

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT166/16

In the matter between:

THANDEKA GQUBULE	First Applicant
FOETA KRIGE	Second Applicant
SUNA VENTER	Third Applicant
BUSISIWE NTULI	Fourth Applicant
KRIVANI PILLAY	Fifth Applicant
JACQUES STEENKAMP	Sixth Applicant
LUKHANYO CALATA	Seventh Applicant
VUYO MVOKO	Eighth Applicant
and	
SOUTH AFRICAN BROADCASTING CORPORATION (SOC)	First Respondent
MINISTER OF COMMUNICATIONS	Second Respondent
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Third Respondent
MEDIA MONITORING AFRICA	Fourth Respondent
S.O.S SUPPORT PUBLIC BROADCASTING COALITION	Fifth Respondent
FREEDOM OF EXPRESSION INSTITUTE	Sixth Respondent
HELEN SUZMAN FOUNDATION	Seventh Respondent
SOUTH AFRICAN NATIONAL EDITORS FORUM	Eighth Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Ninth Respondent
THE CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON COMMUNICATIONS	Tenth Respondent

 APPLICANTS' SECOND SUPPLEMENTARY AFFIDAVIT

I, the undersigned,



THANDEKA GQUBULE

do hereby make an oath and state:

- 1 I am the first applicant in this matter.
- 2 I deposed to the founding affidavit in this application and the supplementary affidavit dated 20 July 2016. I depose to this affidavit on behalf of myself and the second to eighth applicants. I remain duly authorised to do so.
- 3 The facts deposed to in this affidavit are true and correct and fall within my personal knowledge unless the context indicates the contrary or it is expressly stated otherwise. Where I rely on facts conveyed by the remaining applicants, they confirm these facts in their confirmatory affidavits.
- 4 Where I make legal submissions, I do so on the advice of the applicants' legal representatives, which advice I accept as correct.

OVERVIEW

- 5 On 15 July 2016, this application was launched in this Court. It focused on two issues:
 - 5.1 The unconstitutional and unlawful approach of censorship adopted by the SABC management, particularly via the SABC's Protest Policy; and

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- 5.2 The unlawfulness and unconstitutionality of the disciplinary proceedings instituted by the SABC against the eight applicants (the SABC 8).
- 6 The response of the SABC was unequivocal. On 18 and 19 July 2016, it proceeded to dismiss all of the applicants, except Mr Mvoko (who is a contractor rather than an employee). All seven of us were dismissed without any hearing.
- 7 Accordingly, on 20 July 2016, we filed a supplementary affidavit in this Court in which we updated this Court regarding the developments which had occurred and in which we sought amended relief.
- 8 Since then, there have been further developments in this matter. These include, in particular:
- 8.1 The purported acceptance by the SABC that its Protest Policy was invalid;
- 8.2 A judgment and order from the Labour Court regarding the unlawfulness of the dismissals; and
- 8.3 A hearing on 23 August 2016 before the Portfolio Committee on Communications regarding whether to convene an inquiry into the SABC.

9 The applicants fervently hoped that these developments would provide a path to resolving the intolerable state of affairs at the SABC, which first prompted the present application.

10 However, it is now quite clear that this is not the case.

10.1 While the SABC has purported (in correspondence) to accept that its Protest Policy is unlawful, in public both the SABC and the Minister continue to defend its legality and propriety. Moreover, the SABC has taken no steps at all to convey to its news staff that it wishes to reverse its Protest Policy.

10.2 The first seven applicants have been reinstated at the SABC following the judgment and order of the Labour Court. However, our working conditions at the SABC remain intolerable. Even after our reinstatement, we have been publicly accused by the SABC and members of the Portfolio Committee of acting unethically, of lying to the public and of trying to "capture" the SABC. The substantive issues that we raised regarding the SABC's news policies prior to our termination have never been addressed and instead we are subject to ongoing harassment.

10.3 Most alarmingly, despite all of this, the National Assembly's Portfolio Committee on Communications has apparently accepted that these issues at the SABC have all been resolved. It thus refused our pleas and those of civil society organisations to convene an inquiry into the SABC. It took this view purely on the basis of what it heard from the

SABC and the Minister – it did not hear from us or civil society organisations at all. It also took this view even though the Committee had apparently previously agreed that there was a need for a formal inquiry.

- 11 We therefore respectfully submit that the need for the present application remains acute. Indeed, precisely as we indicated in our founding affidavit before this Court, if this Court does not hear and deal with this matter, there is no realistic prospect that the SABC will be able to carry out its constitutional and statutory mandate in respect of the millions of South Africans who depend on it for their news coverage.
- 12 This is especially the case given that the Portfolio Committee has now refused to convene a formal inquiry into the SABC. That inquiry would have created space for SABC journalists to provide information on the SABC in a setting that protected them from discipline and ill-treatment. Moreover, because the inquiry would have been public, it would have ensured that these matters were not dealt with behind closed doors.
- 13 However, the Portfolio Committee has refused to adopt this route. In doing so, we submit that the Portfolio Committee, and the National Assembly of which it forms part, have failed to comply with their constitutional obligations in terms of section 55(2) of the Constitution. These include the obligation to ensure the accountability of the SABC to the National Assembly and the obligation to exercise oversight over the SABC.

