

# COMPLAINTS AND COMPLIANCE COMMITTEE<sup>1</sup>

Dates of hearings: 25 October 2007

Case number: 11/2007

11 March 2009

In the matter between

**FREEDOM OF EXPRESSION INSTITUTE**

**Complainant**

**And**

**SOUTH AFRICAN BROADCASTING CORPORATION**    **Respondent**

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## Complaints and Compliance Committee

K.E. Moloto- Stofile                      (Chairperson)

N. Ntanjana                                  CCC Member

S. Thakur                                      CCC Member

T. Matshoba                                 CCC Member

J.C.W. van Rooyen SC                    CCC Member<sup>2</sup>

## For the Complainant

WH Trengove SC (with him, M Shakhane) instructed by Melissa Moore

## For the Respondent

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<sup>1</sup> In terms of s 17C of the ICASA Act 13 of 2000 as amended. The Complaints and Compliance Committee, although appointed every three years by the Council of ICASA, functions independently from the Council and any other structure at the Independent Communications Authority of South Africa. Its decisions on the merits of a complaint or an interconnection dispute are final and only subject to review by a Court of Law. In so far as complaints are concerned it also decides on what the sanction should be, but in that case it makes a recommendation to Council, which then takes a final decision on what the *sanction* should be. Presently the Honourable Mr. Justice Ratha Mokgoatlheng from the South Gauteng High Court is the part time Chairperson of the CCC. Since the present matter was initially heard when Ms Moloto-Stofile was the Chairperson, she had to chair the final phase which resulted in this judgment.

<sup>2</sup> By virtue of section 17A (1) of the ICASA Act 2000, as amended.

## SUMMARY

The Freedom of Expression Institute (“FXI”) lodged several complaints with the Complaints and Compliance Committee (“CCC”) concerning alleged contraventions by the South African Broadcasting Corporation (“SABC”) of the Broadcasting Act 4 of 1999, as amended. The complaint was subsequently supplemented to include the contravention of the conditions of the SABC licence and its internal policy and code regarding programming. The main question for the CCC was to decide ultimately whether the 2006 SABC Board had, in conflict with its duties, omitted to publish a report of a commission of inquiry appointed by it into blacklisting based on a political agenda and had not informed the public what steps it had taken to ensure that this would not recur.

*Held* that the *Charter* of the SABC, which in section 6(3) of the Broadcasting Act guarantees journalistic independence to the SABC, does not grant the CCC the authority to adjudicate a complaint as to blacklisting, which is an internal journalistic matter. This is a matter for the SABC Board. It is true that the CCC cannot, as a Court of Law would do, simply sit back and decide an issue without investigating it. However, once it is clear that the area to be investigated falls squarely within the protected section 6(3) journalistic field, it would be impermissible to subpoena the MD:News to testify on what his intention with the list was. Accordingly, even if the CCC were to accept that the views expressed by two members of the news team are correct, it would not take the matter any further: blacklisting is a journalistic, internal, activity. Deplorable as it is, it fell within the ambit of the 2006 SABC Board to deal with, which it did by appointing a commission of inquiry.

*Held* that if, as argued by the FXI, the CCC has a residual jurisdiction as to the *Charter* in cases where it deems it fit to interfere because of the seriousness of the alleged breach within the journalistic sphere, it would amount to an assumption of jurisdiction on arbitrary grounds. The Republic of South Africa is a Constitutional State. Organs of State may act only in accordance with powers conferred on them by law. This is the principle of legality, an integral aspect of the rule of law.

*Held* that, even on an alternative approach, assuming that the CCC has jurisdiction, the 2006 SABC Board had no duty to publish an internal report on a journalistic malpractice. The Board is not a Court or a quasi judicial body where there is, generally, a duty to publish a judgment or a report for public consumption. However, the SABC in terms of section 28 of the Broadcasting Act must annually furnish the Minister with a report on the “work” and financial affairs of the SABC. The Minister then tables the report in Parliament. It is not clear what “work” would encompass and it would, in the first place, be for the SABC to decide what “work” it would include in the Report. In the absence of a report on the blacklisting inquiry in the Annual Report, the Minister in office at the time could have directed the SABC in terms of section 28(1)(g) of the Broadcasting Act, to include such a report. A duty would thus only arise where the Minister instructs the Board to include a report on this matter. In this manner the public would, via Parliament, have been informed. There is also no legal duty on the Board to inform the public on how it reacted in a specific case where the internal code or policy had been contravened. Once again, the Minister could have instructed the Board to have included this in its Annual Report.

**The Complaint by the FXI was thus not upheld by the CCC. The matter is, accordingly not referred to the Council of ICASA for the consideration of a sanction.**

From this conclusion it should not be inferred that the CCC in any manner approves of a blacklist based on a political agenda or, for that matter, any policy where a political agenda is applied in regard to what is broadcast. However, as decided above, the CCC does not have jurisdiction over alleged internal journalistic malpractices and the omission to report to the public on it. Alternatively, that the Broadcasting Act provides for an avenue, in terms of section 28 of the Broadcasting Act, for the 2006 SABC Board to have been directed by the Minister in office at the time to have included a full report on the matter in its Annual Report.

# Judgment

## JCW van Rooyen SC

[1] The Freedom of Expression Institute (“FXI”) lodged several complaints with the Complaints and Compliance Committee (“CCC”) concerning alleged contraventions by the South African Broadcasting Corporation (“SABC”) of the Broadcasting Act 4 of 1999, as amended. The complaint was subsequently supplemented to include the contravention of the conditions of the SABC licence and its internal policy and code regarding programming. The main question for the CCC was to decide ultimately whether the 2006 SABC Board had, in conflict with its duties, omitted to publish a report of a commission of inquiry appointed by it into blacklisting based on a political agenda and had not informed the public what steps it had taken to ensure that this would not recur.

