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## **CHAIRMAN’S REPORT SEPT 2010 – SEPTEMBER 2011**

### **1. INTRODUCTION**

The dynamics of broadcasting in South Africa, with its general focus on pressing social and political issues, has kept the BCCSA busier than ever. Debates about hate speech and the limits of political speech have also become hectic at times. In addition to this, the limitations and freedoms of subscription broadcasters have been a challenge in several adjudications and judgments of the BCCSA. TopTV commenced broadcasting in 2010, and their particular approach to age-restricted films has brought a new dimension to regulation. The debate about a Parliamentary investigation into a possible Media Appeals Tribunal for the printed media, the Protection of Information Bill, the appointment of a Press Freedom Commission by the South African National Editors Forum and Print Media South Africa to look into the regulation of the printed media, the Malema hate speech trial before the Equality Court, and the dispute between the Mail & Guardian and the SABC in proceedings before the BCCSA, have all made for interesting reading and have generated much discussion in media circles and in the media itself. Then, of course, there was also the lively debate around the matter of e-tv’s broadcast of the Canadian programme *Naked News*, well after midnight.

### **2. DEALING WITH COMPLAINTS FAIRLY**

During the course of dealing with complaints, the BCCSA has constantly borne in mind its role as an independent judicial body. Independence alone is, of course, not sufficient: the rules of fairness, which underlie our Constitutional system, must remain core values. In addition to this, there is the duty to provide cogent reasons, and to do so within a reasonable period of time. Of course, this becomes a particular challenge when, as in the 2010-2011 period, as many as 1 260 complaints were received. Each complaint has to be evaluated as to whether a *prima facie* case

has been made out, and the Registrar often has to elicit details from a complainant so as to exercise her discretion rationally and fairly. Some complaints are settled, while others are answered satisfactorily by broadcasters, and each complainant is provided with reasons regarding the outcome of the complaint at the first level. There is also the possibility of an appeal to the Chairperson when the Registrar has decided not to entertain a complaint, or when she accepts an apology from a broadcaster. In 2 out of 15 instances, such appeals succeeded. Our appeal system to a second Tribunal was utilised by three complainants and, in two cases, by broadcasters. Late applications for appeals were not condoned. In the *Mail & Guardian* matter, an order from the BCCSA to publish a summary of its judgment during prime time news, was arguably more onerous than a fine. It should, however, be stated that rumours that the SABC was contemplating to withdraw from the jurisdiction of the BCCSA were not founded in fact. It was merely exercising its rights to apply for an appeal. These applications were not successful and the SABC broadcast the statement which it was directed to broadcast within the extended time period set down by the BCCSA Tribunal.

### **3. KEEPING THE PUBLIC INFORMED**

Each of the broadcasters under the jurisdiction of the BCCSA has the duty to advertise the services of the BCCSA on a regular basis. More than 34 000 advertisements were aired by broadcasters during the past twelve months. In fact, at the end of 2010 the BCCSA won a bronze medal from the State President's office for the effective advertising of its services to the public. This endeavour by broadcasters within our jurisdiction, I would submit, is outstanding. This endeavour is especially outstanding when measuring it against advertising time available to, and expenses incurred by, the broadcasters. I would therefore like to express my gratitude to the broadcasters under our jurisdiction for the publicity they have given to the BCCSA. These endeavours demonstrate the availability of the BCCSA to the public, and the support that is given to the BCCSA by the broadcasters under its jurisdiction. Of course, since the BCCSA is not permitted to initiate a complaint itself, we are fully dependent on the public to bring matters to our attention. The public must, and fortunately is, widely informed about our existence.

#### **4. ORCHESTRATED COMPLAINTS**

Orchestrated complaints are not *bona fide*, and the Registrar, in the ordinary course of events, only deals with the first motivated complaint in such circumstances. During the course of the past twelve months, orchestrated complaints were received, *inter alia*, with regard to the after-midnight show, *Naked News*. Although it was clear that few of the complainants had in fact seen the programme, it was decided to refer the matter to a Tribunal. The complaints were not upheld, on the basis that the Broadcasting Code does not prohibit the broadcasting of mere nudity at that time of the night, especially given an added age classification of 18. The Tribunal could find nothing degrading, within the category of hate speech, to women in *Naked News*. A case could also not be made out that the nudity portrayed was likely to contribute to violence against women, or to rape. The test in law is not that of the dysfunctional person who might be influenced by a multitude of factors. The mere fact that the nudity makes no contribution to a better society is irrelevant in law. It is part of the freedom of choice of adults whether they wish to watch *Naked News* or not. If they are suddenly confronted with the nudity and find it offensive, they can either switch channels or switch off the television. Of course, this is not always a defence, but in the case of *Naked News* this was one of the factors which was considered. Moreover, within this paradigm lies the freedom of choice that adults enjoy to decide for themselves in matters such as this.

