

BEFORE THE COMPLAINTS AND COMPLIANCE COMMITTEE

In the matter between

Case No: 70/2014

The Economic Freedom Fighters

Complainant

And

The South African Broadcasting Corporation

Respondent

Committee

JW Tutani	Chairperson
M Ndhlovu	Councillor
J Tlokana	Member
T Ramuedzisi	Member
N Maseti	Member

For the Complainant:

Advocate D. Mpofu, instructed by E. Mabuza

For the Respondent:

Advocate T. Motau SC, instructed by D. Horner

JUDGMENT

[1] The Economic Freedom Fighters (the "EFF") lodged a complaint on an urgent basis on 22 April 2014 with the Complaints and Compliance Committee (the "CCC") after the South African Broadcasting Corporation (the "SABC") rejected its Party Election Broadcast TV advertisement (the "TV PEB"). The EFF had submitted two PEB advertisements to the SABC, one for the radio and another for TV. The radio PEB was accepted and the one for TV was rejected. It was against the rejection of the TV PEB advertisement that the EFF decided to file a complaint with the CCC.

[2] The relevant part of the TV PEB starts with a monologue by one Mrs Nungu in which she uttered the following words:

"I was heartbroken when my husband lost his life. He was shot and killed by the police while the whole world was watching. What has become of this world?" Various pictures then followed accompanied by the following words:

"Destroy E-Tolls Physically. Vote EFF." It was this sentence which made the SABC to decide that the TV PEB collided with the National and Provincial Party Elections Broadcasts and Political Advertisements Regulations, the equitable treatment of Political Parties by Broadcasting Licensees and Related Matters (the "Elections Regulations").

[3] The reasons given by the SABC for rejecting the TV PEB in the e-mail dated 16 April 2014 were that:

- (a) The ICASA Regulations regarding political advertising stated "clearly" that there may not be incitement to violence. The SABC said in their view, references in the TV PEB advertisement to police killing people and the use of visuals showing police pointing guns at people was "cause for incitement to action against the police services."
- (b) The Electoral Code of Conduct signed at the IEC which included the EFF, was part of the Electoral Act which contained a list of prohibited conduct, including using a language which provoked violence.
- (c) The Electoral Code of Conduct also included a clause prohibiting the publication of false information about other candidates or parties. The SABC said it believed that this could also be extended to information that had not yet been tested and confirmed in a Court of law, such as those allegations of corruption regarding Nkandla.
- (d) The statement "destroy the e-tolls physically" was not only a clear incitement to violence but was, in their view, promoting criminal activity which was not permitted by the ICASA Regulations on PEBs.

[4] In the same e-mail, the SABC advised the EFF that it could submit an amended version of the advertisement 72 hours before the broadcast time allocated to it and that, if the amended version was not received by the stipulated deadline, the EFF would forfeit its time as provided in the ICASA Regulations.

- [5] As a result of the rejection of the TV PEB by the SABC, the EFF, instead of exercising its right to amend the TV PEB, chose to lodge a complaint with the CCC. The grounds for the complaint were that:
- (a) The SABC had rejected the EFF elections advertisement on the grounds that it was in violation of the "ICASA Act Regulations" in that it incited violence.
 - (b) The SABC complained about the sentence "Destroy e-Tolls physically, vote EFF" that the EFF "intended to implement upon electoral victory."
 - (c) EFF wished the "audience" to object to the SABC on the grounds of freedom of expression and demand that the lost slots be reinstated with the advertisement as it was.
 - (d) This was an urgent application given the fact that the time of "both broadcasts" had already passed and that the elections timetable was nearing an end.
- [6] The EFF submitted its application as a matter of urgency and, as required by Regulation 6(2) of the Regulations Governing Aspects of The Procedures of The Complaints and Compliance Committee of The Independent Communications Authority of South Africa (the "CCC Regulations"), the Chairperson of the CCC provided the SABC an opportunity to respond in writing to the request that the complaint be dealt with on an urgent basis. After perusing documentation from both parties, the Chairperson was satisfied that this was an urgent matter which had to be dealt with as such, and advised both parties of the time periods and procedure to be followed in compliance with Regulation 6(4) of the CCC Regulations and the complaint was heard on the night of 25 April 2014.