[2] In summarized form, the complaints of the FXI are the following:

### **1. THE COMPLAINTS RELATE TO NON-COMPLIANCE OF THE FOLLOWING:**

- 1.1. The Constitution of the Republic of South Africa;
2. The Broadcasting Act 4 of 1999 (“Broadcasting Act”);
3. The Independent Communications Authority of South Africa Act 13 of 2000;
4. The Independent Communications Authority’s Code of Conduct for Broadcasters;
5. SAFM Licence Conditions;
6. Code of Practice (“the SABC Code”); and
- 1.7. SABC News: Current Affairs and Information Programming Policy (“SABC Policy”).

### **2. INCIDENTS THAT PROVOKED COMPLAINTS, ALLEGING VIOLATIONS OF THE ABOVE.**

#### **2.1 SABC REPORTAGE BY MANDLA ZEMBE (MZ)**

During a rally on 16 June 2005, MZ filed reports for SABC radio bulletins about events at a rally which verged on violence and necessitated that the Premier Ndebele of KZ-Natal had to be escorted away under a metal table. Despite visual proof in newspapers and on a TV news

bulletin, the Premier strongly denied the incident and was given ample air time to comment whilst the reporter was made out to be the liar. MZ was also allegedly intimidated by the Premier's bodyguards at the SABC studios and wrongfully threatened by the MD: News with a disciplinary hearing for reporting the factual events at the rally.

The following were alleged to have been transgressed: sections 8(d) and 10(1) (d) of the Broadcasting Act; the SABC Code, for failure to attain a high standard of accuracy, fairness and impartiality as well as suppressing relevant, available facts, thus distorting the product to the public; the SABC Policy, in that political interests were permitted to influence decision making; the SABC licence conditions, by having failed to report news truthfully, fairly and accurately.

## **2.2. THE BANNING OF PAULA SLIER'S MIDDLE EAST NEWS CONTRIBUTIONS**

It is alleged that the instruction by the MD: News to exclude Ms. Slrier, an independent journalist, as "being biased towards Israel" from filing factual reports from the Middle East during Yasser Arafat's illness and subsequent death, constitutes a violation by the SABC of the following:

- Sections 6(4) (c) and 10(1) (d) of the Broadcasting Act in that the SABC failed to provide significant news which met the highest standards of journalism; was free from government interests; and was fair, unbiased coverage of the event; and that the SABC failed to offer plurality of views and a variety of news, information and analysis from a South African point of view.
- The SABC Editorial Code in that the SABC allowed political and/or personal considerations to influence its editorial decision-making.
- SABC Editorial Policy in that the reporting was not accurate, fair, impartial and balanced. The public have the right to expect SABC news and current affairs programming not to reflect the personal views of staff.
- Clause 4.2.3.4 of the SABC licence conditions in that the SABC failed to attain a high standard of journalistic professionalism, accuracy, fairness and impartiality and as such acted as the mouthpiece of the government.

## **3. THE BANNING OFF AIR OF AUBREY MATSHIQI**

Mr. Matshiqi, an independent political analyst, was allegedly considered irresponsible by the MD: News after he had been quoted in the *Sowetan* saying that the conflict between President Mbeki

and Mr. Jacob Zuma could lead to a civil war. Although Mr. Matshiqi had been used extensively in the past by the SABC, it is alleged that the MD: News was of the opinion that he fell short of the necessary research capacity as an independent analyst and that he should not be used. There was a further alleged intervention when Mr. Matshiqi reported on the Shabir Shaik trial. After this incident Mr. Matshiqi was allegedly taken off air and told not to return to the studio.

This intervention is alleged to be a direct interference with the expression of a point of view that has dominated political discourse in South Africa and consequently is a violation of the following:

- Section 10(1)(d) of the Broadcasting Act;
- Section 6(8) of the Broadcasting Act which requires the SABC to apply a Code of Practice that ensures that its personnel comply with certain values, including 'a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest'.
- Clause 4.2.3.3 of SAFM's licence conditions in that Mr. Matshiqi's analysis of the trial was terminated for improper and, hence, unprofessional, reasons.
- Clause 4.2.3.5 of the SAFM licence conditions: "with respect to news, information and current affairs, the licensee must 'provide a reasonable opportunity for the public to receive a variety of points of view on matters of public concern", was violated by the refusal to allow Matshiqi to be used in relation to the succession debate.
- The SABC Code in that it failed to attain a high standard of accuracy, fairness and impartiality and failed to report, conceptualize and present news and current affairs honestly by disclosing all the essential facts and by suppressing relevant, available facts, thus distorting the product to the public.
- The SABC Policy in that it failed to provide a full spectrum of opinions, perspectives and comment, which also extends to the use of guests, analysts and specialist commentators. According to the Policy on News and Current Affairs the editorial staff is required to choose, as participants, people who have a wide range of views, opinions and perspectives, and are drawn from all over the country.
- Personal and political views were permitted to prevail over news judgments, and could well have resulted in a narrowing of opinion, if his views were excluded from SABC services.

#### **4. BLANKET RESTRICTION NOT TO USE KARIMA BROWN AS A COMMENTATOR AND ANALYST**

When planning a political debate on "AM Live", the team members were allegedly informed by the MD: News that Ms. Brown was not to appear on the show. Alleged reasons put forward was that she appeared too frequently on the show and that she had written a story on President Mbeki in a newspaper, which subsequently had to be retracted.

