



# **EXHIBIT CC 12**

**AFFIDAVIT & ANNEXURES**

**OF**

**JAKOB DANIEL  
KRIGE**



**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,  
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

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**IN THE COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE  
CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR  
INCLUDING ORGANS OF STATE ("THE COMMISSION")**

**AFFIDAVIT**

I, the undersigned,

**JAKOB DANIEL KRIGE**

hereby declare under oath as follows:

1. I am an adult male South African citizen formerly employed as Executive Producer of current affairs at the SABC radio station, RSG
2. The content of this affidavit is true and correct and falls within my own personal knowledge, unless the contrary clearly appears from the context or is otherwise stated.
3. I have been approached by investigators associated with the Commission of Inquiry into Allegations of State Capture, Fraud and Corruption in the Public Sector and certain Organs of State ("the Commission") and have been requested to provide an affidavit which details my dealings with the South African Broadcasting Corporation ("SABC") in relation to how I become known as part of the 'SABC8'.
4. I have agreed to provide this affidavit as well as evidence to the Commission freely and voluntarily.



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## CAREER BACKGROUND

5. I have been a journalist for 37 years. Before joining the SABC, I worked as: a general reporter for Perskor newspapers; parliamentary reporter for Die Transvaler; and a news editor for Vaderland.
6. I was in the employ of the SABC from April 1990 until I retired in May 2019. I held the following positions while at the SABC; newsroom reporter for 5 years and senior reporter for seven years, before joining the RSG Current Affairs team as executive producer, a position I held until retirement.

## EDITORIAL INTERFERENCE

7. During my role as executive producer, there were several instances of direct editorial interference from my line managers.
8. I recall on **5 February 2014** at 09:30 the former acting head of Radio news, Sebolelo Dithlakanyane (Ms Dithlakanyane) came into my office and informed me that we cannot report on any Economic Freedom Front (EFF) activities. I asked her why we couldn't and she responded by saying it was an order from the 27th Floor, my understanding of this was it came from the former Chief Operating Officer ("COO") , Mr. Hlaudi Motsoeneng ("Mr. Motsoeneng")
9. I explained to her that it is not possible to ignore a political party. She said we had no choice because it was a directive from the top. I told her that, we will go on broadcasting news and not ignore the EFF. Ten minutes later I received a

P  
28.

call from Jimi Matthews ("Mr Matthews"), the former Head of News. Mr Matthews requested me to come to his office where he, in the presence of Ms Dithlakanyane, gave me a speech about not conforming to the rest of the SABC and accused my team of thinking they were an island on its own. He proceeded to tell me, to obey any order from Ms Dithlakanyane, I responded by saying, I would listen to every instruction and evaluate it before complying.

10. On **1 December 2014** Mr. Motsoeneng appointed; Ms Dithlakanyane in the permanent position of Head of Radio News, Mr Matthews as GE of News and Current Affairs, while Ms Nontando Maseko became the Head of Television News. See **Annexure JDK001** for a copy of the news insert by Sowetan on this appointment.
11. All three individuals were fingered in the 2019 report by Mr. Joe Tholoe as being instrumental in the editorial interference of the news room. See **Annexure JDK002**.
12. On **26 May 2016** the SABC issued a media statement declaring it would not cover violent protest action. On **30 May 2016** my program, 'Monitor' conducted an interview with Messrs.: Tim du Plessis and Frans Kruger about the decision to ban violent protest action. Mr Motsoeneng was also invited but did not pitch for the discussion.
13. On **31 May 2016** We conducted a studio interview with Mr. Motsoeneng, accompanied by his advisor, Mr. Anton Heunis ("Mr Heunis"). After the interview a debate ensued between Mr. Motsoeneng, Mr. Heunis and myself about the

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merits of the previous days' interview. I told them, I had a problem with having to read about the decision to ban violent protest action on social media as there was no communication between his office and the news room.

14. As a result, I was summoned to Mr Motsoeneng's office on the 27<sup>th</sup> floor of the Radio Park building. I was joined by Mr Heunis, the acting head of News, Mr Simon Tebele ("Mr Tebele"), Mr Matthews who was now the acting Chief Financial Officer, Ms Ditlakanyane, Ms Krivani Pillay (" Ms. Pillay") who was the executive producer of SAFM'S current affairs programmes, and Mr Motsoeneng. We were later joined by Mr. Kaizer Kganyago, the spokesperson of the SABC and two other ladies.

**Summary of meeting (transcript):**

- 14.1 **Hlaudi:** We are cleaning up the organisation. People are doing their own stuff. There are many journalists outside that want to work for the SABC. The environment outside is bad.

No person is independent. The SABC is independent

This is a new SABC. You must adapt or find a job somewhere else.

Tim du Plessis is from a rival organisation. We cannot allow people from outside to say anything negative about the SABC

We asked Frans (Kruger) leading questions

Editors forum must go. It is advertising for rival newspapers.



14.2 **Anton:** I am a RSG listener. I know I am not a journalist. You misunderstand editorial freedom. Asking leading questions.

Why didn't you do an insert on research that shows that presence of cameras leads to violence?

14.3 **Foeta:** If you liaise with your editors and warn us beforehand of such decisions, and maybe give insight in the research on which the decision was based, we could have been forewarned.

14.4 **Hlaudi:** I do not believe in research. You must defend the organisation. No journalist is independent. The COO has the final responsibility for news.

14.5 **Hlaudi:** Simon, if people do not adhere, get rid of them. We cannot have people who question management....this is the last time that we have a meeting of this kind. From now on you handle things on your level.

14.6 **Jimi:** It is cold outside. If you don't like it you can go. You've got two choices: the door or the window.

14.7 **Kaizer:** if you cannot get hold of me sms. I was on the phone the whole morning with member of the media. I do not answer internal calls

15. **On 6-7 June 2016** the senior editorial staff attended a pre-election workshop where Mr Motsoeneng inter alia made the following statements: See **Annexure JDK003 and JDK004**, which are my notes as made during said meeting).

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16. The following was extracted from the transcript of the meeting:
- 16.1 “The SABC is independent, no individual is independent. There is an agenda for the corporation, driven by 3 directors: CEO, COO and CFO. Do not focus on negative stories. Important that you balance stories. Tell Human stories: Is politicians not human beings? Reporters at the SABC do not know the world: When they report they mislead listeners. Go to America, there is poverty. They don't show it. They don't show when their soldiers die. I'll take you to the Brics countries, you can just go to a hotel. You will see South Africa is better. Look at your editorial policy. We have removed news and replaced with content. If you as SABC mess up the organisation, you mess up your life. I am in charge. News is now part of operations. We change the world. We must have news with content. I'm in charge: You must adhere to any instruction. President Zuma is the president of the country. I don't regard him as ANC. You cannot treat him the same. We will give him more time. And you can question every one (Mantahse.et al) except our president. We need to respect him, especially you SABC. I expect you to align you with my instruction.”

## LABOUR PRACTISES

17. During my time at the SABC, I was aware of various instances where staff members were purged. In 2016 I was caught up in a similar situation when I was first suspended and later dismissed without a disciplinary hearing.
18. On **20 June 2016** I participated in a daily line talk where the, Mr. Tebele gave instructions that three top stories should be removed from the diary.



19. Economics editor, Ms. Thandeka Gqubule (“Ms. Gqubule”) questioned Mr. Tebele’s decision after which he explained that the stories were about the SABC.
20. I obtained the transcript of the meeting, copies which I annex hereto as Annexure JDK005.

**Transcript of the meeting:**

- 20.1 **Simon:** Those stories are out as was discussed earlier.
- 20.2 **Thandeka:** We need to report the reasons and the rationale for the decisions. When it later comes to court because we are making these and people are going to say so and so and so and so are sitting here. And when we fall foul of the law, God forbid, we better just have recorded even the dissenting voices. Please record my voice as dissenting.
- 20.3 **Foeta:** I totally agree with you. The initial reason...initially they said we cannot give other newspapers a platform to criticize the SABC. That I totally understand. They’re in the media. But this is not a media issue. It is not other newspapers or opposition or whatever. This is a NGO. It is out there and if we ignore them we are busy censoring our own news. And that is totally unacceptable.
- 20.4 **Suna:** And as junior as I am, please record my voice as dissenting against this

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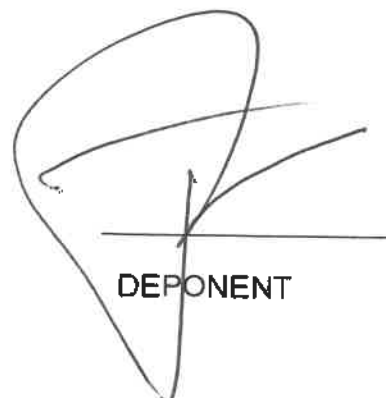
- 20.5 **Foeta:** We cannot allow that people, individuals in this company make decisions on behalf of journalists, if we are going to carry on with that, we are going to lose our integrity, the little integrity that we have at the moment.
- 20.6 **Jonathan:** Johannesburg, did you note what Foeta and they are saying.
- 20.7 **Simon:** Yes I heard that. Please continue.
21. On **23 June 2016**, Ms. Gqubule, Suna Venter ("Ms Venter") and I were called in separately and notified of our suspension.
22. On **27 June 2016**, Mr. Matthews resigned.
23. On **18 July 2016**, I was dismissed along with seven of my colleagues ( Ms. Gqubule, Ms. Pillay, Mr. Jacques Steenkamp, Mr. Lukhanyo Calata, Ms. Venter, Ms. Busisiwe Ntuli and Mr. Vuyo Mvoko) but was reinstated after the Labour Court declared our dismissals invalid. See **Annexure JDK006** for said judgement papers.

#### **INFORMATION ABOUT THE TRANSCRIPTS**

24. The line-talk meeting was recorded by my colleuage and senior producer, the late Ms Suna Venter ("Ms Venter") who was part of the open planning meeting. The other participants were not aware of the recording. A copy of said recording has been handed over to the investigators of the Commission.

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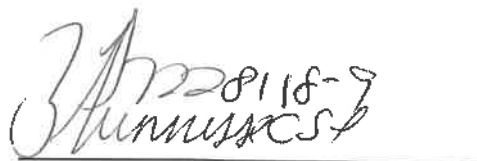
25. I transcribed the recording of the line-talk meeting as received from Ms Venter as well as the notes I took during the meeting on the 27<sup>th</sup> floor, as well as my notes at the election workshop. Therefore, I am not in possession of a transcriber certificate.
26. This is all I wish to declare and accordingly reserve my rights to provide further documents to the Commission as and when they may become available or come into my possession and insofar as they may be relevant to the investigation.

DEPONENT

Signed and sworn before me at Fairland this 12<sup>th</sup> day of August 2019 after the deponent declared that the deponent is familiar with the contents of this statement and regards the prescribed oath as binding on the deponent's conscience and has no objection against taking the said prescribed oath. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).

COMMISSIONER OF OATHS:



FULL NAMES:

Tinao Johannes

CAPACITY:

Constable

ADDRESS:

87 Sophia Street  
Fairland.

A handwritten signature consisting of a large, stylized letter 'P' with a horizontal stroke extending to the right. Below the signature are the initials 'Z.S.' written in a cursive style.

**1**

JOK 001

# SABC announces 'gender equity appointments'

Nov 28, 2014 | Sapa

The SABC on Thursday announced "strategic appointments in line with its commitment to gender equity".

Jimi Mathews has been appointed as Group Executive in the News and Current Affairs division, spokesman Kalzer Kganyago told Sapa.

Mathews was previously appointed in an acting capacity in this division.

The rest of the appointments were women.

The public broadcaster announced that Mofokeng Maseko was appointed as the Head of Television News.

Maseko, who was the former Executive Producer for Morning Live, would be Mathews' understudy until he leaves.

Sebolelo Dithakanyane, the former Regional Editor in the Northern Cape, would head the broadcaster's Radio News division.

The broadcaster announced that Bessie Tugwana had been appointed as Head of Sport while Sully Motsweni was appointed as Group Executive: Stakeholder Relations and Provinces.

The appointments would be effective from December 1.

Women within the SABC would now constitute the majority of the broadcaster's Operations Executive Committee, Kganyago said.

The SABC reported on its website on Thursday that Chief Operating Officer Hlaudi Motsoeneng said the appointments were an indication that the broadcaster was committed to gender equality.

"I'm happy that we have appointed four women in these strategic positions," Motsoeneng was quoted as saying.

"By appointing women to the upper echelon of management, it shows that the SABC takes women seriously."

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**Report of Commission of Inquiry into Interference  
in the Decision-making in the Newsroom of the  
South African Broadcasting Corporation**

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**By Joe Thloloe  
and  
Stephen Tawana (MMM INC)**

**Date: February 25, 2019**





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## EPIGRAPH

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"Every single one of us is entitled to feel fulfilled by the work we do, to wake up feeling inspired to go to work, to feel safe when we're there and to return home with a sense that we contributed to something larger than ourselves..."

"For those who hold a leadership position, creating an environment in which the people in your charge feel like they are a part of something bigger than themselves is your responsibility as a leader..."

"For those who work for an organisation that does not leave you feeling inspired at the beginning and end of every day, you must become the leader you wish you had..."

"Regardless of our rank in the organisation, every single one of us has at least one colleague, client or vendor for whom we can take some responsibility for how they feel when they work with us. The goal is not to focus on what's standing in your way; it is to take steps that will have a positive and lasting effect on everyone around us."<sup>1</sup>

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- <sup>1</sup> Sinek, Simon; Mead, David; and Docker, Peter. *Find Your Why: A Practical Guide for Discovering Purpose for You and Your Team* (p. vii). Penguin Publishing Group. Kindle Edition.



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**EXECUTIVE SUMMARY**

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**FINDINGS**

1. The Commission finds that the SABC suffered from the capricious use of authority and power to terrorise staff and to deflect the Corporation from its mandate and its Editorial Policies.
2. The Inquiry found an organisation crippled by pain, anger and fear; by frustration, anxiety and apathy; and by inattentiveness, detachment and helplessness.
3. A witch-hunt for “enforcers” will not heal the Corporation; it will divide an already fractured institution.
4. No evidence of a direct line between decisions at ANC headquarters, Luthuli House, and decisions in the newsroom, but the spectre of the ANC hovered over the newsroom.
5. The evidence shows that from the year 2012 up until the year 2017, SABC Executives took instructions from people with no authority in the newsroom, for example, members of the SABC Board (Ellen Tshabalala) and the Minister for Communication (Faith Muthambi). The Executives thus failed to execute their duties in terms of the Editorial Policies. The Commission further found that Nothando Maseko, Sebolelo Ditlhakanyane and Nyana Molete were pivotal to the execution of instructions from Hlaudi Motsoeneng, Jimi Matthews and Simon Tebele. They succumbed because of threats of dismissal from their immediate superiors.
6. Lastly, the designation of the GCEO or COO as Editor-In-Chief is not appropriate for the SABC because the circumstances of the Corporation are different from those of the BBC, the model for the current structure.

## RECOMMENDATIONS

1. That the Group Executive: News and Current Affairs should be designated as Chair of the Editorial Policies and Ethics Committee of the Group Executive. He or she should chair the Committee that would include all the Group Executives of information programming – Radio, Television, Sport, Education, etc. The Committee would be the highest point of upward referral by editorial line managers and would uphold the Editorial Policies and the highest editorial and ethical standards. Structurally the chair would report to the GCEO.
2. The creation of a News and Current Affairs Advisory Committee consisting of at least three members – for example, a retired editor, a person who is or was teaching journalism ethics at a tertiary institution, and a retired judge. This Committee would do what the BBC's Editorial Policy Team under the Director Editorial Policy does – advising journalists, editors, and producers on editorial issues throughout the production process, with final decisions resting with the line management.
3. All newsroom staff, from the most junior to the most senior, to attend at least one workshop a year on the Editorial Policies, editorial ethics, the most recent rulings of the BCCSA, ICASA, the Press Council and the reports of the News and Current Affairs Advisory Committee.
4. In as much as the Corporation needs healing from the scourge of the “enforcers”, it needs to attend to team building, where members focus on the common good. The process will include deep conversations among managers and staff in which the frustration, pain, and anger that still linger are surfaced and worked through. Staff who held on in difficult circumstances need to be lauded for being the quiet centre of the tornado, keeping the broadcaster on air and on the internet, bringing news and current affairs programmes to viewers, listeners and online audiences every day and on time.
5. Motsoeneng's instructions to Human Resources to institute disciplinary hearings against employees, or to dismiss, promote or appoint others must be reviewed. Also, Human Resources must do an audit of the appointments, promotions or sideways shifts of senior news management, particularly Nothando Maseko, Sebolelo Ditlhakanyane and Charles Matlou. Where the records are found to be incomplete and the gap is not explained, the

appointment/promotion must be reversed and the position re-advertised, with the person currently occupying it being invited to reapply.

6. A review of the contracts of freelance workers is needed urgently, as these workers need to be a healthy window into the Corporation. It is not good public relations to have these workers walking around long-faced because they are unhappy with their working conditions and remuneration.
7. Improved performance management - at the level of individuals as well as at that of programmes - is vital for the future health of the Corporation. This we recommend after a number of witnesses told us how their programmes were arbitrarily canned, shortened or changed - e.g. the TV programmes *Question Time* and *Rights and Recourse* were taken off air, or current affairs programming on SAfm was reduced from six hours a day to two, or the way the format of Lotus FM, was changed without satisfactory engagement with the people involved in the productions.

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**CHAPTER 1**

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**INTRODUCTION**

1. For five months this Commission examined the innards of an Organisation crippled by pain, anger and fear; by frustration, anxiety and apathy; and by inattentiveness, detachment and helplessness.
2. The Commission heard from people who were not feeling fulfilled by their work, weren't inspired to go to work, didn't feel safe when they were there and didn't return home with a sense that they had contributed to something larger than themselves.
3. This Commission follows a series of inquiries - starting with the Public Protector,<sup>2</sup> to the Parliamentary Ad Hoc Committee on the SABC,<sup>3</sup> all the way to the Independent Communications Authority of SA (ICASA)<sup>4</sup> - that has shown that the SABC and therefore its newsroom are falling far short of the ideal organisation described in the epigraph to this report.
4. On May 31, 2018, the SABC's then Acting Group Chief Executive, Ms Nomsa Philiso, announced the establishment of the Commission of Inquiry and a parallel one on Sexual Harassment. The two members of this Commission were journalist Joe Thlooe and Stephen Tawana, a Director at MMM Attorneys. The task of this Commission was to deliver recommendations that would help heal the Corporation, contribute to the multi-pronged efforts by Parliament and its Portfolio Committee on Communications and the SABC's Board and management to turn the Corporation into a broadcaster that serves the nation and that helps South Africans become active participants in and beneficiaries of their democracy.

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<sup>2</sup> When Governance and Ethics Fail: Investigation into allegation of maladministration, systemic corporate governance deficiencies, abuse of power and irregular appointment of Mr Hludi Motsoeneng by the SABC

<sup>3</sup> Final report of the Ad Hoc Committee on the SABC Board Inquiry into the fitness of the SABC Board, dated 24 February 2017

<sup>4</sup> The Complaints and Compliance Committee at the Independent Communications Authority of South Africa 24 June 2016 CASE NUMBER: 195/2016

5. The Terms of Reference of the Commission included, but were not limited to:
- 5.1 Investigating the nature, prevalence, the merits and veracity of all the allegations and/or grievance(s) and/or complaints of editorial, political, business and commercial interference;
  - 5.2 Establishing the factors and/or mechanisms that enabled the editorial, political, business and commercial interference and/or transgressions;
  - 5.3 Establishing whether there was evidence to substantiate the allegations made;
  - 5.4 Evaluating the substance of all the allegations and/or grievance(s) and/or complaints;
  - 5.5 Reviewing any/or all submissions made before by any person(s) in respect to the allegation(s) and/or grievance(s) and/or complaints lodged by the Employees;
  - 5.6 Making factual findings and conclusions based on the evidence/testimony presented;
  - 5.7 Conducting interviews, a review of submissions, and a review of applicable supporting documents;
  - 5.8 Interviewing all SABC employees and/or any other person(s) that is mentioned in the allegation(s) and/or grievance(s) and/or complaints lodged by the Employees;
  - 5.9 Making recommendations on the appropriate corrective institutional/structural measures to be considered and to be instituted and to address control deficiencies;
  - 5.10 Advising the SABC Board on what steps need to be undertaken;

- 5.11 Recommending appropriate corrective action which may include disciplinary action where there is misconduct; and
- 5.12 Preparing a written report setting out in detail the methodology adopted, the findings, conclusions and recommendations.
6. The Commission's first hearings were in June 27, 2018 and our mandate was to investigate the period from 2012 to now.
7. The testimony of witnesses was made under oath, except for news management who started our process by explaining the mechanics of editorial decision-making in the SABC.
8. It was explained to the witnesses that their identity would be kept confidential unless they did not object to their names being mentioned in the report.

