

# COMPLAINTS AND COMPLIANCE COMMITTEE

Date of Hearing: 9 December 2016

Case Number: 214/2016

**S.O.S SUPPORT PUBLIC BROADCASTING COALITION**

**MEDIA MONITORING AFRICA**

**COMPLAINANTS**

**V**

**SOUTH AFRICAN BROADCASTING CORPORATION**

**RESPONDENT**

**PANEL:** Prof JCW van Rooyen SC; Councillor N Batyi; Ms N Maseti; Prof K Moodaliyar; Mr J Tlokana; Ms M Ramokgopa

For the Complainants: Adv. Kate Hofmeyr and with her Adv. V Bruinders briefed by the Legal Resources Centre

For the Respondent: Adv. LT Sibeko SC and with him Adv. M Seti-Baza briefed by Attorney Thato Mahapa from Ncube Inc, Johannesburg.

CCC: Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

### INTRODUCTION

[1] ] The First Complainant, SOS Support Public Broadcasting Coalition, is a Civil Society Coalition which is committed to, and campaigns for, public broadcasting in the public interest. The Second Complainant, Media Monitoring Africa, inter alia, acts in a watchdog role to promote ethical and fair journalism that supports human rights.

[2]The South African Broadcasting Corporation Soc. Ltd (“SABC”) is, according to the Broadcasting Act 3 of 1999, the public broadcaster. As a broadcasting licensee it falls under the jurisdiction of the Complaints and Compliance Committee (“CCC”) for purposes of complaints by the public or references by the Authority concerning the omission to comply with its duties as a licensee.<sup>1</sup> If a finding on the merits of the complaint is made in favour of the SABC, the complaint is dismissed. If a finding on the merits is made against the SABC the CCC proposes an order to the Council of ICASA which, if it agrees with the order, issues the order.

## **THE COMPLAINT**

[3] On the 3<sup>rd</sup> October 2016 the Complainants lodged a complaint against the SABC with the CCC. At the core of the complaint lies the alleged non-compliance with section 6(6) of the Broadcasting Act 1999 in that the SABC Board did not invite and consider public comment on the draft amendments to its editorial policies, before it accepted the amendments on 25 January 2016.

[4] Section 6(5) and (6) of the Broadcasting Act provide as follows:

- (5) (a) The (SABC) Board must prepare and submit to the Authority (ICASA) not later than three months after the date of conversion, policies that will ensure compliance with the Authority’s Code of Conduct as prescribed and with the Corporation’s licence conditions and with the objectives contained in this Act, including:
- (i) News editorial policy;
  - (ii) programming policy;
  - (iii) local content policy;
  - (iv) educational policy;
  - (v) universal service and access policy;
  - (vi) language policy; and
  - (vii) religious policy.

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<sup>1</sup> In so far as content is concerned, complaints are, however, in terms of section 53(2) of the Electronic Communications Act 2005 ( ECA) dealt with by the BCCSA. During election periods certain content complaints are, however, dealt with by the CCC in terms of the ECA.

(b)The Corporation must notify the Authority in writing of any amendments to the policies referred to in paragraph (a) as soon as reasonably possible.

- (6) The Board must ensure that there is public participation in the development of the policies referred to in subsection (5) by inviting and considering public comment on such draft policies and by other means. (accent added)**

## **BACKGROUND**

[5] In 2004 the SABC Board adopted the said policies. This was done in accordance with section 6 of the Broadcasting Act 1999. In developing and adopting the 2004 policies the SABC embarked on the following process: it released the draft policies in April 2003 for public consideration and invited written and oral presentations. A total of 920 written presentations, of which 847 came from individuals and 73 from organisations, were received. After that the SABC Board accepted the policies and it was submitted to ICASA as required by section 6(5) of the Broadcasting Act.

[6] Over the period June 2013 to February 2016, the SABC embarked on a process to amend its 2004 editorial policies. The process involved engagement both internally and with stakeholders and interest groups. Meetings were held with more than thirty organisations and interest groups from across the country and were followed by seventeen public hearings. However, at no point in the process did the SABC *publish* the proposed revisions to the editorial policies for comment by the public. The revised policies contain a number of significant amendments: the obligation on staff to consult the office of the Chief Legal Adviser is removed; it removes any guidance on privacy issues from the news editorial policy and indicates that the guidance on privacy is to be found in the programming policy, but privacy issues are not dealt with in the programming policy. The revision also amends the substance of the upward referral policy (the CEO is replaced by the COO to resolve disputes), removes the prohibitions on hidden cameras and on sensational reporting in the coverage of crime and removes the obligations to exercise care when interviewing people without broadcast experience.

