

**IN THE COMPLAINTS AND COMPLIANCE COMMITTEE
OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

In the matter between:

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

S.O.S SUPPORT PUBLIC BROADCASTING COALITION Second Complainant

FREEDOM OF EXPRESSION INSTITUTE Third Complainant
and

**SOUTH AFRICAN BROADCASTING CORPORATION
SOC LIMITED** Respondent

COMPLAINT IN TERMS OF SECTION 17C OF THE ICASA ACT 13 OF 2000

I, the undersigned,

WILLIAM BIRD

do hereby make oath and state:

1 I am the Director of the Media Monitoring Africa Trust, operating as Media Monitoring Africa (“MMA”). MMA is the first complainant in this matter.

2 I am duly authorised to depose to this complaint on behalf of all three complainants. In view of the urgency of this matter, the necessary resolutions and the constitutions of the organisations concerned will be made available at the hearing of this matter, should the need arise.

- 3 The facts in this matter fall within my personal knowledge, save where the context indicates otherwise. They are true and correct to the best of my knowledge.
- 4 Where I make submissions of a legal nature I do so on the advice of the complainant's legal representatives. Full legal argument will be advanced at the hearing of this matter regarding the legal issues raised.

THE PARTIES

- 5 The first complainant is **THE TRUSTEES FOR THE TIME BEING OF THE MEDIA MONITORING PROJECT BENEFIT TRUST**, known as **MEDIA MONITORING AFRICA**. Media Monitoring Africa has its national office at Suite 2 Art Centre, 22 on 4th Ave, Parkhurst, Johannesburg South Africa. The objectives of the Media Monitoring Africa include the promotion and development of:

- 5.1 Media that is transparent, diverse, ethical and accountable to its audiences

- 5.2 Critical and constructive communications by the powerful, and;

- 5.3 Informed, engaged and connected citizenry.

- 6 The second complainant is the **S.O.S: SUPPORT PUBLIC BROADCASTING COALITION**, a non-profit voluntary association governed by a constitution

("SOS"), with its principal office at Suite 1, Art Centre, 22 on 4th Ave, Parkhurst, Johannesburg.

6.1 SOS is a civil society coalition engaged in campaigns for public broadcasting in the public interest.

6.2 SOS represents a number of trade unions including the Congress of South African Trade Unions, the Broadcasting, Electronic Media and Allied Worker's Union and the Media Worker's Association of South Africa; independent film and television production sector organisations including the South African Screen Federation; and numerous NGOs and Community Based Organisations as well as a number of academics and freedom of expression activists.

6.3 SOS was formed in 2008. It has since then played an active role in seeking to monitor and resolve the problems facing the SABC. It has done so both by engaging with political processes – such as the Parliamentary Portfolio Committee on Communications – and public processes.

7 The third complainant is the **FREEDOM OF EXPRESSION INSTITUTE ("FXI")**, a non-profit organisation governed by a constitution, with its principal office at 18 Cedar Avenue, 1st Floor Richmond Forum, Richmond, Johannesburg. The principal objects of the FXI are, amongst other things, to fight for and defend the rights to freedom of expression, to oppose censorship and promote access to media and a free press.

- 8 The respondent is the **SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED ("the SABC")**. The SABC is the public broadcaster of the Republic and a statutory public body established by the Broadcasting Act 4 of 1999.

THE NATURE OF THIS COMPLAINT

- 9 This complaint arises from a recent decision of the SABC regarding its coverage of violent protest action.
- 10 On Thursday, 26 May 2016, the SABC issued a media statement regarding its new approach to coverage of violent protest action. A copy of the statement is attached as **Annexure 1**. The statement stated as follows:

"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)

- 11 The complainants are of the view that this decision is in breach of provisions of the Broadcasting Act as well as the SABC's licences. They have accordingly brought this complaint to the Complaints and Compliance Committee (the CCC) as the body statutorily responsible for dealing with such issues.
- 12 As I explain in what follows, this complaint is undoubtedly urgent and ought to be dealt with as such. The complainants therefore respectfully request that the Chairperson issue directions dealing with this matter as one of urgency, in terms of Regulation 6 of the Regulations governing the CCC.
- 13 In what follows, this affidavit deals with the following issues:
 - 13.1 The legal framework;
 - 13.2 The grounds of complaint;
 - 13.3 Urgency; and

13.4 The relief sought

THE LEGAL FRAMEWORK

14 The SABC is governed by a series of different provisions, including the Broadcasting Act, its licences and its Editorial Policies.

