CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 33/07
[2007] ZACC 26

ISLAMIC UNITY CONVENTION	Applicant
versus	
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

Heard on : 11 September 2007

Decided on : 7 December 2007

JUDGMENT

MPATI AJ:

Introduction

[1] This case concerns the constitutional validity of sections 62(3), 63, 64 and 66 of the Independent Broadcasting Authority Act 153 of 1993 (IBA Act) and 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 (ICASA Act). The IBA Act and the ICASA Act are aimed at the regulation of broadcasting, as contemplated by section 192 of the Constitution.[1] In essence, the impugned provisions prescribe a procedure for handling breaches by holders of broadcasting licences of, inter alia, their licence conditions.

[2] The issue is whether the impugned provisions are inconsistent with the right to just administrative action and the right of access to courts as guaranteed by sections 33[2] and 34[3] of the Constitution respectively. The Johannesburg High Court (Van Oosten J) held that they were and declared them to be constitutionally invalid, together with certain paragraphs of procedures followed, and regulations applied, in the investigation and adjudication of complaints against broadcasting licensees.[4] This matter comes before this Court as confirmatory proceedings, coupled with appeals.

The statutory framework

[3] From 1994[5] until 11 May 2000 broadcasting was regulated by the Independent Broadcasting Authority (IBA) which was established in terms of section 3[6] of the now

---

[1] Section 192 provides:

> "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."

[2] Section 33(1) provides: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[3] Section 34 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."

[4] *Islamic Unity Convention v Minister of Telecommunications* Case no 06/3431, 26 April 2007, unreported at para 26.

[5] The IBA Act came into force on 30 March 1994.

[6] Section 3(1)(a) provided that:

repealed IBA Act. The IBA was governed by a council, which was, in turn, required to establish two standing committees, one being the Broadcasting Monitoring and Complaints Committee (BMCC).[7] The third respondent was the Chairperson of the BMCC. The BMCC's responsibilities included monitoring compliance by broadcasting licensees, or their adherence to the terms of their broadcasting licences[8] and the Code of Conduct for Broadcasting Services as contained in Schedule 1 of the IBA Act (Code of Conduct).[9] In this regard it was required to "inquire into and adjudicate any alleged or suspected non-compliance or non-adherence contemplated in [section 62(1)]."[10]

[4] The IBA Act made provision for interested persons who had reason to believe that licensees were guilty of non-compliance with the terms and conditions of their

---

"There is hereby established a juristic person to be known as the Independent Broadcasting Authority, which shall exercise and perform the powers, functions and duties conferred and imposed upon it by this Act or by or in terms of any other law."

[7] The BMCC was established in terms of section 21(1)(b) of the IBA Act.

[8] Section 62(1) of the IBA Act provided:

"Subject to the provisions of sections 56 and 57, the Broadcasting Monitoring and Complaints Committee shall—

(a) monitor compliance by broadcasting licensees or their adherence to—
  (i) the terms, conditions and obligations of their broadcasting licences;
  (ii) the Code of Conduct for Broadcasting Services as set out in Schedule 1 to this Act;
  (iii) the Code of Advertising Practice contemplated in subsection (1) of section 57;
(b) monitor compliance by broadcasting licensees with the provisions of sections 58, 59, 60 and 61;
(c) monitor compliance by broadcasting signal distribution licensees with the terms, conditions and obligations of their broadcasting signal distribution licences and with any requirement relating to such a licensee or licence as imposed by Chapter V or any regulation in terms of section 78; and
(d) monitor compliance by licensees with any other material provisions of this Act relevant to them or their respective licences."

[9] Section 56(1) of the IBA Act provided: "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."

[10] These powers are provided for in section 62(3) of the IBA Act which is quoted in paragraph [21] below.

licences to lodge complaints with the BMCC.[11] The BMCC accordingly adopted procedures (Complaints Procedures)[12] to be followed by it and another entity, the Monitoring and Complaints Unit (MCU),[13] in the processing and adjudication of complaints.

[5] On 13 October 1995 the IBA published regulations (the Regulations) regarding the powers of the BMCC in relation to the summoning and examining of witnesses and related matters.[14] Regulations 5 and 6 of the Regulations formed part of the subject matter of the constitutional challenge. They relate to the summoning and examination of witnesses before the BMCC.

[6] The ICASA Act came into force on 11 May 2000. It repealed certain sections of the IBA Act, provided for the establishment of the second respondent, the Independent Communications Authority of South Africa (ICASA)[15] and dissolved the

[11] In terms of section 63(1) of the IBA Act.

[12] An amended version of the Complaints Procedures was published in Government Gazette 23444 GN 779, 22 May 2002. The amended version indicates that the complaints procedures were adopted by the BMCC on 8 May 1995, and amended on 9 April 2002.

[13] The MCU is referred to in the amended version as the Monitoring and Complaints Unit of ICASA and in the earlier judgment of this Court in *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at fn 2 as "[a] unit of the IBA's Licensing, Monitoring and Complaints department."

[14] The Regulations were made in terms of section 78(1) read with section 63(10) of the IBA Act and published in Government Gazette 16758 GN R1604, 13 October 1995.

[15] ICASA was established in terms of section 3 which reads:

> "(1) There is hereby established a juristic person to be known as the Independent Communications Authority of South Africa.
> (1A) The Authority is deemed to be the Regulator contemplated in the Postal Services Act.
> (2) The Authority acts through the Council contemplated in section 5.
> (3) The Authority is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice.
> (4) The Authority must function without any political or commercial interference."

IBA.[16] Part of the functions and duties of ICASA is to investigate and adjudicate complaints submitted to it, which relate to alleged breaches by broadcasting licensees of their licence conditions.[17]

[7] The impugned provisions of the IBA Act and section 21(1), which established the BMCC, were not repealed and remained in operation. The BMCC consequently became a standing committee of ICASA.[18] The establishment and constitution of the BMCC as a standing committee of ICASA was published on 5 December 2001.[19] That General Notice has been loosely referred to in this Court as "the constitution of the BMCC". I shall continue to refer to it as such. In the Complaints Procedures the BMCC was then defined as the "Broadcasting Monitoring and Complaints Committee of ICASA" and the MCU as the "Monitoring and Complaints Unit of ICASA."[20]

[8] The IBA Act was ultimately repealed by the Electronic Communications Act[21] which came into operation on 19 July 2006, but the Regulations that had been made under it were kept in force.[22] The repeal of the IBA Act meant that the life of the

[16] The dissolution was in terms of section 18(1) of the ICASA Act which provided as follows: "The IBA and SATRA are hereby dissolved with effect from [1 July 2000]."

[17] Section 4(3)(n) of the ICASA Act provides that the Authority "must investigate and adjudicate complaints submitted in terms of this Act, the underlying statutes, and licence conditions."

[18] Section 22(3) of the ICASA Act provides that the Authority (ICASA) is the legal successor of the IBA.

[19] In Government Gazette 22919 GN 2355.

[20] Although the amended version of the Complaints Procedures was published on 22 May 2002, it still made mention of the MCU as the Monitoring and Complaints Unit of the IBA which no longer existed.

[21] Act 36 of 2005.

[22] Section 95(1)(d) of the Electronic Communications Act 36 of 2005 provides:

> "Within twenty-four months of the coming into force of this Act, the Authority [ICASA] may, if the Authority considers it necessary, repeal or amend the regulations made under the IBA Act . . . ."

