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IN THE HIGH COURT OF SOUTH AFRICA  
(WITWATERSRAND LOCAL DIVISION)

CASE NO 06/3431

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES (NO)

(2) OF INTEREST TO OTHER JUDGES: YES (NO)

(3) REVISED

DATE 20-06-2007

*[Signature]*  
SIGNATURE

In the matter between  
**ISLAMIC UNITY CONVENTION**

**APPLICANT**

and

**MINISTER OF TELECOMMUNICATIONS**

**FIRST RESPONDENT**

**INDEPENDENT COMMUNICATIONS  
AUTHORITY OF SOUTH AFRICA**

**SECOND RESPONDENT**

**CHAIRPERSON OF THE BROADCASTING  
MONITORING AND COMPLAINTS COMMITTEE**

**THIRD RESPONDENT**

**SOUTH AFRICAN JEWISH BOARD  
OF DEPUTIES**

**FOURTH RESPONDENT**

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**VAN OOSTEN J**

**INTRODUCTION**

[1] In this case the applicant challenges the constitutionality of certain provisions of the now repealed Independent Broadcasting Authority Act, 153 of 1993 ("the IBA Act") and the regulations made under it, as well as certain provisions of its successor, the Independent Communications Act of South

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Africa, 13 of 2000 ("the ICASA Act"), based on the provisions of sections 34<sup>1</sup> and 33<sup>2</sup> of the Constitution of the Republic of South Africa, 108 of 1996.

[2] The application is opposed by the first respondent, the Minister of Telecommunications as well as by the fourth respondent, the South African Jewish Board of Deputies whereas the second respondent, the Independent Communications Authority of South Africa ("the ICASA") and the third respondent, the Chairperson of the Broadcasting Monitoring and Complaints Committee ("the BMCC"), abide the decision of the Court.

### **BACKGROUND AND ISSUES**

[3] The matter has a long and chequered history.<sup>3</sup> The applicant conducted a community radio broadcasting service under the name of Radio 786 in terms of a community sound broadcasting licence issued to it by the former Independent Broadcasting Authority ("the IBA").<sup>4</sup> On 8 May 1998 Radio 786 broadcast a programme entitled "Zionism and Israel: An in-depth analysis" against which a formal complaint<sup>5</sup> was lodged by the fourth respondent with the IBA, that the applicant had contravened clause 2(a) of the Code of Conduct<sup>6</sup> for Broadcasting Services as it then read, contained in Schedule 1 to the IBA Act.

<sup>1</sup> Section 34 of the Constitution provides: *Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*

<sup>2</sup> Section 33(1) of the Constitution provides: *(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

<sup>3</sup> The history of the matter also appears from reported judgments in previous litigation in which the parties were involved: See *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) and *SA Jewish Board of Deputies v Sutherland NO and Others* 2004 (4) SA 358 (W).

<sup>4</sup> In terms of s3 of the ICASA Act the IBA has been succeeded by the Independent Communications Authority of South Africa.

<sup>5</sup> That the broadcast "was likely to be offensive to the religious convictions or feelings of any section of the population namely the Jewish community or likely to prejudice the relations between sections of the population, namely between the Muslim and Jewish communities and the wider community in general".

<sup>6</sup> Clause 2(a) provided:

"Broadcasting licensees shall... not broadcast any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of a population or likely to prejudice the safety of the State or the public order or relations between sections of the population."

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[4] The IBA referred the complaint to a formal hearing before the BMCC. The applicant brought an application for the review of the BMCC's referral and in the same matter challenged the constitutionality of clause 2(a) of the Code of Conduct. The matter was heard by Marais J in this Court who on review set aside the decision of the IBA but declined to determine the issue of the constitutionality of clause 2(a) of the Code of Conduct. The learned Judge's refusal to decide the constitutional challenge became the subject matter of an appeal lodged by the applicant directly to the Constitutional Court. The Constitutional Court<sup>7</sup> upheld the appeal and declared clause 2(a) of the Code of Conduct inconsistent with s16 of the Constitution. The clause was declared invalid to the extent that it prohibited the broadcasting of material "likely to prejudice relations between sections of the population" to which the Court added the qualification that the order does not apply to "(i) propaganda for war; (ii) incitement of imminent violence; or (iii) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

[5] Following upon the judgment of the Constitutional Court, the fourth respondent requested ICASA to forthwith deal with the complaint in terms of the relevant procedures. The matter was then referred to the acting chairperson of the BMCC for a determination as to whether a formal hearing should be convened. He decided that the complaint did not merit a formal hearing before the BMCC and that consequently no further action was to be taken with regard to the complaint. The fourth respondent successfully took this decision on review before Malan J in this Court, who directed that a formal hearing be convened in respect of the complaint.

[6] The applicant applied for leave to appeal against the judgment and order of Malan J but this was refused as were its further applications for leave to appeal to the Supreme Court of Appeal and to the Constitutional Court.

[7] After a lengthy process involving meetings and extensive correspondence in relation mainly to certain procedural aspects of the proposed hearing of the

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<sup>7</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC).

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BMCC, the applicant launched the present application on 15 February 2006 together with an urgent application *inter alia* seeking an *interim* interdict, pending the final determination of the present application, to prevent the BMCC from proceeding with the hearing of the complaint which was scheduled for 13 March 2006. The matter came before Mbha J who dismissed the application with costs. The learned Judge in essence held that the BMCC was best suited to hear and determine an application for postponement. The applicant applied for leave to appeal which was still pending when the present matter was heard. It has subsequently come to my notice that leave to appeal was refused.

