

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 36/01

THE ISLAMIC UNITY CONVENTION

Applicant

versus

THE INDEPENDENT BROADCASTING AUTHORITY

First Respondent

THE HEAD: MONITORING AND COMPLAINTS
UNIT OF THE INDEPENDENT BROADCASTING
AUTHORITY

Second Respondent

THE CHAIRPERSON OF THE BROADCASTING
MONITORING AND COMPLAINTS COMMITTEE

Third Respondent

THE SOUTH AFRICAN JEWISH BOARD OF DEPUTIES

Fourth Respondent

THE MINISTER OF COMMUNICATIONS

Fifth Respondent

Heard on : 22 November 2001

Decided on : 11 April 2002

JUDGMENT

LANGA DCJ:

Introduction

[1] The applicant, the Islamic Unity Convention, runs a community radio station known as Radio 786 under a broadcasting licence issued to it by the first respondent, the Independent

Broadcasting Authority (the IBA).¹ On 8 May 1998 the station broadcast a programme entitled “Zionism and Israel: An in-depth analysis” in which an interview with one Dr Yaqub Zaki, described as an historian and author, was featured. In the interview, Dr Zaki dealt with the historical, political, social and economic factors which, according to him, played a role in the establishment of the state of Israel. He expressed views which, among other things, questioned the legitimacy of the state of Israel and Zionism as a political ideology, asserted that Jewish people were not gassed in concentration camps during the Second World War but died of infectious diseases, particularly typhus and that only a million Jews had died.

[2] Following the broadcast, fourth respondent, the South African Jewish Board of Deputies (the Board), lodged a formal complaint with the second respondent, the Head: Monitoring and Complaints Unit,² claiming that the material that had been broadcast contravened clause 2(a) of

¹ In terms of section 3 of the Independent Communications Authority of South Africa Act 13 of 2000, the IBA has been succeeded by the Independent Communications Authority of South Africa (ICASA).

² A unit in the IBA’s Licensing, Monitoring and Complaints’ department.

the Code of Conduct for Broadcasting Services (the Code), in that it was “likely to prejudice relations between sections of the population, i.e. Jews and other communities.” The Code is contained in Schedule 1 to the Independent Broadcasting Authority Act (the Act).³

[3] A copy of the complaint was sent to the applicant for its comment. In its response, applicant denied that it had contravened clause 2(a) of the Code and claimed that the complaint had in any event lapsed as it had not been lodged within the thirty days required by the relevant complaints procedures. After some correspondence had passed between the Board and the Complaints Unit however, it was accepted by the latter that the complaint was not out of time. It then referred the complaint to the third respondent, the Chairperson of the Broadcasting Monitoring and Complaints Committee (the BMCC), who decided that the matter should be dealt with by the BMCC by way of a formal hearing.

[4] The Complaints Unit had however failed to comply with the IBA’s procedures which required it to advise the applicant that the complaint had not lapsed but had been referred to the third respondent. When the applicant discovered that the complaint was in fact being processed, it launched an application in the Witwatersrand High Court challenging the decisions that had

³ Act 153 of 1993. Section 56(1) of the Act provides that “[s]ubject to the provisions of subsection (2), all broadcasting licensees shall adhere to the Code of Conduct for Broadcasting Services as set out in Schedule 1.”

been taken by the second and third respondents. Largely as a result of misleading information which applicant had received from the IBA and its Complaints Unit, the relief sought initially was wide-ranging, but much of it had fallen away by the time the hearing before the High Court concluded.

[5] Only two aspects of the relief for which the applicant applied have relevance to these proceedings. First, applicant asked the High Court to grant an order declaring that clause 2(a) of the Code is unconstitutional and therefore invalid because of its inconsistency with the right to freedom of expression in section 16 of the Constitution. Second, the court was requested to review and set aside the decision of the second respondent to refer the complaint to the third respondent, and that of the third respondent to hold a formal hearing to deal with the complaint.

[6] Full argument was addressed to the High Court on both issues. On 12 April 2001 Marais J held in favour of the applicant that the referral of the complaint by the second respondent to third respondent was fatally flawed. He accordingly set aside the decisions of the second and third respondents. In the light of this finding, Marais J ruled that it was not necessary for him to consider the constitutional issue concerning clause 2(a) and he expressly declined to do so.

[7] The applicant now seeks leave to appeal directly to this Court against the High Court's decision not to deal with the constitutionality of the impugned provision. The respondents do not oppose the application to bring the appeal directly to this Court. The Board's opposition is concerned only with the substantive dispute on the constitutionality of clause 2(a). Marais J has

certified under rule 18(2)⁴ that it is in the interests of justice for the appeal to be brought directly to this Court. Notwithstanding the unanimity on the question of a direct appeal, it remains the duty of this Court to consider whether this is an appropriate matter for leave to appeal to be granted.