BMCC and its constitution came to an end. On the same date, sections 17A to 17H of the ICASA Act were inserted.[23] These sections and the impugned provisions of the IBA Act are for all intents and purposes identical. Section 17A(1)[24] enjoins ICASA to establish a Complaints and Compliance Committee (CCC), whose functions are almost identical to those hitherto performed by the BMCC.[25]

Factual background

[9] The applicant is the holder of a community broadcasting licence. On 8 June 1998, and following a particular broadcast over the applicant's radio station[26] on 8 May 1998, the fourth respondent lodged a formal complaint with the IBA. The allegation was that the applicant had contravened clause 2(a)[27] of the Code of Conduct. The complaint was referred to the Chairperson of the BMCC who decided that it be dealt with by way of a formal hearing. The applicant brought an application to review that decision and also challenged the constitutionality of clause 2(a) of the Code of Conduct. The Johannesburg High Court (Marais J) set aside the decision of the Chairperson of the BMCC but declined to consider the constitutional issue. On appeal to this Court, however, clause 2(a) of the Code of Conduct was declared to be

[23] These sections were inserted by section 19 of the Independent Communications Authority of South Africa Amendment Act 3 of 2006.

[24] Section 17A(1) provides:

> "The Authority must establish a Complaints and Compliance Committee which consists of not more than seven members, one of whom must be a councillor."

[25] The functions of the CCC are set out in section 17B of the ICASA Act quoted in paragraph [27] below.

[26] Radio 786.

[27] 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."

inconsistent with section 16 of the Constitution and thus invalid to the extent that it prohibited the broadcasting of material that was "likely to prejudice relations between sections of the population".[28]

[10] Subsequent to the judgment of this Court, the fourth respondent requested ICASA to refer the complaint to the BMCC for a formal hearing, contending that the broadcast constituted hate speech within the meaning of clause 2(a) of the Code of Conduct "as determined" by this Court. On 14 October 2002, the Senior Manager of the Licensing, Monitoring and Complaints Department of ICASA, wrote to the National Executive Director of the fourth respondent and advised that "the Unit has decided to refer the matter to the BMCC for adjudication". The Acting Chairperson of the BMCC, Advocate Sutherland SC, decided that the complaint did not merit a hearing and that no further action would be taken. On review to the Johannesburg High Court, at the instance of the fourth respondent, the decision of the Acting Chairperson was set aside. The court (Malan J) directed that a formal hearing be convened.[29] The complaint was then set down for a hearing before the BMCC on 13 March 2006. On 15 February 2006, following a lengthy process pertaining to procedural aspects, the applicant applied to the Johannesburg High Court for an order declaring the impugned provisions of the IBA Act constitutionally invalid. Further orders of constitutional invalidity were sought in respect of paragraphs 1.6 to 1.21,

[28] Above n 13 at para 60.

[29] This judgment is reported as *South African Jewish Board of Deputies v Sutherland NO and Others* 2004 (4) SA 368 (W) at para 40.

1.23 to 1.28 and 2 (disputed paragraphs) of the Complaints Procedures and regulations 5 and 6 of the Regulations.

[11] On the day of the hearing of the complaint before the BMCC, the applicant requested a postponement on two bases. First, it had not been furnished with a "charge sheet" which ICASA had allegedly undertaken to provide. Second, the outcome of the application for constitutional invalidity could render the proceedings before the BMCC nugatory. The request was refused and the applicant took no further part in the proceedings. The hearing proceeded in its absence. On 12 May 2006 the BMCC published its decision. It found that the applicant's radio station had contravened clause 2(a) of the Code of Conduct. On 30 June 2006 ICASA imposed a sanction on the applicant[30] in terms of the provisions of section 66 of the IBA Act.[31] A review application relating to those proceedings is pending in the Cape High Court.

[30] The sanction is as follows:

> "1. That the Islamic Unity Convention ("Radio 786") be ordered to:
>
> 1.1 [D]esist 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 its news broadcasts on the two (2) days following the grant of this 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."

[31] Section 66 empowered the IBA to impose a sanction on a party found by the BMCC to have been guilty of non-compliance with the IBA Act, license conditions and the Code of Conduct.

[12] After the coming into operation of the impugned provisions of the ICASA Act, the applicant amended its notice of motion to include, in the order of constitutional invalidity sought, these impugned provisions. This constitutional challenge was based on the same grounds as those raised in respect of the impugned provisions of the IBA Act. The High Court granted the orders sought, but suspended the order of declaration of invalidity subject to certain conditions.

[13] It will be convenient to record, at this stage, the relevant paragraphs of the order of the High Court. They read as follows:

> "1. . . . .
>
> 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 adjudications of investigations by the [Broadcasting] 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. . . . .

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 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."

Preliminary issues

Condonation

[14] The Minister of Telecommunications (first respondent) has noted an appeal against the High Court's order of constitutional invalidity in respect of the impugned provisions.[32] Her notice of appeal was, however, filed out of time.[33] The failure to lodge timeously the notice was neither deliberate nor negligent.

[32] Section 172(2) of the Constitution in relevant part provides:

"(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

. . . .

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[33] Rule 16(2) of the Rules of the Constitutional Court provides that a notice of appeal must be lodged within 15 days of the making of an order of constitutional invalidity.

[15] In my view, condonation should be granted. The period of delay is not inordinately long and is satisfactorily explained. The first respondent is the member of the Executive charged with the administration of the legislation at issue. The interest in the matter cannot be gainsaid. Moreover, there was no opposition to the condonation application. It is, in my view, in the interests of justice that condonation for the late filing of the first respondent's notice of appeal be granted.

The second and fourth respondents' applications for leave to appeal

[16] The second respondent was cited but did not oppose the proceedings and abided the decision of the court. The second respondent now desires to enter the fray and has applied for leave to note an appeal against the order of constitutional invalidity in respect of the impugned provisions. Like the fourth respondent, who has also noted an appeal, the second respondent seeks, in addition, leave to appeal against the order in respect of which the disputed paragraphs and regulations 5 and 6 of the Regulations were declared unconstitutional. The applicant opposes the applications by the second respondent on the basis that: (a) it is not in the interests of justice to grant them since the fourth respondent is before court and appeals against the same order; and (b) the attempt by the second respondent to introduce new facts in its affidavit in support of the application for leave to appeal was potentially prejudicial to it.

[17] In my view, the second respondent has sufficient interest in the matter and, as an organ of state, is entitled, without leave, as are the first and fourth respondents, to

appeal against the order in question.[34] Furthermore, this Court has consistently expressed its displeasure at the failure, by organs of state, to participate in proceedings of a constitutional challenge against the validity of statutory provisions that they administer or under which they function.[35] This failure inevitably deprives courts of valuable information that could, and should, have been placed before them, so as to assist in the proper evaluation of the issues at hand. The present matter was no exception. The first respondent, as expected, stated in her answering affidavit that she was in no position to comment on the challenge in respect of the Complaints Procedures and the Regulations, since "section 78 of the IBA Act allocates the power to make Regulations to the Council of ICASA".

[18] The High Court was thus left to decipher from documentation placed before it by the applicant and from the impugned provisions, how the BMCC, the MCU and the CCC functioned. This is unacceptable and the failure by the second respondent to participate in the proceedings before the High Court was regrettable, to say the least. It is so that the Councillor of the second respondent, who deposed to the affidavit in support of the application for leave to appeal, was not part of the second respondent when the decision to abide the ruling of the High Court was taken. For that reason, he is unable to offer an explanation for that unfortunate decision. What he states, though, is what he believes to have been the reason for the second respondent's failure to

[34] See section 172(2) of the Constitution above n 32.

[35] See for example *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at paras 11-12 and *Ex parte Omar* 2006 (2) SA 284 (CC); 2003 (10) BCLR 1087 (CC) at paras 5-6.

participate in the proceedings before the High Court. I find it unnecessary to say more on this issue.

