



Ms Fikile Hlongwane
ICASA
Senior Manager: ICT Licensing Services
Broadcasting Compliance licensing and Compliance Division

Via email: FHlongwane@icasa.org.za
Independent Communications Authority of South Africa
Block A, Pinmill Farm
164 Katherine Street,
Sandton
2146

And
Messrs Gary Naidoo and Kgomotso Amuzu
Infinity Media Networks (Pty) Ltd
52 Lechwe Street
Corporate Park South Corporate Park South
Old Pretoria Road Old Pretoria Road
1685

Via email to:
info@ANN7.co.za
kgomotsoa@ANN7.co.za
gary@ann7.com
kgomotsoa@ann7.com

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Dear Ms Hlongwane

JOINT WRITTEN SUBMISSIONS BY THE SOS COALITION AND MEDIA MONITORING AFRICA ON THE DISCUSSION DOCUMENT ON THE APPLICATION FOR A COMMERCIAL FREE TO AIR TELEVISION LICENCE BY INFINITY MEDIA (PTY) LTD.

1. INTRODUCTION

1.1. In Notice 125 published in Government Gazette No. 41494 dated 13 March 2018 (the Notice), ICASA invited written submissions on any of the applications for a Commercial Free to Air Licence and Spectrum on Mux 3. We thank ICASA for the opportunity of making these submissions and request the opportunity to make oral submissions at any hearings which may take place. We also confirm that these representations have been sent by email to the persons listed in the Schedule to the Notice as is clear from the email that was sent to all three addressees at the same time.

1.2. The SOS Coalition:

1.2.1. The SOS Support Public Broadcasting Coalition (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.

1.2.2. 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 public broadcasting.

1.2.3. The Coalition campaigns for the above by:

1.2.3.1. Lobbying for transparency and accountability by all institutions governing public and community broadcasting: Parliament, the Ministry and Department of Communications, the Media Development and Diversity Agency (MDDA), the SABC, the Universal Service and Access Agency of South Africa (USAASA) and to the Competition Commission.

- 1.2.3.2. Promoting a constructive, engaged role with all stakeholders, including industry bodies such as the National Association of Broadcasters (NAB) and the National Community Radio Forum (NCRF), as well as a range of NGOs, CBOs, campaigns and others.
- 1.2.3.3. Researching international best practices to inform all aspects of our work.
- 1.2.3.4. As part of its lobbying work the Coalition writes submissions, commissions research, engages the media, organises public meetings and where appropriate pickets and protests. Our contributions in advocating for a public-interest-focused public broadcaster have been recognised by the broadcasting sector, the media, the courts, and Parliament as being immensely valuable
- 1.2.3.5. 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.

1.3. Media Monitoring Africa:

- 1.3.1. MMA is Media Monitoring Africa (“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.
- 1.3.2. MMA’s vision is a just and fair society empowered by a free, responsible and quality media.
- 1.3.3. In the last 25 years we have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA has, and continues to challenge media on a range of issues always with the overt objective of promoting human rights and democracy through the

media. In this time MMA has also been one of the few civil society organisations that has consistently sought to deepen democracy and hold media accountable through engagement in policy and law making processes.

- 1.3.4. MMA has made submissions relating to Public Broadcasting, as well as numerous presentations to Parliaments Portfolio Committee on Communication as well as the National Council of Provinces. In addition, MMA has made submissions to Broadcasters, the Press Council, the South African Human Rights Commission and the Independent Communications Authority of South Africa (ICASA). MMA also actively seeks to encourage ordinary citizens to engage in the process of holding media accountable through the various means available – all of which can be found on MMA's website (www.mediamonitoringafrica.org).