[8] At the commencement of the hearing before the BMCC on 13 March 2006 the applicant applied for a postponement of the hearing on the grounds that it had not been provided with a charge sheet, as the regulatory authority had undertaken to do, and further that the outcome of the present application might render the BMCC proceedings nugatory. A postponement was refused and the applicant elected not to further participate in the hearing. The hearing proceeded and was concluded in the absence of the applicant. In its judgment which was handed down on 12 May 2006, the BMCC determined that Radio 786 had contravened clause 2(a) of the Code of Conduct (as amended). A sanction<sup>8</sup> was imposed by ICASA on 30 June 2006. Finally, and while this application was pending, the applicant on 14 January 2007 launched an application for the review of the decision of the BMCC dated 12 May 2006, in the Cape of the Good Hope Division of this Court, which is still pending.

### THE STATUTORY SETTING

<sup>8</sup> The following sanction was imposed:

"1. That the Islamic Unity Convention ("Radio 786") be ordered to:

- 1.1 [To] desist from any further non-compliance with or non-adherence to the Act, including but not limited to, the broadcasting and publication of hate speech;
- 1.2 Generally the advocacy of hatred which constitutes incitement to cause harm against the Jewish people and including the impairment of their dignity.

2. The Licensee is directed to broadcast and/or publish the ruling of the BMCC (dated 12 May 2006) as well as its full Judgment and this Order at its own cost and in the following manner:

- 2.1 As part of all its news broadcasts on the two (2) days following the grant of his Order, save that in respect of such news broadcasts, it shall only be required to broadcast the ruling of [the] committee and this Order and not the full Judgment;
- 2.2 Prominently on the home page of its website for a minimum period of six (6) months from the date hereof, together with a link to the actual Ruling, Judgment and Order of this Committee;
- 2.3 In full in the next edition of its own in-house news letter and magazine."

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[9] ICASA was established in terms of s192 of the Constitution<sup>9</sup> by s3 of the IBA Act, which similarly was promulgated as contemplated by s192 of the Constitution, to regulate broadcasting in the public interest. In fulfilling its regulatory functions the broadcasting authority is bound to respect the provisions of the Bill of Rights.<sup>10</sup> The IBA was re-established by the ICASA Act as ICASA, and its powers and functions are still those provided for in the IBA Act. The objects of the IBA Act, which ICASA is enjoined to perform are *inter alia* to ensure that licensees adhere to a code of conduct acceptable to it and to encourage the provision of appropriate means for disposing of complaints in relation to broadcasting services and broadcasting signal distribution.<sup>11</sup> In order for ICASA to perform its functions s21 of the IBA Act empowers and enjoins ICASA to establish, through its council, a Broadcasting Monitoring and Complaints Committee. The IBA Act furthermore provides for the manner and extent to which the BMCC should exercise, perform and execute its functions. In particular the BMCC is given the power to adjudicate complaints concerning alleged breaches of the Code of Conduct by licensees.<sup>12</sup>

[10] The impugned provisions of the IBA Act and the ICASA Act relate to the investigation and adjudication of complaints from the public and the powers of the BMCC under the IBA Act and the Complaints and Compliance Committee ("the CCC") under the ICASA Act. The whole of the IBA Act has been repealed and replaced by the ICASA Act. That being so, the fourth respondent, relying on the judgments of the Constitutional Court in **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others** 2002 (2) SA 1 (CC) and **JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others** 1997 (3) SA 514 (CC) submitted that the issues raised in this matter have become moot and that this Court should therefore decline to consider the constitutionality of the

<sup>9</sup> Which provides that:

"National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

<sup>10</sup> See *Islamic Unity Convention v Independent Broadcasting Authority supra par* [37].

<sup>11</sup> Section 2(t) and (u) of the IBA Act.

<sup>12</sup> Section 57(2) of the IBA Act.

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impugned provisions. I am unable to agree. In my view the impugned provisions cannot be classified as merely abstract, academic or hypothetical. The constitutionality of the provisions of the IBA Act remains alive in view of the fact that the applicant has been found guilty of a breach of the Code of Conduct by the BMCC and ICASA having imposed a sanction on it, pursuant to a hearing conducted in terms of the very provisions under attack. Nor is it merely of historic interest – the fourth respondent has since the first complaint lodged three further complaints against the applicant under the impugned provisions, which are being held in abeyance pending the outcome of this case. I therefore conclude that this Court should proceed to determine the constitutional issue.

[11] For a proper understanding of the issues it is necessary to set out in full the legislative provisions which are the subject matter of the constitutional challenge. Following the prayers for the relief sought in the Notice of Motion herein, the impugned provisions fall into three groups: firstly, s 62(3); 63; 64 and 66 of the IBA Act<sup>13</sup> together with certain paragraphs of the complaints procedures, secondly regulations 5 and 6 of the Regulations,<sup>14</sup> and thirdly, certain parts of s 17 of the ICASA Act.<sup>15</sup> For ease of reference and for the sake of convenience, all the impugned provisions are quoted in full.

[12] “ **62. Broadcasting Monitoring and Complaints Committee.**

- (1) ...
- (2) ...
- (3) *The Broadcasting Monitoring and Complaints Committee shall, in accordance with the provisions of section 63, inquire into and adjudicate any alleged or suspected non-compliance or non-adherence contemplated in subsection (1).*

**63. Hearings held by the Broadcasting Monitoring and Complaints Committee.**

- (1) *An interested person who has reason to believe that a licensee is guilty of any non-compliance or non-adherence of the nature contemplated in section 62(1), may in connection therewith lodge a complaint with the Broadcasting Monitoring and Complaints Committee*

<sup>13</sup> Referred to in par 1 of the Notice of Motion.