[19] As to the second and fourth respondents' applications for leave to appeal against the order of constitutional invalidity in respect of the disputed paragraphs and regulations 5 and 6 of the Regulations, it would undoubtedly be convenient were they to be considered together with the confirmatory proceedings. The Complaints Procedures and the Regulations were an integral part of the regulatory scheme provided for in the impugned provisions of the IBA Act. In my view, it is in the interests of justice that leave to appeal be granted to both the second and fourth respondents.

[20] The submission by the applicant's counsel that the introduction of new facts was potentially prejudicial to the applicant was levelled mainly at the allegation, on behalf of the second respondent, that the MCU was not a unit within the BMCC (as the High Court seems to have erroneously accepted as a fact), nor is it now a unit of the CCC, but rather a unit of ICASA. This is no new evidence. I have mentioned above, that in the General Notices[36] reference is made to the MCU as a unit of ICASA. The submission cannot be upheld.

The impugned provisions of the IBA Act

[36] See above at paragraph [4].

[21] As will be seen later in this judgment, the gravamen of the constitutional challenge is that the impugned provisions confer investigative, prosecutorial and adjudicative powers on the BMCC (in respect of the IBA Act) and the CCC (in respect of the ICASA Act). I shall accordingly set out what I consider to be the relevant sections that relate to the alleged conferral of these powers. With regard to the impugned provisions of the IBA Act, I shall, merely for convenience, set out the subsection that speaks of the examination of witnesses. As counsel for the applicant submitted, the rest of the impugned provisions are tainted by those sections that confer investigative and adjudicative powers. The relevant sections of the IBA Act provided as follows:

> "**Broadcasting Monitoring and Complaints Committee**
>
> 62 (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).
>
> **Hearings held by the Broadcasting Monitoring and Complaints Committee**
>
> 63 (1) . . .
>
> (2) . . .
>
> (3) . . .
>
> (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) . . .
>
> (6) . . .

> (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.
>
> (8) . . .
>
> (9) . . .
>
> (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."

[22] Section 64 enjoined the BMCC, upon making a finding that any complaint adjudicated by it in terms of section 63 is justified, to make recommendations to ICASA on what sanction should be imposed by the latter in terms of section 66. Section 66 conferred on ICASA the power to impose one or more of the orders set out in subsection (1)(a) to (g).[37]

The disputed paragraphs of the Complaints Procedures

[23] The Complaints Procedures made provision for the lodging, with the MCU, of a complaint of an alleged or suspected non-compliance with, or non-adherence to, its broadcasting licence conditions by a licensee and the referral, by the MCU, of the complaint to the BMCC for its consideration. Disputed paragraph 1.6 provided as follows:

> "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

[37] See below n 81.

> 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."

Provision was then made, where the MCU determined that a complaint fell within the jurisdiction of the BMCC, for the former to communicate with the licensee concerned and to call for a response to the complaint.[38] Where the MCU found a licensee's response to be unsatisfactory, it was required immediately to forward the matter to the Chairperson of the BMCC and to advise the complainant and the licensee thereof in writing.[39] Disputed paragraph 1.14 stated that where a licensee's response adequately addressed the complaint, the MCU had to inform the complainant of this fact and advise the latter that she or he may appeal against its decision to the Chairperson of the BMCC.

[24] Disputed paragraphs 1.16 to 1.19 and 1.21 then provided as follows:

> "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 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.

[38] Paragraphs 1.7-1.8.

[39] Paragraph 1.15.

> 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 . . .
>
> 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."

Paragraphs 2.1 to 2.4 set out the procedures to be followed in the case of investigations by the MCU where, through its monitoring activities, or by means of a tip-off, a suspected contravention of licence conditions comes to its attention. In such a case, the MCU was required to institute an investigation and to take the necessary steps in terms of those sub-paragraphs.

[25] Briefly, the scheme set up by the IBA Act and the Complaints procedures functioned as follows. The MCU received a complaint. If the complaint fell within the jurisdiction of the BMCC and was not frivolous or vexatious, the MCU would request a response to it from the licensee against whom the complaint was lodged. Should it find the response to address the complaint adequately, the MCU informed the complainant of this in writing. The complainant could appeal against that decision to the Chairperson of the BMCC. Should the MCU find the response to be unsatisfactory, it immediately forwarded the matter to the Chairperson of the BMCC and informed the complainant and licensee of its decision. The Chairperson then decided whether the complaint merited a hearing of the BMCC. She or he could

convene a meeting of representatives of the BMCC, the licensee and in the case of a complaint the complainant, in an attempt to resolve the complaint through mediation.

[26] Where she or he decided that the complaint merited a formal hearing, the hearing took place (obviously after appropriate arrangements had been made), whereafter the BMCC made its finding as regards the complaint. The licensee and the complainant would then be afforded an opportunity to make representations to the BMCC for it to make recommendations to ICASA as to what penalty, if any, should be imposed. Once it had decided on its recommendations the BMCC forwarded its finding and recommendations, together with the record of the proceedings before it, to ICASA for the latter's consideration and final decision regarding what penalty, if any, to impose. Should ICASA decide that the contravention warranted a penalty heavier than that recommended by the BMCC, the licensee would be given yet another opportunity to make representations, in writing, before ICASA made a final decision on the matter.

The impugned provisions of the ICASA Act

[27] Again, as regards the impugned provisions of the ICASA Act, only sections 17A(3), 17B and part of 17C need be set out. They provide as follows:

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

Functions of Complaints and Compliance Committee

17B 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;[40]

(ii) complaints received by it; and

(iii) allegations of non-compliance with this Act or the underlying statutes received by it.

Procedure of Complaints and Compliance Committee

17C (1) (a) . . .

(b) The Authority may direct the complaint[41] to the Complaints and Compliance Committee for consideration.

(2) Before the Complaint 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;

(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." (Footnotes added.)

[28] In terms of section 17D, the CCC is required to make a finding within 90 days from the date of conclusion of a hearing and to recommend to ICASA what action, if

[40] The Authority is ICASA.

[41] The complaint is one referred to in section 17C(1)(a), which reads:

> "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."

any, should be taken by the latter against a licensee. Section 17E(1) enjoins ICASA, when making a decision as to what action to take against a licensee, "to take all relevant matters into account", including the recommendations of the CCC. Section 17E(2) then lists the type of actions the CCC may recommend to ICASA. Subsections 17F(5)(d) and (e) make provision for inspectors, appointed by ICASA, to monitor compliance by licensees with the terms and conditions of their licences and to refer all non-compliance matters to the CCC for consideration after an investigation into a complaint has been carried out.

The grounds of attack

[29] The impugned provisions of the IBA Act, the disputed paragraphs of the Complaints Procedures and regulations 5 and 6 of the Regulations were challenged on grounds that they were inconsistent with sections 33, 34 and 192 of the Constitution. As regards the impugned provisions of the IBA Act, it was submitted that the BMCC was the sole functionary charged both with investigating a complaint and deciding whether the complaint merited a formal hearing. The same body would then adjudicate the complaint. The applicant contended that an objective licensee, "charged with contravening the Code of Conduct", would reasonably apprehend that the BMCC would not be impartial in the adjudication of the complaint. The impugned provisions, therefore, gave rise to an inherent bias, alternatively, a reasonable apprehension of bias. The investigation of a complaint by the BMCC and its referral to the same body for adjudication represented an after-the-fact justification

for a decision already made. The impugned provisions of the ICASA Act were challenged on the same grounds.

[30] A further contention that section 63(6) of the IBA Act was inconsistent with sections 33 and 34 of the Constitution, on grounds that a complainant effectively was allowed to prosecute its own complaint, was abandoned in this Court. That decision, in my view, was wisely taken. That subsection merely entrenched complainants' and respondents' entitlement to legal representation at any hearing held by the BMCC for the purpose of adjudicating a complaint.