## **BACKGROUND**

9. Formal interviews were conducted with persons who voluntarily submitted statements to the Commission as well as with those that were identified as likely to provide information relevant to our investigation. As the investigation unfolded some witnesses were recalled to give further testimony and explanation.
10. In addition to the written submissions, the Commission heard oral evidence in 58 hearings – face-to-face, by teleconference and via Skype. The people and organisations that made the submissions are attached as Appendix A. The full written submissions and the transcripts of the oral submissions are available on request.
11. This report gives the texture of life during Hlaudi Motsoeneng's reign, a feel of what it was like in the SABC newsroom. It also gives a feel of the emotional charge during the hearings. We have refrained from a line-by-line analysis of the evidence.



12. Noteworthy in this process was that major players in this drama – former SABC COO Hlaudi Motsoeneng, Acting Group CEO Jimi Matthews and Group Executive: News Simon Tebele – declined the invitations to tell their side of the story.
13. On this, it is important that we quote the lawyers representing Motsoeneng fully:

*"We have noted from your letter of 15 August 2018 that the SABC Commission of Inquiry was appointed by the office of the SABC Group Chief Executive following the recommendation of the Parliamentary Ad Hoc Committee on the Board of the SABC.*

*"As the SABC is fully aware, our client was denied an opportunity by the Ad Hoc Committee to put his side of the story despite the fact that several people who testified at their hearings in Parliament implicated him in one way or another. Ultimately the report of the Ad Hoc Committee mentioned our client no less than 44 times but was produced without him having been given an opportunity to be heard. Leaders of the United Democratic Movement ("UDM") and African People's Convention ("APC") publicly denounced the failure of the Ad Hoc Committee to allow our client to put his side of the story in response to the allegations made against him. So did the SABC in its contribution to the Ad Hoc Committee.*

*"In the above regard, as our client was not allowed to put his side of the story which would have no doubt influenced the report (inclusive of its findings and recommendations) of the Ad Hoc Committee, our client does not see the point of participating at this late stage in the SABC Commission of Inquiry as it was necessitated by the same report of the Ad Hoc Committee.*

*"However, with regard to the questions posed in paragraphs 4.1 to 4.3 of your letter of 21 August 2018, please note that our client's answers are in the negative. (The Commission had asked him if he had personally observed any political, commercial and other interference in the Corporation; if he had ever personally interfered unduly in the decision-making of the newsroom; and if he had ever given instructions that are in conflict with the SABC's 2004 Editorial Policies.)*

*"We hope that this letter has put paid to any expectation on your part that our client will participate in the SABC Commission of Inquiry. "*

14. It is ironic that a person who had been screaming for a chance to be heard thinks it is logical that he skips it and instead offers a blanket denial. The Commission is wondering what he and his legal advisors thought the value of this denial would be.
15. Hlaudi's right-hand man during the drama, Jimi Matthews, told us in a telephonic conversation that he didn't want to "relive the worst time" of his life through a submission to the Commission.
16. Matthews resigned from the SABC dramatically in a midnight tweet on June 27, 2016. In a letter posted in the tweet and addressed to the then Chairperson of the SABC Board, Professor Mbulaheni Maguvhe, he wrote:
 

*"For many months I have compromised the values that I hold dear under the mistaken belief that I could be more effective inside the SABC than outside, passing comment from the sidelines.*

*"In the process the prevailing corrosive atmosphere has impacted negatively on my moral judgement and has made me complicit in many decisions which I am not proud of.*

*"I wish also to apologise to the many people who I've let down by remaining silent when my voice needed to be heard.*

*"What is happening at the SABC is wrong and I can no longer be a part of it."*
17. Again, the apology rings hollow when he chooses to remain silent now when his voice needs to be heard to help us to get to the bottom of this matter.

18. The man on the other side of Hlaudi, Simon Tebele, also refused to talk to the Commission, saying he was scared he might be assassinated if he talked. He has barricaded himself and his family in his home and is under constant security guard. He points to the murder of his friend and former Head of SABC Legal Services, Sizwe Vilakazi, in November 2017 and believes Vilakazi was killed because of the things he had uncovered in the course of his work in the SABC.
19. Vilakazi was shot dead by three gunmen, who ran out to a waiting car without taking anything from the store, his private business premises on the East Rand.
20. The police hasn't solved Vilakazi's murder yet, so the Commission is not in a position to pronounce on it, but it is worrying that a former Head of the biggest news Organisation in the country is living in fear that isn't easy to dismiss as paranoia.



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 CHAPTER 2
 

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**EVIDENCE AND ANALYSIS**

21. The evidence we have heard ranges from a listener complaining that some producers have blocked him from expressing his views on SABC radio talk shows, a reader who was aggrieved that Morning Live interviewed a University of South Africa professor on *#feesmustfall* without inviting a student to balance the information, to journalists who say they were ordered to cover stories not because they were newsworthy, but rather to promote some personalities, right up to instructions not to cover protest marches to SABC offices by media freedom organisations and political parties.
22. Fingers have been pointed at Cabinet Ministers, SABC Board members and senior executives, as well as at mid-level executives who “enforced” the instructions from the top.
23. To start, we depict a few scenarios to take the reader to the heart of the evidence we read and heard.

***EPISODE 1: The story meeting from hell<sup>5</sup>***

24. Zolisa Sigabi, National Editor for Radio News bulletins and newsgathering in Auckland Park, is chairing a planning meeting at 08:30 and all the SABC offices across the country are represented in this “Line Talk”, the audio conference. Port Elizabeth say they have the Right2Know, SOS Support Public Broadcasting and other media freedom activists and the Democratic Alliance, marching to their offices to protest against the SABC’s ban on the use of visuals that show service delivery protesters *destroying public property*.
25. Zolisa says it appears to be a big national story as there are similar marches to all SABC offices. Who will collate the story to make it a big one with inputs from all the SABC offices? What will each office contribute? As the excitement in the conference mounts, Simon Tebele, then Head of news, pours cold water over it: “We are not covering that story.”

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<sup>5</sup> Title lifted from *Storytelling and the Anima Factor* by Tim Knight, Broadcast Press, Toronto, 1995.

Zolisa asks why not, and he replies: *"No, it's about us."*

Zolisa says the SABC has covered stories about the Corporation before so what is unique about this one. Tebele closes the discussion: *"No, we're not doing it."*

26. The participants in the conference were quiet until about 10 minutes later when Thandeka Gqubule-Mbeki, the Economics Editor, says: *"Look, I don't want my name to be associated with the decision."* And Foeta Krige, Executive Producer of RSG Current Affairs, and Suna Venter, an RSG producer, echo her.
27. Then, according to the evidence from Sebolelo Ditlhakanyane, General Manager, Radio News and Current Affairs, a series of hasty meetings followed, and these culminated in the dismissal of the SABC 8 - Suna Venter, Foeta Krige, Krivani Pillay, Thandeka Gqubule-Mbeki, Busisiwe Ntuli, Lukhanyo Calata, Vuyo Mvoko and Jacques Steenkamp. All because they said they didn't want their names associated with that decision.
28. Ditlhakanyane told the Commission: *"The decision that was taken to dismiss the eight had my name on it. I wasn't there...I was attending an AIDS conference in Durban. I never attended a single meeting to dismiss those journalists... I remember quite well, they never said they were not going to implement the decision or the policy.... They said they objected to it."*
- "Whoever told Hlaudi said the people in the Radio Editorial meeting said they're not going to implement".*
29. Sebolelo Ditlhakanyane: *"HR was instructed to suspend them, without my knowledge. I got to know (about it) when Sihle, a Human Resources Department lady who was responsible for Radio News, forwarded the suspension letters to me to check if the contents were okay, factual and so on."*
30. Ditlhakanyane says she called Sihle to find out what the letters were all about.

*"Our Human Resources offices are on the 4th Floor, so I ran to her office and*

*found there was already an initiator (for a disciplinary hearing) who had actually signed the letters.... I objected”.*

*“The initiator was supposed to deliver those letters to them.”*

And what was the outcome of this flurry of meetings that involved Hlaudi, Aguma, Tebele, Kobus from Employee Relations, Anton Heunis, Dithakanyane and others?

31. Dithakanyane said Simon Tebele called her to his office and called them (the eight) one-by-one to give them the suspension letters. *“It was painful,”* Dithakanyane told the Commission. *“This is not how you treat people.”*
32. A few days later, while Dithakanyane and Nothando Maseko were at an AIDS conference in Durban they were called by Human Resources Manager Mannie Alho and told to check letters in their inboxes that they had to sign, dismissing the eight.
33. Sebolelo and Nothando told Mannie they were not going to do that, *“the person who wants to dismiss those people must do it themselves - just remove our names from them. They didn’t - they went ahead and Tebele signed for us, as if with our authority, pp’d, and the letters of dismissal were delivered.”*

### ***EPISODE 2: Turning the blind eye***

34. Dithakanyane woke up on a morning in 2016 to see that media generally, but not the SABC, were carrying stories that the SABC would no longer be showing visuals of the destruction of public property during service delivery protests.
35. She describes the events of that day: *“When I got to work I got a call from Hlaudi asking why I hadn’t run the story.”*

36. Hlaudi refused to accept her version that SABC Radio didn't get the Press release and he shouted at her over the phone. *"He summoned us to a meeting – myself; Angie Kapelianis, the National Editor, Radio Current Affairs; Foeta Krige, the Executive Producer RSG; and, I think, Krivani Pillay as well. He was with Jimi, the Acting CEO at the time. Krige's notes of the meeting are illuminating:*

**31/05/16 (Tue) Radio Park 27 floor:**

Present: Anton Heunis (advisor to Hlaudi Motsoeneng), Hlaudi, Simon Tebele (Acting Head of News), Jimi Matthews (Acting CEO), Krivani Pillay (Executive producer SAfm Current Affairs), Sebolelo Ditlhakanyane (Head of Radio news), Foeta Krige: Executive producer: RSG Current Affairs; later joined by Kaizer Kganyago, (SABC's spokesperson) & two ladies (from SABC Communications).

**Summary of meeting:**

**Hlaudi:** *We are cleaning up the organisation. People are doing their own stuff. There are many journalists outside that want to work for the SABC. The environment outside is bad. No person is independent. The SABC is independent. This is a new SABC. You must adapt or find a job somewhere else. Tim du Plessis (a guest on The Editors) is from a rival organisation. We cannot allow people from outside to say anything negative about the SABC. We asked Franz (Kruger, another guest) leading questions. Editors' forum must go. It is advertising for rival newspapers.*

**Anton Heunis:** *I am an RSG listener. I know I am not a journalist. You misunderstand editorial freedom. Asking leading questions. Why didn't you do an insert on research that shows that the presence of cameras leads to violence?*

**Foeta:** *If you liaise with your editors and warn us beforehand of such decisions, and maybe give insight into the research on which the decision was based, we could have been forewarned.*

**Hlaudi:** *I do not believe in research.*



**Hlaudi:** *You must defend the organisation. No journalist is independent. The COO has the final responsibility for news.*

**Hlaudi:** *Simon, if people do not adhere, get rid of them. We cannot have people who question management.... this is the last time that we have a meeting of this kind. From now on you handle things on your level.*

**Jimi:** *It is cold outside. If you don't like it you can go. You've got two choices: the door or the window.*

37. Dithakanyane says as they were walking back to their offices she told Krivani not to remove The Editors "for now", but about a week later Tebele told her to get rid of the programme and the review of the newspaper headlines – "otherwise you're going to lose your job. I've been instructed to fire you."
38. "I'm a single mother, there's just no way I can lose my job because of that," Dithakanyane told the Commission. "So I spoke to Krivani, and then she notified the staff."

**EPISODE 3: And the winning party is...**

39. Mokonyanya Molete, known as Nyana Molete, National Television News Editor told the Commission about an editorial workshop in Kempton Park meant to get staff ready for the 2014 National Elections. Jimi Matthews, who was head of news then, was also present.
40. "At the workshop - and I was chairing this session - some of our journalists were of the opinion that the things we were discussing and the approach that we were taking to the elections was a good one, but we needed to get top management to walk this path with us.
41. "We agreed that they would arrange a meeting where we would call Hlaudi in order to make him understand what decisions we had taken... basically reinforcing what our own Editorial Policies were saying, and what the



*ICASA Regulations around elections were saying. That is all. But while we were sitting in that meeting some interpreted the discussion to be anti-Hlaudi. I guess some of his people told him that, and my suspicion is that this information was being relayed to him as we were discussing issues."*

42. *Back at the ranch on the Tuesday they invited Hlaudi to a meeting. "Basically he wanted to give us some kind of lecture. Quite a few people stood up to him, but the meeting ended with him saying that he was aware that some managers were conniving with workers, with employees, to destabilise the SABC - that kind of thing. People stood up and said: 'No, but here we are all journalists, there's no management, there's no staff here; we are all equal and we are discussing editorial issues.'*
43. *"After the meeting he called us one-by-one into Jimi's office and accused us of trying to destabilise the SABC. Again we made the point that he should actually thank us for having done this thing, and having done it the way we did it, because what we decided is what actually should happen: it's what the Editorial Policies say, and it's what ICASA says about coverage of elections.*
44. *"At Kempton Park we had decided that two people would basically write up the conclusions of the conference. Mahlatse Gallens - now Mahlatse Mahlase - and Thandeka were going to write up the minutes. A week or less after that meeting with Hlaudi, he called us into Jimi's office in Radio Park - myself and Sebolelo Ditlhakanyane - to meet a gentleman who has subsequently died, whose name was Mohlolo, and who was head of HR, and Keobokile Mosweu.*
45. *"These guys basically gave us an instruction to suspend Mahlatse and Thandeka. And it was clear that that instruction must have come from Hlaudi even though he wasn't present in that meeting. We refused to suspend them.*
46. *"In a follow-up meeting they brought in a gentleman from Employee Relations to help us draft a letter to the two and even help us with the process. Again we stood our ground, and refused to suspend the two.*
47. *"These people had done no wrong: 'If you need to fire or suspend anyone you*

*must fire or suspend us, or fire or suspend everyone who attended that conference. You can't just decide on these two because they were asked to document what had happened.' "*

**EPISODE 4: Hello my baby<sup>6</sup>**

48. KZN Provincial Editor, Busani Mthembu, tells the story of Hlaudi and a very ill uBaba Joseph "Mshengu" Shabalala of the Ladysmith Black Mambazo.
49. *"We were following up on Shabalala's health daily. I spoke to a family member who told me: 'At some stage we want uBaba to have some peace, you know. Maybe the media must just back off. He was just saying let's give him space.'"*
50. On a rainy Thursday evening, the Johannesburg office called Mthembu telling him to send a team to Shabalala's house in Ladysmith because Hlaudi was going there. Mthembu tried to argue that the family had asked for privacy – they had said they didn't want the world to see Shabalala looking frail and on a wheelchair. Mthembu was ordered to send the team through the rain in the night because President Zuma would also be there.
51. When Mthembu phoned the Presidency, it confirmed that Zuma would be visiting Shabalala. Bongani Majola in the Presidency also advised that a team should not be sent because the family had asked for privacy. When Mthembu called Johannesburg to tell them what the Presidency had said, he was told those were instructions from Hlaudi, that he should send the team. *"It was raining, the visibility was very poor. Ladysmith is quite a distance from here (Durban), about three hours. There was fog; it was so bad. The team arrived there at about 10 in the evening."*
52. The family wouldn't talk to the team and it took *"Motsoeneng or someone who was with him"* to persuade them (to talk to us)."

<sup>6</sup> Title of Ladysmith Black Mambazo song.



**EPISODE 5: Me and my friends (1)...**

53. Economics Editor Thandeka Gqubule-Mbeki was called back to the office one evening to meet Brian Molefe, former Transnet boss, urgently. Molefe was angry because during an interview anchor Francis Herd had asked him about the procurement of Chinese locomotives by Transnet. He felt he had been ambushed with this question.
54. In the meeting, also attended by Francis, Thabile Ngoato, Sebolelo and Sophie Mokoena (now Foreign Editor), Sophie, who was playing mediator, asked Thandeka to apologise to Molefe so that the matter could go away.
55. Thandeka refused, saying the SABC had no obligation to ask "sweetheart" questions and that Molefe's communications team should have anticipated the questions and prepared him to meet them.
56. At Molefe's insistence the meeting moved to the office of the Chairperson of the SABC Board, Ellen Tshabalala in Radio Park. Tshabalala was also on the Board of Transnet. In her office Jimi joined them. Molefe remained "aggressive, belligerent and physically threatening", according to Thandeka, and accused Francis of racism.
57. Thandeka told the Commission that Tshabalala had taken sides, demanding that Thandeka act against Francis.
58. Thandeka says it got down to the level of Tshabalala saying: "You can sleep with politicians outside, but here sisemsebenzini (we are at work)." In the end, Jimi dictated an apology to Molefe to a typist, saying the SABC didn't mean to offend him, which Thandeka signed. She says: "I was quite prepared to be fired, but I had to consider the positions of Francis and Jimi."

**EPISODE 6: Me and my friends (2)...**

59. Mthembu remembers when he was asked by then COO Bessie Tugwana to send a team to cover the handing over of seven houses to employees of a company owned by friends of the Chairperson of the Board, Ellen Tshabalala.



60. He narrates that they had a very full bulletin that weekend with very interesting stories. He said that when he looked at the event that they were told to cover, he realised that it was not a story. This guy is handing over seven houses. He had actually invited the Chairperson of the Board, Ms Ellen Tshabalala, and a host of other top guys from the SABC and actresses and actors and all to attend. So it was like a celebrity kind of a thing.

61. He talks about the incident:

*"Come Saturday I realised that we couldn't do it because we didn't have the capacity. That morning I got a call at about 11 o'clock from the Chairperson of the Board, Ms Tshabalala, who told me they were waiting, you know. I explained to her that we wouldn't be able to do it because we didn't have capacity. And she told me the event would not start before our crew arrived. Then a second call came: 'We are waiting and I am giving you 20 minutes to do this'. I said: 'We are doing a story.' We were doing a very interesting story - it was an air show, a very colourful story, that involved something like 60 airplanes, some of them vintage - a very nice visual story. We had to drop that because I was under so much pressure and we went to KwaMashu.*

***EPISODE 7: I can fire you! and I can fire your boss too!***

62. An SABC crew from Durban arrived for a function that then Minister of Communications (Faith Muthambi) had near Pietermaritzburg as part of her constituency work for the ANC. According to Mthembu, she and the Johannesburg newsroom insisted that all her constituency visits to Willowfontein outside Pietermaritzburg be covered. *"On one occasion she was going to hand over a house or something. She had been there some three, four weeks before and then she went back to hand over a house, so we had to be there."*

63. Mthembu testified that their team got delayed somewhere and were about 20 minutes late. When they arrived at the house Ms Muthambi was not there yet. *"She had gone down to a stream where there was a Government campaign to clean up rivers, removing plastic bags and weeds*

*and, you know. So she had gone to this river with some locals. Our team decided to wait for her at the house that she was going to hand over to a family.*

64. *"She sent someone to check if the SABC team had arrived - other journalists from the print media had gone down to the river with her. As the team arrived at the river, in front of everybody she told them how stupid they were, how fat they were, how bad they were. 'I can fire you and fire your boss as well... you are SABC, you are my people and you are not listening. I will fire you and I will fire your bosses as well,' she said.*
65. *"So they filmed her doing whatever she was doing there and then they went up to the house."*
66. *Because TV crews have to pack all their equipment - mikes, tripods, cameras, etc., the team were slower than everybody else in getting back to the house. "When the crew caught up Muthambi told them to be fast - 'or I will fire you, I will really fire you'. Then she picked on this young lady and told her she looked fat and that she wasn't dressed appropriately. The journalist was wearing a nice shirt and a nice skirt.*
67. *Mthembu explained that he was so angry that he wrote a letter of complaint. He said that he "" addressed the letter to Nyana Molete, who is the National Editor; I copied Nothando Maseko, and a whole lot of other people, you know. Not one response came - not even an acknowledgement of receipt."*

#### ***Capricious use of authority and power***

68. *These seven episodes, culled from the evidence, illustrate the affliction of the SABC in the years covered by the Commission in its work. The Corporation suffered from the capricious use of authority and power to terrorise staff and to deflect the Corporation from its mandate.*
69. *The people who were in the middle of this world described it to the Commission:*

Sigabi: *"The atmosphere was not good, morale was low and fear was really dominant at the time, because there were people who were fired for insignificant reasons."*

Ditlhakanyane says: *"The level of pressure that we would be put under and with the kind of attitude along with that, like: You are nothing and you will do this whether you like it or not. Those kinds of things would influence us and sometimes we would end up implementing whatever we were supposed to..."*

*"I ended up with depression and was admitted (to hospital for two weeks.)"*

70. When he resigned Jimi described it as a *"corrosive atmosphere"*.
71. Thandeka Gqubule-Mbeki calls it *"egregious abuse of power"* and describes her state then: *"You know, I'm like on automatic; like I'm a robot. I'm just going through the motions. I get up at 4:30 every day, go to the gym, go to work, do everything that I'm supposed to, but there's no me anymore. There's just this automaton. This person, you can call it a robot, Thandi, but this is what I've become."*
72. Nyana Molete says: *"When you're dealing with individuals like that (Jimi Mathews, Hlaudi Motsoeneng), individuals who are all powerful, and individuals who at any turn would threaten to fire people, you do get demoralised. You just feel you come to work to basically earn your keep. Apart from just the bullying and that kind of thing, there was also a decline in the quality of the work we were doing. To a degree I think people just came to work, people didn't want to challenge, people didn't want to apply themselves. As a result, no matter what we were trying to do in terms of improving the quality of work and that kind of thing, it was a very terrible situation. It was very demoralising."*
73. Molete adds: *"I think it was a combination of a huge ego gone crazy and power and the sense that you made decisions for a lot of people and you were in contact with very powerful people. You would make a call to the President and he would take your call. That makes you feel really powerful..."*

*"I'm sure that he (Hlaudi) was put under a lot of political pressure to do things in a particular way. Unfortunately, I don't think he had the integrity to make a judgment as to whether the direction that they wanted him to take was the correct one or incorrect one. I think he just basked in this whole power thing."*

### **The Newsroom**

74. The pictures above don't square up with what a newsroom should be - an inspired, creative space in which journalists joyfully bounce ideas off each other. This is a space where the question uppermost in everyone's mind is: What story should we tell our listeners, viewers or readers today, this hour, this minute to help them make their lives better?
75. The answers emerge at "Line Talk" - radio at 08:30; online, 09:00; or television at 10:00 - when news executives decide on their diaries for the day. The diary is the outcome of input from all news staff - rural, urban; from leafy suburbs or the shantytowns; from different religions and other persuasions - staff in their diversity. The journalists are from nine regional offices throughout the country, as well as from satellite offices in Bisho and Umtata, in Washington, East Africa, Zimbabwe and Lesotho.
76. Present at the conference are the National Editor, the Executive Producers of bulletins and of current affair shows, bulletin editors, the Head of Radio News, a representative from Digital News, the Editors of Specialist Desks - i.e. Parliament, economics, politics and sports - and Provincial Editors. Ideas go into this crucible, and the best survive to benefit audiences - they reflect who we, as South Africans and as citizens of the world, are.
77. The participants are guided by the Corporation's Editorial Policies<sup>7</sup>, which are "intended to help the editorial staff negotiate difficult editorial issues and decisions so that distinctive and compelling - and sometimes controversial - programmes can be made, while maintaining the highest ethical and editorial standards".