- 14 As we explain in what follows, this failure is a matter that falls within the exclusive jurisdiction of this Court in terms of section 167(4)(e) of the Constitution. Accordingly, only this Court can pronounce on this issue.
- 15 In light of these developments, the applicants have amended the relief sought in the Notice of Motion. These include both abandoning the prayers that are no longer relevant and including additional prayers arising from the decision of the Portfolio Committee. A copy of the amended Notice of Motion is filed simultaneously with this affidavit.
- 16 The purpose of this supplementary affidavit, therefore is to update the Court as to developments that have occurred since the filing of the last affidavit on 20 July 2016 and to support the amended relief. It deals with the following issues in turn:
- 16.1 Developments in relation to the Protest Policy;
 - 16.2 Developments in relation to our position within the SABC;
 - 16.3 The failure of the National Assembly and Portfolio Committee to comply with their constitutional obligations; and
 - 16.4 Exclusive jurisdiction.
- 17 Before doing so, I point out the following in relation to the eighth applicant, Mr Mvoko.
- 17.1 Mr Mvoko's position remains precisely as it was when the original application was launched – he is not being “scheduled” and is

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therefore not being paid by the SABC, because of his criticisms of SABC's conduct.

- 17.2 The High Court dismissed Mr Mvoko's application for individual relief and then refused leave to appeal.
- 17.3 This application does not seek individual relief for Mr Mvoko. That will be addressed by Mr Mvoko in a separate application for leave to appeal, to be filed by him at the appropriate time.
- 17.4 However, Mr Mvoko fully supports the relief sought in the public interest in the present Notice of Motion. Moreover, I later refer to, attach and rely on the papers in Mr Mvoko's High Court matter in support of that public interest relief.

DEVELOPMENTS IN RELATION TO THE PROTEST POLICY

- 18 On 20 July 2016, after my last affidavit had been signed and was being served:
- 18.1 The SABC's attorneys wrote to ICASA indicating that the SABC "*has considered the order of the Council of ICASA and will abide by the terms thereof*". A copy of this letter is attached as "TG1".
- 18.2 The SABC consented to an interim order in Part A of the *Helen Suzman Foundation* case then being litigated in the High Court. A copy of this order is attached as "TG1.1".

- 19 While these were welcome developments, the SABC has at no stage communicated to its newsrooms what the precise position is regarding its Protest Policy and what (if anything) it has been replaced with. Indeed, to the best of my knowledge, the SABC has made no communications to its newsrooms on the subject at all. Employees in the newsrooms have been left simply to guess what the attitude of SABC management is from what they have read in the media regarding the letter mentioned above.
- 20 This is concerning both because of the uncertainty it creates, but also because the ruling of ICASA was explicit. It "*direct[ed] ... the South African Broadcasting Corporation to withdraw its resolution as contained in its statement of 26 May 2016*".
- 21 Moreover, I understand that the attorneys acting for SOS, MMA and FXI (the complainants before ICASA) wrote to the SABC's attorneys on 5 August 2016 regarding this issue. A copy of this letter is attached as annexure "TG2". They asked for "*confirmation and supporting evidence that the SABC has implemented the ruling of ICASA*". I understand that there has never been any response to this correspondence.
- 22 Most alarmingly, in recent public utterances both the SABC and the Minister have not conceded that the Protest Policy was unlawful but have instead sought to defend it.

- 22.1 The Minister at an address she gave on 28 July 2016, defended the SABC's decision not to broadcast violent protests. A copy of an article in this regard is attached as annexure "TG3".
- 22.2 There were also attempts at the Portfolio Committee meeting on 23 August 2016 by the Minister and Mr Motsoeneng to justify the decision not to broadcast violent protests. A copy of an article in this regard is attached as annexure "TG4".
- 23 It therefore appears that the SABC may have only purported to "abide" by the ICASA ruling and agree to the Helen Suzman order in an effort to reduce some of the public criticism and legal pressure on it. It has taken no meaningful steps at all to accept and implement the ICASA decision.
- 24 In the event that the SABC accepts that the Protest Policy was unlawful, unconstitutional and invalid, I invite it to say so expressly in answer to this application and to indicate what steps it intends taking to communicate this to its employees.
- 25 Moreover, and most alarmingly, the culture of censorship that underlies the Protest Policy continues to persist in the manner in which the SABC management operates on a day to day basis. Examples of this include the following:
- 25.1 On 23 August 2016, when social media was abuzz with what transpired at the Portfolio Committee meeting, Ms Ditlhakanyane

instructed Ms Pillay not to broadcast any analysis of the Portfolio Committee deliberations regarding the SABC.

