be made during distribution. If one bears in mind that members of the public may – except in the case of child pornography – import any film for private screening, the pre-clearance does not pose an apartheid-type blackout of films that have not been certified. In the case of publications, there is generally no pre-clearing. Fortunately, the threatened pre-control on newspapers was withdrawn by the Portfolio Committee Home Affairs just this week. The step would, to my mind, have been incompatible with the Constitution. There was no basis for this intervention which, in any case, is in conflict with Government's undertaking in 1994 that it would not place newspapers, which are subject to the Press Ombudsman, under the Act. In so far as licensed broadcasters are concerned, the plans were withdrawn in the light of section 192 of the Constitution, which places the regulation of broadcasting under the control of the Independent Communications Authority of South Africa. The ICASA (then IBA) approved in 1995 that the industry created the BCCSA as the judicial body which deals with complaints against broadcasters which are members of the NAB. Last week in Parliament during the Budget Vote of the Minister of Communications, even the conservative ACDP expressed its support for non-statutory control over the content of broadcasts – in effect supporting the BCCSA. The ICASA chair, Mr Paris Mashile, expressed similar sentiments during an address to the Portfolio Committee Home Affairs two weeks ago.

III. CONSTITUTIONAL TOOL: FREEDOM OF EXPRESSION

Although it might be argued that freedom of expression has always been of special significance at common law, in 1994 it was built into the Constitution of the Republic as a fundamental right. This has led to decisions by the Constitutional Court that freedom of expression lies at the heart of democracy, that it even includes the right to offend, that even child pornography might under certain circumstances be acceptable if it is in accord with the precepts of *bona fide* art, that even the rights of children must at the initial stage of an inquiry be placed at the same level as other fundamental rights, such as freedom of expression, and that reasonable grounds must exist before legislation may depart from the basic right to freedom of expression and the right of the public to be informed.

IV. CONSTITUTIONAL TOOL: FAIR ADMINISTRATIVE JUSTICE

A second, most important, tool of the BCCSA is its obligation to apply fair administrative justice. That it is why its Constitution prohibits the BCCSA from initiating an Inquiry itself, or any form of pre-clearance. Full reasons for decisions must be given, and the reasons must be rationally related to the facts of the matter. More than 1,000 written judgments have been handed down, and all other complaints (in excess of 10,000) were answered, or at least adjudicated upon, at the first level. We wish to express my sincere gratitude to each Commissioner and *ad hoc* Commissioner who has contributed so

greatly to the thinking behind our judgments. Many of these judgments have been published by Butterworth on its Judgments On Line, and a large number of judgments are also to be found on our website. To ensure that justice may be done, we have instituted an appeal procedure which has proved to be an enormous success. The fears which were initially expressed that commissioners would not find against each other, have proved to be unfounded. The Appeal Tribunal has, without fear or favour, adjudicated appeals, and some decisions have indeed gone against that of the First Tribunal. Such instances in the past year include *Boondock Saints* and an issue of the World Wrestling Federation, where negative findings by the First Tribunal were set aside on appeal. Currently, there is an appeal pending as to the use of the word "nigger" on radio by a presenter. Although complainants do not always attend the hearings, it is significant that in more serious matters they do turn up to put their cases before the Tribunal.

Not one of our judgments has been considered by a Court on review.

This is quite an achievement, given the debates within this field!

V. CONSTITUTIONAL TOOL: FREEDOM OF RELIGION

A substantial number of complaints are received where complainants are of the view that their religious convictions or feelings have been offended. Constitutionally, "offence" is not a sufficient ground to base a contravention on. The broadcast must, when judged in context, have