The Broadcasting Act

15 The SABC is regulated by the terms of the Broadcasting Act 4 of 1999.

16 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”. (emphasis added)

17 This provision is strengthened by other provisions of the Broadcasting Act:

17.1 Section 6(4)(c) and (d) enjoin the SABC to “encourage the development of South African expression by providing, in South African official languages, a wide range of programming that offers a plurality of views and a variety of news, information and analysis from a South African point of view, and advances the national and public interest.”

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

SABC licence conditions

18 In addition to the obligations imposed by the Broadcasting Act, the SABC is subject to the provisions contained in its licenses. A copy of the licence for SABC1 and SABC2 is attached as **Annexure 2A**, while a copy of the licence for SABC3 is attached as **Annexure 2B**.

19 In terms of its licence conditions,¹ the SABC is required in the production of its news and current affairs to:

19.1 Meet the highest standards of journalistic professionalism;²

19.2 Provide fair, unbiased, impartial and balanced coverage independent from governmental, commercial or other interference;³

19.3 Provide a reasonable opportunity for the public to receive a variety of points of view on matter of public concern.⁴

¹ Paragraph 4.5 of the SABC 1 and 2 licences and Paragraph 4.7 of the SABC 3 licence (dealing with News and Current Affairs)

² Clause 4.5.3 of SABC 1 licence and clauses 4.5(c) of the SABC 2 and 3 licences

³ Clause 4.5.4 of SABC 1 licence and clauses 4.5(d) of the SABC 2 and 3 licences

⁴ Clause 4.5.5 of SABC 1 licence and clauses 4.5(e) of the SABC 2 and 3 licences

SABC'S Revised Editorial Policies 2016

- 20 Section 6 of the Broadcasting Act requires the SABC to put in place an SABC Charter, including Editorial Policies.
- 21 On 25 February 2016, the SABC Board adopted revised Editorial Policies. A copy of the relevant part of those Editorial Policies is attached as **Annexure 3**.
- 22 I point out that the complainants have serious concerns about whether those Editorial Policies were lawfully adopted in view, for example, of the lack of public participation around them. However, that is not the subject of the present complaint and, present purposes, the complainants are prepared to assume in favour of the SABC that those policies were validly adopted. They do so, however, with full reservation of rights in relation to any future proceedings regarding the lawfulness of the adoption of those policies.
- 23 The following provisions of the Editorial Policies are presently relevant:
- 23.1 In relation to news⁵ the Policies state that “the SABC’s right to freedom of expression comes with an obligation: the duty of every member of its news staff to uphold the highest professional and ethical standards.”
- 23.2 The Policies go on list specific duties on the SABC regarding its news coverage. These include the duties to:
- “Report, contextualise, and present news and current affairs honestly by striving to disclose all the essential facts and by not suppressing*

⁵ Para 4 News, sub-heading “Objectivity, Accuracy, Fairness, Impartiality and Balance” p14 of 40

relevant, available facts, or distorting by wrong or improper emphasis.” (emphasis added)

and

“Aim to tell stories from a South African point of view and deal with issues that are important to South Africans.”

The effect of the Constitution

24 I submit that all of these provisions must be interpreted in accordance with the provisions of the Constitution. This means, in terms of section 39(2) of the Constitution, they must be interpreted in a manner that *“promotes the spirit, purport and objects of the Bill of Rights.”*

25 Of particular importance in this regard is section 16(1) of the Constitution, which 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”*.

THE GROUNDS OF COMPLAINT

26 As I have indicated, on Thursday, 26 May 2016, the SABC issued a media statement regarding its new approach to coverage of violent protest action. The statement stated as follows:

“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."