25.2 *The Siphho Pityana speech*

24.2.1 On the 25th of August 2016, the SABC aired the official state funeral of the late Reverend Stofile. The Live footage was aired on the SABC's 24 hour News Channel; channel 404 on the DSTV platform.

24.2.2 The former Director General of Foreign Affairs, Siphho Pityana, addressed the audience in attendance. In his address he made a scathing attack on the ANC, culminating in a call for President Jacob Zuma to step down. By 12:45 he had concluded his address. Pityana's address was, without question, the main news story from the funeral.

24.2.3 Both the 13:00 and 14:00 SABC news broadcasts covered the Stofile funeral but provided no coverage whatsoever to Pityana's address.

24.2.4 As a result of the non-coverage of Pityana's address, I addressed an email at 15:27 to Nyana Molete (Head of Television News) asking if the SABC was censoring Pityana. The email addressed to Mr Molete and Sophie Mokoena (who is the Acting Political Editor at the SABC) and is attached marked "TG4.1".

24.2.5 The news broadcast shortly before 16h00 on SABC's News Channel, was the first time that the SABC covered the remarks made by Pityana in his address. Both a presenter voice over and a soundbite of the newsworthy portions of the address were broadcast along with footage of the funeral.

24.2.6 After watching this news bulletin I went to the third floor to check the script of the full package for the Stofile funeral scheduled for the prime-time broadcast that evening. The script included the up-sounds of the most newsworthy portions of Pityana's address. However, that night, the prime-time news broadcasts did not include any coverage, or up-sounds, of Pityana's most scathing remarks about the ANC or his call for the President to step down.

24.2.7 The next morning, I confronted Lumko Jimlango (Assignments Editor) about the prime-time coverage of the Stofile funeral. He informed me that at a line meeting that morning (Sophie Mokoena, Political Editor) stated that "they" had elected to choose the "more future looking" up-sounds, which is why there had been a discrepancy between the script and actual broadcast.

25.3 *The coronation of the Venda King*

25.3.1 Mwaba Phiri, who is employed by the SABC as an executive producer and who leads the team that plans the current affairs programme called "Question Time" advised me that a studio

discussion on "Question Time" about the challenge to the coronation of the current Venda King had been arranged.

25.3.2 The King was invited to participate in the studio discussion. Masindi Mphephu, who is challenging his Kingship on the basis that she is the rightful heir to the throne, was also invited. She took up the invitation, but after initially saying that they would participate, the King's office did not respond to the invitation.

25.3.3 Just before the programme was due to start on 01 September 2016, the presenter of "Question Time" was instructed not to proceed with the interview of Ms Mphephu. Since this instruction was not communicated directly to Mr Phiri and since he was in charge of the programme, he indicated that the interview should proceed. Shortly thereafter, Mr Phiri's producer received a call from Mr Tebele and ordered her to stop the programme. Mr Phiri instructed her to proceed. She was concerned that she may lose her job, but Mr Phiri assured her that he would deal with the matter. Mr Phiri's line manager, Nyana Molete, requested Mr Phiri to join a conference call with Mr Tebele, Mr Motsoeneng and Ms Maseko. Mr Phiri joined the call and understood that they were in Mr Motsoeneng's office. Once Mr Phiri joined the call Mr Tebele instructed him to "stop the show". Mr Phiri explained that it would be unprofessional to do so, but Mr

Tebele persisted with the instruction. By the time Mr Phiri returned to the studio the programme was almost complete.

25.4 *The Editors and News Headlines*

25.4.1 In the founding affidavit to this application, at paragraphs 64.1 and 99, I made reference to the cancellation of the "Editors" show on SAfm. The Editors is a show that generally invites online and print media editors to discuss how top stories of the week were covered. Listeners can also call in and ask questions or comment on how stories were covered.

25.4.2 In addition, newspaper headlines used to be read out during morning current affairs programmes.

25.4.3 It is a universal broadcasting practice to read or cover the headlines of the major newspapers of the country or city in which the broadcaster is located. The reasons for doing so are fairly obvious:

- to cover the major stories of any given day in a short period of time;
- to provide a plurality of view-points; and

- to provide cover to stories that may lend themselves to print media, which might otherwise not receive coverage in the broadcasting sphere.

25.4.3 Late afternoon on 8 September 2016, Mr Krige received a call from his Line Manager, Angie Kapelianis, advising that Mr Tebele requested her to instruct Mr Krige to cancel the reading of newspaper headlines. Ms Kapelianis also advised Mr Krige that she requested Mr Tebele to record the instruction in writing, but his attitude was that this was communicated to the Portfolio Committee and a further written instruction was not necessary.