#### **5. PROMOTION OF AN UNLAWFUL ACT**

The addition of the above criterion to the Broadcasting Code in 2011 has led to several adjudications, and four judgments of the Tribunal of the BCCSA. It is clear that the mere broadcasting of that which is unlawful does not amount to a contravention of the said clause. The Registrar, for example, decided not to entertain a complaint where a soapie, *Sewende Laan*, showed adults enjoying alcoholic drinks. The mere fact that euthanasia was the subject of discussion in the same soapie was also not regarded as a contravention of the Code. A complaint that a food supplement was being advertised on *Sewende Laan* was also not entertained by the Registrar, and that decision was upheld by the Chairperson. The reason was simply that the sale of the supplements was not unlawful, and in so far as alleged misrepresentation was concerned, it was held on appeal that the Broadcasting Code does not cater for such complaints in the context of a fictional programme such as a drama. When, however, a broadcaster, through one

of its presenters, propagated the theory that people might get rid of pent-up emotions by, for example, maligning the person who causes such frustration, it was a different matter altogether: the said presenter had referred to a woman (a past girlfriend) as a “whore” in order to demonstrate his support of the theory, and this was regarded as promoting unlawful conduct, in this case, criminal defamation. This important judgment was written by colleague Dr Venter. A fine was, accordingly, imposed. Interviews with people who may be potential criminals and with rioters are not regarded as promotion of unlawful conduct, and are justified on the basis of the right of the public to be informed.

## **6. RELIGION**

This paragraph formed part of the previous Annual Report. However, because of its importance, it is repeated in this Report. The Constitution of the Republic of South Africa guarantees the right to freedom of conscience, religion, thought, belief and opinion. This fundamental right confirms what is already part of common law, but the Bill of Rights strengthened it immensely by making it a fundamental right against which legislation could be tested, and speech could be protected. The Constitution, however, permits only one exception to the protection of religion, and this is to be found in the hate speech provision in section 16(3)(c) of the Constitution. Hate speech is only prohibited when it amounts to the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Mere impairment of the dignity of believers as a section of society is, accordingly, not sufficient. The impairment of dignity, in so far as the definition of hate speech is concerned, is only one of the elements. Advocacy and incitement are other necessary prerequisites. The traditional definition of blasphemy, as developed and understood by our courts, would accordingly have to be adapted in terms of section 39 of the Constitution. When one complainant based his argument on the alleged denigration of Scientology, the remarks by the presenter were regarded as unfortunate, but not as having amounted to hate speech, since the remarks lacked advocacy and incitement. When representatives of a pagan section of the community complained that a false impression was created in a 50/50 programme on SABC that witches are evil, their point of view that this was unjustified was accepted. However, in the absence of advocacy of hatred, the remark was found not to have been in contravention of the Code. In fact, the remark was made in a lighthearted manner and was not intended to hurt anyone. In another judgment, authored by Deputy

Chairperson Viljoen, a derogatory slogan had been drawn across the sky by a light aeroplane. The Tribunal held that the words complained of were so defiant towards the Christian deity that they constituted the advocacy of hatred, but that the context in which the words were published did not amount to the *incitement* to cause harm. These examples illustrate the generous approach to freedom of expression propounded by Moseneke DCJ in the *Laugh It Off Promotions* judgment.

## 7. HATE SPEECH

The BCCSA has often held that *bona fide* news reporting on hate speech may include a verbatim report of what transpired, even where the words quoted in the news report in themselves amount to hate speech. This principle has been applied in several matters before the Tribunal of the Commission. It concerned, inter alia, reportage of parts of a song included in a speech made by the President of the ANC Youth League. These judgments, which also find support in the 1995 *Jersild* judgment of the European Court of Human Rights, emphasise the fact that the public has a constitutional right to be informed by way of *bona fide* news. A particularly problematic aspect of any inquiry into hate speech is that the mere fact that a broadcast is offensive to religious or racial or moral feelings is insufficient grounds for a finding of hate speech. In terms of the Publications Act 1974 “offensive to public morals” and “offensive to religious feelings” were both criteria that were acceptable within a legal system within which certain fundamental rights were not guaranteed in the sense that legislation which offended against these principles had to be applied by the Courts and, to name one important example, the Publications Appeal Board. Although the Appeal Board did its best in the eighties to steer a course as close as possible to freedom of expression, it could not completely ignore the criteria in the Publications Act. Accordingly, the film *The Last Temptation of Christ* was found to be undesirable. Under the new Constitutional dispensation, however, it was possible for the BCCSA to find that it was permissible to broadcast the film, since it did not amount to hate speech, and it was, in any case, saved by the right to artistic and dramatic freedom. The Ministerial Task Group which drafted the Films and Publications Act in 1994, also moved away completely from terms such as indecent, obscene, offensive and harmful to public morals. The accent was on freedom of choice of adults and the protection of children. In a 2011 judgment, authored by colleague Dr Gilfillan, involving a controversial music video, the screening of images of explicit violence were justified

on the basis of their dramatic merit, as well as the socio-political value of the anti-racism message conveyed by the video.

## **8. DIGNITY, PRIVACY AND REPUTATION**

Dignity and its two related rights, privacy and reputation, are regarded as core values within the South African Constitutional democracy. This has been emphasised by the Constitutional Court as well as the BCCSA. Trial by media, whereby a person is, in effect, found guilty, for example, of having molested children, is generally regarded as a particularly risky activity for a broadcaster. In fact, there is ample authority in our law that the mere laying of a charge with the police should not be regarded as sufficient for publication – even if it is stated that this only amounted to the laying of a charge. Trustworthy evidence must accompany such an item. This is especially true where the protection of the dignity and reputation of a person is concerned. In so far as these rights are concerned, only that individual person may lay a complaint with the BCCSA. Accordingly, the fact that a presenter called his ex-girlfriend a whore was not adjudicated under the dignity clause, but rather found to have promoted unlawful conduct, as indicated above in paragraph 5.

## **9. INVESTIGATIVE PROGRAMMES**

Some programmes are of an investigative nature. Acts of alleged corruption, alleged poor service by traders, and alleged irregularities or the failure to act on the part of some enforcement officers, are regularly discussed in great depth. The BCCSA has emphasised the value of programmes of this nature, and it has held that only where the absence of balance is indisputable would a contravention of the Code be found in regard to these kinds of programmes, which form an essential ingredient of any constitutional democracy. A Complaint against the e-tv programme, *The Justice Factor*, was accordingly rejected in a judgment authored by my colleague Mr Makeketa. An application for leave to appeal was dismissed by me. The duty to afford a right of reply to a person whose views are seriously criticised in a programme is also guaranteed by the Broadcasting Code. However, the reply must be relevant to the criticism. This is well illustrated by the judgment in *National Commissioner of Police v e-tv*. The Commissioner, according to the Tribunal, had a right to reply, but his answer related to a

different matter, and therefore there was no duty to publish that reply. Since a further opportunity to reply was afforded, the broadcaster was found not to have breached the Code.

## **10. RESEARCH**

The hundreds of judgments on the BCCSA website (more than 340 of which have also been published by Butterworth's LexisNexis and 2 in the Constitutional Law Reports) bear witness to the fact that the BCCSA is constantly confronted with constitutional issues such as the protection of dignity, privacy, children, freedom of religion, freedom of choice, the right to be informed, material that has *bona fide* artistic and dramatic merit, or scientific merit and, ultimately, the application and interpretation of freedom of expression. In the process, we have also researched several foreign broadcasting systems: German, English, Canadian, Indian, Dutch, American, Greek, Italian, Irish, as well as relevant material in the European Court of Human Rights. We have also made contact with colleagues in these countries by way of visits and international conferences – two of which have been hosted in South Africa by the BCCSA during the past fifteen years. Personal contact has added to our list countries such as Slovakia, Egypt, Russia, Spain, the Netherlands, France, Hong Kong, Japan, Brazil, Uganda, Zambia, Lesotho and Mauritius. Deputy Chairperson Viljoen attended the 4th Meeting of the Internet Governance Forum held at Sharm El Sheikh, Egypt, from 15–18 November 2009. Though I was not representing the BCCSA, in 2009 I attended conferences in Montréal, Geneva and Beirut, where the protection of children in the broadcasting sphere also arose as part of the agenda.

## **11. INFORMATION ON AIR AS TO CONTENT AND AGE RESTRICTIONS**

Once digitalisation has fully taken place, hopefully by 2015, the airwaves will be able to accommodate many more broadcasters. We will then encourage free-to-air television broadcasters to make available continuous advisories, in an attached information text, as to content and age restrictions. Currently, broadcasters are required, where relevant, to include an advisory for the first 90 seconds at the commencement of a broadcast, and to repeat it after each advertisement break for a period of 30 seconds. In some instances the advisory is required to be continuous – e.g. in the case of WWE wrestling or some of the more explicit midnight movies, although the latter programmes seem to be dwindling in number. DSTV provides continuous on-air information (i.e. age restrictions and synopsis of the programme) on all channels through the

Electronic Programme Guide (EPG), and a parental block-out mechanism is also provided. Currently, the EPG does not include L, V, S and N advisories, but it does indicate age restrictions and a synopsis of the programme. This information is accessed by pressing the “i” key on the remote control device. TopTV has introduced a novel procedure to protect children against 18 and R18 films: the films are blocked out and are only accessible by way of a subscriber’s pin. Although this is not a requirement, the BCCSA has recognised the value of this approach. 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 managerial error was to blame. Fines were, on five occasions, imposed to demonstrate the BCCSA’s concern. DSTV and MNet have both taken steps to address the problem. 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 are constantly addressing this matter with foreign sources. If such a problem persists, the only solution would seem to be for the subscription broadcaster to cut ties with that source. Subscribers should, of course, also bear in mind that such a risk exists when they subscribe to a broadcaster with foreign sources.

## **12. COMPLIANCE BY BROADCASTERS**

The BCCSA must, on an annual basis, inform ICASA as to whether the broadcasters under its jurisdiction have abided by its orders and directives. It can be stated with confidence that all the broadcasters that are subject to the jurisdiction of the BCCSA in terms of section 54(3) of the Electronic Communications Act 2005 as a result of their membership of the National Association of Broadcasters or the Association of Christian Broadcasters 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 also done. A list of these broadcasters is attached.

### **13. MOTION OF GRATITUDE**

In conclusion, I wish to thank the Commissioners for their diligent support. The deputy chair, Professor Viljoen, has assisted me considerably in writing judgments, reading all adjudications, and with certain administrative tasks. Commissioners have also written judgments and adjudications, and I would like to thank them for their well-motivated and speedy work. In the past year, 46 judgments and 48 adjudications were handed down. No adjudications were set aside on appeal. During this period we also appointed Mr Justice Ratha Mokgoathleng to chair our appointments committee. We are pleased to have him back in this capacity, and we also esteem him for a decade of work as a Deputy Chair of the Commission, which came to an end when he was appointed as a Judge.

A special word of thanks is also due to Mrs Shouneez Martin, the Registrar, who has done a sterling job as Registrar, 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 lesser complaints, and she also acted as Registrar in January. Ms Deyana Julius joined the staff in March 2010 as an administrative assistant to the Registrar, and during this time she has demonstrated her diligence. I have permitted Ms Julius to take leave from 1 July to 31 December 2011; during this period, she will, however, continue to deal with certain responsibilities on a part-time basis. Mr Kyle Erentzen has taken over the balance of her responsibilities for the six-month period in question. Ms Marion Mansfield, our accountant, has over a number of years ensured that we get an unqualified audit. We are indebted to her for her fine work.

Although work pressure – much of which is caused by problematic cases – has increased substantially during the past year, the personnel have gone about their task in a dutiful and loyal manner.

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

At our AGM we have had the privilege to hear two very relevant talks. The first by The Most Reverend Archbishop Mokgaba and the second by Justice O'Regan. Both talks contributed immensely to the knowledge and expertise of our Commissioners and enhanced the standard of the AGM immensely.



**JCW VAN ROOYEN SC**  
**CHAIRPERSON**  
1 October 2011

### **BCCSA COMMISSIONERS**

- PROF HENNING VILJOEN (Deputy Chairperson)**
- DR LYNDA GILFILLAN**
- DR LINDA VENTER**
- MR BRIAN MAKEKETA**
- MS ZALI MBOMBO**
- MS TEMBEKA MDLULWA**
- MS MODJADJI NKWANE**
- PROF GERRIT OLIVIER**
- ADV ROBIN SEWLAL**

### **BCCSA SIGNATORIES**

#### **TELEVISION BROADCASTERS**

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

#### **RADIO BROADCASTERS**

##### **COMMERCIAL RADIO**

- Algoa FM**
- Cape Talk**
- Capricorn FM**
- Classic FM**

- East Coast Radio**
- Gagasi 99.5FM**
- Heart 104.9 FM 9**
- 94.7 Highveld Stereo**
- Jacaranda 94.2 FM**
- Kaya FM**
- KFM**
- M-Power FM**
- OFM**
- 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)**
- Chai FM**
- Fine Music Radio**
- IFM 102.2**
- 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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