

Yolisa Kedama  
The Acting Chairperson of the ICASA Council  
Independent Communications Authority of South Africa  
Private Bag X10,  
Highveld Park  
0169

Per Email: [licensing@icasa.org.za](mailto:licensing@icasa.org.za)

07 September 2023

Dear Ms Kedama

**SOS SUBMISSIONS ON THE APPLICATION OF THE SOUTH AFRICAN  
BROADCASTING CORPORATION (SABC) IN RESPECT TO THE RENEWAL OF  
ITS INDIVIDUAL TELEVISION BROADCASTING SERVICES AND RADIO  
FREQUENCY SPECTRUM LICENCES FOR SABC 1, 2 AND 3**

- 1 SOS makes this submission in respect of the application The Independent Communications Authority of South Africa (ICASA) has received from the South African Broadcasting Corporation (SABC) to renew its Individual Television Broadcasting Services and Radio Frequency Spectrum Licences for SABC 1, 2 and 3.



2 SOS is the SOS Support Public Broadcasting Coalition (“**SOS**”), 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 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. SOS campaigns for an independent and effective public broadcaster. We engage with policy makers, regulators, and law makers to secure changes to promote citizen friendly policy, legislative and regulatory changes to public and community broadcasting.

3 In this submission we make written representations focusing on both the SABC and ICASA. We further request an opportunity to make oral representations at the renewal hearings which we urge ICASA to hold.

#### 4 **THE SABC’S PUBLIC MANDATE**

4.1 The SABC carries a public mandate as a public broadcaster. The SABC public service content offerings, must be based on the principles of creativity, credibility, reliability, variety and balance in meeting its obligations to entertain, educate and inform. The SABC’s content must be in various local languages and promote cultural diversity, social cohesion, nation building and oneness by giving a voice to South Africans to express their ideas and views in their own languages, with a specific focus on views historically marginalised by the commercial media.



- 4.2 There is an ongoing concern in SOS regarding the SABC's vulnerability to be captured by commercial and political interests, its inability to be financially sustainable and its lack of effective oversight by relevant bodies, including ICASA and Parliament. These problems have crippled the SABC's ability to carry out its public mandate fully.

## **5 THE ROLE OF ICASA IN RESPECT TO THE SABC**

- 5.1 The primary role of ICASA with respect to the SABC is to regulate and to monitor the public broadcaster, and, at least annually, to ensure compliance with its Charter, its licence conditions, and all relevant legislation and regulations. Section 4(3)(b) of the Electronic Communications Act, 2005 (the ECA) requires ICASA to monitoring the broadcasting sector to ensure compliance with the ECA and the Broadcasting Act, 1999 (the Broadcasting Act). Further in terms of section 4(3)(d) of the ECA, ICASA is required to develop, monitor and enforce compliance with licence conditions and regulations consistent with the objects of the ECA, the ICASA Act 2000 (the ICASA Act) and the Broadcasting Act.
- 5.2 ICASA also monitors the SABC's performance in terms of its content offerings to ensure compliance with its local content obligations. The Authority is also responsible for providing a mechanism for the public and other stakeholders to lodge complaints about the SABC (and all its licensees) through its Complaints and Compliance Committee.
- 5.3 SOS is concerned by ICASA's lack of monitoring and compliance enforcement by SABC Television licensees. ICASA has produced only one SABC television compliance report, some fourteen years ago. It has consistently failed to report



to the public on general regulatory compliance by the SABC television stations. This is an abject failure by ICASA in respect of one of its key functions, namely, monitoring and compliance enforcement.

## **6 SABC'S LOCAL CONTENT QUOTAS AND PROGRAMMING OBLIGATIONS**

6.1 The SABC must lead the way in commissioning independent local content and in providing local content to the public. The SABC is obligated to submit quarterly reports to ICASA to indicate its compliance with local content obligations and licence conditions.

6.2 ICASA's Regulations on Local Television Content in Section 3 (1) (2) set out Public Local Television Content Requirements for SABC 1 and 2 as follows:

6.2.1 65% of its programming, measured over a year, during the performance period (05h00 and 23h00 daily), must consist of local television content (as defined in the ECA) and spread evenly throughout the performance period and at prime time (18h00 and 22h00)

6.2.2 Further in complying with its obligations in terms of sub-regulation (1) a public broadcasting licensee must ensure that a minimum of all genres listed below is broadcast with the following percentages of local television content in that genre:

(a) 35% of drama

(b) 80% of current affairs;



- (c) 50% of documentary;
- (d) 50% of information knowledge building;
- (e) 60% of educational; and
- (f) 55% of children's.

