

**BEFORE THE TRIBUNAL OF BROADCASTING COMPLAINTS COMMISSION OF
SOUTH AFRICA**

CASE NO: 05/2011

In the matter between:

**SOUTH AFRICAN BROADCASTING
CORPORATION LIMITED**

Applicant

and

**MAIL AND GUARDIAN MEDIA LIMITED
SAM SOLE**

1st Respondent
2nd Respondent

In re:

**MAIL AND GUARDIAN MEDIA LIMITED
SAM SOLE**

1st Applicant
2nd Applicant

and

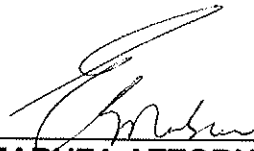
**SOUTH AFRICAN BROADCASTING
CORPORATION LIMITED**

Respondent

FILING SHEET

Documents filed herewith: Applicant's Founding Affidavit.

DATED AT JOHANNESBURG ON THIS 10TH DAY OF JUNE 2011.



MABUZA ATTORNEYS

Applicant's Attorneys
Two Commerce Square
39 Rivonia Road, Cnr Melville Road
Sandhurst
Sandton
Tel: (011) 750 1500
Fax: (011) 750 1512
Ref: Mr ET Mabuza/Mr W
Mathebula/SABC044

**TO: THE REGISTRAR
BCCSA**

**AND TO: CHEADLE THOMPSON & HAYSON INC
Respondents' Attorneys**

BEFORE THE TRIBUNAL OF BROADCASTING COMPLAINTS COMMISSION OF
SOUTH AFRICA

CASE NO: 05/2011

In the matter between:

**SOUTH AFRICAN BROADCASTING
CORPORATION LIMITED**

Applicant

and

**MAIL AND GUARDIAN MEDIA LIMITED
SAM SOLE**

1st Respondent

2nd Respondent

In re:

**MAIL AND GUARDIAN MEDIA LIMITED
SAM SOLE**

1st Applicant

2nd Applicant

and

**SOUTH AFRICAN BROADCASTING
CORPORATION LIMITED**

Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

THABANG SYLVESTER MATHIBE

do hereby make oath and state as follows:

1. I am an adult male, employed by the SABC as a General Manager: Litigation



within the SABC's Legal Department. I am by virtue of my employment authorised to depose to this affidavit.

2. The averments made herein are true and correct and are, save where I say so or the context indicates otherwise, within my own personal knowledge and belief. The legal submissions made in this affidavit are based on advice which I have received from our legal representatives which advice I accept as reflecting the correct legal position.
3. The Applicant is the South African Broadcasting Corporation Limited ("the SABC"). I am duly authorised to bring this application and make this affidavit on its behalf.
4. The First Respondent is the Mail & Guardian Media Limited. It is duly represented in these proceedings by Cheadle Thompson & Haysom Attorneys.
5. The Second Respondent is Sam Sole, an employee of the First Respondent. He is also represented in these proceedings by Cheadle Thompson & Haysom Attorneys.
6. At the outset I wish to place on record the Applicant's objections to the procedure which has been laid down for the "bringing of this application". I have been informed by my attorney of record that this procedure was set out in letters which the Registrar of the BCCSA wrote to my attorneys on 6 June 2011 and 8 June 2011. It is not clear from the letter whether the procedure was determined by the Registrar or the Chairperson, to whom certain far-reaching powers have been granted in respect of the implementation and/or possible staying of the "direction"

Handwritten signature and initials in the bottom right corner of the page.

contained in paragraph 40 of the judgment of the Tribunal and the further conduct of the matter.

7. It appears from the two letters from the BCCSA's Registrar referred to above that reliance is placed on (Procedural) Rule 5 and/or Rule 6.1 as the basis for the procedure laid down and the source of the Chairperson's powers.
8. I have been advised that neither of those provisions is applicable to the issues at hand.
9. However, if those provisions are found to be applicable, which is denied, having regard to the overall context, the Chairperson is, in part for the reasons set out hereunder, precluded from taking any further decisions or playing any further role in this matter.
10. It is common cause that the Chairperson of the Tribunal penned the judgment, which is adverse to the SABC. Thereafter, after a further hearing, he refused the SABC leave to appeal. In effect, he has decided that there are no reasonable prospects of the Appeal Tribunal's coming to a different conclusion or issuing different "directions" from those he issued on behalf of the Tribunal. I submit, with the utmost respect, that in these circumstances it would be inappropriate, if not indeed improper, for the Chairperson of the Tribunal to be further involved in the matter, whether in respect of the implementation of the order of the Tribunal or in the application and/or review processes to be launched by the Applicant before to the Complaints and Compliance Committee ("CCC") and Icasa. He is *functus officio* in every sense of that term. Any further participation by him in the process



would, I submit, be unlawful, unreasonable and procedurally unfair and would consequently violate section 33 of the Constitution and the relevant provisions of the Promotion of Administrative Justice Act, No 3 of 2000.

