

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 81056/14

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|-----------|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED. |
| PP | 17/10/2017 |
| SIGNATURE | DATE |

In the matter between:

S.O.S SUPPORT PUBLIC BROADCASTING COALITION First Applicant

FREEDOM OF EXPRESSION INSTITUTE Second Applicant

THE TRUSTEES FOR THE TIME BEING OF THE

MEDIA MONITORING PROJECT BENEFIT TRUST Third Applicant

and

SOUTH AFRICAN BROADCASTING CORPORATION

SOC LIMITED First Respondent

MINISTER OF COMMUNICATIONS Second Respondent

HLAUDI MOTSOENENG Third Respondent

AND

| | |
|--|--------------------|
| S.O.S SUPPORT PUBLIC BROADCASTING COALITION | First Applicant |
| FREEDOM OF EXPRESSION INSTITUTE | Second Applicant |
| THE TRUSTEES FOR THE TIME BEING OF THE MEDIA MONITORING PROJECT BENEFIT TRUST | Third Applicant |
| and | |
| SOUTH AFRICAN BROADCASTING CORPORATION | |
| SOC LIMITED | First Respondent |
| MINISTER OF COMMUNICATIONS | Second Respondent |
| THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD | Third Respondent |
| THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA | Fourth Respondent |
| THE SPEAKER OF THE NATIONAL ASSEMBLY | Fifth Respondent |
| THE PORTFOLIO COMMITTEE FOR COMMUNICATIONS OF THE NATIONAL ASSEMBLY | Sixth Respondent |
| MINISTER OF TRADE INDUSTRY | Seventh Respondent |
| MINISTER OF PUBLIC ENTERPRISES | Eighth Respondent |

COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION

Ninth Respondent

RACHEL KALIDASS

Tenth Respondent

RONNIE LUBISI

Eleventh Respondent

JUDGMENT

MATOJANE J

[1] The two applications are instituted in the background of systematic and repeated failures in the governance and management of the SABC. This has presented itself in the continuous turn-over of Directors of the Board with resultant financial mismanagement. The critical systemic causes of governance failures and mismanagement were found to have been caused by Ministerial interference in the governance and operations of the SABC.

[2] The improper Ministerial interference in the affairs of the SABC was demonstrated in the report of the ad hoc Committee on the **SABC Board Inquiry into the fitness of the SABC Board**¹ which found that the previous Minister of Communications, Ms Muthambi unlawfully interfered in the affairs of the Board. At paragraph 39 of the report dealing with the role of the shareholder representative the report states:

“The Committee found that the Minister displayed incompetence in carrying out her responsibilities as Shareholder Representative. Evidence suggested major shortcomings in the current Shareholder Representative’s conduct particularly in relation to her apparent failure to lodge the October 2014

¹ FINAL REPORT OF THE AD HOC COMMITTEE ON THE SABC BOARD INQUIRY INTO THE FITNESS OF THE SABC BOARD, DATED 24 FEBRUARY 2017

amendments to the MOI, and her role in Mr Motsoeneng's permanent appointment as COO. The Committee is of the view that the Minister interfered in some of the Board's decision-making and processes and had irregularly amended the MOI to further centralise power in the ministry. In light of this, all political interference in the SABC Board's operations must be condemned and must be reported to the Ethics Committee for processing in line with its mandate. In addition, Parliament must refer any violations of the Constitution, Privileges Act, the Executive Code of Ethics and/or the Broadcasting Act to the Ethics Committee and/or the Presidency for processing and—if there is sufficient proof—ordering appropriate corrective action which could include but is not limited to the institution of charges”.

[3] The ad hoc committee report was preceded by the Public Protector's report on allegations of maladministration, systemic corporate governance deficiencies, abuse of power and irregular appointment of Mr Motsoeneng by the SABC, **“When Governance and Ethics Fail”** (17 February 2014)². The Public Protector's report demonstrates the history of Ministerial interference in the affairs of the SABC. She found that the previous Minister of Communications Ms Pule unlawfully interfered with the recruitment and appointment of a Chief Financial officer of the SABC in 2012. At page 14 of the report, the Public Protector reported that:

“Ms Duda, who was appointed to the position of CFO during February 2012, was not an applicant for the position, which was advertised. Interviews were conducted, and a recommendation was made by the SABC Board to the Minister of Communications, Ms Pule as the shareholder, to appoint Mr Msulwa Daca. Mr Phiri, from the Department of Communications and Mr Motsoeneng from the SABC, orchestrated the appointment of Ms Duda long after the recruitment and selection process had been closed. Ms Duda was interviewed on 07 February 2012, without having applied for the said position and was after the submission of the Board's recommendation of the appointment of a legitimately selected candidate, Mr Daca, submitted to Ms Pule on 31 January 2012, which, the recommendation was rejected by her. ”

The issues

[4] Both applications concern the constitutionality and lawfulness of the powers that the Minister of Communications (“the Minister”) exercises in respect of the Directors of the SABC Board.

²

A REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(11)(bb) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(11) OF THE PUBLIC PROTECTOR ACT, 1994

4.1 SABC 1 concerns the lawfulness of the powers vested in the Minister under SABC's Memorandum of Incorporation (MOI) and SABC Charter in respect of the appointment, discipline and suspension of the three Executive Directors of the SABC, being the GCEO, COO and CFO. The central issue in dispute is whether the powers vested in the Minister undermine the independence of the SABC, which the applicants and amicus contend is required by the right to freedom of expression (including the freedom of the media) under S16 of the Constitution. An ancillary issue is whether the Minister's powers contravene S13(11) of the Broadcasting Act, which provides that the SABC Board must "control the affairs" of the SABC.

4.2 Preliminary issues have also been raised by the Minister and SABC in the matter, namely: (i) the jurisdiction of this Court to entertain the dispute (as opposed to ICASA); (ii) the applicants' reliance on hearsay evidence; (iii) whether the application is ripe for hearing in light of proposed amendments to the Broadcasting Act.

[5] SABC 2 concerns the power of the minister to remove all of the Directors of the SABC Board, including the non-Executive Directors. The issue for determination is whether S71 of the Companies Act may be applied in the removal of Directors of the SABC, or whether the procedures under sections 15 and 15A of the Broadcasting Act must be followed. The applicants seek declaratory relief and the review of the removal decisions taken in respect of the tenth and eleventh respondents on 26 March 2015, on the basis that they were unlawfully removed in terms of section 71 of the Companies Act, and not in accordance with the procedure set out under section 15(1) of the Broadcasting Act.

5.1 In SABC 2, the Seventh Respondent (Minister of Trade and Industry) has raised preliminary issues. The Seventh Respondent has challenged the authority of the deponent to represent the applicants and contends that the alternative declaratory relief sought against him does not concern a live issue.