<sup>14</sup> Referred to in par 2 of the Notice of Motion.

<sup>15</sup> Referred to in par 3 of the Notice of Motion.

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within 30 days after the occurrence of the alleged or suspected non-compliance or non-adherence.

- (2) A complaint contemplated in subsection (1) shall be lodged with the Authority<sup>16</sup> for consideration by the Broadcasting Monitoring and Complaints Committee.
- (3) For the purposes of subsection (2), a complaint may be delivered by hand, sent by registered post, faxed, or communicated telephonically to the Authority, which shall record and transcribe such complaint.
- (4) The Broadcasting Monitoring and Complaints Committee shall as soon as may be reasonably practicable, having regard to the urgency of the matter, investigate and adjudicate any complaint received by it and shall, in doing so, afford the complainant and the respondent a reasonable opportunity to make representations and to be heard in relation thereto.
- (5) The Broadcasting Monitoring and Complaints Committee shall determine the form and procedure as regards the adjudication of any complaint.
- (6) The complainant and the respondent shall be entitled to legal representation at any hearing held by the Broadcasting Monitoring and Complaints Committee for the purpose of adjudicating a complaint.
- (7) (a) After having considered the complaint and the representations (if any) and evidence in regard thereto, the Broadcasting Monitoring and Complaints Committee shall make its finding as regards the alleged or suspected non-compliance or non-adherence.  
 (b) Any finding in terms of paragraph (a) shall be published in such manner as the Broadcasting Monitoring and Complaints Committee may in its discretion determine.
- (8) Hearings held in terms of this section shall be open to the public: Provided that the Broadcasting Monitoring and Complaints Committee may, in exceptional circumstances, after hearing the relevant representations from any party who is at the time present at and concerned with the hearing, and having regard to -
  - (a) any reasonable apprehension of prejudice or harm to the person to be questioned and;
  - (b) the rights of reply and rebuttal of any person whose rights may be adversely affected,

<sup>16</sup> The ICASA established by s 3 of the ICASA Act.

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if it is in the interest of the achievement of the objects of the hearing that any part of the hearing be held behind closed doors, direct that the public or any class thereof, including the representatives of interested parties, other than the legal representative or other adviser to the person being questioned, shall not be present.

- (9) (a) The Broadcasting Monitoring and Complaints Committee shall keep a record of all complaints received by it and of all its proceedings, rulings and findings in relation thereto.
- (b) The records referred to in paragraph (a) shall be kept at the office of the Authority and be open to inspection by interested parties during the normal office hours of the Authority.
- (c) The Authority shall at the request of any interested party and on payment of such fee as may be prescribed (if any), furnish him or her with a certified copy of or extract from any record referred to in paragraph (a).
- (10) With regard to the summoning and examination of witnesses, the administering of the oath or an affirmation, recalcitrant witnesses and the production of books, documents, objects and material, the Broadcasting Monitoring and Complaints Committee shall have such powers as may be prescribed.
- (11) The provisions of subsections (5), (6), (7), (8), (9) and (10) shall *mutatis mutandis* apply in relation to any investigation instituted *mero motu* by the Broadcasting Monitoring and Complaints Committee with regard to any suspected non-compliance or non-adherence of the nature contemplated in section 62(1).

**64. Recommendation of Broadcasting Monitoring and Complaints Committee.**

- (1) Upon having made a finding, in terms of subsection (7) of section 63, that any complaint adjudicated by it in terms of that sections is justified, the Broadcasting Monitoring and Complaints Committee shall in writing make recommendations to the Authority as to which of the steps provided for in paragraphs (a) to (g), inclusive, of subsection (1) of section 66 should be taken against the licensee in relation to whom such finding was made, and forward its finding and such recommendations, together with the record of the adjudication proceedings, to the Authority for appropriate action in terms of section 66.
- (2) The Broadcasting Monitoring and Complaints Committee shall, when forwarding its recommendations to the Authority in terms of subsection (1), simultaneously by written notice

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addressed to the licensee referred to in that subsection, inform him or her accordingly.

**66. Powers of Authority in cases of proven non-compliance with Act, licence conditions or certain codes of conduct and, in limited circumstances, with Independent Media Commission Act, 1993.**

(1) As soon as may be reasonably practicable after receipt of any record of adjudication and the finding and recommendations relevant thereto, as forwarded to it by the Broadcasting Monitoring and Complaints Committee in terms of section 64, or section 65 read with section 64 (as the case may be), and having duly taken into account the nature, consequences and gravity of the non-compliance or non-adherence to which such finding relates, the circumstances in which it occurred and the recommendations so received, the Authority shall make any one or more of the following orders, namely-

- (a) where such finding is founded on non-compliance by the respondent with the provisions of section 58, 59, 60 or 61, an order whereby the respondent, if he or she -
  - (i) is a sound broadcasting licensee, is required to broadcast a party election broadcast or political advertisement (as the case may be);
  - (ii) is a broadcasting licensee, is required to broadcast another version of the programme complained of or counter version of the opinions expressed or alleged facts stated in such a programme, whichever is applicable;
- (b) directing the respondent to desist from any further non-compliance or non-adherence;
- (c) directing the respondent to publish such finding at his or her own cost and in the manner required by the Authority;
- (d) directing the respondent to pay, as a fine, the amount prescribed in respect of such non-compliance or non-adherence;

