

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: _____/2016

In the matter between:

| | |
|---|--------------------|
| THANDEKA GQUBULE | First Applicant |
| FOETA KRIGE | Second Applicant |
| SUNA VENTER | Third Applicant |
| BUSISIWE NTULI | Fourth Applicant |
| KRIVANI PILLAY | Fifth Applicant |
| JACQUES STEENKAMP | Sixth Applicant |
| LUKHANYO CALATA | Seventh Applicant |
| VUYO MVOKO | Eighth Applicant |
| and | |
| SOUTH AFRICAN BROADCASTING CORPORATION (SOC) | First Respondent |
| MINISTER OF COMMUNICATIONS | Second Respondent |
| INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA | Third Respondent |
| MEDIA MONITORING AFRICA | Fourth Respondent |
| S.O.S SUPPORT PUBLIC BROADCASTING COALITION | Fifth Respondent |
| FREEDOM OF EXPRESSION INSTITUTE | Sixth Respondent |
| HELEN SUZMAN FOUNDATION | Seventh Respondent |
| SOUTH AFRICAN NATIONAL EDITORS FORUM | Eighth Respondent |

NOTICE OF MOTION

TAKE NOTICE that the applicants hereby make application to this Court for an order in the following terms:

1. Directing that the forms and rules of this Court are dispensed with and this matter is dealt with as a matter of urgency.
2. Granting the applicants direct access to this Court.
3. Declaring that the Protest Policy purportedly adopted by the SABC during May 2016 is unconstitutional, unlawful and invalid.
4. Declaring that the decision of the SABC during June 2016 to suspend the first to third applicants is unconstitutional, unlawful and invalid.
5. Declaring that the decisions of the SABC during June and July 2016 to institute disciplinary proceedings against the first to eighth applicants are unconstitutional, unlawful and invalid.
6. Directing that the costs of this application are to be paid, jointly and severally, by any respondents opposing the application.
7. Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying affidavit of THANDEKA GQUBULE and annexures thereto will be used in support hereof.

TAKE NOTICE FURTHER that in view of the urgency of this matter, if any respondent intends opposing this application, it must by **Monday 18 July 2016**, notify the applicants' attorneys and the Registrar in writing of its notice of intention to oppose, in accordance with Rule 18(3).

Signed at **SANDTON** on 15 July 2016

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Norton Rose Fulbright South Africa Inc
Attorneys for Applicants
34 Fredman Drive
Sandton
Tel: 011 685 8860
Email: aslam.moosajee@nortonrosefulbright.com
Ref: Mr A Moosajee/PBO1796

To:
The Registrar of the Constitutional
Court
Braamfontein

And to:

**South African Broadcasting
Corporation (SOC)**
1st Respondent
Cnr Artillery & Henley Roads
Auckland Park
Johannesburg

Received copy hereof on this the

15th day of July 2016

And by email
titus@mchunu.co.za
info@sabc.co.za
kganyagok@sabc.co.za
timanarn@sabc.co.za
vilakazide@sabc.co.za

And to:

Minister of Communications
2nd Respondent
Tshedimosetso House
1035 Frances Baard / Festival Sts
Hatfield
Pretoria

Received copy hereof on this the

15th day of July 2016

And by email
sello@doc.gov.za
pari@doc.gov.za
freddy@doc.gov.za
information@doc.gov.za
information@gcis.gov.za
nozipho@doc.gov.za
mishack@doc.gov.za

And to:

**Independent Communications
Authority of South Africa**
3rd Respondent
Blocks A to D
Pinville Farm
164 Katherine Street
Sandton

Received copy hereof on this the

15th day of July 2016

And by email
bmakola@icasa.org.za
mmodisane@icasa.org.za

And to:

**Media Monitoring Africa
S.O.S Support Public
Broadcasting Coalition
Freedom of Expression Institute**
4th to 6th Respondents
c/o Webber Wentzel
90 Rivonia Road
Sandton
Ref: Dario Milo

Service by email as agreed
Email: Dario.milo@webberwentzel.com

And to:

Helen Suzman Foundation
7th Respondent
c/o Webber Wentzel
90 Rivonia Road
Sandton
Ref: Vlad Movshovich/Pooja Dela

Service by email as agreed
Email: vlad.movshovich@webberwentzel.com
Pooja.dela@webberwentzel.com

And to:

**South African National Editors
Forum**
8th Respondent
18 Cedar Ave
Richmond

Received copy hereof on this the

15th day of July 2016

And by email
Tsedumathatha6@gmail.com
admin@sanef.org.za
mahlatsegallens@gmail.com

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

5

CASE NO: _____/2016

In the matter between:

THANDEKA GQUBULE First Applicant

FOETA KRIGE Second Applicant

SUNA VENTER Third Applicant

BUSISIWE NTULI Fourth Applicant

KRIVANI PILLAY Fifth Applicant

JACQUES STEENKAMP Sixth Applicant

LUKHANYO CALATA Seventh Applicant

VUYO MVOKO Eighth Applicant

and

SOUTH AFRICAN BROADCASTING CORPORATION (SOC) First Respondent

MINISTER OF COMMUNICATIONS Second Respondent

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA Third Respondent

MEDIA MONITORING AFRICA Fourth Respondent

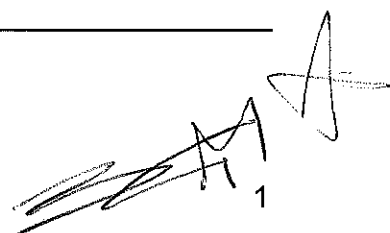
S.O.S SUPPORT PUBLIC BROADCASTING COALITION Fifth Respondent

FREEDOM OF EXPRESSION INSTITUTE Sixth Respondent

HELEN SUZMAN FOUNDATION Seventh Respondent

SOUTH AFRICAN NATIONAL EDITORS FORUM Eighth Respondent

FOUNDING AFFIDAVIT



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I, the undersigned

THANDEKA GQUBULE

do hereby make an oath and state:

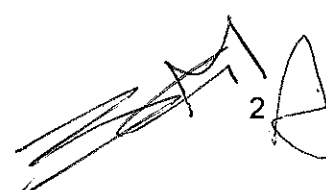
1 I am the first applicant in this matter.

1.1 I am the Economics Editor at the SABC. I am responsible for all markets, business, companies and economics reporting across radio, television and digital platforms. Every day I draw up the economics diary for the SABC – this determines which stories within my area of responsibility are covered nationally and internationally by the SABC.

1.2 I have been employed in different capacities by the SABC for various periods since 1992. In between these periods, I was employed by other organisations, including by the Presidency in the RDP Office from 1994 to 1996.

2 I depose to this affidavit on behalf of myself and the second to eighth applicants. I am duly authorised to do so. I refer to the confirmatory affidavits deposed to by each of the applicants, which are filed together herewith.

3 The facts deposed to in this affidavit are true and correct and fall within my personal knowledge unless the context indicates the contrary or it is expressly stated otherwise. Where I rely on facts conveyed by the remaining applicants, they confirm these facts in their confirmatory affidavits.

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- 4 Where I make legal submissions, I do so on the advice of the Applicants' legal representatives, which advice I accept as correct.

THE PARTIES

- 5 I am the First Applicant.

- 6 The Second Applicant is **Foeta Krige**.

6.1 Mr Krige is the executive producer of current affairs at Radio Sonder Grense (RSG) at the SABC. He is responsible for the production of four news actuality programmes, which broadcast 17 hours of content a week and are supported by a team of journalists, presenters and producers who fall under his supervision.

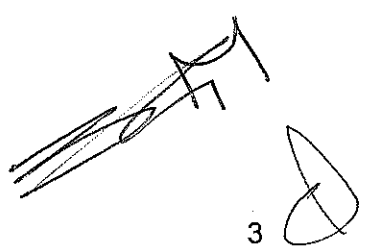
6.2 He has been employed by the SABC for 22 of the last 24 years, and spent the other two years running his own production company.

- 7 The Third Applicant is **Suna Venter**.

7.1 Ms Venter is a producer and presenter in the current affairs team at RSG at the SABC. She manages a team of journalists in the production of a live news actuality programme.

7.2 She has been employed by the SABC for eight years.

- 8 The Fourth Applicant is **Busisiwe Ntuli**.

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8.1 Ms Ntuli is the executive producer of the SABC's flagship investigative television programme, Special Assignment. She is responsible for the production of current affairs television programmes aired on Special Assignment and manages a team of journalists, presenters and producers for that purpose.

8.2 She has been employed by the SABC for 13 years.

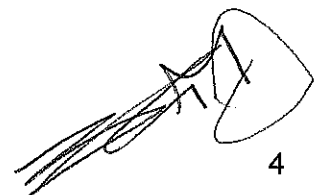
9 The Fifth Applicant is **Krivani Pillay**.

9.1 Ms Pillay is the executive producer for current affairs at SAfm at the SABC. She is responsible for the management of a team of journalists, producers and presenters. SAfm includes five news programmes, broadcasting for a total of 37 hours per week.

9.2 Ms Pillay has been employed by the SABC for 12 of the last 15 years. In the remaining three years she was employed by private broadcasters.