The judicial discretion in an application in terms of section 172 of the Constitution

[8] Marais J declined to deal with the issue of the constitutionality of clause 2(a) of the Code for two reasons. The first was that the issue had become academic in view of his decision to review and set aside the decisions of the second and third respondents. Secondly, the judge took the applicant's request for a declaration that the provision was inconsistent with the Constitution to be a prayer for a declaratory order in terms of section 19(1)(a)(iii) of the Supreme Court Act.⁵

⁴ Rule 18(2) states:
“A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court shall . . . apply to the court which gave the decision to certify that it is in the interests of justice for the matter to be brought directly to the Constitutional Court and that there is reason to believe that the Court may give leave to the appellant to note an appeal against the decision on such matter.”

⁵ Act 59 of 1959.

This led him to hold that, on the assumption that section 19(1)(a)(iii) gave him the power to decide the constitutional issue, this was “not an appropriate case to decide so important an issue”.

[9] In terms of section 19(1)(a)(iii), the High Court has the power, in its discretion, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that the person seeking the order cannot claim any relief consequential upon the determination. In this case the applicant sought an order declaring that clause 2(a) is inconsistent with section 16(1) of the Constitution, and without force or effect. The High Court was not being asked to “enquire into and determine” applicant’s rights, but to exercise its powers in terms of section 172(1)(a) of the Constitution and to declare clause 2(a) invalid.⁶

[10] A court’s power under section 172 of the Constitution is a unique remedy created by the Constitution. The section is the constitutional source of the power to declare law or conduct that is inconsistent with the Constitution invalid. It provides that when a court decides a constitutional matter, it *must* declare invalid any law or conduct inconsistent with the Constitution. It does not however expressly regulate the circumstances in which a court should decide a constitutional matter. As Didcott J stated in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*:⁷

“Section 98(5) admittedly enjoins us to declare that a law is invalid once we have found

⁶ Section 172(1)(a) of the Constitution provides:

“When deciding a constitutional matter within its power, a court -
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.”

⁷ 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC) para 15.

it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration.”⁸ [footnote omitted.]

⁸ Section 98(5) of the interim Constitution, a provision which is comparable to section 172(1)(a) of the final Constitution, provides:

“In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency. . .”

[11] In determining when a court should decide a constitutional matter, the jurisprudence developed under section 19(1)(a)(iii) will have relevance, as Didcott J pointed out in the *JT Publishing* case. It is however also clear from that judgment that the constitutional setting may well introduce considerations different from those which are relevant to the exercise of a judge's discretion in terms of section 19(1)(a)(iii).⁹

[12] What is clear is that the High Court erred in approaching the prayer for constitutional invalidity as if it were a prayer for discretionary relief in terms of section 19(1)(a)(iii). The relief was sought in terms of the Constitution itself and not under the Supreme Court Act. It is already settled jurisprudence of this Court that a court should not ordinarily decide a constitutional issue unless it is necessary to do so.¹⁰ Nor should it ordinarily decide a constitutional issue which is moot.¹¹ The decision as to whether a court should decide a constitutional matter remains

⁹ *JT Publishing* above n 7 para 15.

¹⁰ *S v Mhlungu and Others* 1995 (7) BCLR 793 (CC); 1995 (3) SA 867 (CC) para 59. *Zantsi v the Council of State, Ciskei, and Others* 1995 (10) BCLR 1424 (CC); 1995 (4) SA 615 (CC) para 2-3.

¹¹ *JT Publishing* above n 7 para 15; *National Coalition for Gay and Lesbian Equality and Other v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC); 2000(2) SA 1(CC) footnote 18; *President Ordinary Court Martial and Others v Freedom of Expression Institute and Others* 1999 (11) BCLR 1219 (CC); 1999 (4) SA 682 (CC) para 16; *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC); 2001 (3) SA 925 (CC) para 9.

one governed by the Constitution and its imperatives, not one determined solely by a consideration of the circumstances in which declaratory relief under section 19 of the Supreme Court Act would be granted.

