THE COMPLAINTS AND COMPLIANCE COMMITTEE
AT THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

24 February 2016 CASE NUMBER: 195/2016

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE MEDIA MONITORING PROJECT BENEFIT TRUST First Complainant

S.O.S SUPPORT PUBLIC BROADCASTING COALITION Second Complainant

FREEDOM OF EXPRESSION INSTITUTE Third Complainant

and

SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED Respondent

CCC Members: Prof Kobus van Rooyen SC (Chairperson), Councillor Nomvuyiso Batyi, Mr Jack Tlokana and Mr Jacob Medupe

CCC: Coordinator: Ms Lindisa Mabulu

For the Complainants: G Marcus SC and with him Adv. Ndumiso Luthuli instructed by Webber Wentzel (Dr Dario Milo)

For the Respondent: BR Tokota SC and with him Adv. Z Madlanga instructed by Mchunu Attorneys (Mr Titus Mchunu)

JUDGMENT

JCW VAN ROOYEN

INTRODUCTION

[1] This Complaint, which was lodged on 1 June 2016, concerns the alleged omission to discharge its legal duties by the South African Broadcasting Corporation ("SABC"). The Complainants stated in their founding affidavit that the matter was extremely urgent. After obtaining

its view on urgency from the SABC – which denied that the matter was urgent - I ruled on the 14th June that the matter was urgent and, after exchange of affidavits, the Complaints and Compliance Committee ("CCC"), an independent administrative tribunal[1] at ICASA, heard the matter on 24 June. My decision that the matter was urgent was based on the uncertainty which was created from an information perspective by a statement issued by the SABC that the showing of the burning of public institutions as a result of service delivery protests would not be included in its broadcasts. During the hearing it was pointed out by *Mr Tokota SC*, acting for the SABC, that the term "cover" meant visuals of such destruction and that such events would, in the normal course, be reported on.

[2] Initially counsel for the SABC argued that the CCC does not have the authority to set aside the decision by the SABC. It is true that the CCC does not have the authority to order the SABC to withdraw the decision. The CCC is, however, mandated by the ICASA Act to investigate, and if appropriate hear, and make a finding on the merits of a complaint which is received by it. Since the SABC is a licensed broadcaster it falls within the jurisdiction of the CCC.[2] That the CCC (and thus also Council of ICASA for purposes of an order as and if advised by the CCC) has jurisdiction over editorial decisions of the SABC has been confirmed by the High Court in *Freedom of Expression Institute v Chairperson of the Complaints and Compliance Committee*.[3] The task of the CCC is to establish whether the SABC has overstepped its powers in the Broadcasting Act 1999 and/or its licences. If the CCC finds that it has not overstepped its powers, the matter is closed and Council of ICASA is informed of its decision. Where the CCC finds that the SABC has overstepped its powers, it makes a finding on the merits against the SABC and then puts forward an appropriate order to the Council of ICASA within the terms of section 17D(3) and 17E(2) of the ICASA Act 2000. The Council then considers that order and, if it agrees with it, makes the order. Thereafter the

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[1] *Islamic Unity Convention v Minister of Telecommunications 2008 (3) SA 383 (CC).*

[2] Licensees in terms of the ICASA Act and the underlying statutes (the Broadcasting Act 4 of 1999 and the Electronic Communications Act 2005).

[3] [2011] Judgments Online 26704(GSJ).

Coordinator of the CCC will issue this judgment on the merits of the complaint plus the order, if applicable.

[3] The Complainants have based their case on the legal question whether the SABC has overstepped its powers as set out in the Broadcasting Act 4 of 1999 and/or its licences. Of course, the powers must also, in terms of section 39(2)[4] of the Constitution of the Republic of South Africa 1996 ("the Constitution"), be interpreted in terms of the relevant provisions of the Constitution – and for purposes of this matter, especially sections 16 and 192.[5]

[4] On Thursday 26 May 2016, the SABC issued a media statement regarding its new approach to the broadcast of violent protest action. It stated:

"SABC WILL NO LONGER BROADCAST FOOTAGE OF DESTRUCTION OF PUBLIC PROPERTY DURING PROTESTS

Johannesburg- Thursday, 26 May 2016-The South African Broadcasting Corporation (SABC) has noted with concern the recent turmoil arising from violent service delivery protests in various parts of the country. The SABC as a public service broadcaster would like to condemn the burning of public institutions and has made a decision that *it will not show footage of people*