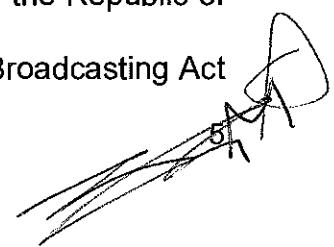
10 The Sixth Applicant is **Jacques Steenkamp**.

10.1 Mr Steenkamp is a senior reporter at the SABC dealing with news and current affairs investigations. He also serves as Acting Assignment Editor from time to time, meaning that he is responsible for day to day operations of the newsroom. He is the author of one book on current affairs and is currently working on two further books on current affairs.



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- 10.2 He has been employed at the SABC for three years.
- 11 The Seventh Applicant is **Lukhanyo Calata**.
- 11.1 Mr Calata is a specialist television reporter for the SABC, based at Parliament.
- 11.2 He has been employed at the SABC since 2011.
- 12 The Eighth Applicant is **Vuyo Mvoko**.
- 12.1 Mr Mvoko is the Contributing Editor at the SABC. He is the specialist television anchor in respect of special projects and high profile events, including the opening of Parliament, the ANC lekgotla, the annual budget and so on.
- 12.2 He has interviewed the Presidents of South Africa on behalf of the SABC on average twice a year since 2011. The Presidents he has interviewed on behalf of the SABC are President Mbeki, President Motlanthe and President Zuma.
- 12.3 Mr Mvoko has been employed at the SABC for a total of nine years. He was first employed by the SABC from 2002 to 2006 as Group Political Editor. He rejoined the in SABC 2011 and has been employed there since.
- 13 The First Respondent is the **South African Broadcasting Corporation SOC Ltd** (the SABC). The SABC is the public broadcaster of the Republic of South Africa and a statutory public body established by the Broadcasting Act

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4 of 1999 (the Broadcasting Act). The SABC's principal business is at the corner of Artillery and Henley Road, Auckland Park, Johannesburg, South Africa. This matter concerns the lawfulness of a policy adopted by the SABC, which I refer to as its "Protest Policy".

14 The Second Respondent is the **Minister of Communications** (the Minister).

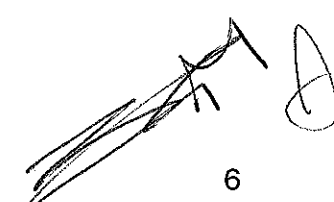
The Minister is the member of Cabinet who is responsible for the administration of the Broadcasting Act and who is the representative of the Government as the sole shareholder of the SABC. She is accordingly cited for such interest as she has in this matter. No order for costs is sought against the Minister, save in the event of opposition.

15 The Third Respondent is the **Independent Communications Authority of South Africa (ICASA)**.

15.1 ICASA is responsible for the regulation of broadcasting, in terms of section 192 of the Constitution and the provisions of the Independent Communications Authority of South Africa Act, 2000.

15.2 ICASA and its Complaints and Compliance Committee (CCC) have ruled that the SABC's Protest Policy is invalid and in breach of its statutory and constitutional obligations.

15.3 Given that this matter too concerns the SABC Protest Policy, ICASA is cited for such interest as it has in this matter. No order for costs is sought against ICASA, save in the event of opposition.

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16 The Fourth to Sixth Respondents are three non-governmental organisations. They were the complainants in the proceedings before the CCC of ICASA regarding the lawfulness of the SABC's Protest Policy.

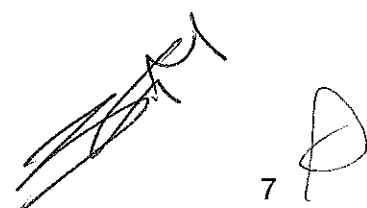
16.1 The Fourth Respondent is **Media Monitoring Africa (MMA)**. MMA is a non-profit organisation whose objectives are to act as a media watchdog in Africa and to improve news quality and ethics in reporting in Africa.

16.2 The Fifth Respondent is the **S.O.S: Support Public Broadcasting Coalition (SOS)**. SOS is a civil society coalition engaged in campaigns for public broadcasting in the public interest.

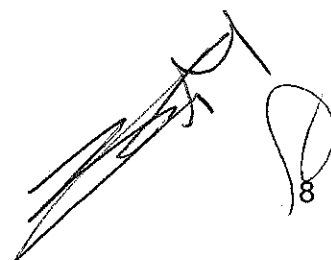
16.3 The Sixth Respondent is the **Freedom of Expression Institute (FXI)**. The FXI is a not for profit non-governmental organization which was established to protect and foster the right to freedom of expression.

16.4 MMA, SOS and FXI are cited for such interest as they have in these proceedings and have authorised Webber Wentzel to accept electronic service of these papers on their behalf, as is evident from Annexures **FA1** and **FA2**. No order for costs is sought against them, save in the event of opposition.

17 The Seventh Respondent is the **Helen Suzman Foundation (HSF)**.

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- 17.1 The HSF is a non-governmental organisation whose objectives are to defend the values that underpin South Africa's liberal constitutional democracy and to promote respect for human rights.
- 17.2 The HSF is cited because it has instituted proceedings in the High Court seeking to review and set aside the SABC's decision to adopt the Protest Policy and seeking interim relief in this regard.
- 17.3 The HSF is accordingly cited for such interest as it has in these proceedings and have authorised Webber Wentzel to accept electronic service of these papers on their behalf, as is evident from Annexures **FA3** and **FA4**. No order for costs is sought against the HSF, save in the event of opposition.
- 18 The Eighth Respondent is the **South African National Editors Forum** (SANEF).
- 18.1 SANEF is a non-profit organisation whose members are editors, senior journalists and journalism trainers from all areas of the South African media. It is committed to championing freedom of expression and promoting quality, ethics and diversity in the South African media.
- 18.2 SANEF is cited because at the heart of this matter lies the ethical and constitutional obligations of journalists towards the public.



18.3 SANEF is accordingly cited for such interest as it has in these proceedings. No order for costs is sought against SANEF, save in the event of opposition.

THE NEED FOR THIS APPLICATION

- 19 This is an application for direct access to this Court. It is brought on an urgent basis.
- 20 This application will determine whether journalists employed at the SABC are able to do their jobs and report to the public on current events, both in the lead up to the Local Government Elections and beyond.
- 21 The eight applicants are all journalists at the SABC. Many of us have been employed at the SABC for many years and some of us occupy senior positions in the SABC.
- 22 However, the events of the past few weeks have made our position at the SABC, and that of many of our colleagues, simply intolerable. These events do not merely affect the journalists employed by the SABC. They prevent the SABC from meeting its obligations as South Africa's public broadcaster. There are 21 million members of the public who rely on the SABC as their primary source of information regarding news and current affairs. The events of the past few weeks severely prejudice these people.

23 The events of the past few weeks therefore violate:

23.1 The rights of SABC journalists, including the First to Eighth Applicants, to freedom of expression in terms of section 16(1) of the Constitution, including the right to freedom of the media and the right to impart information and ideas; and

23.2 The rights of the public to freedom of expression in terms of section 16(1) of the Constitution, including the freedom of the media and the freedom to receive information and ideas.

24 If this Court does not grant direct access and determine the issues raised, the practical reality is that this violation of the rights of the public and SABC journalists will continue for literally years to come. This is because those in power at the SABC are intent on using every avenue available to avoid a final pronouncement on these issues.

25 This Court has held that *"the SABC, as the public broadcaster provided for and regulated in terms of the Broadcasting Act, has a special function to perform"*.¹ However, unless this Court grants direct access, the ability of the SABC to perform that *"special function"* in the months and years to come will be fatally undermined.

26 This is made clear by a brief overview of the events giving rise to this matter.

¹ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para 26

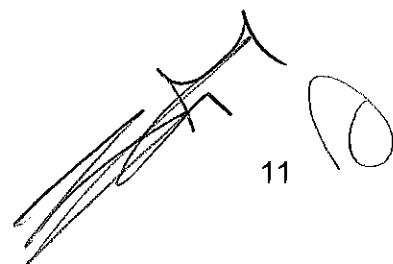
27 On 26 May 2016, the SABC issued a media statement. A copy of the statement is attached marked Annexure **FA5**. That statement indicated that the SABC would no longer "cover" violent protests against public institutions. I refer to this as the SABC's "*Protest Policy*".

28 Journalists within the SABC were not consulted about this radical new policy, despite the effect that it had on our ethical and constitutional obligations. Instead, we were simply instructed to follow the Protest Policy by the Chief Operations Officer, Mr Hlaudi Motsoeneng and the then acting Chief Executive Officer, Mr Jimi Matthews.

29 Moreover the SABC was intent on preventing any internal or external debate about the Protest Policy. Any internal or external criticism of the Protest Policy, even by very senior journalists, was therefore met with an immediate disciplinary response. For example:

29.1 On 31 May 2016, Mr Motsoeneng summoned Mr Krige and Ms Pillay to a meeting to discuss a number of issues over which he was unhappy. These included the fact that on the previous two days, SABC radio shows had included comments from independent analysts which criticised the Protest Policy.

29.2 During the meeting, it was made clear that the SABC wanted complete compliance with the Protest Policy and did not want any criticism of the Protest Policy aired, even if this was criticism by independent analysts.