It is further alleged that she was said not to be used as commentator because she 'spread untruths'. Another reason that was put forward was the allegation that journalists and editors 'from competitor publications' were used for commentary.

Therefore, the alleged conduct of the SABC was in violation of the following:

- Section 10(1)(d) of the Broadcasting Act in that the instructions did not meet the highest standards of journalistic professionalism, accuracy, fairness and impartiality and failed to report, conceptualize, and present news and current affairs honestly by disclosing all the essential facts and by suppressing relevant, available facts and analysis.
- Section 2 of the SABC Code for the reasons mentioned earlier.
- Clause 4.2.3.3 of SABC's licence conditions in that Ms Brown was excluded for inconsistent and unjustifiable and, hence, unprofessional reasons.
- Clause 4.2.3.5 of the licence condition in that the refusal to allow Brown to be used, except in relation to her own articles, is a direct infringement of the requirement to 'provide a reasonable opportunity for the public to receive a variety of points of view on matters of public concern'

## **5. THE REPORTING ON THE ZIMBAWE ELECTIONS BY THE SABC**

It is alleged that the SABC newsroom manipulated the reporting on the elections so as to favour the ruling party in Zimbabwe and thus distorting the news.

Persons with intimate knowledge of the situation in the country were allegedly prohibited to file reports back to South Africa. Accordingly, the SABC's television coverage essentially failed to properly deal with a number of controversial and contested issues relating to the 2005 elections. The SABC allegedly presented a selective and sanitised version of the situation in Zimbabwe. In so doing, the SABC appears to have supported the South African government's undefined policy of 'quiet diplomacy'.

As such, it is alleged that the SABC, and in particular its top management violated the following:

- Section 10(1)(d) of the Broadcasting Act in that the SABC failed to attain a high standard of accuracy, fairness and impartiality and failed to report, conceptualize, and present news and current affairs honestly by disclosing all the essential facts and by suppressing relevant, available facts, thus distorting the product to the public. In this instance FXI submits that SABC was acting as the mouthpiece of the government of the day and its personnel were not free from obligation to any interest group and not committed to the public's right to know.

- Clause 4.2.3.3 of SAFM's licence Conditions in that the analysis referred to in this complaint were excluded for inconsistent and unjustifiable, and hence unprofessional, reasons.
- Clause 4.2.3.4 of the SAFM's Licence Conditions in that the SABC failed to provide fair, unbiased, impartial and balanced coverage independent from government and other interests;
- Clause 4.2.3.5 of the SAFM's Licence Conditions in that its refusal to allow the aforementioned analysts amounts to a direct infringement of the requirement to 'provide a reasonable opportunity for the public to receive a variety of points of view on matters of public concern'.
- The SABC Policy in that the MD: News allowed his personal and political views to prevail over news judgments, and would result in a narrowing of opinion if their views were excluded from SABC services.

## **6. THE SPECIAL ASSIGNMENT INCIDENT**

It is alleged that before broadcasting the current affairs programme “Special Assignment” concerning airport security, the programme was shown to three persons in the Presidency, prior to broadcast. It is alleged that the MD: News was prepared to entertain outside influence even if, in the result, no such interference in fact occurred.

Showing a programme to individuals outside the SABC, especially from the highest office in the land, is deeply improper and opens the SABC up to political pressure to alter programmes before they are broadcast. Showing the programme could have had one objective only: to solicit approval or non-approval for its contents prior to broadcast.

It is consequently alleged that this conduct amounts to a violation of the following:

- Section 16 of the Constitution;
- Section 6(3) of the Broadcasting Act in that the SABC's ability to exercise its independence was undermined;
- Clause 2 of the SABC Code in that the SABC, by the conduct of the MD: News, was acting as the mouthpiece of the government of the day, by opening Special Assignment up to editorial influence by the President's office.

## **7. THE SABC STATEMENT OF 20 JUNE REFUTING THE EXISTENCE OF A BLACKLIST**

It is alleged that the statement misled the public by refuting that such a blacklist existed.

It is considered irresponsible for the SABC to publish misleading information and not even to apologise for doing so once the Sisulu report's findings were made. It casts a pall over all statements made by the SABC, as the public will not know whether to trust the veracity of the SABC's statements in future.

In this regard, the SABC is alleged to be in violation of the following provisions:

- Section 6(8) of the Broadcasting Act in that the SABC has failed to develop a code of practice that ensures that the personnel comply with certain values, including 'a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest'.
- Clause 2 of the SABC Code, by releasing a statement on the blacklisting matter that misrepresented the factual position, and therefore did not meet high standards of accuracy. As a result, the SABC Board has also failed to uphold the principles of freedom of expression and the right of the public to be informed.
- Section 8(d) of the Broadcasting Act, which requires the SABC public services (including SAFM) "to provide, in its public broadcasting services, radio and television programming that informs, educates and entertains". As per the Commission's findings, the above-mentioned statement misinformed the public.
- Regulation 35 of the Code of Conduct, which deals with comment on broadcasting services, including the SABC's. Clause 35 (2) of the Code that states 'comment shall be an honest expression of opinion and shall be presented in such a manner that it appears clearly to be comment, and shall be made on facts truly stated or fairly indicated and referred to'. The SABC has violated this section of the Code by providing a dishonest expression of opinion, which is based on untrue facts.