## **LATE FILING**

[7] In their founding affidavit the Complainants applied for condonation for the late filing of their complaint. The SABC opposed the granting of condonation in an affidavit. In the latter affidavit aspects of the merits of the complaint were also addressed. Later on, the SABC filed an Answering Affidavit on the merits and the Complainants filed a Reply. Ultimately, the Complainants withdrew their application for condonation, stating that after new counsel had been appointed, they were advised that the ICASA Act does not provide for a time limit when a complaint is directly filed with the CCC. The advice by new counsel accords with the ICASA Act. In any case, the period (in working days) which it took the Complainants to lodge the complaint from the time that they became aware of the alleged omission to publish, was reasonable in the circumstances initially put forward for condonation by the Complainants.

## **PUBLIC NOT BEING AFFORDED OPPORTUNITY TO REACT**

[8] Ms *Hofmeyr*, acting for the Complainants, argued that the SABC Board had amended its editorial policies in a manner that breaches its obligations under the Broadcasting Act. It had failed to provide the public with an adequate opportunity to comment on the draft revisions by not having published a draft of the policies as developed after its process of public consultation, which commenced in 2013. In fact, Mr Welch, the relevant Manager from the SABC, in a meeting with a representative of the first complainant on the 27<sup>th</sup> June 2013, also undertook to do so. That this was the intention of the SABC, was also confirmed in a statement published on its website dated 11 February 2014. The statement included the following, under the heading of an article:

*All SABC editorial policy review contributions taken seriously*

The revised policies will be released for public comment. Any changes that emerge as result of this round of engagement will be incorporated into the revised policies that will then follow the appropriate approval process before the process of implementation. Implementation will not be limited to the roll-out of the policies at the SABC, but will also include a public education element.

## **SABC'S DEFENCE**

[9] Mr *Sibeko*, acting for the SABC, argued that the SABC had no duty to have published the draft amendments for comment and that it had consulted sufficiently. He added that it was too late now, in any case, to withdraw the editorial policies in the light of the principle established in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA). It would, as it were, amount to closing the stable door after the horse had bolted.

The *Oudekraal* judgment is, indeed, supportive of the rule that an administrative act remains valid until it is set aside. In the present matter the CCC, however, has a complaint before it directed at, indeed, setting aside the SABC Board's resolution to accept the amended policies.

[10] Mr *Sibeko* further argued strenuously that the CCC is not empowered by the Constitution of the Republic of South Africa 1996 or the Promotion of Administrative Justice Act 2000 to hear the matter, since the CCC is not an independent and impartial tribunal, which is authorised by the Constitution and the said Act to decide on the validity of an administrative act.

The Constitutional Court, in *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) has, however, held that the CCC is an administrative tribunal and that there is nothing in the ICASA Act which impinges upon its independence. Furthermore, the High Court has held in *Freedom of Expression Institute v Chair, Complaints and Compliance Committee*<sup>2</sup> that the CCC is entitled to and, in fact, has a duty, to inquire into a complaint that the newsroom at the SABC had allegedly been biased in its coverage of specified events. The Court upheld the review application on the basis that the CCC had made a legal error in not dealing with a complaint of bias in the newsroom of the SABC.

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<sup>2</sup> 2011 Judgments Online 26704(GSJ); compare Prof Sunette Lötter *Journal for Juridical Science (UFS)* 2016 41(2):14-28 "The eternal quest for an independent public broadcaster: What's news?"

[11]By analogy the CCC would also have the authority, after a complaint had been lodged with it, to inquire into the question whether the Board of the SABC had ensured that public participation took place within the terms of section 6(6) of the Broadcasting Act.

## **FILING WITH THE COUNCIL**

[12] Mr *Sibeko* also argued that the Council of ICASA had already received the amended policies in 2016. The Council of ICASA could, thus, not now be involved in this matter again.<sup>3</sup>

The Broadcasting Act provides as follows in section 6(5)(b):

The Corporation must notify the Authority in writing of any amendments to the policies referred to in paragraph (a) as soon as reasonably possible.

The fact that the SABC must “notify” the Authority in writing of amendments does not mean, in the CCC’s view, that the Council of ICASA is *functus officio* in this matter.<sup>4</sup> The said subparagraph does not require ICASA to “approve” the amendments. In fact, the word “approve” is used in other sections of the Broadcasting Act, in contrast to section 6(5)(b).<sup>5</sup>

The role of the Authority is clear according to section 6(2) of the Broadcasting Act:

“The Authority must monitor and enforce compliance with the Charter by the Corporation.”

“Compliance with the Charter” clearly means that the Authority has the jurisdiction to decide whether there was *compliance* with the Charter. The procedure being that an alleged contravention of the Charter is filed with the CCC by the Monitoring Division of ICASA and where the CCC finds that there was

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<sup>3</sup> It should be mentioned for the record that the SABC, in its full answering affidavit, applied for the recusal of the Chair. I need not go into the details since counsel had, in chambers, informed me that the SABC was abandoning this application. There were in any case, with respect, no grounds for a recusal. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)* 1999 (4) SA 147 (CC).