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 ICASA-process with regard to broadcasting.
- 2.2. Further, and as ICASA is aware, 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. While we have significant experience in making submissions based on principled issues and in line with our human rights driven agendas, we do not usually take the step of making these on the basis of individual licence applications. Accordingly, it is important to draw attention to our motivation in the current instance:
 - 2.3.1. Free to air licences are infrequently allocated and make use of precious public resources in the form of frequency. They are also by their nature designed to be forms of mass media seeking to have broad reach and meet the needs of large audiences. It is thus vital that any such allocation and applications are subjected to significantly greater scrutiny in the public interest than for example, the establishment of a new channel on a subscription broadcaster; and

2.3.2. There are clear public interest issues raised in the application from Infinity Media that we believe are critical to any assessment of the applications being made by Infinity Media.

2.4. SOS and MMA are making submissions on the inappropriateness of the application submitted by Infinity Media Networks (Pty) Ltd (Infinity Media) and will confine its submission to only certain aspects thereof. In this regard, SOS and MMA do not necessarily deal with all issues raised Infinity Media's application nor do they confine themselves to the issues canvassed in the application.

2.5. In making these submissions, SOS and MMA are attempting to assist ICASA in ensuring that only those applications for free to air licences that are genuinely in the public interest ought to be given any serious consideration. We have grave doubts about this when it comes to Infinity Media given its recent history.

3. THE CRISIS OF STATE CAPTURE

3.1. SOS and MMA submits that ICASA must take notice of the massive political crisis that the ruling party, the African National Congress (the ANC), the government, and indeed the entire country, has undergone as a result of the capture of the state by, effectively, a single family, namely the Guptas.

3.2. This State Capture enterprise has been the subject of a Report by the Public Prosecutor, the "State of Capture", numerous front-page news articles, and a number of books, Parliamentary hearings, and court cases. The dismantling of the State Capture enterprise has yet to be finalised and is very much still a work in progress.

3.3. As ICASA is well aware, broadcasting has not been immune from the State Capture enterprise. Documents revealed by Amabhungane as part of the so-called Gupta-leaks, have revealed the extent of the influence of the Guptas and in particular of its channel currently broadcast on DStv, namely ANN7¹. It is alleged for example, that ANN7 was in close contact with the former Minister of Communications, Faith Muthambi, with regard to

¹ <http://amabhungane.co.za/article/2017-11-24-guptaleaks-how-multichoice-paid-the-guptas-millions>.

the non-encryption specification for the Digital Terrestrial Television (DTT) Set-Top Box (DTB), a specification which went against ANC and Cabinet policy at that time.

3.4. Parliament is, as we understand it, still investigating these issues. Further, again as we understand it, the Democratic Alliance has itself requested that ICASA conduct an enquiry into the relationship between DStv and, *inter alia*, ANN7.

3.5. Within this broader political context, it is frankly inconceivable that only the second commercial free to air television licence in the country's history could potentially be granted to Infinity Media, the current owners of ANN7. In this regard we urge ICASA to have regard to the book *Indentured – Behind the Scenes at Gupta TV* by Rajesh Sundaram, former editor of ANN7. To date we are not aware of any legal action or even any press reports to counter, refute or challenge any of the allegations contained therein.

3.6. We are of the view that the State Capture crisis has represented the biggest political scandal since the founding of our democracy in 1994. Until all aspects of the crisis have been investigated and ventilated by regulatory bodies such as ICASA, by Parliament and by the criminal justice system, ICASA cannot, with any degree of certainty, determine that granting Infinity Media the applied-for free to air television licence would be in the public interest. For this reason alone, Infinity Media's application must be rejected.

4. SUBSTANTIVE CONCERNS REGARDING THE APPLICATION ITSELF

4.1. As ICASA is aware, none of the provisions of the Electronic Communications Act, 2005 (the ECA) regarding ownership and control of broadcasting services (provided for in Chapter 9 of the ECA) apply to channels such as those broadcast by DStv.

4.2. However, all of these provisions apply to Infinity Media given that it is now applying to be a licensed free to air television broadcaster and not simply a channel provider.

