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## **ANNUAL CHAIRMAN’S REVIEW: BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA JULY 2013 - JULY2014**

On the 20<sup>th</sup> August 2014, the BCCSA turned twenty-one. So on this celebratory occasion, it is especially fitting to be back at Mount Grace, and to have as guest speaker the Gauteng Judge President: The Honourable Mr Justice Dunstan Mlambo. Yesterday evening we had the privilege of hearing Dr Lynda Gilfillan’s “Perspectives on the Media in Australia”. We are also privileged to have Mr Justice Ratha Mokgoathleng, the Chair of our Appointment Committee, with us today. Judge Mokgoathleng was a Deputy Chair of the Commission before he was elevated to the Bench.

This report is not intended to be an overview of the past year, from July to July, but is rather a report on certain principles that the BCCSA holds dear, and which have been developed over the course of twenty-one years.

1. **Freedom of Speech** lies at the heart of our democracy – the best example of this may be found in our judgment concerning certain reckless statements made by a group of criminals about their intentions vis à vis international visitors at the World Cup in 2010: “We will rob them and, if necessary, shoot our way out”, they said (to the annoyance of the then Commissioner of Police, who was the Complainant). We held the publishing of their plans to be in the public interest, constituting part of the fundamental right of South Africans to have access to what such people are thinking and planning. The judgment was based on a judgment of the European Court of Human Rights in the *Jersild* matter. Two years ago we were privileged to have Mr Jersild as a speaker at our Annual General Meeting. A year before that, we had Archbishop Makgoba and Justice of the Constitutional Court O’Regan with us as

speakers. They all emphasised the crucial importance of freedom of expression in our democracy. The balancing of interests was, however, also held to be constitutionally important within our diverse and complex society.

2. **Dignity** is a crucial constitutional right, given the apartheid history of oppression. Here, minorities such as people afflicted with various conditions, or children attending special schools, are protected against derisive comments on air. Recently, when outrageous sexual jokes were repeatedly made about women from a certain region, the broadcaster was fined. The broadcaster also extended a personal apology to the woman who had travelled all the way from Venda to place her complaint before the Commission. Reputation is, of course, also of particular importance. However, where it is in the public interest, and based on truth, a broadcaster has a right – even a duty – to inform the public. Nevertheless, great care must be taken in this regard to ensure that the right to reply as well as relevant information are included in a broadcast. In fact, professional conduct of the highest order must always be displayed and, where necessary, expert advice should be sought when a decision is taken to broadcast material that requires expert input.
3. **Hate speech** based on race, ethnicity, gender and religion, has formed the focus of much of our work. However, in judgment after judgment, we have stated that that which is offensive does not necessarily amount to hate speech. To qualify as hate speech, language must go beyond mere offensiveness and include *advocacy* of hatred and *incitement* to harm. We have also cautioned ourselves that the hatred expressed must be related to the four categories named in the Code. Legislation that has broadened the categories beyond section 16(2) of the Constitution is probably unconstitutional unless further protection is provided by section 36 of the Constitution in a specific case. What is important about hate speech is that it has also widened the ambit of protection of religion beyond the traditional notion of blasphemy, which in the past protected only Judaeo-Christian beliefs. However, since all religions are equal, they should get equal protection. This means that blasphemy, in terms of section 39 of the Constitution, may only be prohibited where it fits the requirements of hate speech in section 16(2) of the Constitution. In practice, this means that the scope of blasphemy has been limited to material that amounts to hate speech in terms of the

Constitution. The BCCSA has, in the process of applying its hate speech rules, stressed that mere harm or offence against feelings is not sufficient for a finding of hate speech. It has done so in certain cases where Muslims, Christians and Hindus have complained. Where Rastafarians complained that they were offended by jokes made about their conception of God, we resolved the matter by not attending to the merits of the complaint but rather by finding that the broadcaster had apologised in a sincere manner, despite the objections of the Rastafarians in this regard. In so far as hate speech is concerned, we have been very aware of the importance of news that included elements of hate speech: thus, where ANC cadres sang *Kill the Boer, Kill the farmer* at the graveside of a deceased comrade, and the SABC broadcast this scene together with the song in a news bulletin, we found that within the context of news, and from a historical and cultural perspective, it was important to allow the broadcast. In fact, there is no finding of the BCCSA against the song. Broadcasters have, however, demonstrated sensitivity in this regard. When in 2000 we found the Mbongeni Ngema song *AmaNdiya*, which targets the Indian community in Durban, to amount to hate speech, we stressed the fact that the Indian sector is a minority and that special protection should be extended to them. This judgment has been included in the official Constitutional Reports published by Butterworth and has, in Parliament, been praised as a *locus classicus* within judgments on hate speech and has also been quoted by counsel in court cases in this regard. The secret, I would suggest, lies in not readily limiting free speech. Each time there is a finding of hate speech, free speech itself is whittled away – until it becomes a mere spectre of what it should be: robust, honest opinion which, in the words of Mr Justice Oliver Wendell Holmes Junior,<sup>1</sup> should be dealt with in the marketplace of ideas. But here it should be borne in mind that minorities do not necessarily have access to this “marketplace” and that they therefore deserve more protection than others.

4. **Balance in international coverage** has been a bone of contention. Our Code requires balanced reporting and comment when it comes to matters of public importance. We live in a globalised world where the boundaries between one country and another, and therefore the events that take place there, seem increasingly blurred. Gaza and the Isis conflict have made us very aware of this, with the effects of both conflicts being felt

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<sup>1</sup> Associate Justice of the Supreme Court of the USA (1902-1932)

world-wide. But how does one, from a *legal* perspective establish balance when reports are broadcast? We were recently criticised in an article in the *Mail & Guardian* newspaper for not necessarily regarding international events – e.g. the confrontations in the Middle East, politics in the United States, and the clash in the Ukraine – as matters of public importance. There is, however, a very good reason for this. Firstly, the intention of the relevant clause, i.e. clause 12 of the Free-to-Air Code, is to ensure fair debate on matters of public importance *within* the boundaries of South Africa. Secondly, it is generally impossible for the BCCSA to establish what “balance” amounts to in a foreign context. No court or administrative tribunal should come to conclusions on vague perceptions of what balance is within a foreign context. We simply do not know what such “balance” might be. And that is what fair administrative justice means: decisions must be rational and based on facts or fair perceptions of facts. To simply guess at what balance means within a foreign context is inadmissible in a fair judicial process based on facts. Where the facts are readily available and not open to doubt, we will, however, require balance.

5. **The introduction of an Appeal Tribunal** in 2004 has been a success. The Appeal Tribunal may only interfere with the first judgment where it has been *clearly* wrong. Appeals are only permitted where there is a reasonable possibility that the Appeal Tribunal is likely to come to a different conclusion and conclude that the first Tribunal was “clearly” wrong. Since 2004 there have been fewer than 20 such sessions. Important judgments have been the setting aside of the first Tribunal’s decision that the late-night broadcast of the *Last Temptation of Christ* was in conflict with the Code, and a lessening of the fines imposed in regard to the screening of the Gaddafi death scenes without proper warning. The confirmation of the first Tribunal’s judgment in a matter which related to fair news reporting in the so-called *Sunday Rapist* case, was significant in 2013. The accent was on the high standards of fairness required in news reporting, in contrast to comment in discussion programmes.
6. **The fact that there is no provision for representatives from broadcasters** in the BCCSA Constitution is unique in relation to other media councils. Initially, our Constitution did provide for such representation. However, when the IBA (now ICASA) in 1995 excluded such representation and required that the BCCSA should also take its own decisions in so far as its Constitution and Code are concerned, the

independence of the BCCSA was guaranteed. Of course, the funds for the BCCSA are provided for by the National Association of Broadcasters – and for that we are grateful, since the NABSA has ensured that the BCCSA functions as an independent domestic Tribunal without financial concerns.

7. **Our judgments** have all been published on our website, and in more than 400 matters, they have also been published in LexisNexis, an online service provided by Butterworth. We have also been permitted, as an associate member, to join the Allied Independent Press Councils of Europe. The latter organisation holds annual conferences in Europe, and between conferences there is regular contact between the more than 40 member states. Questions are asked via email regarding matters such as jurisdiction, procedure, policy and Codes, and a lively debate frequently ensues. The overall emphasis is on freedom from state control. The BCCSA also organised two international conferences in 1995 and 2005. We had presenters from the US, the UK, France, the USA, Canada, Slovakia, Germany, Australia, Zambia and New Zealand. The 2005 conference was opened by the Deputy Chief Justice Moseneke and the 1995 Conference by the Minister of Communications, Mr Naidoo. The conferences placed us solidly on the international map.
  
8. **The protection of children** has been a priority for the BCCSA. Once digitisation has been fully implemented, probably by 2016, the airwaves will be able to accommodate many more broadcasters. We will then also encourage free-to-air television broadcasters to make available continuous advisories as to content and age restrictions by means of parental block-out mechanisms. Currently, television 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. DSTV provides continuous on-air information (i.e. age restrictions and a synopsis of the programme) on many channels through the Electronic Programme Guide (EPG), as well as a parental block-out mechanism. In addition, DSTV provides a mechanism for “family viewing”. This mechanism excludes crude and profane language in films. Of course, this mechanism is only applied to films that are broadcast from South Africa, where DSTV has direct control. The BBC has taken special steps to improve its

