



16 February 2017

Mr Vincent Smith, MP
Chairperson
Ad Hoc Committee on the SABC Board Inquiry

Via email: cbalie@parliament.gov.za

Dear Mr Smith

SOS: SUPPORT PUBLIC BROADCASTING COALITION'S SUBMISSION ON THE SABC BOARD INQUIRY INTERIM REPORT

SOS: Support Public Broadcasting Coalition ("SOS") would like to thank the Ad Hoc Committee for this opportunity to make an input on your Interim Report and to commend the Committee for its sterling work thus far. We hope your Final Report will be a positive turning point in the fortunes of the South African Broadcasting Corporation (SABC) after years of failed leadership, mismanagement and alleged corruption.

In order to assist the Committee in expediting its work, we have made our input in the form of recommendations that may be included in your Final Report. SOS has also drafted proposed amendments to the Broadcasting Act, the Companies Act and the Constitution of the Republic of South Africa Act in order to give effect to these recommendations.

We remain available to deal with any queries you may have with regard to the SOS submission and related matters.

Yours Sincerely

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SOS: SUPPORT PUBLIC BROADCASTING COALITION

SUBMISSION ON

THE PARLIAMENTARY AD HOC COMMITTEE'S INTERIM REPORT RE: THE INQUIRY INTO THE SABC BOARD

SOS: Support Public Broadcasting Coalition has drafted recommendations to be included in the Ad Hoc Committee's Final Report on the SABC Board. We have also appended under Schedule 1 consequential amendments to the Broadcasting Act (No. 4 of 1999), the Companies Act (No. 71 of 2008) and the Constitution of the Republic of South Africa Act (No. 108 of 1996).

RECOMMENDATIONS

1. THE DISSOLUTION OF THE SABC BOARD

- 1.1 The SABC Board should be dissolved in terms of subsections 15A(1)b and 15(A)(2)(c) of the Broadcasting Act.
- 1.2 An Interim Board should urgently be appointed in terms of subsection 15A(3)(a) of the Broadcasting Act, properly taking into account the qualifications and expertise set out in section 13(4) of that Act.

2. URGENT ACTIONS BY THE INTERIM BOARD

Parliament hereby recommends that the following urgent actions must be taken by the Interim Board:

2.1 Corporate Governance and the Implementation of Remedial Actions

- 2.1.1 the implementation of the Public Protector's 2014 report "When Governance and Ethics Fail", related remedial actions and subsequent related court judgements in full;
- 2.1.2 an investigation into all irregular, fruitless and wasteful expenditure by the SABC as identified by the Auditor-General in the 2013/14, 2014/15 and 2015/16 financial years;
- 2.1.3 the implementation of recommendations of National Treasury and the 2013 report of the Special Investigation Unit (SIU);
- 2.1.4 action must be taken against all employees and/or former Board members and management who incurred or permitted irregular, fruitless and wasteful expenditure;
- 2.1.5 action must be taken to recover irregular, fruitless and wasteful expenditure in instances where it can be recovered from implicated board members, management, employees and third parties;
- 2.1.6 implement disciplinary proceedings against the Acting GCEO, Mr James Aguma for his alleged role in the significant financial losses and irregular, fruitless and wasteful expenditure incurred by the SABC in the last financial year;
- 2.1.7 demonstrable steps must be taken to ensure compliance with existing legislation including inter-alia the Public Finance Management Act and procedures and process with regard to contract management, financial management, supply chain management and human resource management;
- 2.1.8 take steps to recover costs from Mr Motsoeneng in his personal capacity specifically incurred in defence of the appointment of Mr Motsoeneng in all the related court actions;
- 2.1.9 take steps to recover all costs from Professor Maghuve in his personal capacity specifically incurred as a result of the court challenge by the previous SABC Board Chairperson against Parliament;
- 2.1.10 reconsider the SABC's participation in all litigation related to the removal of Board members, the MOI and the (re-)appointment of Mr Motsoeneng, with a view to either withdrawing from such litigation or deciding to abide by the decisions of the court where applicable;
- 2.1.11 the Company Secretary must fulfil all duties as stipulated in the relevant legislation;

- 2.1.12 reporting lines of the administrative staff of the SABC must be reviewed with the intended aim of strengthening corporative governance;
- 2.1.13 the establishment of Board sub-committees must be in compliance with the Companies Act and in keeping with relevant corporate governance codes;
- 2.1.14 the commercial and policy implications of Mr Motsoeneng's unilateral imposition of a 90% local content quota must be investigated with a particular focus on how this decision has impacted on the SABC's sustainability.