4.3. SOS and MMA are of the view that there are a number of provisions in the ECA which make it very difficult to conclude that Infinity Media can be granted a licence by ICASA.

4.4. Foreign Control:

4.4.1. SOS and MMA are cognisant of the fact that section 64(1) of the ECA specifies that a foreigner may not, whether directly or indirectly –

- (a) exercise control over commercial broadcasting licensee; or
- (b) have a financial interest or an interest in doing voting shares or paid up capital in a commercial broadcasting licences, exceeding 20%.

4.4.2. The Infinity Media application, unsurprisingly, does not set out in detail the history of the effective acquisition of the shares in Infinity Media by Mr Manyi, the individual who effectively holds 90% of the shares in Infinity Media². However, media reports at the time made it clear that the transaction (valued at R300 million)³ was vendor-financed by the Guptas themselves⁴. The nationality of the Guptas is, as ICASA must be aware, the subject of its own scandal, with the then-Minister of Home Affairs, Malusi Gigaba, having rushed their applications for citizenship, allegedly outside of the regulatory frameworks for nationalization. This is currently the subject of a separate Parliamentary investigation⁵.

4.4.3. SOS and MMA are of the view that ICASA must satisfy itself through detailed scrutiny of the vendor finance contracts themselves that the vendor-financed effective acquisition of Infinity Media by Mr Manyi has not resulted in a foreigner having a financial interest in Infinity Media exceeding 20% as this is prohibited by section 64(1)(b) of the ECA. This will be exceedingly difficult for ICASA to do given that the nationality of the Guptas is not yet proven and the vendor financing arrangements appear to have covered at least 90% of the purchase price of the company. In this regard, we note that the ECA does not grant ICASA any powers to exempt a licensee from the provisions of section 64 of the ECA. These provisions are peremptory.

4.4.4. Further, SOS and MMA are very concerned that foreigners do in fact exercise control over Infinity Media, in violation of section 64(1)(a) of the ECA. In this regard, it is important to have regard to the senior management of the licensee⁶. Five of the twelve individuals listed as the senior managers are foreigners, including key roles such as Editor, Production Head, Technical Head, Head of Sales and Marketing and Production and Quality Control. Although there is no definition of the “control” in the

² See pg 11 of Volume 1 of the application.

³ <https://www.news24.com/Analysis/gupta-crusader-to-media-owner-who-is-mzwanele-manyi-20170821>

⁴ <https://www.iol.co.za/news/politics/new-age-ann7s-manyi-c-a-foreigner-having-a-financial-interest-learns-the-air-on-gupta-financing-11003208>.

⁵ <http://www.newtimes.co.rw/africa/south-africas-parliamentary-committee-investigate-gupta-familys-citizenship>

⁶ See pgs 23 and 24 of the Volume 1 of the application.

ECA it is clear that, for example, that an editor would have significant control over programming decisions, and that these non-South African managers would have control over a significant proportion of operations, things that constituted examples of *de facto* control over a broadcasting licensee in terms of Schedule 2 to the now-repealed Independent Broadcasting Authority Act, 1993, a still-useful guide to examples of *de facto* control given the lack of these in the ECA.

4.4.5. SOS and MMA are of the view that ICASA must satisfy itself that foreigners do not exercise *de jure or de facto* control over Infinity as this would be prohibited by section 64 of the ECA. In this regard, we note that the ECA does not grant ICASA any powers to exempt a licensee from the provisions of section 64 of the ECA. These provisions are peremptory.

4.5. Party Political Entities

4.5.1. SOS and MMA are cognisant of the fact that section 52 of the ECA specifies that “[n]o broadcasting service licence may be granted to any party, movement, organisation, body or Alliance which is of a party-political nature”. While Infinity Media as a corporate entity is not a itself a party-political entity, it is also clear that Infinity Media is effectively 90% controlled by a single individual namely Mr Manyi, a person who has held many positions of a party political nature including as a government spokesperson and as a special adviser to the former Minister of Communications Faith Muthambi.