[13] The matter is in any event not academic. The setting aside of the decisions of the second and third respondents was not dispositive of the real issue between the applicant and the Board.¹² The dispute concerning the constitutionality of the provision on which the Board's complaint is based is an acute and continuing one. Since it was always highly likely that the Board would renew its complaint, making a determination on the constitutional validity of the provision would avoid subjecting applicant, and anyone similarly situated, to an enquiry held on the basis of a provision of doubtful constitutionality. The dispute is a burning issue and one that is necessary in the public interest to resolve, involving as it does a provision that is fundamental to the regulation of broadcasting and more particularly what may be broadcast and what may not. This is quite apart from another factor which Marais J took into account in coming to the conclusion that the matter was academic, and that is the impression that he had been given to the effect that new proposals which had been made by the IBA to replace provisions of the Code, including the impugned provision, would soon be put into operation. As Marais J later discovered, that impression was based on erroneous information. A position paper, which reflected the IBA's view that clause 2(a) was overbroad and therefore

¹² Id.

constitutionally objectionable had indeed been given to the national Minister of Posts and Telecommunications in March 1999, but to date, three years after the proposals were made, there is still no indication when the proposed legislation would be enacted, if at all. In this Court, counsel were unable to throw any light on the causes for the delay in the implementation of the IBA's proposals.

[14] I accordingly find that the High Court should have dealt with the constitutionality of the provision which formed the basis of the dispute between the applicant and the Board. I turn now to deal with the question whether leave to appeal should be granted by this Court.

The enquiry as to whether leave to appeal should be granted

[15] The broad consideration in determining whether or not to grant leave to appeal directly to this Court is the interests of justice. The exercise involves the weighing up of a number of factors, some of which were summed up by this Court in *MEC for Development Planning and Local Government in Gauteng v Democratic Party & Others*¹³ as follows:

“Relevant factors to be considered in such cases will, on the one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success, and, on the other hand, the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the SCA is

¹³ 1998 (7) BCLR 855 (CC); 1998 (4) SA 1157 (CC).

bypassed.”¹⁴

¹⁴ Id para 32.

[16] The nature of the dispute is a factor in determining the interests of justice in a particular case. In *Amod v Multilateral Motor Vehicle Accidents Fund*¹⁵ this Court held that the benefit of a judgment by the Supreme Court of Appeal is of particular relevance where the development of the common law is at issue. When a case concerns the direct application of the Constitution and does not involve the common law, and the interests of justice require its early resolution, direct access to this Court may be granted with less reluctance.

[17] The present case involves a comparison of a piece of legislation with a provision of the Constitution and an evaluation of their compatibility. It is not concerned with the development of the common law but with the direct application of the Constitution. This is therefore a case where the benefit of first obtaining the views of the SCA may readily be outweighed by other considerations.

[18] A resolution of this issue would have distinct implications for the interests of justice, going beyond the immediate needs of the applicant and the respondents. It would further contribute to certainty, on the part of both the general public and the independent regulating authority as to what is legitimate conduct in relation to that part of the provision

¹⁵ 1998 (10) BCLR 1207 (CC); 1998 (4) SA 753 (CC) para 33; See also *De Freitas and Another v Society of Advocates of Natal (Natal Law Society intervening)* 1998 (11) BCLR 1345 (CC) para 21.

that is presently in dispute.

[19] With regard to prospects of success, in addition to the positive certificate from Marais J, it is also significant that the applicant, the IBA, and the Board accept that the provision on which the complaint is based constitutes a limitation of the right to freedom of expression. The Board maintains that the limitation is justifiable and applicant argues that it is not. Apart from the fact that all the parties to this litigation support the matter being dealt with directly by this Court, there is no doubt that hearing the appeal would avoid protracted procedures and unnecessary costs.

[20] In the circumstances, I consider that it is in the interests of justice that leave to appeal directly to the Constitutional Court be granted.

The constitutional issue

[21] Although the matter has its origins in the complaint by the Board in respect of a specific broadcast, the function of this Court in the present proceedings is to adjudicate on the question of the constitutionality of clause 2(a) of the Code in relation to that complaint as an abstract and objective one. The contents of the particular statement in respect of which the Board complains are not relevant to the enquiry. What the Court is concerned with is whether the provision on which the complaint was based is consistent with the right to freedom of expression in section 16 of the Constitution.

[22] Clause 2(a) provides that -

“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.”

[23] In its written argument, the applicant’s attack was directed at the whole of clause 2(a) and criticised each prohibition, largely on the grounds of vagueness and overbreadth. It was contended that the whole clause was unconstitutional. The Board’s approach to the constitutional challenge was that the clause is “internally severable”¹⁶ and that each of the individual prohibitions contained in it are severable from the other prohibitions in the clause. It argued that since its complaint was that the offending broadcast was “likely to prejudice relations between sections of the population”, only the last segment of the clause was implicated and should be subject to constitutional enquiry. When the matter was argued before this Court, the applicant did not expressly abandon its position that clause

¹⁶ It was suggested by the Board that this conclusion would be self-evident if the clause had taken the following form:

- “Broadcasting licensees shall not broadcast any material which is
- (i) indecent or obscene or offensive to public morals;
 - (ii) offensive to the religious convictions or feelings of any section of a population;
 - (iii) likely to prejudice the safety of the State or the public order, or
 - (iv) likely to prejudice relations between sections of the population.”

