



REPORT SEPT 2009 – SEPTEMBER 2010

1. INTRODUCTION

Initially, I was concerned that this year's Annual Report might simply be a repetition of what the BCCSA has become accustomed to. However, I am pleased to say that I have been proved wrong. The dynamics of broadcasting in South Africa, with its focus on pressing social issues, has kept the BCCSA busier than ever. Debates about hate speech and the limits of political speech also became hectic at times. Of course, the entry of DSTV as a licensed subscription broadcaster also confronted the BCCSA with a challenge to address new issues, such as direct broadcasting via DSTV onto South African television screens, and the concomitant need to keep the public informed so as to protect children in so far as it is practically possible.

2. DEALING WITH COMPLAINTS FAIRLY

In the process of dealing with complaints, the BCCSA has constantly borne in mind its role as an independent judicial body. Independence, of course, is not sufficient: the basic rules of fairness, which underlie our Constitutional system, must remain core values. Added to this, there is the duty to provide cogent reasons, and to do so within a reasonable time. Of course, this becomes a particular challenge when, as in the year reported on, as many as 1 200 complaints are received. Each complaint must 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, others are answered satisfactorily by broadcasters, and each complainant is provided with reasons as to what the outcome of the complaint was at the first level. There is also an appeal to the Chairperson when the Registrar has decided not to entertain a complaint, or accepts an apology from a broadcaster. An apology should, generally,

be broadcast when a wider public is able to hear the apology rather than being limited to a smaller group which may, for example, be part of a viewing audience at 3 am.

3. KEEPING THE PUBLIC INFORMED

Each of the fifty broadcasters under the jurisdiction of the BCCSA has the duty to advertise the services of the BCCSA regularly. A few years ago an independent survey showed that the BCCSA is the best-known complaints entity in the country. Commercial broadcasters (including the SABC) broadcast more than 16 847 BCCSA adverts from January to the end of June this year. This endeavour by broadcasters within our jurisdiction, I would submit, is outstanding. Community broadcasters have also advertised the BCCSA, but the figures are not available at this stage. This endeavour is especially outstanding when measuring it against advertising time and expense for the broadcasters, and I would therefore like to express my gratitude to the broadcasters under our jurisdiction for the publicity they have given to the BCCSA. This demonstrates the availability of the BCCSA to the public and the support which 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. However, orchestrated complaints are not *bona fide*, and the Registrar, in the ordinary course of events, only deals with the first complaint in such circumstances.

4. WITHDRAWING A COMPLAINT

Once the Registrar has accepted a complaint, the complainant is not permitted to withdraw the complaint, unless it is a personal matter – for example, a matter which relates to dignity, privacy or reputation. Recently a complainant, when invited to a Tribunal hearing, informed the Registrar that she was no longer interested in pursuing the matter and was withdrawing the complaint. The BCCSA Tribunal ruled that, unless it is a personal matter, such a withdrawal was not permissible. The complaint was, however, a public interest matter. As it turned out, the broadcaster was fined R15 000 for having transgressed the Code as a result of one of its presenters having described an explicit and violent sexual act, without any reasonable cause for having done so. The fact that the broadcaster had taken internal disciplinary steps and conceded the contravention was regarded as extenuating when it came to the quantification of the fine.

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 common law. The Constitution 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 also have to be adapted accordingly 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 lighter vein and not intended to hurt anyone. In another judgment, authored by Deputy Chairperson Viljoen, a derogatory slogan had been drawn in 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*¹ judgment.

¹*Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC)/.

6. HATE SPEECH AND POLITICS

The BCCSA has often held that bona fide news reporting on hate speech may include a verbatim report of what transpired, even though the words quoted in the news report in themselves amounted to hate speech. This principle was recently applied in four matters before the Tribunal of the Commission. It concerned reportage of parts of a song included in a speech 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, accentuated the fact that the public had a constitutional right to be informed by way of bona fide news.

7. BALANCE AND INVESTIGATIVE PROGRAMMES.

Some programmes may be regarded as being 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 depth. The BCCSA has emphasised the value of programmes in this genre, 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. 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. Particular weight is, however, given to the protection of privacy, reputation and dignity. In the previous year of reportage, a fine of R50 000 was imposed for two programmes that had violated the reputation of an individual. The judgment of the BCCSA emphasised that the mere fact that a person was “alleged” to have abused children was not a defence where the result of each of the programmes was that a clear impression was created that the allegations were true.

8. THE PROMOTION OF VIOLENCE

The clause prohibiting the promotion of violence was the subject of two important judgments. One judgment concerned a programme where horses were allegedly used in a cruel and abusive

manner in a rodeo competition to establish which cowboy could remain longest on a bucking horse. The bucking was, according to the complainants, caused by an apparatus that hurt the horses. The Tribunal held that there was no evidence of actual abuse in the broadcast as such.