25.4.4 The official line of SABC management has consistently stated that the Editors and shows like it and the reading of newspaper headlines, provide free advertising for competitors (even though the SABC does not directly compete with the print media). Motsoeneng stated so at the 27th floor, Radio Park meeting referred to in the founding affidavit at paragraph 64.1 and James Aguma (Acting GCEO) reiterated this position at the Portfolio Committee meeting when he stated:

"We have heard requests to reverse the ban on reading of newspaper headlines on SABC radio and TV. Newspapers are commercial entities. They want to sit on the SABC platform and get free coverage – and we are saying we need revenue"

24.4.4 Yet, the SABC is in a partnership with the New Age, a "supposed" rival commercial entity. That partnership is in respect of business breakfasts. The existence of this partnership is evidenced by emails exchanged between Nothando Maseko (the SABC's Head of News and Current Affairs) and Phumza Macanda of the National Treasury, in which reference to such a partnership is made. The emails evidencing the existence of the partnership are attached marked "TG4.2".

24.4.5 Not only do the SABC provide advertising to New Age in this partnership but the SABC pays for the costs associated with hosting events pursuant to this partnership.

24.4.6 The position posited by the SABC management is one that is in direct conflict with their actions in respect of the New Age, particularly if one has regard to the fact that the New Age is associated with ANN7, which is a direct competitor of the SABC. The intended consequence of cancelling the Editors has nothing to do with revenue generation but to ensure that the SABC does not have to provide coverage to stories which it has not vetted and manipulated. The effect of the cancellation is to bolster its attempt to censor any news which it deems in conflict with its interests.

26 What is alarming is that these are the same sort of censorship practices which not only underlay the Protest Policy but also past practices at the SABC under current management. I refer in this regard to the founding affidavit of Vuyo Mvoko from his High Court matter, particularly paragraphs 23 – 43 thereof.

26.1 Mr Mvoko applied to the Gauteng Local Division of the High Court for relief, following the SABC's decision not to schedule his services as an individual contractor.

26.2 Paragraphs 23 to 43 of his founding affidavit set out the facts regarding the extraordinary practices engaged in by SABC management in patent breach of their constitutional and statutory duties to provide accurate and balanced news coverage to the public. I note that the key facts in relation to these practices were not in any way denied by the SABC in answer.

26.3 A copy of the founding and answering affidavits (without the annexures) before the High Court are attached as annexure "TG4.3 and TG4.4". To avoid prolixity, the annexures have been omitted, but if the above Honourable Court requires any of the annexures or the judgment of the High Court, these will be made available.

27 It is therefore apparent that the concerns of the Applicants regarding the Protest Policy and the broader culture of censorship at the SABC remain extremely acute. That culture of censorship is inconsistent with the Constitution and is a matter of grave public impact and concern, given that

the majority of South Africans rely on the SABC for their news. Yet, despite this, the National Assembly Portfolio Committee on Communications has refused, without a proper basis, to engage in a proper inquiry into the SABC which would have dealt with these issues. I deal with this in greater detail below.

DEVELOPMENTS IN RELATION TO OUR POSITION WITHIN THE SABC

28 As I have indicated, following the launch of this application, the SABC proceeded to summarily dismiss the first seven applicants.

29 These dismissals were ultimately held to be unlawful and invalid by the Labour Court.

29.1 On 26 July 2016, the Labour Court delivered a judgment regarding the dismissals of Mr Krige, Ms Venter, Ms Pillay and Mr Steenkamp. It held that they were invalid and directed reinstatement. A copy of the judgment is attached as "TG5".

29.2 On 28 July 2016, the Labour Court made a similar order regarding my dismissal and the dismissals of Ms Ntuli and Mr Calata. This was after the SABC abandoned its opposition to the order the afternoon before the hearing. A copy of the order is attached as "TG6".

30 However, while these developments are obviously welcome, our working conditions at the SABC remain intolerable and the substantive issues that underlay our complaints and then dismissals have not been resolved.

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Conflicts of interest

- 31 Far from distancing itself from the dismissal decisions, the SABC seems intent on shielding those who were involved in them.
- 32 The judgment of the Labour Court ordered the SABC's General Manager: Radio News and Current Affairs (Ms Dithlakanyane) and the Group Executive: News and Current Affairs (Mr Tebele) to file affidavits showing cause why they should not personally be held liable for the costs of the Labour Court application, instead of the SABC being held liable.
- 33 While the costs issue has not yet been adjudicated, what is clear is that the same set of attorneys is acting both for the SABC and the two employees. This is despite the fact that there is an obvious conflict of interest – if the employees are held liable, then the SABC will not be held liable.
- 34 The attorneys for the applicants in that matter highlighted that there was a conflict of interest between the SABC and the two employees on 28 July 2016. A copy of the letter in this regard is attached as annexure "TG7". Despite this, the SABC's attorneys persisted with acting for the two employees, as is evident from annexure "TG8".