11

29.3 Mr Motsoeneng stated:

"[I]f people do not adhere, get rid of them. We cannot have people who question management... This is the last time we have a meeting of this kind."

29.4 Mr Matthews added:

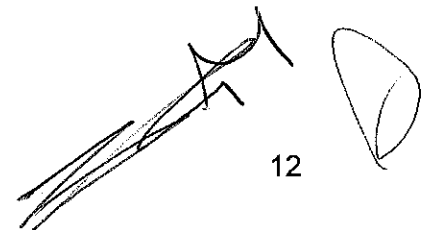
"It is cold outside. If you do not like it you can go. You've got two choices: the door or the window."

29.5 Events escalated on 20 June 2016, when the Right2Know campaign protested against the adoption of the Protest Policy, outside the SABC offices in Johannesburg, Cape Town and Durban.

29.5.1 On the morning of 20 June 2016, a news room diary meeting was held to discuss which events would receive coverage that week. The meeting was attended by various people, including me, Mr Krige and Ms Venter. At the meeting, Simon Tebele (the Acting GE: News) announced that the three protest marches were to be scrapped as stories and afforded no coverage at all by the SABC.

29.5.2 I placed on record my disagreement with this decision not to cover the Right2Know protests. Mr Krige and Ms Venter did the same.

29.5.3 Despite us recording our disagreement, the Right2Know protests were not covered by the SABC. This was pursuant to the instruction given by Mr Tebele.

A handwritten signature in dark ink, appearing to be 'S. Tebele', is written over a circular stamp. The stamp is partially obscured by the signature and another circular mark to its right.

29.6 Three days later, on 23 June 2016, I was called into a meeting with management and informed that I had been suspended. Precisely the same occurred in respect of Mr Krige and Ms Venter. Disciplinary proceedings were instituted against all three of us and remain pending.

29.7 I point out that one of the persons at the SABC most directly involved in driving these processes against us was the acting CEO, Mr Jimi Matthews. Yet, revealingly, a few days later on 27 June 2016, he resigned. In his public resignation letter, Mr Matthews stated:

"[T]he prevailing, corrosive atmosphere has impacted negatively on my moral judgement and has made me complicit in many decisions which I am not proud of.

I wish also to apologise to the many people who I've let down by remaining silent when my voice needed to be heard.

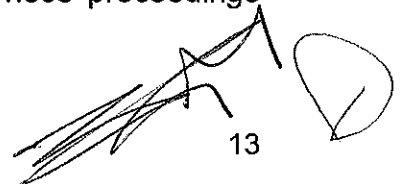
What is happening at the SABC is wrong and I can no longer be a part of it."

(emphasis added)

A copy of the letter is attached as Annexure **FA6**.

29.8 On 26 June 2016, the Fourth to Sixth Applicants – Ms Ntuli, Ms Pillay and Mr Steenkamp – sent an internal letter to the senior managers at the SABC, recording their concern about what was occurring at the SABC, including the Protest Policy and the suspensions of me, Mr Krige and Ms Venter. The letter was then obtained by the media and published.

29.9 Three days later, the SABC instituted disciplinary proceedings against Ms Ntuli, Ms Pillay and Mr Steenkamp. Those proceedings too remain pending.



29.10 On 27 June 2016, the media carried an open letter from the Seventh Applicant – Mr Calata – criticising the direction the SABC had taken. It was headlined: *“SABC’s decisions fly in the face of what many, like the Cradock 4, sacrificed”*.

29.11 Two days later, disciplinary proceedings were instituted against Mr Calata. Those proceedings too remain pending.

29.12 On 6 July 2016, the Eighth Applicant – Mr Mvoko - wrote an article in the media entitled *“My Hell At SABC: In power mongers’ grip”*. It criticised the SABC on a range of fronts, including the Protest Policy.

29.13 Two days later, disciplinary proceedings were instituted against Mr Mvoko. Those proceedings too remain pending.

30 Our peers recognised the extraordinary pressure we were being placed under to conform to the approach demanded by SABC management. On Saturday 9 July 2016, SANEF awarded all eight of us the annual Nat Nakasa Award. The award recognises *“a media practitioner who has shown integrity, commitment and has shown courage in the media”*.

30.1 This was announced at a public ceremony on that evening. The award was accepted publicly by six of us with brief remarks being made.

30.2 The SABC, however, was unmoved. On the morning of Monday 11 July 2016, it issued further disciplinary charges against the first seven applicants. Those charges remain pending.

31 On the afternoon of Monday 11 July 2016, ICASA announced the decision of its Complaints and Compliance Committee (CCC) on a complaint lodged by MMA, SOS and the FXI against the SABC's Protest Policy (the MMA Complaint).

31.1 The unanimous decision of the CCC was that the Protest Policy was invalid and in breach of the SABC's obligations in terms of the Broadcasting Act and the Constitution. ICASA proceeded to direct the SABC to reverse the Protest Policy. A copy of the carefully reasoned judgment of the CCC is attached, marked Annexure **FA7**.

31.2 The SABC, however, remained steadfast. Within two hours of the announcement of ICASA's decision, it held a press conference which was attended by Mr Motsoeneng and the Chair of the SABC Board. At that press conference:

31.2.1 Mr Motsoeneng announced that the SABC would not retract the Protest Policy.

31.2.2 Mr Motsoeneng stated that the SABC would take the decision of ICASA on review to the High Court and that the SABC was prepared to approach the Constitutional Court if needs be. He added that *"No one is going to tell us what to do. We are on track. We are not apologetic."*

31.2.3 Members of the SABC Board stated that ICASA was not a court of law, but merely a chapter 9 institution that only had the power to give *"recommendations"*.

31.2.4 Mr Motsoeneng vowed to “*deal with*” any employee disloyal to the SABC. This would be carried out through “*Operation Clean-Up*”. He stated that: “*We have realized that there are forces outside. They want to destabilise the organisation and also use internal people within the organisation and we are going to deal with them, especially with the people within the organisation.*”

Copies of media articles reflecting these aspects of the press conference are attached marked Annexures **FA8**, **FA9** and **FA10**.

32 The SABC’s conduct has not only been criticized by civil society organisations and ICASA. Political parties from across the political spectrum have condemned the Protest Policy and welcomed the ICASA decision. This includes the African National Congress (ANC).

32.1 On 5 July 2016, the head of the ANC’s sub-committee on communications, Mr Jackson Mthembu, condemned the Protest Policy, stating “*There is nobody in South Africa who needs somebody else to decide [for them] which pictures must they see.*”

32.2 On 12 July 2016, the ANC Secretary-General, Mr Gwede Mantashe stated that the ANC National Working Committee “*reaffirmed the correctness of the communications subcommittee position against any form of certain censorship being imposed at the SABC*”. He also warned the SABC not to ignore the ICASA ruling, stating: “*Our view is that we are hoping the people in the SABC will realise that to defy*

everybody in society doesn't make them a better public broadcaster. It is when they try to listen to what the public view is that makes them a better public broadcaster, and therefore being proud of being described as defiant and being a public broadcaster is a contradiction in terms."

32.3 Copies of media articles reflecting these statements are attached as Annexures **FA11**, **FA12** and **FA13**.

33 Despite all of this and the near universal condemnation of its Protest Policy, the SABC and its management still remain defiant. The SABC has not offered any concession of any kind in relation to its Protest Policy and its treatment of its journalists.

34 On 12 July 2016, the eight applicants, via FXI, wrote to the SABC. We asked for confirmation that, in light of the ICASA decision, the SABC would abandon the Protest Policy and put an end to the suspensions and disciplinary proceedings against us. A copy of the letter is attached as Annexure **FA14**.

35 On 13 July 2016, the SABC replied. It refused to provide these undertakings or any undertaking at all. A copy of the letter is attached as Annexure **FA15**.

36 It has thus become overwhelmingly clear that:

36.1 The SABC is insisting on adhering to its Protest Policy, despite the decision of ICASA that it is invalid.

- 36.2 Any attempts to enforce the ICASA decision will be met by protracted resistance from the SABC in the courts, including appeals all the way to this Court. This was made clear by the statements of Mr Motsoeneng to this Court. This means that it will literally take years for the matter to be resolved.
- 37 I point out that this is precisely what has happened in the context of attempts to enforce the Public Protector's report in relation to the SABC and the position of Mr Motsoeneng. The Public Protector issued her report on the SABC in February 2014. The Democratic Alliance then instituted litigation to enforce the report in July 2014. More than two years later, after multiple court appearances and an SCA judgment against the SABC, there is no end in sight to the litigation concerned and the Public Protector's report has had no discernable practical effect at the SABC.
- 38 Moreover, the problem is not merely the years of delay that the SABC will achieve in relation to implementing the ICASA decision on its Protest Policy.
- 39 Even more alarming is that it is now apparent that, in the interim, the SABC will proceed to "*deal with*" any SABC journalists perceived to be disloyal it, via its "*Operation Clean-Up*". This was made expressly clear by Mr Motsoeneng in his press conference.
- 40 It is thus apparent that even while the Protest Policy issue proceeds through multiple courts, all at taxpayers' expense, the SABC is intent on crushing any

form of disagreement or dissent by its journalists, whether expressed internally or publicly.