2(a) was unconstitutional in its entirety. However, faced with the Board's response which confined itself to the defence of the one prohibition on which its complaint was based, applicant's argument also concentrated on that issue.

[24] The complaint was based entirely on the portion of clause 2(a) that refers to material that is "likely to prejudice relations between sections of the population". It is this part of the clause, therefore, that is the relevant portion for the purposes of this judgment. It is clear that the other prohibitions in clause 2(a) deal with complex and contentious issues which were not the focus of argument in this Court. It would not be appropriate in the circumstances for the Court to deal with the constitutionality of clause 2(a) on a broader basis than that required by the underlying dispute between the parties in this case. I proceed therefore to deal with the question whether the prohibition against the broadcasting of material that is "likely to prejudice relations between sections of the population" is a limitation of the right to freedom of expression.

Freedom of expression

[25] Section 16 of the Constitution provides as follows:

"(1) Everyone has the right to freedom of expression, which includes -

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to -

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm.”

[26] This Court has held that -

“ . . . freedom of expression is one of a ‘web of mutually supporting rights’ in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) . . . The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial”.¹⁷

As to its relevance to a democratic state, the Court has pointed out that freedom of expression -

“ . . . lies at the heart of a democracy. It is valuable for many reasons, including its instrumental functions as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters”¹⁸ [footnotes omitted.]

¹⁷ *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC); 1999 (4) SA 469 (CC) para 8.

¹⁸ *Id* para 7.

and in *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* the following was said -

“Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.”¹⁹

[27] Notwithstanding the fact that the right to freedom of expression and speech has always been recognised in the South African common law,²⁰ we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa’s present

¹⁹ 2001 (5) BCLR 449 (CC); 2001 (3) SA 409(CC) para 37.

²⁰ See *Publications Control Board v William Heinemann, Ltd. and Others* 1965 (4) SA 137(A) at 160E-G; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 585 B-E; *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) at 400 H-J; *S v Turrell and Others* 1973 (1) SA 248 (C) at 256 G; *United Democratic Front and Another v Acting Chief Magistrate, Johannesburg* 1987 (1) SA 413 (W) at 416 C-G.

commitment to a society based on a “constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours”.²¹ As pointed out by Kriegler J in *Mamabolo* -

²¹ *Shabalala and Others v Attorney-General, Transvaal and Another* 1995 (12) BCLR 1593 (CC); 1996 (1) SA 725 (CC) para 26.

“... freedom to speak one’s mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15 to 19 of the Bill of Rights.”²²

[28] South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as “one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members . . .”.²³ As such it is protected in almost every international human rights instrument. In *Handyside v The United Kingdom*²⁴ the European Court of Human Rights pointed out that this approach to the right to freedom of expression is -

“applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb

²² Above n 19 para 28.

²³ Sieghart *The International Law of Human Rights* (1983) at 330. See also art 19 of the Universal Declaration of Human Rights; art IV of the American Declaration of the Rights and Duties of Man; art 19 of the International Covenant on Civil and Political Rights; art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art 13 of the American Convention on Human Rights; art 9 of the African Charter on Human and Peoples’ Rights.

²⁴ (1976) 1 EHRR 737 at 754.

. . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”²⁵

²⁵ See also *R v Zundel* (1992) 10 CRR (2d) 193 (SCC).

[29] The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of “human dignity, the achievement of equality and the advancement of human rights and freedoms.” Thus, open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself.²⁶ Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere.

[30] There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other state interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under section 36(1) of the Constitution. Determining its parameters in any given case is therefore important, particularly where its exercise might intersect

²⁶ See the case of *United Communist Party of Turkey and Others v Turkey* (1998) 26 EHRR 121 paras 38 - 48 and the as yet unreported judgment of the European Court of Human Rights in *Refah Partisi and Others v Turkey* (App nos. 41340/98, 41342/98, 41343/98 and 41344/98). See also the judgments of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) cited in Currie *The Constitution of the Federal Republic of Germany* (The University of Chicago Press, Chicago 1994) at 213 - 215 and the minority judgment of Cory J in *R v Zundel* (above n 25).

with other interests. Thus in *Mamabolo*,²⁷ the following was said in the context of the hierarchical relationship between the rights to dignity and freedom of expression:

“With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.” [footnote omitted.]