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- (e) directing the respondent to take such remedial and other steps, not inconsistent with the objects and principles as enunciated in section 2, as may be determined by the Authority;
  - (f) prohibiting a respondent who is a licensee from carrying on his or her broadcasting service or broadcasting signal distribution service (as the case may be) for such period as determined by the Authority, or revoking his or her licence: Provided that such a prohibition shall not endure for longer than 30 days;
  - (g) if satisfied that the non-compliance or non-adherence to which such finding relates, constitutes an offence, an order directing such record of adjudication and the finding and recommendations of the Broadcasting Monitoring and Complaints Committee relevant thereto, to be referred to the Attorney-General with a view to instituting a criminal prosecution.
- (2) An order in terms of subsection (1)(f) may be made only in circumstances where the Broadcasting Monitoring and Complaints Committee has repeatedly in terms of section 63(7) found complaints against a licensee to be justified.
- (3) Where a licensee is by virtue of an order made in terms of subsection (1)(f), temporarily prohibited from carrying on his or her service, the Authority may order that, for the duration of the period of such prohibition -
- (a) any premises used or capable of being used by such licensee for the provision of his or her broadcasting service or broadcasting signal distribution service (as the case may be) and any transmitters, apparatus and other equipment used or capable of being used for that purpose, be sealed;
  - (b) any transmitters, apparatus and other equipment so used or capable of being so used, be seized and retained for such period.
- (4)(a) Failure by a licensee to comply with an order made in terms of subsection (1), shall be deemed to constitute non-compliance of the nature

- contemplated in subsection (1)(d) of section 62, entitling the Broadcasting Monitoring and Complaints Committee, in relation thereto, to act in terms of subsection (3) of that section.
- (b) The provisions of paragraph (a) may be invoked against the person contemplated therein, irrespective of whether or not such person is being prosecuted for or has been convicted of any offence referred to in section 67(2)(c) or (d).
- (5) Where the Independent Media Commission established by section 2 of the Independent Media Commission Act, 1993, after finalization of any adjudication proceedings in terms of section 23 of that Act -
- (a) has found a broadcasting licensee to have contravened the provisions of that Act;
  - (b) has made an order in terms of section 24(1)(c) of that Act; and
  - (c) has forwarded a certified copy of the said order and of the record of the adjudication proceedings relating thereto to the Authority in accordance with the provisions of section 24(2) of that Act,
- the Authority may, in relation to such broadcasting licensee, make an order contemplated in subsection (1)(f) of this section as if such order were made pursuant to finding of the Broadcasting Monitoring and Complaints Committee in terms of section 63(7) of this Act.
- (6) An order in terms of subsection (1)(a), (c), (d), (e) or (f), or in terms of subsection (5) read with subsection (1)(f), as the case may be, shall not be made in any particular case unless the rules of natural justice have been observed."

[13] The investigative functions of the BMCC are undertaken by a unit within the BMCC, called the Monitoring Complaints Unit ("the MCU"). The functions of the unit and the procedures to be followed by it in the processing and adjudication of complaints from the public are set out in the BMCC regulations. The impugned paragraphs thereof are 1.6-1.21, 1.23-1.28 and 2, which provide as follows:

**"1. Procedures to be followed in the case of complaints from the public.**

1.1-1.5 ...

1.6 If the Unit determines that the complaint is frivolous or vexatious, or that it does not fall within the jurisdiction of the BMCC or any outside body with which the Unit is

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- familiar, the Unit shall inform the complainant in writing that no further action shall be taken on the matter. This letter shall furnish the complainant with reasons for the decision taken.
- 1.7 If the Unit determines that a complaint falls within the jurisdiction of the BMCC, it shall confirm receipt of such complaint in writing. Such written confirmation may be faxed or posted to the complainant and shall inform the complainant that the Unit is investigating the complaint.
  - 1.8 The Unit shall forward a copy of the complaint to the broadcaster concerned and request the broadcaster's licensee's response to the complaint. Wherever possible, this shall be done by fax and/or registered post.
  - 1.9 The Unit may request from the licensee a copy of the broadcast material, which gave rise to the complaint. The licensee shall be required to submit a copy of such material in a form acceptable to the Unit within 48 hours of the licensee's receipt of such request, or such lesser period as shall be determined by the Unit.
  - 1.10 The Unit shall, as far as possible, attempt to determine whether the complaint has already been lodged with the licensee concerned, whether the licensee has responded to the complaint, and the reasons motivating the response.
  - 1.11 The licensee shall have three (3) days from its receipt of the complaint in which to respond to the complaint in writing. The licensee shall send such response to the Unit and the complainant simultaneously.
  - 1.12 On receipt of the licensee's response, the Unit shall determine whether the response adequately addresses the complaint.
  - 1.13. Such response need not be limited to an argument on the basis of the complaint lodged. It may include an admission of a contravention by the licensee, and measures proposed for the implementation of corrective action.
  - 1.14 Should the Unit find the licensee's response to adequately address the complaint, it shall immediately inform the complainant of this in writing. Such letter shall inform the complainant that he/she may appeal against the Unit's decision to the Chairperson of the BMCC.
  - 1.15. Should the Unit find the licensee's response to be unsatisfactory, it shall immediately forward the matter to the BMCC Chairperson. The Unit shall inform the complainant and the licensee in writing of the decision to forward the matter to the BMCC.
  - 1.16 In the case of both paragraphs 1.14 and 1.15, the BMCC Chairperson shall decide whether the complaint merits a formal hearing of the Broadcasting Monitoring and Complaints Committee.
  - 1.17 The Chairperson may convene a meeting of representatives of the BMCC, the licensee and in the