41 Given all of this and the culture of fear and silence that is now permeating the SABC news room, the SABC is literally in crisis. This will directly affect the 21 million members of the public who depend on the SABC as their primary source of news. The only way that this crisis can be effectively resolved is for this Court to grant direct access and deal with this matter so that clarity and finality is achieved.

42 For that reason, the applicants seek direct access to this Court. We do so:

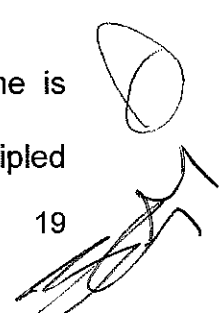
42.1 In terms of section 38(a) of the Constitution, in our own interests;

42.2 In terms of section 38(b) of the Constitution, in the interests of the many journalists employed by the SABC who object to the Protest Policy but are unable to speak out because of intimidation and the fact that to do so would prevent them from supporting themselves and their families; and

42.3 In terms of of section 38(d) of the Constitution, in the public interest.

43 While the applicants are well aware that this Court only grants access in exceptional circumstances, we respectfully submit that this is indeed such a case.

44 Moreover, given that Mr Motsoeneng has publicly announced that he is prepared to take the issue to this Court, it is difficult to see what principled

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objection the SABC could have to such direct access being granted in order to achieve finality sooner rather than later.

45 In what follows in this affidavit, I deal with the following issues in turn:

45.1 The Protest Policy;

45.2 The application of the Protest Policy;

45.3 The SABC's conduct in relation to its journalists;

45.4 The ethical and constitutional duties of journalists;

45.5 The unconstitutionality and unlawfulness of the SABC's conduct; and

45.6 Direct access and urgency.

THE PROTEST POLICY

46 The key facts and documents in relation to the Protest Policy are conveniently set out in the papers that served before the CCC of ICASA in the MMA complaint proceedings.

47 For the convenience of the court, these papers are attached as follows:

47.1 The MMA complaint is attached as Annexure **FA16**.

47.2 The SABC answering papers are attached as Annexure **FA17**.

47.3 The MMA replying papers are attached as Annexure **FA18**.

48 The applicants specifically reserve the right to refer to and rely on these papers during these proceedings. I will make reference to various aspects of these papers in what follows.

49 On 26 May 2016, the SABC issued a media statement regarding its new approach to the coverage 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 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)

50 The text of the media statement is quite clearly inconsistent with its heading. Be that as it may, the media statement appears to capture a policy prohibiting the SABC's journalists from covering violent protests which involve the destruction of public property.

51 On 27 May 2016, Mr Motsoeneng was interviewed on Radio 702. The purpose of the interview was for Mr Motsoeneng to provide clarity on the ambit and effect of the policy. A copy of the transcript of the interview appears as Annexure 4 to the MMA complaint.

52 During the interview, Mr Motsoeneng stated: *"What we mean is we are going to cover all protest, but where we are saying we are not going to show those visuals"*. This statement only served to create further confusion in relation to the ambit and effect of the policy. It clearly contradicted what was captured in the media statement itself:

"We will not cover people who are destroying public property"; and

"the SABC would like to make an appeal to other South African broadcasters and 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". (my emphasis)

53 Later in the interview, Mr Motsoeneng however confirmed that if the SABC was burning as a result of violent protest, the SABC would broadcast such an event when he stated:

"We will. Example Stephen, remember SABC previously did burn, there were no journalists there were no cameras. I mean all people rush to the SABC even SABC we show SABC burning we will do that".

54 Mr Motsoeneng not only contradicted himself during the interview (which created further confusion), but also contradicted what was captured in the media statement and created a single unexplained exception.

55 Later that evening, a further media statement was published by the SABC on its website indicating that it had clarified the terms of the policy. A copy of this further media statement is Annexure 5 to the MMA complaint. This further statement did little to clarify the ambit and effect of the policy, again contradicting its original incarnation. The relevant parts of the further media statement read as follows:

"[the SABC] will still cover protests, but once those turn violent, those aspects will not be aired";

"[the SABC] says it will not provide publicity to such actions, which it describes as destructive"; and

"we will only show the plight of the people and the reason why they are unhappy and all of that. We are not saying we are not going to cover protests".

56 My reference to the "Protest Policy" in this affidavit and the Notice of Motion must be understood to include the media statements and Mr Motsoeneng's comments on Radio 702.

57 The complaint of MMA to the CCC helpfully sets out a series of respects in which the Protest Policy violates the provisions of the Broadcasting Act, the SABC's licence conditions and section 16 of the Constitution. I refer in this regard to paragraphs 14 to 32 of the affidavit of William Bird and pray that they be read as incorporated herein.

58 I wish to elaborate, however, on one particularly important point. The Protest Policy is itself not at all clear about what protest action it will either cover or broadcast. It is sufficiently vague and ambiguous to include the following possibilities:

58.1 The SABC will not cover any violent protest;

58.2 The SABC will not cover violent protests in which there is destruction of public property;

58.3 The SABC will cover violent protests but not broadcast visuals depicting destruction of public property; and

58.4 The SABC will cover violent protests but not broadcast any visuals depicting violence (whether characterised by destruction of public property or not).

59 The multitude of contradictory and vague statements that give rise to the Protest Policy demonstrate that it is fraught with uncertainty; inherently contradictory; impermissibly vague and open to abuse; and not even the SABC management understands the basic and fundamental ambit and effect of the Protest Policy. What the Protest Policy has certainly achieved is a climate of fear and uncertainty, and it has laid the basis for censoring any protest on the pretext of violence while being sufficiently open ended to also result in the censorship of other protests (even peaceful ones, as I explain below).

60 Critically, the vagueness of the Protest Policy permits of a situation where journalists and editors at the SABC are unsure of what they are entitled to cover and/or broadcast. On this basis alone, I submit that the Protest Policy breaches section 16 of the Constitution. It has resulted in the chilling effect that journalists and editors have provided limited coverage and reporting on protests, in order to ensure compliance with the Protest Policy. This chilling effect has been cemented by direct instructions from Mr Motsoeneng and other executives at the SABC, to adhere to the Protest Policy or leave the SABC. I shall deal with these instructions later in this affidavit.

61 In spite of the complete lack of clarity underpinning the Protest Policy, its implementation has thus far exceeded even the multiple possibilities permitted by its contradictory terms.

THE SABC'S APPLICATION OF THE PROTEST POLICY

27th Floor, Radio Park Meeting

62 On 31 May 2016, Mr Motsoeneng summoned Mr Krige and Ms Pillay to a meeting to discuss a number of issues over which he was unhappy. These included the fact that on the previous two days, SABC radio shows had included comments from independent analysts which criticised the Protest Policy.

63 In attendance at the meeting were: Mr Motsoeneng; Mr Anton Heunis (Mr Motsoeneng's advisor and former Acting GCEO); Mr Matthews (Acting GCEO); Mr Tebele (Acting GE: News); Mr Kaizer Kganyago (SABC

Spokesperson); Sebolelo Ditlhakanyane (Head of Radio News); and Ms Pillay and Mr Krige.

- 64 During the meeting, it was made clear that the SABC wanted complete compliance with the Protest Policy and did not want any criticism of the Protest Policy aired, even if this was criticism by independent analysts.

- 64.1 At the meeting Motsoeneng stated:

"We are cleaning up the organisation. People are doing their own stuff. There are many journalists outside that want to work for the SABC. The environment outside is bad. No person [within the SABC] is independent. The SABC is independent. This is the new SABC. You must adapt or find a job elsewhere."

"Editors forum must go. It is advertising for rival newspapers."

- 64.2 He added:

"[I]f people do not adhere, get rid of them. We cannot have people who question management... This is the last time we have a meeting of this kind."

- 64.3 When Mr Motsoeneng was asked by Mr Krige what research or empirical evidence had been obtained to support the premise that broadcasting destruction of public property is a catalyst for more destruction to public property, Motsoeneng replied:

"You must defend the organisation. No journalist is independent. The COO has final responsibility for news"

"[I]f people do not adhere, get rid of them. We cannot have people who question management."

- 64.4 In support of this completely draconian approach adopted to the adherence of the policy, Mr Matthews stated:

"It is cold outside. If you do not like it you can go. You've got two choices: the door or the window."

- 65 The facts set out above are confirmed by Mr Krige and Ms Pillay. Attached as Annexure **FA19** is a copy of Mr Krige's contemporaneous notes, taken during the meeting.

Election workshop

- 66 On 6 and 7 June 2016, a workshop was convened in Magaliesburg, to discuss the SABC's coverage of the upcoming local government elections.
- 67 The workshop was attended by Mr Krige, Ms Pillay and Mr Mvoko.
- 68 At the workshop, Mr Motsoeneng made the following deeply concerning remarks:

"Do not focus on negative stories... Reporters at the SABC do not know the world; when they report, they mislead listeners."

"Today I'm going to talk to the press club, to all editors. I'm going to tell them they cannot try to influence SABC. I'm going to tell them: They cannot tell us what to do."

"Look at your editorial policy. We have removed news and replaced with content. If you as SABC mess up the organisation, you mess up your life. I am in charge. News is now part of Operations. We change the world. We must have news with content."