[31] Section 16 is in two parts. Subsection (1) is concerned with expression that is protected under the Constitution. It is clear that any limitation of this category of expression must satisfy the requirements of the limitations clause to be constitutionally valid. Subsection (2) deals with expression that is specifically excluded from the protection of the right.

[32] How is section 16(2) to be interpreted? The words “[t]he right in subsection (1) does not extend to . . .” imply that the categories of expression enumerated in section 16(2) are not to be regarded as constitutionally protected speech. Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subsection is definitional. Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles

²⁷ Above n 19 para 41.

of dignity, equal worth and freedom, and these objectives should be given effect to.

[33] Three categories of expression are enumerated in section 16(2). They are expressed in specific and defined terms. Section 16(2)(a) and (b) are respectively concerned with “propaganda for war” and “incitement of imminent violence”. Section 16(2)(c) is directed at what is commonly referred to as hate speech. What is not protected by the Constitution is expression or speech that amounts to “advocacy of hatred” that is based on one or other of the listed grounds, namely race, ethnicity, gender or religion and which amounts to “incitement to cause harm”. There is no doubt that the state has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality. There is accordingly no bar to the enactment of legislation that prohibits such expression. Any regulation of expression that falls within the categories enumerated in section 16(2) would not be a limitation of the right in section 16.

[34] Where the state extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution.

[35] The prohibition against the broadcasting of material that is “likely to prejudice relations between sections of the population” self-evidently limits the right in section 16 of the Constitution. The phrase “section of the population” in this part of clause 2(a) is less

specific than “race, ethnicity, gender or religion” as spelt out in section 16(2)(a). The prohibition clearly goes beyond the categories of expression enumerated in section 16(2). It does not, for instance, require that the material prohibited should amount to advocacy of hatred, least of all hatred based on race, ethnicity, gender or religion, nor that it should have any potential to cause harm.

[36] Whilst, on the one hand, the categories of speech referred to in section 16(2)(c), are carefully circumscribed, no such tailoring is evident in the relevant portion of clause 2(a). There is no doubt that each of the forms of expression listed in section 16(2) could produce the result envisaged in clause 2(a). Expression that makes propaganda for war (section 16(2)(a)) may, depending on the circumstances, threaten relations between sections of the population, or produce a situation where these are likely to be prejudiced. The converse is however not true. Not every expression or speech that is likely to prejudice relations between sections of the population would be “propaganda for war,” or “incitement of imminent violence” or “advocacy of hatred” that is not only based on race, ethnicity, gender or religion, but that also “constitutes incitement to cause harm”. There may well be instances where the prohibition in clause 2(a) coincides with what is excluded from the protection of the right. The real question though is whether the clause, in prohibiting that which is not excluded from the protection of section 16(1), does so in a manner which is constitutionally impermissible. It is to that enquiry that I now turn.

The justification enquiry

[37] The responsibility for the regulation of broadcasting in South Africa stems from section

192 of the Constitution 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.”

In fulfilling this regulatory function the broadcasting authority is bound to respect the provisions of the Bill of Rights²⁸ while the legislation may limit the protected rights only as permitted by the Constitution.²⁹ In the context of broadcasting, freedom of expression will have special relevance. It is in the public interest that people be free to speak their minds openly and robustly, and, in turn, to receive information, views and ideas. It is also in the public interest that reasonable limitations be applied, provided that they are consistent with the Constitution.

²⁸ Section 8(1) of the Constitution states:
“The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

²⁹ Section 36(2) of the Constitution states:
“Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

[38] Section 36(1) of the Constitution sets out the criteria for the limitation of rights. The limitation must be by means of a law of general application and determining what is fair and reasonable is an exercise in proportionality, involving the weighing up of various factors in a balancing exercise to determine whether or not the limitation is reasonable and justifiable in an open and democratic society founded on human dignity, equality and freedom.³⁰ No grounds for justification have been provided by either the IBA or the Fifth Respondent, the Minister of Communications, who was joined in the proceedings at the instance of the applicant. On the contrary and consistent with its view that the clause is constitutionally objectionable, the IBA has set a process in train for the relevant legislation and the Code to be revised.

[39] The relevant part of clause 2(a) prohibits licensees from broadcasting any material of the nature which it describes. Applicant has argued that the prohibition is unreasonable and unjustifiable and accordingly inconsistent with the Constitution. The Board denies this and contends that, on a proper interpretation of the prohibition, the limitation is justifiable and therefore consistent with the Constitution. The Board submitted that if the prohibition against the broadcasting of material “likely to prejudice relations between sections of the population” were given a narrow interpretation, it is reasonably capable of a meaning which renders it justifiable in terms of section 36(1).