6. The nature of relief sought by the applicants

6.1 In **SABC 1**, the applicants seek orders declaring that certain clauses of the SABC's Memorandum of Incorporation ("MOI") (Clauses 13.5.1, 13.5.2, 13.5.3, 13.5.6, 13.5.7 and 13.6.3 of the Amended MOI) and SABC Board Charter (Clauses 8.2 and 11) are inconsistent with the Broadcasting Act 4 of 1999 and/or the Constitution and constitutionally invalid. The applicants seek the suspension of the declarations of invalidity for one year to allow the defects to be remedied, and a reading-in order is pending the remedying of the defects or the expiry of the one year period, whichever occurs first.

6.2 In **SABC 2**, the applicants seek a declaratory order that members of the SABC Board may not be removed save in compliance with sections 15(1) and (2) and 15A of the Broadcasting Act, and an order setting aside the Minister's removal of the 10th and 11th respondents from their positions as non-Executive Directors of the SABC. The applicants have also proposed alternative declaratory orders, to the extent they may be deemed appropriate. In particular;

6.2.1 A declaratory order that section 5(4)(b)(i) of the Companies Act is unconstitutional to the extent that it omits any reference to sections 15(1), 15(2) and 15A of the Broadcasting Act, with consequential relief; or

6.2.2 Orders declaring that the failure by the Minister of Communications, the Companies and Intellectual Property Commission and the Minister of Trade and Industry to totally exempt the SABC from section 71 of the Companies Act, in accordance with section 9(2)(a) and 9(3) of the companies Act, is unconstitutional and unlawful; and declaring that the SABC is totally exempt from section 71 of the Companies Act.

Preliminary Objections

The jurisdiction of the High Court

[7] The Minister contended that the applicants should have lodged the complaint with the Independent Communication Authority of South Africa ("ICASA") and has

accordingly fallen foul of the principle of subsidiarity by the not approaching ICASA as a tribunal of the first instance. The Minister asserts that "ICASA is created by statute to attend to, amongst others, the current complaint of the applicants on the issue of alleged impropriety and unlawfulness of the challenged clauses in the SABC MOI and Charter with the power to recommend to Parliament any amendment to policy and or the applicable statutes if this is apposite having regard to the complaint and public interest."

[8] The ICASA Act does purport to oust the power of this Court to determine the legal and constitutional issues arising in this matter even if ICASA has jurisdiction to determine some of the issues. There is a strong presumption against such ouster³. The Constitution empowers the High Court to decide any matter determined by an Act of Parliament⁴

[9] ICASA's mandate is to regulate electronic communications and postal services in the public interest. It is a licensing body of broadcasters, signal distributors providers of telecommunication services and postal services. It is a regulator and a quasi-judicial body because it licenses, regulates, adjudicates complaints and issues sanctions and gives effect to Electronic Communications Act⁵ 36 of 2005.

[10] ICASA is not empowered to determine and regulate the relationship between a broadcaster and its shareholders, nor between a broadcaster and the Executive, or the legal and constitutional issues arising in this matter. It is also not empowered to determine the constitutionality or otherwise of the governance and management structures of broadcasters, including the SABC.

[11] It follows that in the context of the present application, this court is empowered to grant the relief sought in the Notice of Motion. Accordingly, the Minister's contention that this court lacks jurisdiction must be dismissed.

³ *Metcash Trading Limited v CSARS* 2001 (1) SA 1109 (CC) at para 43

⁴ Section 170 of the Constitution states "All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct"

⁵ Section 34 of Act 36 of 2005

The proposed new broadcasting bill

[12] The Minister contends that the applicants' application is premature as she intends to amend or repeal the Broadcasting Act to provide a new framework for broadcasting in the public interest. According to the Minister, it will be in the interest of the applicants to participate in the intended process of the overhauling of the broadcasting policy "as this process unfolds rather than to use the court to deal with policy and legislative debates".

[13] The applicants do not invite the court to deal with policy and legislative debates but instead seek only a declaratory relief, coupled with an interim regime to allow Parliament, the SABC and the Minister an opportunity to remedy the provisions of the MOI and Board Charter that applicants contend are in breach of the Broadcasting Act, in particular, the Minister's appointment power and the quality of broadcasting service the SABC provides.

[14] The determination of the issues in these applications are of vital constitutional importance, and any future policies and legislative changes governing the SABC must be informed by the understanding of the correct constitutional position.

[15] The relief sought does not trench on the separation of powers, in those circumstances, the Minister's objection that in anticipation of a new Broadcasting Bill the issues in the present application should not be determined cannot be upheld.

The hearsay evidence

[16] The SABC and the Minister argued that certain facts pleaded in the founding affidavit did not fall within the personal knowledge of the deponent. In their founding papers applicants relies on evidence contained in publicly available press reports (including those released by the SABC) and reports published by reputable investigative bodies, including that of the Public Protector, the SIU, the Auditor General and PriceWaterhouseCoopers to corroborate allegations of financial

mismanagement, maladministration and corruption, and instability in the governance of the SABC.

[17] Applicants also rely on the widespread perception of interference by the Minister in the appointment of the Executive Directors and its detrimental impact on public confidence in the independence of the public broadcaster. The Minister sought to have this evidence disallowed and struck out. She does not, however, specify precisely which averments and annexures she seeks to have struck out.

[18] The applicants argue that it is in the best interest of justice for the evidence to be admitted, as it is the best evidence available to the applicants. The persons with first-hand knowledge of the Minister's involvement in the appointment of the Executive Directors and the Board are the Minister and the current and former members of the SABC Board. Duties of confidentiality⁶ constrain Board members past and present from disclosing relevant information to the applicants.

[19] The admission of the alleged hearsay evidence does not prejudice the Minister as she has direct and personal knowledge of the facts and is capable of answering the allegations.

[20] The Supreme Court of Appeal in **SABC v Democratic Alliance**⁷ criticised the Minister and the SABC for resorting to technical points to shield themselves from scrutiny. It stated:

"..... The Minister and chairperson of SABC Board are senior public office bearers, whose function it is to inspire confidence that all is well in public life. In those circumstances, we think it is unfortunate that they should have chosen to respond to the evidence as they did. Unlike the DA, they were present and intimately involved in what had transpired. In those circumstances, they owed not just the court but also their fellow citizens an explanation. In our view, the overriding public interest obliged them to make full and frank disclosure rather than shield themselves from scrutiny by resorting to technical points in opposition. After all, the information pertaining to Mr Motsoeneng's appointment was peculiarly within their knowledge".

⁶ See Clause 16.1.1 of the Amended MOI and clauses 8.6 and 8.7 of the Charter.

⁷ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA).

[21] The Constitutional Court in **Kaunda and Others v President of the Republic of South Africa**⁸ has sanctioned the use of reports by reputable international organisations as being materially relevant considerations in deciding human rights cases. The Court explained that:

“While this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case.”