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- case of a complaint, the complainant, in an attempt to resolve the complaint through mediation.
- 1.18 In the case where the BMCC Chairperson decides not to hold a formal BMCC hearing on the complaint, the broadcaster shall be informed in writing of this decision and no further action shall be taken with regards to the complaint.
- 1.19 In the case where the BMCC Chairperson decides that the complaint merits a formal BMCC hearing, the complainant and the licensee shall be advised in writing by the Unit of the date, time and venue for the hearing. The complainant and the licensee shall be advised that they are entitled to legal representation at the hearing.
- 1.20 The BMCC hearing shall take place as soon as may be reasonably practicable, having regard for the urgency of the matter, after the Chairperson has notified the Unit that a hearing will be held.
- 1.21 The BMCC shall have such powers as are prescribed in the Regulations with regard to the summoning and examination of witnesses, the administering of the oath or an affirmation, recalcitrant witnesses and the production of books, documents, objects and material.
- 1.22 ...
- 1.23 After having considered the complaint and the representations (if any) and evidence in regard thereto, the panel of the BMCC which heard the complaint shall make its finding as regards the complaint.
- 1.24 Upon having made a finding, the BMCC shall inform the licensee of the finding within a reasonable time. Should the BMCC find against the licensee, the Committee shall provide the licensee and the complainant with an opportunity to make representations to the BMCC with regard to its recommendations to the Council as to what penalty (if any), as contemplated in Section 66 of the IBA Act, should be imposed on the licensee.
- 1.25 Once it has heard the arguments of the parties the BMCC shall decide on its recommendation to the Council, in accordance with Section 66 of the IBA Act.
- 1.26 The finding of the BMCC and the recommended penalty (if any) to be imposed, together with a record of the proceedings, shall be submitted to the Council of the Authority for its consideration and decision on what penalty (if any) should be imposed. The licensee and the complainant shall also be provided with a copy of the recommendation of the BMCC.
- 1.27 In the event of the Council deciding that the contravention warrants a penalty heavier than that recommended by the BMCC, the licensee shall be given the opportunity to make representations to the Council, in writing, before the Council makes a final decision on the matter.
- 1.28 The Council of the Authority shall as soon as it has taken a decision on the recommendations made by the BMCC

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inform both the licensee and complainant of such decision with regards to the steps to be taken.

**2. Procedures to be followed in the case of investigations by the Unit.**

- 2.1 If, through the monitoring activities of the Unit, or by means of an anonymous tip-off, a suspected contravention of licence conditions comes to the attention of the Unit, the Unit shall institute an investigation into the suspected contravention.
- 2.2 If, after investigating the suspected contravention, the Unit has reason to believe that the licensee is failing to comply with its licence conditions, it shall immediately inform the licensee, in writing, of this and advise the licensee to respond to the allegation of contravention of licence conditions within (3) days of receipt of the Unit's letter.
- 2.3 The licensee shall also be requested to provide reasons in its response for the alleged contravention, and what steps, if any, it has taken to remedy the situation.
- 2.4 If the Unit is satisfied that the licensee has provided satisfactory reasons for the alleged contravention, no further action shall be taken, provided that the alleged contravention does not constitute a serious offence in terms of the Act.
- 2.5 If the licensee disregards any enquiry or request made by the Unit, the Unit shall inform the BMCC Chairperson of the suspected contravention by the licensee. The Unit shall simultaneously inform the licensee that the matter has been referred to the BMCC Chairperson.
- 2.6 In the case where the Unit determines that the suspected contravention might warrant a formal BMCC hearing, the Unit shall forward all relevant documentation to the BMCC Chairperson for consideration.
- 2.7 In the case of both paragraphs 2.5 and 2.6, the BMCC Chairperson shall decide whether the complaint merits a formal hearing of the Broadcasting Monitoring and Complaints Committee.
- 2.8 Clauses 1.17 to 1.29 inclusive are applicable to the determination of such alleged contravention."

[14] Regulations 5 and 6 dealing with the summoning and examining of witnesses, the administering of the oath or affirmation, recalcitrant witnesses and the production of books, documents, objects and materials by the BMCC, provide as follows

- "5. Any witness appearing before the Committee may be questioned through the Chairperson while under oath or affirmation in relation to any matter which may arise in connection with the inquiry or adjudication of complaint in question.

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6. *Such witness may only be cross-examined if the Chairperson deems it necessary and in the interest of the functions of the Committee. A witness appearing before the Committee may have a legal representative or other adviser present."*

[15] Finally, the impugned provisions of the ICASA Act are ss17A(3); 17B(a); 17C(1)(b), (2), (3) and (7)(a); 17 D; 17 E(1)(a), (2) and (3); and 17 F(5)(d) and (e) thereof.