<sup>7</sup> [http://web.sabc.co.za/digital/stage/editorialpolicies/Policies/Editorialpolicies\\_rev.pdf](http://web.sabc.co.za/digital/stage/editorialpolicies/Policies/Editorialpolicies_rev.pdf)

78. "Through this policy, the SABC is well positioned - and unmatched in the market - to meet the challenge of telling the South African story with compassion, determination and resolution, while creating forums where South Africans from every walk of life can communicate ideas about their common future."



***The evidence, its meaning and analysis***

79. The evidence we heard and read confirmed overwhelmingly that there was capricious use of authority and power to terrorise staff and to deflect the Corporation from its mandate. The terrain covered in the following paragraphs will cover:
- a. The abuse of power, the violence, threats and fear;
  - b. The role of the so-called “enforcers”;
  - c. Relations among staff;
  - d. Recruitment, exits, upwards and sideways movements;
  - e. Political and other interference in editorial decision-making; and
  - f. Other issues.

***The abuse of power, the violence, threats and fear***

80. First, we look at the big picture and then zoom in on the specifics; each time we start with a review the evidence of the coordinator of a staff forum, Busisiwe Ntuli, and then we look at some of the individual evidence.
81. Busisiwe told the Commission she *“felt compelled to forward this submission following my unsuccessful efforts to persuade the people who are directly impacted by the incidences below to forward their submissions because of the continued existence of fear in the newsroom”*.
82. She testified: *“People are bruised from their past experiences where they previously attempted to report certain incidents but were either met with complete silence and inaction from the powers that be, or were victimised.”*
83. She told us about the scepticism among staff about the independence of this Commission because the email address we were using was on the SABC server.

84. Her evidence was a bird's-eye view after she collated the stories from staff nationally at regular Tuesday staff forums, linking SABC offices across the country, during which SABC issues were raised.

- a. *Staff members in Kwa-Zulu Natal say that the various factions of the ANC had used their connections to force them to cover their events. In some instances, they would not even call them directly but staff would receive calls from Motsoeneng to go and cover certain events, regardless of whether they were newsworthy or not.*

In her oral evidence, Busisiwe said that when Sihle Zikalala was the Chairperson of the Province, Hlaudi would force staff to cover almost every ANC story and almost every event that the ANC was hosting, newsworthy or not, especially the Youth League of the ANC. They would call the office to a briefing, and sometimes they would make them wait for up to five hours. When other media houses left, the ANC Youth League would boast that SABC journalists had no choice but to serve them.

*"At some point the Women's League demanded that an SABC crew go to Nkandla to cover them protecting Zuma's home. And throughout their four-hour drive, the journalists were shouted at and harassed by women who were calling them throughout their drive, ordering them to hurry.*

*"And I'm told among these women was the current Free State Premier, Sisi Ntombela."*

Busisiwe told us that the ban on the use of protest pictures showing the destruction of property also affected Durban because when the city was on fire with ANC members protesting against Councillors, who, they alleged, were imposed on them, the story was not aired.

b. *Interference by traditional leaders*

*"The SABC staff in Limpopo were prevented from covering the conflict in the Venda royal family in a manner that they as professionals saw fit," Busisiwe told the Inquiry.*

*"At the height of the fight for kingship between King Toni Mphephu Ramabulana and Princess Masindi, who believes she is the rightful heir to the throne, staff was barred from interviewing certain people.*

*"At least one journalist received death threats for doing his job without fear or favour. During this time, senior news managers including Nothando Maseko and Sebolelo Ditlhakanyane travelled to Polokwane to mediate between the royal family and SABC staff.*

*"We were told that these managers prevented staff from opening criminal cases following the death threats, saying that they would negotiate with the royal family."*

***Zooming in to the granular...***

85. Kgaogelo Magolego, a former SABC employee, told the Inquiry that he was dismissed at the instigation of Communications Minister Faith Muthambi. He says he was interviewing her in Lephalale in Limpopo.

*"I asked her to explain DTT (Digital Terrestrial Television) in layman's terms, and once she had finished responding in English, I politely requested - and this is common practice in the SABC - that she repeat the same answer in her mother tongue. She was trying to find her words. It happens with people that say something in English, but can't immediately translate it into their mother tongue".*

*"At that stage she said: No, no, no, I don't want to talk about it. I want to talk about something else. This is boring. At that time she grabbed her handbag and people were laughing at me.*

*"She took her things and said: I'm not even going to do this interview. I can't believe you drove all the way from Polokwane to ask such a boring question. That's how she abandoned the story."*

86. Kgaogelo says he then started to get phone calls from the SABC, saying he had insulted the Minister. *"I didn't. Neither did the cameraman or the radio journalist. We didn't."*
87. He says he appeared at a disciplinary hearing chaired by Simon Tebele, against whom he had previously laid a grievance that was not processed by the Corporation. Tebele overruled his objections to his chairmanship.
88. He was found guilty of leaking information to the press because the Sunday Times had run a story that he was going to be fired because Muthambi wanted him fired. The other charge was that of refusing to carry out a reasonable instruction by a manager.

*"They said I refused to cover the Minister's imbizo."*

89. He said: *"The radio journalist could not continue with the story either. He was not charged. The cameraperson also brought up the little that we had covered. He was not charged. The video editor could not send anything to Johannesburg because we simply did not have enough material. The radio journalist even came to testify at the hearing to say that the Minister actually kicked us off, that she mistreated us, and told us she wanted to have nothing further to do with us."*

And why didn't he broadcast the English version?

90. He says his seniors in Polokwane would not feed it to Johannesburg because although the English version explained DTT, it also showed the Minister saying she didn't even want this bit on air.
91. He was found guilty and dismissed, even though he had no previous records of misconduct at the SABC. Kgaogelo went to the CCMA, which ruled he should not have been dismissed and ordered the SABC to pay him two months' salary as compensation.

92. He says he could not afford to take the matter to the Labour Court on review and so he remains unemployed.

***Back to Busisiwe...***

93. *"In Mafikeng, for instance, there was interference in how the murder of businessman Wandile Bozwana was covered. Staff at that office allege that there was interference with the coverage, that one of the stories was pulled because the reporter had interviewed business people opposed to the premier."*

**Setsokotsane**

94. *"A reporter from Motsweding current affairs was allocated to the North West premier's so-called rural area revival programme called Setsokotsane. This journalist followed the premier in the same way a presidential correspondent would follow the president."*

***Zooming in...***

95. Western Cape Provincial Editor Kenneth Makatees, who was at one time Acting Group Executive: News, illustrated the chaotic decision-making at the time:
96. *"On one of his visits to Parliament Hlaudi met SABC staff in Parliament and told them they were not reporting to me anymore, but directly to Johannesburg."*
97. Makatees says he raised this in a meeting attended by Hlaudi and Jimi. *"Jimi then said they would come back to me. They never did."*
98. Makatees also tells the story of how the reporting lines of the provincial editors were suddenly changed and they had to report to the regional general managers: *"I reported to the Heads of the Radio and of TV News in Johannesburg - part of the problem is that a lot of these things were never written out or didn't come in writing."*

99. "We then queried it with our line managers, that's now the Heads of Radio and TV. *They said they didn't know about it, they were never consulted.*"
100. Makatees also tells the story of how the News HR Manager, Mannie Alho, was threatened by another HR Manager for not appointing a Hlaudi nominee to be Executive Producer of Morning Live.
101. Mannie sent him the following email:

*"Dear Kenneth*

*"I would like to bring to your attention a situation that happened to me yesterday afternoon (30 August 2017) in the Radio Park car park as I was about to leave for home which makes me feel very uncomfortable. The issue involves Mr Rabosana Maliehe.*

*"Mr Keobokile Mosweu greeted me and wanted to know why I was blocking or being a stumbling block with the implementation of the appointment of Mr Maliehe as Executive Producer at Morning Live.*

*"This is the second time that Mr Mosweu has raised this with me. This undue pressure makes me feel uncomfortable and feel that I could be victimised should I not make it happen. There seems to be obvious pressure from other quarters to ensure that this employee be appointed as Executive Producer at Morning Live.*

*"May I request for you to please intervene or give guidance in this regard."*

102. At the time Makatees was Acting GE: News. He told the Inquiry: *"I was very disturbed about it. I phoned the COO Bessie Tugwana about it and I also wrote an email about it.*
103. *"And that's when I realised that this is much bigger than I and it is not as innocent. It is clearly a network controlling this. And that sort of confirmed*



*my suspicion there was a structure to whom the Head of TV News was reporting."*

104. The Inquiry heard more evidence of violence and threats of violence...
105. Thandeka Gqubule-Mbeki tells the story of herself, an intern and a cameraperson being pursued by a strange vehicle, which she reported to the police and the SABC.
106. She concludes: *"R22 000 later and they (the SABC) never even sought to compensate me. Here I am, trying to find out who was chasing (us) SABC employees; we were carrying an SABC satellite, we were carrying the equipment, the cameras, we were with SABC interns, and a representative from the SABC Cameras Department when this incident occurred. The SABC was completely apathetic to their obligations to the equipment and the financial loss that could have ensued if we had lost the equipment; and let alone the human capital, that they tell us is so important. So that indifference tells you everything you need to know about the incident. "*
107. Executive Producer of SAfm Current Affairs, Krivani Pillay, told the Inquiry: *"At first I didn't believe Suna's (Venter) claims that she was being followed and attacked. I thought that she was over-exaggerating.*
108. *"The afternoon of her death was when things - I try not to think about it...Suna and I weren't friends. Sometimes I challenged her on some of these bizarre claims she used to make, but when she died I realised how naive I was and how I wasn't willing to give her the benefit of the doubt. I think the stress eventually killed her.*
109. *"I don't like to think about the SABC 8. I actually don't even like being referred to as someone who belongs to the SABC 8, because it was a very scary time.*
110. *"I worried about my parents' safety, because they live alone on a farm. So I thought if people were tapping my phone, could they know my parents are alone?"*



111. *"I worried about my husband. I never left my home unless it was necessary. The thing I love about radio is people don't recognise you. But then in the two to three weeks we were on the newspapers' front pages almost every day. People in the supermarket used to come up to me, and I was very uncomfortable, I didn't know who to trust, who not to trust, who was on our side or wasn't. It's something that I haven't fully dealt with and I just want it to go away.*
112. *"My psychologist says I suffer from post-traumatic stress disorder and I seem to – I don't like being called a hero. I hate that word and then they say: You should be so proud of yourself. And I know that what we did was a good thing and we exposed something big, but leave it at that. I don't want to talk about it anymore."*
113. Krivani says even as the SABC 8 arrived at Parliament (to give evidence to the Portfolio Committee on Communications), they got a text message: *You must turn around, don't you dare go into Parliament and speak.*
114. *"We were thinking: Who are these people? How serious are their threats?"*
115. The chaos in the decision-making filters down to the level of programme production. For example, the evidence from Business News anchor Francis Herd: *"At one point I was told to cancel interviews with opposition finance people. It was the run-up to budget and we were speaking to the EFF and the DA. We had called them in order to give us their expectations.*
116. *"Sophie Mokoena walked past and about half an hour later I got a call from Nyana Molete saying I needed to cancel those interviews. He didn't give me a reason. I said: What on earth must I tell these people? They were already on their way to the SABC. He didn't tell me to lie or anything, he just said: I'm sorry."*
117. She explained that she knew that Molete was reluctantly telling her to cancel. *"I suspect that he had been told to tell me to cancel them."*
118. TV Current Affairs Executive Producer Mwaba Phiri gave the Inquiry another perspective on the chaos. He said the weekly meetings of current



affairs Executive Producers limped on after the head of current affairs retired three years ago.

119. They continued to meet and rotated the chairing of the meeting among themselves, until Nothando Maseko told them she would chair them.
120. Phiri testified that Maseko has not called a single meeting since then and each EP is left to his or her own devices: *"The destruction of that structure makes it easy for anyone to control the newsroom, because they would meet you in the corridor and tell you: From now on you must not do political stories."*
121. Phiri says he got such an instruction from Maseko. She said he could do political stories only if the Political Editor approved.
122. He also gave evidence about him or members of his team receiving calls to stop a programme that was already running on air.
123. He said: *"On one occasion, for example, Nyana Molete came into the studio and told me: The COO wants to speak to you. (At that time) on air we were discussing the issue of the Venda king being challenged for the throne by Princess Malindi. (Mwaba told us the Venda king and Hlaudi were good friends.)"*
124. Phiri explained that the call he was asked to answer was prompted when Hlaudi saw Malindi on screen challenging the king, Toni Mphephu Ramabulana. Hlaudi called Molete, who came to the studio to call him (Phiri).
125. *"When I reached his Molete's office he told me there were three people in the COO's office - Hlaudi, Nothando, who later denied she was there although I was told she was, and Tebele, who was Acting GE News."*
126. Phiri said it was Tebele that spoke to him on the phone and asked him why he had Malindi in the studio. Tebele ordered him to stop the programme immediately.

127. *"I said I couldn't stop it because if I did I would put the SABC into more problems. It would be very good fodder for sensation in the media because they will say: Here is a programme that's on air, and suddenly it disappeared.*
128. *"I left Nyana Molete talking to them and I ran back to the studio to supervise the discussion. He phoned me again, in the studio, and again instructed me to stop the programme. I refused and was expecting some kind of suspension the next day, but I wasn't (suspended)."*
129. Phiri also told the Commission of an attempt to foist Hlaudi praise-singer Mzwakhe Mbuli as a guest on his programme while it was on air. Again he resisted.
130. Phiri's programme was canned without explanation, his staff were told to find openings elsewhere in the SABC, and he is now left twiddling his thumbs. He reports for duty every day and hangs around until it's time to go home in the afternoon.

### **Enforcers**

131. The one subject at the SABC today that is loaded with emotions it is that of "Enforcers."

### **Sebolelo Ditlhakanyane:**

132. Earlier in this report, we saw a version of Hlaudi, Jimi and Tebele in a meeting railing against Sebolelo Ditlhakanyane (Head of Radio News), Krivani Pillay (Executive Producer SAfm Current Affairs), and Foeta Krige: Executive producer: RSG Current Affairs. Hlaudi was attacking the programme The Editors and the slot where newspaper headlines were reviewed. He ordered them to remove these programmes immediately.
133. Ditlhakanyane said as they were walking back to their offices she told Krivani not to remove The Editors "for now", but about a week later Tebele told her to get rid of the programme and the review of the newspaper headlines – *"otherwise you're going to lose your job. I've been instructed to fire you."*
134. *"I'm a single mother, there's just no way I can lose my job because of that,"* Ditlhakanyane told the Commission. *"So I spoke to Krivani, and then she notified the staff."*
135. Fast forward to the Parliamentary Ad Hoc Committee hearings in Parliament where Krivani fingered Ditlhakanyane as an "enforcer"....
136. Was Sebolelo an enforcer or a victim? When she stalled for a week, with Krivani's concurrence, was she an enforcer? When Krivani notified her staff, was she an enforcer? Where does one draw the line?
137. A large part of the evidence we heard related to relations between staff members and their movements within the organisation, fuelling anger and mistrust among peers and against the Corporation. Again culling stories from the evidence, we have:




### Sophie Mokoena

138. She has been described as an “enforcer”, which she denies. Here she gives her version of her role under Hlaudi. She starts by telling how she was moved from her position as Political Editor and then goes on to tell how she stood up to him on several occasions:

#### *From Political Editor to Coordinator of News*

139. *“Jimi came to me to say: ‘Sophie, you know when the SACP (South African Communist Party), when Blade Nzimande, when Vavi, when Gwede - when they hear your voice on television they don’t even listen to what you’re saying, and then they start calling and complaining that your story is biased. I think you need a break from this political pressure’.*
140. *“That’s when he appointed me as the National Coordinator of General News and moved me from the Political Desk....*
141. *“When the contracts of Eusebius and Sakina, Metro FM, were not renewed - it had nothing to do with content: it was about a leader, or manager, or news editor, or other senior who couldn’t defend the foot soldiers and say: ‘Okay, you are saying Sophie is biased? Let’s listen to her story. Let’s see where the bias is.’ That was allowed to continue, and all politicians now tend to do the same, because they know this thing has happened. If they’re not comfortable with a particular journalist they always call senior managers and put pressure on them. And senior managers will find a way to do it, consciously or unconsciously, I don’t know.”*

#### *Standing up to Hlaudi after Kempton Park meeting and threats to Thandeka and Mahlatse:*

142. *“It was a heated meeting, I stood up alone until Jimi, Nyana Molete, Sebolelo Dithakanyane, said: ‘Yes, as management we did support this memorandum’.*
143. *“The then COO said: ‘Okay, let’s adjourn this meeting’.*

144. *"Then he called me to Jimi's office to say: 'What's happening here?' I said: 'Hlaudi, SABC cannot punish junior staff members for just compiling a collective contribution of the team in terms of their concerns. If you have a problem with this, and the process that led to it, speak to your seniors, the senior management. Let them explain how it happened. How did they allow a workshop that was meant to prepare for election coverage to come up with this document that management is not comfortable with? Start there'.*
145. *"At that time both Nyana Molete and Sebolelo had been given instructions to suspend the four journalists. I stood up. It didn't make newspaper headlines, because that's how I operate, I stand up, I fight, and that's it. It's not about glory and grandstanding. Finally they were not suspended because I was able to tell the COO that this is not correct and it can't be done. Because I used to stand up firmly when I didn't agree with him.*
146. On service delivery protests...
147. *"There was this issue of the visuals, not using the protest visuals. When that memo was issued as a Press release, it was 23h00, almost midnight. I normally look on social media to check whatever is happening around the country and internationally. Then I saw that memo at 23h00, after it was released.*
148. *"Immediately that night I called my senior, Nothando Maseko, to say, 'I don't agree with the content of this memo or media release in terms of how protests should be covered. I understand fully that sometimes when protestors see journalists and they see cameras they get wild and they can sometimes burn things, because you will take pictures and their stories will be heard, or the little ones get excited. You have to be responsible when you cover these: you don't incite - you do the story. We can't ban the coverage of protesting individuals. We can't. We can act responsibly if there's a fire and if someone is setting fires - you know, it's a graphic picture.*
149. *"We can exercise caution but we're not going to stop covering protests. I told her that the next day we must go to Hlaudi and tell him this is not going to happen. And I did just that. When we arrived he said to us: 'No, I don't necessarily say you must stop covering them, I'm just saying be responsible'.*



150. *"Then I said: 'Okay, retract this statement, because it's too harsh and it doesn't say what you are saying.' But they didn't and I told him that I would continue to cover protests if they are politically related.*
151. *"At the elections workshop I again asked Hlaudi about coverage of protests and the burning of buildings. He denied it again. He said: 'No, I don't say you mustn't cover it, I'm just saying you must be responsible.' But the technicality is that they didn't retract the memo. The memo was there, so I could do it, because I felt I can't subscribe to wrong things, but for some people the memo was still there. So, of course, if the memo is still there, some would be scared to do it, but I continued to assign the political team where I had to assign them in terms of protests."*

### **Nyana Molete**

*"I don't want to lose my job" cascades down the organisation.*

152. Molete confesses that what Calata told the Parliamentary Ad Hoc Committee about him is true. He explains that when Jimi stormed into his office one day complaining about the frequent usage of EFF pay-back-the-money visuals and said, *"Look, man, you're going to make me lose my job. Why do you keep using these pictures?"*
153. *"I knew that Jimi was under pressure from his boss to stop this stuff," Molete says. "I called Calata and tried to have a discussion with him, but we didn't agree. He was right, the pictures were relevant and he had to use them.*
154. *"Instead of saying, 'Jimi says we want him to lose his job,' I said: 'Hey, my bra, my kids are coloured, they don't eat pap and vleis, I don't want to lose my job.' Even that in itself was editorial interference.*
155. *"We have the right journalists to do this job and we have the resources to do what we can do. Then something happens, you put someone with a personality disorder there and then everything goes haywire.*

156. *"He (Hlaudi) had this kind of all powerful presence and certain things would be done because he wanted them to happen, not because they were in the best interests of the organisation."*

**Zolisa Sigabi**

*Jobs, jobs, jobs*

157. *"I suppose we were all worried about losing our jobs. If you are then called before a DC because you have defied an instruction, it doesn't matter that the instruction was not legal, and we could prove that - of course you can always prove that the instruction was not legal, it was unlawful, unreasonable etc. But at that moment I don't think we thought of that - the majority of people, I suppose.*
158. *"He (Tebele or Hlaudi) would call and say: 'That story does not sound good, etc.,' and then we defended the stories and the lines or angles that we pursued. This would be largely if it was about Zuma and all the things that he was doing, that we would broadcast. But we also knew that somebody must have called him. He did not listen to the bulletins, because if he had he would have called there and then, saying: 'I have just heard this story.' They would come hours after the story was aired."*

**Nothando Maseko:**

159. Maseko seems to be the only news manager who sees nothing wrong in all she did during Hlaudi's reign as the COO.
160. She testified that she did not see anything wrong or sinister with Hlaudi's instructions or directive on violent protests. She elaborated that he was only urging SABC staff to exercise caution when covering the stories of violent protests.