[22] The above approach extends to the reports of the Public Protector, the Auditor-General, the SIU as well as the PWC report. These reports raise serious concerns which are relevant and in respect of which judicial notice is taken.

[23] In **Economic Freedom Fighters v The President of the Republic of SA and Others**⁹, the Constitutional Court held that “our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force”.

[24] The court, therefore, finds that these evidence falls to be admitted in terms of the Law of Evidence Amendment Act 45 of 1988 and dismisses the Minister’s objection.

The constitutional framework

⁸ (CCT 23/04) [2004] ZACC 5, 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) (4 August 2004)

⁹ (CCT 143/15, CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)

[25] Section 192 of the Constitution requires Parliament to 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”. The Independent Communications Authority of South Africa¹⁰ (“ICASA”) was enacted to give effect to section 192.

[26] The state fulfils its positive obligation in terms of the Constitution by mandating ICASA to regulate electronic communications and postal services in the public interest. ICASA is a licensing body of broadcasters, signal distributors providers of telecommunication services and postal services. It is a regulator and a quasi-judicial body because it licenses, regulates, adjudicates complaints and issues sanctions and gives effect to Electronic Communications Act¹¹ 36 of 2005.

[27] The Broadcasting Act (“the Act”) ¹² explains in its preamble that:

NOTING that the South African broadcasting system comprises public, commercial and community elements, and the system makes use of radio frequencies that are public property and provides, through its programming, a public service necessary for the maintenance of a South African identity, universal access, equality, unity and diversity;

ACKNOWLEDGING that the South African broadcasting services are owned and controlled by South Africans;

REALISING that the broadcasting system must reflect the identity and diverse nature of South Africa, is controlled and managed by persons or groups of persons from a diverse range of communities, including persons from previously disadvantaged groups, and must reflect the multilingual and diverse nature of South Africa by promoting the entire spectrum of cultural backgrounds and official languages in the Republic;

ENCOURAGING the development of South African expression by providing a wide range of programming that refers to South African opinions, ideas, values and artistic creativity by displaying South African talent in radio and television programming and by making use of radio frequencies that are public property and that provide a public service necessary for the maintenance of national identity, universal access, equality, unity and diversity; and

¹⁰ Established by the Independent Communications Authority of South Africa Act 13 of 2000

¹¹ Section 34 of Act 36 of 2005

¹² Act No 4 of 1999

RESOLVING to align the broadcasting system with the democratic values of the Constitution and to enhance and protect the fundamental rights of citizens:

[28] Section 1(2) of the Act provides that “Any interpretation of the provisions of this Act must be construed and applied in a manner which is consistent with freedom of expression and the journalistic, creative and programming independence of the broadcasters guaranteed by the Constitution.”

[29] Section 6(2) provides that the SABC “in pursuit of its objectives and exercise of its powers, shall enjoy the freedom of expression and journalistic, creative and programming independence.”

[30] The right to freedom of expression is the most important principle underlying the regulation of broadcasting. This right finds its most explicit expression in section 16 of the Constitution, which provides that:

“Everyone has a right to freedom of expression, which includes –

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

[31] Section 16 of the Constitution enshrines the right of the public, the SABC’s audience, to be able to access information and ideas so that they can enjoy their rights. The freedom to receive or impart information or ideas relates to the right of the SABC to communicate without interference, but also the right of the broader public to have access to the broadcast media.

[32] The Constitutional Court in **South African National Defence Union v Minister of Defence**¹³ explained the worth of freedom of expression as follows:

“Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition, and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society

¹³ (CCT27/98) [1999] ZACC 7, 1999 (4) SA 469, 1999 (6) BCLR 615 (26 May 1999)
the year you will

generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters

[33] The media is a bearer of the right to freedom of expression. It is also a bearer of constitutional responsibilities. In **Khumalo and Others v Holomisa**¹⁴, O'Regan J held:

"The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate.The media thus rely on freedom of expression and must foster it. In this sense, they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression".

[34] Justice O'Regan emphasized that the media has an obligation to citizens to promote their constitutional right to receive information and ideas by providing citizens with a platform for the exchange of ideas to promote plural programming. She continued at paragraph 24 and stated:

"In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgeling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16".

[35] Section 3(5) of the Act enjoins the SABC to ensure that members of the public have access to accurate, neutral and pluralistic information. It provides that the programming provided by the South African broadcasting system must-

- “(a) be varied and comprehensive, providing a balance of information, education and entertainment meeting the broadcasting needs of the entire South African population in terms of age, race, gender, interests, and backgrounds;
- (b) be varied and offer a range of South African content and analysis from a South African perspective;
- (c) must be drawn from local, regional, national and international sources;
- (d) provide a reasonable, balanced opportunity for the public to receive a variety of points of view on matters of public concern;”

[36] Section 10(1)(d) obliges the SABC to provide coverage of “significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests”;

[37] The SABC Shareholder Compact (concluded between the Government of the Republic as the sole shareholder of the SABC and the SABC) recognizes that “an appropriate balance must be struck between “the independence to manage the SABC, transparency in the management of the SABC and accountability to the Minister.

[38] Clause 8.1 of the SABC Board Charter provides that “the Board constitutes the fundamental base of corporate governance in the SABC. Accordingly, the SABC must be headed and controlled by an effective and efficient Board comprising Executive and Non-Executive Directors of whom the majority must be Non-Executive to ensure independence and objectivity in decision-making”.

[39] The ability of the SABC to reach a vast number of people renders it a powerful tool that potentially could impact on the quality of democracy if it is not independent and pluralistic because the majority of South Africans receive their news and information primarily through the SABC’s radio and television broadcasts. According to its annual report, the SABC has an average of 38.29 million adult listeners weekly, across its 18 radio stations. It has 19.925 million adult weekly viewers across its three free-to-air television stations and subscription news channel.

[40] The SABC has a unique role and responsibility to play as the public service broadcaster. The high rates of illiteracy in the country, the limited distribution and cost of newspapers and the cost of subscription television makes SABC be the primary source of information for the majority of South Africans.

[41] The Supreme Court of Appeal took cognisance of the special responsibility and functions of the SABC in **SABC v Democratic Alliance**¹⁵ and stated:

It is important to emphasise that this case is about a public broadcaster that millions of South Africans rely on for news and information about their country and the world at large and for as long as it remains dysfunctional, it will be unable to fulfil its statutory mandate. The public interest should thus be its overarching theme and objective. Sadly, that has not always been the case. Its Board has had to be dissolved more than once and its financial position was once so parlous that a loan of R1 billion, which was guaranteed by the National Treasury, had to be raised to rescue it. Here as well, the public interest appears not to have weighed with the Board of the SABC

[42] The SABC as a public service broadcaster must promote alternative views to encourage debate that is vital to the functioning of democracy. A healthy democracy requires that the public be able to discuss, share and receive information relating to political, social and cultural matters affecting their lives. The public broadcaster plays a crucial role in strengthening democracy and democratic governance by ensuring that the general public, in particular, those with neither political nor economic influence or power, have access to a broad spectrum of views on issues of public concern.