## **2.8. ATTEMPT TO INTERDICT THE MAIL AND GUARDIAN NEWSPAPER**

On 14 October 2006, the SABC attempted to interdict the *Mail & Guardian* newspaper to compel it to take a copy of the report down from its website, which created the unprecedented situation where one media institution attempted to violate the freedom of expression of another media institution.

This action constituted an abuse of public resources, and amounts to a violation of the requirement of the Board to uphold freedom of expression and the right of the public to be informed, as required by section 13(4)(b) of the Broadcasting Act. In addition, the SABC is required to uphold the South African Constitution. By attacking the media freedom of the

*Mail & Guardian*, they had failed to uphold the Constitutional right of the newspaper to freedom of expression.

## **.9 THE ALLEGED DISCIPLINING OF A STAFF MEMBER (JOHN PERLMAN)**

It is alleged that Mr. Perlman, who was acting in accordance with section 6(8)(f) of the Broadcasting Act, which requires staff to meet a high standard of accuracy, by correcting the official (and incorrect) SABC statement refuting the existence of a blacklist, was issued with a letter of warning.

The management of the SABC is alleged to have thus violated the following:

- Section 6(8)(f) of the Broadcasting Act by acting in an unfair manner against Perlman and punishing him for meeting his ethical obligations. In the process, they would have communicated a message to other staff that the reputation of the SABC supersedes the obligation of journalists to be accurate, even in instances where the SABC itself has misled the public.
- Clause 4.2.3.3 of SAFM's licence conditions, by frustrating Mr. Perlman's attempts to meet the highest standards of journalistic professionalism.

In essence the FXI's complaint is that the mentioned complaints have to be considered so that the CCC can ultimately decide whether the SABC had taken sufficient steps in regard thereto. This would include the question whether it should have published the report of the internal inquiry into the blacklisting, have taken steps to ensure that it did not recur and have kept the public informed in this regard. The blacklisting complaints will be dealt with as a unit. Thereafter the other matters will be considered.

## **BLACKLISTING**

[3] In 2006 the SABC Board resolved to hold an inquiry, chaired by Mr Z Sisulu, with Gilbert Marcus SC and Prof Guy Berger as members – Mr Sisulu and Prof Berger are media experts and Mr. Marcus is Senior Counsel. The appointment of the commission followed upon a complaint to the Board of the SABC that the head of news, Dr S Zikalala, had implemented a policy in terms of which certain persons were blacklisted from being used by the news services for purposes of commentary. It is common cause that the Sisulu Commission advised the Board that this practice was unacceptable and that it made certain recommendations to the Board.

[4] The CCC decides only on the merits of a complaint. If a finding is made against a broadcaster on the merits, the CCC makes a recommendation to Council as to sanction. If the complaint is not upheld, it is final and the matter is not referred to Council for approval.

[5] The SABC abandoned its initial objection against the complaint on the grounds that it was filed late. Instead, it decided, so the CCC was informed by Senior Counsel appearing for the SABC at the time, to face the complaint squarely on the merits. The CCC then handed down an interlocutory judgment in which it gave direction to the inquiry. Firstly, it dismissed the application of the FXI that the CCC should order the SABC to make the Sisulu report available, for the reasons set out in that judgment. Its main directive was, however, that the FXI should provide the CCC with examples where the blacklisting had affected the (balance) provision concerning news or commentary, which had been broadcast by the SABC. The FXI was granted sixty business days to do this. Later on, the CCC permitted the FXI to file the examples within a further period. Thereafter, the FXI filed affidavits by two employees (Mr Perlman and Ms Green), who testified that the blacklist had been implemented by Dr Zikalala. They detailed several examples. In their view, the circumstances showed that Dr Zikalala had a political agenda when compiling the list, and that this had a negative impact on production and programming. The allegations were responded to in an affidavit by Mr Fakir Hassen, General Manager: Regulatory, of the SABC. Unfortunately this all took more time than the time in which one would wish to have resolved the matter. Once the matter was ripe for a hearing, the heavy schedule of senior counsel had to be taken into consideration and the matter was only argued before the CCC in March 2009. This judgment is, in any case, handed down within the time limit set by the ICASA Act 2000.<sup>3</sup>

[6] Mr *Trengove*, for the FXI, argued that in principle there was nothing wrong in having a list of persons who might not qualify as balanced commentators. Such a list should be arrived at on rational grounds. However, as soon as a political agenda formed the basis of such a list, it led to the public being presented with a product which had been or might have been subject to political bias. In that sense, he argued, the preparation of programmes also fell within the ambit of the *Charter* of the SABC, which is to be found in section 6 of the Broadcasting Act. Counsel also referred us to the inclusion of rules as to preparation for programmes in the licence conditions of the SABC. The *Charter*, read together with the conditions, accordingly applied to both the operational and final broadcast spheres. It was also argued that the internal

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<sup>3</sup> See section 17D(1) of the ICASA Act.

policies and codes which the SABC is obliged to prepare and file with the Authority, also fall within the jurisdiction of the CCC when the SABC Board has wholly failed to implement the said policies and codes. This is, in effect, what happened in the present case: the Board investigated the matter by way of a commission, but the report of the commission has not been published and there is no evidence as to whether the Board ever took significant steps to implement the recommendation. The affidavit of Mr. Hassen is based on hearsay and should be rejected. The affidavits of Mr. Perlman and Ms Green should, accordingly, be accepted.