**"17A. Establishment of Complaints and Compliance Committee.**

- (1) ...  
 (2) ...  
 (3) *The Chairperson of the Complaints and Compliance Committee must -*  
 (a) *manage the work of the Complaints and Compliance Committee; and*  
 (b) *preside at hearings of the Complaints and Compliance Committee.*

**17B. Functions of Complaints and Compliance Committee.**

- The Complaints and Compliance Committee -*  
 (a) *must investigate, and hear if appropriate, and make a finding on -*  
 (i) *all matters referred to it by the Authority;*  
 (ii) *complaints received by it; and*  
 (iii) *allegations of non-compliance with this Act or the underlying statutes received by it; and ...*

**17C. Procedure of Complaints and Compliance Committee.**

- (1) (a) ...  
 (b) *The Authority may direct the complaint<sup>17</sup> to the Complaints and Compliance Committee for consideration.*  
 (2) *Before the Complaints and Compliance Committee hears a matter it must -*  
 (a) *provide the licensee to the dispute with -*  
 (i) *a copy of the complaint where a complaint has been lodged; and*  
 (ii) *a notice setting out the nature of the alleged non-compliance;*

<sup>17</sup> A complaint referred to in ss17C(1)(a) which provides:

*"A person who has reason to believe that a licensee is guilty of any non-compliance with the terms and conditions of its licence or with this Act or the underlying statutes may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance."*

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- (b) afford the licensee a reasonable opportunity to respond to the allegations in writing; and
  - (c) afford the complainant a reasonable opportunity to reply to such response in writing where a complaint has been lodged.
- (3) The Complaints and Compliance Committee must hear oral representations made by the parties referred to in sub-section (2) and must permit such parties to be assisted by a legal representative or other adviser.
- (4) - (6)...
- (7) (a) The Complaints and Compliance Committee must keep a record of all complaints received by it, all notices contemplated in subsection (2) issued by it and a record of all its proceedings and findings.
- (b) ...
  - (c) ...

**17D. Findings by Complaints and Compliance Committee.**

- (1) The Complaints and Compliance Committee must make a finding within 90 days from the date of conclusion of a hearing contemplated in section 17B.
- (2) The Complaints and Compliance Committee must recommend to the Authority what action by the Authority should be taken against a licensee, if any.
- (3) The Complaints and Compliance Committee must submit its finding and recommendations contemplated in subsections (1) and (2) and a record of such proceedings to the Authority for a decision regarding the action to be taken by the Authority.

**17E. Decision by Authority.**

- (1) When making a decision contemplated in section 17D, the Authority must take all relevant matters into account, including -
  - (a) the recommendations of the Complaints and Compliance Committee;
  - (b)-(f) ....
- (2) The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -
  - (a) direct the licensee to desist from any further contravention;
  - (b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;
  - (c) direct the licensee to take such remedial or other steps in conflict

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with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;

(d) where the licensee has repeatedly been found guilty of material violations -

(i) prohibit the licensee from providing the licensed service for such period as may be recommended by the Complaints and Compliance committee, subject to the proviso that a broadcasting or communications service, as applicable, must not be suspended in terms of this subsection for a period in excess of 30 days; or

(ii) amend or revoke his or her licence; and

(e) direct the licensee to comply with any settlement.

(3) The Complaints and Compliance Committee must submit its finding and recommendations contemplated in subsections (1) and (2) and a record of its proceedings to the Authority for a decision regarding the action to be taken by the Authority within 60 days.

(4) ...

**17F. Inspectors.**

(1) - (4) ...

(5) An inspector must -

(a)-(c) ...

(d) refer all non-compliance matters to the Complaints and Compliance Committee for consideration where an inspector determines that a licensee has not complied with the terms and conditions of its licence, the provisions of this Act or the underlying statutes or failed to provide broadcasting or communications services;

(e) refer all complaints to the Complaints and compliance Committee for consideration after an investigation into the complaint has been carried out;

(f)-(g) ..."

### THE CONSTITUTIONAL CHALLENGE

[16] The impugned provisions are challenged mainly on the basis that the monitorial, investigative and adjudicative powers are conferred on a single body, the BMCC, and that that they therefore are inconsistent with sections 34 and 33 of the Constitution. As is evident from the above quoted provisions both investigative and adjudicative powers vest in the BMCC. Once a complaint is lodged the BMCC investigates it and in this regard it is much in the same position as a "prosecutor". The Chairperson of the BMCC, as one of the members of the body, then decides whether or not the complaint must be referred to a hearing before the BMCC, and once referred for hearing he then presides over that hearing. The intermingling of these powers brings into question the impartiality of the BMCC.

[17] There is no suggestion that the applicant has suffered any prejudice resulting from the perceived partiality it now relies upon. Counsel for the fourth respondent contended that a fair hearing had in fact taken place and emphasized the absence of any suggestion by the applicant that it did not and cannot enjoy a fair hearing in respect of the complaints lodged against it by the fourth respondent. The test to be adopted whether partiality exists has been dealt with in **BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another**<sup>18</sup> where the Supreme Court of Appeal in dealing with recusal applications involving the appearance of bias, held that:<sup>19</sup>

*"...the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias."*

[18] The test is equally appropriate to the issue at hand. In applying the test the question is whether a reasonable apprehension of partiality and therefore bias exists in the scheme provided for under the impugned provisions. Contending that it does, counsel for the applicant heavily relied upon the judgment of the Canadian Federal Court of Appeal in **MacBain v Canadian**

<sup>18</sup> 1992 (3) SA 673 (A).

<sup>19</sup> Per Hoexter JA at p 693 I-J.