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[4] Section 39 provides as follows:

Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum:-
  (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  (b) must consider international law; and
  (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. (emphasis added)

[5] Section 192 provides as follows:

192. Broadcasting Authority

"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." Initially the Independent Broadcasting Authority Act 1993 and later amended by the Independent Communications Authority of South Africa Act 2000. Initially the BMCC was the independent Tribunal which heard complaints against broadcasters. As from 2006 the Complaints and Compliance Committee, once again an independent tribunal, substituted the BMCC and was also granted jurisdiction over licensees within the electronic media and the SA Post Office.

burning public institutions like schools in any of its news bulletins with immediate effect. We are not going to provide publicity to such actions that are destructive and regressive.

The SABC is cognisant of the fact that citizens have constitutional rights to protest and voice their concerns on various issues that they are not happy with but we also do not believe that destruction of property is the best way to voice those grievances. These actions are regrettable and viewed as regressive on the developments made after 22 years of South Africa's democracy. *Continuing to promote them might encourage other communities to do the same. The SABC would like to stress that we will continue to cover news without fear or favour. We will not cover people who are destroying public property.*

The SABC's Chief Operations Officer, Mr Hlaudi Motsoeneng stated that "It is regrettable that these actions are disrupting many lives and as a responsible public institution *we will not assist these individuals to push their agenda that seeks media attention. As a public service broadcaster we have a mandate to educate the citizens, and we therefore have taken this bold decision to show that violent protests are not necessary.* We would like to encourage citizens to protest peacefully without destroying the very same institutions that are needed to restore their dignity".

The SABC would like to make an appeal to other South African broadcasters and the print media to stand in solidarity with the public broadcaster not to cover the violent protests that are on the rise and in turn destroying public institutions." (Emphasis added in italics)

[5] It was argued by *Mr Marcus SC,* representing the Complainants, that the policy, which includes a resolution, is not only in conflict with the duties of the SABC in terms of the Broadcasting Act and its licences, but also with the constitutional principle of freedom of expression and freedom to receive information or ideas. The decision of the SABC, it was argued, also takes South Africa back to deplorable apartheid bans on news and comment, whether by the then SABC, apartheid laws or regulations. On the other hand *Mr Tokota SC,* representing the SABC, argued that common sense dictates that where television cameras are present they contribute to the zest with which protesters act and would attack public institutions and, for example, set them alight or destroy them. He also added that from the perspective of the protection of children against scenes of violence on television and the protection of SABC journalists against violence in such situations, the decision of the SABC made sense. These points were, of course, not mentioned in the decision as published in the press statement. *Mr Tokota* conceded that he did not have expert evidence available that cameras at the scenes of violence or destructive

scenes on television promoted violence, but argued that this approach, in any case, accorded with common sense. Counsel also mentioned that given the urgency of the matter, it was impossible to obtain such expert evidence.

[6] *Mr Marcus* also commented on the following aspects of the policy decision:

1.1 It seeks to eliminate from public view an entire category of acts of public protest – *"it will not show footage"*; *"[w]e are not going to provide publicity"*; *"[w]e will not cover"*. This approach has been taken, it was argued, even though the SABC expressly acknowledges that the protests are *"service delivery protests"*.

1.2 It is ideologically driven – *"we also do not believe that destruction of property is the best way to voice those grievances"*; *"[t]hese actions are regrettable and viewed as regressive"*; the SABC also appeals to other broadcasters and print media to *"stand in solidarity with the public broadcaster"*.

1.3 This approach, which was argued to be a "blanket" approach, has been continued in the answering affidavit. This is plainly, according to *Mr Marcus*, demonstrated by the following paragraphs:

1.3.1 "[w]hat is sought to be curtailed is the *coverage* of destructive and regressive conduct on public institutions";

1.3.2 "SABC... will not cover people who are destroying public property";

1.3.3 "SABC *will not cover violent protests that are destroying public properties*";

1.3.4 respondents admit that under the Policy it will not provide *"coverage of destruction of public institutions"*. (Emphasis added in italics)

1.4 *Mr Marcus* further argued that the fallacy underlying the Policy is that covering violence breeds more violence. But the SABC has not, *Mr Marcus* argued, produced a single piece of evidence to suggest that this is so. The SABC bears the onus, according to *Mr Marcus,* to produce this evidence and its failure to do so renders the Policy irrational and unlawful. It should be mentioned that since the CCC has an investigative function, which must be exercised with fairness, the traditional approach in Court matters in so far as onus is concerned, is not followed. The fact that the SABC has not provided any expert evidence as to its claim is a factor which must be taken into consideration in this process. At the core of the matter, however, lies the question whether the SABC was permitted in law to ban a whole category of action by protesters. We will return to this later on in the judgment.