information regarding possibly offensive material by posting a warning at the beginning of a programme. ODM 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. ODM has been permitted by ICASA to broadcast pornography. The channels are, however, blocked, and can only be activated by way of a PIN. In the mean time the ICASA decision has been set aside by a Court. The matter is presently on appeal. 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 administrative error was to blame. DSTV and M-Net have both taken steps to address problems. 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 they constantly address this matter with their foreign sources. If such a problem persists, however, the only solution would seem to be for the subscription broadcaster to cut ties with the offending source. Subscribers should, of course, also bear in mind that this kind of risk exists when they subscribe to a broadcaster with foreign sources. The subscription system is working exceedingly well, and local efforts to protect children may be held up as an example within the international sphere. **However, there seems to be a general misunderstanding as to the meaning of PG. The classification PG, which stands for parental guidance, means that the broadcast is of such a nature that children who are either under 10 years old or under 13 may watch a programme in the presence of their parents or other caregivers. Programmes often carry an advisory of PG 13 LV, which means that the broadcast contains some crude language and violence. This advisory seems inappropriate, except where the crudity and violence is mild. Such a film should rather be classified 13 LV, since it seems incomprehensible how a mere PG 13 might counter the language and especially the violence. In any case, as pointed out in our 2013 Report, a mere PG is not acceptable. It must be accompanied by either a 10 or a 13. Ultimately a broadcaster must decide: if it is PG, it means that parents are advised to watch with their children under 10 or 13. If a film is harmful to children under 13, it must be classified as 13 with or without classification symbols. PG would then not be acceptable.**

9. **Certificate of Compliance to ICASA.** In ICASA's recognition of the BCCSA it is required that the Regulator be informed annually whether broadcasters have complied with the BCCSA's orders. It may be stated with confidence that all the broadcasters that are subject to the jurisdiction of the BCCSA, as a consequence of their membership of the National Association of Broadcasters or the Association of Christian Broadcasters – both of 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 done. A list of these broadcasters is attached. As mentioned earlier in this report, between 33 000 and 34 500 BCCSA advertisements were broadcast this year.
  
10. In the past twelve months a total of 1643 complaints were received. Of these, 493 were complaints which the Registrar considered, but did not entertain, 1064 were matters not within our jurisdiction e.g advertisements, Television Licences, the choice and scheduling of programmes and complaints which were too vague to accept. *Panels of the Commissioners* have sat during the current year on 10 occasions. In the year of report, 50 judgments of the Tribunals have been handed down. A total of 36 adjudications were written by Commissioners. Adjudicators are appointed by the Chairperson where it is felt that a matter does not justify a full hearing by a Tribunal. There is, however, a right of appeal to a Tribunal against decisions of adjudicators. All judgments of the Tribunal are sent to all broadcasters under our jurisdiction and also to the Press. As a domestic tribunal, our judgments must comply with the requirements of fairness and rationality. In 21 years, no judgment has been reviewed by the Courts. There have been two applications for review, but they were not proceeded with.
  
11. **In conclusion, I wish to thank the Commissioners** for their diligent support and valuable contributions in our discussions. Deputy Chair Professor Viljoen has provided me with considerable assistance by reading all adjudications, and he has also provided help 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.

A special word of thanks is also due to Mrs Shouneez Martin, the Registrar, who has done an excellent job, 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 complaints, and she also acted as Registrar in January. Ms Erentzen took over the financial administration in April, and was appointed as the Chairperson's Personal Assistant in the place Ms Deyana Julius, who left our services after a conscientious term as Complaints Officer. 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. Special thanks are also due to the Executive Director of the National Association of Broadcasters, Ms Nadia Bulbulia, and the Deputy, Ms Dimakatso Qocha, as well as to the Executive and Council of the NAB for their firm and loyal support. Our sincere thanks also go to Ms Karen Willenberg, Chairperson of the NABSA.

Finally, a word of gratitude to the 60 broadcasters under our jurisdiction. We are proud of the high standards pursued by them, and their co-operation in working towards the success of a voluntary complaints system under the jurisdiction of the BCCSA.



**PROF JCW VAN ROOYEN SC**  
**CHAIRMAN**  
6 September 2014

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## **BCCSA COMMISSIONERS**

- Prof Victoria Bronstein
- Dr Lynda Gilfillan



- Mr Brian Makeketa (Deputy Chairperson)
- Mr Alan Melville
- Adv Robin Sewlal
- Dr Linda Venter
- Ms Giuseppina Harper
- Dr Nana Makaula-Ntsebeza
- Ms Zali Mbombo
- Adv Boitumelo Mmusinyane
- Ms Shamila Singh
- 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
- 94.7 Highveld Stereo
- Jacaranda 94.2 FM

- Kaya FM
- KFM
- OFM
- PowerFM
- Smile 90.4 FM
- 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)
- Bok Radio
- 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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