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**Human Rights Commission et al, MacBain v Lederman et al**<sup>20</sup> where the fairness of proceedings arising from a complaint filed with the Canadian Human Rights Commission<sup>21</sup> was in issue. The complaints procedure under the Canadian Human Rights Act is almost identical to the procedure provided for in the impugned provisions now under consideration. There the complaint was lodged with the Canadian Human Rights Commission, who appointed an investigator. Having completed her investigation, the investigator reported her findings to the Commission. The Commission found that the complaint was substantiated and appointed a Tribunal to inquire into the complaint. A hearing followed<sup>22</sup> with the Commission appearing as prosecutor. The Tribunal also found that the complaint had been substantiated and imposed a sanction. The Federal Court of Appeal invalidated the impugned provisions of the Canadian Human Rights Act as far as the complaint was concerned, on the basis that the scheme of the Act provided for a direct connection between the prosecutor of the complaint (the Commission) and the decision maker (the Tribunal). Having applied the reasonable apprehension of bias-test, the Court found that such connection "easily gives rise...to a suspicion of influence or dependency".<sup>23</sup>

[19] Counsel for the first respondent submitted that the concept of one body being conferred with both investigative and determinative powers was recognised and approved by the Supreme Court of Appeal in **Chairman Board on Tariffs and Trade and Others v Brenco Inc and Others**.<sup>24</sup> In that matter the investigative and determinative functions of the Board of Tariffs and Trade,<sup>25</sup> were considered within the context of whether the *audi alteram partem* rule applied to both those functions. The Court clearly was not required to nor did it pronounce on the constitutionality of the provisions and counsel's reliance on the judgment for the proposition relied upon is therefore misplaced.

<sup>20</sup> 22 DLR (4<sup>th</sup>) 119 (FedCA).

<sup>21</sup> Pursuant to s 36 of the Canadian Human Rights Act, 1976-77 (Can).

<sup>22</sup> The respondent unsuccessfully attempted to stop the proceedings on the basis that it infringed his rights to a fair hearing, whereafter he and his counsel withdrew and the hearing proceeded in their absence.

<sup>23</sup> P 126-128 of the report.

<sup>24</sup> 2001 (4) SA 511 (SCA). See also *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another* 2003 (3) SA 64 (SCA).

<sup>25</sup> Established in terms of s2 of the Boards on Tariffs and Trade Act 107 of 1986.

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[20] I am in respectful agreement with the reasoning and conclusion to which the Court has come in *McBain* and I propose to adopt it in deciding this matter.

[21] In the scheme provided for in the IBA Act, the complaint is ultimately heard by the very same body, having firstly investigated the complaint and secondly made a decision that sufficient evidence exists for the referral thereof to a hearing. In our criminal justice system the office, duties and functions of the prosecutor are for good reasons distinctly separate and independent from that of the decision maker. In the absence thereof a reasonable suspicion of bias is unavoidable. I can see no reason why the principles underscoring fundamental concepts such as independence, impartiality<sup>26</sup> and resulting fairness, should not with equal force apply to administrative bodies like the BMCC. It is accordingly my finding that a reasonable suspicion of influence, dependency or bias arising from the direct connection existing between the prosecutor of the complaint (the chairperson of the BMCC) and the decision maker (the BMCC), cannot be excluded. It follows that the constitutional challenge of the impugned provisions of the IBA Act must be upheld. The impugned provisions of the ICASA Act, which are similar to the impugned provisions of the IBA Act, must accordingly suffer the same fate.

[22] The applicant's challenge of the impugned paragraphs of the Complaints Procedures is based on it being inconsistent with the Constitution, and as such, invalid. Insofar as those provisions confer on the MCU both investigative and adjudicative powers, they are, as I have already found in regard to the impugned provisions of the IBA Act, inconsistent with the Constitution. Paragraphs 1.6, 1.12-1.15, 2.1-2.4 and 2.6 of the Complaints Procedures confer regulatory functions on the MCU. Under the IBA Act however, such powers may be exercised only by the BMCC. Counsel for the applicant submitted that the ICASA provisions conferring regulatory functions on the MCU, violate the principle of legality which is dealt with by the

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<sup>26</sup> *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC).

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Constitutional Court in **Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC). The contention is unassailable and no arguments to the contrary were in any event advanced.

[23] Finally, I turn to the constitutional challenge of Regulations 5 and 6 of the Regulations regarding the powers of the BMCC, which is based on the contention that they infringe upon the right to a fair hearing and that they are therefore inconsistent with s 34 of the Constitution. The regulations it will be remembered, allow for witnesses (other than the complainant and the respondent) to be questioned through the Chairperson (Regulation 5); and further that such witnesses may be cross-examined only if the Chairperson deems it necessary and in the interests of the functions of the BMCC (Regulation 6). These provisions, in my view, are indisputably at odds with the normal rights of cross-examination, which have become well entrenched in our law. I can see no reason for restricting those rights on the basis envisaged in the regulations. It unreasonably curtails the right of a party to properly conduct its case. No arguments to the contrary were advanced and I am therefore satisfied that Regulations 5 and 6 are inconsistent with the right to a fair hearing, which is a founding value of our Constitution and that they therefore ought to be struck down.

#### THE APPROPRIATE ORDER

[24] At my request counsel for the applicant submitted a draft order in respect of the appropriate relief that ought to be granted in the event of the constitutional challenge succeeding. In response thereto counsel for the fourth respondent<sup>27</sup> raised two objections against the proposed order. In his reply thereto applicant's counsel countered the one objection by suggesting an amendment to one of the prayers which clearly eliminates the possible confusion referred to by counsel for the fourth respondent. I do not consider it necessary to deal with that aspect any further. The other objection essentially concerns the retrospectivity of the proposed order. The order as proposed in effect declares the proceedings before the BMCC and the resultant sanction

<sup>27</sup> In a note filed in response to the applicant's proposed order.