6.3 For SABC 3, Section 5 (1)(2) of the ICASA regulations sets out Commercial Television Content Requirements for as follows:

6.3.1 45% of its programming, measured over a year, during the performance period (05h00 and 23h00 daily), must consist of local television content (as defined in the ECA). However, there is no requirement that this be spread evenly throughout the performance period and at prime time (18h00 and 22h00 daily)

6.3.2 Further all programming genres listed below must be broadcast and with the following percentages of local television content:

- (a) 20% of drama;
- (b) 50% of current affairs;
- (c) 30% of documentary;
- (d) 30% of knowledge building; and
- (e) 25% of children's.



6.4 Section 10(1) of the SA TV Content Regs requires the SABC to keep and maintain logs, statistical forms and programme records in a format prescribed format by the authority for a period of 36 months.

6.5 Any contravention of the TV Content Regulations by either a commercial or public television licensee is punishable by a fine not exceeding R5million or 10% of its annual turnover for every day or part thereof during which the contravention continued, in terms of regulation 11(1) of the TV Content Regs.

## **7 DRAFTING PROBLEMS WITH THE LOCAL TELEVISION CONTENT REGULATIONS AND LACK OF PRESCRIBED FORMATS FOR REPORTING**

7.1 There is a drafting problem with the TV Content Regs regarding sub-regulations 3(2) and 5(2) which talk about the need for free- to- air public (SABC 1 and 2) and public-commercial (SABC 3) broadcasters to broadcast a minimum percentage of local content in specific genres but then fail to stipulate the minimum percentage to be broadcast.

7.2 Another drafting problem regarding local content, is that ICASA's prescribed formats for recording keeping as set out in its Compliance Procedure Manual Regulation for the keeping and maintenance by all television licensees of the required logs, statistical forms and programme records which are required for the recording of:

7.2.1 full particulars of all SA content programming broadcast in each week, including each category of SA television content (presumably being genres – sub-regulation 10(1)(a);



- 7.2.2 full particulars of the name(s) of the author(s) of the drama script indicating their nationalities, or that of the adaptor if it is drawn from a literary source – sub-regulation 10(1)(b);
- 7.2.3 full particulars of the name(s) of the drama director(s) indicating their nationalities – sub-regulation 10(1)(c);
- 7.2.4 a list of the creative and technical personnel involved in a drama production indicating their nationalities and, in the case of performers, the roles they play – s10(1)(d); and
- 7.2.5 such other particulars as may be required by the Authority – s10(1)(e),

are insufficient.

7.3 The CPM Regulations do not contain any prescribed forms for the format for reporting on local television content compliance by individual licensees *per se*:

- 7.3.1 Forms 9, that is, Form 9, 9A, 9B, 9C do not relate to local television compliance but are required to be submitted by individual broadcasting services.
- 7.3.2 “General Logsheet”, Form 9A requires submission in accordance with the Standard Terms and Conditions Regulations, licence conditions and the SA Music Content Regulations – there is no mention of the TV Content Regs.



- 7.3.3 Section 2 of Form 9A requires a statement on programmes broadcast, broken down into three information categories, namely: timeslot, name of programme, a brief description of the programme. However, there is no requirement to make any stipulation in relation to TV Content Compliance.
- 7.3.4 Section 4 of Form 9A requires a statement on news and it requires daily and monthly minute breakdowns of the following categories of news: local, regional, national and international and whether the above is self- originated or from other sources, and the sources actually used.
- 7.3.5 “Format Factor Log Sheet for Radio” Form 9C is applicable to compliance with the SA Music Content Regulations only – it has no application to the TV Content Regs.
- 7.4 ICASA does not prescribe formats because of a perceived difficulty of creating standard reporting formats given the differing licence conditions pertaining to different licensees. However, it is not lawful for ICASA to prescribe in a regulation that it is under a peremptory obligation to prescribe reporting formats (that is to put these formats into a regulation) and then fail to do so.
- 7.5 The failure to prescribe local content reporting formats is a violation of the Promotion of Administrative Justice Act, 2000 (PAJA) in a number of important respects but, most basically, of section 6(2)(b) of PAJA. Section 6(2)(b) of PAJA entitles a court or tribunal to judicially review administrative action if “a mandatory and material procedure or condition prescribed by an empowering





provision was not complied with". The word "prescribed" is clearly defined both in the ECA and in the ICASA Act as meaning prescribed in regulations. The effect of this is that sub-regulation 10(1) of the TV Content Regs requires, as a matter of law, that ICASA prescribe regulations to setting out the formats for the logs, statistical forms and programme records which television licensees are required to keep in relation to SA TV content. Its failure to do so is reviewable under PAJA.