- [7] The Chairperson gave the SABC 24 hours within which to respond to the complaint, and it obliged. However, after the exchange of the requisite documents had been completed by the parties and belatedly, the SABC objected to EFF's application on the grounds that it was out of time.
- [8] During his opening address, Counsel for the EFF submitted that he had agreed with Counsel for the SABC that the objection would be dealt with together with the merits and that they did not need a ruling beforehand in order to save time.¹
- [9] Mr Mpofu pointed out that, although the date in the e-mail advising the EFF that the SABC had rejected its TV PEB was dated 16 April 2014, in actual fact, service took place on 22 April 2014. He submitted that the SABC had written a letter which had been bouncing, to one Mr Mbusi Ndlozi of the EFF. In the said letter, Mr Hassen of the SABC informed Mr Ndlozi that they did not have any other contact details in the EFF's form and that the address they had given the SABC "did not have the e-mail bouncing back". Mr Hassen then sent the e-mail again on 22 April 2014. Mr Mpofu submitted that his client responded on 24 April 2014 after receiving the e-mail on 22 April 2014 and, thus, complied with the 48-hour requirement. He said the objection was improperly based on the date of the original letter which was 16 April 2014 and which was never dispatched.²

¹ Page 6 of the Transcript

² Page 6 of the Transcript

[10] In rebuttal of Mr Mpofu's argument, Mr Motau drew the attention of the CCC to the letter marked pages 11 and 12 that was produced on behalf of the EFF on which the EFF said it relied for purposes of advancing its case that the reasons for the rejection were only received on 22 April 2014.³

[11] Mr Motau submitted that in their written submissions, they did not make provision for "this e-mail" because they were not aware of it. He submitted further that, contrary to Mr Mpofu's submission that the e-mail bounced, Mr Hassen said he "did not receive such e-mail" but opted to resend it anyway. He pointed out that the e-mail clearly expressed the view that the author did not accept that the EFF did not receive the e-mail of 16 April 2014 because he did not receive a message that the e-mail had bounced.⁴

[12] He argued that if the CCC decided to uphold his abovementioned submission, then Mr Mpofu did not have an answer because he did not proffer any explanation in the event it was found that the e-mail containing reasons was sent on the 16 April 2014. He said he had no fall-back position.⁵

[13] Mr Motau urged the CCC to find, firstly that the EFF was out of time and, if the CCC agreed with his submission in this regard, he also urged it to dismiss the complaint on the merits.⁵

[14] As pointed out above, the EFF submitted its complaint with a request that it be heard as a matter of urgency in terms of Regulation 6(1) of the CCC Regulations. After perusing the documentation that was exchanged by the parties, the Chairperson of the CCC determined that the matter was, indeed,

³ Page 47 of the Transcript

⁴ Page 47 of the Transcript

⁵ Page 48 of the Transcript

urgent and advised the parties herein of the procedure and time periods to be followed, and both parties obliged without qualms.

[15] The EFF had indicated in its application that it wanted its complaint to be heard as a matter of urgency, and gave cogent reasons therefor, and the Chairperson applied his mind to determine whether the complaint deserved to be dealt with on an urgent basis. It is to be noted that once the Chairperson opined that the matter was indeed urgent, and gave the parties time periods and the procedure to be followed, the SABC did not raise any query. The Chairperson gave the SABC 24 hours within which to respond to the EFF's complaint and the latter was also given 24 hours to answer the SABC's response.

[16] Both parties complied with the time frames given by the Chairperson.

[17] The SABC did not object to the time-frames or protested that the EFF's response was out of time. The EFF responded to the SABC's reply through its attorneys on 24 April 2014 as directed by the Chairperson⁶. In the papers that were exchanged by the parties in the run-up to the hearing, no objection was raised by the Respondent about the EFF being "out of time." The SABC had the opportunity throughout the exchange of documents and during its liaison with the Coordinator of the CCC, to complain about the EFF being out of time. This belated objection seemed to be an afterthought, if not a red herring.

[18] The Chairperson is empowered by Regulation 6(4) of the CCC Regulations to determine the time periods as well as the procedure to be adopted in urgent matters. The short time periods given to the parties should be viewed against the background of the elections which were looming and, in those

⁶ Letter from Mabuza, EFF's attorneys, page 4 of the paginated Bundle

circumstances, the Chairperson did not have the luxury of giving the parties 48 hours and, in any event, he was not bound to. As the EFF correctly put it, "the elections timetable was nearing an end."

[19] Regulation 6(4) is couched in the following terms:

If the Chairperson determines that the matter is urgent, the Chairperson advises the parties of the procedure and time periods to be followed.⁷

[20] Having regard to the above elucidation of the CCC Regulations and the fact that the EFF had complied to the hilt with the directives given by the Chairperson, the CCC was unable to dismiss the EFF's application as prayed by Mr Motau. In short, the EFF was not out of time. In light of this finding, we did not deem it necessary to analyze or comment on the submissions made by Counsel for their respective parties as that would serve no purpose.