"I'm in charge, you must adhere to my instruction. President Zuma is the president of the country. I do not regard him as ANC. You cannot treat him the same. We will give him more time. And you can question everyone (Mantashe et al) except our president. We need to respect him, especially you SABC."

"I expect you all to align with my instruction."

- 69 This is confirmed by Mr Krige, Ms Pillay and Mr Mvoko. Attached as Annexure **FA20** is a copy of Mr Krige's contemporaneous notes, taken during the Elections Workshop.

The effect of the statements of Mr Motsoeneng

- 70 Mr Motsoeneng's statements at the Radio Park meeting and the Election workshop reveal that the SABC (and its management) have adopted the following principles and/or policies to all future news and currents affairs coverage:

- 70.1 No SABC journalists have any independence from the broadcaster;
- 70.2 SABC journalists cannot question management;
- 70.3 SABC journalists must – without exception – adhere to the instructions of management, in particular Mr Motsoeneng;
- 70.4 Those SABC journalists who question management or who fail or refuse to adhere to the instructions of management – in particular Mr Motsoeneng – will have their employment terminated;
- 70.5 Journalists must no longer focus on what the SABC management deems to be "negative" stories;
- 70.6 The SABC will no longer broadcast or air the titles and details of headline stories in 'rival' newspapers;
- 70.7 News and current affairs must now have, or be characterised by, content;

70.8 The President must receive more coverage;

70.9 SABC journalists cannot question the President; and

70.10 The SABC will no longer provide coverage to what management deems to be "negative" stories about the President.

71 In the experience of the eight applicants, it is these principles that the SABC management is seeking to have applied by the SABC journalists on a daily basis.

72 When one couples the above principles or policies with the Protest Policy, it becomes quite clear that SABC management is intent on withholding a substantial array of information from the people who rely on its services for their news and current affairs. In particular, the SABC is intent on depicting a distorted version of reality – punctuated by the exclusion of all "negative" stories – preventing the citizens it is mandated to serve from receiving true and accurate information about the state of the country.

73 The SABC has made debate, criticism, resistance and dissidence a trigger for disciplinary proceedings. Journalists who endeavour to adhere to their ethical and constitutional duties towards the public are now *persona non grata* at the SABC.

Durban protests

74 On or about 6 and 7 June 2016, a number of violent protests broke out across the Northern parts of Durban. The protests were in response to the

ANC's councillor candidate lists for the upcoming local government elections. The SABC did not broadcast any visuals of these protests, instead electing to simply report that the protests had taken place.

Tshwane Protests

- 75 On or about 21 and 22 June 2016, violent protests erupted in various parts of the City of Tshwane. In a similar vein to the protests in Durban, the Tshwane protests were in response to the announcement of Thoko Didiza as the ANC's mayoral candidate for Tshwane. The Tshwane protests saw parts of Atteridgeville and Mamelodi shut down for their duration and were marred by the setting alight of 20 buses and the death of 5 people.
- 76 On 21 June 2016, the first day of the protests, SABC television did not carry any visuals of the Tshwane protests. This is despite the fact that all other television channels did so. On 22 June 2016, the second day of the protests, the decision was taken to show visuals of the aftermath of the protests, but not the protests themselves.
- 77 The Daily Maverick Article attached as Annexure **FA21** provided the following insights into the SABC's coverage of the Tshwane protest:

"Monday had seen a notable absence of coverage via the SABC; while the majority of other media – print, online and broadcast – had either led with the protests or given them substantial coverage, the SABC had failed to do the same";

"Journalist Ferial Haffajee added via Twitter: "Nothing on SABC 1, 2 and 3 which are really important channels. Maybe it's a resource issue. Or skills to do lives. #TshwaneProtests."; and

"Bird told Daily Maverick that he "seriously doubted" anyone relying on the SABC alone for news coverage would have a full

understanding of what had been occurring in Tshwane specifically or the country at large."

- 78 The Times live article attached as Annexure **FA22** provides further sobering details of the extent and detail of the SABC's coverage of the Tshwane protests:

"Journalist Ferial Haffajee said on Monday night that the broadcaster aired a rugby story on its 24-hour news as Tshwane burnt."; and

"A snap shot of SABC's news streams revealed the following:

- At the time of publication, the SABC Digital News YouTube channel had posted four videos on Tuesday relating to the Tshwane protests – none of which showed any scenes of violence or buses burning.*
- In one report an SABC journalist made reference to "criminal elements" in an interview with a police official.*
- In another video, an SABC [presenter] asked its viewers what the penalty should be for burning public infrastructure before interviewing a spokesperson from bus company Putco, to ascertain the situation following the torching of the buses in Mamelodi.*
- Meanwhile, the morning live breakfast show aired on SABC2 had not tweeted anything on the Tshwane protests on Tuesday. Its last post on twitter was a report on a Free State chocolate business tapping into the Russian market on Monday.*
- British Broadcaster the BBC, meanwhile, on Tuesday covered the protests in Tshwane, showing an image of two plumes of smoke rising over the City and another of burnt wreckage on a road"*

- 79 It is thus clear that, at a time when the public should have been informed and furnished with visuals of the political protests and actions of their countrymen, SABC television news was, *inter alia*, focused on a story about chocolate.

The Right2Know protests

80 The Right2Know campaign protested against the adoption of the Protest Policy, outside the SABC offices in Johannesburg, Cape Town and Durban on 20 June 2016.

81 On the morning of 20 June 2016, a national news room diary meeting was held to discuss which events would receive coverage that day. I attended the meeting, as did Mr Krige and Ms Venter.

82 Simon Tebele informed the meeting that the three protest marches were to be scrapped as stories and afforded no coverage. When questioned on the reason for this unprecedented decision, Mr Tebele stated that the marches cannot be covered "*because they are about us (the SABC)*". I shall deal with the full ambit and repercussions of this discussion later in this affidavit.

83 As a result of this instruction, the SABC did not provide any coverage to the peaceful protest marches in Johannesburg, Cape Town and Durban. In so doing the ambit of the Protest Policy was extended to exclude the coverage of protests against the SABC, including peaceful protests.

The Cape Town protests

84 On or about 29 June 2016, violent protests broke out on the N2 in Cape Town. At the time, it was believed that the protests were in response to the candidate lists released by the ANC for the upcoming local government

election. Like the protests in Tshwane, a portion of the N2 was shut down for a period of time, due to burning rubble and buses being set on fire.

85 The SABC did not broadcast any visuals of the Cape Town protests. On its Digital News YouTube Channel, the SABC reported that there had been protests and that two buses had been set on fire but that it was still "*unclear who the protestors are and why they are protesting*". This was in stark contrast to other media outlets who reported that the protests had been precipitated by the ANC's candidate lists.

86 There were no protests on 30 July 2016. Protest action again flared up on 1 July 2016. The SABC, on 1 July 2016 and for the first time, in two articles published on their website, finally and belatedly reported that the protests were in response to the ANC's candidate lists and the protestors were disgruntled ANC members and supporters.

The effect of the Protest Policy

87 In spite of the Protest Policy's vague and ambiguous terms, the following can be gleaned from the implementation of the Protest Policy by the SABC management:

87.1 The SABC will no longer broadcast visuals of violent protests (whether characterised by destruction to public property or not);

87.2 The SABC will – at the very most – merely report that violent protests have occurred and then only after the fact;

87.3 The SABC will no longer fully report on the true nature of violent protests, selecting to underplay the extent and impact of, and reasons for, the violent protests;

87.4 The SABC will not cover in any manner whatsoever, protest action against the SABC.

THE SABC'S CONDUCT IN RELATION TO ITS JOURNALISTS

The disciplinary proceedings against the First to Third Applicants

88 During the news diary meeting on 20 June 2016 (to which reference was made in the previous section), Mr Krige and Ms Venter and I all placed on record our disagreement with the editorial decision not to cover the Right2Know protests at all.

89 I stated: *"We need to report the reasons and rationale for the decisions. When it later comes to court because we are making these and people are going to say so and so and so and so are sitting here. And when we fall foul of the law, God forbid, we better just have recorded even the dissenting voices. Please record my voice as dissenting."*

90 Mr Krige stated in response: *"I totally agree with you. The initial reason they said we cannot give other newspapers a platform to criticise the SABC. That I totally understand. They're in the media. But this is not a media issue. It is not other newspapers or opposition or whatever. This is a NGO. It is out*

there and if we ignore them we are busy censoring our own news and that is totally unacceptable".

91 Ms Venter stated: *"And as junior as I am, please record my voice as dissenting against this."*

92 On 23 June 2016, Mr Krige and Ms Venter and I were each called in to separate meetings with management and informed that we had been suspended. Attached marked Annexures **FA23** and **FA24** are copies of the suspension notices of Mr Krige and Ms Venter. I have mislaid my notice of suspension but it was in identical terms to the suspension notices given to Mr Krige and Ms Venter.

93 All three notices of suspension are identical in their terms and record the following as the reason for suspension:

"It has come to management's attention that you have allegedly refused to comply with an instruction pertaining to the provisions of the SABC Editorial Policy as well as the directive not to broadcast visuals / audio of the destruction of property during protest actions(s) and that you distance yourself from the instruction.