2.2 The Multichoice Agreement

2.2.1 Noting:

- 2.2.1.1 the SABC archives are a public asset;
- 2.2.1.2 that a significant section of the country's population does not have access to DSTV, and therefore cannot view the archival material aired on SABC Encore and SABC News;
- 2.2.1.3 that this is particularly problematic in light of the SABC's public mandate which seeks to ensure programming is widely available and accessible especially to previously disadvantaged and marginalized audiences and groupings;
- 2.2.1.4 that the SABC's sudden about turn with regards to set-top box encryption appears to have been the result of conditions imposed by the Multichoice agreement, giving a competitor a significant role and control over the formulation of SABC policy and strategy;
- 2.2.1.5 that the best content from the archives has already been reserved for exclusive broadcast on the Encore channel on the DSTV bouquet; and
- 2.2.1.6 that there appears to be insufficient disclosure and transparency in the manner in which the Multichoice agreement was negotiated and, furthermore, the way in which the contract was crafted appears to have serious legal implications in respect of access to public information;

2.2.2 A forensic and legal audit must be conducted in relation to the Multichoice agreement in order to establish:

2.2.2.1 whether there was compliance with the relevant provisions of the Public Finance Management Act and section 217 of the Constitution in licensing the SABC archives;

2.2.2.2 whether there was compliance with the relevant provisions of the Public Finance Management Act and section 217 of the Constitution in licensing the SABC archives;

2.2.2.3 whether there was compliance with the relevant provisions of the Competition Act, which matter is currently also being investigated by the Competition Commission. The investigation should assess whether the agreement gives rise to a notifiable merger in terms of the Competition Act;

2.2.2.4 whether the agreement contravened the provisions of section 8(j) of the Broadcasting Act (requiring the SABC to establish and maintain libraries and archives and to make these available to the public with or without charge);

2.2.2.5 whether the agreement was ever formally approved by the SABC board or whether it was concluded by Mr Motsoeneng without the requisite mandate;

2.2.2.6 whether the SABC board's decision to support encryption in the roll-out of set-top boxes was ever formally reversed by the SABC board;

2.2.2.7 and whether any person or persons associated with the SABC have enjoyed any monetary benefit from the Multichoice agreement, whether through disclosed payments of bonuses or other remuneration, or through undisclosed incentives or gratification.

2.2.2.8 why the SABC's 24-hour news channel is included as part of the SABC DTT channels but the Encore Channel is only available on the DSTV platform.

2.3 Human Resources and Procurement

2.3.1 All vacant, critical senior management positions must be filled as soon as is possible, following due process, including that of GCEO, GCOO and Company Secretary in particular;

2.3.2 The established, fair, transparent and approved commissioning procedures that were flouted and ignored by Mr Motsoeneng and others must be reinstated in consultation with the independent production industry, including the reinstatement of the request for proposals book and immediate application of the SABC's formal commissioning protocols in respect of all commissions;

2.3.3 The following alleged human resource and procurement policy breaches must be investigated:

2.3.3.1 all irregular appointments, dismissals, suspensions, golden handshakes, bonuses and commercial agreements during the time Mr Motsoeneng was GCOO and/or Acting GCOO;

2.3.3.2 in general, Investigate human resource practices at the SABC; and

2.3.3.3 new policies around the extending of contracts to freelancers.

2.4 Editorial Policies and Censorship

Affirming that the SABC, as the public broadcaster, must at all time adhere to the highest standards of journalism and editorial independence, the following recommendations must be implemented:

2.4.1 the SABC's editorial independence must be re-established in terms of a Board-approved, published plan with time frames and responsibilities;

2.4.2 all corrective actions and ICASA decisions relating to censorship and editorial policies must be complied with and proof of such compliance shall be submitted to ICASA and made publically available on the SABC's website;

2.4.3 in particular, the SABC's current Editorial Policies must be withdrawn and a new public comment and participation process must be initiated in line with the Broadcasting Act, in order to produce new, legitimate Editorial Policies: Provided that the Board shall ensure, in the formulation of the new Editorial Policies, that the South African National Editors' Forum (SANEF) and the Press Council of South Africa are properly consulted;

2.4.4 steps must be taken to ensure regulatory compliance with all ICASA's regulations and specifically with the licence conditions of each and every SABC broadcasting service; and

2.4.5 steps must be taken and made public to ensure that the SABC's audience regains confidence that the public broadcasters' public interest information, entertainment programmes and educational programs are credible and reliable.