1.5 The Policy statement is, according to *Mr Marcus*, nakedly biased in its refusal to portray truth and reality; in fact, that this approach has no place in our constitutional democracy. At the outset it was stressed by counsel that this complaint is not about whether the SABC must cover each instance of graphic violence which occurs during a service delivery protest – that has never been the complainants' case. Rather, this complaint is about a narrower issue: whether the SABC is empowered to adopt – in advance – a blanket ban on covering an entire category of conduct.

CONSITUTIONAL BACKGROUND

[7] As an administrative tribunal, the CCC: must interpret the Broadcasting Act in a manner that "*promote[s] the spirit, purport and objects of the Bill of Rights*" as required by section 39(2) of the Constitution; 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*". In doing so the CCC must seek to align broadcasting with the democratic values of the Constitution and to enhance and protect the fundamental rights of citizens.[6]

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[6] Preamble to the Broadcasting Act.

[8] Central to this matter is the media's crucial role in our constitutional democracy and the likely impact of the Policy on the capacity of the SABC to fulfil that role. The importance of the free flow of information, particularly information in the public interest, has been widely acknowledged by our courts. In this regard the Constitutional Court has held that the right to freedom of expression and freedom of information under section 16 of the Constitution lie at the very heart of our democracy, since individuals in society need to be able to hear, form and express views freely on a wide range of matters.[7] In *Khumalo and Others v Holomisa*,[8] the Constitutional Court put it thus:

> 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..." (Italics added)

[9] Our courts have repeatedly stressed this pivotal role of the media: it is the watchdog of society, keeping check over the government by keeping the public informed of all matters of public importance and, in particular, allegations regarding the government of the day's performance. Our courts have made the following observations:

(a)The Constitutional Court has held that the very ability of each citizen to be a responsible and effective member of society "*depends on the manner in which the media carry out their constitutional mandate. The media thus rely on freedom of expression and must foster it.*"[9]

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[7] *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) at para 7.

[8] 2002 (5) SA 401 (CC) at paras 22 – 24. See also: *S v Mamabolo 2001 (3) SA 409 (CC)*; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

[9] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para 24.

(b) On the role of a healthy press in the functioning of society the Constitutional Court has stated: *"one might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public's right to a healthy unimpeded media."*[10]

(c)If the media did not properly keep the public informed of matters of public interest, the public would be severely stilted in making real and informed choices about the governance of our democracy.[11]

(d) It has further been stated that "[t]he success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed also, if those criticisms are to be effectively voiced, and if they are to be informed with the factual content and critical perspectives that investigative journalism may provide."[12]

(e) Chief Justice Mogoeng in ***Oriani-Ambrosini v Sisulu***[13] captured the transition to democracy thus:

> "The need to recognise the inherent value of representative and participatory democracy and dissenting opinions was largely inspired by this nation's evil past and our unwavering commitment to make a decisive break from that dark history. South Africa's shameful history is one marked by authoritarianism, not only of the legal and physical kind, but also of an intellectual, ideological and philosophical nature. The apartheid regime sought to dominate all facets of human life. It was determined to suppress dissenting views, with the aim of imposing hegemonic control over thoughts and conduct, for the preservation of institutionalised injustice."[14]

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[10] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 54.

[11] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 22; *NM and Others v Smith and Others* 2007 (5) SA 250 (CC) at para 145.

[12] *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 608.

[13] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC).

[14] At para 49.

(f)The rejection of thought control is at the heart of freedom of expression in a constitutional democracy. In **S v Mamabolo**[15] Kriegler J, on behalf of the majority of the Constitutional Court, stated:

> "Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the *open market-place of ideas* is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore, we should be particularly astute to outlaw any form of thought-control, however respectably dressed."[16] (Italics added)

[10] It necessarily follows from the above that the role of the public broadcaster is critical in empowering every citizen to be able to exercise her or his right to freedom of expression. They can only exercise this right if they have the opportunity to be informed. There is no gainsaying that this role is particularly important in the South African environment, given that large numbers of South Africans receive their news primarily from the SABC.