***Muddied discussions:***

161. Two events have muddied the discussions around the “enforcers” – the first was a staff meeting called by the SABC’s recent Interim Board and the other was a petition signed by 116 “key” news staff members.
162. Izak Minnaar explains the second event, the Interim Board meeting: *“At some stage during the meeting, while the Board members had stepped out, there was a vote of no confidence in a number of specific individuals. The MC then, who I think was one of the SABC 8 if I’m not mistaken, just accepted it.”*
163. In the petition to management staff say: *“We are yet to see the end of impunity where those who were responsible for violating our editorial standing in society through their unlawful conduct and enforcement of political instructions, are held to account.”*
164. Ntuli, of the Staff Forum, said: *“We’re not saying people must be fired. We’re saying how do we move forward? And this is what we’ve raised. How do we move forward when the same people continue to do the same thing? At some point we were saying we’re coming up with a new strategy, a new this and a new that. How can the same people drive the same new strategy when they are the ones that brought us to the current position that we are in, where the newsroom was compromised and SABC journalists are seen as a laughing stock out there - we’re not taken seriously, we are Government spokespersons, because of these managers.”*
165. The evidence on personnel shows the extent to which the mismanagement in the C-suite affected staff below: staff lost trust in each other and in the Corporation, they were at each other’s throats, accusing each other of being Hlaudi’s lackeys and enforcing his edicts.
166. Some of the witnesses said they expected the Commission to recommend disciplinary action against the “enforcers”, while those accused of being enforcers argue that they pushed against Hlaudi to the extent that they could and gave in only when they couldn’t fight any more. They claim they actually defended their juniors.



167. If we recommended that “enforcers” should be face disciplinary action, we move into murky waters. We would have to define the management levels of enforcers; define their motives; and we would have to define what enforcement really meant. Is this a case that can stand scrutiny by our courts?
168. If a manager conveyed his or her fears of losing a job with the instruction he had himself been given, was she as culpable as the person who gave the original instruction? Would the conversation between the “enforcers” and Hlaudi, or Jimi, or Tebele be considered before the label of “enforcer” was slapped on them?
169. Also, were the people who carried out the instruction innocent victims? Why did they not use the Corporation’s Grievance Procedures? Was anybody who worked at the SABC, who didn’t object to what was happening, innocent? Why were the trade unions silent?
170. The guilt does not just stop at the C-suite: why was the Board silent? Where was the Portfolio Committee on Communications? Where were the listeners, viewers and readers of the SABC, where was the South African public, the true owners of the Corporation?
171. The courageous SABC 8 brought matters to the boil, and made South Africans aware of the crisis. That point could have come earlier if staff had filed labour grievances, walked out, toyitoyi-ed, written memos to the Board and to the Portfolio Committee on Communications, to the ANC, and to ICASA. (Courage is one of the distinguishing characteristics of good journalists.)

### **Relations among staff**

172. The irony of abuse of any form is that the victims turn vicisouly against each other - in the case of SABC, staff are angry not only with the C-suite and the enforcers, but they carry deep resentments against each other - one finding fault with the other. Some very strong language came through as people were testifying. An example is that of a witness talking about her immediate senior – “her skillset *when it comes to news and*

*management leaves much to be desired. And she is well aware of where I stand on the issue."*

173. At the other end of the scale is political journalist Mzwandile Mbeje, who believes there's a campaign in the newsroom to discredit him, labelling him as part of the Zuma administration simply because he was the presidential correspondent.
174. *"Unbeknown to me there is a petition drafted by my own colleagues which basically says: This presidential correspondent must be removed immediately because he is politically compromised."* He believes the rumours muttered behind his back have effectively stopped his career dead. *"No one is talking about my qualifications, my experience. No one is talking about that."*
175. Former SABC journalist, Kgaogelo Magolego, who is still hoping to get his job back, is convinced that in the years he was in the Polokwane office, colleagues would tell tales about him to influential people outside the SABC. For example, if a story suggestion was dropped at the diary conference, word would go out to people outside the SABC blaming him for the story being dropped.
176. The finger pointing extends to allegations that some of the freelance workers use SABC platforms to promote their other businesses, e.g. as public relations practitioners.

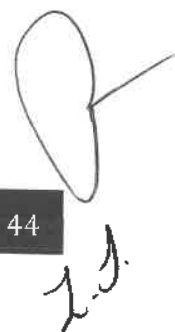
### **Recruitment, exits, upwards and sideways movements**

Ntuli on Regional Editors:

177. *"In my discussions with staff at the Mafikeng and Northern Cape offices, I was informed that Motsoeneng appointed provincial editors who were not qualified for the job. It is important for this inquiry to investigate how these appointments were made and what impact they've had on the editorial standing of these offices."*



178. She alleges at least one of them catapulted from scale 40-something to scale 120 or 125 after he was made provincial editor.
179. News HR manager Mannie Alho told the Inquiry about the pressure from both inside and outside the SABC to manipulate the appointment of a Provincial News Editor in Limpopo. While the interviewing panel was dealing with internal applicants, they started receiving phone calls telling them who to appoint.
180. He believes that one of the panellist got a call from Mohlolo, who was the Group Executive of HR at the time. *"He has now passed on, but I know that he personally called one of the panellists."*
181. Mannie testified that because of this interference, the panel halted the internal process and advertised externally. The matter ended up at the CCMA with one of the internal candidates saying the recruitment process was flawed because he should have been appointed.
182. Other witnesses also spoke about external influences on appointments, promotions, and lateral movements of staff. Mbeje recalls how he was moved from his role as acting Political Editor by Acting COO Bessie Tugwana months before his acting mandate was due to expire. *"She thanked me for a job well done and said I could now revert to my old position."*
183. When he got back to the newsroom his line managers, Nothando, Nyana and Sebolelo were surprised – Bessie had not discussed this with them.
184. Jonathan Tekiso, Group: HR told the Commission that Human Resources document and keep records of:
- the motivation that confirms that the vacancy exists;
  - the motivation that confirms that the budget exists;
  - a copy of the advertisement;
  - copies of the interview panel's scoring sheets: and
  - copies of CVs for all the candidates.



185. It should therefore be easy to audit the records of newsroom personnel, particularly management, to check the credibility of their appointments.
186. The Commission looked at the personnel files of some of the people who were fingered. Nothando Maseko, Sebolelo Ditlhakanyane, Hlaudi Motsoeneng and Charles Matlou.

*Nothando Maseko*

187. All recruitment processes appear to have been followed except for one flaw: there is no satisfactory explanation why Maseko was considered over another candidate, who scored higher.
188. The report states that the other candidate's interview was not considered because a different panel interviewed him.

*Sebolelo Ditlhakanyane*

189. She joined the SABC as a Radio journalist in the Free State and was later appointed as Regional Editor in the Northern Cape.
190. In her HR file, there is no copy of the advertisement for the Regional Editor post, no interview report, no application by her for the post, and no memorandum of the establishment of the post.
191. In her HR file, there is no verification of her qualifications for the post.

*Hlaudi Motsoeneng*

192. He was employed by the SABC in the Free State as journalist in 1995. At the time he did not submit a Matric Certificate as required and promised to submit it. Despite numerous requests from HR since 1996, he did not submit the matric certificate.



193. His appointment as the COO was irregular as all the SABC recruitment processes were not followed. Most of all he did not qualify as there was no record that he possessed the matric certificate. It appears that his name was submitted to the Board, then the Board convened a special meeting to approve his appointment.

*Charles Matlou*

194. All the recruitment processes were followed, except the verification. He was appointed without the verification of his qualifications. There were also outstanding documents.
195. It is not clear in the file if the verification was done in the end or whether the required documents were finally submitted.

#### **Freelancers**

196. Elvis Presslin told the Inquiry that freelancers at the SABC are ill-treated and are not constructively engaged by TV news management: they have no way of ventilating their concerns.
197. *"TV news management has a blasé attitude towards our concerns as freelancers. They act unilaterally and with impunity in removing freelancers from presenting rosters, without formal written Commission or communication or even a meeting to discuss their problems."*
198. He told the Inquiry that his remuneration has remained the same since 2013.

  
*h.d.*

### Editorial Independence and the ANC

199. Among the SABC's values in the extant Editorial Policies is Editorial Independence:
200. *"The SABC is governed by the Charter of the Corporation, which enshrines the journalistic, creative and programming independence of the staff of the Corporation, and the constitutionally protected freedom of expression"; and*
201. *"The principle of editorial independence is therefore fundamental to the operations of the public broadcaster and especially important to the functions of the SABC's news division."*
202. The Commission did not hear evidence alleging a meeting or meetings in smoke-filled rooms from which participants emerged with a plot to capture the SABC newsroom and with assigned roles in the plot. There were no email or sms trails we could follow.
203. We could not delineate a direct path from decisions at Luthuli House to editorial decisions in the SABC's newsroom. However, Nyana Moleté sketched a possibility: *"When it comes to politicians - remember, you also have the SABC reporting to a Minister. That Minister would be a member of a particular political party. Since 1994 all these Ministers that the SABC reported to were ANC deployees."*
204. *"Those people would communicate with people in the SABC. Whether it's people on the Board or Senior Executives in the SABC, those people would communicate with them. The structure of this whole thing allowed them to do that. Then you also find senior executives who actually enjoy being in the company of those types of people, so in the company of Ministers, maybe even in the company of the President and before long they actually lose their identity. They don't know whether they work for the SABC or they work for the Minister, and in some cases whether they work for the ANC or work for the SABC."*
205. A similar picture emerged when Zizi Kodwa and Pule Mabe, for the ANC, proposed to the Commission that the SABC must employ people qualified for their jobs. *"Our sense is that the Corporation comes from a period where*



*because of the notion that somebody reports to Luthuli House, nobody questioned anything, and therefore wrong things went on underneath.*

206. *"We emphasise qualified people because our sense is that less qualified people are braggarts and name droppers, and they don't understand the concepts of independence and impartiality... they create this ANC which somebody would call a gogga...feared by people. There mustn't be a possibility of an individual so powerful that...people can't even think of disagreeing with him or her. There mustn't be fear at the SABC."*
207. This statement might not have been intended as such, but it is a huge concession by the ANC, that there could have been people at the SABC using the organisation's name to intimidate others. It is hard to believe that the ANC woke up to the crisis at the SABC only after Jimi resigned, after the SABC 8 saga, and "after widespread condemnation of policy decisions at the public broadcaster". Was it convenient for the party to turn a blind eye to the mounting crisis at the corporation?
208. The confusion of roles was demonstrated earlier in this report: for example, the chairperson of the SABC Board wore ANC regalia at an SABC Corporate social investment event and was angry when SABC journalists asked her about it; Faith Muthambi insisted on coverage while doing ANC work; and Hlaudi Motsoaneng scrapped The Editors radio programme because guests were *"always lambasting the ANC"*.
209. Furthermore, it is not clear who was pulling the strings behind Motsoeneng, however his utterances to the executives who attempted to resist his manipulation - *"I will go to Pretoria and see the President"*; *"All events attended by the President must be covered by the SABC irrespective of their news-worthiness"*; or *"I will call the president now"* - speak volumes that he was linked to the office of former President Jacob Zuma.
210. And if ever there were doubts about the relationship between the SABC and the ANC leadership, Muthambi and Hlaudi, even after their removal from the SABC, travelled to Durban earlier last year to show support for President Zuma when he appeared in court.
211. Press Statement

212. By the middle of 2016 the chaos at the SABC was obvious to everyone, including the ANC, whose secretary-general at the time, Gwede Mantashe, issued a Press statement that in all fairness we quote in full:

*"The African National Congress (ANC) has noted with grave concern recent developments at the South African Broadcasting Corporation (SABC) which have led to the resignation of the Acting Group Chief Executive Officer, the suspension of several senior journalists and widespread condemnation of policy decisions at the public broadcaster which border on censorship.*

*"Over the last few days, the ANC (and correctly so) has referred all matters relating to the developments at the SABC to the SABC Board of Directors and the Minister responsible for Communications – who are best placed to deal with matters involving the SABC. We emphasised that the SABC does not report to the ANC. It was our hope that by now these issues would have been attended to and resolved. We still believe it is not too late for them to do so; we are of the view however that the ANC must clarify its position on these matters.*

*"The African National Congress has throughout its history steadfastly upheld the principle of media freedom and freedom of expression. This unambiguous position of the ANC is enshrined in the Constitution of the Republic of South Africa and all policy articulations of the movement over many decades. We have jealously guarded the right to freedom of expression and have never hesitated to speak in favour of media freedom wherever and whenever allegations of media censorship of any kind were raised. The people of this country, led by the ANC, fought for freedom of expression, for the freedoms enjoyed by the media today and the right of any person to access any information.*

*"Therefore any policy changes or editorial decisions by the SABC that in anyway limit these freedoms can never be sanctioned by the ANC nor do they represent the policy views and aspirations of the African National Congress. The ANC stands opposed to any actions that infringe on our people's rights to hear and see what they want to hear and see. The ANC also stands opposed to any infringement of journalists' rights to practice their craft.*





*"While the ANC does not glorify violence, the decision of the SABC to desist from showing images of the destruction of property has not been consulted with or condoned by the African National Congress. This is worrying as it amounts to a change in a policy position of the governing party – without any due engagement on its merits and reasoning. Further, significant policy changes such as this in South Africa undergo an extensive public participation process, to canvas opinions of the South African people and to build consensus on a matter – this too has not been done*

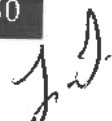
*"Owing to the SABC's unique place in society as well as its public mandate, it is particularly important that the public broadcaster is free of political interference of any kind. Successive administrations have been accused of political interference of some kind at the SABC – and this is nearly always said to be in the name of the ANC.*

*"To date, no evidence has been produced to substantiate such claims. The latest controversy surrounding editorial practices at the SABC, unfortunately being made by an individual who has fallen out of favor with his employer, have also regrettably once again drawn the ANC into the fray.*

*"The ANC categorically rejects any allegation to have connived with members of the SABC staff or management to undermine any political party and change any editorial decisions.*

*"They are a consequence of a lack of leadership at the institution. Vacancies at the most senior and critical positions within the institution as well as ongoing court challenges facing the COO serve to weaken general managerial control and have led to a collapse of corporate governance within the organisation. The role of the Board in the ongoing challenges leaves much to be desired and should be strengthened to allow the public broadcaster to effectively deliver on its mandate.*

*"The African National Congress has sought a meeting with the Minister of Communications, Comrade Faith Muthambi, to receive a briefing on matters related to the SABC including some of the reported decisions being taken within the institution. We will also*

*be calling for an urgent enquiry into the very serious allegations being made that tarnish the image of the ANC in respect of the current developments at the SABC.*

*“The extremely unfortunate developments at the public broadcaster cannot be allowed to continue any further and can definitely not continue in the name of the African National Congress and the countless South Africans who paid the highest price for the constitutionally enshrined freedoms we enjoy today.”*

213. S-l-o-w-l-y now: *“Successive administrations have been accused of political interference of some kind at the SABC – and this is nearly always said to be in the name of the ANC.*
214. *“To date, no evidence has been produced to substantiate such claims.”*
215. This doesn't tell us why the ANC has done nothing to reassure staff at the SABC that those who take the party's name in vain should be exposed and that the party fully supports full compliance with the Editorial Code. Staff needed this assurance much, much earlier.
216. A-g-a-in: *“The African National Congress has sought a meeting with the Minister of Communications, Comrade Faith Muthambi, to receive a briefing on matters related to the SABC including some of the reported decisions being taken within the institution. We will also be calling for an urgent enquiry into the very serious allegations being made that tarnish the image of the ANC in respect of the current developments at the SABC.*
217. Why was this briefing not sought when governance at the SABC started unravelling? Why was the ANC last in the queue in “the widespread condemnation of policy decisions at the public broadcaster which border on censorship”?
218. Zizi Kodwa explains the ANC's interventions, but sidesteps the question of the timing: *“Not only did we make public statements, we made attempts to meet one or two people on official meetings. We can make reference to the meeting we had with the COO at the time, to express this concern. So nobody would have done anything claiming to act on behalf of the African*

*National Congress, because when we met with the COO, we said: 'Some of the issues that are happening under your leadership and everybody else, undermine the very same public mandate of the SABC, including decisions, that in our view sought to undermine the Editorial Policy of the SABC.'*

219. The ANC's message to the COO did not reach the newsroom and did not help staff resist bullying. For example, Ditlhakanyane told the Commission: *"There was a pattern, but mostly it was to protect the ANC. I may not have been instructed by a politician myself but I think it was more for the benefit of the ANC."*
220. The Commission accepts that any person, organisation or institution in the country has the right to influence coverage by the SABC, but the decision on what to cover and how to cover it rests with the editorial staff.

### **Editorial Policies**

221. The latest draft of the Policies states:

*"To sustain and deepen the trust the public have in the SABC, we have to maintain the highest standards of performance. In this regard, the SABC requires its editorial staff to understand that with the legislated and constitutional protection of the Corporation's independence comes the responsibility to serve the public with the highest standards of excellence and integrity.*

222. *"Accordingly, the onus is on individual Executive Producers, Editors and Commissioning Editors to ensure that they understand and uphold the provisions of the Broadcasting Act, including the Charter of the SABC; the Editorial Code, the BCCSA Code of Conduct for Broadcasters as outlined in the Broadcasting Complaints Commission of South Africa (BCCSA), the Independent Communications Authority of South Africa (ICASA) regulations and the Press Council of South Africa (PCSA) Code. As a rule, and as a matter of policy, the authority for editorial decisions is vested in the editorial staff.*



223. *"In this regard, subject to standard management and editorial controls, Executive Producers, Editors and Commissioning Editors are responsible for the production of the programme including editorial control. Should any difficulty arise during programme production and/or editorial control, or the programme producer or Commissioning editor be unsure of anything, they should consult their supervisor for guidance.*

224. The Policies document goes on to say:

*"This process of voluntary upward referral could extend as far as the Group Chief Executive Officer in his capacity as editor-in-chief. The GE: News reports to the Chief Executive Officer, who is accountable to the SABC Board for all content carried on all SABC platforms. The role of editor-in-chief is one of many responsibilities that the GCEO assumes and should not be confused with the functions of the Group Executives of News, Radio, Television, Sport and Education or of the other editors and channel and station managers employed by the SABC.*

225. *"However, the Board of the SABC delegates responsibility, and holds accountable the GCEO for the performance of all news and other programmes, broadcast and presented on all SABC radio, television, internet and other multi-media platforms."*

### ***Hlaudi as Editor-in-Chief***

226. COO Hlaudi treated the Corporation's Editorial Policies in the same way that he treated the SABC and its staff - with disdain, except when he could use them to prove he was boss.