The above alleged offence constitutes a refusal and/or failure to comply with a reasonable and lawful instruction and same impacting negatively on the day-to-day broadcasting operations."

94 A week later, on 30 June 2016, Mr Krige, Ms Venter and I were charged with non-compliance with the duties of our contracts, insubordination and insolence in that:

"you allegedly distanced yourself from the instruction issued by the SABC management not to cover the Right2Know movement marches in Cape Town, Durban and Auckland Park, that is

campaigning against the SABC decision not to broadcast violent protests."

- 95 Attached marked Annexures **FA25** to **FA27** are copies of our disciplinary hearing notices.
- 96 All three disciplinary hearings were set for Friday 1 July 2016 – that is on less than 24 hours' notice.
- 97 On 1 July 2016, all three disciplinary hearings were postponed to 11 July 2016. On 9 July 2016, we were informed our disciplinary hearings were postponed until further notice.

The disciplinary proceedings against the Fourth to Sixth Applicants

- 98 On 26 June 2016, Ms Ntuli, Ms Pillay and Ms Steenkamp wrote an internal letter to Mr Motsoeneng and the SABC management, recording their concern about what was happening at the SABC, including the Protest Policy and the suspensions of me, Mr Krige and Ms Venter. The letter was then obtained by the media and published. A copy of the letter is attached as Annexure **FA28**.
- 99 The letter, in relevant parts, reads as follows:

"Our newsroom has become become a source of derision, despair and criticism from the people that we are fundamentally accountable to, the public at large.

In particular, the developments of the past few weeks have heightened this sense of fear, lack of clarity about our journalistic responsibility and low staff morale permeating our newsrooms... In addition, we are of the view that the recent decisions to remove the newspaper slots and the The Editors on SAFM's AM Live amounts to what we consider censorship... As seasoned journalists within the SABC, we maintain that the reasons given

for these sudden decisions contradict... the revised SABC Editorial Code, the South African Broadcasting Act and the South African Constitution.

... we feel aggrieved that the image of our institution and our journalistic integrity continues to be compromised by unconstitutional pronouncements that erode the credibility of the SABC and the journalistic integrity of all of us who work for it.

Furthermore, we wish to register our deep concern for our colleagues who have been suspended for expressing their right to freedom of expression by simply debating and assessing the newsworthiness of events as expected, during editorial meetings. As such we view the suspensions of Thandeka Gqubule, Foeta Krige and Suna Venter as acts of victimisation."

- 100 On 29 June 2016, Ms Ntuli, Ms Pillay and Mr Steenkamp were charged with non-compliance with the duties of their contracts of employment and contravening the SABC's rules and regulations in that:

"You... allegedly liaised with the media i.e. Star (28 June 2016), The Times (28 June 2016), ENCA (Letter drafted and signed by you and provided to ENCA) and News 24 (Letter signed by you and provided to ENCA) without having had permission to do so. In doing so it is alleged that you contravened Regulation 2(d) of the SABC's personnel Regulations i.e.

"An employee:

(d) Shall not, without prior written consent of the Group Chief Executive, make any comments in the media..."

- 101 Copies of the notices instituting disciplinary proceedings are attached marked Annexures **FA29** to **FA31**.

- 102 The disciplinary hearing was initially set for two days later, on 1 July 2016. On 1 July 2016, the disciplinary hearing was postponed to a provisional date of 8 July 2016. The date of 8 July 2016 did not prove possible and no new date has been scheduled.

The disciplinary proceedings against the Seventh Applicant

103 On 27 June 2016, Mr Calata wrote an open letter speaking out against the "*disturbing direction*" being taken by the SABC. The letter was given to City Press and published by it and then by other media houses.

104 Attached marked Annexure **FA32** is a copy of the letter. It was headlined: "*SABC's decisions fly in the face of what many, like the Cradock 4, sacrificed*".

105 The letter reads in part as follows:

"It is therefore with great sadness that I am confronted with the disturbing direction being taken by my employers. A direction I believe flies in the face of what many have sacrificed.

The decision taken recently by the SABC cannot be described in any other way but them being a curbing of media freedom. A freedom to report ethically, truthfully and without bias.

As I reflect on this day and remember the occasions when leaders of our liberation movements stood at my father's grave and waxed lyrical about the freedom he died for, I wonder where they are today."

106 Two days later, on 29 June 2016, Mr Calata received a notice instituting disciplinary proceedings. A copy is attached as Annexure **FA33**.

107 Mr Calata's disciplinary hearing was scheduled together with the hearing for Ms Ntuli, Ms Pillay and Mr Steenkamp on 1 July 2016. It too was postponed to a provisional date of 8 July 2016. The date of 8 July 2016 did not prove possible and no new date has been scheduled.

The disciplinary proceedings against the Eighth Applicant

108 On 6 July 2016, Mr Mvoko wrote an article in the media entitled "My Hell At SABC: In power mongers' grip". It criticised the SABC on a range of fronts, including the Protest Policy. A copy of the article is attached marked Annexure **FA34**.

109 The article stated, in part:

"What cannot and should not be pawned, though, is the SABC. It's too important an institution for its integrity to be impugned, and for the intelligence of everyone associated with it or the public that's supposed to be benefiting from it to be undermined.

What we are dealing with here is not a choice between 90 percent local content and the starvation of our musicians.

The current source of conflict between the chief operating officer and the corporation's senior journalists is not about making a choice between showing violent images of arsonists versus showing the good story of schools and bridges that are being built, and water and other services that are being delivered.

The editorial conferences where my colleagues expressed their views that led to their suspension are where any news leadership discuss and debate daily.

While fundamental differences may arise, there are procedures and laws to be followed.

And when journalists say no to censorship, they are also referring to self-censorship, and are by no means implying there's no censorship in other news organisations, but rather speaking out of a desire to see the SABC leading in journalistic excellence.

We are saying there's no point in doing the right thing by promoting women to leadership positions - only to reduce them to policing duties, or walking around with their cellphones glued to their ears as they take arbitrary instructions on who to put on air.

I'm sure there are many people who think, correctly, that there are a lot of opportunists out there who have hijacked the SABC and want to use it for all sorts of agendas.

And there are surely lots of others who will want to use the current crisis for their own ends.

But this gulf of mutual incomprehension is not reason enough to abandon our collective wisdom and our ambition to correct the wrongs we are witnessing."

110 Two days later, disciplinary proceedings were instituted against Mr Mvoko. A copy of the relevant notice is attached marked Annexure **FA35**. The SABC is no longer paying Mr Mvoko and apparently has no intention to do so while the disciplinary proceedings are pending.

The additional charges

111 Amidst widespread criticism of the SABC for its conduct against us, our peers recognised the extraordinary pressure we were being placed under to conform to the approach demanded by SABC management.

112 On Saturday 9 July 2016, the SANEF awarded all eight of us the annual Nat Nakasa Award. The award recognises "*a media practitioner who has shown integrity, commitment and has shown courage in the media*". This was announced at a public ceremony on that evening. The award was accepted publicly by six of us with brief remarks being made.

113 One might have hoped that this industry-wide recognition for our plight would cause the SABC management to engage in some introspection on its decision. Regrettably, this did not occur.

114 Instead, on the morning of Monday 11 July 2016, the SABC issued further disciplinary proceedings against all of the First to Seventh Applicants. Those proceedings remain pending against us.

115 Copies of the relevant notices are attached as Annexures **FA36** to **FA42**. I note that the notices are dated 8 July 2016. However, the first time we were told of the notices was on Monday 11 July 2016.

The climate in the SABC newsroom

116 It is quite clear from the implementation of the Protest Policy; the journalists' response and criticism thereto; and the disciplinary actions taken against the journalists, that the SABC is currently engaging in a full scale operation to capture and control the predominant source of current affairs and news information in South Africa. In simple terms, the SABC is censoring the news of the day. Journalists at the SABC are being forced to practice their craft in an environment characterised by fear, confusion and despair. Moreover, they are having to choose between protecting their jobs and adhering to their ethical and constitutional duties to truthfully and fairly report the news.

117 The SABC management now accepts no internal or external disagreement or debate over its decisions. This is the case even, as is the case with the Protest Policy, the decisions taken appear to be patently unlawful, contrary to the ethical and constitutional duties of journalists, and contrary to the public interest.

118 It is essential that newsrooms are open spaces characterised by independence, healthy debate, vigour, camaraderie, high morale, job satisfaction, trust, integrity, credibility and a feeling of acting in the public

interest. By virtue of the conduct of the SABC management, this is not the case in the SABC newsrooms at present.

119 Since the adoption of the Protest Policy and its extended implementation, the newsrooms at the SABC are of a shadow of what they once were. There is extreme fear on the part of the journalists who are mandated to report the news truthfully, fairly and accurately. Journalists are now fearful of reporting on any story that may find them in hot water with the SABC management. There is a genuine feeling that simply doing one's job, could have the farcical consequence of losing that job.

120 This fear is coupled with a great sense of confusion. The Protest Policy is so vague, as to encompass so much, that journalists are not at all sure what they can and cannot cover or broadcast; deepening the sense of fear felt by so many.