THE SABC'S OBLIGATIONS

[11] The SABC has a number of obligations in terms of the Broadcasting Act and its licences. As a background to the obligations of the public broadcaster the Constitution envisions an independent authority to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society.[17] Initially the Independent Broadcasting Authority was established in 1994 and it was succeeded in 2000 by ICASA. For a closer look at the obligations of the SABC, it is important to refer to relevant provisions of the Broadcasting Act 1999:

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[15] *S v Mamabolo* 2001 (3) SA 409 (CC).

[16] At para [37].

[17] S 192.

(a) Section 10(1)(d) of the Broadcasting Act imposes on the SABC an obligation 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".

(b)This provision is strengthened by other provisions of the Broadcasting Act: Section 6(4)(c) and (d) enjoin the SABC to "encourage the development of South African expression by providing, in South African official languages, a wide range of programming that *offers a plurality of views and a variety of news, information and analysis from a South African point of view, and advances the national and public interest*." Furthermore, section 6(8)(f) requires the SABC to develop a code of practice that ensures that the services and personnel comply with *"a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest"*. (Italics added)

(c) In addition to the obligations imposed by the Broadcasting Act, the SABC is subject to the provisions contained in its licenses. In terms of its licence conditions,[18] the SABC is required in the production of its news and current affairs to: meet the highest standards of journalistic professionalism;[19]provide fair, unbiased, impartial and balanced coverage independent from governmental, commercial or other interference;[20] *and provide a reasonable opportunity for the public to receive a variety of points of view on matters of public concern.*[21] (Italics added)

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[18] Clause 4.5 of the SABC 1 license and SABC 2 licence and clause 4.7 of the SABC 3 licence.

[19] Clause 4.5.3 of SABC 1 licence (at p 31) and clauses 4.5(c) of the SABC 2 license (at p 37); and clause 4.7(c) of the SABC 3 licence.

[20] Clause 4.5.4 of SABC 1 licence at p 31 and clauses 4.5(d) of the SABC 2 licence (at p 37) and clause 4.7(d) of the SABC 3 licence.

[21] Clause 4.5.5 of SABC 1 licence and clauses 4.5(e) of the SABC 2 license and clause 4.7(e) of the SABC 3 licence.

A breach of any of these obligations, in terms of the Broadcasting Act or licences is justiciable by the CCC.[22]

[12] Section 39(2) of the Constitution requires – as stated above - that when interpreting any legislation, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights. This duty is one in respect of which *"no court has a discretion"* and must *"always be borne in mind."* The obligations imposed by section 39(2) of the Constitution are twofold:

(a) In terms of the ***Hyundai***[23] obligation, where a court is faced with two interpretations - one of which is constitutionally valid and one of which is not - the courts must adopt the constitutionally valid interpretation provided that to do so would not unduly strain the language concerned.[24]

(b) In terms of the ***Wary***[25]obligation, where a provision is reasonably capable of two interpretations, section 39(2) requires the adoption of the interpretation that *"better"* promotes the spirit, purport and objects of the Bill of Rights.

[13] In recognising the special role played by the SABC, the Constitutional Court in *SABC v National Director of Public Prosecutions & others*[26] stated the following:

> Ultimately, however, *what is central to the issue is not the responsibility and rights of the SABC as a broadcaster. What is at stake is the right of the public to be informed*

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[22] *Freedom of Expression Institute v Chair, Complaints and Compliance Committee* [2011] JOL 26704 (GSJ).

[23] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd : in re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at paras 22 – 23.

[24] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & Others* 2009 (4) SA 222 (CC) at paras 82 – 84.

[25] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107; See also *Fraser v Absa Bank Ltd (NDPP as amicus curiae); Arse v Minister of Home Affairs and Others* 2010 (7) BCLR 540 (SCA) at para 10.

[26] 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at paras 26-28.

and educated as is acknowledged in the Preamble to the Broadcasting Act which reads–

"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 . . ."

The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy." (Italics added)

CONCLUSION

[14] In the view of the CCC all of this means that the SABC's obligations under the Broadcasting Act and its licences must be interpreted in a manner that promotes freedom of expression, which inter alia includes, according to section 16 of the Constitution, (a) freedom of the press and other media; and, *importantly* (b) freedom to *receive* or *impart* information *or ideas*.

[15] What the CCC has to decide is whether the policy statement, which obviously repeats or embodies an instruction to the newsroom of the SABC, is in conflict with the Broadcasting Act and the SABC's licences. A conflict with any one of the two would suffice. The Broadcasting Act must also, as noted above, in terms of section 39(2) of the Constitution, be interpreted by the CCC in a manner that promotes the spirit, purport and objects of the Bill of Rights. In ***SABC v National Director of Public Prosecutions & Others***[27] the Constitutional Court observed that –

"This Court has also highlighted the particular role in the protection of freedom of expression in our society that the print and electronic media play. Thus 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."[28] (Italics added)

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[27] [2006] JOL 18339 (CC)

[28] At para 24, footnotes omitted

[16] In ***Islamic Unity Convention v Independent Broadcasting Authority and Others***[29] Langa DJC (as he then was) stated the following in a matter that concerned the validity of the then Broadcasting Code:

> "South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as "one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members . . ." As such it is protected in almost every international human rights instrument. In *Handyside* v *The United Kingdom* (1976) 1 EHRR 737 at 754 the European Court of Human Rights pointed out that this approach to the right to freedom of expression is –
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> *'applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."*[30] (Italics added)

[17] Given the breadth of the right to freedom of expression and *"what is central to the issue is not the responsibility and rights of the SABC as a broadcaster but the right of the public to be informed,"*[31] it is clear to the CCC that particular focus should be placed on ensuring that accurate information, with the scenes of service delivery protesters burning public property, is broadcast to the public and that, where a breach of these duties is clear, it should advise Council to compel the SABC to give effect to the citizen's fundamental right to receive even *offending, shocking or disturbing* information as long as it enjoys the protection of section 16 of the Constitution read with the Broadcasting Code of the BCCSA.

[18] *Prior restraint*. The present matter is similar to the case concerning blacklisting by the SABC – *Freedom of Expression Institute v Chair, Complaints and Compliance Committee.*[32] Here, as in that case, the head of news of the SABC had – *in advance* – banned a category of coverage. Our courts have held that where forms of expression are cut off before reaching the public, this is known as a *"prior restraint"* and that such restraint would be permitted only in truly exceptional circumstances. In

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[29] 2002 (5) BCLR 433 (CC).

[30] At para 28.

[31] *SABC v NDPP* at para 27.

[32] Supra

the present context, the SABC has *categorically* imposed an absolute restraint on its newsroom and there is nothing in the Broadcasting Act or the licences that permits this. Although it is true that the "prior restraint" was not imposed by an external body – as was the case in *Print Media South Africa v Minister of the Interior and Another*[33] - the effect on the newsroom is the same. In fact, at the core of the matter lies the categorical ban on such material - like the legislative ban which was imposed on quoting persons listed in terms of the security legislation in apartheid times. There was no choice granted to newspapers to publish statements by these persons, even if they were politically irrelevant. This amounted to nothing else than absolutism which was typical of a tyrannical regime. Such absolutism is totally foreign to our new democracy based on freedom of expression and especially, for this case, the right to receive information which is in the public interest - the latter test not amounting to that which is "interesting to the public" but that which serves to inform the public.[34] When the duties under the Broadcasting Act and the licences of the SABC are judged as a whole, there is one basic message: inform when it is in the public interest. The CCC has no doubt that that includes the duty to inform the viewing and listening public when public buildings are set alight or otherwise destroyed as part of a service delivery protest. Why should the public not be informed of this action – illegal as it is – so that it may be part of an open society where good and bad is broadcast so that choices may be made? In fact, the right to freedom of expression is meaningless if there is

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[33] 2012 (6) SA 443 (CC)

[34] See *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) Corbett CJ said in delivering the majority judgment (at 464C-D): "(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known . . .(2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest..." Quoted with approval by Hoexter JA in *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A) at 779 and Hefer JA in *National Media Ltd v Bogoshi & Others 1998(4) SA 1196(SCA) at 1212* where reference is made to Asser *Handleiding tot de Beoefening van het Needelands Burgerlijk Recht (9th Ed vol III at 224 para 238 which, translated, reads as follows:*