³⁰ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC); 1995 (3) SA 3921 (CC) para 102.

[40] In *Investigating Directorate, Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others*³¹ this Court held that if there is an interpretation of the impugned provision that is reasonably capable of being read consistently with the Constitution, such interpretation should be adopted. The interpretation must however not be unduly strained. Furthermore, a balance must be struck between the duty of a judicial officer to interpret legislation in conformity with the Constitution in so far as it is reasonably possible, and the duty of the legislature to pass legislation that is reasonably clear and precise, enabling citizens to understand what is expected of them.³² The question in the present case is whether the relevant portion of clause 2(a) is capable of a meaning that is consistent with the Constitution, while at the same time being sufficiently clear and precise to enable the IBA (ICASA) and the BMCC to handle complaints in a consistent manner.

[41] The Board's suggestion is that the relevant part of the clause should be interpreted to mean that only broadcasts which will probably cause material damage to relations between readily identifiable sections of the population are hit by the proscription. In order to cause legally cognizable prejudice to relations between sections of society, so the argument

³¹ 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC).

³² Id para 23-24.

goes, the broadcast must promote prejudice and stereotyping or the demonizing of a target victim group by violating their dignity in such a way that -

a. other defined groups within society (as opposed to individuals) will be sufficiently moved by the stereotyping or demonizing to regard the target victim group with contempt or hatred or to inflict harm on that target victim group; and

b. the offensive content of the broadcast is viewed by the target victim group as being the collective responsibility of a different section of society (“the perpetrator group”) and not the work or responsibility merely of individuals, and is sufficiently offensive to a sufficient number of members of the target victim group that it moves them as a group, as opposed to individuals drawn from that group, to regard the perpetrator group with contempt or hatred or to want to inflict harm on that perpetrator group.

[42] Thus a breakdown of the phrase “likely to prejudice relations between sections of the population” would go something like this: “likely to prejudice” would be interpreted to refer to material that would “probably cause material damage” and “sections of the population” would be understood to refer to such sections as are identifiable on the basis of race, ethnicity, gender and religion. According to the argument, “relations” would be used in the context of there being a target victim group on the one hand, and a defined perpetrator group on the other, whose expression moves other defined groups to demonise or stereotype the victim group, and the victim group must, in turn, blame the perpetrator

group for this.

[43] It is obvious that the interpretation contended for would entail a complicated exercise of interpreting the very wide language of the relevant part of clause 2(a) in the light of the very concise and specific provisions of section 16(2)(c). Whilst this process might assist in determining whether particular expression can be regarded as hate speech, I fail to see how its meaning can coincide with that of the impugned clause on any reasonable interpretation, without being unduly strained. This segment of the clause is accordingly not reasonably capable of being read to give the meaning which is favoured by the Board.

[44] The next question to be considered is whether the provision is nevertheless justifiable despite its inability to be read in the way that the Board suggests. The prohibition against the broadcasting of any material which is “likely to prejudice relations between sections of the population” is cast in absolute terms; no material that fits the description may be broadcast. The prohibition is so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. It would deny both broadcasters and their audiences the right to hear, form and freely express and disseminate their opinions and views on a wide range of subjects. The wide ambit of this prohibition may also impinge on other rights, such as the exercise

and enjoyment of the right to freedom of religion, belief and opinion guaranteed in section 15 of the Constitution.

[45] The Board has submitted that the limitation of the right to freedom of expression may be justifiable in the interests of human dignity and equality, which are founding values of the Constitution,³³ and national unity, which is an important and legitimate state objective.³⁴ It is indeed true that the appropriate regulation of broadcasting by the government and its organs, in the public interest, serves an important and legitimate purpose in a democratic society, particularly in view of the constitutional duty to put such regulation in place.³⁵ This is because of the critical need, for the South African community, to promote and protect human dignity, equality, freedom,³⁶ the healing of the divisions of the past³⁷ and the building of a united society.³⁸ South African society is

³³ Section 1(a) of the Constitution provides:
 “The Republic of South Africa is one, sovereign, democratic state founded on the following values:
 (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.”

³⁴ The Preamble of the Constitution refers to “Build[ing] a united and democratic South Africa”. The promotion of national unity was also contained in Constitutional Principle III, the principles which had to be complied with in the drafting of the final Constitution. See also *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC); 1996 (4) SA 671 (CC) paras 2-3.

³⁵ Section 192 of the Constitution.

³⁶ Section 1(a) of the Constitution.

³⁷ The Preamble to the Constitution.