121 All of this has led to divisions within news rooms. The dividing line is drawn between those journalists who wish to adhere to their ethical and constitutional mandate, and those journalists who simply wish to retain their jobs. The trust once felt between colleagues in the news rooms is broken. Likewise, the camaraderie that punctuated strong working relationships is gone.

122 As journalists, we have lost our credibility, integrity and independence. Our morale is at an all-time low and ultimately, the ability of newsrooms to cover

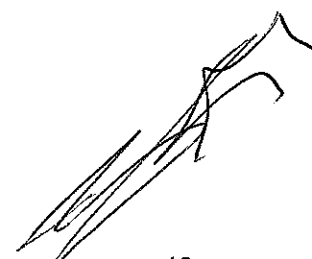
the news of the day, is fraught with various personal and political concerns, hindering any real possibility of true, accurate and fair coverage of the news.

- 123 The actions and statements of the SABC management have only cemented this fear, confusion and despair. The message is clear: if you fail or refuse to follow the Protest Policy or criticise it, then you will be side-lined and pushed out of the organisation. Not even the most respected and senior journalists are immune from the draconian hand of the SABC management in this regard.

THE ETHICAL AND CONSTITUTIONAL DUTIES OF JOURNALISTS

- 124 The ethical duties and obligations to which all South African journalists must at least aspire are to be found in the ICASA Code of Conduct for Free To Air Licensees (the ICASA Code); the Broadcasting Complaints Commission of South Africa Free-to-Air Code of Conduct for Broadcasting Service Licensees (the BCCSA Code); and the Press Council Code of Ethics and Conduct for South African Print and Online Media (the Press Council Code).

- 125 The ICASA Code and BCCSA Code provide that news must be reported truthfully, accurately and fairly. They further provide that the news must be *"presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by: distortion, exaggeration, or misrepresentation; material omissions; or summarization."*



126 Section 1 of the Press Council Code commits journalists to the exact same considerations in their coverage of the news as does the BCCSA Code above.

127 The preamble of the Press Council Code, buttresses these sentiments:

"As journalists we commit ourselves to the highest standards, to maintain credibility and keep the trust of the public. This means always striving for truth...reflecting a multiplicity of voices in our coverage of events... and acting independently."

128 Finally, section 2 of the Press Council Code provides, inter alia, that journalists *"shall not allow commercial, political, personal and other non-professional considerations to influence or slant reporting."*

129 These duties are, however, not merely ethical in nature. They are also duties that derive directly from section 16 of the Constitution. This is made clear in this Court's judgment in *Khumalo and Others v Holomisa*:

"The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected. ...

*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...."*²

² 2002 (5) SA 401 (CC) at [22] - [24].

130 Through the Protest Policy (including the Policy's extended implementation), this is the spectrum of ethical and constitutional obligations which the SABC is asking its journalists to repudiate in their day-to-day coverage of news and current affairs.

131 Moreover, while these duties apply with force to all journalists, they apply with particular force to the SABC.

132 The SABC is not merely a broadcast service provider. It is the public broadcaster. The SABC supplies the majority of South Africans with news and information. The role of the SABC should be understood in the context of the constitutionally entrenched right of freedom of the press and the freedom to receive or impart information.

133 The SABC, which boasts three free-to-air channels, two subscription broadcasting channels and 18 radio stations, is the single largest and most accessed media institution in South Africa. Indeed, it boasted in its 2014/15 annual report³ that it had an average 27.9 million listeners over the age of 15 across its 18 radio stations, weekly, and an average 20.1 million weekly viewers across its three free-to-air television stations and subscription news channel.

134 The SABC is a critical institution for fulfilling the information, education and entertainment needs of a significant proportion of the people of South Africa.

³ SABC Annual Report, Part 2, page 4, <http://bit.ly/25Ee86i>.

Yet, this is being fatally undermined, to the detriment of the public, by the Protest Policy and the disciplinary steps taken against SABC journalists.

THE UNCONSTITUTIONALITY AND UNLAWFULNESS OF THE SABC'S CONDUCT

135 The Protest Policy, the instructions purportedly issued pursuant to the Protest Policy and the conduct of the SABC in relation to the journalists are all unlawful in that they violate section 16(1) of the Constitution and Broadcasting Act.

The Protest Policy violates section 16(1) of the Constitution

136 Section 16(1) of the Constitution guarantees everyone the right to freedom of expression, including the freedom of the press and other media and the *"freedom to receive or impart information or ideas"*.

137 The rights contained in section 16 not only afford protection to agents in the service of the media but also obligations to fulfil a constitutional mandate that is inextricably linked to the prosperity of South Africa's constitutional democracy.

138 The Protest Policy (including its implementation) clearly limits the rights afforded the public at large, and the journalists in particular, under section 16(1) of the Constitution. It does so by ensuring that:

- 138.1 Visuals of violent protests (whether characterised by destruction to public property or not) will not be broadcast;
- 138.2 Violent protest will receive only (at most) limited coverage characterised by a delay in reporting and the withholding of material information in relation to a story;
- 138.3 Any protest against the SABC and its policies will not be covered at all; and
- 138.4 Any criticism or disagreement with the Protest Policy, from within the SABC organisation, will result in either suspension or a disciplinary hearing.
- 139 The effect of the Protest Policy on SABC journalists cannot be overstated. The Protest Policy and its implementation placed the journalists in an impossible position. They had to choose between:
- 139.1 Adhering to an unconstitutional and unlawful Protest Policy adopted by their employer;
- 139.2 Adhering to their ethical and constitutional obligations to report truthfully, impartially and fully on the news.
- 140 They must do so in a context where:
- 140.1 It is not clear at all what the Protest Policy in fact requires; and
- 140.2 They are unable to engage in any meaningful debate and discussion, even internally, regarding the wisdom of the Protest Policy.



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141 Any limitation of the rights contained in section 16(1) must pass the limitations analysis under section 36 of the constitution in order to be lawful. The Protest Policy and indeed its implementation falls foul of this analysis. Although this is principally a matter for legal argument, the following points merit mention.

142 First, the Protest Policy is not law but as the name suggests a policy. This Court has held that a policy or practice does not qualify as law. As such the Protest Policy does not have the requisite status, to justifiably limit the rights contained in section 16(1).

143 Second the Protest Policy, even if found to be a law (which is not conceded), is not a law of general application. The Protest Policy is vague, ambiguous and contradictory. It is not sufficiently clear, accessible or precise to allow those whom it affects to determine the extent of their rights and obligations.

144 In the event that the Protest Policy is found to be a law of general application (which is not conceded), then it fails the criteria of the section 36 analysis itself.

145 One can glean the purported purpose of the Protest Policy from its various iterations. It seeks to reduce the number of violent protests in South Africa; the theory being that the broadcasting of visuals of violent protests, is a catalyst for further violent protests.

146 It is quite clear that the Protest Policy as applied and its stated purpose (or supposed purpose) are completely disconnected from one another:

146.1 There is no connection between not covering peaceful protests and the SABC's purpose of preventing the emulation of violent protests.

146.2 There is absolutely no empirical evidence supporting the claim that those who see violent protests on Television will emulate such violence in future. Mr Motsoeneng clearly demonstrated that no research in this regard had been undertaken when he stated that he does not "*believe in research*".

146.3 A number of violent protests have occurred since the announcement of the policy. The Protest Policy has therefore done little to achieve its stated purpose.

146.4 The same Protest Policy is apparently not applicable to violent protests that occur outside South Africa's borders. The SABC recently showed visuals of the mass violent protests that occurred in Zimbabwe. If the premise underlying the purpose is true, then it must be true of all places at all times. Does this mean that the SABC will no longer show visuals of the many violent protests during apartheid that were integral to bringing about an end to the Apartheid regime?

147 Accordingly, the Protest Policy and its implementation unjustifiably limit the rights of both the public and the journalists and in so doing, violates the provisions of section 16(1) of the Constitution.

The Broadcasting Act

148 The SABC is regulated by the terms of the Broadcasting Act 4 of 1999. Its policies and their implementation must accordingly, conform with the Broadcasting Act.

149 Section 2(d) of the Broadcasting Act provides that the objects of the Act are to develop a broadcasting policy in the republic in the public interest to, *inter alia*, “ensure a plurality of news, views and information”.

150 Section 3(c) of the Broadcasting Act provides that the Broadcasting system must “provide a reasonable, balanced opportunity for the public to receive a variety of points of view on matters of public concern”.

151 Section 6(4)(c) and (d) of the Broadcasting Act 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.”

152 Furthermore, section 6(8)(f) of the Broadcasting Act requires the SABC to develop a code of practice that ensures that the services and personnel of the SABC comply with “the highest standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest.”

153 Section 10(1)(d) of the Broadcasting Act requires the SABC to provide coverage of *"significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests."*

154 The Protest Policy contravenes the provisions of the Broadcasting Act.

The SABC's Conduct Towards the Journalists is also Unconstitutional and Invalid

155 The decision by the SABC to suspend and and discipline the journalists is equally unlawful and unconstitutional.

156 First, the decision to suspend and discipline the journalists was predicated on an invalid and unconstitutional Protest Policy. On this basis alone, it was unlawful and invalid.