11. To the extent that it is necessary for any “order” that the implementation of the “direction” be stayed pending the finalisation of the further processes and procedures still available to the SABC, I respectfully submit that that must be granted (or refused) by Icasa or the CCC – not by the Chairperson.

12. I have been advised, and again without being exhaustive, that among the processes and procedures that are available to the SABC, and which I record it intends pursuing are the following:

12.1 to launch a review application against the decision of the Tribunal in terms of the Icasa Regulations of 9th October 2003;

12.2 to refer the matter to the CCC in terms of section 17B(a)(i) of the Icasa Act, No 13 of 2000;

12.3 to lodge a complaint to the CCC in terms of section 17B(a)(iii) of the Icasa Act.

13. I have already respectfully pointed out that, having regard to the fact that the Chairperson is not permitted to be a judge in his own cause, the merits or *bona fides* of the review application will have to be determined by the CCC or Icasa. However, whilst reserving all the SABC's rights in respect of the review, and solely with the purpose of complying with what has been laid down in the Registrar's letters, I record briefly that among the bases on which the review application will



be brought are the following:

- 13.1 that the procedure adopted by the Tribunal in reaching its decisions and findings was grossly irregular and manifestly unfair;
- 13.2 that the decisions and findings made by the Tribunal are not those which a reasonable tribunal may make on the basis of the material that was before it;
- 13.3 that the Tribunal did not have the power to issue the "direction" that is set out at paragraph 40 of its judgment. Without limiting the generality of this contention, I respectfully point out that clause 14 of the BCCSA Constitution does not give the Tribunal the power to issue such a direction.
14. Finally, in respect of the proposed review application, to the extent that the Icasa Regulations of 9th October 2003 seek to limit the ambit of the review that it contemplates to anything less than a full review as envisaged in the Constitution and PAJA, I submit that they are unconstitutional and accordingly invalid.
15. Whilst the Registrar's letters are limited to requiring that the SABC set out the grounds of the proposed review, for completeness' sake, I place on record that the bases of the application that is to be brought in terms of section 17B(a)(i) of the Icasa Act and the complaint that is to be lodged in terms of section 17B(a)(iii) will cover to a large extent the grounds on which the review is to be brought, as set out but not limited to what is contained in paragraph 13 above.
16. There is a further matter that I must place on record. It is this. The "direction" issued by the Tribunal in paragraph 40 of its judgment has serious implications not



only for the Applicant but for Mr Robert Gumede as well. In this connection, I note the matters set out in the paragraphs immediately hereunder.

17. First, the Tribunal held its hearing and made its order in the absence of Mr Gumede. I submit that that was, in the circumstances of this case, impermissible. To now require the SABC to in effect say that it rejects the correctness or truthfulness of what he had said, without even giving him an opportunity to put his side of the story, will adversely affect fundamental right to his reputation and dignity, which are jealously protected and guarded by the Constitution. Second, the SABC, the Tribunal and its Chairperson, as organs of state, are enjoined in terms of the Constitution to protect the fundamental rights of persons. If there is to be a violation of rights, it can take place only after a proper and fair process was followed. With respect, that did not happen in this case. I respectfully point out that if any of the processes or procedures that the SABC intends pursuing is successful, it will not be required to comply with the Tribunal's direction, certainly not in the form or terms set out in the judgment. Consequently, the SABC, and for that matter Mr Gumede, will suffer irreparable prejudice if it were required to comply with the direction before it had effectively exercised its rights to set it aside.

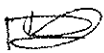
18. I respectfully submit that the application of the principle of proportionality requires that the SABC is given a reasonable opportunity to challenge the correctness and validity of the Tribunal's decision and "direction". In the premises, should the power to do so lie with the Chairperson, which I again deny, I respectfully request that the Tribunal's order should be stayed pending the finalisation of the processes described above.





THABANG SYLVESTER MATHIBE

SIGNED and **SWORN** to before me at ILLOVO on this the 10 day of June 2011, by the deponent who has acknowledged that he knows and understands the contents of this affidavit; that he has no objection to taking the prescribed oath and that he considers the prescribed oath to be binding on his conscience.



COMMISSIONER OF OATHS
Full names: PELETSE DAISY MOLEPO
Capacity: EX OFFICIO PRACTISING ATTORNEY
Address: COMMISSIONER OF OATHS
36 FRICKER ROAD
ILLOVO BOULEVARD
PO BOX 3523, PARKLANDS 2121
TEL 011 447 5805/7 FAX 011 447 6071