2.5 **The SABC 8**

Noting the evidence to presented to the Ad Hoc committee's inquiry of journalists who became known as the "SABC 8" and recognizing the death threats, physical violence and systematic targeting against the SABC 8 and other SABC journalists:

- 2.5.1 steps must be taken and made public to ensure that an environment free of intimidation or abuse of power must prevail at all time at the public broadcaster and any evidence of death threats, violence and targeting must be urgently handed over to the SAPS and relevant authorities;
- 2.5.2 the irregular disciplinary processes and actions against the SABC 8 must be terminated and/or withdrawn.

2.6 **The Vision View and New Age agreements**

There must be an investigation into the Vision View and New Age agreements and in particular a focus on whether there are grounds to terminate such agreements and/or recover any funds allegedly gained by these parties through irregular and prejudicial means.

2.7 **Interim Board to Account to Parliament**

- 2.7.1 Within two months of its appointment, the Interim Board shall report to the Parliamentary Portfolio Committee on Communications in writing regarding progress on all the required actions set out in paragraphs 2.1 to 2.6 above.
- 2.7.2 Failure by the SABC Interim Board and/or successive boards thereafter to comply or commence compliance with the recommendations of this Committee may, in terms of section 15A(1)(b) of the Broadcasting Act, be regarded as a failure by the SABC Board to:
 - (i) discharge its fiduciary duties;
 - (ii) adhere to the Charter; and
 - (iii) carry out its duties as contemplated in section13(11) of that Act.

3. **Amendment of the Broadcasting Act, the Companies Act, the SABC's Memorandum of Incorporation (MOI) and the Constitution**

Overview

- 3.1 Parliament must fast track amendments to the Broadcasting Act and the Companies Act to ensure the supremacy of the Broadcasting Act over all other legislation governing the operation of the SABC.

- 3.2 The Executive and Parliament must clarify that the Broadcasting Act takes precedence over the Companies Act in relation to the appointment and dismissal of Board members and must remove any confusion with regard to overlaps between the two pieces of legislation.
- 3.3 The appointment and removal of the SABC Board or its members must be in compliance with the Broadcasting Act with involvement of Parliament.
- 3.4 The role and responsibility of the Shareholder representative need to be clarified to ensure that there is no undue encroachment into the daily operations of the SABC or undue encroachment into the responsibilities of SABC Board.
- 3.5 The MOI and the Shareholder compact must be amended and aligned with the principal legislation that governs the operations of the SABC.
- 3.6 The Shareholder's involvement must be regulated so as to ensure that there is no undue encroachment in matters normally reserved for the SABC Board.
- 3.7 The Executive and Parliament need to consider legislative amendments with regard to the management and custodianship of SABC archives and libraries which is in line with the Broadcasting Act.
- 3.8 The Portfolio Committee on Communications must ensure that the legislative framework governing the operations of the SABC is finalised urgently.

Amendments to the Broadcasting Act

- 3.9 Political interference has plagued the appointments of the Executive members of the Board of the SABC for over a decade due to a *lacuna* in the Broadcasting Act. It does not specify who is responsible for the appointment of the Executive Members of the SABC Board, namely, the GCEO, GCFO and GCOO.
- 3.10 If the Board is to bear accountability for the SABC, it must be responsible for the appointment of the senior management of the SABC. There cannot be accountability by the SABC Board if the Board is hamstrung in the appointment of the executives running the SABC. These problems will persist unless the lacuna is address urgently. *(See proposed legislative amendments under Schedule 1 below)*

Amendments to the Companies Act

- 3.11 Political interference has plagued the removal of non-executive members of the Board of the SABC in recent years due to an interpretation that the provisions of the Companies Act take precedence over the Broadcasting Act.

3.12 Given the detailed provisions of the Broadcasting Act regarding the removal of non-executive members of the SABC Board, it is imperative that these are to take precedence over the relevant provisions of the Companies Act which essentially entitle a Board to remove one of its own members. Three members of the previous SABC Board have been removed in this fashion and these removals which occur outside of the processes stipulated for Board members in the Broadcasting Act will persist in occurring unless an amendment to the Companies Act is made urgently. *(See proposed legislative amendments under Schedule 1 below)*

Constitutional Amendments

3.13 It is clear that the SABC has long suffered from an unacceptable level of political interference in its operations. The interference has undermined the Board, executive management and this has resulted in unlawful content decisions, such as ban on the broadcast of video footage of violence protests.