157 Second, and in any event, the conduct of the SABC towards its journalists violated section 16(1) of the Constitution, as well as sections 10 and 23 of the Constitution.

157.1 The journalists, in an attempt, to hold true to both their constitutional mandate to truthfully, fairly and fully report the news and their ethical obligations as journalists to the same, voiced their concern with the Protest Policy and its implementation. Their endeavours were rooted in the Constitution itself, the Broadcasting Act and the SABC's own revised 2016 Editorial Policies. Their concern, plainly put, was one of

editorial independence; an intolerable practice for any broadcaster, let alone one that is mandated (as are its journalists) to serve in the public interest.

157.2 Even if the SABC disagreed with the concerns expressed by the journalists, it was required by section 16(1) of the Constitution (and the rights to dignity and fair labour practices under sections 10 and 23 of the Constitution) to give them serious consideration and not to punish the journalists who expressed them. Our Constitution does not contemplate an uncritical workforce, where workers are not entitled to raise concerns with their employers, in any context. More critically, it certainly does not contemplate this in the media context – where the need for an independent, vibrant, critical news room is essential to give effect to section 16 of the Constitution.

157.3 Our Constitution does not contemplate a position where employees are put in a position where they have to choose between adhering to their ethical duties and being able to earn a salary and support themselves and their families.

157.4 The journalists' suspension and/or charges are an obvious attempt to silence any form of debate in the newsroom and punish those journalists who adhere to their ethical duties and obligations. The climate of fear at the SABC, within the ranks of its journalists, was only heightened by these suspensions and charges. The message being sent by the SABC management, to its employees is clear: no dissention will be tolerated; if you wish to remain employed by the SABC you must adhere, without question, to the Protest Policy and

the instructions of the SABC management. This is so even where those instructions appear to be unlawful, inconsistent with the ethical and constitutional obligations of journalists and contrary to the public interest.

157.5 This is not consistent with our constitutional scheme.

158 For these reasons, the journalists' suspensions and disciplinary proceedings must also be set aside and the journalists should be allowed to return to work under the conditions that existed prior to the adoption of the Protest Policy.

DIRECT ACCESS AND URGENCY

159 The applicants are acutely aware that direct access to this Court is only granted in exceptional circumstances and when the interests of justice require it. I submit, however, that this is a truly exceptional case, which warrants this Court granting direct access.

160 In considering the question of direct access, I refer to the first substantive section of this affidavit, headed **"THE NEED FOR THIS APPLICATION"**. The considerations set out there speak strongly to the need for direct access.

161 In this regard, I emphasise the following six considerations which render this an exceptional case and justify direct access being granted in the interests of justice.

162 First, it is difficult to overstate the public importance and impact of this case.

162.1 This case goes to the heart of the SABC – the public broadcaster – whose decisions and policies affect on an hourly and daily basis what news is seen and heard by members of the public.

162.2 I reiterate that for 21 million South Africans, the SABC is their primary source of news coverage. A threat to the constitutionality and lawfulness of that coverage is thus extraordinarily important and has an immediate impact.

163 Second, this case comes at a time where the South African public is desperately in need of proper balanced coverage by its public broadcaster.

163.1 The country is on the verge of what is arguably the most fiercely contested democratic elections in our history. The public require and are entitled to the highest quality of news coverage in the run-up to and aftermath of those elections.

163.2 However, at this critical juncture, the conduct of the SABC management has undermined the ability of the SABC to deliver on its statutory and constitutional mandate in this regard.

163.3 Where people engage in protests, the public will receive (at most) an impoverished and inaccurate report of what occurs. More critically, the sense of fear and disquiet that has been sown in the newsrooms of the SABC by the conduct of the SABC management described in this application means that even non-protest news will not be covered properly. The culture of silence and forced acquiescence that the

SABC management is intent on producing is simply not consistent with the culture required for proper news coverage.

164 Third, while this case is fundamentally about the public interest, for the reasons I have given, it is also about the eight applicants and our families.

164.1 We have been driven to stand up for what we believe in, due to what we perceived were the considerable wrongs brought about by the Protest Policy and related events.

164.2 We have not done so lightly. We are seasoned journalists who have been employed by the SABC for many years. Our pedigree as journalists is unquestionable. We have – for years – been entrusted by the SABC with departments to manage, with programmes to produce, with Presidential interviews to conduct. We would thus not have sought to question or criticise the SABC had we not considered that the SABC and the public faced a grave threat.

164.3 But having done so, we are now paying the price. Three of us are suspended. One of us is not being paid. All of us are being subjected to disciplinary proceedings. All of us have been publicly vilified by the SABC management's implication that we are disloyal to the SABC and that we are allied to forces hostile to it. We have families to support and bonds to pay. We are only able to approach this Court at all due to the fact that the attorneys and advocates representing us have agreed to charge no fees save for those that may be taxed in the event of a favourable costs order.

164.4 We do not regret standing up for what we believe in. But we cannot be expected to wait for the months and years it will take while this dispute proceeds through the court hierarchy.

165 Fourth, the SABC has regrettably shown a tendency to seek to delay the resolution of matters affecting it, by resorting to extensive and costly litigation in multiple fora, all at taxpayers' expense.

165.1 As I have pointed out, this is precisely what has happened in the context of attempts to enforce the Public Protector's report in relation to the SABC.

165.2 For that reason, I regret that we have little faith that the High Court litigation instituted by the HSF will bring effective relief to us or the public. The HSF has sought both interim and review relief in the High Court, as appears from its Notice of Motion attached as Annexure **FA43**.

165.3 But even if interim relief were granted to the HSF, it is almost inevitable that the SABC would seek to appeal that order. And even if the HSF sought execution pending that appeal, it is equally inevitable that the SABC would seek to appeal that execution order. The regrettable reality is that for a powerful organ of state like the SABC with access to unlimited (public) funds, there is little likelihood of finality being achieved unless and until this Court itself deals with this issue.

166 Fifth, in the public statements of Mr Motsoeneng, the SABC has itself signalled its intent to litigate this matter all the way through the court hierarchy until it reaches this Court. Once that is so, there can be no conceivable principled objection by the SABC (or indeed the remaining respondents) to having this matter determined by this Court on on a direct access basis.

167 Sixth, this is a very unusual case. While this Court would not have the benefit of the views of a lower court on the Protest Policy, it has the benefit of the judgment of the CCC of ICASA.

167.1 Parliament designated the CCC of ICASA as the body responsible, as a matter of first instance, for resolving complaints against broadcasters under the Broadcasting Act. That role has been fulfilled in this case.

167.2 Moreover, the role was fulfilled by the CCC hearing full argument from two legal teams, each led by senior counsel, and then delivering a carefully reasoned judgment.

167.3 This Court would thus not truly be dealing with the lawfulness of the Protest Policy as a court of first and final instance.

168 Seventh, this is not a case that will require any oral evidence.

169 For all of these reasons, we respectfully submit that this Court should grant direct access. It is the only way that the issues facing the SABC can be expeditiously and finally resolved, in a manner that will protect the public.

170 Lastly, and for the same reasons I have given in relation to direct access, I submit that this matter should be dealt with urgently.

170.1 With every day that passes without this matter being finally resolved, the prejudice to 21 million South Africans increases in that they are unable to rely on the SABC to fulfil its mandate. This is especially the case given the impending Local Government Elections.


170.2 If it is possible, the applicants seek to have this matter heard and determined before the Local Government Elections on 3 August 2016. That will allow the SABC to carry out its mandate in relation to what is arguably the most important time for it to do so since the first elections in 1994.

170.3 However, in the event that this matter cannot be heard and determined before 3 August 2016, the applicants then seek to have the matter set down in the August 2016 term. While that would not assist in the election coverage, it would at least ensure that these critical issues are resolved speedily and that the ongoing prejudice to the public is curtailed. As I have explained this is manifestly in the public interest and interests of justice.

170.4 In this regard I point out that very shortly after the announcement of the Protest Policy, it was challenged by MMA in the CCC. There was

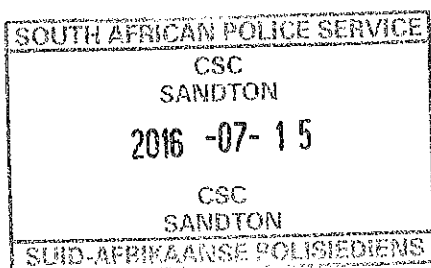
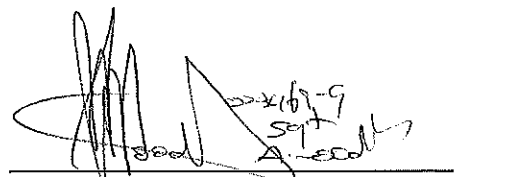
accordingly no need for the present applicants to do so. However, the press conference given by the SABC on 11 July 2016 following the decision of the CCC made clear that the CCC decision would not resolve this issue and that direct access to this Court was essential. This application is being launched four court days after that press conference. The applicants have thus moved extremely speedily to bring this matter to the attention of this Court.

WHEREFORE I pray for the relief in the Notice of Motion.



DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at **SANDTON** on this the 15th day of JULY 2016, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

COMMISSIONER OF OATHS
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