[43] The Act gives effect to this purpose of the public service broadcaster by requiring the SABC in section 6(4) to:

"encourage the development of South African expression by providing, in South African languages, a wide range of programming that-

- (a) reflect South African attitudes, opinions, ideas, values and artistic creativity;
- (b) displays South African talent in education and entertainment programmes

¹⁵ South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others 2016 (2) SA 522 (SCA)

- (c) offers a plurality of views and a variety of news, information and analysis from a South African point of view;

[44] The SABC is obliged to inform the public of all matters of public importance, and in particular of matters regarding the government of the day's performance. That will often include broadcasting that is critical of or disadvantageous to the government. The Constitutional Court in **South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others**¹⁶ has held that

"... everyone has the right to freedom of expression and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. The media thus rely on freedom of expression and must foster it. In this sense, they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression."

[45] At paragraph 28 the Constitutional Court held

"The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy. This was also recognized by the House of Lords in *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* that "[t]he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring." A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. These correspond to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness."

The SABC performs a watchdog function

[46] The SABC is required to perform a watchdog function by investigating and reporting on the maladministration, abuses of power and corruption as these are

¹⁶ (CCT58/06) [2006] ZACC 15, 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC); [2006] JOL 18339 (CC) (21 September 2006)

matters of public interest. The Constitutional Court in **Khumalo and Others, v Holomisa**, observed that :

"... the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require. As Joffe J said in *Government of the Republic of South Africa v "Sunday Times" Newspaper and Another* 1995 (2) SA 221 (T) at 227H - 228A:

"It is the function of the press to ferret out corruption, dishonesty, and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. . . . It must advance the communication between the governed and those who govern."

[47] As with the investigative agencies tasked with probing corruption and abuses of power, such as the Directorate of Priority Crimes investigation (DPCI or the Hawks) and the Independent Police Investigative Directorate (IPID), the SABC must be free from Executive control and influence to be able to perform its function.

[48] Unlike the Haws and IPID which do not have independent Boards and hence the Executive makes appointments, the SABC has an independent Board to govern it. The Board does not report to the Minister but to the National Assembly. The Board is meant to be strictly independent and does not have to work with other government agencies.

[49] *Glenister II*¹⁷ is concerned the question whether the national legislation that created the Directorate for Priority Crime Investigation, known as the Hawks and disbanded by the Directorate of Special Operations, known as the Scorpions is constitutionally valid. The constitutional court found that Chapter 6A of the South African Police Service Act as amended, is inconsistent with the constitution and invalid to the extent that it fails to secure an adequate degree of independence from the DPCI.

[50] The court reasoned that the constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised

¹⁷*Glenister v President of the Republic of South Africa and others* [2011] ZACC 6, 2011(3) SA 347 CC

crime. While the constitution does not in express terms commend that a corruption-fighting unit should be established, its scheme taken as a whole imposes a pressing duty on the state to set up a concrete effective and independent mechanisms to prevent and root out corruption. This obligation is sourced in the Constitution and international law agreements which are binding on the state.

[51] The Court found that the DPCI does not meet the constitutional requirement of an adequate independence. The main reason for this conclusion is that the DPCI was insufficiently insulated from political influence in its structure and functioning. This is because Cabinet must coordinate the DPCI's activities. The court held that adequate independence does not require insulation from political accountability but it does require "insulation from a degree of management by political actors that threaten imminently to stifle the independent functioning and operations of the unit"¹⁸.

[52] Similarly, for the SABC, the requirement of an independent SABC is implied in the duty of the state under section 7(2) of the Constitution to protect and promote the rights in the Bill of Rights, including the right to freedom of expression and a free press. Because the SABC is the medium that should allow the free flow of ideas that is necessary for our democracy to function, the state must ensure that it has the necessary structural and operational independence. The SABC will only have such independence if there are entrenched mechanisms to ensure that it provides accurate, neutral and pluralistic content.

[53] In the landmark case of the European Court of human rights in the case of **Manole a.o v Moldova**¹⁹ it was found that it is the State itself that must be the "ultimate guarantor of pluralism and that the State has a duty to ensure that the public has access to television and radio to impartial and accurate information and a range of opinions and comments, reflecting the diversity of political outlook within the country. Journalists and other professionals working in the audiovisual media should not be prevented from imparting this information and commentary..."Where the state

¹ Application no. 13936/02 of 17 September 2009

decides to create a public broadcasting system, the domestic law and practice must guarantee that the system provides a pluralistic audiovisual service²⁰

[54] Teleradio-Moldova ("TRM") which was created by Presidential decree as a state-owned company was as in the present case transformed into a public company. Nine journalists, editors, and producers, who were all employed by TRM, complained that the public broadcasting company was subjected to political control by the government and the ruling political party, with a lack of guarantees of pluralism in its editorial policy and news and information programmes.

[55] They also claimed that the political control over news and political information worsened after February 2001, when the Communist Party won a large majority in Parliament. Senior TRM management was replaced by those who were loyal to the Government, only a trusted group of journalists were used for reports of a political nature, which were then edited to present the ruling party in a favourable light, other journalists were reprimanded, interviews were cut and programmes were taken off the air, while opposition parties were allowed only very limited opportunities to express their views.

[56] After a strike by TRM journalists protesting against the government's media policy and control over TRM, a large number of journalists were not retained in their posts during a structural reorganisation of TRM. The journalists claimed that they were dismissed for political reasons and appealed the decision to court. They were unsuccessful, however.

[57] The nine journalists lodged an appeal to the European Court in March 2002, arguing that their right to freedom of expression has been violated, due to the censorship regime imposed on them. They also claimed that the Moldovan State had not discharged its positive obligations under Article 10 because it had failed to enact legislation which would offer safeguards against abusive interferences by public authorities.

²⁰ at par 107

[58] In its judgment, the European Court found that during the relevant period there was significant bias towards reporting on the activities of the President and Government in television news and other programming, with insufficient opportunity for representatives of the opposition parties to gain access to the television to express their views

[59] The court also found evidence of the policy of restricting discussion or mention of specific topics because they were considered to be politically sensitive or to reflect poorly in some way on the government. The court found that the applicants, as journalists, editors, and producers at TRM's television station, must have been affected by this policy's.

The right to vote

[60] The independent and pluralistic broadcaster is not only crucial for the right of freedom of expression and access to information. It is also vital to the citizen's right to vote and the right to free and fair elections in terms of section 19. **In President of the Republic of South Africa and Others v M & G Media Ltd**,²² the Constitutional court explained that:

"In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined".