[21] Having given our decision on the question of the Complainant being "out of time," we now proceed to deal with the merits of the complaint.

[22] In his opening remarks, Mr Mpofu submitted that the issues were quite narrow and that the issue was "really whether the wording that appears at the end of the advert 'destroy the e-tolls physically' do constitute valid ground for the rejection of the advert..." He said during informal discussions with his learned friends, they appeared to be in agreement with him on this aspect.⁸

⁷ Regulation 6(4) of the Regulations Governing Aspects Of The Procedures Of The Complaints And Compliance Committee Of The Independent Communications Authority Of South Africa

⁸ Page 3 of the Transcript

[23] As pointed out above, the SABC was of the opinion that the words, destroy the e-tolls physically were an incitement to violence and were promoting criminal activity which was not permitted in terms of the ICASA Regulations on PEB's.⁹

[24] Mr Mpofu submitted that "one has to distinguish this from the DA case in that here, the objection is very clear in that it is based on actual and clear incitement to violence and not merely the likelihood thereof." He said the SABC had nailed its colours on the mast in that it would have to show that those words indeed clearly incited violence and promoted criminal activity.¹⁰

[25] In dismissing this argument, Mr Motau submitted that it was a trite proposition of law that a concession of law was not binding. If he were to make an incorrect submission of law on behalf of the SABC, when the CCC assessed it, it could find for the SABC, based on the opposite because what the law is, does not change. He submitted that the test was the one set out in the Elections Regulation 4(12) (b).¹¹

[26] Mr Motau submitted that on the plain and grammatical reading of Regulation 4(12)(b) of the Regulations, for the SABC to succeed in these proceedings, it would suffice for it to show that the PEB contained material that might be perceived as condoning or lending support to any unlawful, illegal or criminal act. He said there could be no debate that the physical destruction of the e-tolls constituted an unlawful, illegal, criminal act.

[27] He said the physical destruction of e-tolls would constitute an arbitrary deprivation of property in that it would not be done pursuant to any law or

⁹ Letter from the SABC dated 16 April 2014, on page 7 of the paginated Bundle

¹⁰ Page 4 of the Transcript

¹¹ Page 57 of the Transcript

lawful process. He said this would be a clear breach of section 25 of the Constitution.¹²

[28] He submitted further that the PEB offended the provisions of the Elections Regulation 4(12) (b) in that, it contained material which the regulation sought to exclude. Accordingly, he submitted, the SABC's rejection of the PEB was reasonable, rational and lawful and prayed that the complaint should be dismissed.

[29] Elections Regulation 4(12) (b) states that

"A party that submits a PEB to a broadcasting service licensee for broadcast must ensure that the PEB does not contain any material that is calculated or that in the ordinary course, is likely to provoke or incite any unlawful, illegal or criminal act, or that may be perceived as condoning or lending support to any such act."

[30] The test as stated in the Elections Regulation 4(12)(b) is "any material that is calculated to provoke or is likely to provoke or incite any unlawful, illegal or criminal act, or that may be perceived as condoning or lending support to any such act". To invent another test would mean that we had to judge the TV PEB in accordance with a standard not set out in the CCC Regulations pursuant to which the CCC derived its powers. There was no doubt that physical destruction of e-tolls was an unlawful, illegal, criminal act. Even if the SABC, as contended by Mr Mpofu, had raised the bar and based its objection on "actual and clear incitement to violence", the standard that should guide the CCC was the one that is spelt out in the Elections Regulation 4(12)(b). The Regulation

¹² Paragraph 26 of SABC's Written Submissions

speaks of a material that is "likely "and makes no reference to clear and actual incitement to violence and, on this basis, Mr Mpofu's argument was dismissed.

[31] The CCC could not, for expediency, allow the EFF to import words and create a standard that was contrary to what the Regulation says, even if by deed or conduct, the SABC appeared to have done so. The language employed in the Regulation was clear and unambiguous and the CCC was duty-bound to give effect thereto.