[31] The disputed paragraphs were challenged on the basis that ICASA's purported conferral of monitoring, investigative and adjudicative functions on the MCU violated the principle of legality. It was contended that only the BMCC had the power, in terms of sections 62 and 63 of the IBA Act, to monitor non-compliance or non-adherence by licensees as contemplated in section 62(1).[42] [43]

[42] See section 62(1) quoted above n 8.

[43] Under the ICASA Act these functions are performed by inspectors. Section 17F(5) of the ICASA Act in relevant part provides:

> "An inspector must—
>
> (a) monitor compliance by licensees of licence terms and conditions;
>
> (b) monitor compliance by licensees with the provisions of this Act and the underlying statutes;
>
> (c) investigate and evaluate any alleged or suspected—
>
> (i) non-compliance by a licensee with its licence terms and conditions and provisions of this Act or the underlying statutes;
>
> (ii) breach by a licensee of an agreement between such licensee and its subscribers;
>
> (iii) failure to provide a communications service that the licensee is required to provide under the terms of its licence or in terms of this Act or the underlying statutes . . . ."

The decision of the High Court[44]

[32] The High Court upheld the applicant's submissions and stated that in our criminal justice system, the office, duties and functions of the prosecutor are, for good reason, distinctly separate and independent from that of the decision-maker and that in the "absence thereof a reasonable suspicion of bias is unavoidable".[45] It held that there was no reason why the principles underscoring fundamental concepts such as independence, impartiality and resulting fairness, should not, with equal force, apply to administrative bodies like the BMCC. The court found, accordingly, 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".[46]

The impugned provisions were thus held to be inconsistent with the Constitution and consequently invalid. In making this finding the court relied heavily on the decision of the Canadian Federal Court of Appeal in *MacBain v Canadian Human Rights Commission et al; MacBain v Lederman et al*.[47] I shall return to *MacBain* later.

[33] As to the disputed paragraphs, the court concluded that insofar as they conferred on the MCU both investigative and adjudicative powers they are inconsistent with the Constitution. It held that the disputed paragraphs conferred regulatory functions on the MCU; that under the IBA Act the powers could be

[44] Above n 4.

[45] Id at para 21.

[46] Id.

[47] 22 DLR (4th) 119 (FedCA).

exercised only by the BMCC; and that therefore the submission that they violated the principle of legality was unassailable. The disputed paragraphs were thus held to be invalid.

[34] Regulations 5 and 6 were held to be "indisputably at odds with the normal rights of cross-examination, which had become well entrenched in our law."[48] The court found that there was no reason for restricting those rights "on the basis envisaged in the regulations";[49] that regulations 5 and 6 unreasonably curtailed the right of a party properly to conduct its case; and that they are inconsistent with the right to a fair hearing,[50] and ought to be struck down.

Submissions on behalf of the applicant

[35] The independent authority, (ICASA and the IBA before it) tasked with regulating broadcasting is required to ensure fairness in the industry.[51] This means that the CCC, whose functions specifically relate to the regulation of broadcasting, is enjoined to ensure fairness when exercising its regulatory powers.

[36] As has been mentioned above, the attack on the constitutional validity of the impugned provisions was that because of the conferral on the BMCC and CCC of both investigative and adjudicative powers, an objective licensee, charged with contravening the provisions of the IBA Act or the ICASA Act, would reasonably

[48] Id at para 23.

[49] Id.

[50] Section 34 of the Constitution, quoted above n 3.

[51] Section 192 of the Constitution, quoted above n 1.

apprehend that the BMCC or CCC would not be impartial in the adjudication of the complaint. That is to say that the conferral of these powers on one entity gives rise to a reasonable apprehension of bias in the mind of the reasonable licensee against whom a complaint has been lodged. It was submitted that section 34 of the Constitution requires that by its very nature and structure a tribunal, or other forum, resolving disputes by the application of law, must be impartial, fair and independent.

[37] On the question of impartiality, the argument on behalf of the applicant was that a "litigant" in the position of the applicant would reasonably apprehend that the CCC might not be impartial because the CCC acts as prosecutor, in that the Chairperson decides whether a complaint prima facie has merit and must formulate and provide a licensee with a charge sheet.[52] It was submitted that there is a direct connection between the prosecutor (the Chairperson) and the decision-maker (the CCC) which gives rise to a reasonable apprehension of influence or dependency. It was further contended that given the legal qualifications of the Chairperson,[53] a reasonable litigant would apprehend that the other members of the CCC might easily form the view that a Chairperson would not refer a complaint to the CCC unless it had substance. The prosecutor (the Chairperson) is obliged, in terms of the ICASA Act, to preside at the hearing of the very complaint that she or he prima facie found to have merit. Moreover, the Chairperson has a deliberate vote and a casting vote in the event of a deadlock. Consequently, the argument proceeded, the very structure of the CCC

[52] Given that the BMCC no longer exists, counsel dealt only with the CCC. The submissions, however, apply equally to the BMCC.

[53] Section 17A(2) of the ICASA Act provides that the Chairperson of the CCC must be (a) a judge of the High Court, whether in active service or not; (b) an advocate or attorney with at least ten years' appropriate experience; or (c) a magistrate with at least ten years' appropriate experience, whether in active service or not.

as expressly authorised by the ICASA Act, creates a reasonable apprehension that the members of the CCC might be predisposed to decide a complaint in a certain way.

[38] As to fairness, it was submitted that for the reasons advanced in relation to the impartiality component of the section 34 right, the impugned provisions of the ICASA Act are such that they negate the fairness of the procedure at the hearing. It was argued that the ability of the CCC to hold a fair hearing was irredeemably compromised by virtue of the obligation on that body to exercise investigative, prosecutorial and adjudicative powers, and that until the adjudicative power is severed from the former two, the CCC cannot render legally valid decisions. The impugned provisions were therefore said to be inconsistent with the fairness components of sections 34 and 192 of the Constitution.

[39] On independence counsel submitted, in addition to the contentions made under the impartiality component, that in the performance of her or his duties of managing the work of the CCC, the Chairperson selects the other members who will sit with her or him on the tribunal that hears a complaint. Those selected members will be dependent on the guidance and direction of the Chairperson by virtue of her or his legal training or experience. It was accordingly contended that the impugned provisions violate the independence component of section 34 of the Constitution in that they encroach on the decision-making process of individual members of the CCC.

Bias

[40] In considering the constitutional challenge, the High Court[54] reasoned that the test for bias as applied in recusal applications was equally appropriate in the present matter. The test was formulated in *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*[55] as follows:

> "[T]he existence of a reasonable suspicion of bias satisfies the test; and . . . an apprehension of a real likelihood that the decision maker will be biased is not a pre-requisite for disqualifying bias."[56]

The question, as posed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (*SARFU*), is—

> "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel."[57]

The test is objective and the onus of establishing it rests on the applicant.[58]

[41] The present matter does not concern the recusal of a presiding officer. The applicant asserts bias at a structural level. In as much as the applicant raises the issue of a relationship of influence and dependency between the Chairperson of the CCC

---

[54] Above n 4 at para 17.

[55] 1992 (3) SA 673 (A).

[56] Id at 693I-J. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at paras 36-38; *S v Roberts* 1999 (4) SA 915 (SCA) at paras 32 and 33; and *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (SCA) at 8H-I.

[57] *SARFU* above n 56 at para 48. The court at para 38 confirmed the correctness of the test as enunciated in *BTR*, but preferred the use of the phrase "apprehension of bias" to "suspicion of bias".

