



Commission of Enquiry into State Capture

Via Email: inquiries@sastatecapture.org.za

21 September 2018

Dear Evidence Leaders

JOINT WRITTEN STATEMENT BY THE SOS COALITION AND MEDIA MONITORING AFRICA ON EXAMPLES OF STATE CAPTURE AFFECTING THE BROADCASTING SECTOR AND REQUEST TO MAKE ORAL SUBMISSIONS

1. INTRODUCTION

1.1. In Proclamation 3 published in Government Gazette No. 41403 dated 25 January 2018, the President established a Judicial Commission of Enquiry to Enquire into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (the Enquiry).

1.2. These joint submissions to the Enquiry are made by the SOS Coalition (SOS) and Media Monitoring Africa (MMA).

1.2.1. SOS is a civil society coalition that advocates for the presence of robust public broadcasting in the public interest to deepen our constitutional democracy. The coalition represents trade unions, non-governmental organisations (NGOs), community-based organisations (CBOs), community media, independent film and TV production sector organisations; academics, freedom of expression activists and concerned individuals. Overall, the work that SOS does has helped to contribute to the growing public understanding of the SABC as “our” public broadcaster – one that must not be captured by the state or by a particular faction of the

ruling party, and one that must service the information and entertainment needs of the citizens of the country.

1.2.2. MMA is an NGO that has been monitoring the media since 1993. We aim to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are: media ethics, media quality and media freedom. MMA's vision is a just and fair society empowered by a free, responsible and quality media.

1.3. MMA and SOS thank the Enquiry for the opportunity of making these written submissions and respectfully request a joint opportunity to make oral submissions before the Enquiry.

2. NATURE OF THIS SUBMISSION

2.1. SOS and MMA have extensive experience in acting in the public interest on matters of freedom of expression and both organisations have extensive experience in contributing to, *inter alia*, ICASA and Parliamentary processes with regard to broadcasting, particularly with respect to public broadcasting.

2.2. Further, SOS and MMA are concerned about the broadcasting environment as a whole, although traditionally their area of focus has been on the public broadcaster, the SABC.

2.3. In responding to the issues raised in the Commission of Enquiry into State Capture (the Enquiry) SOS and MMA do not necessarily deal with all issues raised in the Enquiry's Terms of Reference.

2.4. In making these submissions, SOS and MMA are attempting to assist the Enquiry in understanding how a number of different players in the broadcasting sector, colluded, through what appear to be corrupt and other means, to capture organs of state, including the public broadcaster, the South African Broadcasting Corporation (SABC), as well as a Cabinet Minister, the former Minister of Communications, Ms Faith Muthambi, and former President, Jacob Zuma.

3. MULTICHOICE AND ANN7 (NOW INFINITY MEDIA NETWORKS)'S ROLE IN STATE CAPTURE.

3.1. We are of the respectful view that broadcasting is essential to meeting the information needs of the people of South Africa. The SABC, in particular is required to act in the public interest and all state role players involved in broadcasting must too. Consequently, any state capture that impacts on broadcasting necessarily involves considerations of the public interest. This is particularly so in a country where more than 40% of the population lacks access to the Internet and is reliant on free to air broadcasting to meet its news and information needs.

3.2. The shocking revelations published by AmaBhungane, News 24 and Daily Maverick's Scorpio reflect, if true, serious examples of state capture involving MultiChoice (Pty) Ltd (MultiChoice), ANN7 and its then-owners, the Gupta family among others, the SABC, the former Minister of Communications, Faith Muthambi, and the former President, Jacob Zuma, namely:

3.2.1. according to a number of news outlets, as evidenced in the "Guptaleaks"¹ stories and the underlying emails forming the basis thereof, former head of Regulatory Affairs for MultiChoice, Ms Clarissa Mack, wrote to the former Minister of Communications, Ms Faith Muthambi, in July 2014, to request that she intervene with the former President to ensure that he amended his Proclamation dividing legislative responsibilities between herself and the Minister of Telecommunications and Postal Services in respect of electronic communications and broadcasting (this is evidenced through the meta-data of the origins of the wording of the Presidential Proclamation which provide that she is the author thereof²). The former Minister of Communications then wrote to Ashu Chawla (an associate of the Guptas who owned ANN7 to whom significant payments had made by MultiChoice in respect of the ANN7 channel), and provided him with a draft proclamation dealing with the allocation of powers as raised by Ms Mack which the Minister tells Mr Chawla that "President must sign"³. Mr Chawla duly passed this on to Tony Gupta and Duduzane Zuma⁴ and some-time later, the President publishes the necessary Proclamation (Proclamation 79 published in Government Gazette No. 38280 dated 2 December 2014); and

3.2.2. an inflated fee of R100m is paid to the SABC by MultiChoice in 2013 for the SABC's non-free to air channels on DSTv in return for changing its position on the encryption standard for Digital Terrestrial Television (DTT) Set Top Boxes (to one of non-encryption), as is clearly evidenced by the minutes of an SABC/MultiChoice meeting dated 6 June 2013⁵ and by clause 2.1.5 in the contract between the SABC and MultiChoice, entered in on 3 July 2013⁶ in which the SABC unambiguously changes its position on this issue to fall in line with MultiChoice's position. Interestingly, the former Communications Minister, Faith Muthambi amended the Digital Migration Policy to reflect MultiChoice's and the SABC's new preferred non-encryption standard for Set Top Boxes (STB) to be used for digital terrestrial television (DTT). See Notice 232 in Government Gazette No 31408 dated 18 March 2015.