[32] There is merit in Mr Motau's argument that when interpreting a statute, the starting point was to ascertain the intention of the Legislature by giving effect to the ordinary, grammatical meaning of the words chosen by the Legislature.¹³ In *Poswa v Member of the Executive Council for Economic Affairs*, the SCA quoted with approval the following excerpt from the dictum in *Bhayat v Commissioner for Immigration* where it was held:

The cardinal rule of construction of a statute is to endeavor to arrive at the intention of the lawgiver from the language employed in the enactmentin construing a provision of an Act of Parliament, the plain meaning of the language must be adopted unless it leads to absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole, a Court of law is satisfied the Legislature could not have intended.¹⁴

[33] Counsel for the EFF argued that "one has to distinguish this from the DA case in that it is based on actual and clear incitement violence and not merely the likelihood thereof." Interestingly, Mr Mpofu told us what this case was about

¹³ Paragraph 46 of the SABC's Written Submissions

¹⁴ 2001(3) SA 582 (SCA) Paragraph 10

without telling us what the DA's case was about. It was inconceivable that we could draw a distinction between this complaint and that of the DA since nothing was before us to ponder. This also precluded Mr Motau from responding to the reference to the DA's case so as to agree or disagree with Counsel for the Complainant as nothing was before the CCC. He was left in a quandary.

[34] Mr Mpofu was not involved in the proceedings that involved the DA and we wondered the extent to which he was acquainted with the facts thereof as well as the underlying issues involved therein to be in a position to talk persuasively about it. He did not endeavour to show us its relevance and how it would help the EFF's case. In our view, it did not assist the EFF.

[35] Counsel for The EFF pointed out that the EFF's application was based on the Constitution, the ICASA Act, the SABC Act, the Regulations "and so on". In his submission, he said the onus was naturally on the SABC to justify the violation of applicable constitutional rights but before the SABC attracted that onus, he had to demonstrate the applicability of the particular sections of the Constitution that the EFF relied on.¹⁵

[36] Quoting from the Constitution, he said "national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and diversity of views, broadly representing South African society."¹⁶ As a result of the aforesaid injunction, applicable legislation and

¹⁵ Page 7 of the Transcript

¹⁶ Section 192 of the Constitution

regulations were promulgated and this resulted in the birth of the Independent Communications Authority of South Africa.

[37] He submitted that the second signpost was the Bill of Rights and that the applicable sections were section 16 which enshrined the freedom of expression as well as section 19 which enshrined the "so called" political rights. He argued that the other relevant section of the Bill of Rights which should must be read together with the aforesaid sections was section 8. Section 8 states that the Bill of Rights applied to all law and binds the legislature, the executive, the judiciary and all organs of State. He added that the SABC was an organ of State as defined in various Court decisions.

[38] He submitted that the citizens had the freedom to receive or impart information or ideas from the EFF. He said there was an "interesting" point in that the Constitution said, the right in subsection 1 (of section 16) did not extend to:

- (a) propaganda for war;
- (b) incitement of imminent violence or advocacy of hatred that was based on race and "so on."¹⁷

[39] He argued that a person could exercise the right to freedom of expression by inciting violence as long as it was not imminent. He submitted that if the Constitution itself was so restrictive, then surely the regulations could not go wider and fathom violence where it did not exist.¹⁸

¹⁷ Page 103 of the Bundle

¹⁸ Page 104 of the Bundle

[40] As an organ of State, he argued, the SABC existed only in so far as it was empowered by law to do "anything." It could only act within the prescripts of the law and within the boundaries of administrative law. He submitted that the SABC was bound by the principle of legality which says a public body or official could only act in so far as they were entitled to do so by the law – which is a new version or post-constitutional version of the old ultra vires rule, which means that you cannot act outside the prescripts of your foundational statutes.¹⁹

[41] He contended that the SABC's conduct compromised the principles of freedom of expression and free and fair elections which were enshrined in sections 16 and 19 of the Constitution. He said the conduct of the SABC was nothing short of banning the EFF from propagating its ideas to the electorate who should, in the final analysis, be the ultimate arbiters of who should govern them.²⁰

[42] Responding to Mr Mpofu's submissions regarding freedom of expression and free and fair elections, Mr Motau submitted that the EFF's complaint did not indicate the manner in which the constitutional rights they were referring to, were violated. He argued that it was trite that all rights were not absolute and could be limited in terms of the test set out in section 36 of the Constitution. This could be achieved in terms of law of general application to the extent that the limitation was reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.²¹

¹⁹ Page 8 of the Transcript

²⁰ Page 16 of the Transcript

²¹ Paragraph 40 of SABC's Written Submissions

[43] He pointed out that in respect of the contention based on the freedom of expression, this right did not entitle one to advocate for unlawful, illegal or criminal acts. In respect of political rights as enshrined in section 19 of the Constitution, Mr Motau said the submissions made in respect of section 16 also applied equally herein.

[44] He submitted that the lawfulness or constitutionality of the regulations in issue pursuant to which the SABC rejected the PEB, was not under challenge. This had important and profound consequences for the bigger part of the argument which was advanced by Mr Mpofu, namely, that there was an infringement of constitutional rights which are entrenched under the Bill of Rights. Where the validity or constitutionality of the instrument by which the power is exercised is not being challenged, the mere implementation of that legal instrument cannot infringe constitutional rights.²²

[45] On the issues raised by Mr Mpofu about the SABC being an organ of state, Mr Motau submitted that if it was the case that the SABC was an organ of state, it would offend the principle of legality for an official of the SABC who was not a lawyer, to be bound for having subjected the SABC to a higher standard legally. He said what the CCC had to do was to test the words complained of, against the Elections Regulation 4(12)(b).²³

[46] Freedom of expression is regarded as a foundational right and the basis of a democratic society, where even the expression of false ideas is protected²⁴

²² Page 45 of the Transcript

²³ Page 57 *et sequor* of the Transcript

²⁴ However this protection is not extended to expression that may be deemed hate speech. Van Wyk, Christa (2003) "The Constitutional Treatment of Hate Speech in South Africa," in SA Public Law, Vol 8 No 1, Page 186.

- [47] The Constitutional Court stated that the right to freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for the truth by individuals and society generally. The Constitution recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.²⁵
- [48] In rebuttal, Mr Motau submitted that the language of section 16(2)(b) of the Constitution did not find expression in Regulation 4(12)(b) in that imminence of violence was not a requirement. The material must either be calculated or in the ordinary course, be likely to provoke or incite any unlawful, illegal or criminal act.²⁶
- [49] We had a difficulty comprehending Mr Mpofu's argument that the Legislature could encourage violence as long as it was not imminent. His argument in this regard was ill-conceived. No Legislature could actually encourage the citizens of a country to incite violence as long as it was not imminent.
- [50] The Constitution was adopted in 1996 whereas the regulations were published in 2014. There is a trite presumption in statutory interpretation that the Legislature knows the law, when it enacted new laws. The fact that the legislature did not apply the higher standard set out in section 16(2)(b) of the Constitution to the Elections Regulation 4(12)(b) but rather applied a less stringent test, was a deliberate act on the part of the Legislature. When the

²⁵ South African National Defence Union v Minister of Defence and Another 1999(4) SA 469

²⁶ Paragraph 4 of the SABC's Written Supplementary Submissions

Legislature enacted the Elections Regulation 4(12)(b), it is presumed that it was aware of the higher standard set out in the Constitution but, decided deliberately to apply a less stringent standard.

The principle of legality and ultra vires would not permit the CCC to rewrite legislation by upholding the contention on behalf of the EFF.²⁷

[51] We agreed with Mr Mpofu that, as an organ of state, the SABC had to act within the statute that created it. It is true that in accordance with the principle of legality, the SABC, as a public body or its officials, could only act in so far as they were permitted by law and it was on this basis that the CCC did not allow the SABC and its officials, to come with a standard that contradicted Regulation 4(12)(b). We rejected the SABC's statement regarding the words "destroy e-tolls physically" to the extent that that statement did not correctly reflect the intention of the lawgiver as encapsulated in the Elections Regulation 4(12)(b).

[52] It is well-established in law that creatures of statute do not have inherent powers and must, at all times conform to the precepts of the statute in question.²⁸

[53] However, we did not agree with his contention that the SABC's conduct compromised the principles of freedom of expression and free and fair elections. It is trite that no right is absolute and this applies equally to the right to freedom of expression and to free and fair elections. In *S v Mamabolo*, the judge said, with us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right. The Constitution in its opening statement and

²⁷ Paragraph 4 of the SABC's Written Supplementary Submissions

²⁸ *S v Kwinana* 1985(3) SA 369 at 371 C-D

repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression.... Freedom of expression does not enjoy superior status in our law.²⁹ In spite of its great importance, the right to freedom of expression is not absolute and is not superior to other rights.

[54] There is merit in Mr Motau's contention that rights can be limited in terms of the test set out in section 36 of the Constitution, that is, in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³⁰ The right to freedom of expression can lawfully be limited by way of means aimed at not allowing free speech to promote unlawful, illegal and criminal act. The same legal principles apply to political rights as enshrined in the Constitution.