- 27 The complainants submit that the decision and approach recorded in this statement are unlawful in a series of respects. While full legal argument will be advanced on these issues in due course, I emphasise the following.
- 28 First, the statement appears to indicate that the SABC will not even "cover" violent protests. This is made clear by the passages of the statement that I have underlined. It thus appears that the effect of the SABC is not merely that they will refrain from broadcasting footage of violent protests, but they will not "cover" (i.e. report on) these violent protests at all.

- 28.1 That approach violates all of the legislative, licensing and policy provisions I have highlighted above.
- 28.2 For example, as I have indicated, 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*”. Refusing to report on violent protests is a manifest breach of this obligation. The public have a right to know about violent protests that are occurring so that they can be aware of the concerns and grievances of their fellow citizens. The attempt by the SABC to effectively self-censor these issues is wholly unlawful.
- 28.3 In this regard the principal function of the news is to tell the public what is going on. I emphasise that the effect of the policy will undoubtedly be to distort the news in a way that favours the government concerned (irrespective of whether the government is the ANC in Gauteng or the Democratic Alliance in the Western Cape). That is so since the effect of the policy is to suppress news coverage of the causes of instability and protest against government. The policy therefore inevitably reduces public knowledge of the extent to which people are dissatisfied with their government. The Constitutional Court has made clear that the media cannot merely suppress information about the level of dissent for “*[i]t is impossible to hold accountable a government that operates in secrecy*” and “*the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of*

citizens to make responsible political decisions and participate meaningfully in public life is undermined.”⁶

28.4 I submit that a policy like the present one (which underplays the amount of dissent and attributes predetermined causes in the country) is the hallmark of repressive regimes – such as apartheid South Africa and Burma – where the government wished to prevent the masses from seeing the extent of discontent. It is plainly not appropriate in an open and transparent democracy.

28.5 Similarly, and again as I have indicated, the SABC’s licences deal with news and current affairs and require it to “*provide a reasonable opportunity for the public to receive a variety of points of view on matters of public concern*”. The mere existence of public violence, including the destruction of government property, is itself plainly a “*matter of public concern*”. The fact that this violence occurs in a context where people are seeking to protest regarding a given issue only exacerbates the nature of the “*public concern*”. Yet, rather than provide the public with a “*reasonable opportunity to receive a variety of points of view*” on these matters, the SABC’s decision prevents the public from hearing about these events properly or at all.

28.6 The Editorial Policies, mandated by the Broadcasting Act, too make clear the duty of the SABC. They require the SABC to “*Report, contextualise, and present news and current affairs honestly by striving to disclose all*

⁶*President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) at para 10

the essential facts and by not suppressing relevant, available facts, or distorting by wrong or improper emphasis.” The SABC decision flies directly in the face of this obligation – it results in news regarding violent protests being suppressed and not being disclosed to the public. At the very least it results in them being distorted via press reports.

- 28.7 I am advised that our courts have held that where forms of expression are cut off before reaching the public, this is known as a “*prior restraint*” and will be permitted only in truly exceptional circumstances. In the present context, the SABC has inexplicably and unjustifiably imposed such a prior restraint on its own journalists and editors.
- 29 Second, I am advised and aver that the policy is irrational even on its own terms. That is so since the policy deals only with the destruction of public property rather than private property. Even if the purpose of the policy is assumed to be legitimate (which it is not), the apparent distinction drawn between covering the burning of a public school and the burning of a private school bears no rational connection to any legitimate purpose.
- 30 Third, I emphasise that these conclusions remain applicable even on the most generous reading of the SABC statement. For example, the SABC may rely on the heading to the media statement to contend that it will still report on violent protests, but will do so only via second-hand accounts rather than actual broadcast footage.