"In practice the public interest is especially employed in matters concerning views expressed via die printed media and television: public interest is, within this context, based on freedom of expression, as guaranteed by the Constitution and by treaties, to expose alleged abuse (and or evil in society).In deciding whether the defence of public interest was lawful usually depends on a balancing of interests – the outcome of which is dependent on the facts of each case.

not also a right, and thus a duty, to be informed as to matters of public interest– as, in fact, the Constitution of the Republic guarantees. In *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)*[35] the Supreme Court of Appeal stated that *"[m]ere conjecture or speculation that prejudice might occur will not be enough."* It is our view that at the most the argument of the SABC in regard to the covering or showing of the burning of public property would fall in the category stated by Nugent J in the said judgment. The Court held that these principles apply, appropriately adapted, *"wherever the exercise of press freedom is sought to be restricted in protection of another right."*[36]

[19] In ***Print Media South Africa***,[37] after reviewing various authorities, the Constitutional Court held that -

> *"The case law recognises that an effective ban or restriction on a publication by a court order even before it has "seen the light of day" is something to be approached with circumspection and should be permitted in narrow circumstances only."*[38]

The SABC has the power to limit visual material in appropriate circumstances where it amounts to a contravention of the BCCSA Code or, in a time of elections, where the material is in conflict with sections of the Electronic Communications Act which deal with elections. However, it has no authority in law to ban an entire category of material in advance.

[20] Lastly, this Tribunal was referred to an earlier matter that was before it and was taken on review to the High Court - ***Freedom of Expression Institute v Chair, Complaints and Compliance Committee***[39]. That case concerned a range of actions by the SABC, including the alleged

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[35] 2007 (5) SA 540 (SCA)

[36] At para [19]

[37] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC)

[38] At para 44

[39] [2011] JOL 26704 (GSJ).

blacklisting of certain commentators by the head of the newsroom. In this regard, the following findings by the Court are relevant:

At para [86] the Court found –

"... [The] blacklisting of commentators perceived to be critical of the government of the day, was clearly designed to silence their voices by not allowing them on air. His purpose was obviously to manipulate the SABC's news and current affairs programmes by excluding these critical voices from them. ... It is obviously impossible to point to any particular programme and say that it was a distortion of the truth because the blacklisted commentators were not on it."

At para [87] the Court stated –

"The conduct of [the head of the newsroom], in effect, amounted to pre-censorship. One can never establish whether a programme is balanced, objective or fair if some relevant views and/or perspectives had been censored."

It was found at para 98.1 of the judgment that [the head's] politically motivated manipulation of the SABC's coverage of the Zimbabwe elections violated the SABC's duties to meet *"the highest standards of journalistic professionalism"* and violated the duty to *"provide fair, unbiased, impartial and balanced coverage"*. The same conclusion (at para 98.3) was reached in relation to the blacklisting of various commentators.

The difference between the SABC and a private party was described as para [77] as follows:

"The SABC is a public broadcaster funded by the taxpayer to provide the highest standards of journalism and fair, unbiased, impartial and independent news coverage. Whereas a private citizen or broadcaster may freely take political sides and promote party political objectives, a public broadcaster may not use public money to do so."

The CCC has no doubt that the same principles would apply to the matter before it – adding, however, that the issue before the CCC was not argued on the basis of *mala fides*, but whether the decision of the SABC was, objectively, ultra vires.

FINDING

[21] After having considered the legal argument from both parties and the affidavits filed, the CCC has come to the following finding:

[a] The CCC must base its finding on the Policy Statement issued by the SABC, the relevant provisions of the Broadcasting Act and the SABC's licence conditions – the Act being read in accordance with section 39(2) of the Constitution in the light of the relevant Constitutional provisions.

[b] The Policy statement by the SABC goes much further than a statement of broad policy: it amounts to a direct order to the newsroom to exclude material of a certain category. We accept that it relates to television broadcasts which portray the burning of public buildings as a protest against poor service delivery. However, insofar as the wording might include a ban on mere *coverage* of such conduct, whether by television or radio, that would, by implication, also be included in our proposed order to the Council of ICASA.

[c] We have no doubt that the duties of the SABC are directed at keeping the listening and viewing public informed so that informed choices may be made as to their daily lives. An informed, constitutional public, must have the full opportunity, which was denied to it in repressive apartheid times, to see and hear what is in the public interest to know.