[58] Id at para 45.

and other individual members, the argument was that the decision-maker (CCC) is inevitably biased as a result of institutional factors rather than an individual member being biased by virtue of personal traits. The court a quo held, however, that the test remains the same. In *Québec Inc v Québec (Régie des permis d'alcool)* the Supreme Court of Canada held that the determination of institutional bias—

> "presupposes that a well-informed person, viewing the matter realistically and practically — and having thought the matter through — would have a reasonable apprehension of bias in a substantial number of cases."[59]

[42] In *Financial Services Board and Another v Pepkor Pension Fund and Another*[60] the issue for decision was whether the provisions of section 26(1)(b) of the Financial Services Board Act[61] were inconsistent with the provisions of section 33 of the Constitution read with item 23(2)(a) and (b)[62] of Schedule 6 thereto, and thus invalid.

---

[59] [1996] 3 SCR. 919 at para 44. The underlining appears in the report.

[60] 1999 (1) SA 167 (C); 1998 (11) BCLR 1425 (C).

[61] Act 97 of 1990. Prior to amendment by the Financial Services Board Amendment Act 12 of 2000, section 26(1) of Act 97 of 1990 provided:

> "There is hereby established a board of appeal, which shall consist of three persons, appointed by the Minister, of whom—
> (a) one shall be a person appointed on account of his knowledge of law, who shall be the chairman;
> (b) one shall be one of the members of the board; and
> (c) one shall be a person registered as an accountant and auditor under section 23 of the Public Accountants' and Auditors' Act, 1951 (Act No. 51 of 1951), and who in the opinion of the Minister has wide experience of, and expert knowledge of the latest developments in, the accountants' and auditors' profession."

[62] Item 23(2)(a) and (b) of Schedule 6 provides:

> "Until the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted—
> (a) section 32(1) must be regarded to read as follows:
> '(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.'; and
> (b) section 33(1) and (2) must be regarded to read as follows:
> 'Every person has the right to—
> (a) lawful administrative action where any of their rights or interests is affected or threatened;

The "Board" referred to in section 26(1)(b) of the Financial Services Board Act was the applicant in that case. It meets from time to time to transact its business. When it is not meeting an executive performs its functions. The executive consists of the Registrar as executive officer and two other persons. The executive may not vary or set aside a decision of the Board unless so directed, but the Board may set aside or vary a decision of the executive, save for certain exceptions.

[43] The contentions in that case were summarised by the presiding judge as follows:

> "*Mr Henning*, who appeared for the applicants, had a difficulty with the presence on the Appeal Board of Mr Haslam, one of the members of the Board, which he articulated by submitting that the relationship between the Board and the Registrar was so close that any tribunal on which a member of the Board sat would not be objectively independent, that is to say would not exhibit that absence of institutional bias (created by its composition or structure) which is implicitly required by ss 33 and 34 of the Constitution (read with item 23(2)(a) and (b) of Schedule 6). This item declares that every person has the right to lawful administrative action. For a body to act lawfully it must comply with its enabling Act which, in turn, must not fall foul of the Constitution."[63]

The Cape High Court (Conradie J), applying the test for institutional bias as applied in *R v Lippe*,[64] said:

> (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
> (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
> (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.'."

[63] Above n 60 at 170E-G and 1427G-H respectively.

[64] [1991] 2 SCR 114 at 144; (1991) 64 CCC (3d) 513 at 534; [1991] 5 CRR (2nd) 31 at 56.

> "The test for this kind of bias is stated in *Lippe's* case . . . to be whether, having regard, *inter alia*, to the parties who appear before a decision maker, a fully informed person would harbour a reasonable apprehension of bias in a substantial number of cases."[65]

In the *Lippe* case the issue was whether part-time judges, who were permitted simultaneously to remain active in private practice, might preside over municipal courts.

[44] We did not have the benefit of full argument on what the appropriate test for institutional bias ought to be and in the view I take of this matter, it is not necessary to consider it. For present purposes, I accept, without deciding, that the court a quo was correct in its view that the test is as enunciated in *BTR*.

Is the conferral of investigative and adjudicative powers on one body permissible?

[45] For convenience, I first consider the impugned provisions of the IBA Act. What follows, though, applies also in respect of the impugned provisions of the ICASA Act.

[46] It was not in dispute that the BMCC was an administrative tribunal performing an administrative function when investigating and adjudicating complaints. In the course of his submissions that the impugned provisions of the IBA Act were inconsistent with section 33 of the Constitution, counsel for the applicant argued forcefully, and correctly, that there can be no question that the adjudication of a

[65] Above n 60 at 175D-E and 1432D-E respectively.

complaint constitutes administrative action as contemplated by the Promotion of Administrative Justice Act (PAJA).[66]

[47] To "investigate" or "inquire into" a complaint means more than simply to sit back and decide on the complaint on an adversarial basis in the same way as a criminal court. The term "investigate" means to "search or inquire into" or "examine",[67] while "inquire" means to "seek knowledge of (a thing) by putting a question" or to "request to be told."[68] As counsel for the second respondent suggested, the BMCC was required to play an active and inquisitorial role in determining matters before it. If the investigative powers that were conferred on the BMCC were understood, as they must, to have referred to the inquisitorial role played by the BMCC, then there was nothing unconstitutional and thus impermissible, in the arrangement. In *S v Baloyi (Minister of Justice and Another Intervening)*[69] this Court considered the constitutionality of section 3(5) of the Prevention of Family Violence Act,[70] which allowed for an inquisitorial process in terms of which the magistrate enquired into the reasons for the accused's failure to comply with an interdict and allowed the court to sentence him to a fine and imprisonment. This Court held that fairness to the complainant required that the proceedings be inquisitorial in that it places—

[66] Act 3 of 2000.

[67] *Oxford English Dictionary Online* 2 ed 1989 (Oxford University Press, Oxford 2007).

[68] Id.

[69] 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC).

[70] Act 133 of 1993.

> "the judicial officer in an active role to get at the truth, which usually will be done through questioning the accused. Fairness to the accused, on the other hand, dictates that within this format the general protection granted by the CPA should apply in measure similar to that available to a person charged under s 170. Such a balancing of constitutional concerns leaves the presumption of innocence undisturbed. At most it may affect the right to silence. The procedure involved in the Magistrate's Court in the present case did not raise this issue, nor was it an issue before us in the confirmation. That issue would have to be resolved when it arises."[71] (Footnotes omitted.)

I mention *Baloyi* to illustrate that even regarding certain aspects or instances in judicial proceedings an inquisitorial process is countenanced, provided that fairness to the accused is assured.

[48] I agree with counsel for the respondents that the inquisitorial role is an inherent aspect of regulatory authority, which in this case, the BMCC represented. Licencees in the broadcasting industry are part of a regulatory realm which requires that they abide by their concomitant responsibilities.[72] They accept as a condition of their licences "that they will adhere to the same reasonable controls as are applicable to their competitors".[73] The BMCC fulfilled its objects of conducting investigations into complaints by engaging in a fact-finding exercise so as to be able to make a finding, which it then forwarded to ICASA. What was required was for the scheme, created in

[71] Above n 69 at para 31. See also *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at paras 11 and 101; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 79; and *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 109 and 124.

[72] See *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 85.

[73] *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) at para 27; 1998 (7) BCLR 880 (CC) at para 20.

terms of the impugned provisions of the IBA Act and the Complaints Procedures, to ensure fairness.

[49] In my view the impugned provisions of the IBA Act endeavoured to achieve this goal. Section 63(4) enjoined the BMCC, when investigating and adjudicating a complaint, to afford the complainant and the licensee a reasonable opportunity to make representations and to be heard. In terms of section 63(6), both were entitled to legal representation. Disputed paragraph 1.24 of the Complaints Procedures also made provision for the licensee, where the finding was against it, to be afforded an opportunity to make representations with regard to the BMCC's recommendations to ICASA as to what penalty, if any, should be imposed. Should ICASA consider that a heavier penalty than that recommended by the BMCC was warranted, the licensee would be given yet another opportunity to make representations.[74] Section 22(3)(a) provided that the Chairperson of the BMCC must be a judge of the High Court, whether in active service or retired, a practising advocate or attorney with at least ten years' appropriate experience, or a magistrate with at least ten years' appropriate experience. This requirement, in my view, was aimed at ensuring fairness, impartiality and independence. The Chairperson was an experienced, legally trained person. In my view, the scheme adequately ensured fairness.