¹ <https://www.dailymaverick.co.za/article/2017-11-24-guptaleaks-multichoice-paid-the-guptas-millions/>

² <https://cdn.24.co.za/files/Cms/General/d/6633/14126168b31846198895b0437f854b31.jpg>

³ <https://www.news24.com/SouthAfrica/News/guptaleaks-how-multichoice-paid-the-guptas-millions-20171124>

⁴ <https://www.dailymaverick.co.za/documents/document/MultiChoice-Files.pdf>

⁵ <https://www.scribd.com/document/365746179/SABC-Board-Minutes>

⁶ <https://www.scribd.com/document/333813019/MultiChoice-and-SABC-Deal>

4. SOS and MMA trust that this statement will be of assistance to the Enquiry with regard to the extent of state capture in the broadcasting sector and requests the Enquiry thoroughly investigate the roles of:
 - 4.1. MultiChoice, the former Minister of Communications, Faith Muthambi, Ashu Chawla, Tony Gupta and Duduzane Zuma, and former President Zuma, with regard to the Proclamation published by the President reallocating certain broadcasting-related powers back to the Minister of Communications; and
 - 4.2. MultiChoice, the former Minister of Communications, Faith Muthambi, and the SABC with regard to the amendments to the Digital Migration Policy which changed the encryption standard for DTT STBs to non-encrypted to fall in line with the subscription broadcaster's wishes on that issue to the detriment of free to air television sector as a whole.
5. WHY IS THE MEDIA'S RELATIONSHIP TO STATE CAPTURE IMPORTANT FOR THE ENQUIRY TO INVESTIGATE?
 - 5.1. It is easy to reflect the damage done to South Africa's poor and marginalised by the siphoning off of state resources as a result of state capture. You calculate the amount stolen and consider how many schools, hospitals and police stations could have been equipped and staffed with that money. It is less easy to consider what damage is done when the media contributes to state capture. However, it is clear that the media, unfortunately, can and has played a participatory role in gross human rights abuses, in the past and now.
 - 5.2. In its Final Report into the conduct of the Media Sector, the Truth and Reconciliation Commission (the TRC) found that the media "analysed society from inside the system and did not provide alternative perspectives and discourses from the outside⁷." The TRC Report concludes by saying that "mainstream newspapers and the SABC failed to report adequately on gross human rights violations. In so doing, they helped sustain and prolong the existence of apartheid"⁸. In respect of the role of the Afrikaans press, of which Nasionale Pers now NASPERS (current controlling shareholder of MultiChoice) was a significant part, the TRC stated "the Afrikaans media...chose to provide direct support for Apartheid and the activities of the security forces – many of which led directly to gross human rights violations".
 - 5.3. What we are dealing with here is not the failure to report on gross human rights abuses but the capture of government officials and the public broadcaster by the Gupta family and by MultiChoice for ends which, ultimately, undermine the fundamental rights of South Africa to the right to receive

⁷ <http://sabctrc.saha.org.za/reports/volume4/chapter6/subsection8.htm> At para 102.

⁸ <http://sabctrc.saha.org.za/reports/volume4/chapter6/subsection9.htm> At para 120.

and impart information and ideas which are guaranteed by the section 16 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

5.4. There is no doubt that the examples of state capture evidenced in this statement have contributed to South Africa failing, dismally, to meet the news and information needs of the people of South Africa, by ensuring that South Africa failed to meet the International Telecommunication Union's deadline for analogue television switch off. The effect of this is that South Africans do not have functional access to DTT as we speak and, worse, that the spectrum currently being used for analogue TV and which was to be freed up for use to provide mobile broadband, thus further denying South Africans their rights to expression and information. In the information age and the so-called era of the 4th Industrial Revolution, this is an example of human rights abuses that do not involve assault, torture and death but which are serious in their denial of a fundamental human right. Crucially without this right being honoured by the state, the very notion of democracy is undermined as citizens who lack access to independent and accurate news and information cannot make informed choices in the ballot box. The evidence of state capture by a commercial media player and their paid associates provided herein is nothing short of evidence of the undermining of:

5.4.1. vital freedom of expression rights protected by our Constitution; and

5.4.2. our entire democratic project.

6. SOS and MMA reiterate their request for an oral hearing at the Enquiry to present on this matter.
7. Please do not hesitate to contact SOS and/or MMA should the Enquiry have any queries or require any further information.

Thank you

Yours Sincerely,

Duduetsang Makuse and William Bird

National Co-ordinator, SOS Coalition and Media Monitoring Africa, Director