[d] The Policy statement by the SABC *prohibits*, in absolute terms, that certain activities – the burning of public property by persons complaining about service delivery, be shown on television. That is a matter of public interest, as defined above in footnote 34.

[e] Even if it is accepted in favour of the SABC that this is not pre-censorship in the traditional mould by an outside agency, the order blocks information of a certain kind categorically. An example of pre-control by an outside organ of state was to be found in the 2009 *amended* Publications Act 1996, which required that publications that contain sexual conduct, vaguely defined, be submitted before publication. This amendment was, justifiably, declared to be unconstitutional by the Constitutional Court.[40]

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[40] Print Media South Africa and Another v Minister of Home Affairs and Another 2012 (6) SA 443 (CC)

[f] Section 6(4)(c) and (d) of the Broadcasting Act enjoin the SABC to "encourage the development of South African expression by providing a wide range of programming that offers a plurality of views and a variety of news, information and analysis from a South African point of view, and advances the national and public interest." Furthermore, section 6(8)(f) requires the SABC to develop a code of practice that ensures that the services and personnel comply with "a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest".

[g] The order of the SABC places an absolute ban on a subject. A subject, as such, may never be blocked from SABC television or radio - South Africa is not, as in the apartheid era, a dictatorship. The Broadcasting Code does, indeed, place certain limits on the screening of violence, but that Code may only be applied when a complaint is lodged with the relevant authority, be that the BCCSA or the CCC and *after* a broadcast – that is clear from section 53(2) of the Electronic Communications Act 2005. Furthermore, the Broadcasting Code is clear as to the broadcast of violence. It does not prohibit the mere broadcasting of violence, but it depends on the manner in which it is broadcast. Clause 11, the News clause, provides as follows:

(8) Broadcasting service licensees must advise viewers in advance of scenes or reporting of extraordinary violence, or graphic reporting on delicate subject-matter such as sexual assault or court action related to sexual crimes, particularly during afternoon or early evening newscasts and updates.

(9) Broadcasting service licensees must not include explicit or graphic language related to news of destruction, accidents or sexual violence which could disturb children or sensitive audiences, except where it is in the public interest to include such material.

Clause 3 of the Code (which is applicable in the main to material other than news) provides as follows:

Broadcasting service licensees must not broadcast material which, judged within context

(a) contains violence which does not play an integral role in developing the plot, character or theme of the material as a whole; or

(b) sanctions, promotes or glamorises violence or unlawful conduct.

These provisions clearly do not provide for an absolute ban on violence. To illustrate that absolute bans on e.g. the mere broadcast of hate speech is not

necessarily in contravention of the Broadcasting Code, the BCCSA[41] has, as pointed out by *Mr Marcus* at the hearing of this matter, on occasion, quoted and followed the judgment of the European Court of Human Rights in the matter of *Jersild v Denmark.*[42] In this matter, it was held that the conviction of Danish television journalist Jersild by a Danish Court was in conflict with the European Convention of Human Rights, which guarantees freedom of expression. Jersild had produced a two-minute news item that was condensed from a longer interview with a group of people (calling themselves "the Greenjackets"). The interviewees had, in the broadcast, used racially derogatory language with regard to immigrants from Africa, and had boasted about their criminal activities directed at such groups. The European Court stated the following:

"The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance ... Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" ... Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media."

(h) In addition to the obligations imposed by the Broadcasting Act, the SABC is subject to the provisions contained in its licenses. In terms of its licence conditions,[43] the SABC is required in the production of its news and current affairs to: meet the highest standards of journalistic professionalism;[44]provide fair, unbiased, impartial and balanced coverage independent from governmental, commercial or other interference;[45] and provide a reasonable

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[41] Cf. *National Commissioner, SAPS v e.tv Pty Ltd* [41] [2010] Lexis Nexis Judgments Online 25644(BCCSA); also compare Human Rights Commission of South Africa v SABC 2003(1) Butterworths Constitutional Law Reports (BCCSA) 92.

[42] Application 15890/89, decided 23 September 1994.

[43] Clause 4.5 of the SABC 1 license (at p 30) and SABC 2 licence and clause 4.7 of the SABC 3 licence. .