E-News broadcast interviews with two self-confessed criminals in January 2010. The criminals said that they planned to rob visitors to the FIFA World Cup, and the interviews, which had evoked broad public discussion, were the subject of a Tribunal hearing. The news insert included details as to how the criminals planned to rob visitors – despite the plans of the National Commissioner of Police to ensure the safety of visitors to the World Cup. In the judgement it was held, *inter alia*, that the conduct of the interviewer in no way indicated that he (and thus e-tv) associated himself with the views expressed by the interviewees. The opposite was in fact found to be true. The news insert included a statement by the National Commissioner that amounted to the outright rejection of criminal behaviour as “inhuman”. Furthermore, having granted them an opportunity to air their plans, the insert portrayed the interviewees as the low characters they were, and in no way glamorised them. The mere fact that the interviews with the self-confessed criminals had been previously arranged did not amount to the promotion or encouragement or sanctioning of violence, but instead had the outcome of exposing to viewers the harsh reality of the criminal mind. The interviews in fact gave credence to the words of the National Commissioner that such criminals were inhuman. Viewers had a Constitutional right to be informed of the realities of the criminal mind.

9. RESEARCH

The hundreds of judgments on the BCCSA website bear witness to the fact that the BCCSA is constantly confronted with constitutional issues such as dignity, privacy, the protection of children, freedom of religion, freedom of choice, the right to be informed, the protection of 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. One of the issues that the conference dealt with was the protection of children within the realm of the electronic media. Though I was not representing the BCCSA, I attended conferences in Montréal, Geneva and Beirut, where the protection of children in the broadcasting sphere also arose as part of the agenda.

10. 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 info 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, though the number of such programmes seems to have dwindled. DSTV and M-Net provide continuous information (i.e. age restrictions and synopsis of the programme) on-air on all channels through the Electronic Programme Guide (EPG), and a parental block-out mechanism is provided. Currently, the EPG does not include L,V,S and N advisories, but does indicate age restrictions and a synopsis of the programme. This information is accessed by pressing the “i” key on the remote control device.

11. 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, however, 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, and 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 published, this was also done. A list of these broadcasters is attached

12. SUBSCRIPTION BROADCASTERS

We are in the first stages of adjudicating complaints against subscription broadcasters. M-Net has been a licensed broadcaster for a number of years. However, among the new licensees, DSTV and Toptv have both consented to the jurisdiction of the BCCSA. Of course, DSTV has been in the market since the mid-nineties, while Toptv has only recently entered the market. The main issue is the extent to which DSTV subscribers and the BCCSA may treat foreign broadcasts according to the same criteria as local broadcasts. To a certain extent, a subscriber enters into a contract with a broadcaster to make foreign material available to him or her. A subscriber should, accordingly, understand that materials from a subscription broadcaster which is, in effect, acting as a conduit, might not necessarily accord with his or her own standards. On the other hand, however, we expect diligence from a subscription broadcaster in the choice of its foreign partners.

13. MOTION OF GRATITUDE

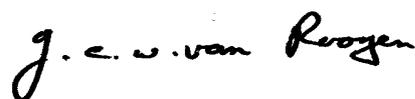
In conclusion, I wish to thank the Commissioners for their diligent support. The two deputy Chairs (Professor Viljoen and, up to June, Prof Lötter) have assisted me considerably in writing judgments and with certain administrative tasks. Prof Lötter resigned as a result of the pressure of additional academic work. I would like to express my gratitude to her for the splendid work done and the collegiality shown for more than a decade. Mr Zolile Ntukwana also resigned as from 1 August as a result of additional duties elsewhere. I would like to thank him for his input, based on his valuable experience in the broadcasting media. Commissioners have also been assisting us in writing adjudications and I would like to thank them for the well-motivated and speedy work. In the last year, more than 40 adjudications were written, and of these, only two were set aside on appeal.

I wish to extend a special word of thanks to the Chair of the Appointment Committee, the Honourable Mr Justice John J Trengove, for having chaired the Appointment Committee from 1993 – 2010. He has indicated to me that he will be retiring from this position at the end of 2010.

I would like to express special gratitude to him for the vision which he has constantly shown in the planning of the BCCSA. His advice on other matters pertaining to the constitution of the BCCSA is also highly appreciated. In short, it has been an honour to have had him in our midst and we wish him and Mrs Trengove well!

A special word of thanks is also due to Mrs Shouneez Martin, the Registrar, who has done a sterling job as Registrar. 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 as an administrative assistant to the Registrar and she has in this time demonstrated her diligence. Though the amount of work 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, 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.



JCW VAN ROOYEN SC
CHAIRPERSON
28 August 2010

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**

LIST OF BROADCASTERS UNDER THE JURISDICTION OF THE BCCSA

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:

<ul style="list-style-type: none"> ▪ Radio Sunshine ▪ Munghana Lonene FM ▪ Ukhozi FM ▪ Good Hope FM ▪ Motsweding FM ▪ RadioSonderGrens ▪ 5FM ▪ Thobela FM ▪ Lesedi FM 	<ul style="list-style-type: none"> Ligwalagwala FM Radio Metro CKI Stereo Radio 2000 PhalaPhala FM SAFM Radio Lotus Ikwewezi FM Umhlobo Wenene FM
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COMMUNITY RADIO

- Bush Radio
- Bay FM (BFM)
- Chai FM
- Fine Music Radio
- IFM 102.2
- Kovsie FM
- Med FM (Alkara 40)
- MFM
- Radio Islam
- Radio Pretoria
- Radio Puk
- Radio Rosestad
- Radio Today
- Rhodes Music Radio
- Rippel 90.5fm
- Transworld Radio
- Tuks FM
- Tshwane University of Technology (Top Stereo)
- University of Johannesburg UJFM (RAU 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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