amounted to the advocacy of hatred based on religion, and must also have amounted to incitement to harm. Some complaints do not directly pertain to religion, but relate to support for one or other side in, for example, the Middle-east crisis. The conflict is often associated with a clash between religions. During the past year, a complaint by a Muslim person was dismissed on the basis that although the Islamic call to prayer, the Azaan, was audible in the background of dance music, this did not amount to a case where the broadcaster advocated hatred by having included this background music which, in any case, was not the broadcaster's own product. Within the next month or so, the Tribunal will have to decide whether the screening by e-tv of *The Last Temptation of Christ* was in contravention of the Broadcasting Code. This film was not certified by the Publications Appeal Board in 1989. In terms of the new Films and Publications Act, video and DVD distribution was permitted at the end of 1999. Cinema screenings were, however, not permitted. The Broadcasting Code provides that no film that has been refused a classification by the Films and Publications Board may be screened. One of the questions confronting the Tribunal would probably be whether the film has now indeed been passed, in spite of the prohibition of cinema screening. A further question would probably be whether it amounts to bona fide drama, which is a defence under the Code, and also a defence in terms of the Films and Publications Act 1996.

VI. CONSTITUTIONAL TOOL: CHILDREN'S RIGHTS

The Broadcasting Code prohibits the broadcast of child pornography. The clause in the Code is wide enough, according to a judgment written for the Tribunal by Commissioner Lötter during 2007, to also include graphic descriptions on radio. The Tribunal, accordingly, held that the graphic description in the lyrics of a song regarding the activities of a paedophile amounted to a contravention of the Code. Accusations that child pornography is broadcast on South African television are unfounded. Only once has a television broadcaster broadcast an insert of child pornography, and that was when Parliament, during the course of that same day, had a discussion on child pornography and indeed viewed some of the photographs broadcast that evening by the SABC. In another instance, a complaint was lodged that the film *Pretty Baby* amounted to child pornography since it portrayed a young teenager as a prostitute. The Tribunal held that the film amounted to *bona fide* drama, and that the required classification accompanied the broadcast of the film. The broadcast also took place well after the watershed.

VII. CONSTITUTIONAL TOOL: GENDER RIGHTS

Although there have been complaints about television programmes where female battering was shown, the instances were regarded as functional and of such a nature that they contributed towards the campaign against female physical abuse. Insofar as drama is

concerned, the well known film, *The Story of O*, was recently screened after midnight on TV. The Tribunal held that in spite of its negative message within the gender framework, the film amounted to *bona fide* drama and that, given the time of the broadcast after midnight and the fitting classification, the broadcast did not amount to a contravention of the Code.

VIII. CONSTITUTIONAL TOOL: NON-DISCRIMINATION

Race remains at the heart of South African politics. The injustices of the past have made it absolutely necessary that political discussion be as free and open as possible. However, so as to ensure that aspects of the past are not repeated, racially derogatory terminology is generally not permitted on radio or television. During the past year it was, however, held that the use of the term "Bushman" within an appropriate cultural context, did not amount to hate speech or an insult to dignity. Complaints are regularly received against films that portray racially abusive or denigrating conduct that occurred during the apartheid years. It is consistently argued that such films, for example *A Place of Weeping*, would give new life to feelings of racial hatred, and that the films might even contribute to violence. The Tribunal's view in this regard has consistently been that it is necessary to constantly remind South Africa of its past. Likely viewers would judge these films as portraying events that occurred within the apartheid context, and rather than being incited to violence, viewers are likely to

realise how important it is to maintain good relations in our multi-cultural and multi-racial society.

IX. CONSTITUTIONAL TOOL: PRIVACY AND SEXUAL ORIENTATION

Privacy as a core human right is also at times the subject of complaints. The latest complaint was by a Minister of State that television cameras were taken into his house without permission, and that his privacy had been invaded in an unreasonable manner. The news item related to a burglary that took place in the Minister's house, and the fact that during that same week prisoners had been granted amnesty. The broadcaster stated that one of the suspects in the burglary was a person who had been freed during the previous week. The Tribunal held that the privacy of the Minister had in fact been invaded, and that mere entry into the house would have sufficed to prove the point that the house was not properly protected. However, when the cameras moved into the bedroom of the Minister, this amounted to a clear invasion of his privacy. The broadcaster was, however, found not to have contravened the Code on the basis that it either had permission, or could reasonably have understood that it had permission to enter the house, since a domestic worker had permitted its team to enter. The Human Rights Commission came to a different conclusion on the last point. Of course, its view did not amount to a binding decision on the matter, since the Commission does not have the authority to bind persons by its decisions.