4.5.2. It is extremely unusual for a large commercial broadcaster to be so dominated by a single individual. While this, on its own, is not necessarily a problem, Mr Manyi is certainly closely identified with a particular faction of a party-political entity, the ruling party, namely that of former President Zuma and his political allies, such as former Communications Minister Faith Muthambi.

4.5.3. This requires ICASA to consider the applicability of section 52 of the ECA to this application and to interrogate Mr Manyi’s involvement in party political structures comprehensively.

4.6. Danger of “Fake News” Misinformation

4.6.1. The ECA does not deal with the concept of “fake news” or misinformation. But ICASA must be aware of the dangers thereof and this issue, as a matter of public interest, ought to be taken into account when considering the appropriateness of potentially awarding the licence to Infinity Media.

4.6.2. SOS and MMA are of the view that the Mr Manyi’s personal history and conduct must be exemplary if the company which he single-handedly guides as its effective 90% shareholder is to be granted a free to air licence. Sadly, numerous press reports have identified his personal involvement and indeed key role in the notorious Bell Pottinger disinformation/fake news campaign⁷ in support of former President Zuma and the Guptas. Bell Pottinger’s disinformation campaign was so unethical the company was expelled from the UK’s Public Relations and Communications Association⁸ as a result. ICASA must take these activities of Infinity Media’s effective 90% owner into account when considering Infinity Media’s application for a free to air television licence as ICASA is required to do in terms of section 51(f) and (g) of the ECA.

5. CONCLUSION

5.1. SOS and MMA are of the view that the application by Infinity Media simply raises too many red flags given foreign financial interests, control, party political concerns and concerns regarding the business record of Mr Manyi and the general State Capture crisis which has engulfed the country and which has not been laid to rest and which has involved, at its centre, ANN7, for it to be granted any broadcasting licence, let alone only the second commercial free to air television licence in the country’s history.

5.2. The myriad criminal trials, criminal charges, Parliamentary, Public Protector and regulatory hearings, including by ICASA itself, would have to have been concluded first, in our view.

5.3. At this stage, ICASA simply cannot find that granting Infinity Media (and, by extension, its effective 90% individual shareholder, Mr Manyi) a commercial free to air television licence would be in the public interest and would further the objects and principles enunciated in section 2 of the ECA as is required in terms of section 51 of the ECA.

⁷ See for example, <https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2017-08-26-manyi-is-no-mogul-just-a-puppet-on-a-gupta-string/> and <https://www.news24.com/Analysis/gupta-crusader-to-media-owner-who-is-mzwanele-manyi-20170821>.

⁸ <https://www.fin24.com/Companies/Advertising/breaking-bell-pottinger-expelled-from-pr-body-for-gupta-work-20170904>

6. In making these submissions we think it important to note that SOS did not support the termination of ANN7 contract as a channel provider with DStv because DStv did not give any substantive reasons for the termination and so, as was the case with the flighting of the ANN7 channel in the first place, DStv appeared to be acting in a politically expedient fashion. As SOS was careful to point out in its press statement at the time, SOS's stance did not constitute support for ANN7 as a news channel, rather it was to signal SOS's concerns regarding the behaviour of DStv. SOS's unhappiness at the manner in which DStv terminated ANN7's channel contract must not be misconstrued as providing any support for Infinity Media's application for a commercial free to air television licence. MMA has also raised concerns publicly about, and condemned threats against, ANN7 as a station by the Department of Home Affairs, and also is on public record questioning the reasons for the cancellation of the channel by DStv.
7. SOS and MMA trust that these submissions will be of assistance to ICASA in its consideration of the application by Infinity Media.
8. Please do not hesitate to contact SOS and/or MMA should ICASA have any queries or require any further information.

Thank you

Yours Sincerely



Duduetsang Makuse

National Co-ordinator, SOS



William Bird

Director, MMA

And