[74] Paragraph 1.27 of the Complaints Procedures reads:

> "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."

Were the impugned provisions of the IBA Act inconsistent with section 34 of the Constitution?

[50] It will be recalled that when this matter was argued before the High Court, the IBA Act had already been repealed. The question whether the issue of the constitutional validity of the repealed impugned provisions of the IBA Act had become moot was raised before the High Court, which reasoned that the issue—

> "remains alive in view of the fact that the applicant has been found guilty of a breach of the Code of Conduct . . . pursuant to a hearing conducted in terms of the very provisions under attack."[75]

That question was not pursued in this Court.

[51] Section 34 of the Constitution guarantees 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." The purpose of the section is—

> "to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the Judiciary from the other arms of the State. Section 22 achieves this by ensuring that the courts and other *fora* which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional State, the 'regstaatidee', for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into 'courts'. One recent notorious example of this was the High Court of Parliament Act. By constitutionalising the requirements of

[75] Above n 4 at para 10.

> independence and impartiality the section places the *nature* of the courts or other adjudicating *fora* beyond debate . . ."[76] (Footnote omitted.)

In *Zondi v MEC for Traditional and Local Government Affairs and Others,* this Court held that "section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions."[77]

[52] Some writers hold the view that where legislation gives decision-making powers to a tribunal which lacks the required impartiality because of its composition or structure, the constitutional validity of such legislation would have to be determined under section 33(1) of the Constitution, where the issue would be whether the scheme set out in the legislation is procedurally fair.[78]

[53] In this case we are not concerned with a court of law or with the fair resolution of social conflict, but with a regulatory body that performed an administrative function. The question is whether a constitutional challenge against legislation conferring investigative and adjudicative powers on an administrative tribunal like the BMCC, based on institutional bias, can be sustained under the right of access to court provisions of section 34 of the Constitution.

---

[76] *Bernstein* above n 72 at para 105.

[77] 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 61.

[78] De Ville *Judicial Review of Administrative Action in South Africa* 1 ed (revised) (LexisNexis Butterworths, Durban 2005) at 281. See also Currie and De Waal *The Bill of Rights Handbook* 5 ed (Juta & Co, Ltd, Lansdowne 2005) at 706-707, where the decision in *Financial Services Board*, above n 60, was criticised. In that case Conradie J held, at 175I-J, that the Appeal Board was an independent tribunal as envisaged by section 34 of the Constitution.

[54] It was submitted on behalf of the first respondent that section 34 was not implicated in this case and that section 33 was. Counsel for the applicant argued, however, that the "dispute" was whether the applicant had breached the Code of Conduct which was determined by the BMCC by the application of that Code of Conduct (a law) to the facts in relation to the complaint. The guarantees of independence, impartiality and fairness in section 34 are not limited to a hearing before a court, but extend to a hearing before other tribunals or fora resolving disputes by the application of law. This is buttressed, so the argument continued, by section 8(1) of the Constitution which provides, inter alia, that the Bill of Rights applies to all law and all organs of state, including the BMCC.

[55] In view of the basis of the applicant's constitutional challenge, it is unnecessary to express a firm opinion on this issue. It suffices to say that it is doubtful whether section 34 is implicated in the present matter. Even if the complaint could be characterised as a "dispute" the BMCC did not resolve it. The BMCC's function of investigating and adjudicating the complaint was but the first of a two-stage process. It was a higher authority, namely ICASA, which took the final decision. The writers Currie and De Waal submit on this issue that before an administrative agency has taken a final decision, there is no "dispute" that can be resolved by an application of law.[79] This view is indeed persuasive. Moreover, ICASA was not bound by the recommendations of the BMCC regarding the sanction to be imposed.[80] As the record

[79] Currie and De Waal above n 78 at 707. See too *Simelane and Others NNO v Seven-Eleven Corporation and Another* 2003 (3) SA 64 (SCA) at para 14 and 17 where reference was made with approval to *Norvatis SA (Pty) Ltd and Others v Main Street 2 (Pty) Ltd* [2001-2002] CPLR 470 (CT) at paras 35-61.

[80] Section 64(1) provided:

of the proceedings before the BMCC was transmitted to it with the BMCC's recommendations, ICASA could, for whatever reason, which, in my view could include a disagreement with the findings of the BMCC, decide not to impose any sanction. The final determination was thus the responsibility of ICASA.[81]

[56] I return to the basis of the constitutional challenge. The grounds for the charge that a reasonable person in the position of the applicant would reasonably apprehend

---

"Upon having made a finding, in terms of subsection (7) of section 63, that any complaint adjudicated by it in terms of that section is justified, the [BMCC] 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."

[81] Section 66(1) provided:

"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 [BMCC] 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 a political advertisement (as the case may be);
  (ii) is a broadcasting licensee, is required to broadcast another version of the programme complained of or a 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;

(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 [BMCC] relevant thereto, to be referred to the Attorney-General with a view to instituting a criminal prosecution."

that the BMCC might not be impartial, fair or independent when dealing with a matter before it, are founded on an erroneous construction of the impugned provisions. There was no provision in the IBA Act which empowered the Chairperson of the BMCC to decide whether a complaint "prima facie [had] merit". Nor was there any provision that required the Chairperson of the BMCC to formulate a "charge sheet". The assertion that the Chairperson of the BMCC acted as prosecutor is therefore ill-founded.

[57] The argument relating to a direct connection between "prosecutor" and the decision-maker, which allegedly gave rise to a reasonable apprehension of influence and dependency, is also based on an incorrect premise, which is that the Chairperson decided that a complaint had merit. As counsel for the second respondent correctly pointed out, the applicant frequently conflated the impugned provisions and the disputed paragraphs. It was disputed paragraphs 1.16 and 1.19 that speak of the BMCC Chairperson "deciding that the complaint merits a formal hearing". None of the impugned provisions of the IBA Act conferred such power. The disputed paragraphs cannot be used as an aid to interpret the impugned provisions, in the same way that regulations made in terms of legislation cannot be used as an aid to interpret that legislation.[82] The question of the Chairperson of the BMCC having a deliberative

[82] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 446; *Anglo South Africa Capital (Pty) Ltd and Others v Industrial Development Corporation of South Africa and Another* 2004 (6) SA 196 (CAC) at 203H-I; *Moodley and Others v Minister of Education and Culture, House of Delegates, and Another* 1989 (3) SA 221 (A) at 233E-F.

and a casting vote was also not provided for in the impugned provisions. It was contained in the constitution of the BMCC.[83]

[58] What has just been said in the preceding two paragraphs applies to the applicant's contentions relating to fairness as summarised above. It remains for me merely to add that the impugned provisions of the IBA Act did not bestow any authority on the Chairperson of the BMCC to select other members who will sit on the tribunal at a particular hearing[84] and neither did the Complaints Procedures. There is no evidence that this occurred as a fact. There is thus no factual or statutory basis for the assertion that the Chairperson selected other members to sit with her or him at a hearing and if it did occur as a fact, the remedy would be to attack that process. It follows that the constitutional challenge against the impugned provisions of the IBA Act on the grounds that they are inconsistent with section 34 of the Constitution cannot be sustained.

Are the impugned provisions of the IBA Act inconsistent with section 33 of the Constitution?