³⁸ Preamble to the Constitution; *Azanian Peoples Organisation* above n 34 paras 2-3.

diverse and has for many centuries been sorely divided, not least through laws and practices which encouraged hatred and fear. Expression that advocates hatred and stereotyping of people on the basis of immutable characteristics is particularly harmful to the achievement of these values as it reinforces and perpetuates patterns of discrimination and inequality.³⁹ Left unregulated, such expression has the potential to perpetuate the negative aspects of our past and further divide our society. The Constitution accordingly demands that regulation should “ensure fairness and a diversity of views broadly representing South African society”,⁴⁰ a mandate which is hardly surprising in a country still riddled with a legacy of inequalities, and in which not all have equal access to and control of resources, including the electronic media.

[46] The purpose behind the regulation of broadcasting in South Africa, as expressed in the Preamble to the Code is that -

“ . . . the freedom of all broadcasting licensees is indivisible from and subject to the same restraints as those relevant to the individual person, and is founded on the individual’s fundamental right to be informed and to freely receive and disseminate opinions.”⁴¹

³⁹ See *R v Keegstra* (1991) 61 C.C.C (3^d) 1 at 36g - 37h.

⁴⁰ Section 192 of the Constitution.

⁴¹ Preamble to Code of Conduct, schedule 1 of the Act.

That purpose is undermined by the prohibition in so far as it inhibits the right to “freedom to receive or impart information or ideas.”

[47] The Board contended further that the impact of the prohibition is not extensive. This factor is relevant in the balancing exercise since the more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.⁴² Three reasons were advanced. The first was that, according to the Board, the prohibition has a very limited ambit since it is contained in a broadcasting code which is only applicable to broadcasting licensees and not to the public at large. This ground ignores the two-sided nature of the right, not only to impart information but also to receive it.⁴³ The broadcaster itself potentially has a wide audience that would be deprived of information that it would receive, but for the prohibition. Furthermore, the fact that section 16(1)(a) makes specific mention of “freedom of the . . . media” is a clear indication of the recognition by the Constitution of the powerful role that the media plays in shaping public opinion and providing the public with information about current events. There can be no doubt that radio and television are extremely influential media. The extent and impact of the infringement is therefore not rendered less significant by reason of the fact that the prohibition applies only to broadcasters.

⁴² *S v Bhulwana; S v Gwadiso*, 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC) para 18.

⁴³ Section 16(1)(b) of the Constitution. See also *Stanley v Georgia* 394 US 557 (1969) at 564.

[48] The second reason advanced by the Board was that no criminal sanction goes with the prohibition and it therefore carries none of the “chilling” consequences of the criminal law. This ignores the fact that the Act authorises the regulatory authority in instances of repeated violations to suspend the license of an errant broadcaster for up to thirty days at most.⁴⁴ I do not agree that the absence of a criminal sanction necessarily means that other sanctions cannot be adequate or effective punishments and deterrents. Broadcasters are in the business of broadcasting; having a licence suspended for a month would have significant implications for their business.

[49] Thirdly, the Board contended that the prohibition has minimal impact on the right because broadcasters are not compelled to subscribe to the Code; it is open to those who wish to “opt out” to do so provided they adopt another code, acceptable to the regulatory authority.⁴⁵ It is no

⁴⁴ Section 67(2) read with section 66(1)(f) of the Act.

⁴⁵ Section 56 of the Act provides that :

- “(1) Subject to the provisions of subsection (2), all broadcasting licensees shall adhere to the Code of Conduct for Broadcasting Services as set out in Schedule 1.
- (2) The provisions of subsection (1) shall not apply to any broadcasting licensee if he or she is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a code of conduct enforced by that body by means of its own disciplinary mechanisms, and provided such code of conduct and disciplinary mechanisms are acceptable to the Authority.”

answer to a constitutionality challenge to argue that the litigant has a choice to opt out. It is trite that law and conduct that is inconsistent with the Constitution is invalid;⁴⁶ the objective invalidity is not lessened by the ability of the person affected to choose not to be bound by it.

[50] The effect of the limitation in this case is substantial, affecting as it does the right of broadcasters to communicate and that of the public to receive information, views and opinions. Could less restrictive means have been used to achieve the purpose of the regulation in this instance? Without prejudging the constitutionality of the IBA proposals in the position paper, it is clear that they are much less invasive of the right to freedom of expression and there is nothing to indicate that they would be any less effective in achieving the purpose of regulation.

Conclusion of justification enquiry

[51] There is no doubt that the inroads on the right to freedom of expression made by the prohibition on which the complaint is based are far too extensive and outweigh the factors considered by the Board as ameliorating their impact. As already stated, no grounds of justification have been advanced by the IBA and the Minister for such a serious infraction of the right guaranteed by section 16(1) of the Constitution. It has also not been shown that the very real need to protect dignity, equality and the development of national unity could

⁴⁶ Section 2 of the Constitution.

not be adequately served by the enactment of a provision which is appropriately tailored and more narrowly focussed. I find therefore that the relevant portion of clause 2(a) impermissibly limits the right to freedom of expression and is accordingly unconstitutional.