[61] The SABC is the primary source of political information for the majority of South Africans. They cannot exercise their right to vote meaningfully without access to independent and pluralistic information and opinion. Justice Cameron held in **My Vote Counts**²³ that:

"Section 19(1) of the Constitution envisages that every citizen is "free to make political choices". This includes forming a political party, participating in a political party's activities, and campaigning for a

²¹ *Glenister v President of the Republic of South Africa and others* [2011] ZACC 6; 2011(3) SA 347 CC

²² (CCT 03/11) [2011] ZACC 32, 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011)

²³ *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 CC at para 39

political party or cause. It also includes, of course, the freedom to choose one's leaders. However, that choice, like all others, is valuable only if one knows what one is choosing. It loses its value if it is based on insufficient information or misinformation. ..."

[62] He continued at paragraph 40 and stated:

"The Bill of Rights also confers the right to freedom of expression. This Court has held that this right is what "makes [the right to vote] meaningful": only if the information is freely imparted, and citizens are kept informed, are their choices genuine. As Mogoeng CJ has also noted on behalf of the Court, "the public can only properly hold their elected representatives accountable if they are sufficiently informed of the relative merits" of the issues at stake. The same is necessarily true when the public decides which representatives to elect by exercising the right to vote."

[63] Without access to information about the conduct, opinions and relationships of political parties and the representatives, it is impossible for citizens to decide how to exercise their right to vote. If political or private interests govern the media, it cannot provide South Africans with the accurate, neutral and pluralistic information they require to make the right to vote meaningful.

Regional and International treaties

[64] South Africa has ratified some regional and international treaties that commit the state to promote free and professional public media which is impartial, independent accurate and reliable.

[65] The UNESCO **African Charter on Broadcasting**, 2001 declared the following principles for public service broadcasting:

1. All State and government controlled broadcasters should be transformed into public service broadcasters, that is accountable to all strata of the people as represented by an independent Board, and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race, and gender.
2. Public service broadcasters should, like broadcasting and telecommunications regulators, be governed by bodies which are protected against interference.

3. The public service mandate of public service broadcasters should be clearly defined.
4. The editorial independence of public service broadcasters should be guaranteed
5. Public service broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets

[66] **The African Union Charter on Democracy, Elections and Governance** 2007 requires State Parties to commit themselves to: “promoting freedom of expression, in particular freedom of the press and fostering a professional media” (Article 27(8), and enjoins States Parties to “ensure and promote ...dialogue between government , civil society and private sector (Article 28)

[67] **The African Union Convention on Preventing and Combating Corruption** 2003 recognises the importance of a free and robust media in the fight against corruption.

“Article 9 states “Each State Party shall adopt such legislative and other measures to give effect to the right of access to information that is required to assist in the fight against corruption and related offences

Article 12(2) further provides that: “ State parties undertake to create an enabling environment that will enable civil society and the media to hold governments to the highest level of transparency and accountability in the management of public affairs.”

[68] Principle 6 of **The African Commission Declaration of Principles on Freedom of Expression in Africa**, 2002 dealing with public broadcasting states amongst others that:

“State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

1. public broadcasters should be governed by a Board which is protected against interference, particularly of a political or economic nature;
2. the editorial independence of public service broadcasters should be guaranteed;

[69] **The Windhoek Declaration on Promoting an Independent and Pluralistic African Press** which was adopted on 3 May 1991 by African journalists and subsequently endorsed by UNESCO states:

"Consistent with article 19 of the Universal Declaration of Human Rights, the establishment, maintenance and fostering of an independent, pluralistic and free press are essential to the development and maintenance of democracy in a nation, and for economic development."

[70] **The Dakar Declaration on Media and Good Governance** adopted in 2005 called on UN member states- including South Africa:

"To respect the function of the news media is an essential factor in governance, vitality to increasing both transparency and accountability in decision-making processes and to communicating the principles of good governance to the citizenry"; and

"to create an enabling environment in which an independent, pluralistic and professional media sector can flourish."

[71] South Africa has ratified the **International Covenant on Civil and Political Rights (ICCPR)**. The body issues general comments sitting out state parties obligation under the Covenant. General Comment 34 was adopted in 2011 and interprets article 19 of the Covenant on freedom of opinion and expression. On the issue of freedom of expression and the media, the General Comment 34 states at paragraph 13:

"A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.²⁸ The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function.²⁹ The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. ³⁰ The public also has a corresponding right to receive media output."

[72] At paragraph 14 it reads:

"As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media."

The appointment of Executive Directors

[73] Part V of Chapter IV of the Broadcasting Act deals with the "Governance of the Corporation."

[74] Section 12 of the Act provides that the Board of the SABC is to consist of twelve non-Executive members and three Executive members, the latter three being the Group Chief Executive Officer ("the GCEO"), the Chief Operations Officer ("COO") and the Chief Financial Officer ("CFO") or their "equivalents" who will be members of the Board.

[75] Section 13 of the Act deals with the appointment of the twelve Non-Executive Directors of the SABC Board. It provides that the Non-Executive members of the Board must be appointed by the President on the advice of the National Assembly, after a public nomination process²⁴.

[76] The President's power to appoint the non-Executive members of the SABC is a purely formal power as the National Assembly is the appointing authority who interviews and selects candidates before forwarding their names to the President for their formal appointment. The President has no discretion but to appoint the candidates recommended by the National Assembly as it is the only authority that is empowered to interview and select candidates. The same principle applies to the appointment of judges of the High Court²⁵

[77] This approach is understandable and sensible because the National Assembly is made up of multiple political parties who appoint members who are acceptable to all parties. Section 13(4)(C) requires that there be a specific representation for minority parties by requiring that the non-Executive Directors must

²⁴ Section 59(1)(b) provides that the National Assembly must conduct its business in an open manner, and hold its sittings, and those of its committees, in public ...

²⁵ Section 174(3) of the Constitution

when viewed collectively" represent the broad cross-section of the population of the public".

[78] The Act is silent, however, on the appointment process to be followed in respect of the three Executive Directors. The roles and responsibilities of the Executive Directors are essential to the SABC's fulfilment of its mandate as a public service broadcaster. The roles of the Executive Directors of the SABC as set out in clause 11.1 of the Charter are set out as follows:

- 11.1.1 ensuring the Shareholder Compact and Corporate Plan of the SABC fully addresses the mandate and strategic objectives set by the Executive Authority;
- 11.1.2 timeously providing the Board with relevant and appropriate information to achieve the necessary strategic objectives and to comply with its legislative, regulatory and other obligations;
- 11.1.3 manage the business of the SABC, in accordance with the directives from the Board, and the Executive Authority"

[79] The SABC Editorial Policies describe the SABC GCEO's position as Editor-in-Chief and the "the daily practice of upward referral in editorial decision-making, is described as follows:

"The role of editor-in-chief is one of many responsibilities that GCEO assumes... The GCEO's role is not to make day-to-day programming or newsroom decisions. However, the Board of the SABC delegates responsibility, and holds accountable the GCEO for the performance of all news and other programmes broadcast presented on all SABC radio, television, internet and other multi-media platforms.