[7] Mr *Semenya*, for the SABC, argued that the operational facet of the SABC's newsroom does not fall within the jurisdiction of the CCC. He also questioned the remedies requested by the FXI: in the absence of a fine (which the FXI excluded from its remedy list), how would the remedies set out in section 17E (2) of the ICASA Act<sup>4</sup> address the omissions which the SABC is accused of? There was no evidence that the blacklist was still in operation, and it would amount to a mere academic exercise to now order the SABC to desist from having an exclusionary list. The same reasoning would apply to the reference to "remedial" steps. Mr *Trengove* argued that not only must the CCC recommend to Council that it orders compliance, but that Council should also direct the SABC to report such compliance to the Council within a reasonable period. In this manner compliance could be monitored by the monitoring staff of ICASA and enforced by its Council.

[8] The first task of the CCC is to determine whether it has jurisdiction to consider the complaints as to the blacklist. The ambit of jurisdiction of the CCC is to hear complaints

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<sup>4</sup> The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely –

- (a) direct the licensee to desist from any further contravention;
- (b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;
- (c) direct the licensee to take such remedial or other steps [not] in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;
- (d) where the licensee has repeatedly been found guilty of material violations -
  - (i) prohibit the licensee from providing the licensed service for such period as may be recommended by the Complaints and Compliance committee, subject to the proviso that a broadcasting or communications service, as applicable, must not be suspended in terms of this subsection for a period in excess of 30 days; or
  - (ii) amend or revoke his or her licence; and
- (e) direct the licensee to comply with any settlement.

concerning contraventions of the ICASA Act and the underlying statutes,<sup>5</sup> which includes regulations issued in terms of the said Acts or which remain valid by virtue of section 95(2) of the Electronic Communications Act 36 of 2005 (“ECA”).

[9] The source of jurisdiction in the present matter firstly, it was argued, lies in section 6 of the Broadcasting Act, which provides as follows:

#### CHARTER OF THE CORPORATION

- (1) *The Corporation must comply with the Charter as outlined in this part.*
- (2) *The Authority must monitor and enforce compliance with the Charter by the Corporation.*
- (3) *In terms of this Charter, the Corporation, in pursuit of its objectives and the exercise of its powers, enjoys freedom of expression and journalistic, creative and programming independence as enshrined in the Constitution.*
- (4) The Corporation must encourage the development of South African expression by providing, in South African official languages, a wide range of *programming* that-
  - (a) *reflects* South African attitudes, opinions, ideas, values and artistic creativity;
  - (b) *displays* South African talent in education and entertainment programmes;
  - (c) *offers* a plurality of views and a variety of news, information and analysis from a South African point of view;
  - (d) *advances* the national and public interest.
- (5) (a) The Board *must prepare and submit to the Authority* not later than three months after the date of conversion, policies that will ensure compliance with the Authority’s Code of Conduct as prescribed and with the Corporation’s licence conditions and with the objectives contained in this Act, including:
  - (i) News editorial policy;
  - (ii) programming policy;
  - (iii) local content policy;
  - (iv) educational policy;
  - (v) universal service and access policy;
  - (vi) language policy; and
  - (vii) religious policy.
- (b) The Corporation must notify the Authority in writing of any amendments to the policies referred to in paragraph (a) as soon as reasonably possible.
- (6) The Board must ensure that there is *public participation* in the development of the policies referred to in subsection (5) by inviting and considering public comment on such draft policies and by other means.

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<sup>5</sup> See section 17C(1)(a) :“A person who has reason to believe that a licensee is guilty of any non-compliance with the terms and conditions of its licence or with this Act or the underlying statutes may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance;” “this Act”, in terms of section 1 of the ICASA Act, includes any regulation made under the underlying statutes.

- (7) The Corporation must provide *suitable means for regular inputs of public opinion* on its services and ensure that such public opinion is given due consideration.
- (8) The Corporation must develop a *Code of Practice* that ensures that the services and the personnel comply with-
  - (a) the constitutional principle of equality;
  - (b) the equitable treatment of all segments of the South African population;
  - (c) the constitutional requirement of equitable treatment of all official languages;
  - (d) the rights of all South Africans to receive and impart information and ideas;
  - (e) the mandate to provide for a wide range of audience interests, beliefs and perspectives; and
  - (f) a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest. (emphasis added)

[10] It is significant that section 6(3) of the Charter grants the SABC, in pursuit of its objectives and the exercise of its powers, freedom of expression and journalistic, creative and programming independence as enshrined in the Constitution of the Republic of South Africa. The importance of freedom of expression and a generous application thereof is emphasised by Moseneke DJP in *Laugh it off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)*<sup>6</sup> where the learned Deputy Chief Justice discusses the limitation of the fundamental right by section 34(1) (c) of the Trade Mark Act:

[47] *We are obliged to delineate the bounds of the constitutional guarantee of free expression generously.* Section 16 is in two parts: the first subsection sets out expression protected under the Constitution. It indeed has an *expansive* reach which encompasses freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research. The second part contains three categories of expression which are expressly excluded from constitutional protection. It follows clearly that unless an expressive act is excluded by s 16(2) it is protected expression. Plainly, the right to free expression in our Constitution is neither paramount over other guaranteed rights nor limitless. As Kriegler J in *S v Mamabolo* puts it: 'With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right.' In appropriate circumstances authorised by the Constitution itself, a law of general application may limit freedom of expression.