Derogatory terms for gays have consistently led to decisions against broadcasters. The Constitution protects sexual orientation, and on the public airwaves a course must be steered away from the use of these terms.

X. INDEPENDENCE OF BROADCASTERS

The independence of broadcasters must be judged according to the content of their broadcasts. The inner workings and management of a Broadcaster do not concern the BCCSA. As in the past, I am satisfied – and I believe, the Commission is, too – that our broadcasters have moved away from the subservient role played in apartheid times. The modern young citizen expects honesty from broadcasters, and broadcasters have responded accordingly. It is of particular importance that during the past two years very few complaints were received in regard to news items. In the case of the SABC, there was one complaint in the last year, and in the case of e-tv, there was the Minister's complaint about privacy, and a complaint concerning a report on maggots in the public water system. The latter two complaints were dismissed, and the first was upheld. It should be mentioned that the SABC matter did not concern balance or truth, but rather a self-motivated amendment to the wording of the news by a news reader. The news reader used a derogatory term for gays while

reporting on gay marriages as sanctioned by Parliament at the end of 2006.

XI. CERTIFICATION

The BCCSA certifies that all the broadcasters under its jurisdiction have consistently given effect to the orders that the BCCSA has made, and that they have given their full co-operation to the BCCSA as an independent judicial body. The National Association of Broadcasters has also fulfilled its duties to the BCCSA with diligence.

XII. In conclusion, I wish to thank all my colleagues for their splendid support during the past year. Prof Viljoen has acted as Chair in the absence of Mr Justice Mokgoatheng, who has, over the past few years, been acting as a Judge. Rev du Toit also acted as Chair of the Appeal Tribunal in one instance. I would like to thank them and other commissioners for judgments written with sensitivity and understanding of the constitutional task before us. My thanks also go to the Chair of the Finance Committee, Prof De Klerk and my colleague, Prof Nayagar, for the prudent manner in which they have kept watch over our finances.

XIII. A special word of thanks to the Registrar, Mrs Shouneez Martin, who, with the assistance of the secretary, Mrs Donna Mohammed, has done a sterling job. 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.

CHAIRPERSON: JCW VAN ROOYEN SC

DEPUTY CHAIRPERSON: R MOKGOATLHENG

BCCSA COMMISSIONERS

- ◆ **Dr Willem de Klerk**
- ◆ **Rev Danie du Toit**
- ◆ **Ms Lauren Gower**
- ◆ **Prof Sunette Lötter**
- ◆ **Mr Barnard Mokwena**
- ◆ **Mr Ravi Nayagar**
- ◆ **Prof Henning Viljoen**
- ◆ **Adv Robin Sewlal.**

AD HOC MEMBERS

- ◆ **Dr Lynda Gilfillan**
- ◆ **Prof Gerrit Olivier**
- ◆ **Adv T Mkhwanazi**
- ◆ **Ms Refiloe Mokoena-Msiza**
- ◆ **Dr Linda Venter**
- ◆ **Mz Zenobia Afria,**

SIGNATORIES AS AT JUNE 2007

TELEVISION BROADCASTERS

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

RADIO BROADCASTERS

COMMERCIAL RADIO

- ◆ Cape Talk
- ◆ Classic FM
- ◆ Capricorn FM
- ◆ East Coast Radio
- ◆ Highveld Stereo
- ◆ Jacaranda 94.2 FM
- ◆ Kaya FM
- ◆ KFM
- ◆ OFM
- ◆ Gagasi 99.5FM (formerly known as P4 Durban)
- ◆ Heart 104.9 FM 9 (formerly known as P4 Cape-Town)
- ◆ Algoa FM
- ◆ 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
- ◆ MFM
- ◆ Radio Islam
- ◆ Radio Puk
- ◆ Radio Rosestad
- ◆ Radio Pretoria
- ◆ Radio Today
- ◆ Radio Shimla (Kovsie FM)
- ◆ Rhodes Music Radio
- ◆ Transworld Radio
- ◆ Tuks FM
- ◆ TUT Top Stereo
- ◆ 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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