Failure to resolve the underlying issues

- 35 On the day we returned to work, I, together with the SABC 4 and Ms Ntuli, met with Mannie Alho (the Human Resources Manager: SABC News), Mr

Tebele, Ms Maseko, Mr Molete and Ms Dithakanyane. A transcript of what transpired at this meeting is attached as annexure "TG9".

36 At this meeting, Ms Ntuli raised the fact that the SABC has still not responded to the concerns that were raised in the letter addressed by her, Ms Pillay and Mr Steenkamp on 26 June 2016 to the senior managers at the SABC.

37 It was indicated at this meeting that the issues raised in the letter would be discussed at a later stage. However, to date no such discussion has been scheduled by the SABC.

Continued accusations of unethical conduct and breaching confidentiality

38 During the Portfolio Committee meeting, the acting CEO of the SABC, Mr Aguma publicly implied that we acted unethically and improperly. He stated, in an apparent reference to the SABC 8:

"The media is out there saying all sorts of things... We are improving the credibility of the information - but at the same time, we are having an unethical core of people in the SABC who choose to go against the code of ethics which talks about confidentiality of information, and I'm saying... you cannot get confidential client information - if you're in the public field - information of your employer and knowingly leak it -whatever your gripes are. But that is the kind of SABC we have - and it becomes a bit difficult to manage or to come to a committee like this and explain a situation where in some instances you find that the reports that you are being questioned on are from leaked information. So we have confidentiality requirements on one hand - and this leaked information on the other one. So it becomes a challenge. But we are up to that challenge. We're gonna deal with it."

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39 Later, he expressly lumped four of the SABC 8 – presumably the four applicants represented by Solidarity – with SABC employees who had been dismissed for medical fraud:

“We are talking about four people, as the minister has alluded to, who were suspended or rather dismissed, but are now back. We dismissed 123 employees for medical aid fraud... So we are just saying that we are going to still continue with disciplinary issues in so far as staff members go against the code of the SABC. Fraud, breaching confidentiality and so on - it will continue.”

40 It is thus quite apparent that the SABC still takes the view that:

40.1 We were wrong and unethical to raise the issues that we did publicly;
and

40.2 It will not hesitate to discipline and dismiss any other employee who similarly “breaches confidentiality” – even if the issues raised are of considerable public interest.

41 Both the Minister and SABC representatives also suggested to the Portfolio Committee that four of the SABC 8 (again presumably those represented by Solidarity) were motivated by a sinister agenda and were against transformation. This is despite the obvious fact that the complaints raised have been raised by all eight of us.

Irregular monitoring and intimidatory messages

42 On 7 September 2016, Mr Steenkamp logged onto his computer. He could not log into a system called ENPS which is used, amongst others, to write and file stories. He therefore contacted IT support at the SABC. A person

from the SABC's IT Department came down and inspected Mr Steenkamp's laptop. He noticed that Mr Steenkamp was connected to the network, but he could not access certain programs. The IT person could only offer the following explanation: *"IT Security must have put something on my(Mr Steenkamp's) computer"*.

43 Ms Venter has received a series of messages plainly seeking to intimidate her:

43.1 Ms Venter received a message on her cellphone on 26 August 2016, which read as follows:

"Go and work for the Freedom Front Solidarity you already do you are poison".

43.2 Ms Venter received another message on 26 August 2016 which read as follows:

"Hi. How dos it feel to be a liar traitor of the organisation".

43.3 On 27 August 2016, Ms Venter received another message which read as follows:

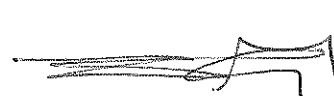
"Hello, did you sleep well?"

43.4 She responded by asking: *"Who are you?"* and the reply she received read as follows:

"not your fan I have warn you. you are a little girl you do not even know anything."

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- 43.5 She received a further message which read as follows: *"let maybe I make this you can understand. You have make mistakes, enough for that, we can get rid of you, and not to court"*.
- 44 On 5 September 2016, the Applicants' attorney sent an email to each of the Applicants requesting them to attend a meeting with them the next day at his office in Alice Lane.
- 44.1 On 5 September 2016, Mr Krige, received a message on his phone from the same number that Ms Venter was sent messages. It read as follows: *"If You Go Ahead Tomorrow It Will Be The Last Warning You And The Little Grl R Fools And Good Luck You LI Never See A Court It Will Be 2 Late, Stop Now Pass Alice Lane For You Both Safety"*.
- 44.2 (The reference to "Alice Lane" was obviously a reference to the offices of the applicants' attorneys.)
- 44.3 Shortly thereafter Mr Krige received another message, which read as follows: *"Bad Influence U Have Ruin My Comrades Lifes Fuck You"*.
- 44.4 A few minutes thereafter, Ms Venter received another message which read as follows: *"Get Out Now Little Girl Don't Go Tomorrow OK"*
- 44.5 This too appears to be a reference to the meeting at the offices of the applicants' attorneys.
- 45 While Ms Venter and Mr Krige have been unable to establish from whose number these messages were being sent and how the person discovered