[55] It is our view that the Elections Regulation 4(12)(b) contained safeguards which qualified as the limitation of freedom of speech. The words in the PEB, "destroy e-tolls physically" were repugnant to and offended the provisions of the Elections Regulation 4(12)(b) and could not be allowed to stand under the guise of freedom of expression.

[56] Mr Mpofu submitted that saying that voters would take up arms and destroy e-tolls was to undermine their intelligence. We took judicial notice of the fact

²⁹ S v Mamabolo 20014(3) SA 409 (CC)

³⁰ Paragraph 40 of SABC's Written Submissions

that people resented e-tolls intensely to the extent of going to Court, more than once, to challenge the validity of the legislation which created them. People refuse to pay for the e-tolls and were prepared to risk prosecution. Now to say destroy e-tolls physically, especially during election period which, by its nature was explosive, was to whip up peoples' emotions. It was to create and promote a climate of lawlessness.

[57] We also took judicial notice of the fact that South Africans, the youth, in particular who are the major supporters of the EFF, were fertile ground to protest when provoked and their protests were usually accompanied by violence and destruction of property, especially government property. Mr Mpofu appealed to the CCC that the words in the PEB be read within the context of the EFF's manifesto published on 20 February 2014 wherein it was stated that the destruction of the e-Tolls would be effected once the EFF won the elections and became the government of the day. He imported the words "the EFF would destroy e-tolls **once it came to power and became the government of the day**" (*emphasis added*) which were not in the TV PEB. He said the voters would readily understand that the destruction of the e-tolls would take place lawfully by the EFF government. We disagreed.

[58] The CCC is empowered to interpret Regulation 4(12)(b) and give effect to the plain and literal meaning thereof and no persuasive reasons were given by Mr Mpofu to deviate therefrom. In the circumstances, we rejected the importation of the statement that destruction of e-tolls would only take place once the EFF wrestled power from the current government.

[59] Mr Mpofu said "the horse has bolted" because the PEB which had been rejected, was information which was freely available and that the SABC itself had broadcast it and there was no violence. According to him, there was no justification for rejecting the PEB that was repeated since 22 February 2012. Mr Mpofu missed the point. The issue was not whether the information was in the public domain, or whether it was repeated over a period of time as this was irrelevant to the issue at hand. The question, really, was whether the PEB was in accord with the jurisdictional prerequisites stipulated in Regulation 4(12)(b). In our view, it was not, hence the rejection.

[60] We found the following submission by Mr Mpofu disturbingly inappropriate:-
".....other neutral broadcasters which are not slave masters to the ruling party or pretending to be his Master's Voice have aired this advert and no violence has resulted."³¹

[61] Mr Mpofu did not produce any evidence to substantiate this accusation. We would understand if he said the SABC misdirected itself in interpreting the Regulations or that it did not apply its mind before coming to a decision not to flight the PEB.

[62] He also said that "the real reason for the rejection of the advert was not that it violated the code or the regulations, but it was simply an attempt to muzzle the EFF and to prevent it from communicating its message to the public and to effectively ban apartheid-style, the EFF from propagating its ideas." This submission, has no basis whatsoever as Mr Mpofu did not give the source of

³¹ Page 10 of the Transcript

this assertion nor provide evidence to support this contention. It was unfair and it was unwarranted.

[63] In criticizing the SABC, Mr Mpofu said “any broadcaster that arrogates to itself the role of being a filter as to what the public should get, is violating the public’s right to make up its own mind...What we respectfully submit, using the most docile language, is that the motive for this rejection is political and it runs against everything that the SABC should stand for.” ³²

[64] Counsel for the EFF appeared to have disregarded the fact that the SABC was mandated by the Regulations to determine whether a PEB offended the jurisdictional prerequisites stipulated in Regulation 4(12)(b). He did not provide any evidence in support of his contention that the motive for the rejection was political. It was unfair to imply that the SABC had a political agenda and, in the result, we rejected his proposition.

Recommendation

[65] Council accepted our ruling in this matter and we now request it to finally approve the comprehensive judgment in terms of Section 17D of the Independent Communications Authority of South Africa Act.

³² Page 12 of the Transcript

Dated at Bryanston on this 20th day of July 2014.

A handwritten signature in black ink, appearing to be 'JW Tutani', is written over a horizontal line.

JW Tutani

Chairperson

**Miki Ndhlovu, Jack Tlokana, Nomfundo Maseti and Tumeka
Ramuedzisi concurred with the above judgment.**