- 30.1 I emphasise that this is not what the text of the statement says and it is inconsistent with the repeated admonition by the SABC that these violent protests should not even be “covered”.
- 30.2 But in any event, it is no answer to this complaint and does not resolve the breaches identified.
- 30.3 An approach of not screening footage of violent protests places the SABC viewers at a considerable disadvantage and undermines their rights. It makes those viewers entirely reliant on the second-hand and necessarily more unreliable and contested reports of journalists, rather than allowing them to watch and judge the footage and events for themselves.
- 30.4 I am advised that, in the context of debates about cameras in courts, some of our most senior judicial officers have recognised that this is profoundly inappropriate.
- 30.5 The point was emphatically made by Judge President Mlambo in *MultiChoice*. Refusing a broadcaster permission to screen footage of court proceedings would, he held:

“perpetuate the reality that the community at large remains dependent for news on what happens in the court room from the summarised versions of the journalists and reporters who follow these proceedings. These summarised versions or accounts have, in my view, been correctly categorized as second hand, liable to be inaccurate as they also depend on the understanding and views of the reporter or journalist covering the proceedings.”⁷

(emphasis added)

⁷*Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* [2014] ZAGPPHC 37; [2014] 2 All SA 446 (GP); 2014 (1) SACR 589 (GP) at para 21.

30.6 The recently retired Deputy Chief Justice Moseneke recently made precisely the same point in his speech welcoming the developments in the live broadcasting of court proceedings:

“[I]n most cases, live camera footage will be more accurate than a reporter’s after-the-fact summary. Whatever account they give after they leave the courtroom will inevitably be a second-hand account, their interpretation bleeding into their report. More so, mischievously selected sound bites may indeed undermine accuracy and the important context within which the words were uttered.”⁸

30.7 Moreover, even if this were left aside, the approach of the SABC would make no sense. Its purported desire is to prevent violent protests having publicity. But even if this were a legitimate objective (which it is not), this would not be achieved by reporting on such events using only second-hand accounts – such accounts still result in publicity.

31 Fourth, and in any event, the approach of the SABC rests on a series of flawed assumptions.

31.1 The SABC appears to seek to justify its approach by contending that reporting on or broadcasting footage of violent protests promotes or incites protesters to become violent and destroy property and encourages other people to do the same.

31.2 There is simply no logical or sustainable basis for this concern. There is no evidence at all to support it. The suggestion that ordinary members of

⁸Dikgang Moseneke, “The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice” (15 May 2015) at 12.

the public will be inspired to copy these violent acts is in truth deeply patronising.

31.3 Moreover, the complainants do not suggest that the SABC can or should glamorise or sensationalise the violence – rather it should report it in an accurate and responsible manner.

31.4 Indeed, the complainants readily accept that in broadcasting violent footage, the SABC must act appropriately, including by giving warnings to sensitive viewers in advance. That is made clear by the BCCSA Code, to which the SABC is subject. But treating violence sensitively and issuing warnings is a far cry from not broadcasting violent footage at all or not covering violent protests at all.

32 Lastly, I point out that the SABC itself seems confused about the effect of its decision.

32.1 I have already quoted the media statement of 26 May 2016 and drawn attention to the fact that the text of the statement is inconsistent with its heading.

32.2 On 27 May 2016, Mr Hlaudi Motsoeneng, the COO of the SABC was interviewed on Radio 702 at approximately midday. I attach a transcript of the interview as **Annexure 4**. In that interview – at odds with the media statement – Mr Motsoeneng states: “*What we mean is we are going to cover all protest, but where we are saying we are not gonna show those visuals.*” But later he appears to suggest that only non-violent protest will be covered at all.

32.3 Yet, in the same interview (**Annexure 4**), Mr Motsoeneng claimed that the SABC would for example “show” the SABC if it were burning:

“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.”

32.4 By the evening of 27 May 2016, an article appeared on the SABC’s own website indicating that it had “clarified” its stance on this issue. A copy of the article is attached is **Annexure 5**. However, the “clarification” does little to assist. It states in relevant part:

“The SABC has clarified its position with regard to reports that it will stop coverage of violent protests on its various platforms.