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that they were due to consult regarding this matter, the inescapable inference that can be drawn from what is set out in this section of the affidavit is that our communications are being monitored and there are attempts to intimidate the Applicants not to persist with this application.

The climate at RSG

46 At the Portfolio Committee meeting, Mr Motsoeneng stated that some of the SABC radio stations had not been transformed and that they were going to zoom in and transform RSG.

47 After hearing these comments, Mr Krige requested one of the morning presenters (Anita Visser) to invite Mr Motsoeneng to a show the next morning to discuss his RSG remarks.

48 She refused to contact him and requested Mr Krige not to rock the boat further. It was clear that she was afraid and she also mentioned at one of the weekly meetings that "*it was hell to present a programme under fear*".

49 Marlinee Fouche, a freelance journalist at RSG advised Mr Krige that she was afraid of her future, by virtue of what Mr Motsoeneng said in Parliament.

Conclusion on the position within the SABC

50 It is therefore clear that although the first to seven applicants have been formally reinstated, the underlying issues that gave rise to their being disciplined have not been deepened. Despite the judgment of the Labour

Court, no space at all has been created for a meaningful debate within the SABC newsrooms regarding its policies and approach. On the contrary, the culture of fear persists. This can only be deepened and exacerbated by the fact that – even after the Labour Court judgment – the senior SABC executives have seen fit to attack us in public and insist that confidentiality would be strictly enforced, apparently irrespective of questions of public interest.

- 51 Yet, despite this, the Portfolio Committee has refused, without a proper basis, to engage in a proper inquiry into the SABC which would have dealt with these issues and created a protected and public space for us and other SABC employees to speak out. I now turn to deal with this failure.

THE FAILURE OF THE NATIONAL ASSEMBLY AND PORTFOLIO COMMITTEE TO COMPLY WITH THEIR CONSTITUTIONAL OBLIGATIONS

- 52 On 20 July 2016, the Chair of the Portfolio Committee expressed “deep concern” regarding developments at the SABC. A copy of a news article reporting this is attached as “TG10”.
- 53 It appears that the Portfolio Committee correctly took the view that a full inquiry into the SABC was necessary. On 17 August 2016, the Chair of the Portfolio Committee indicated that the Committee would table this request

~~XXXXXXXXXX~~ OR

before the House Chair, but that it would hear from the SABC before commencing such enquiry:

"We must have an inquiry, but we thought an inquiry before we're even listening to the department and SABC is premature. Be that as it may, we have tabled that to the house chair [Cedric Frolick] as one of [the steps]."

- 54 A copy of an article reporting the comments of the Chairperson is attached as "TG11".
- 55 The Portfolio Committee scheduled its initial meeting with the SABC for 23 August 2016.
- 56 Prior to this meeting taking place, I, on 17 August 2016, wrote to the Chairperson of the Portfolio Committee on behalf of the applicants. The email is attached as annexure "TG12". The email stated inter alia:

"We the SABC 8, a group of journalists whose rights to freedom of expression were violated at the South African Broadcasting Corporation, write this letter and prayer to the Communications Committee to investigate the crisis at the national broadcaster in an open hearing, granting protection to journalists in and outside the SABC who wish to testify to the various infringements of the right to freedom of expression and freedom of the press in this institution. In writing this letter we support the South African National Editor's Forum in a similar call to your honourable committee."

- 57 Despite this email, we were not invited to make a presentation to the Portfolio Committee.
- 58 I have now learnt that, on 11 August 2016, the SOS Coalition also wrote to the Chairperson of the Portfolio Committee.