[48] It is so that the anti-dilution prohibition under s 34(1) (c) seeks, in effect, to oust certain expressive conduct in relation to registered marks with repute. It thus limits the right to free expression embodied in at least s 16(1) (a) to (c) of the Constitution. We are, however, not seized with the adjudication of the constitutional validity of the section. We must assume without deciding that the limitation is reasonable and justifiable in an open and democratic society to which our Constitution is committed. That in turn impels us to a construction of s 34(1) (c) most compatible with the right to free expression. The anti-dilution provision must bear a meaning which is the least destructive of other entrenched rights and in this case free expression rights. *The reach of the statutory prohibition must be curtailed to the least intrusive means necessary to achieve the purpose of the section.* Courts must be astute not to convert the anti-dilution safeguard of renowned trademarks usually controlled by powerful financial interests into a monopoly adverse to other claims of expressive conduct of at least equal cogency and worth in our broader society. (emphasis added and footnotes omitted)

[11] The reference in section 6(3) to the Constitution of the Republic of South Africa includes, of course, the limitation to that right in section 36 of the Constitution. The *Charter* already includes a limitation when it expressly, in subsections (4) and (5), provides that (the

<sup>6</sup> 2006 (1) SA 144 (CC) (2005 (8) BCLR 743).

product of journalistic creativity) programming<sup>7</sup> must “display, reflect and offer” and that the Board must prepare and submit to ICASA policies that will ensure compliance with ICASA’s Code of Conduct as prescribed, with the SABC’s licence conditions, and with the objectives contained in [section 8] of the Broadcasting Act. Whilst the Code of Conduct is a set of regulations<sup>8</sup> which must be applied by the CCC, unless ICASA has recognised another disciplinary structure<sup>9</sup> with its own approved Code in terms of section 54(3) of the ECA, the only obligation on the SABC as to the Code of Practice is to follow certain procedures in *compiling* it and *filing* it and its amendments with ICASA. There is no provision which authorises the CCC to adjudicate complaints as to alleged breaches of the Code of Practice. Mr *Trengove* conceded that in general, the Code of Practice did not fall within the jurisdiction of the CCC, but argued that it would be senseless to exclude the jurisdiction of the CCC where the SABC Board failed to take steps to enforce the Code of Practice, as is presently the case – so he contended – with the blacklisting matter under discussion.

[12] The CCC is of the opinion that the exclusion of its jurisdiction in regard to breaches of the internal Code of Practice follows naturally upon the guarantee of independence in section 6(3) and that the only limitations to section 6(3) must be sought in the exact wording of section 6(4), which refers to the *product* of the journalistic activity, which in turn reaches the public. It was common cause that the programmes which were broadcast and referred to by the FXI did not, in themselves, demonstrate any breach of the Broadcasting Code or any other requirement as to product to the public. It would therefore, according to both advocates, be senseless for the CCC to watch the programmes. The problem, according to Mr *Trengove*, however lay in the omission of more views from persons who were on the blacklist.

[13] The preparation of the programme falls within the guaranteed section 6(3) journalistic, creative and programming independence, and only the product may be adjudicated by the CCC when it applies the Broadcasting Code. Licence conditions of the SABC, which are referred to in section 6(5), also fall within the jurisdiction of the CCC. However, any reference in the licence conditions of the SABC which includes jurisdiction of ICASA as to the preparation of programmes clashes with section 6(3) of the Act and the Act would, of necessity, prevail. The *Charter* clearly intends that ICASA (and, thus, also the CCC) has

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<sup>7</sup> Also see sections 6(8)(f), 10(1)(b), 10(1)(d), 10(1)(e),

<sup>8</sup> See section 54(1) of the Electronic Communications Act 2005.

<sup>9</sup> In 1995 the IBA recognised the Broadcasting Complaints Commission in terms of section 56 of the IBA Act. This decision still applies in terms of section 22 of the ICASA Act.

jurisdiction over the product and not the preparation. The preparation falls within the jurisdiction of the SABC Board.<sup>10</sup> “Plurality” of views is a relative concept and the mere fact of a blacklist – even when based on political preference – is not conclusive as to the absence of such plurality. Plurality can only be judged with reference to all the broadcasts of the SABC and the present matter, where especially blacklisting is before the CCC, does not justify further inquiry into this aspect over a broader spectrum. In any case, once again, it is what the public sees and hears which counts. It is common cause that even the programmes selected by the FXI as a result of the CCC’s having afforded it an opportunity to provide it with examples where the balance requirements of the Broadcasting Code were affected, do not demonstrate such absence of balance.

[14] If, however, as argued the CCC has a residual jurisdiction as to the *Charter* in cases where it deems it fit to interfere because of the seriousness of the alleged breach within the journalistic sphere, it would amount to an assumption of jurisdiction on arbitrary grounds. The Republic of South Africa is a Constitutional State. Organs of State may act only in accordance with powers conferred on them by law. This is the principle of legality, an integral aspect of the rule of law.<sup>11</sup> The importance for an organ of state that it acts within the powers granted, is emphasised by Navsa JA in *Gerber and Others v Member of the Executive Council of Development and Planning and Local Government, Gauteng and Another* :<sup>12</sup>

“[34] It is abundantly clear ...that the Council and the MEC failed to properly appreciate their functions and powers. The Council cannot be heard to say that the wrong reference to legislation is cured by the fact that it has original powers to impose property rates. The question is whether it had the power to act in the manner complained of and to impose the rates in question.”

And, more recently, Van Heerden JA said in *Minister of Local Govt, Housing & Traditional Affairs (KZN) v Umlambo Trading 29 CC*:<sup>13</sup>

[17]The principle of legality lies at the centre of the appeal. It is a fundamental principle of the rule of law that the exercise of public power is only legitimate where it is lawful. It is central to our constitutional order that the legislature and the executive are in every sphere constrained by the principle that they may exercise no power and perform no function beyond those conferred on them by law.