227. By 2015 a review team led by Graham Welch was finalising the amendments to the 2004 Policies document. By January 2015 the amendments were submitted to Group Executive for approval ahead of a Board Subcommittee meeting. On January 12, an instruction was issued by the COO's office to the Company Secretary to withdraw it, and to ask all Group Executive members who had received copies of the submission and copies of the revised Editorial Policies to destroy them. Four days later Hlaudi called the review team into a meeting and said that because the

underlying legislation was likely to be changed in the short-term the review was no longer appropriate and would stop and the team would be re-deployed.

228. Welch says in 2016 he was instructed by the CEO's office to go to a meeting somewhere around Muldersdrift on the West Rand to brief the then Acting CEO, Jimi Matthews; the CFO, James Aguma; and the COO, Hlaudi Motsoeneng, about the status of the Editorial Policies.
229. *"Anton Heunis, who at that stage, I think, was no longer a permanent employee of the SABC, but was described as the COO's commercial advisor, was also in attendance."*
230. *The two most vocal participants were Heunis and Motsoeneng. "They were complaining that I was taking up too much time by arguing about the changes that they wanted because they needed to get them to the Minister. So I think they took that presentation directly through to the Minister and said that these are the new Editorial Policies."*
231. A critical part in what was taken to the Minister was the change of Editor-in-Chief from the GCEO to the COO, thus paving the way for Motsoeneng to climb into the newsroom with his edicts. The 2016 – the "Hlaudi" - Editorial Policies were struck down by ICASA on March 2, 2017 because the public was not fully involved in writing them and the SABC was instructed to revert back to the 2004 document, the one still in operation, with the GCEO as Editor-in-Chief.
232. However, a closer look at the issue of the policies further reveals the extent of the chaos at the Corporation. One of the people key to implementing the Editorial Policies, Ditlhakanyane, General Manager: Radio News and Current Affairs, told the Commission: *"I've never seen it (the 2016 Editorial Policies), but we were told that it was there. And I think in March 2016, we saw a Press release, where it was stated that the Editorial Policies had been amended. But we have never seen that particular document."*

233. *"How we also got to know about it was at a rediffusion - a video staff meeting - where we connect with all the provinces. Hlaudi announced that the COO was now the Editor-in-Chief."*
234. Sigabi, National Editor: Radio Bulletins and Inputs, told the Commission: *"He (Hlaudi) was introducing the new Group CEO, Lulama Mokhobo, to staff when he announced it and I think it must have shocked the new GCEO. Hlaudi said as Head of Operations of the SABC the COO was now Editor-in-Chief."*
235. Several witnesses argued against the GCEO's designation as Editor-in-Chief, saying that this confusion about the title Editor-in-Chief provided the window for Hlaudi to sneak into the newsroom and take control.
236. The Commission recommends that the Group Executive: News should be designated as Chair of Editorial Policies and Ethics Committee of the Group Executive he or she should chair the committee that would include all the Group Executives of information programming - Radio, Television, Sport, Education, etc. The committee would be the highest point of upward referral for editorial line managers and would uphold the Editorial Policies and the highest editorial and ethical standards.
237. Structurally he/she reports to the GCEO. He or she and her committee will be responsible for upholding the Editorial Policies and the highest editorial and ethical standards.
238. The model of the GCEO as editor-in-chief is derived from the BBC, where the Director-General is designated as editor-in-chief, but a quick examination of the BBC model shows that the directors-general have risen through the ranks in television and radio journalism.
239. Experience and training in journalism is not a requirement for appointment to GCEO position at the SABC. The recommendation confirms the Editorial Policies that already state: *"As a rule, and as a matter of policy, the authority for editorial decisions is vested in the editorial staff."*

**Editorial Forum and Internal Ombud – view from staff**

240. Many of the witnesses saw the revised Editorial Policies as one way to help heal the SABC. For example, in their submission to the Commission and to the committee that is reviewing the Policies, staff say:
241. *“The SABC’s newsroom has over the years experienced serious challenges of lack of integrity and credibility as a result of editorial interferences. This has eroded our public trust and our ability to meet our mandate in our young democracy.*
242. *“As part of the mechanisms to ensure newsroom democracy and avoid future interferences, the SABC newsroom shall appoint an editorial forum to guard against any erosion of freedom of expression and adjudicate disputes on matters that threaten to compromise our editorial standing in the eyes of the public to which we have to remain accountable.*
243. *“The forum shall be constituted by editorial managers and staff.”* This suggestion stems from a visit to Germany by the SABC 8. The public broadcaster they visited had a 12-member editorial forum comprising six editors/managers and six journalists. It convened immediately when there were large differences in the newsroom and made recommendations to the editors involved.
244. There were also suggestions, first made by the SABC 8 to the Parliamentary Ad Hoc Committee, that an internal Ombud be appointed to adjudicate in editorial complaints from both outside the SABC and from staff.
245. The Policies review committee seems to lean to the idea of an Ombud. In the recommended amendments there is a section on an SABC News Ombudsman:

### **RATIONALE OF SABC NEWS OMBUDSMAN**

- *To restore public trust in SABC News;*
- *Provide a platform for the public to register complaints and receive adequate attention on the grievances made against the broadcaster;*
- *To support News in providing assurance to the public on complaints pertaining to all News content.*

### **ROLE OF OMBUDSMAN**

246. *The primary role of the SABC News Ombudsman is to provide impartial and expeditious assurance of all external complaints received of all news, current affairs content on radio, television and the internet; whether in-house or produced by a third party that falls within the scope of the Corporation's policies; as amended from time to time.*
247. *The SABC News Ombudsman ensures that the members of the public are well served by the news content and its presentation with respect to issues of disclosure, fairness and accuracy.*
248. *Responds timeously to complaints raised by members of the public.*
249. *Performs an assurance role on all external complaints and makes recommendations on the corrective actions regarding a complaint to SABC News Management and Board.*
250. *Prepares quarterly reports to the Board of Directors of the Corporation on how complaints were handled and review main issues handled by the Office of the Ombudsman.*
251. *When necessary, the SABC News Ombudsman identifies major public concerns as gleaned from complaints received by the Corporation and advises SABC News Management and journalists accordingly.*





252. These two suggestions were presented to the Commission by various witnesses and after weighing the evidence we recommend the creation of a News and Current Affairs Advisory Committee consisting of three – for example, a retired editor, a person who is or was teaching journalism ethics at university, and a retired judge.
253. This committee would do what the BBC's Editorial Policy Team under the Director Editorial Policy does – advising journalists, editors, and producers on editorial issues throughout the production process, with final decisions resting with line management.
254. The Advisory Committee would convene when a staff member was unhappy with an editorial decision, an editor asked for guidance on an ethical issue and on any other ethical matter that had come to its attention.
255. This Advisory Committee would not adjudicate: merely advise staff and editors. Decision-making would remain firmly in the hands of the editorial staff.
256. However, unhappy staff would get an independent platform to vent their grievances about editorial decisions, managers would have the advantage of a fresh, independent look at issues. The Advisory Committee would publicise monthly reports on the issues they handled, and would provide quarterly and annual reports to the SABC Board. The reports would alert South Africans in time if there was a crisis looming at the Corporation.
257. This mechanism will not dilute the line authority in the newsroom – it would enhance it. A disgruntled reporter would perhaps understand better why her idea for a story was rejected if the explanation came from an independent Advisory Committee or, on the other hand, the editor might revise his opinion after a recommendation from the committee.
258. The Advisory Committee would thwart any regression to the era of Hlaudi, the era of fear and pain. The Commission did not embrace the idea of an Internal Ombud because the industry mechanisms for the public to complain about editorial output from the SABC are adequate. Members of the public can complain to the BCCSA, ICASA, or the Press

A large, stylized handwritten signature in black ink, possibly reading 'J.J.', is located in the bottom right corner of the page.

Council and these are mechanisms that have garnered credibility over decades.

259. An Internal Ombud would clutter the chain of authority in the newsroom. The democratisation of the newsroom through an editorial forum would also blur the line of authority and possibly paralyse the newsroom.

*A workshop a year to keep the doctor away*

260. Instead, the Commission recommends that all newsroom staff, from the most junior to the most senior, to attend at least one workshop a year on the Editorial Policies, journalist ethics, the most recent rulings of the BCCSA, ICASA, and the Press Ombud, as well as the reports of the News and Current Affairs Advisory Committee. The various codes should be embedded in the daily language of all news staff when they argue for or against ideas in the creative space of the newsroom.
261. The one workshop a year would change the narrative from the newsroom from what we heard from Nyana Molete: *"It (the Editorial Policies) hasn't been socialised properly. It has not been made the bible of the editorial staff. I wouldn't be surprised if there are journalists and management in the News Department who last read this thing in 20-whatever. And also when we recruit people, when we get new journalists, we don't give them this stuff..."*

**Other issues**

262. Among other issues raised by witnesses:

The SABC-The New Age breakfast contract; and

Allegations that there's a plan to let Lotus FM collapse in order to privatise it and sell it to people who have already been identified.

The Commission saw these as more examples of the chaotic decision-making and the distrust fanned by it.

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**CHAPTER 3**

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**CONCLUSION, FINDINGS AND RECOMMENDATIONS****Conclusion**

263. The real motives of those who abused power and authority are still unclear as the people who could have explained declined invitations to talk to the Commission. Was it sheer incompetence, personality disorders, or for monetary gain? We don't have the answers.
264. But we believe our recommendations address the issues raised in our hearings:
- a. A clear line of authority in the newsroom and channels to resolve issues before they grow to be damaging and unmanageable;
  - b. Clarification of the credentials and roles of all in the newsroom;
  - c. A chance at healing and starting afresh;
  - d. A shield against non-editorial interference in the decision-making in the newsroom.

**Findings**

265. The Commission finds that the SABC suffered from the capricious use of authority and power to terrorise staff and to deflect the Corporation from its mandate and its Editorial Policies.
266. The Inquiry found an organisation crippled by pain, anger and fear; by frustration, anxiety and apathy; and by inattentiveness, detachment and helplessness.

267. A witch-hunt for “enforcers” will not heal the Corporation; it will divide an already fractured institution.
268. No evidence of a direct line between decisions at ANC headquarters, Luthuli House, and decisions in the newsroom, but the spectre of the ANC hovered over the newsroom.
269. The evidence shows that from the year 2012 up until the year 2017, SABC executives took instructions from people with no authority in the newsroom, for example, members of the SABC board (Ellen Tshabalala) and the Minister for Communication (Faith Muthambi). The executives thus failed to execute their duties in terms of the Editorial Policies. The Commission further found that Nothando Maseko, Sebolelo Ditlhakanyane and Nyana Molete were pivotal to the execution of instructions from Hlaudi Motsoeneng, Jimi Matthews and Simon Tebele. They succumbed because of threats of dismissal from their immediate superiors.
270. Lastly, the designation of the GCEO or COO as editor-in-chief is not appropriate for the SABC because the circumstances of the Corporation are different from those of the BBC, the model for the current structure.

### Recommendations

271. That the Group Executive: News should be designated as Chair of the Editorial Policy and Ethics Committee of the Group Executive. He or she should chair the committee that would include all the Group Executives of information programming – Radio, Television, Sport, Education, etc. The committee would be the highest point of upward referral by editorial line managers and would uphold the Editorial Policies and the highest editorial and ethical standards. Structurally the chair would report to the GCEO.
272. The creation of a News and Current Affairs Advisory Committee consisting of at least three – for example, a retired editor, a person who is or was teaching journalism ethics at a tertiary institution, and a retired judge. This committee would do what the BBC’s Editorial Policy Team under the Director Editorial Policy does – advising journalists, editors,

and producers on editorial issues throughout the production process, with final decisions resting with the line management.

273. All newsroom staff, from the most junior to the most senior, to attend at least one workshop a year on the Editorial Policies, editorial ethics, the most recent rulings of the BCCSA, ICASA, the Press Council and the reports of the News and Current Affairs Advisory Committee.
274. In as much as the Corporation needs healing from the scourge of the “enforcers”, it needs to attend to team building, where members focus on the common good. The process will include deep conversations among managers and staff in which the frustration, pain, and anger that still linger are surfaced and worked through. Staff who held on in difficult circumstances need to be lauded for being the quiet centre of the tornado, keeping the broadcaster on air and on the internet, bringing news and current affairs programmes to viewers, listeners and online audiences.
275. Motsoeneng’s instructions to Human Resources to institute disciplinary hearings against employees, or to dismiss, promote or appoint others must be reviewed. Also, Human Resources to do an audit of the appointments, promotions or sideways shifts of senior news management, particularly Nothando Maseko, Sebolelo Ditlhakanyane and Charles Matlou. Where the records are found to be incomplete and the gap is not explained, the appointment/promotion must be reversed and the position re-advertised, with the person currently occupying it being invited to reapply.
276. A review of the contracts of freelance workers is needed urgently, as these workers are a window into the health of the Corporation. It is not good public relations to have these workers bad-mouthing the Corporation because they are unhappy with their working conditions and remuneration.
277. Improved performance management - at the level of individuals as well as at that of programmes - is vital for the future health of the Corporation. This we recommend after a number of witnesses told us how their programmes were arbitrarily canned, shortened or changed – e.g. the TV programme Question Time was taken off air, or current affairs programming on SAfm was reduced from six hours a day to two, or the

way the format of Lotusfm, was changed without satisfactory engagement with the people involved in the productions.

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**JOE THLOLOE**

**AND**

**STEPHEN TAWANA**

**JOHANNESBURG**

**25 FEBRUARY 2019**

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**ANNEXURE A**

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The Commission acknowledges the contributions of the following individuals and organisations, and thanks them heartily:

1. Zolisa Sigabi, National Editor Radio News (x2)
2. Sebolelo Ditlhakanyane, GM Radio News (x2)
3. Nyana Molete, National News Editor, TV (x2)
4. Izak Minnaar, Digital News Editor (x2)
5. Nothando Maseko, GM TV News (x2)
6. Angie Kapelianis, National Editor Radio Current Affairs (x2)
7. Elvis Presslin, freelance anchor SAfm,
8. Lucas Masake, member of public
9. Zizi Kodwa, Pule Mabe (ANC)
10. Lucas Kgaphola, former news anchor and producer
11. Krivani Pillay, EP Current Affairs SAfm
12. Kgaugelo Magolegwa, former employee (producer Thobelafm)
13. Mzwandile Mbeje, political reporter and Presidential Corps (x2)
14. Francis Herd, SABC news anchor, Radio and TV.
15. Mwaba Phiri, EP Question Time
16. Thandeka Gqubule-Mbeki, Economic Editor TV (x2)
17. Stephen Kirker, freelance Weekend PMLive
18. Foeta Krige, EP RSG Current Affairs
19. EFF (Mbuyiseni Ndlozi)
20. Sophie Mokoena, Foreign Editor
21. DA (Phumuzile van Damme)
22. Busisiwe Ntuli, EP Special Assignment
23. Nadive Schraibman, Story Editor, Special Assignment
24. Richard Newton, former employee
25. Zolisa 2<sup>nd</sup> call

26. Izak Minnaar 2<sup>nd</sup>
27. Nyana Molete 2<sup>nd</sup>
28. Sebolelo Ditlhakanyana 2<sup>nd</sup>
29. Angie Kapilianis 2<sup>nd</sup>
30. Nothando 2<sup>nd</sup>
31. Portia Kobue, former employee was EP Morninglive
32. Dumile Mateza, producer SABC News, freelance
33. Aabra Bramdeo, EP Digital News
34. Thandeka Gqubule 2<sup>nd</sup>
35. Gerald Koning, radio listener
36. Mvusiwekhaya Sicwetsha, EC Provincial Government, Rural Development and Reform – member of public
37. Mosololi Mohapi, Specialist Producer Lesedifm
38. Sam Mochichila, EP Thobelafm News Current Affairs
39. Mzwandile Mbeje 2<sup>nd</sup>
40. Graham Welch, Acting GM TV Strategy and Policy Development
41. Mann Alho, HR News
42. Kenneth Makatees, Regional Editor Western Cape, former Acting GE:News
43. Sophie Mokoena 2<sup>nd</sup>
44. Tebogo Alexander, EP Special Broadcasts National Events
45. Kaizer Kganyago, SABC spokesperson
46. Simon Mathebula, Avhasei Nemaguvuni, Mandlenkosi Thabethe – security office
47. Buti Motaung, EP Sesotho Desk, TV
48. Judy Sandison, retired Regional Editor KZN
49. Santosh Beharie, former Programme Manager Lotusfm
50. Busani Mthembu, KZN Provincial Editor: News
51. Motale Sebege, Provincial News Editor, Bloemfontein
52. Linda Mgobozi, KZN Acting TV Assignment Editor
53. Bontle Motsoatsoe, EP SAfm
54. Tshepiso Makwetla, News Anchor SAfm
55. SANEF, MMA, SOS: William





56. Naka Moloi, EP Lesedifm Current Affairs

57. Tuwani Gumani (MWASA)

58. Jonathan Tekiso (GE: HR)



3



Hlandi: Today I'm going to talk to  
Press Club: to all the  
editors

Do not try to influence SABC  
I'm going to tell them  
They cannot tell us what to  
do.

I'm also going to talk to editors  
in Durban

Remove News : replace with Content

If you as SABC mess up the organization  
you mess up your life:

I am in charge: News is not part of  
operation / we change the word  
News with Content

I'm in charge: you must adhere to  
my instructions

P.S.

4

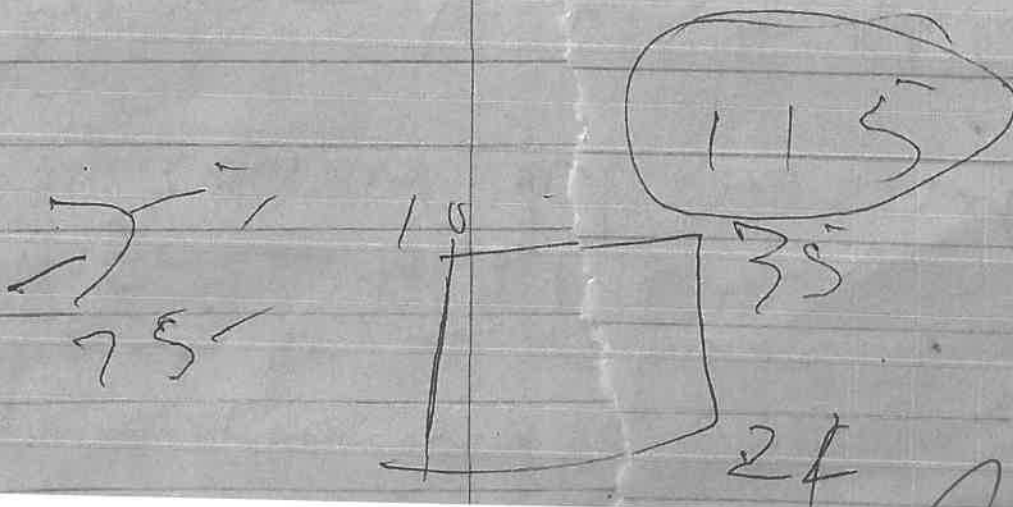
Prof Linn is the president of the court.

I don't regard him as ANE  
 You cannot treat him the same  
 We will give him more time.

And

You can question every one except the president.

We need to respect him especially you SABC  
 I expect you to align you with my instructions



G.S.

**5**

JDK005

JDK005

Transcription of the line talk on 20 June 2016 from a audio recording made by the late Suna Venter:

20/06/16 (A copy of said recording has been handed over to the investigators of the Commission)

During the line talk, the head of news, **Simon Tebele** give instructions that three top stories should be removed from the diary. R2K marches in Cape Town, Durban and Jhb outside SABC offices. Thandeka ask Simon why. Simon says it is because it is about us.

**Audio:**

**Simon:** Those stories are out as was discussed earlier.

**Thandeka:** We need to report the reasons and the rationale for the decisions. When it later comes to court because we are making these and people are going to say so and so and so and so are sitting here. And when we fall foul of the law, God forbid, we better just have recorded even the dissenting voices. Please record my voice as dissenting.

**Foeta:** I totally agree with you. The initial reason initially they said we cannot give other newspapers a platform to criticize the SABC. That I totally understand. They're in the media. But this is not a media issue. It is not other newspapers or opposition or whatever. This is a NGO. It is out there and if we ignore them we are busy censoring our own news. And that is totally unacceptable.

**Suna:** And as junior as I am, please record my voice as dissenting against this.

**Foeta:** We cannot allow that people, individuals in this company make decisions on behalf of journalist, if we are going to carry on with that, we are going to lose our integrity, the little integrity that we have at the moment.