[59] Section 33 of the Constitution guarantees everyone the right to administrative action that is reasonable, lawful and procedurally fair. As stated earlier in this judgment, the BMCC is an administrative tribunal performing an administrative

[83] Clause 12(g) of the constitution of the BMCC provides: "In the event of an equality of votes regarding any matter, the Chairperson has a casting vote in addition to his/her deliberative vote."

[84] Clause 12(d) of the constitution of the BMCC, which deals with meetings and hearings of the BMCC, makes provision for a quorum consisting of the Chairperson or her or his deputy, a representative from the Council of the IBA and one additional member. The constitution of the BMCC does not say that the other two members would be selected by the Chairperson.

function. In *Zondi* this Court held that PAJA, which was enacted to give effect to section 33 "governs the exercise of administrative action in general".[85] The Court stated that all decision-makers entrusted with the authority to make administrative decisions by any statute are required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA, unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA.[86] The Court held further that—

> "where there is a constitutional challenge to the provisions of a statute on the ground that they are inconsistent with the provisions of s 33 of the Constitution, the proper approach is first to consider whether the provisions in question can be read in a manner that is consistent with the Constitution. If they are capable, they will ordinarily pass constitutional muster."[87]

[60] The applicant's arguments under this head are no different to those advanced under the section 34 attack. It was submitted, though, that the standard of procedurally fair administrative action laid down in section 3 of PAJA does not, and indeed cannot, cure a decision-making structure that is inconsistent with section 34 of the Constitution. As will have become clear from the discussion on section 34, there was nothing unconstitutional in the performing, by the BMCC, of investigative and adjudicative functions. And the prescribed procedure has not been shown to be at odds with PAJA. The standard of procedural fairness in section 33, at the minimum,

[85] Above n 77 at para 101.

[86] Id.

[87] Id at para 102.

entrenches the common law right to natural justice.[88] The content of this right to procedural fairness must be determined with reference to the context in which it is asserted.[89] As has been mentioned above the impugned provisions of the IBA Act in fact ensured procedural fairness. The submissions on behalf of the applicant under the section 33 attack can therefore not be sustained.

The constitutional validity of the complaints procedures

[61] Disputed paragraphs 1.6 to 1.15 and 2.1 to 2.6 were challenged on the basis that they violated the principle of legality. It was contended that General Notice 779[90] violated the provisions of section 192 of the Constitution and the principle of legality in that it attempted to establish the MCU as an authority to regulate broadcasting without national legislation authorising it. In my view, it is not necessary to consider the grounds of attack pertaining to the constitutional validity of the establishment of the MCU. The fourth respondent's complaint was investigated and adjudicated by the BMCC and the sanction imposed on the applicant by ICASA as provided for in the impugned provisions of the IBA Act. The fact that the complaint may have gone through the MCU, which referred it to the BMCC did not invalidate the proceedings before the BMCC and ICASA. A declaration of invalidity of the MCU will have no

[88] *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 84.

[89] *Truth and Reconciliation Commission v Du Preez and Another* 1996 (3) SA 997 (C) at 1008F-G. See also *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at paras 39 and 41; *Maharaj v Chairman, Liquor Board* 1997 (1) SA 273 (N) at 277F-G; and *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (C) at 305C-D.

[90] Above n 12.

practical effect.[91] I have mentioned that the Complaints Procedures would have perished with the BMCC when the IBA Act was repealed, unless they were adopted by the CCC. There is no evidence to that effect.

[62] Disputed paragraphs 1.16 to 1.21 and 2.7 were challenged on the ground that they conferred investigative, prosecutorial and adjudicative functions on the BMCC and, in particular, on its Chairperson. It was accordingly contended that these paragraphs were inconsistent with sections 33 and 34 of the Constitution for the same reasons advanced in respect of the challenge against the impugned provisions of the IBA Act. In terms of these disputed paragraphs, the Chairperson of the BMCC considered a complaint that was referred to the BMCC and decided whether or not the complaint merited a formal hearing. It was contended that the Chairperson's decision was foundational to these paragraphs. In dealing with the allegation that the impugned provisions of the IBA Act did confer prosecutorial powers, I held that to be unfounded. For the same reasons, the submission that these disputed paragraphs conferred prosecutorial functions on the BMCC cannot be upheld.

[91] *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at paras 16-18; *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at paras 16-17. The dictum in *JT Publishing* at paras 16-17 were applied most recently by this Court in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 60:

> "What was in the rules is now contained in the Credit Act. The content also differs from the rules. In those circumstances, the enquiry into the constitutionality of the Credit Act will be materially different from the enquiry into the constitutional validity of the rules relating to privacy. A finding in relation to this issue will therefore be of little practical significance. Unlike the issue in relation to whether the rule-making by the Council constituted private or public power, there are no conflicting judgments in existence on the privacy issue." (Footnote omitted.)

[63] In my view, the constitutional challenge against the disputed paragraphs has also become moot. I have already held, when I dealt with the section 34 challenge against the impugned provisions of the IBA Act, that the investigative and adjudicative powers conferred on the BMCC did not extend also to prosecutorial functions. It is not insignificant that the applicant makes no allegation of prejudice anywhere in its papers, in the sense that a reasonable person in the position of the applicant would have entertained a reasonable apprehension that the BMCC might be biased in dealing with the complaint against it. Indeed, it could not, because the complaint was not referred to the BMCC by its Chairperson, but by order of court.[92] In fact, the Chairperson had decided against a hearing and a different Chairperson presided at the eventual hearing. There could therefore not have been any suggestion of an apprehension of bias, reasonable or otherwise. A declaration of constitutional invalidity of the disputed paragraphs 1.16 to 1.21 and 2.7 will not affect the decision of the BMCC nor the sanction imposed by ICASA and will therefore be of no practical effect.[93]

[64] Disputed paragraphs 1.23 to 1.28 were challenged on the basis that they conferred investigative, prosecutorial and adjudicative functions on the BMCC and were thus inconsistent with the provisions of sections 33, 34 and 192 of the Constitution. They read:

[92] Above n 29.

[93] Above n 91.

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

It was argued that these disputed paragraphs could only take effect once the BMCC had held a hearing and that inasmuch as the impugned provisions of the IBA Act were inconsistent with the Constitution because they conferred investigative, prosecutorial and adjudicative functions on the BMCC respectively, they could not stand. These submissions must fail for the same reasons given in respect of the submissions on the impugned provisions of the IBA Act.

[65] These paragraphs were also challenged on the basis that they were constitutionally tainted as a result of the exercise of investigative and adjudicative powers by the MCU, a body without legal authority. Further, that the exercise of monitoring, investigative and adjudicative powers by the MCU was a condition precedent for the exercise of the adjudicative powers of the BMCC. Whatever the legal status of the MCU, it has not been suggested that its establishment had the result that the BMCC became deprived of its monitoring, investigative and adjudicative functions.

Are the impugned provisions of the ICASA Act inconsistent with sections 33 and 34 of the Constitution?

[66] After the IBA Act was repealed[94] and the impugned provisions were inserted[95] into the ICASA Act, the applicant amended its notice of motion to include, in the orders sought, an order declaring those provisions constitutionally invalid. The constitutional challenge was based on the same grounds as those raised in respect of the constitutional challenge against the impugned provisions of the IBA Act. It must follow that the constitutional challenge against the impugned provisions of the ICASA Act must fail for the same reasons given above for the rejection of the challenge against the impugned provisions of the IBA Act.

[67] I deal, however, with two specific subsections. With regard to the submission that the Chairperson of the CCC selects other members of panels for hearings, it was

[94] Above n 21.