Even when specific editorial advice is not asked for, programmes or news items that are controversial, or likely to have an extraordinary impact, should be reported in advance to the senior news and programming Executives. They, in turn, may decide to notify top management."

"The daily practice of upward referral has evolved over time and has not been documented, or written into a manual or style guide. This practice will continue to develop, and as editorial policies are constantly updated to reflect the prevailing social values and international best practice, it will be refined further."

[80] The roles and responsibilities of the Executive Directors are essential to the SABC's fulfilment of its mandate as the public service broadcaster. They manage the finances and budget of the SABC, implement strategic priorities and performance targets and manage the day to day operations of the public broadcaster.

[81] The editorial powers of the GCEO trump that of the editors of the SABC editors and the GCEO is accountable for the performance for the performance of all news and other programmes broadcast on SABC radio, television, internet and any other platform. Significantly, controversial or impactful news items or programmes should be reported to senior management through an upward referral process

[82] The influence wielded by the Executive leadership over the content broadcast by the SABC can be easily abused as evidenced in the SABC's unfortunate history of internal censorship. Mr Motsoeneng who was appointed acting COO at the instance of Minister Muthambi directly intervened in SABC news, current affairs and programming and issues related to it.

[83] In December 2012, Mr Motsoeneng was mainly responsible for the termination of planned debate on Metro FM on the topic of media coverage of the ANC's Mangaung Policy Conference. Mr Motsoeneng intervened to prevent the debate from going ahead on the basis that the ANC was not the party to the debate even though some other political parties were also not the party to the debate.

[84] Also in December 2012, Mr Motsoeneng was reportedly directly responsible for the termination of Fish and Chips Company television advertisement broadcast on one or more of the SABC's television channels because he felt that it portrayed President Zuma and his family in a negative light.

[85] In August 2013, Mr Motsoeneng called for a 70% quota of "good news" to be broadcast on all SABC news programming, both radio, and television

[86] In April/May, Mr Motsoeneng was directly responsible for any number of incidents of censorship at the SABC in the lead up to the fifth democratic national elections including the refusal by the SABC to broadcast scenes of violence arising

out of service delivery protests in the banning of a Democratic Alliance advertisement.

The power of the Minister regarding the Executive Directors

[87] In terms of the Amended SABC's Memorandum of Incorporation ("MOI") and Board Charter, the Minister has extensive powers over the three Executive Directors of the SABC. Including over their appointments, terms, and conditions of appointment, discipline and suspension. The amendments to MOI in September 2014 by Minister Muthambi entrenched the Minister's power over the GCE CFO and COO, as well as over the SABC Board more generally. The relevant part of the MOI is quoted below

"Appointment of the GCEO, the CFO and the CEO

- 13.5.1 the GCEO, CFO and COO (as the case may be) shall be confirmed by the Minister before being appointed by the Board, pursuant to the board having embarked on the following process:
- 13.5.1.1 The Board shall present the terms and conditions of appointment ("the employment contract") to the Minister for approval prior to embarking on the process of recruiting suitable candidates;
 - 13.5.1.2 the Board shall advertise or employ any other executive search mechanism to source potential candidates; and
 - 13.5.1.3 the board shall conduct interviews and compile a shortlist of at least 3 (three) preferred candidates who are suitable to hold the contemplated position including any motivation that the board considers necessary to make.
- 13.5.2 the Minister is entitled to approve the division of 13.5.1.2 and 13.5.1.3 upon considering relevant factors.
- 13.5.3 the board may recommend less than 3 (three) candidates in the event of the Minister agreeing to a shorter list, and motivating reasons for an inability to provide at least 3 (three) candidates and the Minister shall be entitled to reject any of the candidates proposed in terms of paragraph 13.5.1.3 or the shorter list contemplated in this 13.5.2 of this Mol, with reason, save that the board or any person having an interest therein shall not be entitled to challenge the Minister on the reasons given, and in the event

that a candidate is rejected then the process shall be repeated in order to find a suitable candidate for the Minister's approval"

[88] The Minister has veto power over the appointment of the GCEO, COO and CFO. There is no limit on the number of candidates the Minister can veto. The Minister could prolong the selection process indefinitely. Under section 174 of the Constitution, the President is afforded only one opportunity to veto the nominations on the shortlist prepared by the Judicial Services Commission. (Clause 13.5.1).

[89] The Minister is permitted to manipulate the Board's interview and shortlisting process altogether and to accept recommendations of a single candidate. The Minister could effectively waive the requirement for the Board to advertise and shortlist candidates who apply for the positions of GCEO, COO and CFO. (Clause 13.5.2)

[90] The Minister's unfettered discretion in the appointment process is indeterminate, as no criteria are prescribed for the appointment of candidates to the Executive Director position. The Constitutional Court in *Dawood*²⁶ has held that the legislature should provide guidance as to when limitation of rights will be justifiable-

"...It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority"

²⁶ *Dawood and another v Minister of Home Affairs and Others* 2000(3) SA 936 (CC) at para 54

[91] This unfettered discretion was used in the appointment of Mr Motswening and Ms Duda who were both appointed at the instance of former Ministers Muthambi and Pule.

[92] Clause 13.5.3 of the MOI renders any decision taken by the Minister to reject the Board's recommended candidate immune from challenge by the "Board or any interested person".

[93] The Minister's veto power in the appointment of the Executive Directors is also sourced in the Board Charter

Clause 8.2 provides:

"The Board of the SABC has absolute responsibility for the performance of the entity and is accountable for such performance. As a result, the Board should give strategic direction to the SABC and, in concurrence with the Executive Authority [the Minister] and the President, appoint the Group Chief Executive Officer, the Chief Operating Officer and the Chief Financial Officer and ensure that an effective succession plan is in place and adhered to for all Directors and key Executives."

[94] Under Clause 13.1.1 and 13.4.4 the terms and conditions of the employment contracts of the GCEO CFO and COO are made subject to the Minister's approval.

[95] The Minister determines the duration of the employment contract subject to a maximum of five years (Clause 13.5.5)

[96] The reappointment of the GCEO, CFO, and COO, and terms and conditions of any re-appointment is subject to the Minister's approval (Clause 13.5.6 and 13.5.7)

[97] The institution of any disciplinary proceedings against, and the suspension of, the GCEO the CFO and COO is subject to the Minister's approval (Clause 13.6.3) and the appointment of an Acting GCEO, CFO or COO, and the extension of such appointments is subject to the Minister's approval (Clauses 13.7.1 and 13.7.2 and 13.7.4.

