

The Islamic Unity Convention v the Independent Broadcasting Authority and Others

Case CCT 36/01

Explanatory Note

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This application for leave to appeal directly to this Court is concerned with the constitutional validity of a provision in the Code of Conduct of the Independent Broadcasting Authority (IBA). The South African Jewish Board of Deputies (the Board) complained to the IBA that an interview broadcast by radio 786, a community station owned by the Islamic Unity Convention (IUC), breached the relevant provision (clause 2[a]) in the Code that prohibits the broadcasting of material that is “likely to prejudice relations between sections of the population”. Before a formal enquiry could be held to deal with the complaint, the IUC launched proceedings in the High Court challenging the validity of the decision to hold the enquiry as well as the constitutionality of the relevant provision of the Code, claiming that it was a violation of the constitutional right to freedom of expression (section 16 of the Constitution).

The High Court, reasoning that it had a discretion under the Supreme Court Act, declined to decide the constitutional issue which it regarded as very important but academic. In a unanimous judgment of this Court (delivered by Langa DCJ), it was held on appeal that the validity of the clause had to be decided under the Constitution and not the Supreme Court Act. Nor was the question academic. The basis of the Board’s complaint was clause 2(a) and the High Court ought to have decided its validity in order to resolve the burning issue between the parties. The issue is important as it concerns the balancing of constitutional rights. Its resolution has implications going beyond the immediate needs of parties to the case. It was therefore in the interests of justice that the appeal should be dealt with.

Holding that it would be inappropriate, in the circumstances of this case, to conduct a broad-based examination of the whole of clause 2(a), the Court proceeded to consider whether the prohibition against the broadcasting of material that is “likely to prejudice relations between sections of the population”, is consistent with the Constitution. The Bill of Rights (section 16) protects freedom of expression but because of the potential of harm, excludes some material from its protection. It was held that the relevant portion of the clause limits the right since it was regulation of expression that is protected by the

right to freedom of expression. The question was whether the limitation was nevertheless constitutionally justifiable.

The Court noted that the regulation of broadcasting was a legitimate objective and was mandated by the Constitution because of its importance to national unity and the founding values of dignity, equality and freedom. It held nevertheless that the prohibition went too far and was not sufficiently focussed to guide broadcasters in what they may or may not broadcast. Since the prohibition was too intrusive and made serious inroads into the right to freedom of expression, the appeal had to succeed and the prohibition was declared unconstitutional and invalid. The declaration of invalidity was however made subject to the proviso that no protection is given to the broadcasting of material that amounts to propaganda for war, the incitement of imminent violence or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.