[44] Clause 4.5.3 of SABC 1 licence and clauses 4.5(c) of the SABC 2 license; and clause 4.7(c) of the SABC 3 licence.

[45] Clause 4.5.4 of SABC 1 licence at p 31 and clauses 4.5(d) of the SABC 2 licence and clause 4.7(d) of the SABC 3 licence.

opportunity for the public to receive a variety of points of view on matters of public concern.[46]

[i] The SABC resolution in the present matter amounts, at its core, to a categorical blocking of the public's right to information in conflict with the Broadcasting Act which places a duty on the SABC to keep the public informed in the public interest. This resolution is in conflict with the Broadcasting Act 1999 read with section 39(2) and 16(1)(a) and(b) of the Constitution. It is also in conflict with the licence conditions of the SABC.

[j] Our conclusion is that the SABC has acted outside its powers in taking the decision as published in the 26 May statement. Ultimately, one of the core values in terms of our Constitution is legality and the decision of the SABC did not comply with this central constitutional value. Thus, Judge of Appeal Navsa stated in *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para [1]:

> "Our country is a democratic state founded on the supremacy of the Constitution and the rule of law. It is central to the conception of our constitutional order that the legislature, the executive and judiciary, in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law. *This is the principle of legality, an incident of the rule of law.* Public administration must be accountable and transparent. All public office bearers, judges included, must at all times be aware that principally they serve the populace and the national interest. This appeal is a story of provincial government not acting in accordance with these principles." (Emphasis added in italics) [47]

DECISION OF THE CCC

The order by the SABC was invalid from its inception. The Complaint is, accordingly upheld.

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[46] Clause 4.5.5 of SABC 1 licence (at p 31) and clauses 4.5(e) of the SABC 2 license and clause 4.7(e) of the SABC 3 licence.

[47] Also see Navsa JA's judgment in *Gerber and Others v Member of Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA).

DETAIL

The finding by the Complaints and Compliance Committee on the merits of the complaint is:

The Complaints and Compliance Committee's finding in terms of section 17D (1) of the ICASA Act 13 of 2000 as amended is:

(a)The Complaint is upheld.

(b)The order by the SABC as articulated in its Policy Statement of 26 May 2016 (*SABC WILL NO LONGER BROADCAST FOOTAGE OF DESTRUCTION OF PUBLIC PROPERTY DURING PROTESTS)* is in conflict with its duties as a public broadcaster and was invalid from its inception

(1) in terms of the Broadcasting Act 1999 read with the sections 16, 192 and 39(2) of the Constitution of the Republic of South Africa 1996; and

(2) in terms of its licences.

RECOMMENDATION TO THE COUNCIL OF ICASA

That Council in terms of section 17E(2)(c) of the ICASA Act 2000 direct the South African Broadcasting Corporation to withdraw its resolution as contained in its statement of 26 May 2016 (*SABC WILL NO LONGER BROADCAST FOOTAGE OF DESTRUCTION OF PUBLIC PROPERTY DURING PROTESTS*) as a whole retrospectively as from the date when the resolution, as published in the above statement on the 26th May 2016, was taken.

The recommendation does not, as argued for by the Complainants, include an order concerning the training of journalists. This is an internal matter for the SABC to decide on and does not fall within the jurisdiction of ICASA.

If the above recommendation as to an order is accepted by Council, the wording of the order of the ICASA Council may read as follows:

(A)The Council of ICASA directs the South African Broadcasting Corporation to withdraw its resolution as published in its statement of 26 May 2016 (*SABC WILL NO LONGER BROADCAST FOOTAGE OF DESTRUCTION OF PUBLIC*

***PROPERTY DURING PROTESTS*) as a whole retrospectively as from the date when the resolution, as published in the above quoted statement on the 26th May 2016, was taken.**

(B)The Chairperson of the Board of the SABC must confirm in writing to Council via the Office of the Coordinator of the Complaints and Compliance Committee within seven calendar days from the date on which the order is emailed to the Chairperson of the Board of the SABC: that the above resolution was taken as ordered.

The above order is legally enforceable.[48]

Prof JCW Van Rooyen SC **3 July 2016**

Chairperson of the Complaints and Compliance Committee

Councillor Batyi, Mr Jack Tlokana and Mr Jacob Medupe concurred with the finding and recommendation as set out above.

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[48] See section 17H(1)(f) of the ICASA Act 2000.as amended.