[95] Above n 23.

submitted that this is done consequent upon the Chairperson's responsibility of managing the work of the CCC. Section 17A(3) of the ICASA Act provides only that the Chairperson of the CCC must manage the work of the CCC and that she or he must preside at hearings of the CCC. Managing the work of the CCC does not necessarily entail also the selection of a panel of the CCC for a hearing. But even if it did, the selection would be open to a court challenge were it to be done in a manner that created, in the mind of an objective licensee, a reasonable apprehension that the hearing would not be fair.

[68] Section 17C(2) of the ICASA Act enjoins the CCC to provide the licensee with a copy of the complaint if a complaint has been lodged and a notice setting out the nature of the non-compliance before it hears a matter.[96] In this regard it was argued that the Chairperson of the CCC formulated a charge sheet in respect of the complaint. I am prepared to accept that in all probability it will be the task of the Chairperson to provide such notice to the licensee by virtue of being the person tasked with managing the work of the CCC. However, a notice setting out "the nature of the non-compliance" is a far-cry from "formulating and providing a charge sheet" as a prosecutor would. There is, in my view, no rational basis for equating the function of providing the kind of notice referred to, with formulating a charge sheet. The contention that the Chairperson of the CCC acts as a prosecutor is without foundation.

The MacBain *judgment*

[96] Section 17B(a)(iii) of the ICASA Act provides that the CCC must investigate and hear, if appropriate, allegations of non-compliance with this Act or the underlying statutes received by it.

[69] In declaring the impugned provisions unconstitutional and therefore invalid, the High Court relied on the *MacBain* decision referred to earlier. The High Court observed that the complaints procedure under the Canadian Human Rights Act[97] "is almost identical to the procedure provided for in the impugned provisions".[98] In *MacBain*, a complaint had been lodged with the Canadian Human Rights Commission (the Commission) which appointed an investigator.[99] After she had completed her task, the investigator submitted her report to the Commission, which, after it had decided that the complaint had been substantiated, appointed a tribunal to enquire into the complaint. Before the tribunal the Commission appeared as prosecutor. The tribunal also found that a complaint had been substantiated and imposed a sanction. The Federal Appeal Court invalidated the relevant provisions, holding that the scheme

---

[97] Section 39 of the Canadian Human Rights Act provided:

> "(1) The Commission may, at any stage after the filing of a complaint, appoint a Human Rights Tribunal (hereinafter in this Part referred to as a 'Tribunal') to inquire into the complaint.
> (2) A Tribunal may not consist of more than three members.
> (3) No member, officer or employee of the Commission, and no individual who has acted as investigator or conciliator in respect of the complaint in relation to which a Tribunal is appointed, is eligible to be appointed to the Tribunal.
> (4) A member of a Tribunal is entitled to be paid such remuneration and expenses for the performance of duties as a member of the Tribunal as may be prescribed by by-law of the Commission.
> (5) In selecting any individual or individuals to be appointed as a Tribunal, the Commission shall make its selection from a panel of prospective members, which shall be established and maintained by the Governor in Council."

Section 40 of the Canadian Human Rights Act provided:

> "(1) A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, or appearing before the Tribunal, presenting evidence and making representations to it.
> (2) The Commission, in appearing before a Tribunal, presenting evidence and making representations to it, shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint being inquired into. . . ."

[98] *Islamic Unity Convention* above n 4 at para 18.

[99] In accordance with section 35(1) of the Canadian Human Rights Act which provided that: "The Commission may designate a person (hereinafter referred to as an 'investigator') to investigate a complaint."

of the Canadian Human Rights Act provided for a direct connection between the prosecutor (the Commission) and the decision-maker (the tribunal). The court expressed the view that the prosecutor should not be able to choose the judge. It accordingly concluded that an informed person viewing the matter realistically and practically and having thought the matter through, would conclude that a reasonable apprehension of bias existed under the statutory scheme.[100]

[70] In the present matter, the High Court agreed with the reasoning and conclusion of the court in *MacBain* and applied it. The court held as follows:

> "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 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."[101] (Footnote omitted.)

[71] This reasoning is flawed. I have already found that the impugned provisions of the IBA Act did not provide for a prosecutor. The Chairperson of the BMCC did not

[100] *MacBain* above n 47 at 126-130.

[101] Above n 4 at para 21.

act as a prosecutor and there is no evidence that she or he chose or appointed other members of the panels for hearings. The same applies with regard to the Chairperson of the CCC. Reliance on the *MacBain* case was, in my view, erroneous.

Regulations 5 and 6

[72] The High Court held these Regulations to be inconsistent with the right to a fair hearing, which, it said, is a founding value of our Constitution, and declared them invalid. Regulation 5 makes provision for a witness who appears before the CCC to be questioned through the Chairperson.[102] In terms of regulation 6 such witness may only be cross-examined if the Chairperson deems it necessary and in the interest of the functions of the CCC.[103] It was submitted on behalf of the applicant that the Chairperson of the CCC, by being able to determine what cross-examination is necessary and in the interest of the functions of the CCC, and what evidence is to be led, might exercise her or his powers such as to justify the initial decision to refer the matter to the CCC for hearing. The Chairperson might thus be predisposed to deciding the matter in accordance with his or her decision that the complaint has merit.

[102] Regulation 5 provides that:

> "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 the complaint in question."

[103] Regulation 6 provides that:

> "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."

[73] In my view, the argument cannot be sustained. The Regulations do not prohibit cross-examination. There is nothing unusual, in an inquisitorial process, in the cross-examination of witnesses being done through the Chairperson. Nor is it impermissible, I would suggest, for a Chairperson to have the power to allow cross-examination only where she or he deems it to be necessary. The question is whether a decision to disallow cross-examination or certain questions will lead to unfairness. That question would have to be answered on a case-by-case basis. There may be a perfectly valid reason why, in a particular instance, cross-examination was disallowed. And if the decision of the Chairperson renders the hearing unfair, it may be reviewed and set aside under PAJA. I find that the Regulations at issue are not unconstitutional.

Costs

[74] These are mainly confirmatory proceedings although appeals were also considered. It was in the interests of justice that the appeals against the order of constitutional invalidity of the Complaints Procedures and Regulations be argued together with the confirmation proceedings. As was said in *Mistry*[104] the split between the referral and the appeals resulted from the procedural requirements of the interim Constitution.[105] The matter thus had to be argued in this Court. In the court below no costs order was made. I think it is only fair that the same should apply in this Court.

Order

[104] Above n 73 at para 53 and para 46 respectively.

[105] Section 172(2)(a) of the Constitution above n 32. See *Zondi* above n 77 at para 29 where it was said that only the constitutional invalidity of an Act of Parliament, a provincial Act or any conduct of the President must be confirmed by this Court. See also *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC); 2001 (11) BCLR 1168 (CC) at para 13.

[75] The following order is made:

1. The Court declines to confirm the order of constitutional invalidity made by the Johannesburg High Court on 26 April 2007 in case No 06/3431.
2. The late filing of the first respondent's notice of appeal is condoned.
3. The second and fourth respondents' applications for leave to appeal are granted.
4. The appeals of the first, second and fourth respondents are upheld and the order of the High Court is set aside and is replaced with an order dismissing the application.
4. There is no order as to costs.

Langa CJ, Moseneke DCJ, Madala J, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J, Van der Westhuizen J, and Yacoob J concur in the judgment of Mpati AJ.

For the Applicant:	Advocate A Schippers SC and Advocate MC Solomon instructed by LA Adams & Associates.
For the First Respondent:	Advocate KD Moroka SC and Advocate PL Nobanda instructed by The State Attorney, Pretoria.
For the Second Respondent:	Advocate GJ Marcus SC and Advocate S Budlender instructed by Mkhabela Huntley Adekeye Inc.
For the Fourth Respondent:	Advocate DN Unterhalter SC , Advocate AD Stein and Advocate N Rajab-Budlender instructed by Feinsteins Attorneys.