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<sup>10</sup> See section 13(11) of the Broadcasting Act which provides as follows: “The Board (of the SABC) controls the affairs of the Corporation and must protect the matters referred to in section 6(2) of this Act.” The reference must be to section 6(3) and not 6(2). That a Court may correct such a printing error has been held in *S v Mpofo* 1979(2) SA 255(R) at 257 and *In re Duma* 1983(4) SA 469(N) at 479. Even if it is not a printing error, it is obvious from the Act, read as a whole, that the *Board* would protect the interests of the Corporation.

<sup>11</sup> See *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) 374 (CC) at 399 D-E (para [56]) and 400D – E (para [58]). Also see *Pharmaceutical Manufacturers of South Africa: In Re ex parte President of the Republic of South Africa* 2000(2) SA 674 (CC) at 6.

<sup>12</sup> 2003(2) SA 344(SCA) at para [34] and [35].

<sup>13</sup> 2008 (1) SA 396 (SCA).

Moseneke DCJ in *Masetlha v President of the RSA*<sup>14</sup> also accentuates that an organ of state cannot arbitrarily widen its powers:

[81] It is therefore clear that the exercise of the power to dismiss by the President is constrained by the principle of legality, which is implicit in our constitutional ordering. Firstly, the President must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred.

Secondly, the decision must be rationally related to the purpose for which the power was conferred. *If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.* (emphasis added)

The conclusion is, accordingly, that the *Charter* does not grant the CCC the authority to adjudicate a complaint as to blacklisting. This is a matter for the SABC Board and even if the CCC were to be of the view that the SABC had not acted vigorously enough against the MD: News, it is a responsibility which the SABC Board must take. It is true that the CCC cannot, as a Court of Law would do, simply sit back and decide an issue without investigating it. However, once it is clear that the area to be investigated falls squarely within the protected section 6(3) journalistic field, it would be impermissible to subpoena Dr Zikakala to testify on what his intention with the list was. Accordingly, even if the CCC were to accept that the views expressed by Perlman and Green are correct, it would not take the matter any further: blacklisting is a journalistic, internal, activity. Deplorable as it is, it falls within the ambit of the SABC Board to deal with.

## **SECTION 10 OF THE BROADCASTING ACT**

[15] Section 10 of the Broadcasting Act, which imposes certain duties outside the *Charter*, must also, be considered. The relevant part of section 10 provides as follows:

### **Public service**

10(1) The public service *provided* by the Corporation must -

- (a) make services available to South Africans in all the official languages;
- (b) reflect both the unity and diverse cultural and multilingual nature of South Africa and all of its cultures and regions to audiences;
- (c) strive to be of high quality in all of the languages served;
- (d) *provide 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;*
- (e) include significant amounts of educational programming, both curriculum-based and informal educative topics from a wide range of social, political and economic issues, including, but not limited to, human rights, health, early childhood development,

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<sup>14</sup> 2008 (1) SA 566 (CC).

agriculture, culture, religion, justice and commerce and contributing to a shared South African consciousness and identity;

- (f) enrich the cultural heritage of South Africa by providing support for traditional and contemporary artistic expression;
- (g) strive to offer a broad range of services targeting, particularly, children, women, the youth and the disabled;
- (h) include programmes made by the Corporation as well as those commissioned from the independent production sector; and
- (i) include national sports programming as well as developmental and minority sports.  
(emphasis added)

[16] The only paragraph which is applicable to the blacklist is paragraph (d) as quoted above. In spite of its reference to the “highest standards of journalism” it is still the *provision* (of the service) which is the subject of the duty.<sup>15</sup> These standards are included in the Broadcasting Code and, in so far as news and commentary are concerned, regulations 34, 35, 36 and 37 are dominant. All these regulations pertain to the product which is seen or heard by the public. Nevertheless, it would be academic to dwell on the Broadcasting Code itself, since the SABC, in so far as the Broadcasting Code is concerned, falls under the jurisdiction of the Broadcasting Complaints Commission of South Africa in terms of section 54(3) of the Electronic Communications Act 2005. Furthermore, it is, in any case, common cause that the programmes selected by the FXI do not, as such, amount to a contravention of any of the said regulations.

## **OTHER MATTERS**

[17] The Zimbabwe, Mzembe and Special Assignment matters also fall within the journalistic sphere and the CCC’s conclusion on the blacklist also applies in these cases. In so far as the warning of Mr. Perlman by the SABC is concerned: this is, once again, an internal matter between employer and employee and there were labour law remedies open to him. The application for an interdict against the *Mail & Guardian* fell squarely within the constitutional rights of the SABC Board in terms of section 34 of the Constitution of the Republic. One media institution may certainly take another media institution to Court. Obviously, the Court will have the final say. The issue of an untrue statement by the SABC does not fall within the jurisdiction of the CCC. Firstly, the mere fact that such a statement was made, and not corrected after the report of the commission of inquiry, is an internal

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<sup>15</sup> A consideration of sections 2(d) and 3(5)(a) and (d) of the Broadcasting Act do not lead to a different conclusion

management matter and the Broadcasting Act does not impose a duty in this respect, which can be enforced by ICASA. Secondly, in so far as broadcasts thereof by the SABC are concerned, a complaint could have been lodged with the Broadcasting Complaints Commission which has jurisdiction over broadcasts of the SABC. News that is untrue may not be broadcast in terms of clause 34 of the Code, which is applied by the BCCSA. Thirdly, the Minister of Communications has the power to direct the SABC to explain this statement in its annual report, which is tabled by the Minister in Parliament – see section 28(1)(g) of the Broadcasting Act. In this manner the right of the public to be informed is addressed and it is not for ICASA to usurp jurisdiction in this matter. To base a duty to publish on the SABC as a result of the requirement for the appointment of a Board member in section 13(4) that he or she must be a person who is committed to freedom of expression, the right of the public to be informed and openness and accountability on the part of those holding public office, as the FXI claims, unjustifiably enhances qualifications for office into a duty to publish an internal report.<sup>16</sup> Of course blacklisting based on a political agenda concerns the public, but the Broadcasting Act creates a channel for such a report to be published via the Minister on the instruction of the Minister. If the Board does not publish and the Minister does not act in terms of section 28, then it is not for ICASA to compel it to publish. The CCC has already in its interlocutory judgment indicated why it did not deem it necessary for its present inquiry to subpoena the report. In short, because the commission's report was based on evidence not heard by this Committee and thus amounted to hearsay.