[98] Power is diverted away from the Board to the Minister and the Executive Directors. The Minister is now vested under clause 13.9.2 with the power to extend the term of office of a non-Executive Director beyond three terms (of not more than five years each), and the Executive Committee is now appointed by the GCEO and "the Board may give input to the GCEO on the composition of the Executive Committee.(Clause 11.3)

[99] Whereas previously the Board was explicitly required to approve the appointment of senior Executives at the level of General Manager, the Amended MOI now provides that "the powers to appoint and to discipline staff and members of the SABC management team is delegated to the GCEO CFO and COO and can only be revoked by the Minister.

[100] The Amended Mol extends new powers to the Minister over the administration and operations of the SABC Board. Specifically, the Board is required to seek the approval of the Minister should it wish to make any rules relating to the governance of the SABC (Clause 5)

[111] Whereas previously the number of meetings of the Board was determined solely by the Board." provided that the Board shall meet regularly and at least once a quarter" (Clause 16.1 of the previous Articles of Association, the Amended Mol requires the Board to develop an " annual meeting plan" and request the Minister's consent to any Board meetings in excess of the planned meetings (Clause 15.1.1 to 15.1.4)

[112] Whereas previously it was the sole prerogative of the Chairperson of the Board and the secretary at the request of a Director to convene a meeting (Clause 16.3) of the previous articles of Association, the Amended MOI entitles the Minister " at any time." to convene a meeting of the Board.

[113] Whereas previously the Board alone had the power to recommend the removal of a Board member (Clause 14.3.1.3) of the Amended Mol gives the Board or the Minister the power to do so.

[114] In terms of clauses 13.5.6 and 13.5.7 the Minister is vested with the power to determine whether an Executive Director should be reappointed, and the terms and conditions of such reappointment.

[115] Clause 13.6.3 of the Amended MOI provides:

"The Board shall have all the rights and powers to institute any disciplinary proceedings against the GCEO, CFO or COO (as the case may be) upon the approval of the Minister and also have the right and power to suspend the employment of the GCEO, CFO or COO up and approval of the Minister (as the case may be)" emphasis added.

[116] In terms of these provisions, disciplinary proceedings may be brought against an Executive Director only on approval of the Minister and an Executive Director may be suspended from office on the approval of the Minister.

[117] The powers granted to the Minister to appoint, re-appoint and discipline Executive Directors makes undermine the independence of the SABC which is required by the right to freedom of expression (including the freedom of the media) under S16 of the Constitution. This powers are inconsistent with the specific independence and pluralism required of public service broadcaster.

[118] In **Helen Suzman Foundation** in the Constitutional Court in dealing with the extension of tenure upheld HSF's challenges that section 17 CA(15) and 16 amounted to the renewal of the Head and Deputy Head of the Hawks' terms of office which undermines the operational independence of the Head and Deputy Head of the Hawks.

[119] The Court held that the Minister's power to remove the Head of the Hawks from office in section 17DA is a threat to his or her job security. The suspension and removal of the Head through a parliamentary process, however, guarantees job security and accords with the notion of adequate independence. The Court accordingly struck down the Minister's power to extend the term of office, as well as the Minister's power to suspend and remove the Hawks head from office without

parliamentary oversight. The Court retained the sections which provided for the Head of the Haws to be removed only by a two-thirds vote from Parliament.

The Effect of section 13(11) of the Broadcasting Act

[120] The SABC and the Minister contended that the effect of the Act's silence on the appointment of the Executive Directors is that the Broadcasting Act either permits or does not preclude the appointment process prescribed in the Amended MOI and the Board Charter.

[121] Section 13(11) stipulates: "The Board controls the affairs of the Corporation and must protect the matters referred to in section 6 of this Act". Section 13(11) must be read with section 6(2) which reads " The Authority must monitor and enforce compliance with the Charter by the Corporation" - the two sections requires the Board to control the affairs of the SABC and to ensure SABC's compliance with the Charter.

[122] The Minister, as the representative of the sole shareholder and not a member of the Board, does not have the right to act on behalf of SABC or to manage the its business or affairs. Section 66(1) of the Companies Act states that the business and affairs of a company must be managed by or under the direction of its Directors and that the Directors have the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or the Memorandum of Incorporation (MOI) of the company provides otherwise.

[124] Section 13(11) provides that the SABC Board is to control "the affairs" of the Corporation not only "the business" of the SABC. Didcot J in **Ex Parte Russlyn Construction (Pty) Ltd**²⁷ drew the distinction between the power to control the business of a company and the broader power to control its affairs: He stated that the power to manage all the 'affairs' of the company's business is a concept wider than the power to manage the company's business alone.

²⁷ 1987 (1) SA 33 (D) at 36 H

[125] The ultimate decision-making power is that of the Board and not the Minister as a sole shareholder save where the MOI provides otherwise. The Minister contends that her role in the appointment process is legitimate because she “represents the public interest and must vet candidates on behalf of South Africans”.

[126] In her engagement with the Board, the Minister represents of the sole shareholder of the SABC - the Government of the Republic of South Africa. It is Parliament, not the Minister that represents the public interest and performs an oversight role on behalf of the public. The Constitutional Court in *Glenister II* explained the difference between parliamentary oversight and that which the Executive exercises as follows:

“Under our constitutional scheme, Parliament operates as a counter-weight to the Executive, and its committee system, in which diverse voices and views are represented across the spectrum of political views, assists in ensuring that questions are asked, that conduct is scrutinised and that motives are questioned.”²⁸

“parliamentary committees comprise members of a diversity of political parties and views. No consolidated or hegemonic view, or interest, is likely to preponderate to the exclusion of other views. As importantly, parliamentary committees function in public. The questions they ask of those reporting to them aim at achieving public accountability. The Ministerial Committee, by contrast, comprises political Executives who function out of the public gaze. The accountability they seek to exact is political accountability. It is inimical to an adequately independent functioning of the DPCI.”

[127] The effect of section 13(11) therefore is to confer on the Board the exclusive power to control the affairs of the SABC. The Minister is accordingly precluded from exercising any powers by which she may control the Directors in how they control the affairs of the SABC.

The power of the Minister to remove the Directors, including the non-Executive Directors

²⁸ *Glenister II* at para 239 and para 243

[128] In March 2015 three non-Executive Directors of the SABC were removed without due regard to the provisions of section 15 of the Broadcasting Act. The SABC and the Minister submit that the removal of the three non-Executive Directors was lawful because the removal process under section 71 of the Companies Act²⁹ was followed.

[129] The applicants, on the other hand, argued that the removals were unlawful for non-compliance with the special provisions governing the removal of SABC Directors under sections 15 and 15A of the Broadcasting Act.

[130] Section 15 of the Broadcasting Act is headed removal from office and provides:

“(1) The appointing body may –

- (a) remove a member from the office on account of misconduct or inability to perform his or her duties efficiently after due inquiry and upon recommendation by the Board.
- (b) must remove the member from office after finding to the effect by a committee of the National Assembly and the Adoption by the National Assembly of a resolution calling for that member's removal from office in terms of Section 15A.”