**Jonathan:** Johannesburg, did you note what Foeta and they are saying.

**Simon:** Yes I heard that. Please continue.



Simon Tebele

6



JDK 006

DELETE IF NECESSARY IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

26-07-2016

DATE SIGNATURE



Reportable

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Case no: J 1343/16

In the matter between:

**SOLIDARITY**

**FOETA KRIGE**

**SUNA VENTER**

**KRIVANI PILLAY**

**JACQUES STEENKAMP**

And

**SOUTH AFRICAN BROADCASTING CORPORATION**

**First Applicant**

**Second Applicant**

**Third Applicant**

**Fourth Applicant**

**Fifth Applicant**

**Respondent**

**Heard:** 22 July 2016

**Delivered:** 26 July 2016

**Summary:** (Urgent interdict – unlawful summary dismissal – dismissals in breach of contractual right to disciplinary procedure and in breach of right to freedom of expression - dismissals *void ab initio* – costs)

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**JUDGMENT**

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LAGRANGE J

2.3

## Introduction

- [1] This is an application which was brought on an urgent basis by a number of employees of the respondent, the South African Broadcasting Corporation ('the SABC'). The application was initially launched on 15 July and was set down for a hearing on the urgent roll on 21 July 2016.
- [2] The individual applicants are: Mr F Krige ('Krige'), an executive producer of current affairs at Radio Sonder Grense ('RSG'); Ms S Venter ('Venter'), a producer and presenter in the current affairs team at RSG; Ms K Pillay ('Pillay') and executive producer of current affairs at SAfm, and Mr J Steenkamp ('Steenkamp'), a senior reporter at SABC news dealing with news and current affairs investigations, who also serves as acting assignment editor from time to time meaning that, he is responsible for day-to-day operations of the newsroom. The applicants have a varying lengths of service between three and 22 years.
- [3] Initially, the applicants sought interim relief to the uplift their suspensions from work, suspend disciplinary proceedings against them and various other related relief pending the outcome of three other applications namely:
- 3.1 The final determination of the application by eight individual applicants ('the SABC 8') including the Second to Fifth Applicants' application for direct access to the Constitutional Court;
- 3.2 The final determination of the High Court review intended to be launched by the SABC in relation to the decision of ICASA regarding its Protest Policy; and
- 3.3 The final determination of Parts A and B of the matter of Helen Suzman Foundation v South African Broadcasting Corporation, case no: 52160/16 in the Gauteng Local Division, Pretoria of the High Court.
- [4] Apart from finalising the interim relief sought in the Labour Court, the Constitutional Court application aims to have the so-called protest Policy<sup>1</sup> adopted by the SABC in June 2016 declared unconstitutional, unlawful and invalid. The application before the Gauteng Local Division was in fact

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<sup>1</sup> Described more fully at par [8] below

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finalised on 20 July before this application was heard. In that matter, the parties agreed to an interim order, the gist of which was that, pending the final determination of that application the SABC and the Chief Operating Officer Mr H Motsoeneng ('the COO' or 'Motsoeneng') undertook to exercise editorial discretion in accordance with the Constitution, the Broadcasting Act, 4 of 1999, and various other legislation and are prohibited from suppressing coverage and reportage of protest action and events or actions which might reflect negatively on the President of the Republic of South Africa and any political party or politician.

[5] On Wednesday 20 July, the day before the urgent application had initially be set down, and before the SABC had filed any answering affidavit, the applicants filed a notice of amendment to include relief setting aside the dismissal of the individual applicants which had taken place on 18 July and ordering their reinstatement. As Mr Skosana, who appeared for the SABC assisted by Mr Madlanga correctly observed, unlike the remaining relief relating the interdicting of the disciplinary proceedings, which is retained in the amended notice of motion, the relief sought in the new prayer is final in nature. Mr Budlender, appearing for the applicants with Mr Bruinders concurred in this.

[6] On 21 July, the SABC sought a postponement to obtain more time to file an answering affidavit in view of the amended application. An interim order was made postponing the matter to 12H30, the following day and setting timetables for the filing of answering and replying affidavits. Costs of the postponement are to be costs in the cause. The matter was eventually heard after 14h15 on Friday 22 July.

#### Chronology of relevant events.

[7] The sequence of events is essentially undisputed as are most of the relevant facts. In the answering affidavit of the SABC deposed to by Mr M Tebele ('Tebele'), the SABC's Acting Group Executive: News and Current Affairs.

[8] It is now well known that on 26 May 2016, the SABC issued the following news editorial edict known as the Protest Policy which stated:

  
2.3

"SABC WILL NO LONGER BROADCAST FOOTAGE OF  
DESTRUCTION OF PUBLIC PROPERTY DURING PROTESTS

Johannesburg- Thursday, 26 May 2016-The South African Broadcasting Corporation (SABC) has noted with concern the recent turmoil arising from violent service delivery protests in various parts of the country. The SABC as a public service broadcaster would like to condemn the burning of public institutions and has made a decision that it will not show footage of people burning public institutions like schools in any of its news bulletins with immediate effect. We are not going to provide publicity to such actions that are destructive and regressive.

The SABC is cognisant of the fact that citizens have constitutional rights to protest and voice their concerns on various issues that they are not happy with but we also do not believe that destruction of property is the best way to voice those grievances. These actions are regrettable and viewed as regressive on the developments made after 22 years of South Africa's democracy. Continuing to promote them might encourage other communities to do the same. The SABC would like to stress that we will continue to cover news without fear or favour. We will not cover people who are destroying public property.

The SABC's Chief Operations Officer, Mr Hludi Motsoeneng stated that "It is regrettable that these actions are disrupting many lives and as a responsible public institution we will not assist these individuals to push their agenda that seeks media attention. As a public service broadcaster we have a mandate to educate the citizens and we therefore have taken this bold decision to show that violent protests are not necessary. We would like to encourage citizens to protest peacefully without destroying the very same institutions that are needed to restore their dignity".

The SABC would like to make an appeal to other South African broadcasters and the print media to stand in solidarity with the public broadcaster not to cover the violent protests that are on the rise and in turn destroying public institutions. " (emphasis added)"

- [9] Journalists within the SABC were not consulted about this radical new policy, but were simply instructed to follow the Protest Policy by the Chief Operations Officer, Mr Hludi Motsoeneng ('Motsoeneng') and the then acting Chief Executive Officer, Mr Jimi Matthews ('Matthews').



- [10] The SABC was intent on preventing any internal or external debate about the Protest Policy. Even internal criticism of the Protest Policy by very senior journalists was therefore met with an immediate disciplinary response.
- [11] On 31 May 2016, Motsoeneng summoned Krige and Pillay to a meeting to discuss a number of issues over which he was unhappy. These included the fact that on the previous two days, SABC radio shows had included comments from independent analysts which criticised the Protest Policy.
- [12] During the meeting, it was made clear that the SABC wanted complete compliance with the Protest Policy and did not want any criticism of the Protest Policy aired, even if this was criticism by independent analysts.
- [13] Mr Motsoeneng stated: "[I]f people do not adhere, get rid of them. We cannot have people who question management... This is the last time we have a meeting of this kind." Mr Matthews added: "It is cold outside. If you do not like it you can go. You've got two choices: the door or the window."
- [14] Events escalated on 20 June 2016, when the Right2Know campaign protested against the adoption of the Protest Policy, outside the SABC offices in Johannesburg, Cape Town and Durban.
- [15] On the morning of 20 June 2016, a news room diary meeting was held to discuss which events would receive coverage that week. The meeting was attended by various people, including Mr Krige and Ms Venter. At the meeting, Tebele announced that the three protest marches were to be scrapped as stories and afforded no coverage at all by the SABC.
- [16] Krige and Venter, together with another employee, Ms Gqubule ('Gqubule'), placed on record their disagreement with this decision not to cover the Right2Know protests. In any event, the Right2Know protests were not covered by the SABC. This was pursuant to the instruction given by Tebele.
- [17] Three days later, on 23 June 2016, Krige, Venter and Gqubule were called into a meeting with management and informed that they had been suspended. Disciplinary proceedings were instituted against all three employees and remain pending. The suspension notices of 23 June 2016 are identical in their terms and state:

"RE NOTICE OF SUSPENSION

A large, stylized handwritten signature is present in the bottom right corner of the page. Below the signature, the initials 'Z.J.' are written in a smaller, more legible hand.

It has come to management's attention that you have allegedly refused to comply with an instruction pertaining to the provisions of the SABC Editorial Policy as well as the directive not to broadcast visuals / audio of the destruction of property during protest action(s) and that you distance yourself from the instruction.

The above alleged offence constitutes a refusal and/or failure to comply with a reasonable and lawful instruction and same impacting negatively on the day-to-day broadcasting operations.

Please be advised that management regards the alleged offence as being of a serious nature and has furthermore resolved that the potential of your presence at the workplace may interfere with the investigation into the matter, therefore, a decision was taken to suspend your services with the SABC with immediate effect pending institution of disciplinary action. Your suspension is with full remuneration.

Please hand in your SABC access card, office keys, laptop, iPad Tablet and 3G card to the Human Resources Manager: News & Current Affairs, Mr Mannie Alho, before leaving the premises of the SABC.

Please keep the office of the Acting Group Executive: News & Current Affairs informed of your whereabouts should you need to leave the Johannesburg area for any reason, as the SABC might need to liaise with you in respect of the institution of disciplinary action, during your suspension,

During the suspension period, you are not allowed to have any communication with any employee, without obtaining prior permission from the office of the Acting Group Executive: News & Current Affairs. You will be informed of the outcome of the investigation in due course.

Yours faithfully

SIMON TEBELE

ACTING GROUP EXECUTIVE: NEWS & CURRENT AFFAIRS"

- [18] Krige and Venter are alleged to have failed and/or refused to comply with a lawful instruction. In particular, that they failed and or refused to comply with a directive relating to the SABC's Protest Policy.
- [19] One of the persons at the SABC most directly involved in driving these processes against the journalists was Matthews. However, a few days later



on 27 June 2016, he resigned from the SABC. In his public resignation letter, Matthews stated:

"The prevailing, corrosive atmosphere has impacted negatively on my moral judgement and has made me complicit in many decisions which I am not proud of. I wish also to apologise to the many people who I've let down by remaining silent when my voice needed to be heard.

What is happening at the SABC is wrong and I can no longer be a part of it."

On 26 June 2016, Pillay and Steenkamp (along with another employee, Ms Ntuli) sent an internal letter to the senior managers at the SABC, recording their concern about what was occurring at the SABC including the Protest Policy and the suspensions. The letter was then obtained by the media and published. On 29 June all three employees received letters notifying them of the institution of disciplinary proceedings in the following terms:

**"RE DISCIPLINARY HEARING**

You are hereby notified to attend a disciplinary hearing to be held on Friday 1 July 2016 at 09:00 in .... Johannesburg, in order to investigate the following alleged offences brought against you.

**1. CHARGE 1**

**NON-COMPLIANCE WITH THE DUTIES OF YOUR CONTRACT OF EMPLOYMENT**

alternatively

**CONTRAVENTION OF SABC RULES AND REGULATIONS**

In that

You in Your Capacity As a Reporter, for Radio News in Johannesburg Allegedly Liaised with the media i.e. Star (28 June 2016), The Times (28 June 2016), ENCA (letter drafted and signed by you and provided to ENCA) and News 24 (letter drafted and signed by you and provided to ENCA) without having had permission to do so. In doing so it is alleged that you contravened regulation 2 (d) of the SABC's personnel regulations i.e.

"An employee:

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(d) shall not, without prior consent of the group chief executive, make any comments in the media or ....."

Should these facts be proven it will constitute an act of non-compliance with the duties of your contract of employment on your part alternatively contravening SABC rules and regulations.

You will be entitled to the following:

- To be represented by a co employee of the corporation or a union representative, who is an employee of the Corporation should you be a member of a recognised trade union;
- To call witnesses to testify in support of your case;
- To cross-examine the employer's witnesses
- To have access to documentation that will be used by the initiator; and
- To request the services of an interpreter, should it be necessary.

The disciplinary panel will consist of:

.....

Should you have any objection against any of the panel members or any other query in this regard, you are requested to contact the initiator on telephone number... without delay."

(Emphasis added, superfluous detailed excluded)

[20] A letter to Krige dated 30 June contained a slightly different charge. It read:

"You are herewith notified to attend a disciplinary hearing to be held on Friday 1 July 2016 at 09:00 in ...of the SABC Offices in

Johannesburg, in order to investigate the following alleged offenses brought against you:

1. CHARGE 1

NON-COMPLIANCE WITH THE DUTIES OF YOUR CONTRACT OF EMPLOYMENT

alternatively INSUBORDINATION

alternatively

INSOLENCE



In that

You in your capacity as the Executive Producer: RSG News & Current Affairs, during a Radio News line talk meeting held on Monday 20 June 2016, you allegedly categorically distanced yourself from the instruction issued by the SABC management not to cover the Right-2, Know movement marches in Cape Town, Durban and Auckland Park, that is campaigning against the SABC decision not to broadcast violent protests.

Should these facts be proven it will constitute an act of non-compliance with the duties of your contract of employment on your part alternatively insubordination alternatively insolence.

Should these facts be proven it will constitute an act of non-compliance with the duties of your contract of employment on your part alternatively insubordination alternatively insolence.

The panel will consist of:

....

You will be entitled to the following:

- To be represented by a co-employee of the Corporation or a union representative, who is an employee of the Corporation, should you be a member of a recognised trade union;
- To call witnesses to testify in support of your case;
- To cross examine the employer's witnesses;
- To have access to documentation that will be used by the Initiator; and
- To request the services of an interpreters should it be necessary.

Should you have an objection against any of the panel members or any other query in this regard, you are requested to contact the Initiator on ... without any delay..."

(redundant detail excluded)

[21] The South African National Editors Forum recognised the extraordinary pressure that the eight journalists were being placed under to conform to the approach demanded by SABC management. On Saturday 9 July 2016, SANEF awarded the eight members of the SABC 8 the annual Nat Nakasa Award. The award recognises "a media practitioner who has shown



integrity, commitment and has shown courage in the media". This was announced at a public ceremony on that evening. The award was accepted publicly by six of the eight. Only Pillay commented at the awards ceremony, which she did by reading out the terms of the SABC's mandate and then said "*Until this is achieved, #notinourname*".

11 July 2016

[22] These plaudits cut no ice with the SABC and on the morning of Monday 11 July 2016, the SABC issued further disciplinary charges against seven members of the SABC 8. This included the Second to Fifth Applicants. The disciplinary proceedings against the journalists have not yet commenced. On 8 July 2016 the disciplinary proceedings were postponed indefinitely by the SABC. It seems from the letters that they were drafted on 8 July 2016 as that is the date which appears on the letters. The contents of the letters read:

NOTICE IN TERMS OF SCHEDULE 8 OF THE LABOUR RELATIONS ACT  
NO. 66 OF 1995

1. You are hereby notified in terms of schedule 8 of the Labour Relations Act no. 66 of 1995 that allegations have been received that you are continuing to commit further acts of misconduct after receiving your letter informing you of your disciplinary hearing in the following respects:

1.1 You wrote and signed a letter to the SABC COO raising concerns in relation to the instruction given by him and leaked it to the media platforms thereby displaying disrespect and persistence in your refusal to comply with an instruction pertaining to the editorial policy of the SABC as well as the directive not to broadcast visuals/ audio of the destruction of property during protest actions.

1.2 Since the Policies and Personnel Regulations are incorporated into your employment contract, your conduct as stated above constitutes a contravention of paragraph 2 (d) of the Regulations in that you made comments or published an article in the media on your terms and conditions of contract while you are in the service of the SABC without prior consent of the Group Chief Executive.

A handwritten signature, possibly 'P', is written in the bottom right corner of the page. Below the signature, the initials 'Z.J.' are written.

1.3 it also contravenes regulation 2 (e) in that it constitutes a refusal to obey and carry out reasonable and lawful instructions including the Policies and Regulations of the SABC. It amounts to insubordination and contravenes clause 2.1 of the Disciplinary Code & Procedure.

1.4 it undermines editorial responsibility and authority of the SABC as vested upon its Operating Officer in terms of paragraph 2 of the SABC Revised Policies, 2016.

2. Since receiving your disciplinary hearing notice, you continuously took part in media interviews with various daily newspapers resulting in the publication of articles wherein you criticized and displayed disrespect and persistence in your refusal to comply with an instruction pertaining to the editorial policy of the SA3C as well as the directive not to broadcast visuals/ audio of the destruction of property during protest actions. Your conduct constituted a contravention of the prescripts set out in paragraphs 1.2 to 1.4 above.

3. You are accordingly afforded an opportunity to state your case in response to these allegations. In that regard you are entitled to prepare that response with the assistance of a trade union representative, a fellow employee or lawyers of your own choice. Such response must be delivered to my office not later than 16h00 on Friday, 15 July 2013, failing which I will assume that you have no answer to the allegations leveled against you.

Your co-operation herein is appreciated.

Yours faithfully

Seboleto Dithakanane

General Manager: Radio News & Current Affairs"

[23] On the same day, a few hours after the additional charges had been served on the journalists, the Complaints and Compliance Committee ('CCC') of the Independent Communications Authority of South Africa ('ICASA') upheld a complaint lodged on 1 June 2016 against the SABC policy decision. The decision of the CCC is a carefully considered one. It takes into account the obligations of the SABC in terms of the Broadcasting Act, the provisions of its license and the special role the broadcaster plays as



confirmed by the Constitutional Court *SABC v National Director of Public Prosecutions & others* in which it was held:

"Ultimately, however, what is central to the issue is not the responsibility and rights of the SABC as a broadcaster. What is at stake is the right of the public to be informed and educated as is acknowledged in the Preamble to the Broadcasting Act which reads—

'Noting that the South African broadcasting system comprises public, commercial and community elements, and the system makes use of radio frequencies that are public property and provides, through its programming, a public service necessary for the maintenance of a South African identity, universal access, equality, unity and diversity .

The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy."<sup>2</sup>

[24] In its conclusions, the CCC also found *inter alia* that:

[16] In *Islamic Unity Convention v Independent Broadcasting Authority and Others* Langa DJC ( as he then was) stated the following in a matter that concerned the validity of the then Broadcasting Code:

'South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as "one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members. As such it is protected in almost every international human rights instrument. In *Handyside v The United Kingdom* (1976) 1 EHRR 737 at 754 the European Court of Human Rights pointed out that this approach to the right to freedom of expression is —

'applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'

[17] Given the breadth of the right to freedom of expression and "what is central to the issue is not the responsibility and rights of the SABC as a broadcaster but the right of the public to be informed," it is clear to the CCC

<sup>2</sup> 2007 (1) SA 523 (CC) at paras 26-28.



that particular focus should be placed on ensuring that accurate information, with the scenes of service delivery protesters burning public property, is broadcast to the public and that, where a breach of these duties is clear, it should advise Council to compel the SABC to give effect to the citizen's fundamental right to receive even offending, shocking or disturbing information as long as it enjoys the protection of section 16 of the Constitution read with the Broadcasting Code of the BCCSA.

[18] Prior restraint. The present matter is similar to the case concerning blacklisting by the SABC — *Freedom of Expression Institute v Chair, Complaints and Compliance Committee*. Here, as in that case, the head of news of the SABC had — in advance — banned a category of coverage. Our courts have held that where forms of expression are cut off before reaching the public, this is known as a "prior restraint" and that such restraint would be permitted only in truly exceptional circumstances. In the present context, the SABC has categorically imposed an absolute restraint on its newsroom and there is nothing in the Broadcasting Act or the licences that permits this. Although it is true that the "prior restraint" was not imposed by an external body — as was the case in *Print Media South Africa v Minister of the Interior and Another*<sup>33</sup> - the effect on the newsroom is the same. In fact, at the core of the matter lies the categorical ban on such material - like the legislative ban which was imposed on quoting persons listed in terms of the security legislation in apartheid times. There was no choice granted to newspapers to publish statements by these persons, even if they were politically irrelevant. This amounted to nothing else than absolutism which was typical of a tyrannical regime. Such absolutism is totally foreign to our new democracy based on freedom of expression and especially, for this case, the right to receive information which is in the public interest - the latter test not amounting to that which is "interesting to the public" but that which serves to inform the public. When the duties under the Broadcasting Act and the licences of the SABC are judged as a whole, there is one basic message: inform when it is in the public interest. The CCC has no doubt that that includes the duty to inform the viewing and listening public when public buildings are set alight or otherwise destroyed as part of a service delivery protest. Why should the public not be informed of this action — illegal as it is — so that it may be part of an open society where good and bad is broadcast so that choices may be made? In fact, the right to freedom of expression is meaningless if there is not also a right, and thus a duty, to be informed as to

matters of public interest— as, in fact, the Constitution of the Republic guarantees. In *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* the Supreme Court of Appeal stated that "[m]ere conjecture or speculation that prejudice might occur will not be enough." It is our view that at the most the argument of the SABC in regard to the covering or showing of the burning of public property would fall in the category stated by Nugent J in the said judgment. The Court held that these principles apply, appropriately adapted, "wherever the exercise of press freedom is sought to be restricted in protection of another right".