[52] Before dealing with the issue of appropriate relief, some general remarks concerning clause 2(a) are apposite. This judgment deals with the determination of the constitutional validity of one portion of the clause only. The rest of the prohibitions in clause 2(a) deal with the regulation of material that is indecent, obscene or offensive to public morals, offensive to religious convictions or feelings of sections of the population, or that is likely to prejudice the safety of the state or the public order. There is no doubt that these are important areas with which the government, or the relevant regulatory authority, might be expected to concern itself. I express no view on the question whether these prohibitions pass constitutional muster. It is however relevant to observe that together with the impugned part of clause 2(a), these provisions were framed and put in place before the new constitutional order was established. They implicate important competing rights as well as the government's interest and duty to protect those rights. It is obviously necessary to ensure that the regulatory provisions are in line with the Constitution. It is presumably this realisation that prompted the IBA to embark on an exercise to revise the Code.

Relief

[53] Section 172(1) requires that when a court decides a constitutional matter within its power, it -

- “(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including -
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[54] Various considerations come into play in deciding on an appropriate order. On the one hand, there is recognition of the importance of regulation in the public interest. The implications of striking down the impugned provision for government and for the public interest must be assessed as well as the time it will take for Parliament to come up with new legislation. On the other hand, there is the need for this Court to fulfil a judicial and not a legislative role, while at the same time ensuring that as far as possible the relief protects freedom of expression as enshrined in the Constitution.

[55] Various forms of relief were suggested in the course of argument. These include severance, notional severance and the striking down of the relevant portion of clause 2(a) with nothing put in its place. Another suggestion by the Board was the suspension of a declaration of invalidity for twelve months to enable Parliament to enact appropriate legislation. I have considered each submission in the light of what would be appropriate relief in the

circumstances of this case.

[56] If the relevant portion of clause 2(a) were struck down in its entirety with nothing to replace it, a dangerous gap would result. Since the Constitution specifically mandates regulation in this field,⁴⁷ it would be neither just and equitable nor in the public interest to allow such a gap to exist. Since the regulation of broadcasting in the public interest is required by the Constitution,⁴⁸ it is the legislature, not the courts, that must provide the necessary regulations and guidelines for what broadcasters may or may not broadcast. As pointed out earlier in this judgment, this is an area which the legislature might do well to attend to with some urgency, in order to fulfill its constitutional mandate.

[57] I consider that an order which is just and equitable would be a notional severance formulated so as to ensure that the relevant part of clause 2(a) is rendered ineffective in its application to protected expression, but that a prohibition is left in place to prevent the broadcasting of unprotected expression as referred to in section 16(2) of the Constitution. Such an approach would meet the concerns of the applicant, address the legitimate concerns raised by the Board about protecting people's dignity and the values of equality and national unity, while at the same time ensuring that the requirements of the

⁴⁷ Section 192 of the Constitution.

⁴⁸ Id.

Constitution are met. It will be open to the legislature to decide to keep regulation at this minimal level or to regulate further subject to the provisions of section 36(1).

[58] This order will also provide a guiding principle for the determination of the complaints brought against the applicant by the Board. It would be inappropriate for this Court to make that determination. It is a matter which falls primarily within the jurisdiction of the BMCC. I therefore express no view on the merits of the Board's complaint which gave rise to this litigation.

[59] There is no reason to limit the retrospectivity of the order, which is effective from the date on which the Constitution came into force.

Order

[60] The following order is accordingly made

1. The application for leave to appeal directly to this Court is granted;
2. The appeal is upheld;
3. The decision of the Witwatersrand High Court declining to consider the issue of the constitutionality of clause 2(a) of the Code of Conduct for Broadcasting Services as contained in Schedule 1 to the Independent Broadcasting Authority Act, 153 of 1993, is hereby set aside;
4. Clause 2(a) of the said Code of Conduct for Broadcasting Services is declared to be inconsistent with section 16 of the Constitution and invalid to the extent that it prohibits the broadcasting of material that is "likely to prejudice relations between

sections of the population”; provided that this 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. No order is made for costs.

Chaskalson CJ, Ackermann J, Kriegler J, Madala J, Mokgoro J, O’Regan J, Sachs J, Yacoob J, Du Plessis AJ and Skweyiya AJ concur in the judgment of Langa DCJ.

For the Appellants:

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For the Fourth Respondent:

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