7.6 Apart from the unlawfulness of ICASA's failure to prescribe reporting formats, this means that the public has not had the opportunity of commenting on the draft prescribed forms, a process that is required in terms of section 4(4) of the ECA. This deprivation means that the public, including television viewers and members of the independent production sector, have been unable to comment on the current situation and are entirely voiceless, and even ignorant, in respect of ICASA's methodology for local content reporting by public and commercial television licensees.

7.7 The overall effect of ICASA's unlawful administrative action in failing to prescribe reporting formats in regulations has been to:

7.7.1 deprive the public of the ability to participate, through a public notice and comment procedure, on crafting reporting formats that materially and adversely affect them which is itself a violation of the provisions of section 4(1) of PAJA too; and



7.7.2 allow for secretive and non-uniform reporting formats to be required of different television licenses despite the peremptory requirement that these be contained in regulations.

## **8 ICASA'S LACK OF MONITORING SABC'S PERFORMANCE**

SOS is concerned that ICASA has failed to effectively monitor SABC TV's performance for compliance with local content quotas and licence conditions. The SABC is a crucial institution in our democracy and its compliance with legal and regulatory requirements such as regulations and licence conditions are required to be monitored on and reported on annually.

8.1 The licence renewal comes at a time where it appears that ICASA has not performed adequate monitoring of SABC TV's performance in over a decade. Certainly, it has been 14 years since the ONLY compliance report on SABC television was produced by ICASA. As an organisation that advocates for the existence of an effective and robust public broadcaster, we certainly want the SABC's licence to be renewed for continued existence of a public broadcasting services in South Africa. However, SOS is concerned that this licence renewal may just be a tick box exercise considering that ICASA (or indeed any member of the public) has no way of knowing whether SABC is indeed eligible for a renewal based on its performance. Further, that ICASA is not aware of areas of concern in the SABC's performance.

8.2 SOS is of the view that the SABC meets its obligation of submitting television quarterly performance reports for assessment of compliance by ICASA. It is ICASA that has failed to verify the validity of information it receives from the



SABC and publish SABC TV's compliance reports. Because ICASA has not prescribed appropriate reporting formats and the reporting done is not made public, the public is unable to undertake any independent verification of compliance, particularly with local content obligations. This is not in ICASA's interest or in the public interest.

- 8.3 SOS urges ICASA to fulfil its oversight role and ensure that the SABC delivers high quality content to South African citizens in the public interest.

## **9 IMPACT OF SABC'S NON-COMPLIANCE ON THE PRODUCTION SECTOR**

- 9.1 Adherence to local content quotas is essential in ensuring that the SABC fulfils its role of nation building by means of promoting cultural and linguistic diversity and supporting local producers.

- 9.2 The SABC has played a significant role in establishing and growing the local production sector. However, over the years producers have raised numerous complaints about the detrimental impact in the industry when the SABC fails to meet its local content obligation. In fact, the detriments are not only limited to local producers but the creative industry at large, including actors, writers, etc. Broadly, this impacts the sustainability of the sector and its overall contribution to the country's socio-economic growth.

- 9.3 SOS submits that it is vital for ICASA to fulfil its role effectively and ensure that the SABC is compliant. Compliance Reports must be published annually on ICASA's website in accordance with its mandate, regarding SABC TV's compliance status. As a public broadcaster, the SABC is accountable to the



public and its proper functioning is essential for the promotion of democratic values. The public has a right to know how the SABC is performing and whether it meets its obligations. ICASA's failure to efficiently inform the public on SABC's performance indicates failure to regulate in the public interest and inherently failure to effectively carry out its own mandate.

9.4 Renewing the SABC's broadcasting licences without concrete evidence of compliance poses risks to the Authority, the SABC and the public:

9.4.1 Cripples the growth of the local production sector

9.4.2 Leads to commercialisation of SABC content at the expense of the public interest.

9.4.3 Impacts SABC's ability to effectively carry out its public mandate

9.4.4 Undermines the credibility and effectiveness of the Authority.

9.4.5 Erodes public trust in the SABC.

9.5 SOS believes that efficient and transparent local content commissioning practices should be implemented that embrace the principles of a diversity of voices, ideas, opinions, and worldviews; and that the intellectual property regime needs to be completely overhauled to ensure a sharing of rights.

## 10 CONCLUSION

10.1 SOS does not support the renewing of SABC's broadcasting licences without concrete evidence that it is compliant but understands that it must be done as it



is not the SABC's fault that ICASA has failed to prescribe appropriate reporting formats or produce annual compliance reports for SABC 1, 2 and 3. However, going forward, the Coalition submits that ICASA must ensure effective monitoring of SABC TV as obligated by its statutory mandate.