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- 58.1 A copy of the SOS letter is attached as annexure "TG13". He recorded, inter alia, that there was a crisis at the SABC and that the Fifth Respondent requested an audience with the Portfolio Committee on 23 August 2016.
- 58.2 The Chairperson of the Portfolio Committee responded on 12 August 2016. A copy of his response is attached as annexure "TG14". He did not deal with the Fifth Respondent's request for an audience with the Portfolio Committee.
- 58.3 Consequently, the Fifth Respondent sent a further email to the Secretary of the Committee on the 15 August 2016, again requesting an opportunity to make oral representations to the Portfolio Committee. A copy of this email is attached as annexure "TG15". There was no response to this email.
- 59 On 23 August 2016, the Portfolio Committee meeting took place.
- 59.1 The applicants do not have access to the official transcripts of these proceedings. The quotes and summaries set out in this affidavit have been made by the applicants after listening to and watching the proceedings.
- 59.2 However, I trust that the ninth and tenth respondents will have full transcripts of what occurred during these sessions. I invite them to put those transcripts up as part of their answering affidavits.
- 60 For present purposes, I emphasise the following:

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- 60.1 The Committee allowed the Minister of Communications, Mr Motsoeneng, Mr Aguma and Mr Tshidzumba (an SABC Board Member) to address it. There was also a question and answer session thereafter.
- 60.2 No oral representations were entertained from any other party, including the SABC 8, SOS and so on.
- 60.3 Moreover, the Chairperson at no point during the meeting made reference to the letters from the SABC 8, SOS and on.
- 60.4 As I have already indicated, the Minister and SABC representatives did not accept that the Protest Policy was invalid and had to be corrected. At times, they appeared to defend it.
- 60.5 There was also no acceptance by the Minister or SABC representatives that what the SABC 8 had done was to be welcomed. On the contrary, the SABC 8 were accused of being unethical and breaching confidentiality.
- 60.6 We were also castigated by a member of the Portfolio Committee, MP Maisane Kekana who stated:

"Let me start by saying that I really appreciate the report from the Minister and the board of SABC and the management. The clarity that was given is amazing. Because South Africans were misled. Our journalists made the public to believe that there is policy changes while there is not. There was only a decision in the boardroom and they know that those decisions happen every day. Even before some of us were born. But then they went to the media, chose to be unpatriotic to their country. Telling lies. I think sometimes its through our Labour Relations laws such mishaps needs to be dealt with. Now they will tell us about the selection of

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issues, as censoring. It's bad if people who will want to capture the SABC through lies."

60.7 Neither the Chairperson of the Committee, nor the SABC representatives or the Minister sought to disagree, despite the Minister and Mr Motsoeneng addressing the Committee after these remarks were made.

60.8 Mr Motsoeneng also seemingly failed to understand the public role of the SABC and its duty to account to the public, when he stated:

"I ask myself, why do people obsess about the SABC? What is their interest? They shouldn't be. I don't need to account to them if they don't give the SABC money."

61 Ultimately, the Portfolio Committee "resolved" that there was no need for an inquiry into the SABC. A copy of the media statement published on behalf of the Portfolio Committee is attached as annexure "TG16".

62 The media statement states:

"In relation to the editorial policy regarding the showing of footage of violent protest, the Committee welcomes the assurance that there has been no shift in editorial policy at the public broadcaster. The minister assured the Committee that the decision that was made was purely an editorial decision which is part of the life of a newsroom.

Whilst the Committee accepts this explanation, the Committee cautioned the SABC against making decisions that might be interpreted as censoring of news. To this effect, the Committee welcomes the pledge by the broadcaster to abide by the Icasa (Independent Communications Authority of South Africa) ruling on the matter between the SABC and the Media Monitoring Project."

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63 The fact that the Committee “accepted this explanation” is extremely concerning.

63.1 It is clear that the Protest Policy was not merely an “*editorial decision which is part of the life of a newsroom*”. As my founding affidavit made clear, the Protest Policy was announced by Mr Motsoeneng and there was no consultation at all regarding this issue with even very senior journalists. This is despite the extraordinary nature of the Protest Policy.

63.2 Moreover, as my previous affidavits and the affidavits of Mr Mvoko and this affidavit make clear, the Protest Policy is part of a general trend towards censorship at the SABC. It cannot seriously be suggested that this is a normal “*part of life of a newsroom*”.

64 Moreover, the mere “*caution*” that the Committee offered – “*against making decisions that might be interpreted as censoring of news*” – does not constitute any effective step against what is going on at the SABC. It neither prevents nor impedes the SABC from continuing its current train of censorship.

65 The media statement records that the Portfolio Committee welcomed the pledge by the SABC to abide by the ICASA ruling. But the Portfolio Committee did not properly canvass how the SABC complied with the ruling, if at all.