3.14 Chapter 9 of the Constitution should be amended to include the public broadcaster, the SABC, as a Chapter 9 body.

3.15 It is clear that the current statutory regime is insufficient to protect the interests of the South African public. Consequently the SABC should be transformed into a Chapter 9 institution as a way of protecting the public broadcaster's independence.

3.16 Chapter 9 of the Constitution provides for a number of state institutions that support constitutional democracy, including, the Public Protector and the South African Human Rights Commission. These institutions are directly answerable to Parliament and the Constitution specifically protects the appointments and removals of Chapter 9 institutions' governing bodies from political and other interference.

3.17 Being a Chapter 9 body does not insulate an institution from suffering from ineffectual leadership, institutional ineffectiveness and institutional weaknesses arising out of, for example, a flawed corporate structure.

3.18 However, the more active Parliamentary oversight role that is thrust upon Chapter 9 bodies would improve the SABC's responsiveness and accountability. ppublic.

3.19 Including the SABC as a Chapter 9 body is critical in order to:

3.19.1 transform the public broadcaster into a genuine means of empowering citizens;
and

3.19.2 ensure that the public broadcaster is committed to the broader public interest.

(See proposed Constitutional amendments under Schedule 1 below)

4. Amendments to the SABC's Memorandum of Incorporation (MOI)

- 4.1 Parliament must oversee that the Minister of Communications properly aligns the MOI to the Broadcasting Act.
- 4.2 The MOI is the SABC's key document for corporate governance and is formulated in terms of the Companies Act. It was recently amended/replaced in 2014 and certain of its provisions are extremely problematic as they are contrary to the provisions of the Broadcasting Act and even the Constitution.
- 4.3 Parliament must ensure that the following amendments are urgently implemented by the Minister of Communications to the SABC's MOI:
 - 4.3.1 Clause 5 of the MOI, which provides for the unlawful involvement of the Minister of Communications in approving rules established by the Board as contemplated in the Companies Act, is to be amended to remove any reference to the Minister of Communications.
 - 4.3.2 Clause 11.3 of the MOI is *ultra vires* the provisions of section 14(1) of the Broadcasting Act and requires to be amended to bring it into conformity with the Broadcasting Act.
 - 4.3.3 The whole of clause 13 of the MOI, which provides for the unlawful involvement of the Minister of Communications in the process of selecting the executive members of the SABC Board, setting contractual terms therefor and involvement in managing the performance thereof, is to be amended to remove any reference to the Minister of Communications.
 - 4.3.4 Clause 14.3.1.3 of the MOI, which provides for the unlawful involvement of the Minister of Communications in recommending the removal of Board members, is to be amended to remove any reference to the Minister of Communications.
 - 4.3.5 Clauses 15.1 and 15.3 of the MOI, which provides for the unlawful involvement of the Minister of Communications in approving Board meetings or calling Board meetings, respectively, are to be amended to remove any reference to the Minister of Communications.

5. Accountability, Political Interference and Parliamentary Oversight

- 5.1 Witnesses found guilty of providing misleading or false information or testimony to Parliament whilst under oath must be identified and the appropriate sanctions must be implemented.
- 5.2 The SABC is the Public Broadcaster and therefore the Board must be held accountable by Parliament notwithstanding the fact that the SABC is only partly funded from the national fiscus.
- 5.3 Parliament, in the process of exercising oversight, must insist that no information should be withheld from Parliament, including potentially commercially sensitive information.
- 5.4 The Portfolio Committee on Communications must ensure that the quarterly reporting by the SABC includes the monitoring of corrective actions with regard to corporate governance, financial management and human resource policy compliance.
- 5.5 All political interference in the SABC Board's operations must be condemned and any such interference must be attended to and exposed immediately the SABC Board and Parliament.
- 5.6 The Portfolio Committee on Communications must play a greater oversight role to ensure that there is clear separation of powers between (i) the Shareholder and SABC ensuring that the Shareholder is not involved in the day to day operations of the SABC as well as inappropriate interference with the duties of the SABC Board; and a clear separation between (ii) the Board and the operations at the SABC.
- 5.7 All potential misleading or contradictory evidence relating to SABC Board minutes, commercially sensitive documentation not provided, costs incurred by the SABC in hosting the TNA breakfast show and the appointment of a service provider/publicist for the GCEO must be further investigated by the SABC Interim Board and Parliament and sanctions must be applied where proof of perjury is proven.