[18] Ultimately the question arises whether the 2006 SABC Board had taken sufficient steps in regard to the blacklisting. The crucial question is whether it had a duty to publish the report and inform the public what steps it would take to ensure that a repetition would not take place. Blacklisting based on a political agenda is unacceptable within a open and democratic society based on equality and freedom. The SABC appointed a commission to inquire into the matter and a report was filed with the SABC Board. The FXI argued that the report should have been published. Furthermore, that the SABC should have informed the public as to what steps it would take to ensure that a repetition would not take place.

[19] It is the CCC's view that it does not have jurisdiction as to whether the 2006 SABC Board had taken sufficient steps in this matter and whether it should have published the report of the Commission of Inquiry. This is an internal matter and even if the CCC may not

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<sup>16</sup> Section 8(d) also does not take the matter further: it only relates to product.

agree with the lack of transparency and the seemingly insufficient steps taken so as to ensure that such a practice would not recur, it is the responsibility of the SABC Board, as appointed by the President, to decide what to do in a journalistic matter such as politically inspired blacklisting. For the CCC to intervene because it regards the matter as serious enough for it to intervene, would amount to an arbitrary and thus *ultra vires* exercise of its powers in regard to an alleged journalistic abuse which, by law, resorts with the SABC itself in terms of section 6(3) of the Broadcasting Act. Section 10 does not widen the powers of the CCC.<sup>17</sup> In so far as clashing licence conditions are concerned: the Act must prevail. The internal codes and practices of the SABC do not fall under the CCC's jurisdiction – even in cases which allegedly amount to gross dereliction. The jurisdiction of the CCC is clearly delineated by the ICASA Act, read especially with section 6 of the Broadcasting Act and section 54(3) of the Electronic Communications Act 2005.

## **ALTERNATIVE APPROACH**

[20] From an alternative perspective, accepting that the CCC does have jurisdiction as to whether the SABC should have published the Report, the question arises whether there was a legal duty on the SABC Board to have published the report. The answer to this question lies in the Broadcasting Act.

(1) It is common cause that a commission of inquiry was appointed and that the report was considered by the 2006 SABC Board. The FXI complaint is, ultimately, that the Board did not publish the report, inform the public which steps it had taken and how it would ensure that a repetition would not take place. The SABC Board has no duty to publish an internal report on a journalistic malpractice. The Board is not a Court or a quasi judicial body where there is, generally, a duty to publish a judgment or a report for public consumption. However, the SABC in terms of section 28 of the Broadcasting Act must annually furnish the Minister with a report on the “work” and financial affairs of the SABC. The Minister then tables the report in Parliament. It is not clear what “work” would encompass and it would, in the first place, be for the SABC to decide what “work” it would include in the Report. In the absence of a report on the blacklisting inquiry in the Annual Report, the Minister could have directed the SABC in terms of section 28(1)(g) of the Broadcasting Act, to include such a report. A duty would thus only arise where the Minister instructs the Board to include a report on this

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<sup>17</sup> Sections 2(d) and 3(5)(a) and (d) do not take the matter further.

matter. In this manner the public would, via Parliament, have been informed. There is also no legal duty on the Board to inform the public on how it reacted in a specific case where the internal code or policy had been contravened. Once again, the Minister could have instructed the Board to have included this in its Annual Report.

(2) Ultimately, even if the CCC were to be of the view that the 2006 Board should as a matter of *policy* have approached the matter differently (e.g. have published the report and the steps taken to ensure compliance), its conclusion is that the 2006 Board did all that was required by the *Broadcasting Act* and that the question as to whether there was a “serious” breach does not even become relevant. It was also common cause that the broadcast programmes identified by the FXI, as directed by the CCC in its first judgment, were not in breach of the Broadcasting Code.<sup>18</sup>

[21] From this conclusion it should not be inferred that the CCC in any manner approves of a blacklist based on a political agenda or, for that matter, any policy where a political agenda is applied in regard to what is broadcast. Furthermore, it is the opinion of the CCC that it would have been in the public interest to have been as transparent as possible about the inquiry held. However, as decided above, the CCC does not have jurisdiction over alleged internal journalistic malpractices and the omission to report to the public on it. Alternatively, that the Broadcasting Act provides for an avenue, in terms of section 28 of the Broadcasting Act, for the 2006 SABC Board to have been directed by the Minister to have included a full report on the matter in its Annual Report.

**In the result the complaint by the FXI is not upheld.**

Ms Moloto-Stofile (Chairperson), Ms Ntanjana, Mr Thakur and Ms Matshoba concur in the above judgment.

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**K.E. MOLOTO- STOFILE**

**18/06/2009**

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<sup>18</sup> This would, in any case, have been a matter for the BCCSA in terms of section 54(3) of the ECA to have decided on.