(footnotes omitted)

- [25] The CCC found that the Policy was in conflict with its duties as a public broadcaster and was invalid from its inception in terms of the Broadcasting Act 1999 read with the sections 16, 192 and 39(2) of the Constitution of the Republic of South Africa 1996, and in terms of its licenses. ICASA confirmed that the findings constituted a decision of ICASA.
- [26] After the decision of ICASA that the Protest Policy was unlawful on 12 July 2016, the SABC 8, through the freedom of expression Institute ('the FXI'), wrote to the SABC. They asked for confirmation that, in light of the ICASA decision, the SABC would abandon the Protest Policy and reverse the suspensions and disciplinary proceedings. On 13 July 2016, the SABC replied. It queried the standing of the FXI to make representations on behalf of the applicants and pointing out that it was in the process of taking the ICASA decision on review.
- [27] The same day, the applicant's attorneys of record wrote to the SABC asking for an undertaking that, unless and until the ICASA decision was finally set aside by a competent court, the SABC would agree to reverse the suspensions and suspend in totality the disciplinary proceedings. No response was received to this letter.
- [28] Although the answering affidavit on behalf of the SABC was deposed to by Mr M Tebele, the acting Group Executive: News and Current Affairs, and despite the fact that the events set out in paragraphs [8] to [27] were contained in the founding affidavit served on the SABC on 15 July, the response of Tebele, who was also personally involved in some of the events related was perfunctory, viz:



"As these paragraphs relate to the factual background and this was the events in this case, and in view of the limited time for dealing with this affidavit, the contents thereof are denied in so far as they are in conflict with the allegations and contentions already stated herein..."

In truth, very little of the contents of those paragraphs were disputed elsewhere in Tebele's affidavit and his excuse that there was insufficient time is unacceptable given that nearly six days had passed since receipt of the founding affidavit in which all these averments were made and given the relative simplicity of the averments made. Effectively, the applicants' version set out above is undisputed.

15 July 2016

[29] As mentioned above, in the letters issued to them on 11 July, the applicants had been called upon to answer the charges contained therein by 15 July. As the applicants were that stage in the process of preparing this urgent application, the attorneys sent the following letter to the SABC:

"2. We refer to the notices served on our clients on Monday, 11 July 2016, which contained the additional charges raised against our clients and which required a response by today.

3. As you will be aware, our clients-along with four other SABC employees-today launched an application for direct access in the constitutional court seeking to have the decisions to Institute disciplinary proceedings against them declared unconstitutional, unlawful and invalid.

4. Our clients will also, this afternoon launched urgent proceedings in the labour court seeking to interdict the disciplinary proceedings on an interim basis, pending the outcome of into alia the constitutional court application.

5. In the circumstances, our clients consider it would be inappropriate the stage to respond to the charge sheets. Suffice it to say that our clients deny all of the additional charges against them

6. We point out also that, as you are no doubt aware, our courts have made clear that parties including especially organs of state, are not permitted to conduct themselves in a manner that impedes or undermines the ability of courts to grant relief to litigants for them. We refer for example to the matter

of *Gauteng Gambling Board and another v MEC for Economic Development*, Gauteng 2013 (5) SA 24 (SCA).

7. We are of the view that any attempt by the SABC to proceed with the disciplinary proceedings against our clients in the face of the pending Constitutional Court and Labour Court proceedings, would be unlawful and would amount to constructive contempt of court. We trust that the SABC will not do so."

The Constitutional Court application had already been served by this stage and it was obvious from the letter that an interim application in this Court was imminent. That Labour Court application was served later that afternoon.

18 July 2016

[30] The SABC displayed reckless disregard for the pending applications. Instead of pausing, it pressed ahead with the dismissal of the applicants, which it did through correspondence in the form of letters signed by Mr Ditlhakanane, the General Manager: Radio News & Current Affairs. The letters stated:

"NOTICE OF TERMINATION OF EMPLOYMENT

I referred to the notice in terms of schedule eight of the labour relations act served on you on the 08th of July 2016.

Further, I confirm receipt of a letter from your attorneys... Dated 13<sup>th</sup> of July 2016. It is SABC's see's considered view that the said letter from your attorneys does not amount to adequate response to the issues/concerns raised by the SABC against you.

It is common cause that you have made it known to the SABC that you will continue to this respect the SABC, your employer. It has now become clear to the SABC that you have no intention to refrain from your conduct of undermining the SABC and the authority of its management.

In the premise your continued acts of misconduct become intolerable. Your employment with the SABC is thus terminated with immediate effect, being 18 July 2016.

You have a right to refer a dispute the CCMA in the event that you are not satisfied with this decision."





[31] It was this action which necessitated the applicants filing an amended notice of relief to set aside the dismissals and reinstate them and to hold the relevant SABC officials personally liable for the costs concerned. They claim that by dismissing them, the SABC deliberately sought to prevent them having the lawfulness of their suspensions and the pending disciplinary enquiries determined by a court, which flouted their right of access to a court.

[32] The applicants also argue that their dismissals are in breach of their contracts of employment for the following reasons. Clause 20 of their contracts of employment states:

"If the employee breaches this agreement, violate[s] the SABC policies or acts inappropriately, acts illegally or in breach of labour legislation, the SABC shall be permitted to take the necessary disciplinary actions as allowed and detailed in the relevant labour legislation and SABC Disciplinary Procedures and Code of Conduct. Such action may result in dismissal of the employee and termination of this agreement."

(emphasis added)

[33] Clause 1.5 of the SABC's Disciplinary Procedure states:

"The Disciplinary Procedure and Code of Conduct supplements the SABC's Personnel Regulations, and together with the said Regulations, they form part of all employees' contracts of employment."

Clauses 4.5 and 4.6 of the same Procedure provides:

"4.5 For misconduct or offences which, in the opinion of management warrant a stronger disciplinary measure than a verbal warning... a formal disciplinary hearing must be held"

4.6 The disciplinary hearing will be presided over by a disciplinary panel, chaired by the employees line manager for another manager (if the line manager is involved in the evidence against the employee where he is not available). The chairperson can appoint additional members of management to serve on the disciplinary panel. The chairperson must be seen to be as independent and objective as possible..."

(emphasis added)



- [34] Clause 4.8 goes on to detail the procedures for conducting a hearing providing for both parties to call witnesses in support of their versions after which the chairperson will consider the evidence and determine the question of guilt. In the event an employee is found guilty, the chairperson is required to allow an opportunity for mitigation to be presented and after considering both mitigating and aggravating factors to make a decision on the appropriate disciplinary measure.
- [35] Lastly, the applicants argued that the SABC by admitting in its answering statement that the reason for the dismissals is that the *"employees were criticizing the 'editorial decision' their suspension and SABC management"* with that, this was an impermissible ground of dismissal. They contend that in the circumstances, to dismiss SABC journalists for criticising the Protest Policy, the suspensions and SABC management were actions based on the application of an invalid policy and is a breach of section 16(1) of the Constitution.

#### Evaluation

- [36] The applicants claim that their suspensions and the pending disciplinary action prior to their dismissal were unlawful because they both arose from and are directly related to their dissent over the protest Policy. Given that they alleged that the protest Policy was invalid, a fact which was confirmed by ICASA on or about 11 July 2016, the suspensions and disciplinary action could not lawfully be pursued because any instruction to comply with the policy would be an unreasonable and unlawful one, as would any suspension based on an alleged breach of that policy.
- [37] In relation to their claim that their dismissals are unlawful and invalid, the applicants' claim rests on two distinct and independent grounds. Firstly, they contend that it was unlawful to terminate their services without complying with their contractual rights to a disciplinary hearing before they were dismissed. Secondly, they contend that their dismissal is in breach of their constitutional right to freedom of expression and cannot be lawful for that reason either.



I.S.

- [38] The SABC contends that the Labour Court has no jurisdiction to hear their claim. The jurisdictional objection also has two independent legs. Firstly, the SABC argues that the applicants are essentially relying on a claim under the LRA and in keeping with the recent judgement of the Constitutional Court *in Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)*<sup>3</sup> they are confined to remedies for unfair dismissal and, presumably, for unfair suspension. The second leg of the argument is that, in seeking to interdict the disciplinary proceedings which were initiated before the applicant's dismissal and in asking for an order that the officials responsible for dismissing them should be called upon to show cause why they should not be held personally liable for the costs of the application, the applicants are seeking incompetent relief.
- [39] In respect of the merits of the applicants claim, the SABC maintains that because the applicants were not dismissed for the original charges brought against them but for the new misconduct they allegedly committed afterwards, which was set out in the so-called schedule 8 of the notices, the SABC was entitled to adopt the procedure sanctioned by Schedule 8, item 4 of the LRA. Consequently, they cannot allege that the procedure adopted was unlawful.
- [40] Secondly, it was perfectly lawful of the SABC to dismiss them for acting in violation of their contracts in terms of which they were forbidden to comment in the media in respect of their conditions of employment. They had no permission to do so, which is a precondition of regulation 2(d) and they had not denied making such comments.
- [41] Thirdly, the SABC disciplinary code provided for summary dismissal in a number of instances as set out in clause 1.8 thereof, and clauses 1.2.3 and 1.2.7 of part two of the code authorised summary dismissal when an employee deliberately caused negative publicity of SABC affairs in the media and/or for non-compliance with duties of the applicant's service contract. The specific clauses referred to read as follows:
- "1.8 notwithstanding anything contained herein, any employee who allegedly breaches his conditions of employment by participating

<sup>3</sup> (2016) 37 ILJ 564 (CC)

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unprocedural collective industrial action such as strikes, boycotts, go slows overtime bands, or who incites other employees to participate in such unprocedural collective industrial action need not be dealt with in terms of this disciplinary procedure and may be summarily dismissed. Management may at its own discretion in exercising any right to tested discipline or dismiss an employee arising out of the employee's participation in unprocedural collective industrial action without the necessity of first convening a disciplinary hearing. The provisions pertaining to unprocedural industrial action contained in procedural and recognition agreement is will, in so far as they clash with the provisions of this clause take precedence.

....

## Part 2

### CODE OF CONDUCT

1. The following are examples of misconduct or offences and do not include all possible forms of misconduct or offences. These offences can be committed against the management of the SABC, fellow employees and outsiders, where the image of the SABC is concerned.

1.1 ...

#### 1.2 Misconduct and Offences Warranting Summary Dismissal

....

1.2.3 Deliberately causing negative reporting of SABC fares in the media

...

1.2.7 non-compliance with duties of the service contract, indicating a breach of contract."

### Jurisdictional Issues

[42] Before turning to the merits, it is necessary to address the preliminary objections raised by the SABC. In the *Steenkamp* case, the Constitutional Court was seized with the question of the kind of relief that can be obtained by employees if an employer gives shorter notice of termination in a large-

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scale retrenchment than the 60 day period stipulated in section 189A of the LRA. In brief, the majority decision of Constitutional Court found that a dismissal in breach of that provision did not make the dismissal invalid because the invalidation of a dismissal is not a remedy contemplated by the LRA. Employees who are not given the requisite notice are confined to their remedies under the unfair dismissal regime of the LRA. The SABC cited extracts from some of the following passages of the majority judgement (passages numbered in bold are those cited by the SABC, others have been included for the sake of completeness) in support of its contention that, the applicants in this matter are likewise precluded from pursuing a claim based on the invalidity of their dismissal:

[130] The scheme of the LRA is that, if it creates a right, it also creates processes or procedures for the enforcement of that right, a dispute resolution procedure for disputes about the infringement of that right, specifies the fora in which that right must be enforced and specifies the remedies available for a breach of that right. A well-known example is every employee's right not to be unfairly dismissed which is provided for in section 185. In section 186 there is a definition of what dismissal means. In section 187 there is a special category of dismissals, namely, automatically unfair dismissals. In section 188, other categories of dismissals are created, namely, dismissals that lack a fair reason and procedurally unfair dismissals.

[131] In section 189 the LRA sets out the process or procedure that an employer must follow when contemplating the dismissal of any employee for operational requirements. In section 189A the LRA creates rights and obligations for a certain category of employers and their employees in regard to dismissals for operational requirements which did not form part of the LRA before 2002. It also creates the processes or procedures to be complied with. Section 189A also specifies the process for the adjudication of disputes. In this regard it makes provision for the referral to the Labour Court for adjudication of a dispute about whether there is a fair reason for dismissal. It makes provision for the route of a strike and lock-out for the resolution of a dispute. It is particularly significant that section 189A(9) expressly contemplates the very eventuality that arises in this case. That is the eventuality of an employer giving notice of dismissals prematurely. It provides the remedy of an immediate strike for a breach of the section's



provisions. In section 189A(13) the LRA specifies special remedies for non-compliance with a fair procedure. All of that – including subsection (8) – is about the right not to be unfairly dismissed which the LRA creates in section 185. In section 191 the LRA sets out the dispute procedure that must be used to resolve disputes concerning alleged infringements of the right not to be unfairly dismissed. No provision is made anywhere for a dispute procedure that must be used for a dispute about the validity or lawfulness or otherwise of a dismissal.

[132] One can take other rights provided for in the LRA and do the same exercise. These include organisational rights, collective bargaining rights, the right to strike and others. There is even a special dispute resolution chapter in the LRA but it says nothing about a right not to be dismissed unlawfully or about disputes concerning invalid dismissals. There is no reference to a right not to be unlawfully dismissed.

There are no processes or procedures for the enforcement of such a right. There are no fora provided for in the LRA for the enforcement of such a right. Nowhere in the entire LRA is there mention of the words "dismissal" and "unlawful" or "invalid" in the same sentence. Yet there are many sentences in the LRA in which the words

"dismissal" and "unfair" appear. The LRA makes no provision for dispute procedures to be followed in the case of a dispute arising out of the infringement of such a right. The only sensible explanation for these omissions in the LRA is that the LRA does not contemplate a right not to be unlawfully dismissed nor does it contemplate invalid dismissals or orders declaring dismissals invalid and of no force and effect.

[133] The absence in the LRA of any provision for a right not to be dismissed unlawfully and of any dispute procedures or processes for the enforcement of that right explain why the applicants have been forced to go to another statute i.e. the BCEA to enforce a right that is not provided for in the BCEA which they say is provided for in the LRA. The explanation is simply that the LRA does not contemplate the right and the invalid dismissals on which they base their case. If the LRA contemplated such a right in regard to dismissals, it would have made provision for it and for a dispute procedure to be followed in disputes concerning its infringement.

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[137] The second basis for my conclusion that the applicants' appeal should be dismissed is a principle that, for convenience, I call "LRA remedy for an LRA breach". The principle is that, if a litigant's cause of action is a breach of an obligation provided for in the LRA, the litigant as a general rule, should seek a remedy in the LRA. It cannot go outside of the LRA and invoke the common law for a remedy. A cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanisms of the LRA to obtain a remedy provided for in the LRA.

...

[143] Ngcobo J also said:

"The question therefore is whether a dispute about a failure to comply with the mandatory provisions of item 8 and 9 of Schedule 8 to the LRA is a dispute which falls to be resolved under the dispute resolution provisions of the LRA. In the light of the principles to which I have referred, the answer is clear; a dispute concerning the alleged non-compliance with the provisions of the LRA is a matter which under the LRA, must be determined by the Labour Court. This result cannot be avoided by alleging, as the applicant does, that the conduct of Transnet violates the provisions of the LRA in question and violates a constitutional right to just administrative action in section 33 of the Constitution and is therefore reviewable under PAJA."

[144] Applying this passage to the present case, the dispute concerns the breach by Edcon of the procedural requirements of section 189A(8). Accordingly, the dispute "falls to be resolved under the dispute resolution provisions of the LRA". The applicants cannot avoid this result by alleging that the dismissal is invalid and of no force and effect. What this passage means in part is also that, if a litigant's case is based on a breach of an LRA obligation, the dispute resolution mechanism used must be that of the LRA and the remedy must also be a remedy provided for in the LRA.

Accordingly, on this ground, too, the appeal falls to be dismissed."

(emphasis added)

[43] The Constitutional Court in *Steenkamp* further held *inter alia* that:



[108] Another indication that the LRA does not contemplate an invalid dismissal is this. In section 187 the LRA created a new category of dismissals. It called them "automatically unfair dismissals". This is a special category of dismissals. What makes this category of dismissals special is that the dismissals in this category are all based on reasons that we, as society, regard as especially egregious. They include cases where an employee is dismissed for his or her race, gender, sex, ethnic origin, religion, marital status, political opinion, membership of a trade union, participation in a protected strike, exercise of rights provided for in the LRA and other such arbitrary reasons. Another factor that makes this category of dismissals special is that for those cases where an employee's dismissal has been found to be automatically unfair, the LRA provides the Labour Court with power to order the employer to pay double the maximum compensation that the Labour Court would have had the power to order if the dismissal had not been found to be automatically unfair but was found to simply lack a fair reason or was found to have been effected without compliance with a fair procedure.

[109] Most, if not all, of the reasons for dismissal that render a dismissal automatically unfair as contemplated in section 187 are reasons that would ordinarily render a dismissal unlawful and invalid. If the Legislature had intended that under the LRA there would be a category of invalid dismissals, it would have been the automatically unfair dismissals. The Legislature must have deliberately decided that the LRA would not provide for invalid dismissals but rather for automatically unfair dismissals instead. Put differently, the Legislature deliberately provided in the LRA for unfair dismissals and automatically unfair dismissals to be outlawed and to attract a remedy but did not make any provision for unlawful or invalid dismissals..."

(emphasis added)

[44] A consequence of the Constitutional Court's interpretation of the LRA is that the LRA does not provide remedies for unlawful or invalid dismissals. The issue which arises from this for present purposes is whether the judgment means that the Labour Court has no jurisdiction to provide such remedies. It does not follow as a matter of logic that because the LRA does not provide such remedies that such remedies do not exist or that this Court cannot grant them if they do exist. The point made by the applicants is that they are

  
Z.S.

not relying on any remedy provided by the LRA, but essentially assert that they are entitled to reject what they claim is the unlawful termination of their contracts of employment which they say the SABC committed when it dismissed them without a disciplinary hearing and also in breach of their constitutional right to freedom of expression. They maintain that they are entitled to enforce their contracts of employment and set aside their dismissals.

- [45] In support of this contention they cite examples of judgements in which the Labour Court has made orders of specific performance compelling an employer to honour contractual obligations to hold a disciplinary hearing and setting aside dismissals in breach of such obligations, namely *Ngubeni v National Youth Development Agency & another*<sup>4</sup> and the unreported decision in *Dyakala v City of Tshwane Metropolitan Municipality*.<sup>5</sup> In *Ngubeni's* case, the court noted:

"[19] Insofar as it may be contended that the remedy of specific performance is either unavailable or inappropriate, the starting point is to note that s 77A(e) of the BCEA specifically empowers this court to make such orders. In *Santos Professional Football Club (Pty) Ltd v Igesund & another* 2003 (5) SA 73 (C); (2002) 23 ILJ 2001 (C), the court noted that courts in general should be 'slow and cautious' in not enforcing contracts, and that performance should be refused only where a recognized hardship to the defaulting party is proved."

- [46] In *Ngubeni's* case the court held both that clause 10.1 of his contract of employment<sup>6</sup> and a further written undertaking by the employer offering him "a procedure that would have made any criminal court proud", both constituted binding obligations on the employer which he could enforce by

<sup>4</sup> (2014) 35 ILJ 1356 (LC)

<sup>5</sup> (J 572 / 15) [2015] ZALCHB 104 (23 March 2015)

<sup>6</sup> The clause read:

\*10.1 *Misconduct*

The employment of the employee may be terminated at any time, either summarily or on notice by the agency after a fair disciplinary procedure establishes that the employee is guilty of any misconduct or the employee has committed a breach of material obligation under this agreement which is incompatible with a continued employment relationship, or if the employee is found guilty of any act which would, at common law or in terms of any applicable statute, entitle the agency to terminate the employee's employment."

way of specific performance. The court found that his dismissal in breach of clause 10.1 was unlawful and set the termination aside. In *Dyakala's* case the court held *inter alia* :

'In regard is had to the applicant's contract of employment it is clear from clause 18.2 of the contract that, where the reason for terminating the employment contract include being guilty of any serious misconduct, the employer is entitled to terminate the contract after due compliance with its disciplinary code and procedures. The applicant therefore has, in my view, established that he has a contractual entitlement to a disciplinary hearing. Insofar as there clearly has been no compliance with this contractual obligation to hold a disciplinary hearing before terminating the contract, the termination of the contract was unlawful.'<sup>7</sup>

[47] The SABC advanced no authority why either of these judgements were wrong either with respect to the power of the Labour Court to hear and determine contractual disputes or to make orders pronouncing on the lawfulness of a breach of contract or granting relief in the form of specific performance in the exercise of jurisdiction under s 77(3) of the Basic Conditions of Employment Act ('the BCEA')<sup>8</sup>. I am satisfied that the decision of the Constitutional Court does nothing to disturb the legal premises of either of these and similar judgements. Consequently, the Labour Court is entitled to entertain the applicants' claims based on any alleged invalid termination of their contracts of employment and to make orders which are competent in claims based on breach of contract.