SCHEDULE 1

PROPOSED IMMEDIATE AMENDMENTS TO LEGISLATION

AMENDMENTS TO THE BROADCASTING ACT

Section 13(1) of the Broadcasting Act be amended as follows: (Note, words in **bold type** in square brackets [] indicate omissions from existing provisions. Words underlined with a solid line indicate insertions in existing enactments):

“13(1). The twelve non-executive members of the Board must be appointed by the President on the Advice of the National Assembly and the three executive members of the Board must be appointed by a majority of the non-executive members of the Board.”

This amendment will require a consequential amendment to the definition of “appointing body in section 1 of the Broadcasting Act, as follows:

“Appointing body” means either of the **[body]** bodies, as the case may be, charged with the appointment of members of the Board in terms of section 13 of the this Act.”

PROPOSED AMENDMENTS TO THE COMPANIES ACT

Consequently, SOS recommends that section 5(4)(b)(i) of the Companies Act be amended by the inclusion of a new sub-section (jj) as follows: (Note, words in **bold type** in square brackets [] indicate omissions from existing provisions. Words underlined with a solid line indicate insertions in existing enactments):

- (i) Any applicable provision of the –
 - (aa) Auditing Profession Act;
 - (bb) Labour Relations Act, 1995 (Act No. 66 of 1995);
 - (cc) Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);
 - (dd) Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);
 - (ee) Public Finance Management Act, 1999 (Act No. 1 of 1999);
 - (ff) Financial Markets Act, 2012;
 - (gg) Banks Act;
 - (hh) Local Government: Municipal Finance Management Act, (Act 56 of 2003); **[or]**
 - (ii) Section 8 of the National Payment System Act, 1998 (Act No. 78 of 1998)[.] or
 - (jj) Broadcasting Act, 1999 (Act No. 4 of 1999),prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in section 49(4); or”

PROPOSED AMENDMENTS TO CHAPTER 9 OF THE CONSTITUTION

The proposed amendments to or insertions in respect of sections: 181(1), 192, 192A, 193 and 194 of the Constitution, all of which are contained within Chapter 9 of the Constitution, in the manner of a Bill, that is: Words in **bold type** in square brackets [] indicate omissions from existing provisions Words underlined with a solid line indicate insertions in existing enactments.

Proposed Amendments to Section 181(1) of the Constitution:

"Establishment and Governing Principles

181. Establishment and governing principles. - (1) The following state institutions strengthen constitutional democracy in the Republic:

- (a) The Public Protector.
- (b) The South African Human Rights Commission.
- (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
- (d) The Commission for Gender Equality.
- (e) The Auditor-General.
- (f) The Electoral Commission.
- (g) The Public Broadcaster."

Proposed Insertion of Section 192A of the Constitution:

"Public Broadcaster

192A. Public Broadcaster. – National legislation must establish an independent national public broadcaster to provide broadcasting services in the public interest and in accordance with its national public broadcasting mandate set out in such legislation."

Proposed Amendments to Section 193 of the Constitution:

"193 Appointments.-(1) The Public Protector, **[and]** the members of any Commission and the non-Executive Board members of the Public Broadcaster established by this Chapter must be women and men who-

- (a) are South African citizens;
- (b) and proper persons to hold the particular office; and
- (c) comply with any other requirements prescribed by national legislation.

(2) The need for a Commission and the Public Broadcaster established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint:

(a) the Public Protector, the Auditor-General and the members of-

(i) the South African Human Rights Commission;

(ii) the Commission for Gender Equality;

(iii) the Electoral Commission[.]; and

(b) the non-executive members of the Board of the Public Broadcaster.

(5) The National Assembly must recommend persons-

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a supporting vote -

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor- General; or

(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission or of a non-executive Board member of the Public Broadcaster.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a)."

Proposed Amendments to Section 194 of the Constitution:

"194. Removal from office.- (1) The Public Protector, the Auditor-General, **[or]** a member of a Commission or a non-executive Board member of the Public Broadcaster established by this Chapter may be removed from office only on-

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly; and

(c) the adoption by the Assembly of a resolution calling for that person's removal from office.

(2) A resolution of the National Assembly concerning the removal from office of -

(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

(b) a member of a Commission or a non-executive Board member of the Public Broadcaster must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President-

(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal."