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CHAIRMAN'S REVIEW SEPT 2011 – SEPTEMBER 2012

1. INTRODUCTION

The dynamics of broadcasting in South Africa, with its general focus on pressing social and political issues, has kept the BCCSA particularly busy in its nineteenth year. The main concerns have been the protection of dignity and reputation, balance in programmes dealing with matters of public importance, the right to reply, inadequate warnings (especially concerning the Gaddafi murder) and, in general, the matter of sufficient information regarding content and appropriate age restrictions relating to films that are broadcast.

In the last twelve months a total of 1 586 complaints were received. Of these, 1 180 concerned material that fell within the BCCSA's jurisdiction, while the remainder related to advertisements, which were referred to the Advertising Standards Authority. Where promotional material relates to the station itself, such material does, however, fall within the jurisdiction of the BCCSA. Complaints as to promotional material were, for the most part, concerned with material alleged to be excessively gruesome or explicit, which was broadcast at a time when a large number of children would probably form part of the audience. Altogether, 732 complaints were deemed to be too general to warrant being entertained. In spite of efforts from the Registrar to convince these complainants to be more specific, the attempts failed. In all, 57 of the complaints were adjudicated by Commissioners at the request of the Chairperson, and in 48 instances the matters were referred to a Tribunal by the Chairperson.

In two instances, applications for leave to appeal to the Appeal Tribunal were allowed. In one case, the Appeal Tribunal set aside some of the findings against the broadcaster; on the whole, however, the majority of the findings and fines were confirmed. The fines were, nevertheless, reduced.¹ The most recent matter concerned footage broadcast by e.tv news (free-to-air) and e-news (subscription), relating to the murder of Colonel Gaddafi. The final judgment was limited to contraventions concerning the absence of due warnings to viewers concerning the material. The Appeal Tribunal also held that news is governed by clause 11 of the Code, and that if any other findings are made against a broadcaster these must accord with the limitation clause in section 36 of the Constitution of the Republic. This obviously means that if news contains a defamatory or injurious statement, or invades the privacy of a person in cases where the public interest defence is not applicable, contraventions will be found. The latter was indeed the approach of the Tribunal in a subsequent case where a defamatory statement was made in a newscast.² The other appeal concerned a complaint relating to a programme broadcast by M-Net, in which the complainant was accused of having sold a mere time-switch and not an electricity saver, as claimed. The first Tribunal held that the broadcast was unfair in that it did not state the view of the complainant. The appeal will be heard on 13 September 2012.

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. However, independence alone is not a sufficient guarantee: 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 2011–2012 period, as many as 1 180 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. The Chairperson introduced new rules regarding the Registrar's motivation as to why a complaint is not entertained. Although reasons

¹ *e.tv vs Chirongoma, Townsend & Brand, Case No: 16/2012 (BCTSA)*.

² *See Naicker vs 94.7 Highveld Stereo & Talk Radio 702; Case No: 26/2012(BCTSA)*.

were in the past always provided to a complainant, the Registrar is now required to set out the complaint and response and provide more detailed reasons. Although these reasons remain short, they keep the Commissioners more informed as to the nature of complaints, and how they are dealt with. 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 4 out of 12 instances, such appeals succeeded.

From a legal point of view, it needs to be emphasised that the Tribunal is in no way responsible to the General Meeting of the BCCSA. It is responsible to the Courts, where judgments may be taken on review.³ In cases where a procedural error is made, a Complainant may, however, file a complaint with the Complaints and Compliance Committee (“CCC”) of ICASA. If the CCC finds that an error has been made, it must refer the matter back to the BCCSA for a re-hearing of the matter. This remedy is only available to members of the public who file complaints with the BCCSA, and not to broadcasters. Although there have been five such applications to the BMCC (now the CCC), not one of them was referred to the BMCC by its Chairperson of the BMCC. These cases all took place before 2000. The one instance where the SABC notified the BCCSA in 2011 that it would approach the CCC, and applied for a suspension of the order of the BCCSA Tribunal, this was turned down by the Chairperson because the SABC, as a *broadcaster*, did not have the right to take a matter to the CCC.

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 35 000 advertisements were aired by broadcasters over the past twelve months. Indeed, at the end of 2010 the BCCSA won a bronze

³ Which, of course, is not an appeal on the merits but amounts to a process whereby the Court determines whether the BCCSA has come to a rational decision on the facts. The general approach in a review is stated to be as follows by O’Regan J in the Constitutional Court case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC):“(A)n administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.” In its nineteen years of existence the BCCSA has not been taken on review.

medal from the State President's office for the effective advertising of its services to the public. This endeavour by broadcasters within our jurisdiction, is, I submit, 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. THE PROTECTION OF CHILDREN

The protection of children against material that is harmful to them, is an important aim of the Broadcasting Code. In the last year, however, for the first time, complaints were also received where the reputation and dignity of children were allegedly impaired by a broadcaster. The complaints were lodged by parents and other custodians. In two instances, the complaints were upheld: in one instance, the broadcaster was ordered to pay a fine, and in the other instance it was ordered to broadcast an apology. In the third matter it was held that the words complained of did not in fact defame but served to debunk the stereotype that violence was located in the area whence the complaint emanated.⁴

In so far as the protection of children is concerned, DSTV provides its subscribers with a block-out mechanism, and TopTv requires subscribers to insert a pin for all films with an 18 rating. The Tribunal of the BCCSA has also held that DSTV could introduce this principle for certain channels that are specifically subscribed to. The Tribunal, however, also unequivocally stated that this should not be regarded as a loophole to introduce the broadcasting of X18 pornography, since the broadcasting of such material is prohibited by the Broadcasting Code and the Films and Publications Act 1996.

⁴ *BCVO & Geldenhuys vs Jacaranda 94.2 FM ,Case no: 02/2012(BCTSA); PACSEN & Several Others vs Jacaranda 94.2 FM ,Case no: 05/2012(BCTSA); Botha and Hoërskool Alberton vs Jacaranda 94.2 FM, Case no: 25/2012(BCTSA).*

In so far as children are concerned, the Tribunal also held that the screening of an attempted suicide in *Sewende Laan* – a soapie broadcast by SABC 2 on weekdays between 18:30-19:00 – was too explicit and drawn out, and was harmful for younger children who might be watching such material at that time of the evening. A Parental Guidance advisory was not sufficient.⁵

5. RELIGION

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 into what section 16(2)(c) of the Constitution prohibits 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, though they were deemed not to amount to hate speech, since they 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 found to have been made in a lighthearted manner, without the intention to hurt anyone. Another judgment, authored by Deputy Chairperson Viljoen, concerned a derogatory

⁵ *De Lange, Saunders & Others vs SABC2, Case No: 24/2012 (BCTSA)*

slogan drawn across the sky by a light aeroplane: while the Tribunal held that the words complained of were so defiant of the Christian deity that they constituted the advocacy of hatred, nevertheless, the context in which the words were published did not amount to the *incitement* to cause harm. That hurt to religious feelings is, in itself, not sufficient to justify a finding of hate speech based on religion, is apparent from the 2012 dismissal of a complaint by a Roman Catholic who alleged that the Pope had been maligned in a broadcast. These examples illustrate the generous approach to freedom of expression propounded by Moseneke DCJ in the *Laugh It Off Promotions* judgment of the Constitutional Court.⁶

6. 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. 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. That dramatic merit and an anti-discriminatory message may also save material which, on the face of it appears to be hate speech, emerges from a 2011 judgment, authored by colleague Dr Gilfillan, where the screening of images of explicit violence were justified in a music video on the basis of their dramatic merit, as well as the socio-political value of the anti-racism message conveyed in the video.

A particularly problematic aspect of any inquiry into hate speech is the fact that, while the broadcast of material may be offensive to religious or racial or moral feelings, this is insufficient grounds for a finding of hate speech. There have not, in the past, been any matters before the BCCSA Tribunal which concerned hate speech based on gender. In 2012, however, the repetitive broadcast of a joke concerning sex with women of a certain ethnic origin, was held to have amounted to hate speech based on gender. That derogatory language does not necessarily amount

⁶ 2006 (1) SA 144 (CC).

to an impairment of dignity, or to hate speech based on gender, was, however, held in a matter where a presenter was merely poking fun at a female caller.⁷

7. 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. Opinions must, however, be either based on the truth or reasonably related to the truth.

8. RESEARCH

The hundreds of judgments on the BCCSA website (more than 360 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 the principle 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 were hosted in South Africa by the BCCSA. 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 the Chairman was not at the time representing the

⁷ *Hoyte & Others vs 5FM, Case 33/2012*

BCCSA, in 2009 he attended conferences in Montréal, Geneva and Beirut, where the protection of children in the broadcasting sphere also arose as part of the agenda. The recent inquiry into the Press Council by the Press Freedom Commission, of which the Chairperson was a member, also contributed to making contacts in many countries, including Denmark where contact was made with our guest speaker, Mr Jersild. The Chairperson will represent the BCCSA at a conference of European Ombudsmen in October 2012.

9. 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 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 this 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 frequency of the latter programmes seems to be diminishing. *The BCCSA Tribunal has emphasised that a mere PG is insufficient. It must be accompanied by a 10 or a 13.*

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. DSTV also provides a mechanism for “family viewing”. This mechanism excludes crude and profane language from films. Of course, this mechanism is only applied to films that are broadcast from South Africa. The BBC has taken special steps to improve its information as to possible offensive language by posting a warning at the beginning of a programme. TopTv has introduced a novel procedure to protect children from films rated 18 and R18: 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. 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.

10.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 may 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 consequence 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

11. NEW COMMISSIONERS

The terms of the Commissioners expired on the 31st December 2011. The positions were advertised in the broadcasting media, and more than 340 nominations were received. Mr Justice Ratha Mokgoatlheng, who is also a past Deputy Chair of the Commission, chaired the appointment panel, and 12 Commissioners were appointed. Of these, 6 Commissioners had already served a term or, in some cases, two terms.

12. 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. Deputy Chair Makeketa has played an important role in his additional function as Chair of the Finance Committee – an important task which he has performed with diligence, assisted by Commissioner Venter. 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, 48 judgments and 57 adjudications were handed down. In 2011 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. She has succeeded in building this post into one that has gained special significance within the broadcasting world. 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. She is now the Personal Assistant of the Chairperson on a part-time basis. Mr Kyle Erentzen was appointed as a Complaints Officer in 2011, and he has played an important role in the systematic processing of complaints. Ms Marion Mansfield, our accountant, has ensured that we continue to 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 five years, 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.

NOTE

We have had the privilege of hearing two relevant talks at this AGM. The first, by Reverend Danie du Toit, was on the role of art in broadcasting, and the second talk was given by Mr Jens Olaf Jersild, a Danish broadcasting producer. Mr Jersild is internationally known for having successfully pursued an appeal to the European Court of Human Rights in 1995. The recognition of the public interest defence was greatly enhanced by the judgment of that Court, and the judgment has often been quoted by the BCCSA Tribunal. Both talks contributed immensely to the knowledge and expertise of our Commissioners, and enhanced the standard of the AGM. Mr Johann Koster, Executive Director of NABSA also addressed us on the task of this important organisation within the broadcasting sphere. The NABSA is, of course, one of our two founding members, and represents the vast majority of broadcasters in South Africa.



JCW VAN ROOYEN SC

CHAIRPERSON

1September 2012

BCCSA COMMISSIONERS

- **Prof Victoria Bronstein**
- **Dr Lynda Gilfillan**
- **Ms Giuseppina Harper**
- **Dr Nana Makaula**
- **Mr Brian Makeketa (Deputy Chairperson)**
- **Ms Zali Mbombo**
- **Mr Alan Melville**
- **Adv Boitumelo (Tumi) Mmysinyane**
- **Adv Robin Sewlal**
- **Ms Shamila Singh**
- **Dr Linda Venter**
- **Prof Henning Viljoen (Deputy Chairperson)**

BCCSA SIGNATORIES

TELEVISION BROADCASTERS

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

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**