<sup>4</sup> Also see section 6(5) which refers to “submit”.

<sup>5</sup> See sections 11(1)(d), 18(2), 18(4) and 18(5) of the Broadcasting Act 1999.

not compliance, it advises Council of an order, which it is authorised to issue in terms of section 17E(2). Members of the public may, of course, also lodge a complaint that the SABC has not complied with its policies.

Of course, the present complaint concerns the legality of the procedure followed by the SABC Board in regard to the amendments to its editorial policies. If it is found that the procedure as prescribed by the Act for amendments to the policies has not been followed, the Authority, on the advice of the CCC, has the authority to find that resolution by the SABC Board to have been invalid.

### **JOINING THE MINISTER**

[13] It was also argued that the Minister of Communications should have been joined as a Respondent, since the Minister has a substantial interest in the matter – being indicated in the Broadcasting Act as responsible for broadcasting policy. It is clear that the Minister has broad duties of oversight of broadcasting in the public interest in terms of the Broadcasting Act.

The ICASA Act does not provide for a procedure according to which a third party must or may be joined in an inquiry by the CCC. Since the Minister is not a licensee there is no manner in which the Minister may or must be included in a procedure before the CCC as a respondent.

The Minister's answer in Parliament was placed before the CCC as evidence of what steps had taken place in regard to the amended policies. The answer in Parliament does not include that the final draft policies were published for comment by the public. This was not disputed by the Respondent.

### **THE MAIN DISPUTE**

[14] The dispute is limited to the question whether the editorial policies, as amended, should first have been published by the Board of the SABC for comment. Again: section 6(6) of the Act provides as follows:

The Board must ensure that there is public participation in the development of the policies referred to in subsection (5) by inviting and considering public comment on such draft policies and by other means.

It is true that, what may be termed private consultation, plus public meetings did take place in the present matter. However, what section 6(6) requires is *public* participation in a prescribed manner: there must be an *invitation* for *public* comment on a draft policy. Such comment must then be *considered* by the Board of the SABC before it finalises the matter.

## **FINDING**

[15] The CCC's finding is that public participation had not taken place in terms of section 6(6). The omission was to not publish the draft amended policies and invite public comment on them. If the draft policies had been published for comment and the SABC were to have confirmed by affidavit that it had considered those comments, that would probably have closed the matter. However, this was not done and draft amendments were considered by the SABC Board and accepted without having obtained the required public input. In *Doctors for Life International v Speaker of the National Assembly and Others*<sup>6</sup> the following was stated by the Constitutional Court in regard to public involvement in the making of legislation:

Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a *meaningful* opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less. (emphasis added)

[16] The CCC, accordingly, holds that the SABC Board did not comply with the duty in section 6(6) of the Broadcasting Act by not having published the draft amended editorial policies for public comment and then considering such

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<sup>6</sup> 2006 (6) SA 416 (CC). Also see *Glenister v President of the RSA & Others* 2011(3) SA 347(CC) where Chief Justice Ngcobo stated as follows, before quoting the *Doctors for Life* judgment: "Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less." Also compare the judgment of Justice Van der Westhuizen in *Merafong Demarcation Forum v President of the RSA* 2008 (5) SA 171 (CC).



comment before accepting amendments to the said policies. It had not complied with an essential condition as prescribed by the Broadcasting Act in section 6(6). The duty as prescribed could readily have been complied with by, for example, publishing the amended policies on the SABC's website and giving publicity to the relevant entry on its website on its news services. This omission, which was substantial, led to the invalidity of the Board's resolution to adopt the amendments to the editorial policies.

The complaint is, accordingly, upheld.

### **ADVICE TO COUNCIL AS TO AN ORDER**

[17] Section 17E(2)(c) of the ICASA Act, inter alia, provides as follows:

- (2) The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -
  - (c) direct the licensee to take such remedial or other steps[not] in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;

[18] Given the fact that the CCC has come to the conclusion that the SABC Board had not consulted the public as prescribed in section 6(6) of the Broadcasting Act, the resolution by the SABC Board to approve the amendments to its editorial policies was invalid in law. The Board, accordingly, acted outside its powers by approving the amendments to the editorial policies.

The ICASA Council is advised to make the following order:

**That since the public participation procedure prescribed by section 6(6) of the Broadcasting Act 1999 was not adhered to by the SABC Board in the 2016 amendment of its editorial policies, the following is, in terms of section 17E(2)(c) of the ICASA Act, ordered:**

- (a) That the 2016 amendments by the SABC Board to its editorial policies were invalid in terms of the Broadcasting Act 1999.**

**(b) That the 2004 SABC editorial policies, accordingly, remained valid.**

*J. C. W. van Rooyen*

JCW VAN ROOYEN SC

24 February 2017

The above mentioned Members of the CCC concurred.