[131] The Appointing body is defined in section 1 of the Act as “..... the body charged with the appointment of members of the Board in terms of section 13 of his Act.”

[132] Section 13, in turn defines the appointment procedure, and provides:

13. Members of Board—

- (1) The twelve non-Executive members of the Board must be appointed by the President on the advice of the National Assembly.
- (2) The non-Executive members of the Board must be appointed in a manner ensuring--
 - (a) participation by the public in a nomination process;
 - (b) transparency and openness; and
 - (c) that a shortlist of candidates for appointment is published, taking into account the objects and principles of this Act.

²⁹ Act 71 of 2008

[133] Section 15A deals with a resolution for the removal of a member in two ways, firstly, the appointing body conducts an inquiry and determines that member is guilty of misconduct and is unable to perform his or her duties efficiently and makes a recommendation to that effect to the President for that member's removal. (Section 15(1)(a))

[134] A committee of the National Assembly conduct an inquiry and makes a finding that a member is guilty of misconduct or is unable to perform his or her duties efficiently. The National Assembly adopted a resolution calling for that members removal. The president removes the member from office. Section 15(1)(b) and 15A

[135] Section 71 of the Companies Act prescribes two removal processes for Directors. Firstly, under s71(1)-(2) the removal by ordinary resolution is adopted at a shareholder's meeting (i.e removal by the Minister as the sole shareholder representative, on any ground, other than those specified in s71(3) subject to notice and comment procedure in s71(2).

[136] Secondly, under s71(3)-(4): Removal by the Board on grounds specified in s71(3) (negligence, dereliction of duty, disqualification, incapacity); Removal is by simple majority vote subject to the notice and comment procedure under s71(4).

[137] Section 32(2) of the Constitution require the court to interpret the Broadcasting Act in the manner that "promotes the spirit, purport an object of the Bill of Rights" and must give effect to section 192 of the Constitution which requires broadcasting to be regulated "in the public interest, and to ensure fairness and a diversity of views broadly representing South African society". As indicated earlier, the Broadcasting Act specifically require that its interpretation must be construed and applied in a manner which is consistent with freedom of expression and the journalistic, creative and programming independence of the broadcasters guaranteed by the Constitution.

[138] The Constitutional Court, in *Goedgelegen*³⁰, per Moseneke DCJ, remarked:

“We must seek to promote the spirit, purport, and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and the statute as a whole, including its underlying values.”

[139] Sections 15 and 15A of the broadcasting Act ensures that there is a level of oversight in the removal of an SABC Director, neither the Minister or the Board can remove the Director unilaterally. Removal requires an inquiry and must be based on specified, objective grounds for removal and where the National Assembly recommends removal, the President has no discretion and must remove the Director from office.

[140] Section 71 of the Companies Act on the other hand, empower the Minister to remove any member of the Board, for any reason, subject only to the requirement of notice under section 71(2). The Board is empowered to remove any member of the Board, inter alia, for negligence or dereliction of duty by a simple majority, subject only to the requirement of notice and comment under section 71(4).

[141] The removal provisions of the Companies Act cannot be construed as applying to the SABC because the Broadcasting Act prevails over the Companies Act as it was specifically enacted to govern the operations of the SABC. The removal processes prescribed under the Companies Act denies members of the SABC Board security of tenure and thus undermine the independence of this SABC Board in a manner that is inconsistent with the Constitution.

³⁰ Department of Land Affairs v Goedgelegen Tropical Foods 2007 (6) SA 199

[142] The Broadcasting Act is the specific legislation enacted by Parliament in respect of the national public service broadcaster, with the broadcasting services to be “owned and controlled by South Africans”. It was also enacted to encourage the development of the right to freedom of expression through a plurality of views. It has detailed provisions governing the appointment of members of the SABC Board which are enacted to ensure that the objects of the Broadcasting Act in section 16 of the Constitution are met.

[143] By permitting the removal of a board member unilaterally at the instance of the Minister as sole shareholder and removal by simple majority vote of the Board, section 71 undermines their independence. The threat of removal without any oversight, on any ground, and without due enquiry, would render Board members not likely to express views not aligned with that of the government or the majority Board members.

[144] Section 5(4)(b)(i) of the Companies Act provides for certain statutes and provisions in other statutes to prevail in the event of inconsistency with the provisions of the Companies Act. Section 9(2)(a) and (3) of the Companies Act provide for the total, partial or conditional exemption of state-owned companies from the Companies Act. Such exemptions may be granted by the Minister of Trade and Industry, by notice in the Government Gazette, upon the request of the Minister responsible for state-owned companies and on the advice of the CIPC.

[145] The Broadcasting Act is not listed under section 5(4)(b)(i) of the Companies Act, according, none of the provisions of the Broadcasting Act, is made applicable in the event of inconsistency with the Companies Act. This bridges section 7(2) and 16 of the Constitution and the relevant provisions of the Companies Act are invalid to this extent.

Order

[146] The following order is made:

In respect of **SABC 1**

1. Clauses 13.5.1, 13.5.2, 13.5.3, 13.5.6, 13.5.7, and 15.6.3 of the Amended Memorandum of Incorporation of SABC and SABC Board Charter are declared inconsistent with the Broadcasting Act 4 of 1999 and are invalid.
2. the declaration of invalidity is suspended for a year to allow for the defects to be remedied.
3. the executive members of the Board are to be appointed solely by the non-executive members of the board and without any requirement of approval by the Minister.
4. Before appointing any person to the position of executive director on a permanent basis, the non-executive members of the board shall follow a process which ensures transparency and openness, including publicly advertising the position in, among other things, the Government Gazette, and conducting interviews of suitable candidates, taking into account objects and principles of the Broadcasting Act.
5. Where it is necessary for the non-executive members to appoint a person to the position of Executive director on an interim basis, such person may not serve in such temporary position for more than four months.
6. in respect of the Minister's disciplinary powers under clause 13.6.3 of the amended memorandum of Incorporation, the words " upon the approval of the Minister" are struck out pending the remedying of the defects, or the expiry of the one-year period ever occurs first. The provision read thus " the board shall have all the rights and powers to institute any disciplinary proceedings against the GCEO, CFO or COO (as the case may be) and also have the right and power to suspend the employment of the GCEO, CFO, or COO (as the case may be)

In respect of **SABC 2**

1. It is declared that members of the SABC Board may not be removed save in compliance with sections 15(1) and 2 and 15A of the Broadcasting Act.
2. The removal of 10th and 11th respondents from their positions as non executive directors of the SABC are reviewed and set aside as they were unlawfully taken under section 71 of the Companies Act and not in accordance with the mandatory procedure set out in s 15(1) of the Broadcasting Act.
3. The 10th and 11th respondents are not to be re-instated to their previous positions in the Board.
3. The first and second respondents are ordered to pay the costs of both applications.



K Matojane

Judge of the High Court

APPEARANCES:

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