[48] Quite apart from its contractual jurisdiction, under s 157(2) of the LRA, the Labour Court also has concurrent jurisdiction with the High Court "...in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from - (a) employment and from labour relations; (b) any

<sup>7</sup> At para [20].

<sup>8</sup> Section 77(3) of the BCEA states:

"The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer;..." (emphasis added). Plainly, the LRA did envisage and provide for this court granting relief for the violation of constitutional rights within the ambit of its sphere of operation in labour matters.

### Substantive merits

#### *Breach of contractual right to a hearing before dismissal*

- [49] As in *Ngubeni's* and *Dyakana's* cases above it is plainly also the case in this instance that in terms of clause 20 of applicants' contracts of employment and clause 1.5 of the SABC Disciplinary Code And Procedure, the disciplinary code and procedure is incorporated in the provisions of their contracts. Further, on a plain reading of the disciplinary code and procedure, it is clear that before an employee may be dismissed they should be subjected to an oral disciplinary hearing presided over by a chairperson, or a panel which will hear evidence and representations, reach a verdict on the question of guilt and consider further representations, if necessary on the issue of an appropriate sanction before imposing one.
- [50] It is also clear that until the SABC issued the schedule 8 notices, the more comprehensive hearing contemplated in its disciplinary code was precisely the kind of disciplinary proceeding it envisaged. When it issued the schedule 8 notices, the content of those notices merely called on the applicants to respond to charges stated in the vaguest form, without offering any form of hearing of the kind previously envisaged. The SABC argued that it was entitled to do this because clause 20 of the contract of employment effectively gave it an option of either following its disciplinary code and procedures for the more attenuated form of enquiry required by schedule 8 of the LRA. A plain reading of that provision does not support the SABC's interpretation that it provides it with an election between different procedures. The most plausible interpretation of the provision is that, an employee is entitled to a disciplinary procedure that conforms both with the

SABC code and procedure and with schedule 8. The express incorporation of the disciplinary code and procedure in the employee's contracts contained in clause 1.5 of the procedure leaves little scope for the interpretation advanced by the SABC.

- [51] It follows therefore that the applicants were entitled to a proper disciplinary enquiry in conformity with the SABC Disciplinary code and procedure and that their dismissal in breach thereof was invalid. By parity of reasoning with *Ngubeni and Dyakana*, there is no reason not to declare their dismissals invalid for this reason alone.
- [52] Before passing on to the question of whether the applicants' constitutional right to freedom of expression was also infringed, another argument advanced *albeit* faintly should be dealt with. It was suggested that if one has regard to the fact that the alleged misconduct committed by the applicants could have led to their summary dismissal, in that instance, they were not entitled to a disciplinary enquiry as a matter of right. Reference was also made to clause 1.8 of the disciplinary code in terms of which employees engaging in unprotected industrial action are not entitled to a hearing in terms of the code but may be "summarily" dismissed. The suggestion was made that the applicants and unprotected strikers, as a result fell into the same category of employees who might forfeit the right to a formal enquiry.
- [53]
- [54] The first point to make is that the procedural rights of unprotected strikers in the code effectively mimic the attenuated requirements of procedural fairness which the courts have recognised as sufficient in the case of unprotected strikes. These limited rights are different from the requirements of procedural fairness in the case of dismissals for individual misconduct.<sup>9</sup> Secondly, the term 'summary dismissal' is derived from the law of the employment contract and arises when an employer terminates an employee's contract of employment without paying the employee notice pay, on account of the fact that the employee is guilty of a fundamental

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<sup>9</sup> See *Modise & others v Steve's Spar Blackheath* (2000) 21 ILJ 519 (LAC) at 556. para [91]



breach of the employment relationship.<sup>10</sup> In *Steenkamp*, the Constitutional Court expressed the difference between fairness and lawfulness in dismissal thus:

"[191] The distinction between an invalid dismissal and an unfair dismissal highlights the distinction in our law between lawfulness and fairness in general and, in particular, the distinction between an unlawful and invalid dismissal and an unfair dismissal or, under the 1956 LRA a dismissal that constituted an unfair labour practice. At common law the termination of a contract of employment on notice is lawful but that termination may be unfair under the LRA if there is no fair reason for it or if there was no compliance with a fair procedure before it was effected. This distinction has been highlighted in both our case law and in academic writings."

[55] In the context of the SABC disciplinary code, the classification of misconduct as warranting summary dismissal is really an echo of the common-law characterisation of certain conduct as constituting a repudiatory breach of the employment contract which warrants the employer terminating it without notice. However, it would be absurd on this basis to interpret that provision to mean that all serious misconduct set out in clause 1.2 of the code disentitled employees accused of such misconduct to a disciplinary enquiry before their dismissal.

#### *Dismissals as violation of constitutional right to freedom of expression*

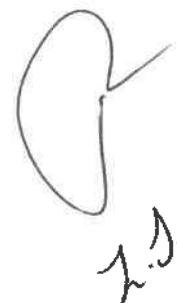
[56] Section 16(1) of the Constitution provides

- "Everyone has the right to freedom of expression, which includes:
- a. freedom of the press and other media;
  - b. freedom to receive or impart information or ideas;
  - c. freedom of artistic creativity; and

<sup>10</sup> See e.g. *Moonian v Balmoral Hotel* (1925) 46 NPD 215 and *Mine Workers' Union v Brodrick* 1948 (4) SA 959 (A) as examples of cases in which the contractual dispute concerned whether the employee had been wrongfully dismissed without notice, entitling him to damages in the form of notice pay or payment for the unexpired period of a fixed term contract.

academic freedom and freedom of scientific research.”

- [57] If one has regard to the sequence of escalating actions taken by the SABC against the applicants, they were firstly suspended on the basis that they had disobeyed the policy which ICASA declared invalid and unlawful *ab initio*. The thrust of the charges proffered against some of the applicants at the end of June was that they contravened regulation 2 (d) of the SABC's personnel regulations by making comments in the media without prior consent of the Group Chief Executive by releasing a letter to various media agencies. Krige was charged with misconduct relating to his unwillingness to align himself with the policy.
- [58] Coming to the reason given for their dismissals, which stemmed from the schedule 8 notices, the SABC stated in its answering affidavit that the reason for the dismissals is that the employees were dismissed “for criticizing the ‘editorial decision’, their suspension and SABC management which was committed through the media.” It also stated that “It must be noted that the charges and the schedule eight notices issued against the employee's do not relate to the employer's refusal to comply with the policy but to them making comments in the media relating to their conditions of employment contrary to their contracts of employment.” Thus, the emphasis in the complaint against the employee's shifted as the public clamour over the suppressive policy grew. The complaint no longer concerned expressions of dissent over the policy or a supposed reluctance to comply with it, but focused on the alleged dissemination of the internal dissent to external media.
- [59] The applicants claim that it was only in the SABC's answering affidavit that it set out in the alleged factual basis for the charge on which they had been dismissed. In their replying affidavit they denied the charges were true. Be that as it may, the claim they make in relation to the alleged violation of their constitutional right is that the SABC by relying on that reason, even if the allegation was true, is relying on a reason in breach of their constitutional right to freedom of expression which includes making information about the internal dissent over the policy more widely known. As such, the reason for the dismissal could not be a lawful one, quite apart from the fact that their dismissal was in breach of their contractual right to a disciplinary enquiry.



- [60] In argument, *Mr Budlender* acknowledged that employees cannot rely on the constitutional right to freedom of expression to disseminate any form of information which might put place their employer in a bad light. However he argued that there were certain exceptional features about the SABC and the issue it objected to being publicised. The issues which make the dissemination of such information distinct from ordinary disclosures about the internal affairs of an employer may be summarised as follows.
- [61] The SABC is a public institution and the public has an interest in how it is run. It is also an institution bound by certain constitutional values. The public also had a right to know if the SABC is implementing important constitutional principles which apply to it. In the case of **National Union Of Public Service And Allied Workers obo Mani and Others v National Lotteries Board**<sup>11</sup> the Constitutional Court held that these factors warranted the union and workers, who were involved in a dispute with the Lotteries Board, in publicising a letter, which amongst other things questioned whether the head of the organisation was committed to ensuring that the lotteries Board was broadly representative of the population.:
- [62] The applicants argue that for all the more reason, that approach is applicable in this instance. In this regard, apart from the special nature of the SABC, they rely on two other reasons which relate to the recognised role played by journalists:
- [63] Firstly, all journalists have ethical and constitutional obligations which they must at least aspire to which are found in the ICASA Code of Conduct for Free To Air Licensees (the ICASA Code); the Broadcasting Complaints Commission of South Africa Free-to-Air Code of Conduct for Broadcasting Service Licensees (the BCCSA Code); and the Press Council Code of Ethics and Conduct for South African Print and Online Media (the Press Council Code). The ICASA Code and BCCSA Code state that news must be reported truthfully, accurately and fairly. They further provide that the news must be "presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by: distortion, exaggeration, or misrepresentation; material omissions; or summarization."

<sup>11</sup> 2014 (3) SA 544 (CC) at 596-7, paras [186]-[190].





Section 1 of the Press Council Code commits journalists to apply exactly the same considerations in their coverage of the news as does the BCCSA Code above.

[64] Moreover, these sentiments are echoed in the preamble of the Press Council Code, viz: "As journalists we commit ourselves to the highest standards, to maintain credibility and keep the trust of the public. This means always striving for truth...reflecting a multiplicity of voices in our coverage of events... and acting independently." Lastly, section 2 of the Press Council Code provides, inter alia, that journalists "*shall not allow commercial, political, personal and other non-professional considerations to influence or slant reporting.*"

[65] These duties have also been ascribed to journalists in the Constitutional Court's judgment in ***Khumalo and Others v Holomisa***<sup>12</sup>

"[22] The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected. The ability of each citizen to be an effective and responsible member of our society depends upon the manner in which the media carry out their constitutional mandate. As Deane J stated in the High Court of Australia,

'... the freedom of the citizen to engage in significant political communication and discussion is largely dependent upon the freedom of the media'.

The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.

[23] Furthermore, the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require. As Joffe J said in *Government of the Republic of South Africa v 'Sunday Times'*

*Newspaper and Another* 1995 (2) SA 221 (T) at 2271 - 228A:

<sup>12</sup> 2002 (5) SA 401 (CC)

'It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. . .

It must advance communication between the governed and those who govern.'...

[24] In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16.<sup>13</sup>

[66] Secondly, the applicants argue that journalists at the SABC are under a particular duty to advance the public interest because the SABC is a public broadcaster with a special mandate. In this regard, the Constitutional Court has held, "*the SABC, as the public broadcaster provided for and regulated in terms of the Broadcasting Act, has a special function to perform*".<sup>14</sup> When the SABC is involved, what is at stake is "*the right of the public to be informed and educated*".<sup>15</sup> Having regard to the role the SABC is expected to fulfil in terms of its mandate and licensing provisions, it is clear that that the dissent over the extraordinary censorship measure is a matter which concerns the core functions of the SABC as a public broadcaster. Whatever concerns might apply to the Lottery Board that might warrant a more

<sup>13</sup> At 416-418.

<sup>14</sup> *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para 26

<sup>15</sup> At para 27

cautious approach to the public dissemination of information about that institution's management do not apply to the issue at hand for which the applicants were disciplined.

- [67] Consequently, the applicants contend that to dismiss SABC journalists for criticising the Protest Policy and in suspending them, amounts to conduct by SABC management which is plainly in breach of section 16(1) of the Constitution, and it is conduct in respect of which the Labour Court, in the exercise of its concurrent jurisdiction with the High Court under s157(2) of the LRA, can make an appropriate order in terms of s 158(1).

### Urgency

- [68] The mere fact that the applicants have been dismissed in breach of their contracts of employment might not in and of itself warrant urgent relief. What makes the application urgent is related to a number of factors. Firstly, despite having accepted at least for the foreseeable future the invalidity of the Policy and therefore in principle being logically committed to complying with the order agreed in the *Suzman Foundation* matter, the SABC has been unrelenting in opposing the relief sought by the applicants whose dismissal, suspensions and early disciplinary steps would never have come about but for the unlawful policy. One might have thought that the sincerity of the SABC in agreeing to accept the invalidity of the policy would have been followed up by an offer at least to allow the applicants to return to work in the interim, pending a final decision on that application. It cannot be reassuring for journalists who are currently working at the SABC to know that those who questioned an unlawful policy remain dismissed despite the SABC supposedly agreeing not to enforce that policy in the meantime.
- [69] Secondly, it is important at a time when the role of the SABC will be in the spotlight in the course of the imminent local elections that its will and ability to fulfil its mandate as an instrument of a constitutional democracy will not be questioned on account of it adopting an inconsistent stance towards the applicants and the ICASA ruling.
- [70] Thirdly, the importance of the applicants returning to work without delay is also because of the importance of them actually being able to perform their

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work as journalists in the light of all the considerations mentioned above. This is not a case where damages for wrongful dismissal would be an appropriate alternative remedy in due course.

### Relief

[71] The appropriate relief in this instance given that the claim rests on unlawfulness is that the dismissals should be nullified. As the court stated in *Steenkamp*

"[189] An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer...

...

[192] It is an employee whose dismissal is unfair that requires an order of reinstatement. An employee whose dismissal is invalid does not need an order of reinstatement. If an employee whose dismissal has been declared invalid is prevented by the employer from entering the workplace to perform his or her duties, in an appropriate case a court may interdict the employer from preventing the employee from reporting for duty or from performing his or her duties. The court may also make an order that the employer must allow the employee into the workplace for purposes of performing his or her duties. However, it cannot order the reinstatement of the employee."

[72] Consequently, an order declaring the applicants' dismissals invalid, will have the legal effect that their dismissals never took place and can be accompanied by an order that the SABCC must allow them into their workplaces for the purpose of performing their duties.

[73] There is also the question of the suspensions and the incomplete enquiries which were initiated prior to the applicants' dismissals. It was argued by the SABC that those would fall away as the fact of the applicants' dismissal would have that effect. However, if the legal consequence of the final relief is that the dismissals did not happen, it does not seem to follow in my view that everything preceding them has no application. As those enquiries were essentially initiated for the same reason as the dismissal or because of the applicants' disagreement over adopting the policy, it would follow from the

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analysis above that those instructions and steps were unlawful because they were premised on the enforcement of an unlawful policy.

- [74] Paradoxically, the applicants did not amend their prayer only for interim relief in respect of the suspensions and pending disciplinary proceedings, linked to the final outcome of the other proceedings. However, if final relief is competent on the papers in respect of the dismissals and because the continuation of those other measures would be unlawful, it is appropriate to make an order for final relief in respect of those too.

### Costs

- [75] In the amended papers, the applicants also sought an order compelling the SABC to reveal the identity of officials involved in taking the decisions to terminate the applicants' employment. The object of this was to put them on terms to show cause why they should not be held personally liable for the costs of the application.
- [76] The reason for this unusual prayer is that even if it cannot be shown that the SABC proceeded with the dismissals in a wilful attempt to avert the possible consequence of the Constitutional Court application and this one which were launched on 15 July, whoever took the decision to dismiss the applicants did so with reckless regard for the pending applications and arguably if a more considered, reflective and financially accountable approach had been taken, the SABC would not have proceeded with the dismissals or persisted in opposing this application after agreeing to the order in the Suzman Foundation application.
- [77] In ***Gauteng Gambling Board And Another v MEC for Economic Development, Gauteng***<sup>16</sup> the SCA made the following observation:
- [54] In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the board, cannot conclusively be said to constitute contempt of court. However, that does not excuse their behaviour. The MEC, in her responses to the opposition by the board, appeared indignant and played the victim. She adopted this attitude while acting in flagrant disregard of

<sup>16</sup> 2013 (5) SA 24 (SCA)

constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers. Regrettably, in the present case, it was not prayed for and thus not addressed.

[78] I am satisfied that there is no question that the applicants should not bear the costs of bringing this application including the costs of two counsel. I am also concerned that the dismissals were authorised with reckless disregard for the pending applications and with little regard for the relative costs and benefits to the SABC of doing so. That, this should occur during a time of financial crisis makes it more worrying. The only question is whether these costs should be levied on those who took the decision or on the SABC as an entity. Accordingly, I think it is appropriate that the person who appears to have authorised the dismissals when signing the dismissal letters should be given an opportunity to explain why he should not be held liable, at least in part, for the costs. The same applies to Tebele who seems to have played an active role in the events.

#### Order

[79] In light of the above it is ordered that,

- 79.1 The forms and rules of this Court are dispensed with and this matter is dealt with as a matter of urgency.
- 79.2 The respondent's dismissals of the second to fifth applicants are unlawful and void *ab initio*.
- 79.3 The second to fifth applicants are entitled to return to work at the SABC and to continue with their respective duties and responsibilities in accordance with their job descriptions.
- 79.4 The respondent is interdicted from proceeding with the disciplinary proceedings initiated against the second to fifth applicants prior to their dismissal.



A large, stylized handwritten signature in black ink, possibly reading 'F.J.', is located in the bottom right corner of the page.

79.5 Within five days of this order, Seboleto Ditlhakanane, the respondent's General Manager: Radio News & Current Affairs and Mololo S Tebele, Acting Group Executive: News and Current Affairs, must file affidavits showing cause why they should not personally be held liable for all or part of the costs of this application, such costs to be paid on the attorney-own client scale and including the costs of two counsel.

79.6 The determination of the final apportionment of liability for payment of the applicants' costs of the application including the costs of two counsel, as between the respondent and any of its officials or employees is postponed *sine die*, and may be enrolled by any party for determination once 20 days have elapsed from the date of this order.

11/11/2014



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**Lagrange J**  
**Judge of the Labour Court of South Africa**



2.1.

**APPEARANCE:**

**For the Applicants: S Budlender assisted by V Bruinders instructed by Serfontein, Viljoen & Swart Attorneys**

**For the Respondent: D T Skosana SC assisted by Z Madlanga instructed by Ningiza Horner Inc.**

*[Faint, illegible handwritten text]*

*[Handwritten signature]*  
*[Handwritten initials]*



COMMISSION OF INQUIRY INTO STATE CAPTURE

TELECONFERENCE / INTERVIEW

PARKTOWN, JOHANNESBURG

ON [NO DATE PROVIDED]

10

20

[NO DATE PROVIDED]

TELECONFERENCE / INTERVIEW:

THANDEKA GQUBULE: ...both the ...[indistinct] and SABC. Whether we need to, perhaps always record the reasons and the rationale of these decisions.

JONATHAN: I do not... I ...[intervenes]

THANDEKA GQUBULE: I mean, when it later comes to court... Because we are making these decisions. And people are going to say, so and so, and so and so, and so and so were seated here. And when we file for – ...[indistinct] the law, God forbid, we better just, you know, have it recorded. Even the descending voices. Please record my voice as descending.

10 SUNA VENTER: Ja.

JONATHAN: I understand. I totally agree with you. The initial reason was – or initially, they said: “We cannot let – give other newspapers the platform to criticise the SABC.” That I totally understand, because they are in the media. But this is not a media issue. It is not other newspapers or opposition or whatever. This is a ...[intervenes]

SUNA VENTER: An NGO.

JONATHAN: An NGO that is out there and if we ignore them, we are busy censoring our own news and that is totally unacceptable.

20 SUNA VENTER: And as junior as I am, please also record my voice as descending against this.

JONATHAN: We cannot allow that people – individuals in this company make decisions on behalf of - doing this. And if we are going to carry on with that, we are going to lose our integrity. The little integrity that we have at the moment.

SPEAKER 4: Okay, is that ...[indistinct]

JONATHAN: Ja.

[NO DATE PROVIDED]

SPEAKER 4: Okay. [Indistinct]

[No audible reply]

SPEAKER 4: Johannesburg?

SPEAKER 5: Yes? Hallo?

SPEAKER 4: [Indistinct]

SPEAKER 5: You know what I mean?

SPEAKER 4: Did you note what ...[indistinct]

SPEAKER 5: Ja, I hear what they are saying.

SPEAKER 4: Okay. All right. So, are we...? What, what...?

10 SPEAKER 5: Continue. Please, continue.

SPEAKER 4: Okay. All right. Colleagues, let me continue with our national diary. We have ...[intervenes]

SPEAKER 5: Ja, just before... Before you... I just want to link what I have said with a story that was presented by Mafikeng, because we – internally(?), we also have a ...[indistinct] which has been a web-on(?), which is called Kim(?). And it was presented, I think, on Thursday or Friday, at - is corrupt(?). Is the story about the – also the battles between the different fractions of the ANC's involvements done outside of Pretoria, where people have been disgraced. About fifteen families living in a communal basement, directly after their houses were...

20 [END OF RECORDING]

SPEAKERS 3, 4 AND 5 WAS NOT CLEARLY IDENTIFIED AND HENCE THEIR NAMES ( MR SIMON TEBELE, MR FOETA KRIGE AND JONATHAN) WERE NOT ADDED BUT INDICATED AS SPEAKER.