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29

66 The media statement also recorded that the Portfolio Committee "*welcomes the undertaking that the matter with the seven journalists that were fired has now been finalised and closed*". To the best of my knowledge no such undertaking had been given. In any event, the Applicants cannot understand on what basis this conclusion was reached when:

66.1 We had requested an opportunity to make submissions to the Portfolio Committee and we were not given that opportunity; and

66.2 The issues that gave rise to our disciplinary proceedings have not been resolved, as this affidavit makes clear.

67 Moreover, the Committee statement inexplicably made no reference to the position of Mr Mvoko – despite the fact:

67.1 He was and is one of the SABC 8 who approached this Court;

67.2 The issues he raised and the manner in which he was treated for raising them should have raised considerable concern in the minds of the Committee; and

67.3 His position has still not been resolved.

68 The Applicants respectively submit that the Portfolio Committee could not have been satisfied that:

68.1 The matter of the Protest Policy had been resolved, when the Minister and the SABC sought to defend it before the Portfolio Committee, despite belatedly agreeing to abide by the ICASA ruling;

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- 68.2 The broader trend of censorship at the SABC had not been resolved at all; and
- 68.3 The issues with the Applicants had been resolved, when Mr Mvoko had not been reinstated and there were various attacks on the Applicants by the SABC during the course of the Portfolio Committee deliberations.
- 69 The Portfolio Committee made no attempt to hear from us whether the hostility in the workplace (as detailed in my founding affidavit before this Court) had been resolved.
- 70 The Portfolio Committee also did not apply itself to which SABC officials were responsible for the unlawful decisions to dismiss the Applicants and how this would be avoided in the future.
- 71 In these circumstances we respectfully submit that the Portfolio Committee, and the National Assembly of which it forms part, have failed to fulfil their constitutional obligations in terms of section 55 (2) of the Constitution. That section provides:

"The National Assembly must provide for mechanisms-

(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and

(b) to maintain oversight of-

(i) the exercise of national executive authority, including the implementation of legislation; and

(ii) any organ of state."

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- 72 This Court explained the role of the National Assembly in *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC). This Court held as follows at para 22:

"[T]he National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least-remembered. It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made to the populace through the State of the Nation Address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office."

- 73 The Portfolio Committee did not ensure that the SABC was accountable to it or maintain oversight on it. On these matters of critical public importance, it did precisely the opposite.

EXCLUSIVE JURISDICTION

- 74 I submit that the failure of the Portfolio Committee and National Assembly to comply with their section 55(2) obligations is a matter on which only this Court can pronounce, in terms of section 167(4)(e) of the Constitution.

- 75 In the *EFF* matter, this Court explained as follows at para 43:

"Is holding the Executive accountable a primary and undefined obligation imposed on the National Assembly? Yes! For the Constitution neither gives details on how the National Assembly is to discharge the duty to hold the Executive accountable nor are the mechanisms for doing so outlined or a hint given as to their

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nature and operation. To determine whether the National Assembly has fulfilled or breached its obligations will therefore entail a resolution of very crucial political issues. And it is an exercise that trenches sensitive areas of separation of powers. It could at times border on second-guessing the National Assembly's constitutional power or discretion. This is a powerful indication that this Court is entitled to exercise its exclusive jurisdiction in this matter. But that is not all."

76 In the circumstances, the only Court that can deal with prayers 3 and 4 of the amended Notice of Motion is this Court.

77 It is for this reason that the Applicants have now cited the Speaker of the National Assembly and the Chairperson of the Portfolio Committee as the Eighth and Ninth Respondents in this Application.

77.1 This application will be served on the Speaker and Chairperson via e-mail. This is in order to avoid the delays that would result from physical service in compliance with the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

77.2 The application will also then be served physically, as soon as the requisite permission is obtained for such service in terms of section 5(a) of that Act.

CONDONATION

78 The directions issued by the Chief Justice required the applicants to clarify the relief being sought by Friday 9 September 2016. Those directions were only received by the Applicants' attorneys on Friday, 2 September 2016.

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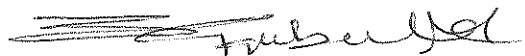
79 Unfortunately, the Applicants' lead counsel appeared in the Supreme Court of Appeal on Tuesday and Wednesday, 6 and 7 September 2016. He was accordingly not available to commence settling this affidavit until Thursday 8 September 2016, whereafter further consultations with the applicants had to be held to finalise it.

80 In the circumstances, it was not possible to file this affidavit on Friday 9 September 2016 and it is instead being filed on Tuesday 13 September 2016.

81 We respectfully submit that the slight delay in the filing of this affidavit was due to circumstances beyond our control. We apologise for the delay and, to the extent necessary, we seek condonation for the late filing of this affidavit.

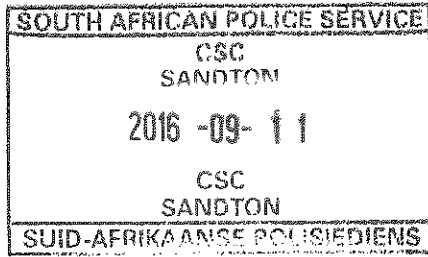
CONCLUSION


82 Wherefore the Applicants pray for the relief claimed in the amended Notice of Motion filed together with this supplementary affidavit.


 THANDEKA GQUBULE

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at sandton on this the 11 day of SEPTEMBER 2016, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August

1977, and as further amended by R1428 of 11 July 1989, having been complied with.



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