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imposed, a nullity. Counsel for the fourth respondent submits that such an order would be unfair to the fourth respondent. In my view however there are a number of considerations in favour of retrospectivity.<sup>28</sup> First and foremost the BMCC proceedings and the findings made by it should, in my view, not be allowed to stand in the face of a declaration of the unconstitutionality of the very provisions in terms of which it acted in coming to those findings. The matter moreover has not reached finality yet, the review application I have referred to, is still pending. In addition hereto the impugned provisions were challenged by the applicant prior to the BMCC hearing which eventually became one of the reasons for the applicant withdrawing from the hearing. The matter, as I have already alluded to, proceeded on an *ex parte* basis. A full hearing allowing for a ventilation of all disputes has therefore not taken place. Finally, the fourth respondent's complaint against the applicant can again be dealt with in the new dispensation provided for in the order which I propose to make. I therefore conclude that in these circumstances it would not be just and equitable<sup>29</sup> to limit the retrospectivity of the declaration of invalidity in order to preserve the BMCC proceedings.

### COSTS

[25] The awarding of costs is a matter within my discretion.<sup>30</sup> The applicant has succeeded on the constitutional issues raised by it. On the other hand the fourth respondent in pursuing its complaint against the applicant acted in terms of the law of the land. It did not act frivolously or vexatiously. The constitutional issues dealt with in this matter are important<sup>31</sup> and obviously in the public interest.<sup>32</sup> I therefore consider that this is a case in which it would be appropriate to make no order as to the costs of the application.

### ORDER

<sup>28</sup> Subject to the conditions as set out in the order granted at the end of the judgment.

<sup>29</sup> As provided for in s 172(1)(b) of the Constitution.

<sup>30</sup> *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* supra par [270].

<sup>31</sup> See *Islamic Unity Convention v Independent Broadcasting Authority* supra par [54].

<sup>32</sup> See *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) [33].

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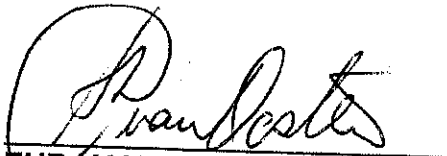
[26] The following order is made:

1. The Registrar of this Court is directed to lodge a copy of this order within 15 days of the date of this order, with the Registrar of the Constitutional Court.
2. The following provisions are in terms of s 172(1)(a) of the Constitution of the Republic of South Africa 1996 ("the Constitution"), declared to be inconsistent with the Constitution and invalid:
  - 2.1. Sections 62(3), 63, 64 and 66 of the Independent Broadcasting Authority Act 153 of 1993 ("the IBA Act");
  - 2.2. Paragraphs 1.6–1.21, 1.23–1.28 and 2 of the "Procedures to be followed by the Monitoring and Complaints Committee of the Independent Communications Authority of South Africa in the processing and adjudication of complaints from the public, and the processing and adjudication of investigations by the Monitoring and Complaints Unit", published under GN No 779 of 2002 in Government Gazette No. 23444 of 22 May 2002;
  - 2.3. Regulations 5 and 6 of the "Regulations regarding the powers of the Broadcasting Monitoring and Complaints Committee in relation to the summoning and examining of witnesses, the administering of the oath or affirmation, recalcitrant witnesses and the producing of books, documents, objects and material", published under GN No.R.1604 in Government Gazette No. 16758 of 13 October 1995.
  - 2.4. Sections 17A(3), 17B(a), 17C(1)(b), (2), (3) and (7)(a), 17D; 17E(1)(a), (2) and (3); and 17F(5)(d) and (e) of the Independent Communications Authority of South Africa Act 13 of 2000 ("the ICASA Act").
3. The order in paragraph 2 above shall in terms of section 172(1)(b)(i) of the Constitution, not extend to all findings and/or determinations made by the Broadcasting Monitoring and Complaints Committee or to sanctions imposed by the Independent Broadcasting Authority or the Independent Communications Authority of South Africa in terms of the IBA Act or the ICASA Act after 27 April 1994, and shall be limited to only cases in respect of which, as at the date of this judgment, either an appeal or review is pending or the time for the noting of an appeal or the launching of review proceedings, has not yet expired.
4. The declaration of invalidity made in terms of par 2 above is suspended for a period of 12 months from the date of this

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order to enable Parliament to amend the ICASA Act to correct the inconsistencies which have resulted in the declaration of invalidity, subject to the following conditions:

- 4.1 Complaints received by ICASA shall be investigated and prosecuted by a unit within ICASA, which is wholly independent of the Complaints and Compliance Committee ("the CCC"), to be established within 60 days of the date of this order.
- 4.2 The CCC shall exercise only adjudicative powers in relation to complaints lodged with ICASA.
- 4.3 Nothing in this order precludes the CCC, after it has adjudicated a complaint, from making a recommendation to ICASA as to what action should be taken against a licensee found guilty of a contravention of the ICASA Act.
5. The coming into effect of the declaration of constitutional invalidity of the statutory sections referred to in par 2 above as well as the consequential orders thereto, are subject to the confirmation thereof by the Constitutional Court.
6. No order is made as to the costs of this application.

  
**FHD VAN OOSTEN**  
**JUDGE OF THE HIGH COURT**

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**FOURTH RESPONDENT'S  
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**ADV A KATZ**  
**ADV (Ms) E FITZ-PATRICK**

**FEINSTEINS ATTORNEYS**

**DATE OF HEARING**

**DATE OF JUDGMENT**

**05 FEBRUARY 2007**

**26 APRIL 2007**

*gm*  
*DIC*