SABC Spokesperson Kaizer Kganyago says they will still cover protests, but once these turn violent, those aspects will not be aired. The public broadcaster says this is to make sure that airing such footage or sound doesn’t encourage protesters to commit violence.

“We are taking this stance because we believe that when people see the footage of themselves doing that on public television, they then encourage people from other communities to think that in order for them to gather attention from us, they need to do the same. And at the end of the day, this is destructive, and it destroys property that belongs to the people of South Africa,” says Kganyago.

The SABC also says the decision to stop broadcasting footage of people burning or destroying public property during community protests is not self-censorship. The public broadcaster says it will not provide publicity to such actions, which it describes as destructive and regressive.

The corporation has also appealed to other broadcasters and the print media to support this initiative.

“It is across the board, but in the main it will be on television because when people are protesting peacefully and telling us about their plight, we will cover that. We want to emphasize that very clearly that we are going to continue to cover public service marches, service delivery campaigns, but when people are burning infrastructure, they are destroying public infrastructure, we are not going to show that footage. 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.”

(emphasis added)

32.5 It is thus still unclear what coverage – if any – the SABC will give to violent protests. Is it going to report on the fact of the violence? If so, how does this achieve its aims and how is it consistent with its stance of “*not providing publicity to such actions*”? If not, then it is clear that violent protests will not be reported on at all.

32.6 This vagueness and lack of certainty is an enormous problem and itself violates the various provisions mentioned above. It means that individual SABC journalists and editors will not know what they are permitted to do. This produces a “*chilling effect*” – whereby SABC journalists and editors report on and broadcast less and less regarding violent protests – just to ensure that they comply with this vague and uncertain policy.

URGENCY

33 The complainants submit that this matter is extremely urgent.

34 It appears that the SABC has already implemented its decision given that it was stated to be “*with immediate effect*.” This means that with every day that passes, the public is already prejudiced and will continue to be prejudice by this unlawful decision.

35 Moreover, the decision has understandably given rise to a national outcry. A wide range of groups, including SANEF and COSATU, have condemned the SABC decision.

36 It is also noteworthy that this complaint concerns the SABC, the public broadcaster. The role of the SABC is critical in empowering every citizen to be able to exercise their right to freedom of expression given that:

36.1 the majority of people in South Africa receive their news from broadcast media (radio and television);

36.2 large numbers of South Africans are unable to afford access to subscription television and, apart from the SABC, there is currently only one other free-to-air television channel available;

36.3 a substantial number of people receive their information primarily through the broadcast media due to, amongst other things, high rates of illiteracy; and

36.4 problems with illiteracy are also compounded by the difficulty and cost of distributing newspapers which means that broadcast news may be the only media which is accessible for many people.

37 Therefore, the SABC is for many South Africans the primary source of news and information. Yet, the decision of the SABC undermines the rights of these South Africans and their ability to know what is happening in the country. It means that while elites – who gain access to the news via Twitter or websites or private broadcasters – will have full access to information, many ordinary South Africans will not.

38 Lastly, the national elections are due to be held in just over two months. It is especially inappropriate that the public should have their access to news

regarding protests, including service delivery protests, curtailed in the run-up to these elections.

39 I therefore submit that the matter is urgent and should be dealt with as such by the CCC.

CONCLUSION

40 In the circumstances, the complainants seek a ruling by this Committee as follows or such alternative relief as the Committee deems appropriate:

- “1. The decision by the SABC to cease or curtail its coverage of violent protests, as communicated in the media statement of 26 May 2016, is declared to be in breach of:*

 - The Broadcasting Act 4 of 1999;*
 - The SABC licences; and*
 - The SABC Editorial Policies*
- 2. The SABC is directed to forthwith reverse the decision concerned.*
- 3. The SABC is directed to engage in training of its journalists and editors regarding the coverage of protests in accordance with the Broadcasting Act, its licences and the Editorial Policies and to*

report to the CCC and the complainants on affidavit within 30 business days as to the steps it has taken in this regard.”

WILLIAM BIRD

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at **SANDTON** on this the ____ day of May 2016, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

Full names:

Address:

Capacity: