

PUBLIC BROADCASTING IN AFRICA SERIES

SOUTH AFRICA

A SURVEY

Africa Governance Monitoring and Advocacy Project (AfriMAP)
Open Society Foundation for South Africa (OSF-SA)
Open Society Institute Media Program (OSIMP)

AN OPEN SOCIETY INSTITUTE NETWORK PUBLICATION

Copyright © 2010, Open Society Initiative for Southern Africa. All rights reserved.

No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form, or by any means, without the prior permission of the publisher.

Written by: Libby Lloyd (researcher up to June 2009), Prof Jane Duncan (researcher from September 2009), Jeanette Minnie (regional editor) and Hendrik Bussiek (editor-in-chief)

Published by:
Open Society Initiative for Southern Africa

ISBN:

For more information contact:

CONTENTS

Acronyms	v
Foreword	vii
Introduction	viii
1 Country Facts	1
1 Government	2
2 Economic and social development	6
3 Main challenges	10
4 The media landscape	16
5 Brief history of broadcasting	22
2 Media Legislation and Regulation	29
1 International, continental and regional standards	29
2 The Constitution of South Africa	33
3 General media laws and regulations	35
4 Other laws that impact on media and freedom of expression	39
5 Case law and judgements	43
6 Conclusions and recommendations	46
3 The Broadcasting Landscape	51
1 The public broadcaster	51
2 Commercial broadcasters	52
3 Limitations on media ownership	56
4 Community broadcasting	57
5 Audiences of all three sectors	60
6 Accessibility of broadcasting services	61
7 Technical standards	64
8 Conclusions and recommendations	65
4 Digital Migration	69
1 Policy	69
2 Signal distribution	73
3 Impact on broadcasters	73
4 Impact on consumers	75
5 Convergence	77
6 Competition and the broadcasting environment	79
7 Conclusions and recommendations	80
5 Broadcasting Legislation and Regulation	83
1 Legislation	83
2 The Independent Communications Authority of South Africa	87
3 Licensing of broadcasters	95

4	Complaints procedures	100
5	Conclusions and recommendations	104
6	The South African Broadcasting Corporation (SABC)	107
1	Legislation	108
2	Definition of public broadcasting	110
3	The legal status of the SABC	113
4	The Board	118
5	Profile of the SABC	128
6	Organisation	132
7	Conclusions and recommendations	138
7	Funding of the South African Broadcasting Corporation	141
1	Overview	142
2	Sources of funding	147
3	Expenditure	158
4	Conclusions and recommendations	162
8	Programming	169
1	Types of formats on SABC stations	170
2	Programming/editorial policies and guidelines of the SABC	173
3	Types of programmes on other broadcasters	177
4	Analysis of programmes	180
5	Audience research	184
6	Feedback and complaints procedures	186
7	Conclusions and recommendations	187
9	Perceptions of and Expectations towards the SABC	191
1	Political parties	191
2	Civil society	193
3	Employees of the SABC	197
4	Conclusions and recommendations	198
10	Broadcasting Reform Efforts	201
1	Previous and current broadcasting reform efforts	201
2	Public Services Broadcasting Bill	205
3	Future of public broadcasting	210
4	Conclusions and recommendations	212
11	Overall Conclusions and Recommendations	215

Acronyms

ACDP	African Christian Democratic Party
ACHPR	African Commission on Human and Peoples' Rights
AMPS	All Media Products Survey
ANC	African National Congress
APRM	African Peer Review Mechanism
ASA	Advertising Standards Authority
AU	African Union
AZAPO	Azanian People's Organisation
BBC	British Broadcasting Corporation
BCCSA	Broadcasting Complaints Commission of South Africa
BEE	Black Economic Empowerment
BEMAWU	Broadcasting and Electronic Media Allied Workers Union
CCC	Complaints and Compliance Committee
CIB	Campaign for Independent Broadcasting
COPE	Congress of the People
COSATU	Congress of South African Trade Unions
CWU	Communications Workers Union
CWUSA	Creative Workers Union of South Africa
DA	Democratic Alliance
DFA	Documentary Filmmakers Association
DSTV	Digital Satellite Television
DTT	Digital Terrestrial Television
DMWG	Digital Migration Working Group
EC Act	Electronic Communications Act
ECNS	Electronic Communications Network Operators
FEDUSA	Federation of Unions of South Africa
FXI	Freedom of Expression Institute
GEAR	Growth, Employment and Redistribution Strategy
HSRC	Human Sciences Research Council
IBA	Independent Broadcasting Authority
ICASA	Independent Communications Authority of South Africa
ID	Independent Democrats
IDASA	Institute for Democracy in South Africa
IEC	Independent Electoral Commission
IFP	Inkatha Freedom Party
IPO	Independent Producers Organisation
IPTV	Internet Protocol Television Service
ITU	International Telecommunications Union
LSM	Living Standards Measurement
MISA	Media Institute of Southern Africa
MMA	Media Monitoring Africa
MDDA	Media Development and Diversity Agency
NAB	National Association of Broadcasters of South Africa
NCOP	National Council of Provinces
NCRF	National Community Radio Forum

NDPP	National Directorate of Public Prosecutions
NUMSA	National Union of Metalworkers of South Africa
OAU	Organisation of African Unity
ODAC	Open Democracy Advice Centre
OSF-SA	Open Society Foundation for South Africa
PAIA	Promotion of Access to Information Act
PFMA	Public Finance Management Act
RDP	Reconstruction and Development Programme
SAARF	South African Advertising Research Foundation
SABC	South African Broadcasting Corporation
SACP	South African Communist Party
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SANEF	South African National Editors Forum
SAPA	South African Press Agency
SARS	South African Revenue Service
SASFED	South African Screen Federation
SATRA	South African Telecommunications Regulatory Authority
SOS	Save the SABC Coalition
Stats SA	Statistics South Africa
STB	Set Top Box
TVIEC	Television Industry Emergency Coalition
UNESCO	United Nations Educational, Scientific and Cultural Organisation
USAASA	Universal Service and Access Agency of South Africa
USAF	Universal Service and Access Fund
WGSA	Writers Guild of South Africa

Foreword

This report is the result of research that started in 2008 with the aim of collecting, collating and writing up information about regulation, ownership, access, performance as well as prospects for public broadcast reform in Africa. The South Africa report is part of an eleven-country survey of African broadcast media. The main reason for conducting the research is to contribute to Africa's democratic consolidation.

Many African countries have made significant gains in building democratic systems of governance that are based on popular control of decision making and in which citizens are treated as equals. Availability and access to information by a greater number of citizens is a critical part of a functioning democracy and a country's development. The role of a public broadcaster as a vehicle through which objective information and diverse perspectives are transmitted into the public domain cannot be overstated.

A number of countries are currently undertaking public broadcast media reforms that aim to improve service delivery and accountability to citizens. Such reforms draw from evolving African and global standards regarding media and broadcast media in particular. The survey instrument that was developed in consultation with African media experts and others from other parts of the world is largely based on agreements, conventions, charters and declarations regarding media that have been developed at regional and continental levels in Africa.

The survey of broadcast media in Africa was initiated by two projects of the Open Society Institute (OSI), the Africa Governance Monitoring and Advocacy Project (AfriMAP) and the Open Society Institute Media Program, working with the African members of the Soros foundation network – in South Africa, the Open Society Foundation for South Africa. The bulk of the report was researched and written by Libby Lloyd, a media and broadcasting consultant based in Johannesburg. When she was appointed as a member of an interim board of the South African Broadcasting Corporation in July 2009 she handed over to Jane Duncan, professor of Media and Information Society at Rhodes University Grahamstown, South Africa, in order to avoid any conflict of interest, actual or perceived. The report was co-edited by Jeanette Minnie, an international freedom of expression and media consultant, and the editor-in-chief of the project, Hendrik Bussiek, a media consultant with extensive broadcasting experience in Africa and globally.

It is our hope that the research will clear some of the misconceptions about public broadcasters. In its simplest definition a “public broadcasting service” is a broadcaster that serves the public as a whole and is accountable to the public as a whole. Yet in most instances what is referred to as a public broadcaster is in fact a state broadcaster: this research aims to help the process of aiding the transformation of Africa's public broadcasters into media worthy of the name.

Ozias Tungwarara
Director, AfriMAP

Introduction

The survey on public broadcasting in Africa starts from the premise that development and democracy cannot thrive without open and free public space where all issues concerning people's lives can be aired and debated and which gives them room and opportunity to participate in decision making. Nobel Prize laureate Amartya Sen describes democracy as "governance by dialogue" and broadcasters are ideally placed to facilitate this dialogue by providing the space for it – if their services are accessible, independent, credible and open to the full spectrum of diverse views.

Following from this premise, the key objective of the survey is to assess whether and to what extent the various forms of broadcasting on our continent can and do create such a free public space, with special attention given to those services which call themselves 'public'. A total of eleven country reports look closely at the current status of broadcasting in Benin, Cameroon, Kenya, Mali, Mozambique, Namibia, Nigeria, South Africa, Uganda, Zambia, and Zimbabwe.

While this survey may be unprecedented in its scope and depth, it does feed into ongoing discussions among broadcasters, civil society and politicians in Africa on the nature and mandate of genuine public broadcasting. Reform efforts are under way in a number of countries. And at least on paper there is already broad consensus on the need to open up the airwaves to commercial and community broadcasters and for state broadcasters to be transformed into truly public broadcasting services. The Declaration of Principles on Freedom of Expression in Africa adopted by the African Union's Commission on Human and Peoples' Rights in 2002, for example, says "a State monopoly over broadcasting is not compatible with the right to freedom of expression" and demands that "State and government controlled broadcasters should be transformed into public service broadcasters accountable to the public". This document and other regional policy declarations serve as major benchmarks.

In particular, these African documents inform the vision and mandate of public broadcasting as understood in this study.¹ This vision can be summarised as follows:

- to serve the overall public interest and be accountable to all strata of society as represented by an independent board
- to ensure full respect for freedom of expression, promote the free flow of information and ideas, assist people to make informed decisions and facilitate and strengthen democracy.

¹ Apart from the African Commission's Declaration of Principles on Freedom of Expression, these are the African Charter on Broadcasting 2001 as well as two policy papers by the Southern African Broadcasting Association, "On The Move" (1995) and the 2007 draft "Now is the Time", in which state/public broadcasters in Southern Africa commit themselves to the aim of public broadcasting.

The public broadcasters' mandate is

- to provide access to a wide range of information and ideas from the various sectors of society
- to report on news and current affairs in a way which is not influenced by political, commercial or other special interests and therefore comprehensive, fair and balanced (editorial independence)
- to contribute to economic, social and cultural development in Africa by providing a credible forum for democratic debate on how to meet common challenges
- to hold those in power in every sector of society accountable
- to empower and inspire citizens, especially the poor and marginalised, in their quest to improve the quality of their lives
- to provide credible and varied programming for all interests, those of the general public as well as minority audiences, irrespective of religious beliefs, political persuasion, culture, race and gender
- to reflect, as comprehensively as possible, the range of opinions on matters of public interest and of social, political, philosophical, religious, scientific and artistic trends
- to promote the principles of free speech and expression as well as of free access to communication by enabling all citizens, regardless of their social status, to communicate freely on the airwaves
- to promote and develop local content, for example through adherence to minimum quotas
- to provide universal access to their services, with their signal seeking to reach all corners of the country.

Other broadcasting services can – in one way or the other – also fulfill aspects of this mandate, and the survey, therefore, looks at them as well in order to assess their contribution to the creation of a public space.

The facts, figures and informed assessments presented in the survey will, it is hoped, provide a nuanced picture of where broadcasting in Africa at present stands between “His Master’s Voice” of old and the envisaged public broadcasting service of the future. This information should provide a sound basis for advocacy work, both among decision makers and civil society as a whole.

In the case of South Africa the findings and recommendations of the country report come at a particularly timely juncture. Over the past few years the South African Broadcasting Corporation has been experiencing a number of crises due to various causes and explored more fully in this report. These developments (while, obviously, not making the work of our researchers any easier) have served to open up the debate on the public broadcaster generally and created the chance for a thorough review of the entire public broadcasting legislation as well as the organisational structures of the SABC. Civil society organisations, in particular the broad-based Save Our SABC (SOS) Coalition (now renamed SOS: Supporting Public Broadcasting) have taken up the challenge and started developing concrete policy papers for broadcasting reform from 2008. In October 2009 the Department of Communications, for its part, gazetted a controversial Public Broadcasting Services Bill. If passed into law, this would fundamentally change the legal and regulatory environment for broadcasting in the country and, critics argue, allow government to exert more rather than less control over the sector.

In order to contribute to the current debate on broadcasting in South Africa, the research and editing team have made their findings, conclusions and recommendations successively available to the SOS Coalition. In January 2010 the report was included in the coalition’s submission on the proposed bill to the Department of Communications. Thus, many of the research results in this report have already informed the public discourse.

The report starts out with a comprehensive audit of existing media laws and legislation with an impact on freedom of expression and a critical in-depth assessment of broadcasting legislation and regulation. This is followed by a detailed study of the SABC – its organisation, its finances, its policies, the content it offers.

The report was completed in March 2010. Researchers and editors would like to express their gratitude to all those who contributed by sharing their information and insights and providing valuable feedback and constructive criticism.

Hendrik Bussiek

Country Facts

South Africa is a multi-party constitutional democracy.

The first democratic elections were held in April 1994 – ending centuries of colonialism and decades of apartheid rule where only white people were entitled to vote or have meaningful access to social and economic rights. Under apartheid, all aspects of society were segregated along racial lines – including neighbourhoods, schools, and sports. Whilst the ruling National Party euphemistically dubbed this racist system ‘separate development’, in reality it involved the empowerment of only the white community and the systematic exploitation and underdevelopment of the black majority.

The policies of separation extended not only to the black and white population. The Indian community and people of mixed race (dubbed ‘coloureds’) were also segregated and forced to, for example, live in separate areas and attend racially defined schools.

Divisions among all these groups were enforced by repression and the denial of human rights. Significant segments of the privately-owned media as well as state monopolisation of the airwaves and a powerful state-controlled national broadcaster played a key role in affirming and upholding continued white minority rule.

The 1994 elections marked the end of apartheid following a negotiated settlement. The new government was tasked with creating a democratic society based on equality, non-racism and non-sexism – in line with an interim Constitution. The final Constitution of the Republic of South Africa was adopted two years later in 1996. It states in its founding provisions (Chapter 1: Section 1):

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b. Non-racialism and non-sexism.
- c. Supremacy of the constitution and the rule of law.

- d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Given the country's history of apartheid, the Constitution, policies and laws of South Africa recognise not only the need for equality between all citizens, but also the necessity of redressing injustices and imbalances resulting from the past. The Constitution states in its Preamble that it aims to:

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which ... every citizen is equally protected by law;
- Improve the quality of life of all citizens ...; and
- Build a united and democratic South Africa ...

Chapter Two of the Constitution sets out the Bill of Rights and includes protection of freedom of religion, belief and opinion (section 15), freedom of expression - including freedom of the press and other media (section 16) and access to information (section 32).

1. Government

Government consists of national, provincial and local spheres and the responsibilities of each layer of government are outlined in the Constitution.² Executive power at the national level rests with the President and the cabinet, legislative power with Parliament, and judicial authority is vested in the courts.

The President of the country is elected by Parliament.³ The Constitution stipulates that National Assembly elections are held every five years⁴ and states that no President may serve more than two terms.⁵ South Africa's electoral system is governed by the 1998 Electoral Act (No 73 of 1998).

1.1 National government

The Constitution is the supreme law of South Africa⁶ and is interpreted by a Constitutional Court. Power at national level is shared between the President and Parliament. National legislative authority lies with Parliament, whilst the President (as the head of State) has executive authority (together with other members of the cabinet).⁷

In practice this means that bills are drafted and adopted by Parliament and submitted to the President for assent. The President may only send a bill back to Parliament if s/he is

² Schedule 4 of the Constitution lays out areas of concurrent national and provincial legislative competence, Schedule 5 outlines the areas of exclusive provincial legislative competence and Chapter 7 details the status and objects of local government or municipalities.

³ Section 86 of the Constitution

⁴ Section 49 of the Constitution

⁵ Section 88 of the Constitution

⁶ The Constitution of the Republic of South Africa: Chapter 1 (Founding Provisions), Section 2 (Supremacy of Constitution)

⁷ Sections 43 and 85 of the Constitution

concerned that it may breach the Constitution.⁸ The President together with the Executive (Cabinet) is responsible for implementing legislation and developing policy.

Parliament consists of two houses: the National Assembly and the National Council of Provinces. The Assembly is elected by a system of proportional representation (PR) and consists of 400 members (the Constitution allows for a range of between 350 and 400 members⁹). Seats in the National Assembly are allocated according to the percentage of votes each party receives.

In the PR system, voters do not elect members of parliament from a range of candidates contesting individual wards (as in the constituency-based First Past the Post [FPTP] electoral system). Each party determines its candidates for parliamentary seats according to publicly advertised lists in which they rank selected members in order of precedence. Lists are produced for both National Assembly and Provincial Assembly elections, which take place concurrently. Local Government elections, however, are held separately and make use of a hybrid system that combines the FPTP and PR system.

The strength of the PR electoral system – and the main reason for its adoption in newly democratic South Africa - is that it provides inclusion and representation of almost all political parties in Parliament - fairly based on the number of votes they received in a general election. The weakness of the PR system is that MP's are accountable only to the political parties that included them on their lists, and not to a clearly defined block of voters in any geographical ward or district of the country.

South Africa is defined in terms of the Constitution as a multi-party democracy, but the ruling party traditionally has a huge majority in Parliament. In the most recent elections (2009), the African National Congress (ANC) won 264 seats, down from 279 in 2004, and the official opposition (the Democratic Alliance - DA) 67 seats, up from 50 in 2004. A range of other parties hold the remaining 69 seats.¹⁰ The National Council of Provinces (NCOP) consists of 90 members – ten from each of the nine provinces again selected according to their party's representation in provincial legislatures. The NCOP must approve legislation that involves shared national and provincial competencies.

Section 59 of the Constitution provides for public access to Parliament. It states that:

The National Assembly must –

- a) Facilitate public involvement in the legislative and other processes of the (National) Assembly ...
- b) Conduct its business in an open manner and hold its sittings ... in public ...
- c) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

1.2 Provincial and local government

There are nine provinces in South Africa – and each has its own legislature of 30 to 80 members. Provinces share legislative and executive powers with the national government in areas such as primary and secondary education, health, housing, welfare and language

⁸ Section 79(1) of the Constitution

⁹ Section 46 of the Constitution

¹⁰ J. Daniel and R. Southall, 'The outcome', in: J. Daniel and R. Southall, *Zunami! The 2009 South African elections*. Jacana Media and Konrad Adenauer Foundation: Johannesburg 2009. p. 265.

policy. They have exclusive competency over such issues as ambulance services, provincial museums and provincial cultural matters.¹¹

Local government bodies or municipalities are primarily tasked with service delivery and are responsible for providing infrastructure. There are 283 municipalities in South Africa.¹²

1.3 The judiciary

The third arm of the national government is the judiciary. The Constitution states that the courts are “independent and subject only to the Constitution and the law” (Section 165(2)). The Bill of Rights outlines in Section 35 (3) that every accused person has a right to a fair trial.

The Constitutional Court is the highest court dealing with constitutional matters.¹³ In matters not related to constitutional rights, the Supreme Court of Appeal is the final authority.

1.4 Independent bodies supporting democracy

The Constitution also establishes a range of state institutions to “strengthen constitutional democracy”. Often dubbed the Chapter Nine Institutions (in line with their placing in the Constitution), these include:

- the Human Rights Commission: established to investigate violations and report regularly on the observance of human rights,
- the Public Protector: set up to oversee conduct in government,
- the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,
- the Commission for Gender Equality: to “monitor, investigate, research, educate ... and advise on issues concerning gender equality” (Section 187 (2) of the Constitution)
- the Auditor General,
- the Electoral Commission, and
- an independent authority to regulate broadcasting in the public interest¹⁴.

In terms of the Constitution, all these institutions are independent and subject only to the Constitution and the law. They must report to the National Assembly and not to a specific government department.¹⁵

¹¹ Schedules 4 and 5 of the Constitution

¹² *Pocket Guide to South Africa 2008/9*, published by Graphicor on behalf of the Government Communication and Information System (GCIS), p. 34 (hereinafter ‘*Pocket Guide to South Africa*’), (hereinafter ‘*Pocket Guide to South Africa*’), p. 38

¹³ The Constitution, Section 167 (3). Note that although the Constitution confines the Constitutional Court to only deciding on constitutional matters, the African National Congress at its December 2007 policy conference has called for an inquiry into the need to give the Constitutional Court final authority over all judicial matters.

¹⁴ Note that whilst Section 192 of the Constitution specifically includes a “broadcasting authority” as one of the independent institutions to support constitutional democracy, the regulator is not mentioned in Section 181 which lists the state institutions established in terms of the Constitution. Whilst legal experts have suggested this is an oversight, some public officials (including the former Director General of the Department of Communications) have tried to argue that this means that the broadcast regulator does not have the same independence as other institutions (see ‘Word Games’ by Duncan McLeod, published in the Financial Mail on 19 May 2006, <http://www.hellkom.co.za/articles/view.php?id=564>).

Parliament in 2007 appointed an ad hoc committee, chaired by then Member of Parliament Kader Asmal, to review the performance of these constitutional institutions. The Parliamentary Ad Hoc Committee to Review Chapter Nine Institutions recommended that the budget allocation process, appointment procedures and oversight provisions for these institutions be standardised to reinforce their independence as the Committee found that in practice mechanisms for independence differed across the different institutions.¹⁶

It further proposed that those institutions dealing specifically with human rights issues be merged into one human rights body in order to increase their overall effectiveness and efficiency. The recommendation suggests that an overarching South African Commission on Human Rights and Equality be established incorporating the Human Rights Commission, the Commission for Gender Equality, the National Youth Commission, the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities and the Pan South African Language Board.¹⁷

1.5 The balance of power

Political realities on the ground as they have developed over the first decade and a half of democracy do not necessarily always fully reflect the spirit of constitutional provisions. South Africa is indeed a multi-party democracy, but the huge majority enjoyed by the ruling party relegates smaller parties to the position of minor players.

The enduring allegiance of a large majority of the population to the ANC as the party of liberation makes it almost impossible for opposition parties like the DA – perceived as historically ‘white’ - to make any meaningful inroads into that pool of voters. A significant development in the run-up to the 2009 elections, therefore, was the emergence of the Congress of the People (COPE), formed by disaffected members of the ANC. Contrary to initial projections, however, the new party failed to attract a significant portion of voters away from the ANC. It seems that those unsatisfied with the performance of the ruling party will still not readily opt for any alternative. As a result one of the important features in a democratic multi-party system – fear of electoral defeat – is largely absent.

Under the leadership of former President Thabo Mbeki many powers and functions were centralised in the Presidency – of both party and state. This has led to some blurring of the lines between the two and to the provincial and local tier of government playing minor roles, with people being ‘deployed’ to various positions at the behest of the top leadership rather than elected or chosen by provincial or local structures. In addition, the ANC-dominated Parliament exercised its oversight role over the executive in a rather timid manner. The new President, Jacob Zuma, has called on Parliament to strengthen its oversight role and instructed Directors General to take their accountability to Parliament seriously.¹⁸ It remains to be seen whether Parliament will indeed become more assertive in the future.

¹⁵ Section 181 of the Constitution

¹⁶ Page 12, Parliament of the Republic of South Africa, Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions: A Report to the National Assembly of the Parliament of South Africa, 31 July 2007, hereinafter ‘Report of the Ad Hoc Committee on Chapter 9 Institutions’.

¹⁷ Ibid.

¹⁸ A. Butler, ‘Renewal or a ghostly wind blowing through Parliament?’. *Business Day*. 14 September 2009

2. Economic and social development

When the ANC came into power in 1994, decades of macroeconomic and fiscal mismanagement by the apartheid regime had left the country's economy in tatters – the state coffers depleted, severe balance of payments constraints, high inflation and interest rates, a vulnerable exchange rate, and unsustainable government budget deficits.

According to government, it became clear that the ruling party's Reconstruction and Development Programme (RDP) intending to improve living standards, in particular among the historically disadvantaged, would not be feasible without first putting the economy on a sound footing.

In June 1996, a new macroeconomic policy was unveiled - the Growth, Employment and Redistribution Strategy (known as GEAR) aimed at restoring and stabilising the economy and building credibility. The strategy relied on the market rather than the state as the major driver of economic growth and employment, with the "trickle down" effect from improved overall economic performance expected to benefit and uplift the poor. From its inception this approach faced major opposition from labour organisations and left wing structures (the ANC alliance partners Congress of South African Trade Unions (COSATU) and the South African Communist Party [SACP]) who decried what they perceived as its lack of a 'pro-poor bias' and failure to create jobs. As then head of policy coordination in the Presidency, Joel Netshitenzhe noted self-critically in 2007: "Unfortunately, GEAR was communicated as an over-arching economic growth strategy ...; whereas it was a necessary and self-imposed structural adjustment programme ..."¹⁹

Since 2004 (dubbed the post-Gear period), government has embarked on a number of other strategies to speed up growth and the absorption of the unemployed into the labour market, among them extensive public works programmes, a focus on the promotion of small businesses and individual entrepreneurship as well as an initiative for accelerated and shared growth (AsgiSA). There has also been increasing reference lately to a 'developmental state', responsible for correcting market failures and making strategic interventions in the economy. South Africa has been heavily affected by the recession which gripped the global economy from 2008 onwards, and attempts to lessen its negative effects include more interest rate cuts, as well as scaled-up infrastructure investment and expanded public works programmes.²⁰

2.1 Population data

The official statistics organisation, Statistics South Africa (Stats SA) estimates the population at 47.9m as of mid-2007 (this is based on projections from a 2001 census).²¹ As can be seen from the table below, Africans are in the majority (nearly 38.1 million) and constitute close to 80 percent of the total South African population.

¹⁹ Opening Address by Joel Netshitenzhe, Head of the Policy Co-ordination and Advisory Services in The Presidency at the International Conference: Living on the Margins, 26 March 2007, <http://www.thepresidency.gov.za/main.asp?include=hpcas/sp/2007/sp0326140.htm> accessed January 2008

²⁰ H. Marais, 'The impact of the global recession on South Africa'. Offnews.info. Accessed on 18 September 2009 from <http://www.offnews.info/verArticulo.php?contenidoID=16198>.

²¹ <http://www.statssa.gov.za/publications/statskeyfindings.asp?PPN=P0302&SCH=3952> accessed on 14 January 2008

Table 1: Mid Year 2009 population breakdown

Population Group	Number	Percentage
African	39 136 200	79.3
Coloured	4 433 100	9.0
Indian/Asian	1 279 100	2.6
White	4 472 100	9.1
Total	47 850 700	100

Source: Statistics South Africa²²

The mid-year projections further state:

- Fifty-two per cent (approximately 25.45 million) of the population is female.
- Approximately one third of the population (31.4 per cent) is aged 0-14 years and approximately 7.5 per cent of the population is 60 years and older.
- Of the nine provinces, Gauteng, the industrial heartland, now has the largest percentage of the population (21.4 percent), closely followed by KwaZulu-Natal (21.2 percent). Life expectancy has improved recently, and is now 53,5 years for males and 57,2 years for females, compared to 49 years for males and 52 years for females in 2007.
- Estimated HIV prevalence is 10.6 percent (approximately 5.21 million people). The infant mortality rate is 45.2 per 1 000 live births²³

2.2 Languages

South Africa has 11 official languages: English, Afrikaans, isiZulu, isiXhosa, Sesotho, Sesotho sa Leboa, Setswana, Tshivenda, Xitsonga, isiNdebele, and siSwati. According to the 2001 census, the most spoken language is isiZulu (23.8 per cent defined their home language as isiZulu), followed by isiXhosa, Afrikaans and then English (8.2 per cent of the population are English home language speakers).²⁴ These facts notwithstanding, English is the primary language of business, of tuition, court proceedings, academia and the vast majority of print media, and is used by government for internal communication.²⁵

2.3 Religion

The official Pocket Guide to South Africa (2008/09) published by government, states that almost 80 per cent of South Africa's population is Christian, whilst 15.1 per cent described themselves as having 'no religious affiliation' during the 2001 census.²⁶ Other religions include Islam (1.5 per cent of the population), Hinduism (1.2 per cent), and Judaism (0.2 per cent).

2.4 Education

Education was directly and devastatingly affected by apartheid, which enforced a racially divided school system. White schools were far better resourced than those for black South Africans. According to the previous Minister of Education, Naledi Pandor, in 1994, at the start

²² Statistics South Africa, Statistical Release PO302, Mid-year Population Estimates 2009, 27 July 2009 (<http://www.statssa.gov.za/publications/P0302/P03022009.pdf>), accessed 18 September 2009.

²³ See note 18 above

²⁴ See note 18 above

²⁵ *Pocket Guide to South Africa*, p. 27

²⁶ *Pocket Guide to South Africa*, p. 30

of democratic governance in the country, the state had been spending five times more on a white than a black pupil. In a speech in April 2008, she pointed out that, whilst fourteen years later there was equal spending per child, “equity has proven very elusive as the backlogs in disadvantaged communities have been so severe that it will take many decades to close the gaps”.²⁷

Access to education has improved since the advent of democracy and 84 per cent of the adult population (16 years and over) has had some primary school education (compared to 70 per cent in 1996). Legislation makes it compulsory for children to attend school up to the age of 14. This has resulted in increased enrolment in primary schools. According to the Development Indicator report released by the Presidency, it stood at 97.85 percent in 2009²⁸ and there is now parity between enrolment of girls and boys.

The percentage of the population with no education has dropped accordingly – from 12 per cent in 1996 to 5 per cent in 2007. However, whilst the number of people who have completed school has increased, the figures show that 63 per cent of the population do not have matric (successful completion of grade 12).

2.5 Literacy

According to the All Media Products Survey (AMPS) 2007B results²⁹, 88 per cent of South Africans (aged 16 and over) are functionally literate (defined as having completed at least grade 7). Functional literacy rates have grown with increased school enrolment from 71 per cent in 1996.³⁰

Government statistics figures for non-literacy are higher as they are calculated on figures of those aged 20 and up (rather than 16) – thus excluding more people in the younger age bracket who have benefited from enforced school enrolment. According to the 2008 Development Indicators report, 25 per cent of the adult population was not functionally literate in 2006.

2.6 Living standards

AMPS statistics indicate that the average household income has more than doubled since 1994 (from just under R2 500 in 1994 to just over R5 800 in 2007). This is supported by statistics for real GDP per capita, which has grown continuously since 2000 and risen annually between 3 per cent and 4 per cent since 2004. (South African Presidency 2009 Development Indicators³¹)

GDP per capita however is a crude tool – and does not measure disparities. Government’s 2008 report on development indicators emphasises that, whilst the economy has grown,

²⁷ Remarks at the opening of the Second International Symposium on Education, Equality, and Social Justice in Brazil, India, South Africa and the UK, Brasilia, 22 April 2008, accessed in July 2008 from <http://www.education.gov.za/dynamic/dynamic.aspx?pageid=306&id=7752>

²⁸ Republic of South Africa, the Presidency, ‘*Development Indicators 2009*’, 25 September 2009, accessed from <http://www.thepresidency.gov.za/learning/me/indicators/2009/indicators.pdf>

²⁹ These statistics are not included in AMPS 2009A, as there have been changes made to this survey that have resulted in print and household data no longer being trendable with previous years. Hence some of the figures in this chapter are from 2008B.

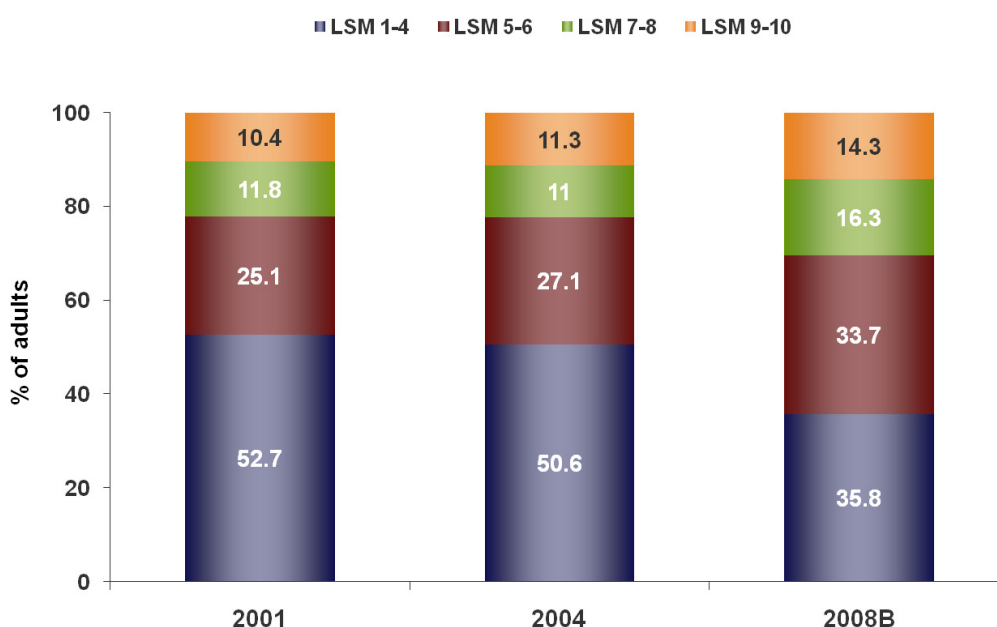
³⁰ South African Advertising Research Foundation (SAARF) - All Media Products Survey (AMPS) 2007B, accessed from <http://www.saarf.co.za> in July 2008

³¹ Republic of South Africa, the Presidency, ‘*Development Indicators 2009*’, 25 September 2009, accessed from <http://www.thepresidency.gov.za/learning/me/indicators/2009/indicators.pdf> hereinafter referred to as ‘*Development Indicators 2009*’

income inequality has also widened as measured by an increase in the Gini Coefficient from 0.64 in 1995 to 0.666 in 2008.³² The report notes that whilst income for all groups has improved, it has increased at a faster rate for the richest segment of society.

SAARF provides a useful categorisation of living standards – the Living Standards Measurement (LSM). A range of variables are considered (including income, assets and access to services) to determine different categories of living standards – with LSM 1 representing those with the lowest and LSM 10 those with the highest standards of living. Figure 2 shows that, although the number of poor people has declined significantly since 2001, in 2008, 35.8 per cent of adult South Africans were located within the LSM 1-4 bands.

Figure 1: SAARF LSM's: 2001 – 2008B profile



Source: SAARF AMPS 2008B

This is matched by statistics on the percentage of the population living on the international poverty standard (or below) of less than a dollar a day. According to the Presidency's Development Indicators report, whilst in 1994 31 per cent of the population lived on less than R250 a month (equating to less than 1\$ a day), the figure went down to 23 per cent in 2005 – in part due to an increase in spending on social grants. The number of people receiving such grants (pensioners, children under 15 years of age via caregivers, the disabled etc) has risen from 2.4 million in 1996 to 12.4 million at the beginning of 2008.³³ Poverty is significantly more wide-spread in rural provinces than those where large cities are located and is still racially determined. According to SAARF's 2008B AMPS figures, whilst 35.9 percent of black African people are in LSMs 1-3, only 3.1 per cent of the white, Indian and coloured populations fall within these lowest living standard categories.³⁴

³² *Development Indicators 2009*

³³ *Development Indicators 2008*

³⁴ SAARF AMPS 2008 B, accessed from <http://www.saarf.co.za> in September 2009

Access to electricity in the home has, according to these statistics, increased significantly. Whilst just under 65 per cent of adults had electricity in their home in 1996, 88.6 per cent of the population now have access.

Both economic growth and the expansion of the electricity network have put enormous pressure on the supply of power. According to the electricity utility, Eskom, demand way exceeds capacity and in the first half of 2008 this resulted in extensive power outages on a national scale. Eskom predicts that the power shortage will only be resolved by 2013.

3. Main challenges

As is evident from the statistical information in the previous section, in its second decade of democracy, South Africa is still haunted by the stark inequalities created by apartheid and, whilst much has been achieved, a great deal more needs to be done in order to address continuing dire poverty, enhance transformation of the society and the economy and ensure meaningful equity for all South Africans. At the same time, the prevalence of HIV/AIDS with its high toll on life and productivity, the slowing down of economic growth in line with global trends and the concomitant rising costs of living threaten to undermine the gains that have been made.

Due to the huge inequalities in incomes and living standards and the dramatic decline in life expectancy over the last decade caused by HIV/AIDS South Africa now ranks 125th in terms of human development out of 177 countries (based on 2006 data) according to the United Nations Human Development Index (HDI). This is well below countries with similar GDP per capita levels such as Mauritius (ranks 74 overall), Chile (40) and Malaysia (63).

An abbreviated list of challenges facing any country inevitably glosses over any inherent subtleties of such issues – and the intricacies involved in addressing them. In addition key challenges in any country cannot be viewed in isolation but are interlinked. The following list should be viewed with these disclaimers in mind.

Key challenges facing South Africa include (in no particular order of priority):

- **Inequality**

Nobel Peace Prize winner and Archbishop Emeritus Desmond Tutu has described inequality in South Africa as “a powder keg” waiting to explode.³⁵

The Mbeki government spoke about two economies/nations within one country: “(A) dominant First Economy that is at the cutting edge, globally integrated and with the capacity to export manufactured goods... (and) another that is marginalised, exists at the edges and consists of large numbers of the unemployed and unemployable...”³⁶ This situation has not changed.

The skewed distribution of job opportunities and services inherited from the apartheid era, where vast tracts of overpopulated land in the so-called homelands served as labour reservoirs for the few industrial centres, remains largely intact. In the industrial centres and urban areas, segregation, though no longer legally enforced, continues to prevail. While white South Africans are still largely concentrated in the comfortable

³⁵ Tutu, Desmond, ‘Dullah Omar Memorial Lecture’, 27 March 2008, Cape Town, accessed from http://www.polity.org.za/article.php?a_id=130020 in August 2008

³⁶ Republic of South Africa, the Presidency, ‘Brief Concept: Clarifying the Second Economy Concept’, November 2006, accessed from <http://www.thepresidency.gov.za/docs/pcsa/social/briefsynopsis.pdf>

suburbs with all their amenities, space and greenery, those who live in cramped and vastly inferior conditions in former townships or informal settlements are almost exclusively black - and inevitably the worst affected by unemployment and inadequate services and resources such as water and sanitation. However, within these two distinctly visible blocs, other trends have also emerged including the rise of a small but growing group of extremely wealthy black elites as well as a growing number of impoverished whites.

Efforts by government to alleviate poverty are hampered by the uneven and often slow pace of delivery of services, due in part to difficulties in changing the culture of the public service and lack of skills particularly in rural municipalities. Thus, for example, only 65.5 per cent of households in the Eastern Cape province have access to electricity according to the Stats SA's 2007 Community Survey (up from just over 32 per cent in 1996), compared to 94 per cent in the Western Cape. The same survey also shows that only just over 70 per cent of households in the Eastern Cape have access to piped water, as against close to 99 per cent of households in the industrial province Gauteng.

The slow pace of tangible and positive change in the living conditions of the majority of citizens has led to the formation of social movements like the Anti-Poverty Campaign or the Homeless People's Movement. There has been much criticism also from the trade unions and the political left of the government's unwillingness to ditch its policy of fiscal discipline and market economics in favour of 'pro-poor' policies and subsidies for the needy. Public protests over lack of services and unaffordable food and energy prices are a common occurrence. While the new Zuma administration, brought into office with the express backing of the trade union leadership, has committed itself to a pro-poor approach, there have been mixed signals so far about whether it will indeed pursue a relaxation of monetary policy and promote a more expansionary budget.

- **HIV/AIDS**

The United Nations' UNAIDS annual report on the epidemic for 2007 states that "South Africa is the country with the largest number of HIV infections in the world".³⁷ The South African Government's 2007 'Development Indicators: Mid-term Review' states that HIV prevalence in antenatal surveys increased from 7.6 per cent in 1996 to just over 30 per cent in 2006 – though the document notes that prevalence has levelled off in recent years. Of the more than 5.4 million people currently living with HIV (11 percent of the population), the vast majority are in the most productive young adult and early middle age brackets.

The pandemic has hampered the transformation of the public health service meant to ensure equitable access to health care for all South Africans. As highlighted by UNAIDS, a "combination of weak infrastructure and human capacity constraints are major challenges in expanding HIV and AIDS programmes. The AIDS pandemic was superimposed on an already overstretched health service and has further compounded the capacity problem..."³⁸

A further consequence of the pandemic is the growing number of AIDS orphans and child headed households. According to the Medical Research Council, the number of

³⁸ UNAIDS Regional Support Team for Eastern and Southern Africa, 'South Africa: Country Situation Analysis', accessed from http://www.unaidsrstea.org/countries/south_africa/south_africa.html in January 2008

maternal orphans who are under the age of eighteen years is estimated to be 1.5 million in 2006, and two thirds are as a result of AIDS.³⁹

Apart from its human toll and the devastation it causes in families, relationships and communities across the country, HIV/AIDS inevitably also impacts on a range of other issues crucial to all transformation efforts – including poverty alleviation, economic growth and development prospects.

Crime

South Africa is often described in newspaper articles and reports, both national and international, as 'crime-ridden'. Whilst actual figures and the extent of the problem are disputed, government has acknowledged that levels of violent crime are unacceptable. The African Peer Review Mechanism (APRM) country report states, "...the distinctive feature of crime in South Africa is not its volume but its level of violence."⁴⁰

The government's 2009 report on development indicators cites police statistics on reported crime. According to these, the overall number of cases of crime reported has decreased since 2002, though violent crimes have increased. The report notes that there were 66.9 reported cases of murder per 100 000 people in 1994 and 37.3 cases per 100 000 people in 2008/9. While this may be a significant decrease, it still translates into more than 18 000 victims of murder or homicide a year, a rate way higher than in most other countries of the world.

According to the report, police detected only 50.86 per cent of all crimes in the 2008/2009 financial year (April to March), and only 16.05 per cent of property crimes.

The rich and the poor are equally affected and the "scourge" of crime is a frequent talking point and a valid source of concern in all sections of society. The seemingly intractable nature of the problem has led to calls from sections of the public as well as from populist politicians from different political perspectives for draconian measures to be imposed. Demands for criminals to forfeit their rights to a legal defence and humane treatment in prison, as well as for the reintroduction of the death penalty are commonplace and threaten to undermine the human rights culture that the new democracy set out to entrench⁴¹. The new National Commissioner of Police, Bheki Cele, appointed after the April 2009 elections, has also caused controversy by calling on the police to use deadly force against criminals.

- **Education and skills**

Whilst South Africa has begun to address inherited disparities in education, poor facilities and a shortage of qualified teachers, particularly in subjects such as maths and science, impact negatively on pupils in many schools – especially those in disadvantaged, i.e. formerly and still 'black', areas.

³⁹ Medical Research Council, 'Frequently Asked Questions, <http://www.mrc.ac.za/bod/faq aids.htm>, accessed in September 2009.

⁴⁰ APRM, *South Africa Country Review Report*, p. 285. Note that according to Appendix 3 of the Review (minutes of the meeting of the Committee of Heads of State of countries participating in the peer review mechanism), President Thabo Mbeki reportedly "took issue with the suggestion (in the country review report) that there is an unacceptably high level of violent crime".

⁴¹ Judge Dennis Davis has reportedly estimated that as many as 85 per cent of the South African population would support the reintroduction of the death penalty (see D'angelo, A., 'Death Penalty: 85% of SA want it back' ; 23 July 2007, Pretoria News, accessed from http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20070723073951125C692759 in August 2008

At the same time, there is a need to increase skills in South Africa to meet the needs of the emerging (and changing) economy. With the country now being part of the global labour market, the skills shortage is exacerbated by a 'brain drain' as professionals (including engineers and medical personnel) leave South Africa to work in other countries lured by promising packages (fear of crime has also been cited as a reason for leaving).

According to the Human Sciences Research Council (HSRC) the country is not developing (or retaining) sufficient skilled personnel to fill the gaps, and the exceedingly high drop-out rates are not helping matters. According to a study conducted by the Human Sciences Research Council undertaken in 2006, whilst 120 000 students enrolled at tertiary institutions in 2000, 30 per cent had dropped out by the end of the first year, and a further 24 000 dropped out between their second and third years. Of the remaining 50 per cent, less than half graduated within the specified three-year period.⁴² The HSRC has noted in a later publication that 'it has since emerged that at some institutions the drop-out rate is as high as 80 percent'.⁴³

- **Employment**

Unemployment is still high in South Africa – and difficult to combat given the need for more skilled labour and a large unskilled potential labour force. Stats SA's Labour Force Survey⁴⁴ states that the official unemployment rate has decreased from 31.2 per cent in March 2003 to 23.6 per cent by the second quarter of 2009.

This official rate (also dubbed the narrow rate) reflects people who have not been employed in the previous two weeks, but not those who have not been actively seeking employment. The figures for the broad unemployment rate are higher. These reflect both those seeking employment and people who have given up on finding a job. In terms of the broad unemployment statistics, 32.5 per cent of the labour force was unemployed in June 2009 – down from 41 percent in September 2003.

Unemployment affects women more than men, and, similar to other countries, is worst amongst the youth. Government policy head, Joel Netshitenzhe highlighted this in 2007:

Of great concern is that the most affected are youth (unemployment for under-30's in 2005 was at 49 per cent [at the official narrow rate] compared to 21 per cent for over-30's) and women (with unemployment among them at 31,7 per cent compared to 22,6 per cent among males). So progress has been made, but not enough and not fast enough; and we have to contend with the uncomfortable reality about growing inequality.⁴⁵

- **Transformation of the economy**

Government has introduced legislation and policies aimed at transforming the economy and facilitating black economic empowerment (BEE). These include employment equity laws (promoting affirmative action in favour of black people,

⁴² Human Sciences Research Council, *Media Release: Research Project on High Drop-Out Rate of Black Students*, 8 February 2006, www.hsrc.ac.za

⁴³ Human Sciences Research Council. 'High university drop-out rates: a threat to South Africa's future', HSRC Policy Brief, March 2008, <http://www.hsrc.ac.za/Document-2717.phtml>, accessed from <http://www.hsrc.ac.za/Document-2717.phtml>.

⁴⁴ Statistics South Africa, Labour Force Survey, December 2008

⁴⁵ See note 17

women and people with disabilities) and the Broad Based Black Economic Empowerment Act of 2004 and Codes of Good Practice effective from 2007 (which require all public bodies to consider the empowerment status of a company when deciding on tenders, licensing and/or the sale of state-owned assets).

Empowerment in terms of legislation is measured in relation to ownership and control, the profile of senior management, employment equity policies as well as 'indirect' means such as preferential procurement policies, enterprise development plans and corporate social investment.

Whilst these measures have assisted in changing the face of business in South Africa (which was overwhelmingly white-owned before 1994), it is acknowledged that only a small portion of a new black 'elite' have really benefited from transformation policies, a fact that government seeks to address through the Broad Based Black Economic Empowerment law and codes.

According to the government's 2009 Development Indicators report, the value of BEE transactions (shares of businesses actually changing from white into black hands) as a percentage of all mergers and acquisitions, has gone up since 1994, though performance has been volatile. The report says that the value of BEE transactions was 28.8 percent of all mergers and acquisitions in 1995 but dropped over successive years to a low of five per cent in 2001. The value peaked again in 2004 – rising to 30.1 per cent – and stood at just over 19.5 per cent in 2008

The report also notes that in 2008 only 24.2 per cent of top managers were black. Although the figure is significantly up from 2000 (when 12.7 per cent of top managers were black), this profile in no way represents the population of South Africa. The report states that whilst the public sector is largely representative of the population, the private sector is lagging behind.

- **Racism, xenophobia and prejudice**

The illusion of what has been dubbed 'the rainbow nation' after the country's peaceful transition and first democratic election in 1994 has been pierced – and a growing number of incidents widely reported in the media have highlighted the deep-seated racism, sexism, xenophobia and prejudice that still afflict South African society.

Centuries of separation and segregation have deeply ingrained racism and racial prejudice in the South African psyche and left communities deeply distrustful of 'the other', fellow South Africans of other races and Africans from outside the country alike. Racial prejudice is pervasive and readily invoked, resulting in much racist verbal sparring on a range of issues and thus stifling the quality of debate in the country.

There are still many incidents of white racist brutality against black people. In January 2008, for example, the seemingly arbitrary shooting dead of three black people by a white youth in the North West Province was reportedly motivated by race. Shortly afterwards, a video from a previously white University was leaked to the media showing some white students apparently urinating on food and then forcing black workers to eat it. Reports about the incident resulted in a number of other students and people going public about abusive racism they had faced in a range of institutions and situations.

Xenophobic violence is also pervasive. In May 2008, a wave of attacks in a number of poor settlements across the country against mainly African immigrants, seen as vying

with the locals for scarce resources, in particular housing and jobs, left more than 60 people dead and tens of thousands displaced.

Frequent appeals from government and civil society leaders for a so-called 'moral regeneration' of society, the invocation of traditional African values like 'ubuntu' (acknowledging everybody's common humanity), of the ANC's long-standing tradition of anti-racism and non-sexism and the spirit of Pan-Africanism are yet to become part of general consciousness.

- **Political transition and entrenchment of a democratic culture**

In December 2007, the ruling ANC elected Jacob Zuma as its new president. The drawn-out battle over the change of leadership from the incumbent (and then state president) Thabo Mbeki, dominated the political scene for many months before and after the event and absorbed much of the energy that government and the political establishment – as well as the media - could have been spending on dealing with the country's many challenges. . Corruption charges against Jacob Zuma were dropped by the National Prosecuting Authority in 2009, thus removing the last remaining obstacle to him becoming President of the country.

In the absence of any discernible policy differences or disputes over matters of substance between the two candidates (at the conference, delegates unanimously adopted the programme of action proposed by the previous leadership), the battle between the two opposing camps was fought over perceptions and personality issues. There have been no discernible economic policy shifts after the elections, with the Zuma administration being quick to reassure investors that the economic fundamentals of the Mbeki era will remain intact.

In the build-up to the elections, many concerns were expressed over the erosion of respect for the judiciary and its independence. Former Chief Justice, Pius Langa, warned against attacks on the judiciary in a lecture in August 2008. He stated:

(T)he integrity of the judicial process is fundamental to the rule of law ... (A) weak, unprincipled judiciary will be powerless to stem a tide of human rights violations and to keep state power in check. It is accordingly in everybody's interest that the courts should be enabled and protected so that they can do their work properly and impartially, without fear, favour or prejudice ... At the same time, we should demand the highest ethical standards ... and integrity among members of the judiciary. Comment and criticism must be informed and thoughtful, not reactionary and alarmist ... Such criticism ... has the potential to weaken confidence in the judiciary; and without public confidence, the judicial system loses its legitimacy and cannot operate effectively.⁴⁶

The Zuma administration has sought to reassure the judiciary on a number of occasions that their freedom and independence will be respected, while emphasising the importance of ongoing transformation to make it more representative of the country's demographics. Some appointments in the judicial services sector, however, have cast doubts on these proclaimed intentions

Zuma has also attempted to heal rifts in the ANC and retained a number of cabinet ministers from the Mbeki administration. However, indications towards the end of 2009 are that tensions within the ruling party and among the alliance partners over

⁴⁶ Langa, P, 'Inaugural lecture in memory of the late Justice Ismael Mahomed', 1 August 2008, accessed in August 2008 from http://www.polity.org.za/article.php?a_id=140237

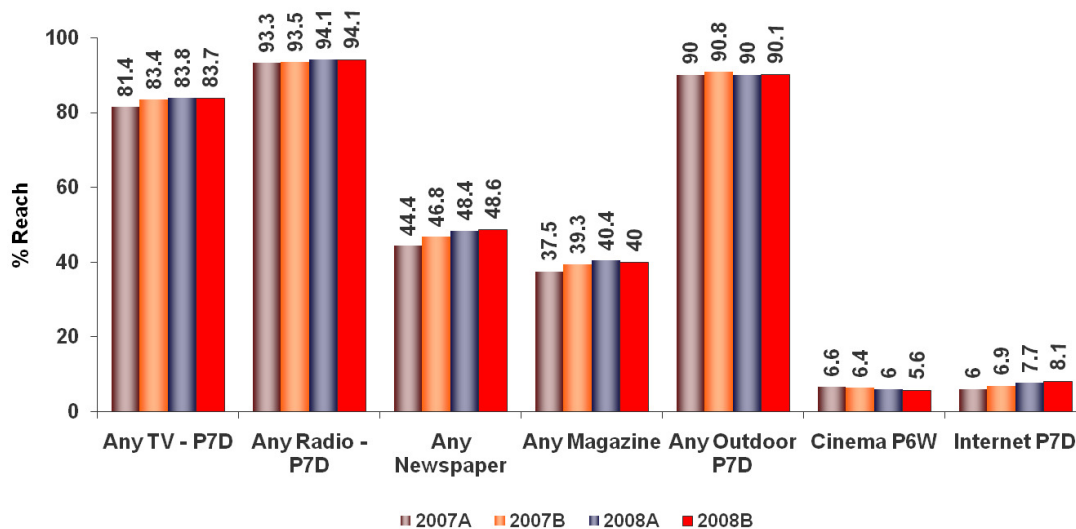
policies and personalities are re-emerging, now that the anti-Mbeki common denominator has fallen away.

South Africa is still a new democracy, recently emerged from a history of suppression and division. Respect for democratic institutions, trust in the independence of the judicial system, tolerance of dissent and a culture of free contestation of ideas still need to be firmly entrenched, in line with the promise and precepts of the constitution.

4. The media landscape

Though South Africa has a wide range of media, both print and electronic, there are many people in remote rural areas who still do not have access to a diverse range of information. Radio has the greatest reach of any media in South Africa.

Figure 2: Broad Media Consumption 2007 - 2008



Source: SAARF AMPS 2008B

4.1 The press

Newspapers and magazines (apart from ‘knock and drop’ newspapers) are not readily affordable, as many cost more than, for example, a loaf of bread. This in part accounts for the high readership per copy of popular newspapers - with one copy of some newspapers being read by up to 14 people according to latest AMPS statistics (SAARF AMPS 2007B).

Four major companies dominate the South African newspaper and magazine industry:

- AVUSA Limited (previously Johnnic Communications Ltd)

Avusa leads the weekly newspaper and financial publications market through the *Sunday Times* (with 3.3 million readers the biggest paper in the country) and

Sunday World, and shares in daily influential newspaper *Business Day* and the weekly *Financial Mail* magazine. AVUSA Ltd also owns the daily *Sowetan* newspaper (aimed at black readers), major newspapers in the Eastern Cape and a range of free sheet newspapers. Avusa has interests in media, book publishing, the music industry and other entertainment entities (including movies). In mid-2008, major BEE investment company Mvelaphanda Holdings (owned by business tycoon and ANC National Executive Committee member Tokyo Sexwale), finalised the acquisition of a 25.5 per cent stake in Avusa. Sexwale resigned as Executive Chairman when he was appointed Minister of Human Settlements after the April 2009 elections, but did not relinquish his shares in the company.

- CTP Pty Ltd (Caxton)

Caxton publishes knock and drop local papers as well as the national daily newspaper *Citizen*. The newspaper division of the company owns or co-owns 88 titles (including free and sold newspapers). The magazine unit has 15 titles. CTP Pty (Ltd) is one of the largest commercial printers in South Africa.

Avusa Ltd has an indirect 38 per cent stake in Caxton, though its shareholders at the time of writing had approved the splitting off of these assets into a separately listed company - ElementOne.⁴⁷

- Independent Newspapers

Independent Newspapers is a wholly owned subsidiary of Independent News and Media (SA) Limited which is owned by Irish tycoon Tony O'Reilly's Independent group. It publishes 14 daily and weekly newspapers in South Africa's major metropolitan areas including *The Star* (Johannesburg), *Cape Argus* (Cape Town), *Isolezwe* (IsiZulu newspaper), *Cape Times* (Cape Town), the *Mercury* (Durban) and the *Pretoria News*. Sunday newspapers include the *Sunday Tribune* and the *Independent on Sunday*.⁴⁸

- Nasionale Pers

Naspers owns Media 24, which in turn controls 60 per cent of South Africa's magazine market. Naspers defines itself as a "multinational media company with principal operations in electronic media (including pay-television, internet and instant-messaging subscriber platforms and the provision of related technologies) and print media (including the publishing, distribution and printing of magazines, newspapers and books, and the provision of private education services)".

It publishes 50 newspaper titles including Afrikaans newspapers *Die Burger*, *Beeld*, *Volksblad* and the weekly *Rapport*, the tabloid *Daily Sun*, as well as the Sunday newspaper *City Press*. In South Africa, Nasionale Pers controls internet service provider M-web, as well as Multi-choice which owns subscription broadcasters DSTV and M-Net.⁴⁹

In the 1980s there was a thriving 'alternative' press sector including journals, magazines and newspapers. As these survived largely through foreign funding, the majority of such publications closed down during the early 1990s as donor funding foci shifted.

⁴⁷ Information sourced from <http://www.caxton.co.za/>

⁴⁸ Information sourced from http://www.southafrica.info/ess_info/sa_glance/constitution/971557.htm

⁴⁹ Information extracted from Nasionale Pers web-site <http://www.naspers.com/English/print.asp>

There are a few smaller but significant media groups (notably *Mail & Guardian* newspapers and *UmAfrika*) and according to reports over 200 non-profit and community newspapers.⁵⁰ Some of the alternative journals have survived (such as the *Agenda* feminist journal and the *Labour Bulletin*) and recently a number of other left-wing publications have emerged (such as *New Agenda* and *Amandla*).

Most of the mass media publishes in English or Afrikaans. Smaller media groups face huge challenges as the major distribution networks and the big media players control printing presses. Newspapers are primarily distributed in metropolitan areas, and not always easily accessible in poor areas in towns. The costs of purchasing newspapers for poor people are thus prohibitive if one considers transport costs.

As can be seen from the table below, the number of newspaper and magazine titles measured by SAARF AMPS has grown since 1996.

Table 2: Growth in publications carried on SAARF AMPS

Number of magazines						
	1998	2000	2002	2005	2007	2008
Weekly	15	13	15	13	16	14
Fortnightly	5	5	3	2	1	2
Monthly	43	59	61	66	88	93
Number of newspapers						
Daily	17	17	16	18	20	22
Weekly	27	26	22	24	27	28
Any	44	43	40	43	50	51

Source: SAARF AMPS 2008A

Penetration of print media inevitably is highest amongst wealthier communities. SAARF reports, for example, that whilst only six per cent of the population in LSM 1 reads a newspaper, there is 75 per cent penetration in LSM 10.

The largest newspapers according to SAARF AMPS are described in Table 3 below.

⁵⁰ This is according to the Association of Independent Publishers in South Africa which represents grassroots print media.

Table 3: Largest newspapers in terms of readership

Name of daily newspaper	Description	2005 readership (% penetration of adult population)	2009 readership (%penetration of adult population)
<i>Daily Sun</i>	Tabloid largest daily in South Africa published in English in Gauteng and distributed through province as well as Free State, Eastern Cape and KwaZulu Natal	9.8%	14%
<i>The Sowetan</i>	English daily distributed in Gauteng and KwaZulu-Natal	5%	4.7%
<i>The Star</i>	English language daily distributed primarily in Gauteng	1.8%	2.5%
<i>Isolezwe</i>	IsiZulu daily newspaper published in KwaZulu Natal	1.6%	2.4%
Weekly newspapers		2005	2009
<i>Sunday Times</i>	National English language Sunday newspaper	10.7%	12.6%
<i>Sunday Sun</i>	National tabloid newspaper publishing in English	6.2%	8.3%
<i>City Press</i>	National newspaper publishing in English	6.4%	6.5%
<i>Soccer Laduma</i>	National English weekly soccer focused newspaper	5.7%	8.7%
<i>Sunday World</i>	National tabloid newspaper publishing in English	5.1%	5.9%
<i>Rapport</i>	Afrikaans Sunday newspaper distributed nationally	5.1%	4.5%

Source: SAARF AMPS 2009B

Other influential dailies are the Afrikaans *Beeld* with a readership of 1.6 per cent and *Business Day* (0.3 per cent). The weeklies *Mail & Guardian* and *Sunday Independent* have a readership of 1.6 and 0.6 per cent respectively.

4.2 News agencies

There is one national news agency – the *South African Press Agency (SAPA)* – which is jointly controlled by the major newspaper groups. In May 2008 the South African Broadcasting Corporation (SABC) launched a news agency to provide raw or packaged audio and visual content.

A number of smaller news agencies have been established including *African Eye* (in the province of Mpumalanga), *Health-e* (focusing on health news), and the *Eastern Cape News Agency* based in Grahamstown.

Government has established a government news service *BuaNews*, aimed at distributing government information and news to media.

4.3 Broadcasting

4.3.1 Radio

Radio has the greatest reach of any media in South Africa – with the public broadcaster's stations accessible to nearly all South Africans. Radio is obviously one of the most affordable mediums as radio sets are relatively cheap and stations are broadcast free-to-air. According to Stats SA, 76.6 per cent of households (766 of every 1 000 households) owned working radio sets in 2007 (compared with 73 per cent in 2001).⁵¹ Radio listenership has been steadily increasing and (according to SAARF AMPS) 93.3 per cent of South Africans listen to radio. The SABC and all the commercial stations also stream content over the internet.

As of March 2009, 96 community and three low power radio stations as well as 13 commercial and 18 SABC radio stations were licensed.⁵²

The public broadcaster has stations in each of the official languages, as well as a station broadcasting in two Khoi San languages - !Xu and Khwe.

Commercial radio stations are centred in the major metropolitan areas (Johannesburg, Cape Town, Durban, Polokwane, Nelspruit and Mafikeng) and broadcast in English primarily.

Community radio stations are targeting both geographic communities and/or special interest groups (e.g. Muslims, Chinese speakers, "Boere Afrikaners"⁵³ etc). They broadcast in a range of official and other local languages.

(More details in chapter three)

⁵¹ Stats SA Community Survey 2007, http://www.statssa.gov.za/community_new/content.asp accessed on 28 January 2008

⁵² Icasa Annual Report 2008/2009, pg. 6.

⁵³ A network of Afrikaans language radio stations describes their community as boere Afrikaners – literally meaning farmer Afrikaners. They argue that their community is not Afrikaans speakers but rather conservative Afrikaners.

4.3.2 Television

Ownership of television sets has increased rapidly since 1994 (linked in part to the extension of the electricity grid). According to Stats SA's 2007 Community Survey, 65.6 per cent of households in 2007 (656 out of every 1 000 households) owned a working television set (compared to 53.8 per cent in 2001).⁵⁴

12 television operators are licensed in South Africa:

- three national public television channels
- one national private free-to-air channel (*e.tv*)
- one terrestrial subscription service (M-Net, owned by Naspers)
- one existing satellite subscription service (DSTV, also owned by Naspers)
- three satellite subscription services licensed in 2008 and likely to be launched in 2010: Super 5 media, previously known as Telkom Media (before Telkom sold its majority stake to a Chinese company), On Digital Media and a religious multi channel provider, Walking on Water).⁵⁵
- three one-year community television licences (*Soweto TV* in Johannesburg, Cape Community TV in Cape Town and *Bay TV* in Richards Bay). Other community television services have operated on and off on 30 day special event licences. (More details in chapter 3)

4.4 Internet

According to Stats SA's Community Survey 2007, computer ownership in the home almost doubled between 2001 and 2007. 8.6 per cent of households owned computers in 2001 increasing to 15.7 percent of households in 2007 (157 per 1 000 households).

Internet usage was not measured in 2001 and therefore no comparative data is available. The statistics however show that 7.3 percent of households had access to internet at home in 2007.

The most used media site is *News24* (part of the Nasionale Pers/ Media 24 stable). Bizcommunity (a media and marketing electronic newsletter) cites Nielsen/NetRatings research indicating that the site recorded more than one million unique South African visitors in October 2007 (the first South African web site to do so).⁵⁶ According to Nielsen/NetRatings, news and weather sites are the most frequented.

4.5 Telecommunications

The percentage of households with a landline telephone has declined from 24.4 percent in 2001 to 18.6 percent in 2007 (186 per 1,000 households). At the same time there has been a significant increase in cellular telephone ownership from 32.3 percent of households in 2001 to 72.9 percent in 2007 (720 per 1 000 households).

⁵⁴ Stats SA, Community Survey 2007, http://www.statssa.gov.za/community_new/content.asp

⁵⁵ Jones, C. 'Pay-TV competition stalls'. ITWeb. 20/10/2009. Accessed from http://www.itweb.co.za/index.php?option=com_content&view=article&id=27311:paytv-competition-stalls&catid=69:business&Itemid=58 on 14/11/2009.

⁵⁶ Bizcommunity, "Milestone for SA Internet", 26 November 2007, <http://www.bizcommunity.com/Article/196/16/20022.html> accessed on 30 January 2008

The “ICT Sector Performance Review 2006” published by the Link Centre (which focuses on ICT research), states that mobile operators cover over 90 per cent of the country, though subscribers are predominantly in major urban centres.⁵⁷ The study attributes this partly to costs – and points out that South Africa’s mobile costs are higher for both high and low-end users than those in, for example, Botswana.

The report furthermore notes that there is an “access shortfall” in relation to broadband:

In terms of GDP per capita (PPP US\$), South Africa is broadly comparable to Turkey, Mexico, Poland, Hungary and the Slovak Republic. Broadband penetration per hundred inhabitants, on the other hand, is on average two-thirds less in South Africa than in any of these five other countries.

The authors attribute this to both lack of supply and high prices.

Many researchers have emphasised that access to telecommunications still reflects apartheid disparities in South Africa – and thus whilst richer households (which are still predominantly white) have access to a range of services, poorer (predominantly black) households have limited access.

5. Brief history of broadcasting

The history of broadcasting in South Africa is a microcosm of the history of the country. Initially broadcasting was established based on the British model for public broadcasting. It however became a powerful prop for apartheid policies and was dubbed ‘his master’s voice’ by anti-apartheid organisations. In the 1990s, broadcasting was the first institution to be transformed – even prior to the holding of the 1994 elections.

Some interesting milestones:⁵⁸

1924

The first radio station, ‘JB Calling’ began broadcasting in Johannesburg on 1 July 1934. Stations in Cape Town and Durban hit the airwaves the same year.

1927

The three stations combined to form the African Broadcasting Corporation.

1936

The African Broadcasting Corporation was dissolved and the South African Broadcasting Corporation (SABC) was established by an Act of Parliament. It was emphasised that Afrikaans radio should be introduced by 1937 (other stations were all in English). The Charter for the SABC was developed by John Reith credited as developing the British Broadcasting Corporation’s (BBC) model of public broadcasting.

⁵⁷ S. Esselar, A. Gillwald, C. Stork, *South African Telecommunications Sector Performance Review 2006*, LINK Centre Public Policy Research Paper No 8, Published by Learning Information Networking and Knowledge (LINK) Centre, Graduate School of Public and Development Management, University of Witwatersrand. <http://link.wits.ac.za/papers/SPR-SA.pdf> accessed on 29 January 2008

⁵⁸ The information in this section is a collation of information from a range of different documents: G. Mampono: “The SABC - 70 Years of broadcasting”, <http://www.bizcommunity.com/Article/196/59/8771.html>; B. Cros, “Why South African television is only twenty years old” <http://www2.univ-reunion.fr/~ageof/text/74c21e88-271.html>, www.sabc.co.za; and www.icasa.org.za, www.bushradio.co.za

1940s

The first direct transmissions were made in African languages by telephone line.

1948

The National Party came into power and started implementing policies of separate development and promotion of Afrikaans people ('die volk' [the people]) and nationalist Christian values based on Calvinism.

1950s

SABC introduced *Springbok Radio* – the country's first 'commercial' service, broadcasting entertainment (including dramas and comedies).

1959

Radio Bantu established broadcasting in African languages to 'homeland' areas set up to accommodate different ethnic groups to further apartheid's philosophy of "separate development".

1960

Then Minister of Posts and Telecommunications Albert Herzog tells the Senate (upper house of parliament) that "(t)elevison as a destroyer of the human spirit is a bigger menace than the atom and hydrogen bombs".⁵⁹

1963

In June 1963 underground leader of the then banned African National Congress, Walter Sisulu, made the first pirate broadcast from *Radio Freedom*, "the voice of the ANC". After the ANC was forced into exile, *Radio Freedom* negotiated access to shortwave frequencies in a number of supportive countries (including Zambia, Angola, Ethiopia, Madagascar and Tanzania) and broadcast into the country. It was reportedly regularly jammed by the South African authorities.

1969

On the 20th July 1969, Apollo 11 landed on the moon and Neil Armstrong made history with his moon walk. Lobbying for television hots up as South Africans are denied the chance to view the moon landing. It was insulting, one senator declared, to be "bracketed with the most backward peoples of the world such as the Eskimos who have not got television".⁶⁰

1971

The 'Commission of Inquiry into Matters Relating to Television' is established, headed by PJ Meyer, to investigate the introduction of television. The report endorses the introduction of television – with strict conditions:

An SABC-controlled radio and television service...should... give direct and unequivocal expression to the established Christian Western set of norms and values that are valid for South African society All radio and television services shall have a Christian and a broad national character ... (T)he broadcasting services of our country will be introduced and presented by norm-conscious officials and in such a way that the morals and morale of the community will not be undermined and especially that no programmes harmful to the youth of our country will be presented.⁶¹

⁵⁹ Cited in B. Cros, 'Why South Africa's Television is only Twenty Years Old: Debating Civilisation, 1958-1969

⁶⁰ R. Nixon, "Apollo 11, apartheid and television", July 1999, *The Atlantic Online*, <http://www.theatlantic.com/issues/99jul/9907apartheidtv.htm>

⁶¹ See note 44

1976

SABC's first television channel goes on air on 5 January 1976. It broadcasts in colour in Afrikaans and English.

Purported "independence" is given by the apartheid government to the Transkei as part of the National Party's programme of separate development. The SABC facilities in Transkei become the Transkei Broadcasting Corporation.

1978

Advertising is allowed on SABC television (up to then it was funded through a licence fee).

1979

Commercial radio station *Capital Radio* goes on air broadcasting from the Transkei. It broadcasts a mixture of music and news. *Capital Radio* closed down in the 1990s.

1980

Following the so-called independence of the Bophutatswana homeland, Bophuthatswana Broadcasting Corporation takes over the SABC facilities for this region. The Bop Broadcasting Corporation later launched *Bop TV* in 1983.

Another commercial radio – *Radio 702* – goes on air. It was initially an adult music format station but in 1988 became a talk station. *Radio 702* now broadcasts on FM in the Gauteng province of South Africa.

1981

A second television channel is introduced on SABC, broadcasting in African languages such as IsiZulu, isiXhosa, Sesotho and SeTswana.

Venda and Ciskei are given "independence" and take over broadcasting facilities (*Radio Thohoyandou* and *Ciskei Broadcasting Corporation*) for their regions.

1986

M-Net – South Africa's first subscription broadcaster – is launched. It is backed by a consortium of newspaper publishers. Rumours abound that it was given a licence to appease the Afrikaans press who face competition for advertising due to television. It is restricted in its licence from broadcasting news and current affairs.

1990

Liberation movements are unbanned and there is agreement to negotiate a new democratic future.

1990s

Civil society organisations join together to set up the Campaign for Independent Broadcasting (CIB) to lobby and fight for the transformation of the SABC from a state broadcaster into a public broadcaster and for the establishment of an independent regulatory authority. The Campaign includes a wide range of media, labour and other civil society groups as well as a number of political parties and movements including the ANC, the Democratic Party and the Azanian People's Organisation (AZAPO). The political parties and movements, however, are by mutual agreement not included in the steering committee of the CIB to ensure that civil society controls the organisation.

1992

Bush Radio in Cape Town (the first community radio station in the country) is formed (although it could not yet broadcast as it was refused a temporary licence).

1993

The ANC and the apartheid government agree to appoint an independent board of the SABC prior to the first democratic elections in 1994. It was agreed that a selection panel made up of judges would call for public nominations to the Board and make recommendations on appointment. Over 700 nominations were made. Despite the agreements, however, then State President FW de Klerk refused to appoint seven of the proposed new members or the recommended chairperson. After negotiations, and the resignation of de Klerk's nominee for the chair, the Board elected its own chairperson (current Minister of Communications Ivy Matsepe-Casaburri).⁶²

Parliament passes the Independent Broadcasting Act of 1993 providing for an independent regulator for broadcasting.

Bush Radio goes on air illegally in May for four hours before being closed down by police.

Radio Zibonele went on air later that year illegally for two hours a week. It was broadcast from a health clinic in Khayelitsha near Cape Town with equipment stored under a clinic bed until broadcast time. Community health workers ran the station focused on delivering health messages.

1994

Parliament establishes an Independent Broadcasting Authority (IBA) to regulate broadcasting "in the public interest" under the IBA Act.

First democratic elections are held in April 1994 and the ANC is elected into power.

1995

The IBA launches the Triple Inquiry Report – looking into public broadcasting, South African content and cross-media control.

The first community radio stations receive temporary one-year licences from the IBA.

Multichoice (owner of subscription television service M-Net) launches Digital Satellite Television (DSTV) – taking advantage of what they claimed was a gap in the existing legislation (the IBA Act) that did not specifically provide for licensing of satellite broadcasting services.

1996

Parliament agrees to privatisation of six of SABC's radio stations. These are "sold" off through licensing processes to private players. However, despite recommendations from the IBA that the funds raised should be invested in the SABC to assist in its transformation, the state treasury takes the money.

SABC relaunches its television channels and new policies. Different languages are represented across the three channels.

1997

The IBA licences eight new commercial radio stations in Johannesburg, Cape Town and Durban.

⁶² Freedom of Expression Institute, *The Broadcasting Independence Handbook: Lessons from the South African experience*, 2008, Johannesburg, pp. 9-12, ISBN: 978-0-620-40300-9

1999

The Broadcasting Act (No 4 of 1999) comes into effect following a white paper process. The Broadcasting Act amongst other things amends old legislation relating to the SABC and provides for it to be corporatised and divided into public and public commercial wings.

1996 – 1998

The former Bantustan broadcasting services are incorporated into the SABC (Transkei Broadcasting Corporation, Ciskei Broadcasting Corporation, Venda and Bophuthatswana Broadcasting Corporations).

1998

E.tv, the first national private free to air television channel is awarded a licence and launched.

2000

The Independent Communications Act of South Africa (no 13 of 2000) is promulgated and the IBA is merged with the South African Telecommunications Regulatory Authority (SATRA) to form the Independent Communications Authority of South Africa (ICASA).

2003

The Media Development and Diversity Agency (MDDA) is launched as a statutory body, funded as a public-private partnership, to provide financial and other support to community and small commercial media.

2005

The Electronic Communications Act is promulgated – changing the face of regulation of broadcasting and telecommunications. The Act provides for convergence between broadcasting and ICTs and puts in place mechanisms for issuing individual and class licences. Community radio and television stations no longer have to go through protracted applications for licences but merely need to seek authorisation for a class licence.

2007

Soweto Community TV is given a one year community television licence.

ICASA awards licences to four new broadcast licensees – Walking on Water (a dedicated Christian service), On Digital Media (broad spectrum offering), e-Sat (a satellite service from e.tv) and Telkom Media (a broad spectrum multi channel subscription and internet protocol TV service controlled by the incumbent telecommunications operator). E-Sat decides to reject the licence as it states the market will be oversaturated.

2008

South Africa switches on its digital signal in preparation for full digital switchover by November 2011, anticipating a dual illumination period of three years before the analogue signal is turned off.

2009

President Kgalema Motlanthe signs the Broadcasting Amendment Bill into law, giving Parliament the powers to recommend the removal of the SABC Board. After the Bill is enacted, Parliament recommends to the President the removal of the SABC Board on the grounds of failure to perform their fiduciary duties. By that stage, the majority of board members had already resigned. The board is replaced by an interim board, and a permanent board is selected.

The Department of Communications releases a draft Public Broadcasting Services Bill.

ICASA issues an invitation to apply for commercial broadcasting licences in the primary markets of Gauteng, KwaZulu-Natal and Western Cape.

Media Legislation and Regulation

1. International, continental and regional standards

South Africa is party to a number of international and regional protocols relating to freedom of expression.

South Africa's founding documents and its laws, however, in many respects more strongly protect freedom of expression than provisions in such international agreements. Where a law might be lacking, the Constitution specifies that international law will be considered in making any determinations. The Constitutional Court has used these provisions widely and cited international laws and interpretations of principles in motivating its judgements.

1.1 United Nations

South Africa was one of the founding members of the United Nations (UN). The following instruments of the UN are relevant to freedom of expression:

- *The United Nations Universal Declaration of Human Rights* (adopted in 1948)

The Universal Declaration is not a treaty that is ratified by states and thus legally binding. However, scholars now regard it as either having itself become international customary law or as a reflection of such law.⁶³ In either case the inclusion of freedom of expression in the declaration implies that even states that have ratified none of the relevant treaties are bound to respect freedom of expression as a human right.

Article 19 of the Declaration deals with the right to freedom of expression:

⁶³ See for example H. Hannum, "The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law", *Georgia Journal of International and Comparative Law*, 287; H. J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context: Law, Politics, Morals — Texts and Materials*, Oxford: Oxford University Press (third edition), 2007

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

- *International Covenant on Civil and Political Rights* (enacted by the United Nations in 1976)

The International Covenant on Civil and Political Rights (CCPR) is a treaty that elaborates on many of the rights outlined in the Declaration South Africa formally ratified the CCPR on 10 March 1999. The Covenant's Article 19 declares:

1. Everyone shall have the right to hold opinions without interference;
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

- *The Windhoek Declaration on Promoting an Independent and Pluralistic African Press* (adopted by the general assembly of the UN Educational, Scientific and Cultural Organisation - UNESCO - in 1991)

UNESCO's Windhoek Declaration, like other non-treaty documents, has moral authority by representing a broad consensus of the international community on the detailed interpretation of the Universal Declaration and other relevant standards as they relate to the press in Africa.

The Windhoek Declaration states:

(We) declare that

1. Consistent with article 19 of the Universal Declaration of Human Rights, the establishment, maintenance and fostering of an independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation, and for economic development.
2. By an independent press, we mean a press independent from governmental, political or economic control or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals.
3. By a pluralistic press, we mean the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community.

1.2 African Union

South Africa is also a member of the African Union (AU), whose Constitutive Act states that its objectives include the promotion of "democratic principles and institutions, popular participation and good governance" (Article 3(g)).

The most important human rights standard adopted by the AU, or its predecessor, the Organisation of African Unity (OAU), is:

- *The African Charter on Human and Peoples' Rights* (adopted 27 June 1981)⁶⁴

South Africa acceded to the Charter in January 1996 and is thus bound by its provisions. Its Article 9 on freedom of expression states:

- Every individual shall have the right to receive information.
- Every individual shall have the right to express and disseminate his opinions within the law.

The African Commission on Human and Peoples' Rights (ACHPR) is the body established under the Charter to monitor and promote compliance with its terms.

- *Declaration of Principles on Freedom of Expression in Africa*

In 2002, the African Commission adopted this Declaration to provide a detailed interpretation for member states of the AU of the rights to freedom of expression outlined in the African Charter, stating in its Article I:

Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

It goes on to say in Article II:

No one shall be subject to arbitrary interference with his or her freedom of expression; and
Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.

The Declaration details how such freedom of expression should be realised. Of particular relevance to this study is the statement regarding public broadcasting (Article VI):

State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed;
- public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets;
- public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and
- the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.

The document also states that freedom of expression “places an obligation on the authorities to take positive measures to promote diversity” (Article II), that community

⁶⁴ Organisation of African Unity, *The African Charter on Human and Peoples' Rights*, adopted 27 June 1981, Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

and private broadcasting should be encouraged (Article V) and that broadcasting and telecommunications regulatory authorities should be independent and “adequately protected against interference, particularly of a political or economic nature” (Article VII). The Declaration furthermore provides for freedom of access to information and states that “the right to information shall be guaranteed by law” (Article IV).

- *African Charter on Democracy, Elections and Governance (2007)*

This Charter highlights the importance of access to information in a democracy. It states:

(State parties shall) (p)romote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs. (Article 2(10))

State parties shall ... ensure fair and equitable access by contesting parties to state controlled media during elections. (Article 17 (3))⁶⁵

By mid-2008, South Africa (like most countries on the continent) had not yet signed or ratified the Charter. For that reason, it does not have the force of law in South Africa (though the country’s own laws provide for equitable treatment to all parties by broadcasters during election periods).

1.3. Southern African Development Community (SADC)

South Africa is a member of the Southern African Development Community (SADC). The treaty establishing SADC provides that member states shall operate in accordance with principles that include respect for human rights, democracy, and the rule of law (Article 4(c)). In addition, the regional structure has adopted several protocols related to media and/or communications.

- *SADC Protocol on Culture, Information and Sport (adopted in 2000)*

South Africa ratified this Protocol in 2005 and has thus formally agreed to its provisions. This Protocol focuses on harmonising policies on culture, information and sport by SADC member states. Article 17 outlines the following key objectives, amongst others:

Co-operation and collaboration in the promotion, establishment and growth of independent media, as well as free flow of information

Development and promotion of local culture by increasing local content in the media

Taking positive measures to narrow the information gap between the rural and urban areas by increasing the coverage of the mass media

Encouragement of the use of indigenous languages in the mass media as vehicles of promoting local, national and regional inter-communication

Ensuring the media are adequately sensitised on gender issues so as to promote gender equality and equity in information dissemination.

⁶⁵ <http://www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf>

Article 18 focuses on information policies, including committing member states to “create (a) political and economic environment conducive to the growth of pluralistic media”.

Article 20 enjoins member states to take “necessary measures to ensure the freedom and independence of the media”, with “independence of the media” being defined as “editorial independence, whereby editorial Policy and decisions are made by the media without interference”.

- *SADC Declaration on Information and Communication Technology* (2001)

This Declaration focuses on telecommunications structures and promotes the creation of a three-tier system in each country with:

Government responsible for a conducive national policy framework, independent regulators responsible for licensing, and a multiplicity of providers in a competitive environment responsible for providing services. (Article 2(a)(i))⁶⁶

Although the Declaration does not have the same legal force as a protocol, all countries that are party to it (including South Africa) have made a commitment in adopting it to abide by its provisions.

1.4 Other documents

- *African Charter on Broadcasting* (2001)

This Charter was adopted by media practitioners and international media and other human rights organisations at a UNESCO conference to celebrate ten years of the Windhoek Declaration. Although it has not been endorsed by any inter-state structures, it represents a consensus of leading African and other international experts on freedom of expression and the media.

The Charter specifies, amongst other things, that there should be a three-tier system of broadcasting (public, private and community), demands that “(a)ll state and government controlled broadcasters should be transformed into public service broadcasters”, and states that regulatory frameworks should be based on “respect for freedom of expression, diversity and the free flow of information and ideas”.

2. The Constitution of South Africa

South Africa has a Bill of Rights contained in Chapter Two of the Constitution.

Section 16 deals with freedom of expression:

- Everyone has the right to freedom of expression, which includes –
- freedom of the press and other media;
 - freedom to receive or impart information or ideas;
 - freedom of artistic creativity; and
 - academic freedom and freedom of scientific research.

The right (outlined above) does not extend to –

⁶⁶ http://www.sadc.int/key_documents/declarations/ict.php

- propaganda for war
- incitement of imminent violence; or
- advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Section 36 sets out the limitation of rights. It states:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- the nature of the right;
- the importance of the purpose of the limitation;
- the relation between the limitation and its purpose, and
- less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Freedom of expression is not listed as one of the non-derogable rights of the Constitution. It has to be balanced against other rights (such as equality, privacy and human dignity) on a case-by-case basis.

The Constitutional Court is the final judicial arbiter of constitutional issues – though other courts may hear matters relating to this prior to the issue being brought before it. In addition, the South African Human Rights Commission, established by the Constitution as an independent institution (see Chapter 1), is charged with protecting and promoting constitutional rights.

Section 39 of the Bill of Rights deals with interpretation. It stipulates that:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

South Africa's Bill of Rights is often lauded around the world, and in some ways goes further than many of the international, continental and/or regional provisions. The Bill of Rights provides specifically for freedom of the media, and the limitations of that freedom are clearly outlined. For example, exceptions to freedom of expression require proof of incitement to *imminent* violence.

South African media and civil society organisations generally guard their rights to freedom of expression fiercely – and there are ongoing debates in many fora about the subtleties of applying this right in relation to other rights.

A 2008 African Media Barometer report on freedom of expression in South Africa⁶⁷ noted the following:

The South African media enjoy considerable freedom of expression. This is evidenced by the frequency with which the media criticize the government, the ruling political party, the police

⁶⁷ Full report can be sourced from <http://www.fesmedia.org.na>

and many other public institutions and services. Investigative reporting is prominent and widely respected. ...

On the down side, defamation cases are increasing with (ANC President) Jacob Zuma taking the lead as complainant ... While intimidation of journalists by provincial governments is decreasing, there are still incidents of media practitioners getting angry phone calls from officials. The situation is worse at local level where especially community media are from time to time threatened by ... councillors. In many cases, allegations of corruption are not investigated for fear of reprisals. Generally, there seems to be a lack of tolerance of criticism amongst politicians.

South African media publish a significant amount of advertising from the government, and there are cases where government officials have threatened to withdraw their custom from publications they regard as being excessively critical. Commercial interests tend to exert even more pressure: To a large extent commercial enterprises escape the critical attention of the mass media fearful of annoying the big advertising spenders.

3. General media laws and regulations

South Africa does not have a national press/media law. The Imprint Act (no 43 of 1993) requires only that the name and address of the printer appear on any printed matter intended for public sale or distribution.⁶⁸ Thus, media and journalists are not subject to special regulations but, as any other citizen, have to comply with general laws.

3.1 Regulation

Broadcasting and print media are regulated differently in South Africa.

Print

Print media regulate themselves through the Press Council/Press Ombudsman established and funded by the Newspaper Association of South Africa (which represents the major newspaper groups). The self-regulatory mechanisms were reviewed in 2007, and the structures expanded to include members of the public both on the Council itself and on structures to adjudicate complaints.

Essentially the Press Council (made up of six representatives of media organisations and another six public representatives) approves of the Press Code and appoints a Press Ombudsman and members of an Appeal Panel (which is currently headed by an ex judge and also includes an equal number of representatives from the press and from the public).⁶⁹

All newspapers and magazines that subscribe to the jurisdiction of the Press Council are required to include in every publication the organisation's logo and details of how to complain about any reports.

Complaints from the public are first considered by the Ombudsman (currently ex editor Joe Thlooe), and attempts are made to mediate between the complainant and the publication. If

⁶⁸ G. Berger, *Media Legislation in Africa: A Comparative Legal Survey*, United Nations Educational, Scientific and Cultural Organization, 2007, chapter 2.8, South Africa, hereinafter Berger, *Media Legislation 2007*

⁶⁹ Press Council of South Africa, *Constitution*, accessed from <http://www.presscouncil.org.za/pages/welcome/constitution-of-the-pcsa.php> in July 2008

a hearing needs to be called, the ombudsman presides, together with a member of the public and a representative from the media. Any decision can be appealed against to the Appeal Panel.

The Press Council can order a publication found to be in breach of the code to publish an apology and/or correct the story, as well as print the ruling of the Ombudsman or Appeals Panel.

The Press Council has since its restructuring in 2007 focused on creating awareness amongst the public of its role and ensuring that journalists know and observe the code. At the launch of a booklet outlining the code in December 2007, Ombudsman Joe Thlooe stated that in the 18 months between January 2006 and July 2007, his office had dealt with 268 cases.⁷⁰

The Council's website lists rulings for 25 cases decided in 2008 and 2009.⁷¹

Broadcasting

Broadcasters have the option of either adhering to a code developed by the regulator (the Independent Communications Authority of South Africa) and adjudicated by the Complaints and Compliance Committee (CCC) of ICASA, or of abiding by their own code administered by the Broadcasting Complaints Commission of South Africa (BCCSA).

The two regulatory structures are dealt with in detail in Chapter 5 of this survey.

New policies – tighter regulation for press?

The ruling party has questioned the principle of self-regulation of the press. At its 52nd National Conference in December 2007, the ANC resolved to investigate the establishment of a Media Appeals Tribunal (MAT):

With particular reference to the print media, the ANC notes that the current form of self regulation ... is not adequate to sufficiently protect the rights of the individual citizens, community and society as a whole.⁷²

Paragraph 126 of the resolution states that the MAT would “strengthen, complement and support the current self-regulatory institutions ... in the public interest”.

The resolution does not expand on why existing laws and rights do not sufficiently protect individuals, though in other sections it raises concerns over media concentration, limited black economic empowerment in the press and what it terms an “ideological offensive, largely driven by the opposition and fractions (sic) in the mainstream media, whose key objective is the promotion of market fundamentalism” (par 88 and 89).

⁷⁰ According to an ‘Announcement’ by the Press Council of South Africa, posted on its website 22 February 2010 and accessed from <http://www.presscouncil.org.za/pages/posts/press-council-announcement4.php> in March 2010 these seem to be the latest available figures.

⁷¹ Information accessed from <http://www.presscouncil.org.za/pages/documentation/rulings.php> on 4 March 2010

⁷² ‘Communications and the Battle of Ideas’, ANC 52nd National Conference 2007, Resolutions, Par 93

The ANC promises in the document to consult the media and other stakeholders during the investigation and says that “Parliament will be charged with this mandate to establish this MAT, in order to guarantee the principles independence, transparency, accountability and fairness” (par 128).

The resolution outlines the following objectives for this inquiry:

The investigation should consider the desirability that such a MAT be a statutory institution, established through an open, public and transparent process, and be made accountable to Parliament. The investigation should further consider the mandate of the Tribunal and its powers to adjudicate over matters or complaints expressed by citizens against print media, in terms of decisions and rulings made by the existing self-regulatory institutions, in the same way as it happens in the case of broadcasting through the Complaints and Compliance Committee of ICASA ... The investigation should further consider remedial measures which will safeguard and promote the human rights of all South Africans ... (par 130 and 131).

Although the resolution seems to assume a precedent of oversight set by the Complaints and Compliance Committee of the broadcasting regulator ICASA, it is unclear what is being referred to. The Electronic Communications Act, No 36 of 2005 (the EC Act), makes no provision for the review of decisions made by any self-regulatory body – though such body and its code and disciplinary mechanisms need to be “approved” by the regulator. In fact, the relevant clauses of the EC Act seem rather to endorse the principle of self-regulation.

The ANC’s resolution has resulted in disquiet amongst the media. Franz Kruger, the ombud for the *Mail & Guardian*, wrote in January 2008:

The party can’t have it both ways: media freedom is incompatible with a statutory body that has authority over what journalists write. If an organ of state can sit in judgement over the media, they are no longer free. A tribunal would not ‘complement and support’ self-regulation; it would kill the principle.

The Press Ombudsman’s office has recently been restructured ... There may be arguments for further reforms: ideas mooted include introducing the power to fine, and allowing the Press Ombudsman to take steps proactively, without a formal complaint being laid.⁷³

Self-regulation of the media is an important mechanism for protecting freedom of the media and must be guarded. This is recognised by the African Commission on Human and Peoples’ Rights in its Declaration of Principles on Freedom of Expression in Africa⁷⁴ – which states that “effective self-regulation is the best system for promoting high standards in the media”.

In order to protect independent regulation, media organisations themselves need to ensure that self-regulatory structures are (and are perceived to be) effective at promoting ethics – and not just mechanisms to protect those they represent from criticism. Readers and viewers (important stakeholders) must be aware of such structures and endorse them so that politicians cannot easily sway popular opinion against the media to promote their own interests.

Given this, Kruger’s suggestions regarding the strengthening of the self-regulatory structures by giving the press ombudsman more teeth and enabling him/her to be more proactive need to be seriously considered.

⁷³ F. Kruger, ‘Regulating press freedom: A bad idea’, *Mail & Guardian*, 28 January 2008 http://www.mg.co.za/articlePage.aspx?articleid=330885&area=/insight/insight_comment_and_analys/s/

⁷⁴ See sub-section one of this chapter dealing with international and regional protocols

It would seem, though, that the ANC has reviewed the wisdom of setting up the MAT, after the chorus of criticism about its proposal. In March 2009, an ANC spokesperson stated that 'now is not the time and place for tribunals', and that the ANC had engaged with the Press Ombudsman's office and reached agreement that the office would be strengthened.⁷⁵

3.2 Legislation promoting media diversity

Media Development and Diversity Agency Act (MDDA Act)

The MDDA Act was promulgated in 2002 and a Board appointed in January 2003. The Agency is a public-private partnership – funded jointly by government and big media players, both broadcast and print.

The Act states that the Agency's objective is "to help create an enabling environment for media development and diversity ... (and) redress exclusion and marginalisation of historically disadvantaged communities and persons from access to the media"⁷⁶. The Agency is mandated to:

- encourage ownership and control of, and access to, media by historically disadvantaged communities, historically diminished indigenous language and cultural groups;
- encourage the channelling of resources to community and small commercial media;
- encourage human resource development and capacity building in the media industry, especially amongst historically disadvantaged groups;
- encourage research regarding media development and diversity.⁷⁷

The Agency has nine board members – six appointed by the President on the recommendation of Parliament after a public nomination process, and the other three selected by the funders (one representing broadcasting, one print and the other government).

Since its formation, the MDDA has awarded grants of R77 million in total (=US\$ 10.5 million [January 2010]) to over 239 projects.⁷⁸

Funding agreements with print and broadcasting partners end in 2009 (they each currently contribute R1m a year). The MDDA receives funding from Caxton, Independent Newspapers, Avusa, Kagiso broadcasting, Media 24, Midi Television, Electronic Media Network, Primedia Broadcasting and the SABC. In the financial year 2008/2009, broadcasters contributed a total of R10 471 600, and the print media a total of R4 800 000.⁷⁹ In terms of the Electronic Communications Act, broadcasting partners must contribute up to 0.2% of turnover to a universal service agency (see chapter 5) but can write this off against contributions made to the MDDA. MDDA is trying to persuade broadcasters to rather contribute to the Agency.

⁷⁵ S. Masinga, 'Calls for media censorship', News24, <http://www.news24.com/>, accessed on 6 May 2009

⁷⁶ Preamble, MDDA Act, No 14 of 2002

⁷⁷ <http://www.mdda.org.za>

⁷⁸ *Strategic and business plan, Medium Term Expenditure Framework 2009-2010*, Media Development and Diversity Agency.

⁷⁹ *Ibid.*

The MDDA's support for community broadcasting is outlined in Chapter 3 of this report.

Competition legislation

Competition law was reformed in 1998 with the introduction of a new Competition Act. The Act provides for various prohibitions on anti-competitive conduct, restrictive practices (such as predatory pricing and price fixing) and 'abuses' by 'dominant' firms. Certain mergers and acquisitions need prior approval.

The competition authorities (Competition Commission and Competition Tribunal) have dealt with a range of applications for mergers in the media industry. Several complaints regarding uncompetitive practice have also been lodged but dismissed.⁸⁰

It is not clear whether or not the competition authorities have ever been formally requested to investigate fair competition in the media as a whole. In research commissioned by the Open Society Foundation for South Africa (OSF-SA) into the MDDA in 2006,⁸¹ the Competition Commission is reported as being interested in working with the MDDA to get information on ownership and control and industry pricing issues.

4. Other laws that impact on media and freedom of expression

Although the Constitution guarantees freedom of expression and information, and new legislation such as that governing the right to access to information promotes this, there are several apartheid era laws still on the statute books, which could (if utilised) impede the media and journalists. Given the Bill of Rights, however, any cases brought under such laws would have to take into account the Constitution in interpreting such legislation.

4.1 Access to information

The right to access to information is guaranteed in the Constitution in Section 32(1):

Everyone has the right of access to –

- a) any information held by the state; and
- b) any information that is held by another person and that is required for the exercise or protection of any rights”

This right has been translated into legislation – the Promotion of Access to Information Act 2002 (PAIA). As can be seen from the constitutional clause, unlike the majority of countries that have access to information laws, South Africa has stipulated that both public and private organisations are bound by this legislation. In the case of private institutions and individuals,

⁸⁰ See for example Competition Tribunal, Case no 48/cr/jun04, *Mandla-Matla Publishing Pty Ltd vs Independent Newspapers* <http://www.comptrib.co.za/comptrib/comptribdocs/581/48CRJun04.pdf> , *Nasmedia AND Paarl Post Web Printers (Pty) Ltd*, Case no 65/LM/may00, http://www.comptrib.co.za/list_search.asp?dboption=6&keywords=large%20merger ; *Naspers and Supersport*, Case No 23/LM/Feb07, http://www.comptrib.co.za/list_search.asp?dboption=6&keywords=large%20merger

⁸¹ K. Skinner, Freedom of Expression Institute, 'Facilitating Media Diversity? The Media Development and Diversity Agency', published in *Meeting their Mandates? A Critical Analysis of South African Media Statutory Bodies*, OSF-SA, 2007, ISBN 978-1-920051-86-0, p. 239

a person requesting access to information has to show that this is necessary to exercise or protect other rights.

The legislation states that a person can apply for access to information, and, if refused, can appeal such decision internally before approaching the High Court.

South African NGO the Open Democracy Advice Centre (ODAC) has stated that the law is “exemplary, and has been called ‘the gold standard’ for such legislation”.⁸² However, ODAC highlighted in its submission to the African Peer Review Mechanism (APRM) that implementation is lagging – due in part, they state, to lack of rules for the use of the Act and an “urgent need for an adjudication system allowing a more rapid, accessible and inexpensive resolution to contested decisions”. They suggest that a freedom of information ombud be appointed to deal with delays caused by internal appeals and the courts.

In its submission, the Centre refers to a study it conducted in 2003 monitoring progress of 100 applications for access to information. “Of these requests,” they say, “only 23% resulted in disclosure of the desired information, while just over half of the requests received no response from the relevant public body.”

4.2 Defamation

Defamation is largely a civil rather than criminal matter in South Africa and legislation is designed to protect a person’s reputation⁸³. Defamation is linked to the constitutional right to dignity (Article 10 of the Bill of Rights).

Given the right to freedom of expression set out in the Constitution, the common law definition of defamation has evolved through a range of judgements since 1994. This is dealt with more substantially under section 5 below where landmark judgements are discussed.

The permissible defences against a claim of defamation are:

- privilege (e.g. the statements published were made by witnesses in court and reported, or by lawyers in a court or by legislators)
- that the statement was true and its publication was in the public interest
- the statement was a fair comment in the public interest
- the absence of intention to defame (mistake, jest etc)
- the publication was reasonable (i.e. the publisher had good reason to believe the statements were true and had taken steps to verify them and the person ‘defamed’ was given a chance to respond).⁸⁴

Defamation claims are traditionally used post publication to sue a newspaper, but have been cited in applications to interdict newspapers from publishing.

⁸² This statement was made in ODAC’s submission to the African Peer Review Mechanism (ARPM). ‘The State of Whistleblowing and Access to Information in South Africa: A submission to the African Peer Review Mechanism’, March 2006 http://www.aprm.org.za/docs/submissions/ODAC_APRM.doc March 2006

⁸³ Berger, *Media Legislation 2007*

⁸⁴ S. Delaney, for Freedom of Expression Institute, *The Media and the Law: A Handbook for Community Journalists*, 2007

4.3 Privacy

Section 14 of the Constitution states that “everyone has the right to privacy”. The rights to privacy and to freedom of expression are weighed up on a case-by-case basis. The courts have generally recognised that the public interest in public officials may be higher than that in other individuals.

4.4 Protection of sources

Section 205 of the Criminal Procedures Act No 51 of 1977 empowers the courts to imprison any person who refuses to give information relating to a criminal investigation. This has been used to try to pressurise journalists to reveal their sources (despite protests). Section 189(1) allows anyone to refuse to give information if they have a “just cause”.

A record of understanding was signed between the South African National Editors’ Forum (SANEF) and the Ministers of Justice and Safety and Security in 1999 following a media outcry over a photographer being subpoenaed in terms of the Act after witnessing the murder of an alleged gang leader. The agreement pointed out the “need to balance the interests of the maintenance of law and order and the administration of justice on the one hand with the right of freedom of expression and specifically freedom of the press and other media. The parties agreed to investigate the amending of Section 205...”⁸⁵

There has been no subsequent amendment to the relevant section, however, and this provision in South African law remains one of the most contentious for South African journalists.

4.5 Access to courts

Other sections of the Criminal Procedures Act have also been identified by media organisations as potentially inhibiting the rights of freedom of expression and access to information.⁸⁶ This includes section 153, which allows a judge or magistrate to hold a hearing behind closed doors and order that no information about the case may be published (if it is in the interests of a fair trial). The Constitution however specifies that courts should decide issues in a fair public hearing (Article 34) and a case can only be held *in camera* with good reasons (i.e. in the interests of a fair trial).

Other laws protect children – and thus a child under the age of 18 (if an accused, or a witness) may not be identified in the media.

4.6 Internal security laws

The Defence Act, No 42 of 2002, gives the State President the power to make regulations censoring information when a State of National Defence has been declared (Section 91(2)(h)). Section 89 of the Act specifies that a State of National Defence can be declared if

⁸⁵ www.sanef.org.za

⁸⁶ This is according to the SANEF submission to the African Peer Review Mechanism in 2006, ‘South African National Editors’ Forum (Sanef) Submission to the African Peer Review Mechanism’, January 2006 http://www.sanef.org.za/download_files/media_free/APRM_Response_Final_SANEF_1_Feb_2006.doc

South Africa is, amongst other things, threatened by war or is being invaded, or under armed or cyber attack.

Section 82 of the Act enables the Minister of Defence to make regulations outlining the classification of information, areas or facilities, whilst Section 83 states that such information may only be made public after 20 years have lapsed “since the year the record came into existence”. The Act emphasises however that this is subject to the Promotion of Access to Information Act (PAIA) (see above).

The Defence Act states that anyone responsible for publishing information which has been classified in terms of the Act, may be imprisoned for up to five years. Again this is made subject to the PAIA.

The Protection of Information Act, No 84 of 1982, replaced the Official Secrets Act, No 16 of 1956. This legislation gives the President the power to declare an area a “prohibited area” (including military areas and places where ammunition is kept). Journalists are restricted from entering prohibited areas, and the Act prohibits the disclosure or receipt of official secrets such as codes, or passwords or documents.⁸⁷

4.7 Equality

The Promotion of Equality and Prevention of Unfair Discrimination Act (2000) introduces measures which extend the hate speech limitation clauses in the Constitution to include harmful and hurtful speech.

Section 10 of the Act prohibits not only speech which is advocating hatred and constitutes incitement to cause harm (as stipulated in the Bill of Rights), but also bars publication of material that “could reasonably be construed to demonstrate a clear intention to ... be hurtful, be harmful ... promote or propagate hatred”.

Specialised Equality Courts (headed by a magistrate) are being established around the country in terms of the law, and it is difficult to assess whether such clauses have been used against media as cases are not consistently reported.

The South African Human Rights Commission (SAHRC) has however in a draft document on freedom of expression suggested that the identified clauses are contrary to the constitution:

There is a view that holds that the test for admissible freedom of expression should be that of ‘hurt’ or ‘hurtfulness’ in line with the proposal found in the Equality Act. It holds that if a person feels hurt as a result of utterances, those utterances should be disallowed. It is submitted that a test based on hurt, besides not according with the Constitutional provisions, may be far too subjective to make it justiciable. It would, however, have application and could be taken into account as an aspect to be weighed up during the limitation process in the Bill of Rights.⁸⁸

⁸⁷ Berger, *Media Legislation 2007*

⁸⁸ Discussion Document: Freedom of Expression, South African Human Rights Commission, 21 November 2002, Par 42
http://www.sahrc.org.za/sahrc/cms/downloads/Freedom%20of%20Expression_Discussion%20Document.pdf accessed 28 January 2008

5. Case law and judgements

There have been few specific tests of the right to freedom of expression before the Constitutional Court since 1994 – particularly as relates to the media. The Constitutional Court though has in several of its judgements highlighted the importance of the right to freedom of the media and freedom of expression. For example, in a case dealing with defamation law (which will be discussed in detail in subsequent sub-chapters), the Court found the following:

The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society ... The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their responsibility ... The media thus rely on freedom of expression and must foster it ... Furthermore the media are important agents in ensuring that government is open, responsive and accountable ... 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 ... they will invigorate and strengthen our fledgling democracy. If they vacillate ... the constitutional goals will be imperilled.⁸⁹

5.1 Dignity and reputation versus freedom of expression

Whilst high courts have set major precedents in law endorsing the principle of freedom of expression in defamation cases by public figures, several interdicts against publishing houses have been temporarily won in the lower courts (in contradiction sometimes of precedents). This has highlighted a divergence of views in the judiciary regarding the weight to be given to the different rights in the Constitution – and has led to calls for high-level discussions between media organisations and the judiciary.⁹⁰

Pre-publication gagging

In a number of instances over recent years individuals and organisations have lodged urgent interdicts in a bid to stop newspapers from publishing information. The *Mail & Guardian* newspaper seems to have borne the brunt of these – and between May 2006 and July 2007 six interdicts were lodged against the paper in the Johannesburg High Court.⁹¹ Only two of these interdicts, according to the Freedom of Expression Institute (FXI), were temporarily successful,⁹² but the organisation has pointed out that even the threat of a gagging order could have a chilling effect on freedom of expression:

⁸⁹ Constitutional Court, 'Fred Khumalo and others versus Bantubonke Holomisa', CCT 53/01, Paragraphs 21-25, handed down 14/06/2002 accessed from <http://www.constitutionalcourt.org.za> in February 2008

⁹⁰ The University of Witwatersrand Journalism Department has established a "Journalism and Judges" project to amongst other things promote discussion between editors and the judiciary and facilitate better reporting on courts.

⁹¹ Freedom of Expression Institute, media statement, July 2007, 'FXI outraged by gag on M&G newspaper', <http://www.fx.org.za/content/view/124/1/>, accessed on 5 February 2008

⁹² The urgent interdict was granted but publication was later allowed after a full hearing

The constant interdict pressure and high litigation costs contribute to a sense that the more involved and time-consuming enterprise of investigative reporting about matters of great public importance is especially risky.⁹³

A few examples of interdicts sought in recent years are outlined below:

- February 2006: The Jamiat-ul Ulama won an interdict against a range of Sunday newspapers to prevent them from publishing a controversial Danish cartoon depicting the Prophet Mohammed.⁹⁴
- November 2006: The National Directorate of Public Prosecutions (NDPP) lodged an application to prevent the *Mail & Guardian* from publishing articles on the relationship between the National Commissioner of Police, and a person accused of murdering a prominent businessman. The Johannesburg High Court dismissed the application with costs.
- May 2007: The Minister of Transport applied for an interdict to stop *Beeld* newspaper from revealing potential security problems with a new computer based traffic information system sourced from a leaked auditor general report. The case was dismissed with costs.
- July 2007: Then SABC legal head, Mafika Sihlali, lodged an interdict against the *Mail & Guardian* newspaper to block publication of allegations against him outlined in an internal audit report. Sihlali initially won a temporary interdict, but failed to lodge papers or appear at the final court hearing two weeks later. The final application was dismissed with costs. The judge stated that the “public has the right to know what is happening in institutions where the taxpayer’s money is spent”.⁹⁵
- February 2008: Singer Jurie Els succeeded in obtaining an urgent interdict against Media24, to prevent publication of an article implicating him in child molestation (he was later cleared of all charges). The publishers expressed surprise at the interdict, in view of an earlier Supreme Court of Appeal (SCA) ruling, which – in their interpretation - made it extremely difficult for an interim interdict to succeed as complainants had access to the post-publication remedy of suing for defamation.

The case on which the SCA ruled in May 2007 arose after the Directorate of Public Prosecutions (DPP) lodged an urgent interdict against Midi TV (*e.tv*) in 2005 to stop the channel from broadcasting a documentary about a murder case still being considered by the courts. The Cape Town High Court initially granted the interdict, and although after viewing the documentary the DPP dropped its objections, *e.tv* proceeded with an appeal in order to set case law in such instances.

The appeal court decided that the interdict should not have been granted as it interfered with freedom of expression and the Directorate had not shown that there was a real risk that substantial prejudice would result if the broadcast went ahead – setting a new benchmark and placing the onus on any plaintiff to prove the risk of substantial prejudice.

Two media lawyers, Dario Milo and Pamela Stein from Webber, Wentzel, Bowen, writing about this judgement said:

⁹³ See note 24 above

⁹⁴ *SA Sunday Paper Gagged*, 14/02/2006 http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1875279_00.html

⁹⁵ As reported in *Mail & Guardian*, 3 August 2007, ‘No Such Luck, Sihlali!’, http://www.mg.co.za/articlePage.aspx?articleid=315726&area=/insight/insight_editorials/ accessed on 7 February 2008

The Supreme Court of Appeal's decision is, in our view, one of the most significant decisions in favour of press freedom ... (W)here attempts are made to interdict the media from publishing defamatory articles, but it has yet to be established that the defamation is unlawful ..., an anticipatory ban on publication will seldom be necessary ... In other words, if the newspaper asserts that it will argue truth or reasonableness or fair comment ..., courts should adopt the principle, "publish and be damned", rather than ordering that the article be interdicted.⁹⁶

Defamation

Prior to the adoption of the Constitution and a landmark ruling in terms of the principles of freedom of expression contained therein in 1998, newspapers and broadcasters were hampered by what is known as the "absolute liability rule" in defamation cases. This meant that the media were regarded as absolutely liable for any defamation unless they could prove the story was both true and in the public interest.⁹⁷ This however changed with what is called the "Bogoshi judgement" (National Media Ltd and others vs Bogoshi).

The Supreme Court of Appeal in this case ruled that a newspaper only has to show that it took "reasonable precautions" to establish the accuracy of the report and that the report "is in the public interest", to defend itself against a defamation claim. In considering the reasonableness of the publication a court, it was ruled, should take into account "the nature, extent and tone of the allegations" and "greater latitude" will usually be allowed "in respect of political discussion".⁹⁸

This developed common law significantly and has allowed for new defences to defamation suits.

In 2002, the publishers of the *Sunday World*, which was being sued for defamation, asked for the Constitutional Court to further develop case law.

In *Khumalo and others vs Holomisa*, the newspaper argued that common law violated the right to freedom of expression as it did not require a plaintiff to prove that a report was false.

Judge Kate O'Regan for the Constitutional Court dismissed this, emphasising that the right to freedom of expression, whilst a fundamental right, is "not a paramount value" and must be considered in the context of other rights such as equality, dignity and freedom⁹⁹. She said that the Bogoshi judgement had recognised that it might be difficult for a range of reasons for a newspaper to prove the truth of any allegations. Plaintiffs, she found, were similarly challenged and therefore should not have to prove the falsity of statements.

5.2 Privacy versus freedom of expression

Section 14 of the Constitution states that every person has the right to privacy.

The courts have made several judgements relating to the rights of privacy and freedom of expression. In 2007, the *Sunday Times* published allegations, based on medical records, that then Minister of Health Manto Tshabalala-Msimang had drunk excessive amounts of alcohol during a hospital visit. The Minister (together with the hospital where she was admitted) challenged the matter in court.

⁹⁶ D. Milo and P. Stein (partners at Webber Wentzel Bowens), 'The Quiet Revolution for Freedom of the Press', 28 May 2007

⁹⁷ P. Reynolds, Webber, Wentzel and Bowens, "'Bogoshi' - Loosening the chains!", 7 February 2000

⁹⁸ Cited in Constitutional Court Ruling, Fred Khumalo and others versus Bantubonke Holomisa, Par 18, CCT 53/01, handed down 14/06/2002,

<http://www.constitutionalcourt.org.za/Archimages/9442.PDF>, accessed on 10 February 2008

⁹⁹ *Ibid.*, paragraph 25

Although the judge awarded costs to the Minister, and ordered that the records be returned as they are highly confidential, the judgement itself raised interesting issues regarding press freedom.

The judge dismissed both an application to restrain the newspaper from publishing any further stories based on information obtained from the records and a request that the *Sunday Times* destroy any records apart from the medical record.

Judge Jajbhay ruled:

Freedom of the press does not mean that the press is free to ruin a reputation or break a confidence, or to pollute the cause of justice or to do anything that is unlawful. However freedom of the press does mean that there should be no censorship. No unreasonable restraint should be placed on the press as to what they should publish.¹⁰⁰

... the information, although unlawfully obtained, went beyond being simply interesting to the public, there was in fact a pressing need for the public to be informed about the information contained in the medical records ... (T)he publication of the ... information was capable of contributing to a debate in our democratic society relating to a politician in the exercise of her functions ...¹⁰¹

The judge emphasised that the privacy rights of the Minister are “diluted” as the newspaper had asserted that the information in the medical records could be verified by reliable sources (including medical staff and other hospital patients).¹⁰²

5.3 Hate speech

The Human Rights Commission, which is not a court of law but is charged with investigating and finding appropriate remedies for breaches of constitutional rights, has looked at a number of cases of what was perceived as hate speech and public apologies have been demanded (and made) by those responsible. Occasionally the Commission also been requested to adjudicate such complaints against the media. In April 2008, for example, it decided not to pursue complaints about a column in the *Sunday Times*, alleged to have been racist, after both the columnist and the newspaper apologised for causing offence. The Commission stated that the apologies removed the need for further investigation.

6. Conclusions and recommendations

There is media freedom in South Africa, but ...

That essentially sums up the position in the country. As Professor Guy Berger from Rhodes University wrote in his study on media legislation, “South African media operate with substantial impunity in a free environment ... however, there is a certain amount of harassment.”¹⁰³

The concern is that the number of ‘buts’ might rise – though this would not happen silently given the vocal and vibrant media and civil society sector in South Africa.

¹⁰⁰ Judgement in the High Court of South Africa, Witwatersrand Division, Mantombazana Edmie Tshabalala-Msimang and others versus Mondli Makhanya and others, Case No: 18656/07, (hereinafter Jajbhay judgement), 30 August 2007, Paragraph 35, http://www.jacobson.co.za/files/Manto_versus_The_Sunday_Times_judgment.PDF

¹⁰¹ Par 46, Jajbhay judgement

¹⁰² Par 47, Jajbhay judgement

¹⁰³ Berger, *Media Legislation* 2007, p. 107, Clause 2.8.9

The overall legal framework guarantees the right of all South Africans to freedom of expression. The Constitution promotes this right (in line with international and regional protocols), and the Constitutional Court has shown sensitivity in its balancing of freedom of expression against other individual rights. The Constitution has been used to develop common law and interpret apartheid-era laws that unfortunately remain on the statute books. In addition, the President has referred laws back to the legislature over concerns that they might violate the Bill of Rights – further emphasising the weight of the Constitution.¹⁰⁴

Some courts have made insightful judgements when balancing the different rights in the Constitution against freedom of expression (and certainly are not swayed by political expediency as evidenced by the ruling in the case outlined above dealing with the *Sunday Times*' story on the Minister of Health).

However, this is not necessarily the norm and there are apparently divergent views in the judiciary on the value of freedom of expression versus other rights (as indicated by seemingly conflicting judgements identified above and the granting of gagging orders by some lower courts). Whilst the media can successfully challenge these (and have done so), the threat of costly and time-consuming court processes undoubtedly has a chilling effect on their work and their willingness to tackle controversial subjects.

Freedom of the media and information is potentially hampered by a number of other factors: There is a tendency among public figures (including some politicians) to respond to opportunities to use their right of reply with an interdict to attempt to stop publication. There is also a seeming lack of awareness about the implications of the Bill of Rights and the law amongst officials such as police and security guards who, according to a range of reports, have barred journalists from certain areas at their own discretion.¹⁰⁵

On a more general level: The fact that a huge number of South Africans have only limited access to a diverse range of information and opinion in the language of their choice (see Chapter 1) also serves to diminish their chance of exercising one of their important constitutional rights.

The debate about the balancing of freedom of expression against other rights has been intensifying – with both the ruling party and its new president, Jacob Zuma, being amongst those that are highly critical of the media. However, since assuming office, Zuma's administration has been at pains to adopt a more conciliatory tone in relation to the media. At the same time, though, it has introduced some pieces of legislation such as the Film and Publications Amendment Bill, the Protection of Personal Information Bill and the Protection from Harassment Bill which, if passed, could hamper the work of investigative journalists. While the Film and Publication Amendment Act is an improvement on the initial draft, it still requires newspapers not registered with the Press Ombudsman, as well as non-media related publishers, to submit their work for pre-publication classification and possible censorship. With respect to the Protection from Harassment Bill, the South African National Editor's Forum has voiced its objections, arguing that the bill may hamper the newsgathering

¹⁰⁴ In 1999 the Broadcasting Bill was also referred back to Parliament by then President Mandela over reservations about the constitutionality of the Minister's proposed powers. In April 2006 President Mbeki asked Parliament to reconsider the ICASA Amendment Bill over concerns that clauses allowing the Minister to appoint Councillors to the Council could violate the constitutional protection of independence of the broadcasting regulator (see http://www.mg.co.za/articlePage.aspx?articleid=269702&area=/insight/insight_national/).

¹⁰⁵ For example, police at the site of an accident in Durban arrested a *Sowetan* journalist in February 2008 - allegedly for obstructing justice. Sanef says in a statement that it "has protested on several occasions recently about the police arresting reporters and photographers at crime scenes, pointing out that these appear to be attempts by the police to prevent journalists from reporting the incidents. In all recent cases – except one that is pending – the cases have been thrown out of court by prosecutors as being baseless." http://www.sanef.org.za/press_statements/903824.htm

role of journalists because the definition of harassment is so wide that it could include the conduct of journalists seeking information about people in the news.¹⁰⁶

Recommendations

How can the hard-fought for legal rights to freedom of expression be entrenched and advanced? These are some of the suggestions (in no order of priority) that flow from what has been outlined in this chapter:¹⁰⁷

- It is essential that there are ongoing awareness campaigns about the importance of freedom of expression and the value of robust debate. The media and human rights organisations need to themselves initiate and be part of such campaigns in order to increase understanding amongst all South Africans that freedom of expression is critical for all citizens - and is not only the purview of the media itself.
- Campaigns for the review of all apartheid-era laws should be intensified.
- At the same time, the media and civil society need to continue to scrutinise proposed new laws and/or amendments to existing laws and engage with the legislative process to ensure that proposed provisions do not negatively impact on freedom of expression.
- Discussion and debate between the judiciary and editors needs to continue to assist in limiting conflicting judgements.
- The review mechanisms in the Promotion of Access to Information Act need to be strengthened to allow for efficient and effective implementation – in line with suggestions from the Open Democracy Advice Centre outlined above.
- More funding for the MDDA is essential. At the same time, the MDDA Act should be strengthened to allow the Agency to address limits to media diversity generally – and not only focus on non-profit and small commercial media organisations (thus barring it from assisting new bigger players to enter the market).
- The Competition Commission should be formally requested to investigate allegations of unfair competition in the press sector. The MDDA and the Competition Commission should work together closely to increase awareness of competition law and to promote and increase media diversity.
- The press, together with all stakeholders, needs to review its self-regulatory structures and codes to, for example, consider equipping such structures with powers to impose fines for violations of the code. Consideration should also be given to involving the public and other stakeholders in contributing to the Code of Standards. This could ward off potential threats to independent regulation of the press as it would ensure that the public feels involved in determining media ethics. The Press Council should also intensify public awareness campaigns to ensure readers and audiences know about the Code and mechanisms for lodging complaints.

¹⁰⁶ R. Louw, 'Creeping censorship a threat to the post-apartheid media'. *Business Day*. 12 November 2009.

- In order to promote black economic empowerment in the press, the print media industry should urgently consider drafting its own media charter in terms of the sectoral Broad-based Black Economic Empowerment Charter, following the example of advertising and the IT industry.

The Broadcasting Landscape

Radio listeners and television viewers in South Africa are being offered a variety of services by public, commercial and community broadcasters. This three-tier system is based on section 192 of the Constitution of South Africa (Act No 108 of 1995), which establishes an independent authority to regulate the broadcasting sector as a whole in the public interest and to ensure fairness and diversity of views broadly representing South African society. Legislation and policies are aimed at providing all South Africans with access to broadcasting services and a diverse range of information, education and entertainment.

1. The public broadcaster

The South African Broadcasting Corporation (SABC) is established as a public company (SABC Ltd) with the state as the sole shareholder in terms of the Broadcasting Act, no 4 of 1999 (Sec 8A). This Act (in line with the White Paper on Broadcasting Policy¹⁰⁸) determined new policies for public broadcasting – repealing the previous Broadcasting Act (Act no 73 of 1976) and extending and reinforcing principles determined in the IBA's Triple Inquiry Report dealing with public broadcasting. The Act also reorganised the broadcaster into two separate entities – a public broadcasting service and a public commercial wing (Sec 9), with the latter supposed to cross-subsidise the former (more details in chapters 6 and 7).

The SABC public wing comprises

- fifteen radio stations (including 11 full-spectrum services broadcasting in each of the official languages, a station broadcasting in the Northern Cape in !Xu and Khwe, a service for the Indian community and one targeting the Eastern Cape), and
- two existing national television channels. A further two regional television channels have been licensed, but are not yet on air pending finalisation of funding. (For more details see chapter six.)

The SABC's public commercial services are subject to the same terms and conditions as private commercial stations and channels – but in terms of the Act they still have to adhere to

¹⁰⁸ Department of Communications, White Paper on Broadcasting Policy, May 1998

the values of public broadcasting (Sec 11 Broadcasting Act).

There are three public commercial music radio stations and one designated public commercial television channel. (For more details see chapter six.)

2. Commercial broadcasters

There are a range of commercial radio and television services in South Africa. These include both free-to-air channels and subscription services (terrestrial and satellite). Government and regulatory policies emphasise that they should fulfil certain public service responsibilities – though these are less onerous than those imposed on public and community broadcasters.¹⁰⁹ Free-to-air broadcasters in turn have greater public service obligations than subscription services.

To date, licences have been awarded through a competitive process and the regulator has made decisions based on which applicant/s best meet the objectives of broadcasting legislation in deciding between applicants. Thus, although ICASA's position papers and regulations dealing with commercial broadcasting set certain minimum public service obligations which must be met, those awarded licences generally exceed these minimum requirements.

All free-to-air services have to air regular news bulletins according to ICASA regulations. The Position Papers on Private Sound Broadcasting Services and on Private Television emphasise the importance of the diversity of news and news formats.¹¹⁰

In terms of the requirements, commercial radio stations have to broadcast at least 30 minutes of news each day and private free to air television has to provide at least one hour of news per day, including at least half an hour of news packaged as a single programme during prime time.

As highlighted in the previous chapter, broadcasters also adhere to a Code of Conduct developed through a public process. This stipulates that broadcasters must “report news truthfully, accurately and fairly”.¹¹¹

There is no evidence of undue interference in the editorial independence of any of the commercial services from either owners or politicians. Although there have been a range of complaints in terms of the Code of Conduct against broadcasters (from competitors and listeners/viewers over the years), none of these have specifically dealt with breaches relating to editorial independence. Executive Director of the National Association of Broadcasters of South Africa (NAB), Johann Koster, confirmed this in an interview.¹¹²

Whilst *e.tv* prides itself on its news, it is unclear whether radio stations (with the exception of the talk and news focused services) are producing their own news (rather than just sourcing them from a national news agency such as the South African Press Agency, SAPA) as no study on diversity of news sources has been conducted.

¹⁰⁹ The White Paper on Broadcasting for example states that private broadcasters must, amongst other things, air predominantly South African content, provide news and commentary and increase diversity of programme content and ownership in broadcasting (Chapter Three).

¹¹⁰ Independent Broadcasting Authority, *Position Paper on Private Sound Broadcasting Services*, 16 May 1996 and *Private Television Position Paper*, 2 May 1997

¹¹¹ Broadcasting Complaints Commission of South Africa (BCCSA), Code of the BCCSA, applicable from March 2003 accessed from <http://www.bccsa.co.za/>

¹¹² Interview Johann Koster, March 2008

2.1 Television

There is only one licensed commercial free-to-air television station – *e.tv* (Midi TV (Pty) Ltd). *E.tv* provides a national service and in terms of its licence has to reach at least 77 per cent of the population of South Africa. It is licensed as a broad spectrum channel and has to include children's programmes, news and current affairs, documentaries and South African drama, amongst other things.

E.tv is owned by Sabido Investments. The majority shareholder in Sabido is Hoskins Consolidated Investments – which in turn is controlled by, amongst others, the South African Clothing and Textile Workers Union's investment company.

There are two subscription services currently on air – both owned by Nasionale Pers (National Press) which also owns a number of newspapers and magazines (see chapter 2). These subscription television services are:

- M-Net – a terrestrial subscription service; and
- DSTV/Multi-Choice – a multi-channel satellite subscription service.

Another four subscription services were awarded licences after a competitive bidding process towards the end of 2007. Three of these were due to go on air early in 2009, but had not done so at the time of writing.

- E-sat – an application by the owners of *e.tv*. *E.tv* has subsequently turned down the licence and opted for a 24-hour news channel to be broadcast via the DSTV/Multi-Choice platform instead.
- On Digital Media (ODM) – a multi-channel subscription service. ODM has a range of shareholders including a black economic empowerment (BEE) investment company, a women's group, the investment wing of the Congress of South African Trade Unions (COSATU) and a 20 per cent shareholding from European satellite company, SES Astra.¹¹³
- Telkom Media – a multi-channel subscription service which promised to also offer Internet Protocol TV and include a South African based 24-hour news channel. The majority shareholder, the incumbent telecommunications operator, Telkom Pty Ltd, has since sold its stake to a Chinese company, and the company has been re-launched as Super 5 Media. At the time of writing, the sale still had to be approved by ICASA.¹¹⁴
- Walking on Water – a single channel Christian focused subscription service aimed at a niche audience. The two largest shareholders are WindsObey (Pty) Ltd and Cornerstone Technology Holdings¹¹⁵.

2.2 Radio

At present there are 16 commercial radio stations in South Africa¹¹⁶. These include regional and city-wide stations. There is no national commercial radio station. Most of these stations broadcast in English.

¹¹³ www.ondigitalmedia.co.za

¹¹⁴ 'Pay-TV competitor ready to go, 9 November 2009, <http://mybroadband.co.za/news/telecoms/10373.html>.

¹¹⁵ Independent Communications Authority of South Africa, *Applications for Commercial Satellite and Cable Subscription Broadcasting Licences: Reasons for Decision*, November 2007, p. 163.

As outlined in chapter 1, six of the SABC's existing services were sold to private entities in 1996. These stations all have a regional profile (covering provinces rather than just cities) and are still the biggest money spinners:

Algoa FM is an adult contemporary station in the Eastern Cape based in Port Elizabeth and broadcasting in English. It is controlled by African Media Entertainment (AME) – which also controls OFM and has a stake in M-Power FM. AME is listed on the Johannesburg Stock Exchange (JSE) and also owns a radio advertising sales house.

East Coast Radio is a hit music station broadcasting in English in KwaZulu Natal. It is owned by Kagiso Media (100 per cent). Kagiso Media also controls Jacaranda FM and has minority stakes in Heart FM, Gagasi FM, OFM and Kaya FM. Kagiso Media's key shareholder is Kagiso Trust Investments – the investment wing of a developmental trust established in the 1980s.

Highveld Stereo covers Southern Gauteng (including Johannesburg and Pretoria). It is an "all hits" station broadcasting in English and is owned by Primedia (which also controls Cape Talk, Radio 702 and KFM). Primedia is owned by the Kirsch family and the Mineworkers Investment Company.

Jacaranda FM broadcasts in English and Afrikaans and covers Gauteng as well as parts of the North West province, Limpopo and Mpumalanga. It is a "hits station" format. The major shareholder is Kagiso Media (80 per cent) which also owns East Coast Radio and has minority stakes in other stations around the country.

K-FM covers the Southern Cape including Cape Town and surrounding areas and is an adult contemporary station broadcasting in English. It is owned by Primedia (which also owns Cape Talk in Cape Town as well as Radio 702 and Highveld Stereo).

OFM broadcasts from Bloemfontein and covers the Free State province as well as parts of the Northern Cape and North West provinces. It is controlled by African Media Entertainment (AME), which also has stakes in Algoa FM and M-Power. It is an adult contemporary/greatest hits station broadcasting in English and Afrikaans. Kagiso Media has a non controlling interest in OFM (24.9 per cent).

A talk and news radio station broadcasting in English, *Radio 702* (broadcasting in the Gauteng and North West provinces), was "grandfathered" with the introduction of the IBA Act (as it had been broadcasting prior to the introduction of the legislation it was guaranteed a licence under the Act). *Radio 702* is owned by Primedia (which also owns *Highveld Stereo*).

In 1997 the IBA licensed eight new commercial radio services. These stations focus on cities rather than provinces. Two of these, broadcasting on medium wave in Afrikaans in Cape Town and Johannesburg, have subsequently closed down.

Johannesburg: *Classic FM*: which focuses on classical music and broadcasts in English. There is no shareholder with over 25 per cent of shares (the legislative determination of control). The largest shareholders are Classic FM PLC (the owners of Classic FM in London which owns 20 per cent of shares), Liberty Life Foundation (a South African foundation), Ingoma Trust (a trust made up of musicians) and

¹¹⁶ <http://www.icasa.org.za>

Moneyweb Holdings (which produces a business programme called Moneyweb).¹¹⁷

Kaya FM is an African focused urban adult contemporary station broadcasting in English. It provides 60 per cent music and 40 per cent talk.¹¹⁸ The controlling shareholder is Thebe Convergent Technologies (made up of a number of BEE groups). A number of other companies hold shares including Kagiso Media (see above), Makana Investment Company (an investment company representing ex political prisoners) and Tiso Radio (a BEE investment company). These three have joint stakes in other stations in Cape Town and Durban (see below).

Y-fm is the station for the youth and broadcasts both music and talk radio predominantly in English. The major shareholder is HCI – which also owns e.tv.

Cape Town: *Cape Talk* is a news and talk station that broadcasts on MW and FM in English. It is owned by Primedia (which also owns K-fm, Radio 702 and Highveld Stereo). It shares some programming with Radio 702.

Heart FM is an urban adult contemporary station (including soul music) which broadcasts in English. It is controlled by Makana Radio Investments which is made up of Makana Investments Corporation, Kagiso Media and Tiso Radio. The consortium also owns Gagasi in Durban and has a stake in Kaya FM in Johannesburg.

Durban: *Gagasi 99.5* covering Durban and Pietermaritzburg is an R&B Afro pop station which broadcasts in both English and IsiZulu. It is owned by Makana Radio Investments (see details under Heart FM above).

ICASA issued new licences to stations in what are called secondary towns (not the major cities) at the beginning of 2007. These licences are provincial rather than just limited to towns in order to increase their viability. ICASA had advertised the licences in four provinces (Limpopo, North-West, Mpumalanga and Northern Cape), however there were no applicants for the Northern Cape frequencies. Those awarded licences are:

Polokwane *Capricorn FM* broadcasts from Polokwane (the provincial capital) to the Limpopo Province. It is a music driven station (70 per cent music and 30 per cent talk) broadcasting predominantly in English with a young adult contemporary format. Capricorn is owned by MSG Afrika Investment Holdings (37.5 per cent) – a new black empowered media company, Safika, a major BEE investment company in South Africa and Limpopo based business people. Capricorn FM went on air in the last quarter of 2007.

North-West *Radio North West* broadcasts from Rustenburg to the North West province. It broadcasts in SeTswana (80 per cent) and in English and

¹¹⁷ Independent Communications Authority of South Africa, *Reasons for Decision, Application for a Renewal of a Commercial Sound Broadcasting Licence*, 30 June 2004

¹¹⁸ Independent Communications Authority of South Africa, *Reasons for Decision, Application for a Renewal of a Commercial Sound Broadcasting Licence, Kaya FM (Pty) (Ltd)*, 8 July 2005, <http://www.icasa.org.za/SearchResults.aspx?Page=91&Criteria=kaya%20fm>

other languages spoken in the province (20 per cent). There is no majority shareholder. The two largest shareholders are Direng Investments (a black economic empowerment company involving a number of individuals with a background in radio) and the South African Democratic Teachers Union Investment Company. The station is a predominantly gospel music service with 80 per cent music and 20 per cent talk and has pledged to provide educational programmes in the evenings. The station commenced broadcasting in February 2008.

Mpumalanga *M-Power* Pty Ltd is an adult contemporary music station broadcasting primarily in English. It airs 70 per cent music and 30 per cent talk. It is owned by African Media Entertainment Ltd (AME), Direng Investment Holdings, and a Mpumalanga based consortium - Mbombela Investment Holdings.

ICASA has issued invitations to apply for commercial licences in the three primary markets (one each for Gauteng, Durban and Cape Town). 38 applications were received by the deadline date, end of November 2009. At the time of writing no decisions had been made by the regulator.

3. Limitations on media ownership

The re-regulation of broadcasting which commenced in 1995 has resulted in the growth of a range of new media companies and owners in line with the legislation's requirements of diversity and ensuring ownership by historically disadvantaged groups. In addition, requirements in legislation dealing with cross media control and limiting foreign control have assisted in limiting any monopolies.

In terms of current legislative requirements:

- No foreign person or entity may own or control more than 20 per cent of any broadcasting licence (Sec 54 Electronic Communications (EC) Act).
- No person may control more than one commercial television channel or more than two FM or two AM commercial radio stations. Such stations should not have similar licence areas. ICASA has the power to exempt any person from these clauses "on good cause" (Sec 55 EC Act).
- No person who controls a newspaper may have financial control of any broadcasting licensee. In addition, no person who controls a newspaper may have control (more than 20 per cent) of any broadcasting licensee that broadcasts in a similar area to that in which the newspaper "has an average ABC circulation of twenty percent (20%) or more of the total newspaper readership in the area".¹¹⁹ Again the regulator has the power to deviate from the law on good cause (Sec 56 EC Act).

In response to concerns raised by the industry that the ownership limitations potentially stifle growth in the sector and limit the development of new black companies, ICASA held a review of the legislative provisions in 2003 and published a Position Paper in January 2004.¹²⁰ The document highlighted concerns raised by commercial broadcasters over the dominance of

¹¹⁹ This clause, it has been argued, is void for vagueness as it alternately uses two distinct concepts – circulation and readership.

¹²⁰ Independent Communications Authority of South Africa, *The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences: Position Paper*, 13 January 2004

the public broadcaster in the commercial broadcasting market (in terms of both audience and advertising share).

The regulator, after considering all submissions made to it, decided that it would be important to change the ownership restrictions and suggested the following amendments to legislation¹²¹:

- The limit on foreign shareholding in a broadcasting licensee should be increased to 25 per cent.
- The cap on the number of commercial radio stations which can be controlled by one entity should be converted to a limit on the proportion of the total number of stations, rather than limiting it to a set number. Diversity, ICASA noted, is dependent on the size of the industry. The Authority suggested therefore that the law be changed to state that no one entity can control more than 35 per cent of the number of radio stations. The regulator proposed however that limitations on the ownership of stations with overlapping licence areas should continue, though the number of stations which any one entity can own in one area should be increased to two services.
- The limit of one television channel should remain.¹²²

The proposals on cross media control do not amend the substance of initial clauses, but do address loopholes in the original law.

ICASA submitted these recommendations to the Minister of Communications, as required by legislation, in 2004. To date, the Minister has not forwarded the recommendations to Parliament and therefore the original legislative requirements remain in place.¹²³

In January 2010, ICASA released a discussion document on ownership and control issues, requesting the public to respond to a range of questions about whether these rules safeguarded diversity sufficiently, or whether they should be relaxed.¹²⁴ At the time of writing, ICASA was still considering the public responses, which may result in the regulator exercising its power to issue new regulations, and may also lead to recommendations to the Minister to alter the limitations on control provision set out in the ECA.¹²⁵

4. Community broadcasting

The Electronic Communications (EC) Act defines a community broadcaster as an entity which:

- is fully controlled by a non-profit entity and carried on for non-profit purposes;
- serves a particular community;

¹²¹ This is an abridged version of the actual proposed amendments which detail clauses to close loopholes in existing legislation, and outline specific grounds for exemptions to requirements.

¹²² Independent Communications Authority of South Africa, *Final Recommendations to the Minister to Amend Certain Provisions of the Independent Broadcasting Authority Act (Act No 193 of 1993)*, undated

¹²³ The new amendments were not tabled or discussed by Parliament when the EC Act replaced the IBA Act in 2005. It is unclear why the proposed amendments were not discussed – or why the original clauses were transcribed exactly into the new legislation without even addressing obvious loopholes.

¹²⁴ Independent Communications Authority of South Africa, Discussion Document on Ownership and Control, November 2009, Government Gazette, Notice 1532 of 2009.

¹²⁵ "Ownership and control: broadcasting", Lisa Thornton Inc., accessed from <http://thornton.co.za/ict-law-and-regulation-south-africa-blog/ownership-and-control-broadcasting> on 23/03/2010.

- encourages members of the community served by it or persons associated with or promoting the interests of the community, to participate in the selection and provision of programmes ...
- may be funded by donations, grants, sponsorships or advertising or membership fees or any combination of the aforementioned.¹²⁶

A community can be either geographically based or share a common interest (for example, religion). Community broadcasters have developed different mechanisms for ensuring participation by their communities including programming committees open to all members of the community and structures enabling communities to vote for governing boards.

All stations are, according to the ICASA frequency plan, local. Obviously, the actual coverage area is more extensive in rural areas than in cities.

The EC Act has considerably simplified the application process for community broadcasters. Whereas before 2005 stations had to wait for invitations to apply to be issued by the regulator¹²⁷, under the new legislation community stations and channels just require class licences¹²⁸. This means that they merely have to apply for registration rather than go through an application process (Sec 5(b) EC Act).

The Government has made a further commitment to community broadcasting by establishing the Media Development and Diversity Agency (MDDA). From its establishment in 2003 until April 2009, the MDDA has provided support for 239 projects.

In an interview for this research, CEO of the Agency Lumko Mtimde stated that this support has ranged from mentoring and training to assist stations to develop strong management and governance practices, to financial contributions for up to three years to cover administration costs. According to Mtimde, the MDDA has also assisted fledgling stations to develop applications for ICASA and supported the community television movement by assisting channels to develop models for sustainability and impact on the overall broadcasting policy framework.¹²⁹

4.1 Radio

In January 2009, ICASA confirmed that it had licenced 96 community radio stations and a further three low power sound stations.¹³⁰ Whilst initially stations were predominantly based in cities and towns, ICASA has made a concerted effort to expand the community radio network by issuing specific invitations for licensees in what are termed “nodal points” – determined by government as the most disadvantaged and poor areas in the country.

Sixty-four of these stations target geographic communities (specific areas), and the others cater for particular language groups (such as Chinese and Greek), students, religious or cultural communities. They broadcast in a range of languages and dialects.

¹²⁶ EC Act, Section 1, Definitions

¹²⁷ There have been two invitations to apply for four year licences issued by the regulator since its establishment in 1994.

¹²⁸ The Act differentiates between class and individual licences.

¹²⁹ Lumko Mtimde responded in writing on 24 April 2008 to a set of questions submitted by the researcher.

¹³⁰ ICASA Annual Report, 2008/2009, p. 6.

ICASA has set minimum requirements for community radio stations. The exact formats are defined in licence conditions and vary from station to station. Applicants have to show that their proposed programming line-up is relevant to their defined communities.

In its Position Paper on community radio, the regulator states that the majority of programmes – and in particular news and current affairs – must be sourced from within the target community.¹³¹ All stations are required to broadcast news including local news. The policy further states that community stations must:

(P)rovide a distinct broadcasting service dealing specifically with community issues which are not normally dealt with by the broadcasting service covering the same area ... (and) focus on ... programmes that highlight grassroots community issues ...¹³²

4.2 Television

South Africa has a fledgling community television sector. One community of interest television service was grandfathered at the time of promulgation of the IBA Act in 1994 (Trinity Broadcasting Network – a Christian station in the Eastern Cape). Three others have been granted one-year licences (in Cape Town, Soweto and Richards Bay). The sector is too young to assess its long term effect and sustainability.

ICASA's Position Paper on community television outlines several minimum standards for community channels.¹³³ It states that the majority of programmes must be sourced and produced locally and that there must be community access to the channel.¹³⁴ Community television channels are also expected to air news, actuality programmes and children's programmes.¹³⁵

4.3 Challenges

As with all other broadcasters, community stations and channels have to abide by a set Code of Conduct which specifically provides for editorial independence. Community media however face differing challenges in implementing this:

- A lack of journalistic skills could affect the quality of editorial content. Whilst there has been ongoing training of community radio staff over the years by a range of institutions (including the Institute for the Advancement of Journalism, Bush Radio training school, ABC Ulwazi, Rhodes University Sol Plaatje Institute, etc), skilled staff are regularly recruited by commercial and public broadcasters – continuously depleting the pool of trained members of community stations.
- Concerns have also been raised about the relationships between municipalities and local media (including community radio). According to a report by the Democracy Radio Project of the Institute for Democracy in South Africa (IDASA), this relationship

¹³¹ ICASA, *Community Sound Broadcasting Policy Position Paper*, 5 June 2006, p. 23, Section 11

¹³² Ibid, p. 27

¹³³ Independent Communications Authority of South Africa, *Community Television Broadcasting Services: Position Paper*, 30 November 2004

¹³⁴ Ibid, p. 17. The policy document emphasises that the management of community television channels “act as responsible civic custodians”.

¹³⁵ Ibid, Section 7, pp. 19-21

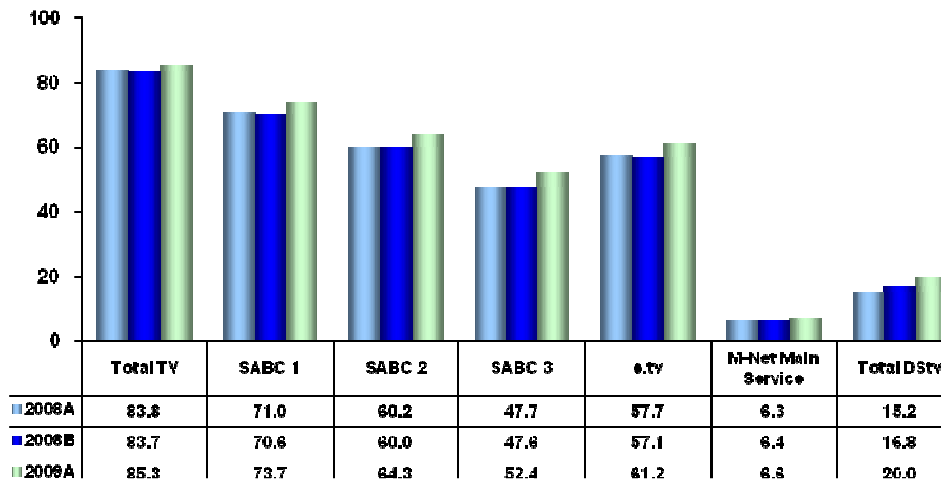
is often “difficult” and community media (including radio) battle to get access to local government officials.¹³⁶ This inevitably affects reporting on local issues.

5. Audiences of all three sectors

The All Media Products Survey (AMPS) information released in June 2009 (AMPS 2009A) shows an increase in overall media consumption.

Television viewership figures are generally up. As can be seen from the graph below, SABC 1 has the largest audience, followed by SABC 2 and e.tv.

Figure 3: Television viewership in South Africa



Source : SAARF AMPS 2009A

Radio listenership has been relatively stable, although there have been recent indications of a slight decline in numbers. In the second half of 2007, 93.5 per cent of South Africans listened to radio over a seven day period.¹³⁷ By the first half of 2009, this figure had decreased to 90 percent.¹³⁸

Radio stations are too numerous for all of their listenership figures to be reflected here. The top ten are mostly SABC services – as is to be expected because they have wider coverage than the others. Those with provincial coverage also obviously score higher figures – though a Durban commercial radio station, Gagasi, is amongst the ten most popular services.

¹³⁶ S. Mati and B. Davidson, IDASA, *Report on Municipal Journalism Seminars: Restoring a sense of public responsibility and mission in the media*, Grahamstown, Thoyoandou and Durban, November 2006, accessed from <http://www.idasa.org.za/index.asp>

¹³⁷ SAARF AMPS 2007B

¹³⁸ SAARF AMPS 2009A

Table 4: Favourite radio stations - National Top 10

Station	Percentage (15 + yrs old)	Number of listeners
Ukhozi FM	12.0	4 168 000
Umhlobo Wenene FM	10.9	3 530 000
Lesedi FM	6.7	2 191 000
Thobela FM	6.0	1 947 000
Metro FM	5.3	1 722 000
Motsweding FM	4.9	1 608 000
Radio Sonder Grense	3.5	1 149 000
East Coast Radio	2.8	911 000
Gagasi 99.5	2.7	888 000
94.2 Jacaranda	2.7	887 000

Source: SAARF December 2009

6. Accessibility of broadcasting services

The public broadcaster, the SABC, is the only broadcaster tasked in terms of law with making its services available throughout South Africa. Other broadcasters have their respective coverage areas prescribed through their licence conditions.

Commercial radio stations are generally licensed to cover individual major cities and towns and do not broadcast into rural areas located far from urban centres. Many community radios, on the other hand, have been licensed in rural areas, with their coverage confined to specific villages and/or defined communities.

There is only one licensed free-to-air commercial television channel – *e.tv*. Its licence conditions stipulate that it should cover at least 77 per cent of the population. *E.tv* states that it exceeds this requirement and is in fact accessible to 80.5 per cent of all South Africans.¹³⁹

The SABC has special obligations as regards universal service and access. The Broadcasting Act of 1999 stipulates that the SABC has to “make its services available throughout the Republic” (Section 8(a)) and in all official languages (Section 10(1)). The definition of universal access to broadcasting as formulated by the then newly established broadcasting regulator, the Independent Broadcasting Authority (IBA)¹⁴⁰, in 1995 is quite broad:

(Access) refers to the availability of services to all citizens. The concept ... extends the notion from simply who receives information to what kind of information, to what degree and on what terms. ... Genuine access depends not only on the existence of channels, but on their effective distribution, availability and affordability....

Access to choice ... relates not only to the range of information, education and entertainment available but also ... to access to a diverse range of language, cultural, religious and regional programmes.¹⁴¹

¹³⁹ *E.tv, About Us*, accessed from http://www.etv.co.za/pages/about_us in July 2008

¹⁴⁰ Now the Independent Communications Authority of South Africa

¹⁴¹ Triple Inquiry Report, p. 16, point 7.1.3

In its Triple Inquiry Report (on the protection and viability of public broadcasting, cross media control of the media and local television content and South African music), the Authority also set out targets for the SABC.¹⁴²

The SABC has made strides in meeting these goals – though it has not as yet achieved full terrestrial access. In an interview in August 2008, the SABC General Manager in charge of facilitating universal access (now General Manager of Strategic Planning), Lynn Mansfield, stated that about 3.6 million South African households did not at that time have access to television and a further 5.4 million did not have access to a radio service:¹⁴³

We are about to turn on television transmitters that will bring television to about 600 000 of these people. We have also developed a plan to use low power radio and television transmitters to ensure that as many people as possible can have access to television and radio by 2010 when the soccer World Cup is held in South Africa. By 2011 all South Africans should be able to tune into all three SABC television channels via a low power transmitter and listen to a radio station in the language most spoken in the area.

This innovative plan, using both low power transmitters and exploiting the cellular phone networks, has been confirmed by Robin Nicholson, the Chief Financial Officer (who has since been suspended pending a disciplinary enquiry). The SABC, he said, has set aside the funds necessary to purchase these transmitters for the signal distributor Sentech.¹⁴⁴

Radio stations are web-cast and television channels are available via satellite subscription broadcasters, thus technically reaching all parts of the country. But this comes at a price which many cannot afford and does not make these services accessible in terms of the above definitions. Access to computers and broadband determines the availability of radio services over the web, and one has to have a set top box to view the television channels beamed over satellite.

Television

As regards television, the Triple Inquiry Report stated that the SABC's services must be extended across South Africa. The Corporation's licence conditions (renewed in 2005) do not however set specific targets to be met. They merely require the service to "cover the Republic". However, as ICASA has not released a report on compliance by SABC television with this licence condition, it is not possible to say with any certainty what percentage of the population has been covered.

Radio

The situation in relation to radio is more complex. The SABC inherited an apartheid driven system where English and Afrikaans language services were well resourced and covered most of the country, whilst African language stations were under-resourced and targeted primarily areas designated by the then government for particular African language speakers as part of the policies of separate development.

¹⁴² The contents of the Triple Inquiry Report are dealt with more fully in Chapter 5.

¹⁴³ Telephone Interview, Lynn Mansfield, SABC General Manager Special Projects in the Policy and Regulatory Affairs Department, on 1 August 2008. Note that the figures differ from AMPS data on television and radio listenership as these measure listenership and viewership over the past seven days – regardless of whether or not this was in the home or, for example, at work.

¹⁴⁴ Interview, Robin Nicholson, Chief Financial Officer of the SABC, on 25 June 2008

This was recognised in the 1995 Triple Inquiry Report and the Authority ruled that the existing nine “black language stations be dramatically upgraded” and that full spectrum language services should “reach at least 80% (per cent) of people who speak the principle language of the station within 18 months, and 90% (per cent) within five years”.¹⁴⁵

These targets appear ambitious in retrospect. There are insufficient frequencies in cities such as Cape Town and Johannesburg to accommodate all African language stations, community radio services and new commercial players. At the same time, rural populations are migrating to cities and thus potentially population coverage by a radio service could drop even with expanded transmitter networks.¹⁴⁶

It seems, however, as if these targets have been modified (although not officially retracted), as licence conditions for the individual services are vague about targets to be met as the conditions refer to coverage maps rather than progressive percentages which increase over a period.

The table below gives some indication of achievements in expanding coverage by SABC language services to speakers of official languages.

Table 5: Growth in coverage of SABC public radio language services

SERVICE	Language of broadcast	1995 % of population whose home language is that of the station	Current
Ikwewezi FM	isiNdebele	37%	82.5%
Lesedi FM	SeSotho	73%	78%
Ligwalagwala FM	SiSwati	34%	71%
Motsweding FM	Setswana	86%	87%
Munghana Lonene FM	xiTsonga	84%	84%
Phalaphala FM	TshiVenda	79%	79%
RSG	Afrikaans	87%	87%
SA FM	English	95%	95%
Thobela FM	Sepedi	73%	78%
Ukhozi FM	isiZulu	69%	81%
Umhlobo Wenene FM	isiXhosa	79%	83.61%

Sources: These figures have been compiled from IBA’s Triple Inquiry Report, SABC documents, applications to the broadcasting regulator by the SABC and from information gathered from SABC staff

¹⁴⁵ Independent Broadcasting Authority, *Report of the Triple Inquiry into the protection and viability of public broadcasting, cross media control of the media and local television content and South African music*, 1995, p. 6, paragraph 4.1, accessed from http://www.icasa.org.za/Manager/ClientFiles/Documents/Triple_Inquiry_Report.pdf

¹⁴⁶ The Minister of Housing in May 2008 indicated to Parliament that urban migration stood at about three per cent of the population a year – above the average international figure of 2.5 percent each year. South African Press Association, “Migration hits housing delivery”, 17 May 2008, accessed from http://www.iol.co.za/index.php?art_id=nw20080527142321806C860209 in July 2008

Signal distribution

Part of the process of re-regulating the broadcasting environment with the advent of democracy was the establishment of a separate signal distributor. Signal distribution had previously been controlled from within the SABC, which fell under the Postmaster General.

In 1996, all units of the SABC dealing with signal distribution were incorporated into a new public company – Sentech (Ltd). The Sentech Act (no 63 of 1996) was promulgated and the company was licensed in terms of the then IBA Act as a “common carrier” signal distributor. Sentech was given all existing signal distribution equipment and granted exclusivity over transmitter high sites critical for effective transmission. In exchange the signal distributor was obligated to provide equitable signal distribution to those that required it.

Sentech has come under scrutiny about allegations of poor management and the Minister of Communications in 2009 appointed a team of advisers (called the Task Team) to interrogate concerns about the financial state of the signal distributor. In a statement on the findings of the Task Team issued in February 2010, Minister of Communications Sipiwe Nyanda said that the advisory team had found “immediate action” was needed if Sentech was to “avoid lapsing into terminal decline”. According to the statement the Task Team defined the signal distributor as “rudderless, inadequately funded and misdirected”.¹⁴⁷ The team estimated that at the close of the 2009/2010 financial year, Sentech was facing a net loss of R123 million, partly due to its failed broadband services. The team recommended the removal of the chief executive officer, Sebileso Mokone-Matabane, and the entire board.¹⁴⁸

Whilst broadcasting legislation allows for other privately owned signal distributors, as well as for services to provide their own signal distribution, only one private signal distributor, Orbicom, is licensed. This commercial service is linked to subscription television provider, Multichoice, and does not generally provide signal distribution services to other broadcasters. In effect, therefore, Sentech operates as a monopoly and currently all commercial and public broadcasting services are transmitted via their facilities. Many community stations however provide their own signal distribution as their coverage is often limited.

7. Technical standards

South Africa’s broadcasters are generally well equipped. Technical resources and capacity are two of the criteria assessed by the regulator in deciding on the grant of licences.¹⁴⁹

The SABC has set aside R1.3 billion (US\$ 167 million as of August 2008, including R400 million from government) to upgrade all its production facilities to digital technology by 2010. Plans include upgrading all television and radio studios, outside broadcasting facilities and production and news facilities around the country. In its 2006/2007 annual report (ending 30 June 2007), the Corporation stated that it had completed 40 per cent of the plan, but it is unclear from the latest annual report what the progress is on this plan..

The public broadcaster in 2008 had 13 regional studios around the country and five foreign bureaus.

¹⁴⁷ Department of Communications, ‘Statement by Minister of Communications on Ministerial Task Team on Sentech and SABC’, 4 February 2010, accessed from <http://www.doc.gov.za/images/stories/final%20sabc-sentech.pdf> in March 2010

¹⁴⁸ Mochiko, T. “Sentech loss could be R214m”, Business Report, accessed from <http://www.busrep.co.za/index.php?fSectionId=561&fArticleId=5333922> on 23/03/2010.

¹⁴⁹ See ICASA Position Papers on private sound broadcasting, free-to-air television and community sound broadcasting.

Radio studios and production facilities at the public broadcaster are currently fully computerised – and computer programmes are in the process of being upgraded as part of the technology plan. Broadcast studios are not only utilised by SABC stations but are rented out – and therefore a source of revenue.

Radio facilities include drama studios in all provinces, a symphony studio to record orchestras in Johannesburg (and facilities to record orchestras in Cape Town, Durban and Port Elizabeth), and music recording studios around the country (many of which have been upgraded to international standards.¹⁵⁰

As regards television, SABC has a range of outside mobile broadcast units (OBUs) – including a high definition television unit. SABC plans to upgrade all its OBUs to high definition television – in preparation for the 2010 Soccer World Cup to be held in South Africa. The Corporation has a range of digital satellite news gathering (DSNG) units and facilities to broadcast using microwave links from mobile units.¹⁵¹

Commercial broadcasters (which were mostly licensed from the late 1990s) have generally had the advantage of being able to start up with newer computerised and digital equipment and have not faced the same challenges as the SABC associated with upgrading outdated studios.

There are no national commercial radio stations and owners of these services are thus only faced with equipping one or two centres (depending on the coverage area of the station). The free-to-air commercial television service e.tv is national and has studios in Cape Town, Johannesburg, Durban and Bloemfontein.

Even community radio – traditionally the most under-resourced sector – has access to good professional equipment thanks to support from organisations such as the Open Society Foundation of South Africa, the British High Commission, the Friedrich Ebert Stiftung, the Department of Communications in government and the Media Development and Diversity Agency. One of the challenges however facing community broadcasters – particularly those in rural areas – is capacity and skill to maintain and utilise equipment fully.¹⁵²

8. Conclusions and recommendations

The African Commission on Human and Peoples Rights' Declaration of Principles on Freedom of Expression in Africa states that:

- States shall encourage a diverse, independent private broadcasting sector (Article 5 (1));
- Community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves (Article 5 (2) bullet 4), and
- States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole. (Article 14 (3))

¹⁵⁰ http://www.rpstudios.co.za/RBF_EasternCape/studios.asp

¹⁵¹ <http://www.airtime.co.za/portal/site/airtime/>

¹⁵² See the report of the Technical Support Roundtable for Community Radio, organised by the Open Society Foundation of South Africa, Johannesburg, 25 July 2003, prepared by Martin Sims, accessed from http://www.osf.org.za/File_Uploads/pdf/TechnicalSupportRoundtable.pdf

South African legislation, policy and practice do encourage a diverse commercial and community sector. Amongst other things:

- Legislation provides for three broadcasting sectors: public, commercial and community.
- The government has taken positive steps to promote media diversity. The establishment of the MDDA shows a commitment not only to creating an enabling framework for development of diverse media, but also to ensuring that communities and individuals have the means to realise their right to freedom of expression.
- The public broadcaster has plans in place to strive to reach all parts of the country.
- Legislation limits ownership concentration and puts in place cross-media controls.

However, there are still too few stations broadcasting in languages other than English, and whilst there are a range of services available to people within the bigger cities, there is little choice of content for those in other towns and in rural areas.

Although the regulator has proactively encouraged the development of community radio stations in the most disadvantaged areas, it has delayed licensing more commercial radio services. This has limited the growth of new broadcasting companies essential to ensuring a level playing field given the SABC's size and reach and concomitant dominance of available broadcasting advertising spend.

Recommendations

Diversity and universal access are fluid and complex principles, and policies, laws and regulations seeking to achieve these aims need to be continuously and progressively revised. It requires more than just an enabling environment to ensure that all citizens have access to a diverse range of broadcasting services and programmes in their preferred language/s. The following should be considered in order to continuously enhance access for all South Africans:

- The MDDA Act should be reviewed to enable the Agency to commit more resources to research into media diversity issues¹⁵³ and to facilitate the development not only of community radio but also the development of other broadcasting services in what are seen as unviable markets. This would require more resources to be allocated to the MDDA.
- Amendments to the Electronic Communications Act on ownership and control of broadcasting services should be considered by government and parliament taking into account any recommendations arising from the review of ownership and control rules by ICASA. In addition, the White Paper on Broadcasting must be reviewed to assess the relevance of existing policy on ownership and control, to look holistically at whether measures in place to increase diversity have been effective, and where necessary, the EC Act should be amended. Debate should not only centre on the recommendations to be made by ICASA to existing clauses limiting ownership (if any), but should also explore other ways to increase diversity of ownership in what are seen as non-viable markets/areas. For example, ownership limitations could be relaxed in order to lure existing media companies to assist in establishing stations outside of the cities. This could also encourage the growth of new black media

¹⁵³ The law and linked regulations limit the spending on research into media diversity. The MDDA however could play a key role in monitoring media diversity in South Africa.

companies. Specific attention should be paid to the dominance of the SABC in the commercial broadcasting arena.

- ICASA as well as civil society organisations should review the diversity of news across the different stations to assess whether or not current measures are ensuring access to diverse and original news on radio, or if there is an over-reliance on news agencies for content.

Digital Migration

The International Telecommunications Union (ITU), a United Nations agency tasked with coordinating global telecommunications and services, has set a deadline of 17 June 2015 for terrestrial television broadcasters in Europe, Africa, Middle East and the Islamic Republic of Iran to migrate from analogue to digital transmission. After this date, frequencies set aside for analogue transmission of television by the ITU will no longer be protected from interference. Deadlines for the digitalisation of radio have not yet been determined.

Digital broadcasting uses the frequency spectrum more efficiently as channels are compressed, and therefore will free up scarce spectrum space for more television and telecommunications services. Digital broadcasting also allows for the easy addition of interactive services and better picture and sound quality. It will lead to better quality television services and a greater choice of free to air programming.

The process for switching from analogue to digital terrestrial television however is not an easy one. It is costly to both existing television channels and to audiences. A set top box is needed to convert the signal so that it can be viewed on ordinary television sets. To ensure awareness about the advantages and encourage viewers to buy the necessary equipment, the analogue and digital signals have to be transmitted simultaneously for a period determined by government or the regulator (the dual illumination period). It is critical that governments develop clear policy frameworks to manage the switch-over process.

1. Policy

The South African policy for migrating from analogue to digital broadcasting has gone through an extended gestation period. The process got off to a good start in 2005 when the Minister of Communications announced the establishment of a Digital Migration Working Group (DMWG) including representatives of the broadcasting sector, government, the regulator, organised labour and civil society. The group finalised recommendations to government in November 2006. Apart from detailed proposals on the migration process and future digital policy environment, the recommendations emphasised that it was essential for government to work together with all stakeholders (including broadcasters, signal distributors and consumer groups) to ensure an effective and successful switch-over.

Government seemed to move relatively quickly after delivery of the report:

- In February 2007 Cabinet announced that the digital television signal would be switched on in November 2008 and the analogue signal switched off in November 2011 – allowing for a three-year period of dual illumination. According to the Cabinet statement:

(T)he meeting approved the retention of sufficient frequency spectrum for broadcasting purposes to provide for new television channels for specialised services that would be dedicated to education, health, and youth, small to medium enterprises, sports; and three regional service channels that would cater for three channels each.¹⁵⁴

- The Department of Communications (DoC) issued a Draft Digital Migration Strategy and proposed an Implementation Plan (draft policy) for public comment in March 2007.

The process then began to stall. About two weeks after releasing the draft strategy, the Department distanced itself from the proposals. In a statement, the then-Director General of the Department, Lyndall Shope-Mafole, said that the strategies and plans distributed for public comment were “not representative of the views of the Department and therefore the Minister”.¹⁵⁵ Although the DoC had stressed that the public comment period would be short as it was critical that the final strategy be finalised by May 2007, a broad policy statement was released only in August 2008 – just months before the switch-on date of 1 November. As there were no approved set top boxes (STBs) available at the time, the “launch” was a test, rather than the introduction of services to the public. At the time of writing (March 2010), there were still no STBs available to viewers as government was in the process of finalising a STB manufacturing strategy and the pilot phase was thus continuing.

In July 2009, the new Minister of Communications, Sipiwe Nyanda, stated that until such time as Cabinet announced an alternative date for switch-off of the analogue signal, the November 2011 deadline would remain.¹⁵⁶ The Independent Communications Authority of South Africa (ICASA), though, has adopted a more pragmatic position. In its reasons for decision for regulations on Digital Terrestrial Television (DTT), the regulator stated that all terrestrial broadcasters will be required to broadcast on both digital and analogue platforms only at a time to be determined by the Authority and that the analogue signal would be switched off three years after that date.¹⁵⁷

Although there is still a lack of clarity about when the dual illumination period will officially start, the following policies have been agreed to:

¹⁵⁴ Government Communication and Information Services, *Statement on the Cabinet meeting 21 February 2007*, issued on 22 February 2007, accessed from <http://www.info.gov.za/speeches/2007/07022211451001.htm>

¹⁵⁵ Department of Communications, Media Statement, *Director-General of Communications corrects some statements in the media on digital migration attributed to the Minister Matsepe-Casaburri*, issued on 4 April 2007, accessed from <http://www.info.gov.za/speeches/2007/07040509151001.htm>

¹⁵⁶ Minister of Communications, Gen Sipiwe Nyanda, (ret), ‘Speech on the occasion of the launch of the Digital Dzonga’, 21 July 2009, accessed from <http://www.godigitalsa.co.za/files/Minister's%20Speech%20on%20Digital%20Dzonga%20Launch%2021%20July%202009%20Final.pdf> in July 2009

¹⁵⁷ Independent Communications Authority of South Africa, ‘General Notice – Reasons Document on Digital Migration’, 15 February 2010, published in Government Gazette No 32957

- The dual illumination period (from public launch to switch-off of the analogue signal) will be relatively short. Dual transmission is expensive for broadcasters and it has been agreed that this period will be limited in recognition of this. Over the three-year dual illumination period there will be a phased increase in digital coverage. Initially the digital television signal will be available only in major urban centres or, given their population density, to about 60 per cent of the population.¹⁵⁸ Government has pledged that “all households should be enabled to receive a digital signal” when analogue transmission is switched off ¹⁵⁹.
- All existing free-to-air and terrestrial subscription television broadcasters will be accommodated on the digital network during the dual illumination period. No new broadcasters however will be licensed until after the migration process is complete.
- One multiplex (television bouquet broadcasting a number of channels) will be set aside for the SABC during the dual illumination period, with (up to) 10 per cent of that capacity earmarked for community television broadcaster Trinity Broadcasting Network (TBN). The two other terrestrial television services, e.tv and M-Net, will share the second multiplex made available for the dual illumination period.¹⁶⁰
- Regulations determined by ICASA do not specify the number of channels each broadcaster can air, but rather set limits on the percentage of the multiplex they can use. Thus SABC has access to all capacity on Multiplex 1, but must provide space for TBN (which broadcasts in the Eastern Cape). The SABC estimates that this will enable it to stream about 10 video streams (channels). It is also allowed to transmit its public service radio stations on its digital platform. E.tv is allocated 50 per cent of Multiplex 2 and M-Net 40 per cent (with the remaining 10 per cent set aside for test broadcasts). All channels will be broadcast in standard definition during the dual illumination period.¹⁶¹
- All broadcasters will have to simulcast their analogue services during the dual illumination period and will have to apply to ICASA for authorisation for each additional channel (dubbed ‘digital incentive channels’ and aimed at enhancing their programming offerings in order to encourage viewers to acquire STBs).¹⁶²
- The Regulations specify that SABC must ensure that three quarters of its digital services must be public, rather than public commercial, channels.¹⁶³

¹⁵⁸L. Kantor, Chairperson Digital Dzonga, ‘Leading the Migration to DTT’, presentation at launch of the Digital Dzonga, July 2009, available at <http://www.godigitalsa.co.za/files/Presentations/Leading%20the%20migration%20to%20DTT.%20%20L%20Kantor.%2021%20July%202009.pdf> accessed in March 2010

¹⁵⁹ Republic of South Africa, Department of Communications, Media statement: *South Africa's Broadcast Digital migration process is on course*, 21 February 2008, accessed from <http://www.info.gov.za/speeches/2008/08022113151001.htm>

¹⁶⁰ Independent Communications Authority of South Africa, *Digital Migration Regulations*, 15 February 2010, published in the Government Gazette, No 32956

¹⁶¹ Ibid

¹⁶² Ibid.

¹⁶³ This may change as Government had initiated a review of broadcasting legislation at the time of writing and many submissions made on proposed amendments suggested that the division of the SABC into public and public commercial divisions and services should be removed.

- Whilst no time frames have been announced for the switch-on of the digital radio signal (Digital Audio Broadcasts or DAB), government has indicated that the analogue signal will not be switched off.¹⁶⁴

Proposed implementation plans as suggested at the launch of the draft strategy in May 2007 are meanwhile also lagging behind – though the Department of Communications and the Minister initially seemed to be pressing ahead.

The Minister announced in her May 2007 budget speech the establishment of an agency to oversee the digital migration process – called the Digital Dzonga (South), as well as the appointment of the chairperson for the agency. This is in line with recommendations made by the DMWG which suggest that government establish an “organisation to co-ordinate and monitor the roll-out of digital broadcasting ...”¹⁶⁵

It was only a year later, in her next budget speech in May 2008, that the Minister named the other ten Digital Dzonga board members (including representatives from the broadcasters, signal distributors, manufacturers, consumer bodies and unions). The objectives for the Dzonga were spelt out with the launch of the Digital Policy in August 2008. The policy states that the Digital Dzonga will be responsible for consumer awareness and education, liaison with the regulator and monitoring of implementation.¹⁶⁶ The Dzonga was formally launched in July 2009 by the new Minister for Communications, Sipiwe Nyanda.¹⁶⁷

The regulatory process has also not been smooth. ICASA first issued regulations in July 2009, but these were challenged legally by e.tv as well as a consortium of business groups under the National African Federated Chamber of Commerce (NAFCOC). E.tv argued in its urgent application that the regulations were fundamentally flawed and would disadvantage the broadcaster, while NAFCOC’s challenge related primarily to the fact that no new broadcasters would be given licences during the dual illumination period. It argued that this negatively impacted on black economic empowerment.

In response to the threatened legal action, the regulator withdrew the regulations and requested further public comment on the process. New regulations were published in February 2010, and according to media reports NAFCOC has already stated its intention to challenge the new regulations as well on the basis that they still do not provide for new broadcasters during the dual illumination period.¹⁶⁸ In its document outlining the reasons, the regulator stated that its decision to only allow incumbents to broadcast to the public during dual illumination was based on government’s policy. It said however that it had set aside 10

¹⁶⁴ DoC, *Draft Broadcasting Digital Migration Strategy for South Africa*, March 2007, Section 2.1

“Customised approaches for migration to digital television and radio”, sub-section 4, p. 9

¹⁶⁵ Digital Migration Working Group, *Report: The Proposed Switchover from analogue broadcasting to digital broadcasting in South Africa*, 17 November 2006 (hereinafter referred to as “DMWG Report”), p. 100, accessed from

http://www.digitalmigration.gov.za/DMWG_Report22Mar2007/Main%20Report%20Document/CONSO%20LIDATED%20%20REPORT%20OF%20THE%20DMWG%20%20VER%2017%20November%202006%20v2.doc in November 2007

¹⁶⁶ Digital Migration Policy, Section 8.1.1

¹⁶⁷ A new Minister was appointed after 2009 elections leading to a review of all policies.

¹⁶⁸ T. Mochiko, *Business Report*, ‘ICASA’s digital migration plan lacks BEE element: NAFCOC’, 22 February 2010, accessed from

<http://www.busrep.co.za/index.php?fSectionId=561&fArticleId=5361904> in March 2010

per cent of Multiplex 2 for test broadcasts by “interested parties” before the introduction of more competition after dual illumination.¹⁶⁹

2. Signal distribution

Before the digital switch-on on 1 November 2008, South Africa’s common carrier signal distributor, Sentech, stated that it would be ready for the switch-on deadline, but expressed doubts about being able to meet the targets for extension of the digital network due to budgetary constraints.¹⁷⁰

Executive Director of the National Association of Broadcasters (NAB), Johann Koster, also expressed concern about signal distribution capacity in an interview. “It is unclear whether or not Sentech will have sufficient resources to transform all its analogue equipment by November 2011,” he said. “This has implications for universal access.”¹⁷¹

Sentech itself has come under scrutiny about allegations of poor management (see chapter three).

3. Impact on broadcasters

3.1 Readiness

Broadcasters have been preparing for the digital switch-over for some time, and have participated in the pilot digital broadcasts currently under way. While they are thus technically ready, the lack of certainty around the final regulatory position has hampered their development of final plans - up until February 2010 it was unclear exactly what the licensing requirements would be and how much space each would be allocated. The South African content requirements have also not been finally set.

As far as equipment is concerned, commercial and community broadcasters are in many ways in a more advantageous position than the SABC. Most of them have been licensed in the past 15 years, and thus from set-up have installed digital production equipment.

The South African Broadcasting Corporation (SABC), on the other hand, has had to convert its equipment from analogue to digital. The public broadcaster established a DTT project team to prepare for digital migration in January 2008, set aside funds for the upgrade of all its production facilities and received earmarked funding for this from government. The SABC indicates in its 2008/2009 Annual Report that it has postponed the digitalisation of all of its archives due to funding constraints.¹⁷² The report says that the necessary equipment for multiplexing (encoding channels and grouping them into a bouquet to be transmitted together) were in place.¹⁷³

¹⁶⁹ Independent Communications Authority of South Africa, ‘General Notice – Reasons Document on Digital Migration’, published on 15 February 2010 in the Government Gazette No 32957

¹⁷⁰ Sentech, *Presentation to the Portfolio Committee*, 7 May 2008

¹⁷¹ Interview Johann Koster, 7 March 2008

¹⁷² SABC Annual Report 2008/2009, p. 60

¹⁷³ SABC Annual Report 2008/2009 p. 27

As indicated earlier, the SABC, together with e.tv and M-Net, have been part of the DTT pilot to test the signal. The trial was launched on 1 November 2008 and includes existing analogue channels, three additional SABC channels (SABC Entertainment, Education and Sport) and one digital e.tv channel. According to the public broadcaster's annual report, 1 755 people have been participating in the trial. The SABC states that the pilot has been used to test the technology (including STBs and the signal), gain insight into viewers' perceptions of content and train staff in working in a digital environment.¹⁷⁴

In the final official policy, government said it would request ICASA to review existing television content requirements as these are based on a single channel broadcaster rather than the multi-channel environment.¹⁷⁵ These revised requirements were still not set at the time of finalising this report, though ICASA had indicated its intention to do so in its reasons for decision for DTT regulations. In the interim, the regulator has stated that broadcasters will have to abide by existing regulations on local content, though they can apply for an exemption for particular channels, such as niche channels broadcast to incentivise take-up of technology by audiences.

A further challenge highlighted in the DMWG report to the Minister is the need to develop capacity in the independent production sector to meet increased content demands given the increase in channels. The report recommends that "additional government support mechanisms for content development should form part of government's digital switch-over strategy".¹⁷⁶

The national policy recognises this, but does not outline clearly how it will support the development of South African content. It states that Digital Content Generation Hubs will be established aimed at increasing content production and that these will work with "all broadcasters, independent producers and the National Electronic Media Institute of South Africa (Nemisa is a training school established by Government focusing on radio, television and electronic communication)."¹⁷⁷

In February 2010, the Department of Communications indicated that it would be establishing a South African Broadcast Production Advisory Body and called for nominations to this structure.¹⁷⁸ The call for nominations from the public stated that the objectives of the body would include advising the Minister regarding policies to "enhance the production of local content for the multi-channel and digital environment" and financing strategies to support production.¹⁷⁹

3.2 Costs

While the long-term benefits of digital television broadcasting are many (more frequency space, increased number of channels, potential to offer additional services to viewers such as multiple audio tracks and interactivity, etc.), the costs of the migration for existing television services are extensive. These include the costs of transmitting both digital and analogue signals during the period of dual illumination and the development of additional channels.

¹⁷⁴ SABC Annual Report 2008/2009 pp. 63-64

¹⁷⁵ Digital Migration Policy, Section 2.3.3

¹⁷⁶ DMWG report, p. 84

¹⁷⁷ Digital Migration Policy, Section 2.5.8

¹⁷⁸ Department of Communications, "Broadcasting Act (4/1999): Public nomination to service on the South African Broadcast Production Advisory Body", published on 5 February 2010 in Government Gazette No 32932 (hereafter referred to as DoC, Call for nominations to production advisory body)

¹⁷⁹ DoC, 'Call for nominations to Production Advisory Body' Section 3.1, p. 4

In a submission to Parliament in June 2008, *e.tv* head Marcel Golding estimated that for his company the costs of dual transmission alone over the three-year transition period would run into “tens of millions of rand per annum” and argued that it should not be liable for these costs over this period.¹⁸⁰

In recognition of the substantial costs involved, the Digital Migration Working Group had recommended that government put in place a range of incentives for existing broadcasters. It suggested that these include:

(P)referential treatment in terms of access to frequencies for the purposes of initiating digital transmissions, reductions in licence fees, lowering of SA content requirements for additional digital broadcasting services offered by existing broadcasters, signal distribution subsidies or lower tariffs, etc.¹⁸¹

The final policy however, does not address these issues. Instead, statements made by government officials hint at the possibility of existing levies on broadcasters being increased in order to subsidise the roll-out of set top boxes to disadvantaged communities. The former Minister of Communications suggested, for example, that they might increase the contributions payable by all licensees (broadcasters and telecommunications services) to the Universal Service and Access Fund (USAF) to assist in covering these costs.

The USAF is a fund established by the Electronic Communications Act aimed at increasing access to telecommunications and broadcasting services. It is managed by the Universal Service and Access Agency of South Africa (USAASA). The fund had originally been created in terms of the since repealed Telecommunications Act and focused only on facilitating access to telecommunications. Telecommunications operators have been required since 1999 to pay 0.2 per cent of their annual turnover towards the fund.¹⁸²

4. Impact on consumers

4.1 Consumer awareness

There was little clarity at the time of conducting this research about how government would create awareness of the implications of digitalisation, as this task had been allocated to the Digital Dzonga, finally officially launched in July 2009. While there had been some media coverage about the switch-over deadlines, much of this was negative due to reports on the policy delays and bumbles.

In order to view digital television, audiences will need a set top box (STB) to convert the digital signal into an analogue one.

The South African Bureau of Standards (SABS – the official body that sets equipment and other standards) has approved the technical requirements for STBs and government

¹⁸⁰ M. Golding, *e.tv briefing on digital migration to Parliament's Portfolio Committee on Communications*, 17 June 2008

¹⁸¹ DMWG report, p. 102

¹⁸² P. Vecchiatto and C. Du Toit, ITWeb, '*Telcos unhappy about digital millions*', 14 August 2008, accessed from

<http://www.eneews.co.za/sections/telecoms/2008/0808141100.asp?A=LEG&S=Legal%20View&T=Section&O=ST> in August 2008

emphasised that these will be manufactured in the country, rather than imported. Official statements regarding the launch of the digital migration policy specified that even the most basic box available will have some inbuilt capability in order to facilitate e-government applications.

However, the process of kick-starting manufacturing of STBs has been slow to get off the ground. It was only in July 2009 that the Department published a Draft STB Manufacturing Sector Development Strategy for public comment. In line with the policy, the draft strategy aimed at establishing local capacity, as well as export capability, in the manufacturing of STB's, using South African intellectual property only. It stated that up to four companies would be designated as prime manufacturers.¹⁸³ The strategy however does not stress the importance of affordability of equipment as primary to ensure that audiences can afford the technology. Critics have pointed out that the approach proposed would limit growth to existing manufacturers and not allow for new BEE companies to benefit. The draft strategy was discussed at a summit on STB manufacturing in October 2009. At the time of writing, the final strategy had not been released.

This rendered the "launch" of digital television on 1 November 2008 essentially irrelevant as no-one is able to view services without an STB.¹⁸⁴ It remains unclear whether there will be sufficient capacity to manufacture enough STBs to meet demand prior to the date of switch-off of the analogue signal). According to All Media Products Survey (AMPS) there are over 9 million households with television sets and all of these will need STBs. Government's plans seem vague. In a briefing to the media, Minister of Transport, Sibusiso Ndebele, reported on behalf of government's Infrastructure Development Cluster that "(t)he cluster will be finalising and implementing the set top boxes (STBs) Manufacturing Sector Development Strategy this year. The intention is to manufacture ... 500 000 in the 2010/11 financial year".¹⁸⁵

In the meantime, the Digital Dzonga has indicated that it will put in place a conformance process to protect consumers from purchasing non-compliant STBs as has happened in some countries. All approved equipment will have a logo on it indicating that it does conform.

4.2 Mechanisms for support

Government has estimated that the most basic STB will cost about R700 (US\$ 95). It has agreed to subsidise set top boxes for poor people (those that receive government social grants) in order to ensure universal access to the digital signal after the analogue signal is switched off. In its statement on the approval of the digital policy, Cabinet indicated that government would subsidise 70 per cent of the cost of the set top box for the five million poorest television owning households.¹⁸⁶ Beneficiaries of this subsidy would have to pay the remaining 30 per cent (R210) themselves¹⁸⁷.

¹⁸³ 'Set-top-box Manufacturing Sector Development Strategy for South Africa', Department of Communications, *Government Gazette*, No. 32421, 22 July 2009

¹⁸⁴ According to reports, broadcasters are planning to distribute some STBs once test models are available as part of a pilot of digital television.

¹⁸⁵ Ndebele: Briefing by the Minister of Transport, on the Infrastructure Development Cluster programme, Pretoria 1 March 2010, quoted from <http://www.polity.org.za>

¹⁸⁶ Republic of South Africa, *Statement on Cabinet Meeting of 06 August 2008*, 7 August 2008, accessed from <http://www.gcis.gov.za/media/cabinet/2008/080807.htm> on 7 August 2008

¹⁸⁷ Note that whilst the Cabinet statement says that the subsidy or incentive has been set at 70 per cent, the Minister of Communications indicated in her statement detailing Cabinet decisions that they had decided on support for "up to" 70 per cent. See Department of Communications, *Media Statement: Cabinet Approved Digital Migration Policy*, issued on 7 August 2008, accessed in August 2008 from

The subsidy system has been dubbed the ‘Scheme-for-Ownership-Support’ (SOS) by government and whilst the principles have been determined by Cabinet, the details of and mechanisms for providing it still have to be finalised.

The overall cost of this support is estimated at R2.45 billion. At the time of writing, the National Treasury had allocated R400 million to the Universal Service and Access Agency of South Africa (USAASA) to cover subsidies for set top boxes over the next three years. However, questions have been raised by the Portfolio Committee on Communications and a range of stakeholders about USAASA’s effectiveness and management capabilities. In the past, when the agency was focused solely on telecommunications access, it regularly received qualified audit reports and much of its budget remained unspent. This has fuelled doubts about the body’s capacity to lead such an extensive and critical process and to roll out the subsidy effectively.¹⁸⁸ It is also still unclear how the subsidy will be administered, with proposals being considered of applying the subsidy at the manufacturing level, or at the distribution level, or as coupons to individuals as a last resort.¹⁸⁹

5. Convergence

Convergence in relation to broadcasting refers both to the capacity to air broadcast content over what have traditionally been thought of as telecommunications networks (e.g. over cellular phone networks) and to utilise telecommunications networks (such as broadband) to facilitate interactive television.

The promulgation of the Electronic Communications Act (ECA) in 2006 was aimed specifically at promoting such convergence by recognising new technologies and providing what are termed technology neutral definitions of broadcasting and telecommunications.

However, the process of converting all licences in terms of the new legislation is a laborious one, and the licensing of new technologies in terms of the Act requires frameworks to be developed through public consultation (see chapter five). Some of these frameworks (like those for mobile television) are also awaiting finalisation by government of strategies.

5.1 Mobile television

Whilst mobile television (available on a mobile telephone) is available through the streaming of broadcast content on 3G handsets, there is no licencing framework for DVB-H (Digital Video Broadcast Handheld).

The then Minister Matsepe-Casaburri announced in her 2007 budget speech that digital television would be prioritised for the FIFA Soccer World Cup in 2010. Availability of DVB-H is reportedly one of the commitments made by South Africa to FIFA.¹⁹⁰ The minister also

http://www.doc.gov.za/index.php?option=com_content&task=view&id=276&Itemid=457&limit=1&limitstart=0 (hereinafter referred to as Minister of Communications, Digital Policy Media Statement)

¹⁸⁸ ‘Department of Communications, National Electronic Media Institute, Universal Service and Access Agency annual reports 2008/9 (minutes of meeting with Portfolio Committee on Communications), 20 October 2009

¹⁸⁹ P. Vecchiatto, ‘Usaasa must justify its existence’, ITWeb, downloaded from http://www.itweb.co.za/index.php?option=com_content&view=article&id=27348:usaasa-must-justify-its-existence&catid=260:telecoms&Itemid=59 on 11/11/2009.

¹⁹⁰ B. Kelly, ‘Way cleared for mobile TV’, 24 May 2007, Fin24.com, accessed from http://www.fin24.com/articles/default/display_article.aspx?Nav=ns&ArticleID=1518-1786_2118767

said that a single national network for mobile broadcasting would be established. No time frames were set.

ICASA's invitations to tender for licences ran into trouble, ostensibly because of objections from broadcasters. In February 2009, ICASA invited tenders for two DVB-H multiplexes in Johannesburg, Cape Town, Durban and Pretoria, but the invitation was withdrawn a month later. At the time of writing, Cabinet had just approved a temporary mobile broadcasting licence, due to expire two weeks after the 2010 FIFA World Cup. This decision was taken to allow ICASA time to design a proper licensing process.

The 3G standard for mobile television does not require a licence as it utilises the cellular provider's network infrastructure and frequency. It is a one-to-one transmission and content is downloaded on demand.

Cell phone operator Vodacom has for example launched what it calls mobile television available on 3G handsets.¹⁹¹ The operator offers 22 different television channels¹⁹² and the web-site states that subscribers can access 10 of these for R29 per month (this is apart from the costs involved in streaming). The company has produced content specifically for cell phones (including a soap opera, *SoLikeLife*).¹⁹³ Radio stations are available for free (one South African station is listed – SABC public commercial service *Metro FM*).

Subscription television service MultiChoice (which owns DSTV), in the meantime has conducted tests on DVB-H¹⁹⁴, together with mobile operator MTN. They are awaiting finalisation of the licensing framework by ICASA, however, before launching a full service. DVB-H uses broadcasting frequencies and thus requires a licence.¹⁹⁵ DSTV offers 11 channels as part of the trial – including sports channels and *SABC 1*.

In the meantime, broadcasting services have started using mobile phones to send news via text messages. You can for example subscribe to what is called Newsbreak from the SABC to receive SABC news headlines for R10 per month. SABC also provides information such as matric (grade 12) results to pupils via text messages.

5.2 Internet and broadcasting

South Africa licensed its first internet protocol television service (IPTV) in 2007– Telkom Media. IPTV delivers television signals over broadband or computer networks rather than through traditional broadcasting formats. It provides for what is called 'triple play' –a service that combines broadcasting, telephony and internet access.

Super 5 Media, formerly known as Telkom Media (which is in part owned by the country's fixed line operator¹⁹⁶) has stated that it will launch this service once ICASA approves changes to its ownership structure.

¹⁹¹ The service was first launched in 2005 according to the vodacom web-site, <http://www.vodacom.co.za/services/mobiletvplaya/>

¹⁹² Channels include *E! Entertainment*, Tellytrack (horse racing), an extreme sports channel, *ABC News*, South Africa's *e-news* and *Fox news*.

¹⁹³ T. Mochiko, *Business Report*, "Policy U-turn on mobile TV welcomed", published 11 August 2008

¹⁹⁴ DSTV, The satellite multi channel subscription service owned by MultiChoice began testing DVB-H mobile tv together with mobile phone operator, MTN, in 2005.

¹⁹⁵ <http://www.dstvmobile.co.za>

¹⁹⁶ Telkom was originally the majority shareholder but in 2008 announced that it would reduce its shareholding. A Chinese partner was found.

In the meantime all SABC channels and radio services, commercial broadcasters and some community radio stations are streaming their services over the internet – enabling listeners and viewers around the world to listen to and view internet broadcasts.

6. Competition and the broadcasting environment

Digitalisation and convergence open up opportunities for the licensing of more broadcasters and for creative use of new technology to deliver content over new networks. Existing broadcasters will have access to additional channels, and will be able to explore innovative services to enhance their offerings to the public (such as interactive television, closed captioning to enable viewers to select captioning of programmes, audio description to assist viewers with vision disabilities and multiple language tracks to address language needs). The new technologies also offer the potential of new revenue streams.

In South Africa, where spectrum limitations have restricted, for example, the licensing of new television channels and community television, the new environment will potentially increase access to diverse content for all viewers (not only those that can afford subscription services).

However, this also poses a risk to existing broadcasters (who bear the costs involved in the switch-over). Additional channels increase the costs for these broadcasters and the potential of new players further threatens their revenue streams.

The head of e.tv, Marcel Golding, emphasised potential risks in his presentation to Parliament in June 2008:

...the introduction of new channels will fragment audiences and will drive down advertising rates. It is unlikely, particularly given the current economic environment, that advertising spend available to broadcasters will increase – it is more likely that the available spend will have to be shared across more channels. As more channels mean higher costs for broadcasters, this will have an adverse affect on incumbent broadcasters.

Moreover, plurality and access to a wide range of channels and stations does not necessarily lead to more diversity of content. Existing policies and regulations need to be reviewed to ensure that all viewers have easy access to, for example, a range of creative South African content in the language/s of their choice. It is also important to ensure that public interest programming and programming of importance to society does not get marginalised.

Current laws, regulations and practice do provide some protection of viewers' needs. These include:

- The Electronic Communications Act, No 36 of 2005 (EC Act) stipulates that its primary objectives is to regulate broadcasting “in the public interest”; (Section 2). This section further outlines the following goals:
- The Act defines “diversity” of broadcasting services as one of the key aims of policy and legislation. (Sec 2(s)(i)).
- It provides for three tiers of broadcasting – public, commercial and community.
- The law also states that broadcasters must provide for regular news services, actuality programmes on matters of public interest, and programmes on political issues. (Sec 2 (s) ii EC Act).
- The EC Act stipulates that the integrity and viability of public broadcasting must be protected. (Sec 2 (t) EC Act).

- Legislation emphasises the need to ensure fair competition and encourage investment and innovation (Sec 2 (d) & (f)).
- Legislation further requires that in deciding on any new licence, the regulator must consider the above objectives as well as the need and demand for the suggested service. (Secs 49, 50 and 51 EC Act).
- The EC Act further requires the regulator to develop regulations on “the extent to which subscription broadcast services must carry ... the television programmes provided by a public broadcast service licensee” (Sec 60(3)). Such “must carry” rules are aimed at ensuring that viewers can easily access public interest programming on the platform of their choice and thus protect the viability of public broadcasting. In some countries must carry rules have been extended to cover a range of free-to-air broadcasters. ICASA has initiated this process, and final regulations were published in October 2008.¹⁹⁷
- The regulator has previously only invited applications for licences after considering the impact of new services on the public interest and the market. Application processes are competitive – and thus aimed at enhancing choice and diversity for viewers and listeners. The Digital Migration Working Group has recommended that what it identifies as South Africa’s ‘public trustee model’ of broadcasting regulation should continue.¹⁹⁸ This approach recognises that the spectrum is a public resource and that all broadcasters, therefore, should be required to meet identified public goals in exchange for the privilege of access to frequency. The report posits this as an alternative to a market driven approach.

The digital environment requires both government and the regulator to review some of the laws and regulations developed to assist in achieving the objectives of broadcasting policy in an analogue environment. Licence conditions of existing free-to-air broadcasters will also need to be evaluated in line with this. Issues which need to be reviewed include:

- The sections of the Act that deal with ownership limitations (including those limiting the number of services that one group can control and foreign ownership limitations).
- South African content regulations should be reviewed and regulations developed for free-to-air multi-channel broadcasters.

7. Conclusion and recommendations

Digital broadcasting has the potential to enhance the ability of all stakeholders to meet the identified objectives of broadcasting in South Africa. In order to achieve this, however, it is necessary for government to proactively determine the parameters and strategies for migration from analogue transmission.

Initially government was deservedly praised for starting as early as 2005 a consultative process to determine policy and for setting in 2007 clear timeframes for the switch-on of the digital signal and switch-off of analogue transmission. However, since then, the unexplained delays in finalising an overarching strategy and implementation plan have cast doubt on the Department of Communications’ ability to provide the decisive leadership essential to ensure that the migration process will address the needs of all South Africans.

¹⁹⁷ A discussion paper was published by ICASA in September 2007 and public hearings were held at the end of the year. Draft regulations were published mid 2008 for further public comment, and were finalised in October 2008.

¹⁹⁸ DMWG report, Section 4.1, p. 47

Recommendations

- Government should officially extend the date for switch-off of the analogue signal beyond 01 November 2011. The procrastinations affecting policy development, funding and STB specification details, have led to delays in the effective launch of digital services to the public. In order to ensure that all South Africans have the requisite set top boxes prior to switch-off it is critical to allow for a period of at least three years after the commercial launch of STBs before analogue transmission is discontinued. As this launch has not taken place yet, government should make a policy statement, in line with ICASA's regulatory policies that switch-off will take place three years after the public launch of DTT.
- The entire framework for broadcasting in South Africa should be reviewed in light of the move to digital broadcasting (including the White Paper on broadcasting and the Broadcasting Act). Clauses relating, for example, to limitations on the number of free-to-air terrestrial television channels which a private broadcaster can offer become contradictory in a multi-channel environment. The provisions in legislation regarding the number of public channels the SABC provides – and the division into public and public commercial channels - also become meaningless in the new environment.
- Government must finalise its STB Manufacturing Strategy – and ensure that provisions will emphasise the need for STBs to be affordable. The focus must not only be on capacitating the local industry, but ensuring that audiences can afford to buy STBs.
- The policy for subsidising set top boxes for poor families needs to be developed beyond a mere statement of intention and principles. While a Scheme for Ownership Support has been drawn up, it does not identify how the roll-out will be implemented and who will take responsibility for the process. A comprehensive plan must also include proposals for assisting audiences with installation and operation of STBs where necessary.
- The Digital Dzonga must be fully operationalised and have clearly outlined powers and responsibilities to allow it to act decisively. It must also be provided with an adequate budget to enable it to carry out its mandate effectively.
- A mass awareness campaign must be launched as soon as possible to ensure that consumers know how they can view digital television channels and what benefits this will have for them. It is important to ensure that any information released is consistent and accurate. Even Cabinet in its statement on the launch of the digital migration policy referred to a plan for the disposal of “redundant” television sets – creating the misleading impression that viewers will need to purchase new sets rather than just set top boxes.
- ICASA must as soon as possible finalise its South African content requirements in a multi-channel environment.

Broadcasting Legislation and Regulation

1. Legislation

The Independent Communications Authority of South Africa (ICASA) regulates broadcasting, telecommunications (dubbed electronic communications in legislation) and postal services in South Africa.¹⁹⁹ It is established in terms of the Constitution and the Independent Communications Authority of South Africa Act, No 13 of 2000, as amended (hereinafter 'the ICASA Act').

The Constitution

Chapter Nine of the Constitution deals with "state institutions supporting constitutional democracy". Section 192 of this chapter stipulates that:

National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

Section 181 (2-5) of the Constitution details the conditions under which constitutional institutions should operate:

- These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.
- No person or organ of state may interfere with the functioning of these institutions.

¹⁹⁹ ICASA was mandated to regulate postal services in 2006. The ICASA Act was then amended to provide that the Authority take over the functions of the Postal Regulator which had previously been located in the government Department of Communications. The amendment was included amongst those changes to the founding legislation enacted at the time of the introduction of the Electronic Communications Act.

- These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

However, there are ongoing disputes about whether or not the above section applies to the broadcast regulator.

Whilst the regulator is referred to in Section 192, it is not specifically mentioned in Section 181(1), which lists the institutions that “strengthen constitutional democracy”. Some have argued that this is clearly an oversight. Others, including officials of the government department responsible for broadcasting legislation, the Department of Communications, have suggested that this is intentional and means that the broadcasting regulator does not enjoy the same protections as the other listed institutions.

The issue has not been taken to the Constitutional Court (and thus there is no final clarity on the matter). However, a range of other decisions appear to reinforce the constitutional protection of the independence of broadcasting regulation:

- The Presidency has thrice sent back bills dealing with broadcasting for reconsideration by Parliament. According to the Constitution, the President may only refer bills back if s/he is concerned about the constitutionality of the proposed law.

In 1999, then President Nelson Mandela returned the Broadcasting Bill to Parliament. A statement released by the Presidency at the time says that the President was concerned that the bill:

...confers an imprecise, potentially over-broad, power on the Minister to regulate even on matters which fall within the regulatory function of the Independent Broadcasting Authority. (This) unnecessarily exposes the Bill to constitutional attack... (I)t may well be that the Minister may need to formulate policy ... in the public interest ... However, if this power impinges upon the independent decision-making function of the IBA it will run the risk of falling foul of section 192 of the Constitution.²⁰⁰

In 2006, President Thabo Mbeki refused to sign the ICASA Amendment Bill - seemingly due to concerns about the constitutionality of clauses dealing with the appointment of members of the ICASA Council, the introduction of a performance management system for councillors and the removal from office of councillors.²⁰¹

In 2008, President Kgalema Motlanthe refused to sign the Broadcasting Amendment Bill, due to concerns about the constitutionality of provisions around the removal of the SABC Board. This followed requests from opposition parties for him not to sign the bill into law.²⁰²

- A 2007 report from a parliamentary ad hoc committee established to review the provisions for the Chapter Nine Institutions and other constitutional bodies emphasises the importance of independent broadcasting regulation. Rejecting arguments from the Department of Communications that constitutional protection of

²⁰⁰ *Statement on the Referral of Bills to Parliament*, Issued by Office of the President, accessed from ANC Daily News Briefing, 22 January 1999 from

<http://70.84.171.10/~etools/newsbrief/1999/news0122>

²⁰¹ These were the clauses highlighted as possibly problematic in Minutes of the Parliamentary Portfolio Committee on Communications of 18 May 2006.

²⁰² L. Ensor, ‘Parliament will “have enough time” to discuss Bill’, *Business Day*, 11 February 2009.

the regulator is “inappropriate”, the Committee states that this view appears to be a “misunderstanding” and essentially argues that, anyway, this position is irrelevant. The report says that in any case independence (which the report argues is justifiable) is not only provided for in the Constitution but also in the ICASA Act, and that there are other bodies which are regarded as independent even though they are not specified in Chapter Nine of the Constitution.²⁰³

ICASA Act

The ICASA Act was promulgated in 2000 when the then broadcasting and telecommunications regulators (the Independent Broadcasting Authority and the South African Telecommunications Regulatory Authority) were merged in recognition of the convergence of broadcasting and telecommunications and the resultant need to streamline regulatory frameworks affecting the two industries.

Section 2 of the ICASA Act states:

The Object of this Act is to establish an independent Authority which is to:

- a) regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution;
- b) regulate electronic communications in the public interest, and
- c) regulate postal matters in the public interest ... and
- d) achieve the objects contemplated in the underlying statutes.

Section 3 stipulates that:

The Authority is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice.
The Authority must function without any political or commercial interference.

Whilst the ICASA Act establishes the regulator as an independent body and sets out its powers, the Authority’s responsibilities as regards the different sectors it regulates are outlined in the underlying statutes, namely the Electronic Communications Act, No 36 of 2005 (the EC Act), the Broadcasting Act, No 4 of 1999 and the Postal Services Act, No 124 of 1998.

Electronic Communications Act and Broadcasting Act

The Electronic Communications Act (EC Act) was promulgated in 2006. The Act is aimed at promoting convergence between broadcasting and telecommunications and ensuring that the regulatory approach to both sectors is similar. The Broadcasting Act (introduced in 1999) sets out specific requirements for broadcasting – including particular stipulations for the public broadcaster. Many of the provisions in the Broadcasting Act regarding broadcasting are repeated in the EC Act, leading to calls for the Broadcasting Act to again be amended to focus only on the SABC.

The Acts provide for a three tier broadcasting system – public, commercial and community – and for both free-to-air and subscription radio and television services. They outline

²⁰³ Parliament of the Republic of South Africa, *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions: A Report to the National Assembly of the Parliament of South Africa*, (hereinafter Ad Hoc Committee on the Review of Chapter 9 Institutions), 31 July 2007, chapter 13, p. 207

requirements and processes for applying for a licence and stipulate that no political party may be granted a licence (Sec 52 EC Act).

They further outline the guiding principles that inform ICASA's regulation of the broadcasting industry:

- **Diversity**
The EC Act and the Broadcasting Act emphasise the importance of diversity of content and ownership. One of the core objectives is to “promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level that cater for all language and cultural groups and provide entertainment, education and information” (Sec 2(s)(i) EC Act). The Act further stipulates that broadcasting services, when viewed collectively, must be provided “by persons or groups of persons from a diverse range of communities in the Republic” (Sec 2(k) EC Act) and include details of ownership limitations).
- **Public interest**
Legislation emphasises that all broadcasting services must be “responsive to the needs of the public” (Sec 2(r) EC Act). The law specifies that broadcasting services must *collectively* meet public interest goals but also recognises that the public broadcaster, given its funding by the public, has greater obligations than other sectors. Section 2(u) of the EC Act, for example, gives the public broadcaster specific obligations regarding the provision of programming in all South African languages.
- **Promotion of a South African cultural identity**
Policies and legislation are designed to promote South African content as well as South African cultural industries (Sec 62 EC Act). ICASA's local content policies developed in terms of legislative requirements emphasise the need to promote and showcase South African talent and facilitate the development of a vibrant independent production sector.²⁰⁴ Legislation also highlights that broadcasters must be “effectively controlled by South Africans” (Section 2(v) EC Act).
- **Empowerment and redress**
In line with the Constitution and government policy, the law emphasises the need to promote ownership and control, management and provision of programming by “historically disadvantaged groups and individuals”. This term refers to those groups and/or individuals that were disadvantaged by apartheid: black people, women and people with disabilities.²⁰⁵
- **Universal access**
Legislation and policies are aimed at ensuring that all South Africans have access to broadcasting services and a diverse range of information, education and entertainment (EC Act Sec 2(c) and 2(s)(i))

Broadcasting policy is further set out in a range of documents, including:

- The government White Paper on Broadcasting Policy published in May 1998;
- Specific government policies on, for example, convergence and digital migration;

²⁰⁴ See endnote 3

²⁰⁵ Section 2(h) of the EC Act states that one of the objectives of the legislation is to “promote the empowerment of historically disadvantaged persons, including black people, with particular attention to the needs of women, opportunities for the youth and challenges for people with disabilities”.

- The regulator's Triple Inquiry Report into public broadcasting, cross media control of the media and South African content (1995) which was endorsed by Parliament;
- ICASA's position papers and regulations relevant to the specific sectors (e.g. the local content regulations for television and radio).

Other laws

Like other public bodies, the regulator is required to abide by a number of other legislative requirements, including those laid down in:

- The Public Finance Management Act, No 1 of 1999 (the PFMA) which sets out rules on expending and accounting for public money.
- The Promotion of Access to Information Act, no 2 of 2000 (the PAIA), which stipulates rules for promoting access to information by the public and stakeholders.
- The Promotion of Administrative Justice Act, No 3 of 2000 (PAJA), which outlines mechanisms to promote the right to administrative justice. This includes the procedures to ensure a fair process and the right to be given reasons for any administrative action.

2. Independent Communications Authority of South Africa (ICASA)

2.1 Funding

ICASA is funded through the fiscus in terms of a budget allocation decided on by Parliament. The regulator's budget forms part of the budget allocation for the Department of Communications. Amendments to the ICASA Act in 2006 further provide that the regulator may receive funds through other mechanisms as determined by the Minister of Communications together with the Minister of Finance and Cabinet (Sec 15 ICASA Act). No such determination of alternative sources of funding has as yet been made.

This clause was added in response to concerns raised by the Authority and stakeholders about inadequate resourcing of ICASA, impacting on its capacity to fulfil its mandate effectively and therefore its credibility. Resources have been further stretched by the introduction of the EC Act which imposes more responsibilities such as the regulation of postal services.

The Parliamentary Ad Hoc Committee to review constitutional institutions endorsed concerns about inadequate funding for the regulator in its report to Parliament, stating that the funding model should be reviewed "in order to support and enhance (ICASA's) independence and effectiveness".

ICASA has suggested on many occasions that it be enabled to keep the licence fees it raises rather than hand these over to Treasury. This, the regulator has argued, would also reinforce its independence from the executive. However, whilst government has acknowledged the need to increase funds, it has claimed that it is concerned that the retention of such fees by the Authority could result in capture by industry.²⁰⁶

²⁰⁶ The Minister raised this concern in her address to Parliament during the debate on the ICASA Amendment Bill in November 2005, though she acknowledged the importance of ensuring increased resources to the regulator. See: *Address by Dr Ivy Matsepe-Casaburri, Minister of Communications, on the occasion of the second reading debate on the Independent Communications Authority of South Africa Amendment Bill*, National Assembly, 4 November 2005, accessed from

Whilst this argument might be relevant if funding of the regulator by the industry was voluntary and the Authority could then be perceived as acting in the interests of its funders rather than the public, it is difficult to understand government's reasoning when such fees are determined by regulation. Licensees are compelled to pay these fees in terms of the legislation and cannot withhold them in order to sway the regulator.

In fact, inadequate funding itself potentially could lead to industry capture: With limited resources at its disposal to effectively defend its decisions and actions in court the regulator might be loath to make decisions which could be challenged in court by litigious licensees intent only on delaying implementation of new requirements.

In an interview for this research, Johann Koster, the Executive Director of the National Association of Broadcasters expressed the group's concern about the Authority's inadequate resources:

We are particularly concerned about a lack of broadcasting technical expertise in the regulator at the moment. This is critical given the need for ICASA to develop regulations and allocate spectrum in order to facilitate digital migration. Limited resources and resultant staff capacity also inevitably slows ICASA down and leads to delays which negatively affect the industry.²⁰⁷

2.2 Composition of the ICASA Council

The Council of ICASA was expanded with the amendment of the ICASA Act in 2006. Whereas there were previously seven councillors (including the chairperson), all responsible for telecommunications and broadcasting regulation, the amendment provides for nine councillors (presumably to increase capacity in view of the addition of postal regulation to the ambit of ICASA in terms of the EC Act).²⁰⁸

The law states that the Council must appoint a Chief Executive Officer (CEO) and other staff necessary to fulfil its functions (Section 14 ICASA Act).

The CEO is the accounting officer (Sec 15 ICASA Act) in terms of the PFMA, reinforcing the independence of the regulator. In terms of Section 36 of this Act, only government departments and constitutional institutions have their own accounting officers. These officers are solely responsible for the management of funds and accountable for fiscal discipline. ICASA is recognised as a constitutional institution in Schedule One of the PFMA. This Schedule of the Act does not only list Chapter Nine institutions, but sets out oversight requirements for all public bodies which are deemed to be independent.

2.3 Appointment and removal of Council

Criteria

Councillors are full-time appointees and in terms of legislation must be "committed to fairness, freedom of expression, openness and accountability". The ICASA Act stipulates that Council as a whole must have relevant expertise and experience in a wide range of

www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F2005%2F05110812151005 in March 2008

²⁰⁷ Interview Johann Koster, Executive Director National Association of Broadcasters, 2 September 2008

²⁰⁸ Section 5, ICASA Act

fields including broadcasting policy, electronic communications, engineering, law, journalism, education and economics (Section 5, ICASA Act).

At the time of the merger between the broadcasting and telecommunications regulators to form ICASA, several stakeholders (including representatives of the then IBA) had expressed concerns that broadcasting might be neglected by a merged regulator – given that telecommunications is a significantly larger industry. It was suggested in several submissions that, given this, the new legislation could establish a specific broadcasting committee, or that the Act should stipulate the number of councillors with expertise in each of the relevant sectors. The legislature, however, decided against this, stating that a general clause requiring that the Council must as a whole include, for example, people with broadcasting and journalism experience was sufficient to address perceptions.²⁰⁹

The clauses in the ICASA Act dealing with criteria for appointment do limit appointment of people with either party political or industry interests. Persons cannot be appointed as councillors if, amongst other things, they are office bearers in a political party, are public servants or if they or a family member have a “direct or indirect” financial interest in broadcasting, electronic communications or the postal sector (Sec 6, ICASA Act).

Procedures for appointment

The procedures for the appointment and removal of board members of independent bodies are recognised regionally and internationally as a key indicator of independence. In the case of ICASA, whilst the legislation stipulates that the Authority is independent, appointment procedures (and actual appointments made) have been the subject of ongoing tussling.²¹⁰

Councillors on the predecessors of ICASA (the IBA and SATRA) were both appointed by the President on the recommendation of Parliament after a public nomination process. The original ICASA Act (of 2000) incorporated these appointment procedures into the new legislation. However, more recent amendments to the ICASA Act, introduced together with the EC Act in 2006, have introduced changes - removing the President from the process, reducing Parliament’s role in determining appointments and giving greater power to the Minister:

- Parliament through its Portfolio Committee on Communications calls for public nominations for members of Council – as previously.
- After public interviews of short-listed candidates, Parliament no longer recommends who actually should be appointed, but rather proposes a shortlist of potential candidates to the Minister. This list must “be at least one and a half times the number of councillors to be appointed” (so if there are four vacancies, for example, Parliament would have to recommend at least six candidates).
- The Minister then selects his/her proposed appointees from this shortlist and submits these names to Parliament for final approval. Parliament can request the Minister to review his/her decision if they are not satisfied with the proposal. Previously, the President only had the power either to appoint or to refer the list as a whole back to Parliament to review.

²⁰⁹ Parliamentary Monitoring Group, “Minutes: Independent Communications Authority Bill: discussion”, 05 April 2000, accessed from <http://www.pmg.org.za/minutes/20000404-independent-communications-authority-bill-discussion> in August 2008

²¹⁰ As has been highlighted earlier in this section, proposed amendments to the appointment procedure have led to Bills being returned by the President to Parliament for reconsideration.

- If Parliament approves of the proposed candidates, then the Minister appoints them and selects the Chairperson of the Council. Previously the President appointed the Councillors and the Chair (Sec 5, ICASA Act).

This new appointment procedure is far more cumbersome than the previous process and has been criticised as potentially undermining the independence of the Authority. The Parliamentary Ad Hoc Committee to Review Chapter Nine Institutions stated that it regards the new procedure as “inappropriate” and has recommended that the legislation be amended again and the original appointment process be reinstated²¹¹, stating that it was “dissatisfied” with the Minister’s involvement in appointments as “this may create a perception that the Authority is not an independent institution”.²¹²

The process for removal of Councillors was also amended in 2006 by giving the powers previously granted to the President to the Minister (Sec 8, ICASA Act).

In terms of the legislation, the Minister (previously the President) can only remove a Councillor from office on a resolution by Parliament to that effect. The Act states that Parliament can make such a finding on the following grounds:

- Misconduct;
- Inability to perform his or her functions;
- Absence from three or more consecutive meetings without the permission of Council except “on good cause shown”;
- Accepting other work or taking up a position which would either create a conflict of interest or interfere with their ability to fulfil their responsibilities as outlined in legislation (i.e. accepting a position on a board of a licensee);
- Failure to disclose a conflict of interest by themselves or a family member or business associate;
- Becoming disqualified in terms of the Act (i.e. be declared insolvent); or
- Refusal to enter into a performance agreement (see below).²¹³

2.4 Functions and responsibilities of ICASA

The responsibilities of the regulator are greater for broadcasting than for telecommunications and electronic communications. This is reflective of the history of the development of the different sectors.

The revoked IBA Act, in recognition of the imperatives of independent regulation of broadcasting, gave sole responsibility to the regulator to develop regulations and decide on and award licences. The powers of the then telecommunications regulator SATRA, on the other hand, were circumscribed and the regulator had to wait for the Minister to issue invitations to apply for key licences (such as those for a Second National Operator for the provision of a fixed line telephone service). Similarly the Minister had to endorse key regulations.²¹⁴

²¹¹ Report of the Ad Hoc Committee on the Review of Chapter 9 Institutions, p. 202, Par 4(b)

²¹² *Ibid.*, pp. 196-197, Par 3.3 (f)

²¹³ Section 8 of the ICASA Act

²¹⁴ The limited powers of the regulator for telecommunications have been criticised particularly as the government is also a player in the sector through shareholding, for example, in the incumbent fixed line operator, Telkom.

With the dissolution of the IBA and SATRA and the introduction of a merged regulator, ICASA, this duality initially continued. The EC Act has since provided some relief, but the law still requires the Minister to issue invitations to apply for key electronic communications network licences in line with government's "managed liberalisation policies".²¹⁵ While broadcasters are not regarded as electronic communications network operators (ECNS licensees) in the legislation, and are thus not directly affected by this clause, broadcasting signal distributors are classified as such. This clause thus potentially limits national broadcasters' rights to conduct their own signal distribution as ICASA has deemed all national players to be "key" licensees.

In terms of the EC Act, one of the core functions of ICASA is to "promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services" (Sec 2(a) EC Act). As regards broadcasting, ICASA issues licences to public, private (commercial) and community broadcasters and develops regulatory policy.

Other functions and responsibilities of ICASA related to broadcasting are outlined in Section 4 of the ICASA Act as well as in the Broadcasting Act. These include:

- Making recommendations to the Minister of Communications on policy matters and proposed amendments to legislation in order to promote development of the communications sector (EC Act);
- Awarding of licences in terms of the underlying legislation, issuing of licence conditions and ensuring compliance by licensees with the relevant legislation and licence conditions. This goes for all broadcasting licensees – including the public broadcaster (EC Act and Broadcasting Act);
- Monitoring compliance by the SABC with its legislative Charter (Broadcasting Act);
- Managing the radio frequency spectrum (according to Section 33 of the EC Act, the Authority drafts a national frequency plan which has to be approved by the Minister) (EC Act);
- Prescribing regulations in line with the objects of the relevant laws; and
- Ensuring free and fair coverage by broadcasters of all political parties during an election. This includes developing guidelines for election coverage as well as allocating free airtime and adjudicating complaints against broadcasters.

2.5 Oversight and accountability

ICASA is technically accountable to Parliament as its funding is approved by Parliament and it has to report to the legislature annually on implementation of programmes and expenditure of funds (Sections 15 and 16 ICASA Act). The budget is approved as part of the budget for the Department of Communications.

However, as identified above, several sections of the founding legislation (the ICASA Act as amended) appear to strengthen the Minister of Communication's role as against that of the National Assembly, in particular by giving the minister more control over the appointment process.

In addition, Section 6A introduces a performance management system for Council. Whilst it is important to ensure the efficiency of any body utilising public funds, the process outlined could be seen as impacting on the independence of the regulator.

²¹⁵ Electronic Communications Act, Section 5(6)

In terms of this section, the Minister must “in consultation with the National Assembly” develop a performance management system to assess the performance of councillors and the chairperson. The Act outlines standard components of any such system, including the development of indicators and targets on an annual basis and a performance agreement. Legislation states that the Minister, again in consultation with Parliament, must set up a panel to conduct annual performance assessments and report on them to the legislature. Refusal to sign a performance agreement has been added in Section 8 as one of the grounds for removing a councillor from office.

The Ad Hoc Committee on Chapter Nine Institutions in its report to Parliament stated that the clauses relating to ministerial involvement in determining performance agreements should be removed.

The Committee also made general suggestions on strengthening the independence of ICASA and other constitutional institutions and on increasing the capacity of Parliament to oversee them (rather than ministers or government departments). Due, amongst other things, to a lack of capacity, the Committee found, Parliament’s engagement with these organisations was “wholly inadequate”²¹⁶. Challenges to the independence of such institutions identified in the review include:

- The location of the budgets for constitutional and associated institutions within a government department’s budget allocations. Whilst the Committee noted that departments are merely conduits for funds (and not able to change appropriations), this practice, it said, impacts negatively on perceived independence of institutions. The Committee suggested that their budgets rather be included in the Parliamentary Budget Vote.²¹⁷
- The submission of annual reports to Parliament via ministers rather than directly.²¹⁸
- “Minimum engagement” by relevant parliamentary committees with the strategic plans and budgets of independent institutions. The Committee pointed out that such engagement is “essential for effective oversight”.²¹⁹ Similarly it noted that substantive issues raised by or about institutions are not necessarily explored by Parliament.

The Ad Hoc Committee made a number of recommendations aimed at increasing Parliament’s capacity to ensure effective oversight of independent institutions. It proposed that:

- The capacity of Portfolio Committees should be enhanced through, for example, the equipping of members (and the chairperson) with specialist and technical knowledge, the appointment of specialist researchers and where necessary technical experts and the establishment of focused sub-committees.²²⁰
- Parliament should create a specific unit focused on institutions appointed by Parliament within the office of the Speaker of Parliament. The unit should be headed by a senior person (at the level of Deputy Director-General)²²¹.

²¹⁶ Report of the Ad Hoc Committee on the Review of Chapter 9 Institutions, Executive Summary, Par 5.3, p. xii

²¹⁷ *Ibid.*, Chapter 2: Common Issues and Key Recommendations, Par 1 (a), p. 20

²¹⁸ See note 15

²¹⁹ Report of the Ad Hoc Committee on the Review of Chapter 9 Institutions, Chapter 2: Common Issues and Key Recommendations, Par 3.1, p. 28

²²⁰ *Ibid.*, Par 3.3.2, p. 31

²²¹ *Ibid.*, Par 3.3.1, p. 30

- Legislation dealing with accountability and standards to regulate the relationship between Parliament and independent bodies should be promulgated.²²²

This report was tabled in Parliament and – after a lengthy delay - discussed in a meeting of the Portfolio Committee Justice and Constitutional Development in July 2009, which agreed to formulate a programme of action drawing on the recommendations of the report.²²³ By year-end no further action had been taken.

2.6 Division of responsibilities

In order to reinforce the independence of the regulatory Authority, it is also critical that any Act should outline clearly the different roles and responsibilities of the regulator and government as the lines between regulatory and national policy can be blurred. The EC Act does this by making ICASA solely responsible for licensing and limiting the Minister's role (Sec 3, EC Act).

The Act stipulates that the Minister may not be involved at all in the “granting, amendment, transfer, renewal, suspension or revocation of any licence” (Sec 3(3)). S/he can however develop national policies and issue policy directions to the Authority. The regulator, according to the Act, has to “consider” such policies or policy directions (rather than abide by them).²²⁴ The law outlines the conditions and process for the development of policy and issuing of policy directions as follows:

- The Minister “may make policies on matters of national policy applicable to the ICT sector, consistent with the objects of this Act”.²²⁵ S/he can make such policies in relation to international treaties/agreements, universal service and access, the radio frequency spectrum, the application of new technologies and “other policies necessary for the application of this Act ...”
- The Minister may also, in terms of Section 3(2), issue policy directions to ICASA “consistent with the objects” of the relevant legislation after consulting with the Authority and publishing in the government gazette for public comment notice of his/her intention to make such directions.

However, whilst any law can establish a framework for independence, its implementation is dependent on the commitment of government, the industry and the regulator to this principle. An old regulatory adage says that a regulator is only as independent as its latest decision and it has been suggested that the previous Minister, Dr Ivy Matsepe-Casaburri, did not fully understand or agree with the legislative limitations on her power and that ICASA itself did not always rigorously defend its legislative autonomy.

Two incidents appear to confirm this:

²²² *Ibid.*, Par 3.3.3, pp. 31-32

²²³ ‘Legacy report, five year review, state of the nation address, Chapter Nine ad-hoc committee report: research unit briefings’, minutes of meeting held on 1 July 2009, accessed from <http://www.pmg.org.za/report/20090701-legacy-report-five-year-review-and-perspective-state-nation-address-o> on 15/11/2009.

²²⁴ Electronic Communications Act, Section 3(4)

²²⁵ Electronic Communications Act, Section 3(1)

- A court judgement in August 2008 declared that a 2007 Ministerial Policy Direction was ultra vires as it had usurped ICASA's responsibility for licensing. The judge moreover implied that, given this, ICASA itself should not have considered this Direction in its decision-making.²²⁶ The court case related to a fairly complex telecommunications licensing issue and the details are therefore not relevant to this review - but the finding itself is pertinent.
- In a Ministerial Policy Direction in September 2007 the Minister directed ICASA to conduct an inquiry into how the services of a particular international subscription satellite radio provider (Worldspace) could be continued and licensed.²²⁷ Although there has been no court decision challenging the Policy Direction, it appears to clearly usurp ICASA's powers in determining licences independently and on its own. Worldspace had previously applied for a subscription service licence but had withdrawn its application after the Minister published a draft Policy Direction for public comment on the need to ensure the service continued to broadcast. Whilst it is unclear why Worldspace did not pursue its application, speculation abounds that the broadcaster does not meet foreign control limitations in the Act and therefore could have been refused a licence.

It remains to be seen whether the new Minister, Sipiwe Nyanda, continues in the same vein, but the provisions in a Public Broadcasting Services Bill, published by the ministry in October 2009, do not inspire confidence that he will break with his predecessor's practices. The proposed bill gives the minister wide powers over both the SABC and ICASA (see chapter ten for more information).

2.7 Review

ICASA's decisions can be challenged in the courts. Grounds for review include evidence of bias in the decision-making, inconsistency with the law and procedural inconsistencies (in terms of the Act and the Public Administrative Justice Act). If a court finds that the regulator has acted ultra vires or there have been procedural irregularities, it cannot decide on the merits of the case, but can refer a decision back to ICASA.

2.8 Protection against conflicts of interest

As mentioned earlier, people may not be appointed to Council if they have a financial interest in the sector to be regulated. In addition, the ICASA Act includes other provisions to guard against industry capture or conflicts of interest once a councillor is in office:

- Section 5(4) of the ICASA Act states that councillors must on appointment take an oath confirming their commitment to "fairness, freedom of expression, openness and accountability" and pledge to abide by the Constitution.
- Section 12(1)(a) precludes councillors from voting or taking part in any decision on a licence if s/he or a family member is a director, member or business partner of the applicant or any person who has made a representation about the application/matter. As noted above, councillors in breach of this clause can be removed from office.
- Section 12(1)(b) prohibits a councillor from participating or being present at a meeting if s/he "has any interest which may preclude him or her from performing his or her functions as a councillor in a fair, unbiased and proper manner".

²²⁶ Judge Davis, "Judgement in the High Court of South Africa in the Transvaal Provincial Division in the matter between Altech Autopage Cellular (Pty) Ltd and the Chairperson of the Independent Communications Authority of South Africa and others", Case No 20002/08

²²⁷ Department of Communications, "Policies and Policy Directions drafted in terms of Section 3(1) and 3(2) of the Electronic Communications Act, 2005 (No 36 of 2005)", accessed from <http://www.greengazette.co.za/docs/200709/20070917%20-%20National%20Gazette%20No%2030308%20of%2017-Sep-2007,%20Volume%20507.pdf>

A councillor who defies these regulations faces a fine of up to R250 000 and/or imprisonment for up to five years (Sec 12(4)). In the history of regulation in South Africa no councillor has been charged in terms of this section.

2.9 Public participation

ICASA is required by law to involve the public in decision-making.

When developing regulations and policies, the regulator has to first publish a draft in the Government Gazette and invite the public to comment on it. The EC Act states that the draft must be published at least 30 days before any regulation is promulgated. Similarly, any application for a licence, or for the amendment or renewal of any licence, has to be published in the Gazette for public comment.

ICASA has the discretion to decide whether or not it will hold public hearings to further explore representations. The regulator has in the past tended to hold hearings where there are contrasting opinions and views (for example into the development of South African content quota regulations) and/or where there is more than one applicant for a single broadcasting licence (as in the licensing of regional commercial radio services in secondary towns in 2005 and 2006). ICASA has also held hearings before refusing any licence in order to provide an applicant with an opportunity to address potential concerns (as was done in the licensing of subscription broadcasters in 2007).

3. Licensing of broadcasters

Within the three tiers of broadcasting - public, commercial and community the Broadcasting Act recognises different types of services, including free-to-air and subscription services, as well as terrestrial and satellite broadcasters (Sec 5(2) Broadcasting Act).

ICASA, in line with the Broadcasting White Paper of 1998 and legislation, has developed differing obligations for the different sectors. Public broadcasting, for example, has more responsibilities than commercial services, whilst community broadcasters are expected to meet the needs of the communities they serve. Similarly, free-to-air commercial broadcasters have greater public obligations than their subscription counterparts.²²⁸

The EC Act has introduced a new licensing regime applicable to both broadcasters and electronic communications services (telecommunications services). In terms of this, there are two categories of licence:

- individual licences (which in relation to broadcasting apply to public and commercial broadcasting services and are granted for a maximum of 20 years, with the actual term to be determined by ICASA); and
- class licences (which apply to community and low power stations and channels and are granted for a maximum of 10 years). (Sec 5 EC Act)

²²⁸ These differing minimum requirements are set out in the relevant Regulations and Position Papers published by ICASA.

There are different procedures outlined in the EC Act for application for the different categories of licence. However, in all licensing decisions the following issues have to be considered:

- The need for the service (considering other broadcasters and the requirements of legislation to promote a diverse range of services);
- The capacity of those applying to implement their strategic plans and objectives; and
- The financial means of the applicant (not necessarily if they have the funds, but if they have shown that they will be able to raise them and that they have viable business plans).²²⁹

3.1 Individual licences

Section 9 of the EC Act outlines the process for the granting of an individual licence.

Applications for individual licences are only considered on invitation by the Authority. Such an invitation must include the minimum requirements for the licence and the standard terms and conditions applicable, as well as set a deadline for application.

Once applications are received, these must be gazetted to enable the public to make representations on the proposal/s. Applicants are given an opportunity to respond to representations (if any). After considering the applications and any submissions on these (and, if deemed necessary, holding a public hearing), the Authority must decide on the application and publish reasons for its decision.

If a licence is awarded, the Authority must then issue licence conditions, including standard terms and conditions as well as special conditions reflecting undertakings made by the applicant during the application process.

Similar processes (of publication, representation and decision) are followed for the amendment of any licence and the renewal of a licence (these are outlined in Sections 10 and 11 of the EC Act) – though the Authority’s powers in this regard are circumscribed in order to promote regulatory certainty.

For example, the regulator may only amend a licence:

- if the licensee has applied for the amendment (and the proposed amendment would not prejudice others and is in line with policy and legislation);
- to ensure consistency with the licence conditions of similar licensees;
- to promote fair competition;
- due to technological changes or in the interests of orderly frequency management;
- on the recommendation of the Complaints and Compliance Committee of the regulator (which, amongst other things, adjudicates complaints relating to violations of licence conditions) ;
- if it is necessary to achieve the objectives of the Act; and/or
- if it is necessary to achieve universal service and access. (Sec 9, EC Act)

ICASA can only refuse to renew a licence if the licensee “has materially and repeatedly” breached its terms and conditions of licence, any regulations and/or the legislation (Sec 11(7) EC Act).

²²⁹ This is a summary of common requirements outlined in Secs 49, 50 and 51 of the EC Act.

Similarly, a licence can only be revoked or suspended on the recommendation of the Complaints and Compliance Committee after this committee has “repeatedly” found the licensee guilty of “material violations” (Sec 17 E, ICASA Act).

Any applicant or licensee can have a decision by the regulator reviewed in a court.

3.2 Class licences

The procedure for obtaining a class licence (applicable to community and low power stations and channels) is much simpler (Sec 17 EC Act).

Applications for class licences can be submitted at any time (rather than only on invitation). The Act merely specifies that once such an application for registration of the licence has been received, ICASA must decide on it within 60 days (unless it has provided written reasons for any delay). If the Authority does not either grant the application or give valid reasons for a delay within the 60-day period, and the application complies with all relevant policies and regulations, it is deemed to have been granted (Sec 17 EC Act).

As in the case of individual licences, the licence conditions include both standard and specific conditions (Sec 8 EC Act).

3.3 Licence conditions

ICASA has since the introduction of the EC Act been laboriously converting licence conditions issued under previous law²³⁰ into licences in terms of the new legislation.²³¹ This is necessary as the new regime, amongst other things, sets out new categories of licence (such as class licences) and provides for ICASA to determine new licence terms. In terms of the law, the licence conversion process had to be – and was indeed - completed in January 2009 (Section 92(6) of the EC Act).

The regulator has finalised the terms and conditions for all broadcasters (after a public process) as well as the special conditions for each licensee, in consultation with them, and issued the licences in January 2009. Standard licence conditions are fairly generic, and underline the need to abide by the law, relevant regulations and the code of conduct for broadcasters. They further:

- set the term of licences as decided by ICASA (15 years for public and commercial free-to-air television and subscription services, 10 years for public and commercial radio stations and five years for community and low power stations and channels). In setting these terms ICASA gave consideration to both the financial outlay required in establishing each particular service and the need to update licences regularly through the renewal process in line with changing public needs.
- stipulate which records licensees should keep to facilitate monitoring of compliance with conditions and what information should be regularly submitted to ICASA (this includes logs of programmes, records of sponsorship and advertising and, in the case of community broadcasters, details of all funds received). Licensees are required to keep recordings of all programmes for three months but do not need to submit these to ICASA unless requested.

²³⁰ The IBA and SATRA Acts

²³¹ ICASA, according to its own schedule, has to convert 138 broadcasting licences, 68 telecommunications licences and 368 Value Added Network Service Licences.

- require that all broadcasting services air public service announcements for free when requested to do so either by the Authority or by the National or Provincial Commissioner of Police (in the case of a disaster or immediate grave danger); and
- provide for fines for contravening the conditions (not exceeding either 10 per cent of the previous year's revenue up to a total of R10m in the case of public and commercial entities or a maximum of R50 000 for community and low power services).

The standard conditions for class broadcasting licences (community broadcasters) further stipulate that entities must be non-profit and that any profits made must be ploughed back into the station or into community projects.²³²

Specific details for each licensee are contained in the special licence conditions attached as a schedule to the standard terms and conditions. These include details of:

- the licence/coverage area;
- the target audience/community;
- the programming format, including the percentage of talk radio and music, the number of minutes which must be devoted to news bulletins and other public service programming, the percentage of South African content to be aired and the languages to be used; the shareholding/control structure of commercial broadcasters and the organisations that are to participate in community services; and
- any specific pledges made by the licensee during the application process.

The last mentioned special licence condition is designed to capture promises made by the licensee which might have given it the competitive edge over other applicants – thus binding licensees to such pledges and limiting the chance that applicants will make wild proposals merely to win the licence. During the application process, bidders often seek to show that they will exceed the minimum requirements set by regulation in areas such as black ownership, South African content and news provision. The licence granted then compels them to actually deliver on their promises.

Adherence to licence conditions is monitored by ICASA through checking of all the reports submitted by licensees (including content logs). Spot checks are also conducted and at times stations and channels are required to submit recorded material in order to ensure that the written records match what was actually aired.

ICASA's capacity to regularly monitor broadcast output though is limited as it does not have the necessary equipment or staff to check what goes out on air all over the country. This limitation is in some ways mitigated as the legislation allows for complaints from the public and other broadcasters, and because competitors keep a close watch on each other and immediately report any perceived breach of licence conditions.

3.4 Regulations

In addition to their specific licence conditions, broadcasters also have to adhere to regulations developed by the regulator (through a public process). These include:

²³² The information was extracted from: ICASA, "Regulations Regarding Standard Terms and Conditions for Class Licences under Chapter 3 of the Electronic Communications Act (No 36 of 2005)", published in *Government Gazette* No 30512, 23 November 2007 and "Regulations Regarding Standard Terms and Conditions for Individual Licences under Chapter 3 of the Electronic Communications Act (No 36 of 2005)", published in *Government Gazette* No 30530 on 30 November 2007

- Regulations specific to the type of broadcaster, outlining the minimum requirements applicable (for commercial radio stations, for commercial free-to-air television services, for subscription services and for community broadcasters). These set, for example, the number of minutes of news which must be aired daily, the maximum number of minutes of advertising per hour, other programming requirements as well as details of black economic empowerment and employment equity criteria. There are no specific criteria for the public broadcaster as these regulations are generally used to set minimum requirements for all broadcasters in a particular category. SABC's licence conditions are instead developed in a public process similar to the finalisation of regulations.
- Regulations applicable across all the different broadcasters, such as local content regulations, sports rights rules (aimed at ensuring that sports events of national importance are aired on free-to-air television) and requirements for advertising and sponsorship.

South African content rules

South African local content rules are aimed at both showcasing South African creative product as well as building the local independent production and music industries. Quotas set in regulations are reviewed regularly (roughly every five years²³³) and, in line with legislation, require the public broadcaster to air a higher proportion of South African content than commercial stations and channels.

As regards South African music content, the regulations set the following minimum local music quotas to be broadcast on radio between 5am and 11pm²³⁴:

- Public and community radio stations must air at least 40 per cent South African music.
- At least 25 per cent of the music broadcast on a commercial radio station must be South African.²³⁵

The content regulations for television are more detailed, and set minimum quotas for the different genres of programming, as well as overall percentages for content. They also stipulate that at least 40 per cent of any broadcaster's South African content must be produced by independent producers. Details of content requirements are outlined in the table below.

Table 6: Television content quotas

Category	Public	Community	Commercial	Terrestrial or cable subscription	Satellite subscription broadcaster
Overall quota	55%	55%	35%	10%	10% of channel

²³³ ICASA aimed to review the regulations in 2008 in line with new digital migration policies. It appointed consultants to conduct research, which then led to consultations with stakeholders and the release of a Draft Discussion Document in November 2008. At the time of writing, this process was still being finalised.

²³⁴ ICASA, "South African Music Content Regulations", Notice 153 of 2006, published in *Government Gazette* No 28453, 31 January 2006

²³⁵ Note that as commercial stations were awarded licences through a competitive process, many play much more South African content in line with their licence conditions.

					acquisition budget to be spent on SA channels
Drama	55%	(not specified)	20%	2% of the SA content must be drama	
Children's programming	55%	(not specified)	25%		
Documentary	50%	(not specified)	30%		
Knowledge building	50%	(not specified)	30%		
Current affairs	80%	(not specified)	50%		
Education	60%	(not specified)	(not specified)		

Source: ICASA, *South African Television Content Regulations*, Notice 154 of 2006, published in Government Gazette No 28454 on 31 January 2006

The regulations further include incentives for airing more expensive programmes (e.g. specially commissioned television films and serials²³⁶ rather than soap operas), neglected genres (such as arts programming) and promoting new artists (including previously unrecorded musicians). These incentives work on a points system and essentially mean that a half hour South African produced arts programme, for example, will contribute more than other, cheaper programming towards meeting the above quotas. Points are awarded for specific programmes, and 10 points is equivalent to 1 per cent of South African content – over and above the actual amount of time dedicated to it.

4. Complaints procedures

The legislation provides for two categories of complaints by the public, other stakeholders, or ICASA:

- complaints regarding breaches of licence conditions, regulations or the law; and
- complaints related to violations of the Code of Conduct.

There are differing approaches to handling these different sorts of complaints:

- The law provides that alleged breaches of licence conditions, regulations or legislation must be adjudicated by the Complaints and Compliance Committee (CCC) established under ICASA.
- Alleged code of conduct breaches can either be considered by the CCC or by a self-regulatory body approved by the regulator. Broadcasters choose which body they will fall under (Sec 54 (3) EC Act). The SABC together with all commercial broadcasters has opted for self-regulation and established, under the auspices of the National Association of Broadcasters, the Broadcasting Complaints Commission of South Africa (BCCSA). Most community stations have chosen to fall under the CCC as they do not have to make any financial contribution to its running and say they have faith in the independent system prescribed in law.

²³⁶ Defined as a drama aired over a set number of episodes – distinct from a soap opera which can be endless

4.1 The Code of Conduct

The regulatory Code of Conduct for broadcasters is developed by ICASA after consultation with the public and stakeholders (sec 54(1) EC Act).

Section 54(2) stipulates that all broadcast licensees must adhere to the prescribed regulations: “subject to the provisions of sub-section 3”. Sub-section 3 states that this does not apply to those licensees who have opted for self-regulation:

(T)he provisions of sub-section 2 do not apply to a broadcasting service licensee who is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a code of conduct enforced by that body by means of its own disciplinary mechanisms, provided such code of conduct and disciplinary mechanisms are acceptable to the Authority.

The self-regulatory and the ICASA Code, however, are very similar. Both focus on protection of children and providing viewers with sufficient information through advisories (information prior to and during a programme alerting audiences to either age restrictions or content that may be offensive to some). They determine a watershed period between 9pm and 5am (or 8pm and 5am for subscription broadcasters) during which “adult” programming can be aired (including violence and sexually explicit material).

Other stipulations in the ICASA Code, which was amended in June 2009, are the following:

- Broadcasters shall not air material which, judged within context, “contains violence which does not play an integral role in developing the plot, character or theme of the material as a whole, or sanctions, promotes or glamorises violence” including violence based on race, gender, ethnicity, sexual orientation, religion, age, mental or physical disability. Discussion programmes “in the public interest” relating to violence or bona fide scientific, documentary or creative programmes are excluded from this ban;
- Channels shall be particularly cautious about programmes which depict violence during times when large numbers of children are likely to be watching or listening. Violence involving real-life characters may only be depicted if it is essential to the development of a character and plot;
- Programmes for children must deal “with reasonable care” with issues that might affect the security of children (for example relating to themes of domestic violence, death or crime);
- Programmes for children must be careful about portraying acts which can be imitated such as use of plastic bags and matches;
- Offensive language, including profanity and other religiously sensitive material, must not be broadcast in children’s programmes or in excess before the watershed period;
- Broadcasters must not broadcast material which, judged within context, contains the following material: child pornography, bestiality, sexual conduct which degrades a person in the sense that it advocates a particular form of hatred based on gender and which constitutes incitement to cause harm, explicit sexual conduct, explicit extreme violence or the explicit effects thereof and explicit infliction of domestic violence;
- News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts;
- If there is doubt about the correctness of a report and it cannot be verified, this should be highlighted;
- If a report is found to be materially incorrect, it should be corrected “without delay” and with due prominence;
- Any comment on an issue must be clearly shown as comment, not fact; and

- When dealing with controversial issues, reasonable steps should be taken to present all views and those criticised should be given a right of reply.²³⁷

4.2 The Complaints and Compliance Committee

Prior to the promulgation of the EC Act, broadcasting and telecommunications complaints were adjudicated separately. Broadcasting complaints about licence conditions, violations of regulations or the Code of Conduct (if broadcasters had not opted for self-regulation) were considered by the Broadcast Monitoring and Complaints Committee (BMCC).

In 2006, however, this Committee was dissolved and, by means of an amendment to the ICASA Act, replaced with the Complaints and Compliance Committee (CCC). The CCC deals with both telecommunications and broadcasting complaints.

Section 17A of the ICASA Act stipulates that the CCC must have no more than seven members, including one member of the Council. It must be chaired by a judge, magistrate or attorney with at least 10 years experience. Other members are appointed by the ICASA Council after a public nomination process.

According to the Act, members of the public can lodge a complaint with ICASA about a licensee within 90 days of the alleged transgression. In terms of its procedures ICASA notifies the broadcaster of this complaint and, where possible, encourages a resolution between the parties. If no agreement is reached and the complaint is found to have merit, it is referred to the CCC for adjudication. ICASA can also lodge a complaint about alleged non-compliance with the CCC for consideration.

The CCC, after hearing all parties, must make a finding about the matter and recommend to Council a punishment/remedy. The Council after considering the finding must make a final decision on the action to be taken.

During the financial year 2008/2009 the Committee had adjudicated complaints against nine licensees charged with non-compliance and made recommendations to Council on sanctions. Most complaints related to failure by community stations to submit reports as required, to hold Annual General Meetings, or to meet licence conditions.²³⁸

The Freedom of Expression Institute (FXI) had submitted a complaint accusing the SABC of violating its licence conditions and relevant legislation by allegedly blacklisting commentators critical of the government. The complaint was based on the findings of an internal Commission of Enquiry, launched by then GCEO Dali Mpofu, after newspaper reports about alleged blacklisting of commentators and allegations made on-air by a staff member that the then Group Executive News and Current Affairs had been responsible for the blacklisting. The final enquiry report found that commentators had indeed been excluded on grounds that were not objectively defensible in terms of basic journalistic ethics. The FXI lodged its complaint after becoming concerned about the SABC's lack of appropriate action on the Commission's findings, and the essence of the FXI's complaint was that SABC news management manipulated its news and current affairs content in pursuit of a political agenda, and failed to effect corrective measures. The CCC dismissed the complaint in July 2009 on

²³⁷ ICASA, 'Regulations – Code of Conduct', *Government Gazette, No. 958*, 06 July 2009

²³⁸ ICASA Annual Report 2008/9, pp. 14-15, accessed from <http://www.icasa.org.za> on 11 November 2009

the grounds that ICASA had no jurisdiction over the SABC's internal matters or its editorial policy, and the FXI is appealing the matter.²³⁹

4.3 The Broadcasting Complaints Commission of South Africa

The BCCSA was recognised as a self-regulatory body by the then IBA in 1995. It is established as an independent body to adjudicate on complaints from the public about broadcasts by members of the National Association of Broadcasters (NAB) - the SABC, all commercial broadcasters and several community radio stations.

Its constitution states that the BCCSA shall have up to 13 commissioners (including the chairperson) appointed for five-year terms. Six of the commissioners are selected on the basis of their "interest or expertise" in broadcasting and another six because of their "interest and/or expertise in matters which relate to the interests of viewers and or listeners". The chairperson is elected at an annual general meeting of the BCCSA and the Constitution states that s/he need not be a member of the Commission.²⁴⁰

An appointment panel chaired by an external person (who is selected by the BCCSA) appoints members to the Commission after a public nomination process. The appointment panel also includes the existing chairperson of the BCCSA, the chairperson of the NAB (or a nominee) and two other external members.

All broadcasters that subscribe to the BCCSA Code have to advertise regularly how to lay a complaint with the Commission. A complaint must include details of the time of broadcast and can only be made within 30 days of the broadcast – unless there is good cause for any delay. The registrar of the BCCSA first decides whether or not the complaint complies with the Commission's procedures and then, if necessary, forwards it to be considered by a Complaints Panel. Such a panel must include the chairperson (or an alternate) as well as one member with broadcasting expertise and another who is representing viewers or listeners.²⁴¹

Broadcasters found to have contravened the Code can be reprimanded, directed to air a correction or given a fine (not exceeding R50 000).

In 2003, the BCCSA introduced an internal appeals process to enable either a complainant or broadcaster to complain against a judgement and/or penalty. The appeals panel is made up of members of the Commission other than those who heard the original complaint.

According to the BCCSA's 2008-2009 annual review, it has handled over 14 000 complaints in the sixteen years of its existence. The number of complaints received has increased steadily, and currently exceeds 1800 annually. The review states that the BCCSA has "often acted as a lightning rod for irate complainants by the mere fact that we have meticulously attended to every complaint and provided reasons for our decisions". It further stated that, on average, 10 per cent of complaints are actually heard.

²³⁹ 'FXI takes issue with finding on SABC "blacklisting"', *Mail & Guardian Online*, accessed from <http://hades.mg.co.za/article/2009-06-30-fxi-takes-issue-with-finding-on-sabc-blacklisting> on 12/11/2009.

²⁴⁰ Broadcasting Complaints Commission of South Africa, Constitution, clause 5 (hereinafter BCCSA Constitution)

²⁴¹ Clause 10 BCCSA Constitution

The review groups the main areas of complaint as those relating to the right to dignity which the Commission has held, includes the right to reputation and generally refers to the right of an individual, not the right of a group. In a large number of cases the BCCSA was called upon to decide whether gratuitous violence might be excused on the basis of the documentary nature of a particular programme. It has also handled numerous complaints about derogatory terms used to describe sections of the South African population.²⁴²

5. Conclusion and recommendations

It is important in assessing the regulatory framework in South Africa to consider it against accepted regional codes and agreements. The African Commission on Peoples' and Human Rights Declaration of Principles on Freedom of Expression in Africa provides such guidance.

Clause Five of the Declaration states:

- an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions;
- licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting.

South Africa has established a regulatory body responsible for issuing broadcasting licences and the law does provide for fair and transparent processes and seeks to promote diversity in broadcasting.

Clause Seven of the Declaration states:

- Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.
- The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.
- Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

Again, the ICASA framework technically meets this provision, though concerns have been raised about an apparent erosion of independence through the increased role of the Minister of Communications. Most notable are the findings detailed above of the Parliamentary Ad Hoc Committee to review Constitutional Institutions. The report of this Committee reinforced the need to safeguard the independence of both broadcasting and telecommunications regulation:

The Committee is convinced of the necessity for the existence of an independent regulator for both the protection of free speech and the economic development of the sector. In particular, the Committee highlights the importance of an independent regulator for broadcasting as a key construct of democracy.²⁴³

Financial and other constraints potentially inhibit ICASA's ability to regulate the sector effectively and fairly. The regulator faces ongoing litigation from those with the means to

²⁴² Broadcasting Complaints Commission of South Africa, Chairperson's Report 2008/2009, accessed from <http://www.bccsa.co.za>, 11/11/2009.

²⁴³ Parliamentary Ad Hoc Committee on the review of Chapter 9 Institutions, p. 194

challenge decisions and has limited funds to defend itself in protracted court battles. This inevitably favours those with resources (the established broadcasters).

An additional concern arises from perceptions that the regulator does not have sufficient expertise in broadcasting and that growth of the industry is being hindered by this.

Clause Nine of the Declaration deals with complaints mechanisms. It states:

- Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.
- Effective self-regulation is the best system for promoting high standards in the media.

The regulatory framework provides for both self-regulatory and statutory processes for complaints against broadcasters. It is up to broadcasters to decide which adjudicatory system they will adhere to. Both options provide for public participation in the selection of adjudicators of complaints and public processes for adoption of codes.

Recommendations

- All stakeholders need to be vigilant about potential breaches of the independence of the regulator by government, political parties or vested interests. Any breaches must be publicised and challenged.
- The recommendations made by the Parliamentary ad hoc committee on enhancing the independence of constitutional and parliamentary bodies should be adopted and, where necessary, amendments made to legislation and practice. This includes removal of the Minister's role in appointment and dismissal of ICASA councillors and recommendations regarding the funding and oversight of the regulator.
- The composition of the ICASA council should in any review of the broadcasting framework be reconsidered to determine if it is necessary to specifically stipulate that a certain proportion of councillors must have broadcasting experience and expertise.
- The adequate resourcing of the regulator needs to be addressed. This has been acknowledged in many government and civil society forums, but alternative mechanisms for funding have not yet been put in place. The arguments of government that financing the Authority through fees paid by industry would compromise its independence seem baseless. These fees are determined through regulation and not arbitrarily. Licensees are required to pay fees as prescribed regardless of the popularity or otherwise of the Authority's decisions.
- Adequate financing would assist ICASA to properly monitor compliance with provisions to ensure diversity and public interest requirements. This is essential if the regulator is to be effective in ensuring that the principles and objectives of broadcasting are met.
- The process of reviewing ICASA decisions should further be debated. Court processes are slow and costly and inevitably favour those with more

resources. It may be worth considering alternative review processes which could be used to resolve disputes before people resort to the courts.

The South African Broadcasting Corporation (SABC)

The South African Broadcasting Corporation (SABC) is by far the largest and most influential broadcaster in South Africa – in terms of reach, size, overall audience figures, number of channels, and share of the advertising market. Nearly 20 million of the 29 million radio listeners in South Africa tune into one of the SABC's 18 radio stations²⁴⁴ and SABC's three free-to-air television channels attract more than 17 million adult viewers each day.

In some areas in South Africa, the SABC is the only source of news and information – and in many others the only media in the community's home language. As such it plays an important (and special) role in people's lives. A recent survey of public confidence in key institutions found that the public broadcaster is the second most trusted institution in South Africa – beaten only by churches.

A Human Sciences Research Council (HSRC) study (*Between TRUST and SCEPTICISM: public confidence in institutions*) released in March 2008 showed that the SABC since 2003 was consistently ranked the second most trusted institution – with 72 per cent of those surveyed stating that they trusted or strongly trusted the broadcaster. This compared with churches, which were trusted by 82 per cent of respondents, while 68 per cent of those surveyed expressed confidence in the Independent Electoral Commission (IEC) and 59 per cent in national government.²⁴⁵

At the same time, the Corporation has over the years been dogged by controversies – and has often been the subject of the news rather than just a producer. As media analyst and academic from the University of the Witwatersrand, Tawana Kupe²⁴⁶, said at a seminar in 2005:

²⁴⁴ South African Advertising Research Foundation (SAARF), *Radio Audience Measurement Survey* (RAMS) April 2008, accessed from <http://www.saarf.co.za>

²⁴⁵ Human Sciences Research Council, "Between TRUST and SCEPTICISM: Public Confidence in Institutions", *HSRC Review*, Volume 6, No 1, March 2008, accessed from http://www.hsrc.ac.za/HSRC_Review_Article-85.phtml in March 2008

²⁴⁶ Kupe is currently professor of literature and language studies at the University of Witwatersrand.

...The SABC comes across a reluctant and lumbering giant ...It seems to be in defensive mode unable to convincingly ride out controversies. Instead controversies often consume its energies.²⁴⁷

1. Legislation

1.1 The Constitution

The SABC is not specifically mentioned in the 1996 Constitution of the Republic of South Africa, though freedom of expression is enshrined, including the right to freedom of the media (Section 16). The Constitution also stipulates that an independent broadcasting regulator must be established (section 192).

The clauses related to an independent regulator replaced sections in the Interim Constitution (1993), which specifically referred to media owned by the State. The right to freedom of expression in this earlier version of the Constitution stated that:

All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion. (Section 15(2))

As noted below, the Broadcasting Act (no 4 of 1999) specifically entrenches the SABC's independence in order to enhance its right to freedom of expression.

1.2 Broadcasting legislation

The process of transforming the South African Broadcasting Corporation (SABC) from a state broadcaster into a public broadcaster began in the early 1990s following the unbanning of liberation movements, the release of political prisoners by the then ruling National Party and the start of talks between the two opposing sides on a new political order.

The transformation of the Corporation into a public broadcaster was identified as one of the critical precursors for a free and fair election, and thus discussions on this started well before to the first elections in April 1994 – involving civil society as well as political parties. The need to change the SABC was agreed in principle by all sides, not least the liberation movements and the then ruling party, even if for very different reasons: the National Party did not want a new party to assume the control it had held over broadcasting and the African National Congress (ANC) did not want the apartheid government to control broadcasting over elections. In line with this, a publicly nominated SABC Board was appointed in 1993 – (largely) outside of the existing legal framework and through negotiation – a year before the 1994 elections.

Development of public broadcasting, however, is a process and not an event. In the case of the SABC, this involved not only asserting independence from government and establishing accountability to the public (rather than the ruling party), but also attempting to change the authoritarian culture of the broadcaster and redressing the skewed allocation of resources in the Corporation to ensure that the needs of all South Africans were met.

This process began with the appointment of a new board and a new management (led by veteran media activist Zwelakhe Sisulu) and with the establishment within the Corporation of

²⁴⁷ T. Kupe, "The SABC as a Public Broadcaster: Between a Rock and a Hard Place?", Paper for the Harold Wolpe Memorial Seminar, 7 September 2005, accessed from <http://www.the-edge.org.za/Content/Seminars%20list/Seminar%206%20-%20Kupe%20speech.pdf> in April 2008

a transformation unit. An intensive programme of training new journalists, production staff and management commenced, with the assistance of a range of international public broadcasters (including the Australian Broadcasting Corporation, the British Broadcasting Corporation and the Canadian Broadcasting Corporation).

The promulgation of the Independent Broadcasting Authority Act (IBA Act) in 1993 further advanced the transformation process. This law emphasised the need for the regulator to conduct a study into the protection and viability of public broadcasting, universal access and South African content – dubbed the Triple Inquiry Report (see chapter 5). This study was finalised in 1995 and debated in Parliament in 1996²⁴⁸.

In 1997, Government asserted its right to be involved in developing broadcasting policy (rather than just the regulator) and began reviewing the existing Broadcasting Act (of 1976) and developing what it termed an overarching broadcasting policy. This culminated in the publication of the White Paper on Broadcasting in 1998 and the promulgation of the Broadcasting Act, No 4 of 1999.

This legislation, while dealing with all tiers of broadcasting, predominantly focuses on public broadcasting. Among other things, the Act introduced a Charter for the SABC and provided for the division of the Corporation into public and public commercial wings (purportedly to address funding constraints). The law further provided for the corporatisation of the SABC (the conversion of the organisation into a public company – SABC Ltd).²⁴⁹

The SABC – which previously had balked at direct oversight by the regulator stating that, like the then IBA, it was answerable to Parliament – now had to report to the Authority on compliance with its Charter and adhere to new licence conditions determined by the regulator.

The Broadcasting Act was amended in 2002. The amendment further strengthened the Charter and required the SABC to develop editorial policies through a public process²⁵⁰.

The Act was amended again in 2009 to strengthen Parliament's role in removing members of the SABC board and allow it to recommend dissolution of the entire board.

During 2008 the Department of Communications indicated its intention to review the existing law, with a view to evaluating the need for a separate SABC Act. This review resulted in the release of a Public Service Broadcasting Discussion Document in July 2009 and Public Service Broadcasting Bill in October 2009 which is intended to replace the existing Broadcasting Act. The bill does not focus separately on the SABC and instead proposes a number of fundamental policy changes in relation to broadcasting overall (see chapter ten for more information).

As can be seen from the following analysis, obligations relating to public broadcasting are spread through different sections of three laws (the Broadcasting Act, the Electronic Communications Act and the ICASA Act). Sections in the Broadcasting Act dealing with

²⁴⁸ Note that the IBA model for sustaining the public broadcaster involved the selling off of a range of commercial stations and using the funds to subsidise the development of public stations. Parliament however, in response to petitions from the SABC, reduced the number of radio stations to be sold and decided not to privatise any television channels. Although the IBA intended that the funds from the sale be reinvested in the SABC, government decided otherwise and Treasury took control of all the funds.

²⁴⁹ The corporatisation process was fine-tuned in a 2002 amendment to the Broadcasting Act.

²⁵⁰ The original draft of the bill required that these policies be presented to the Minister. Following a public outcry about the potential of this to impact on independence, the provision was changed to require submission to the regulator.

broadcasting in South Africa as a whole, or focusing specifically on the commercial or community sectors, are for example often repeated in the Electronic Communications Act (No 36 of 2005).²⁵¹ ICASA policies on broadcasting and the license conditions it specifies for all the SABC's channels very significantly affect its conduct and operations.

The need for improved law was also emphasised by the fact that the SABC was embroiled in a series of crises throughout 2008 and much of 2009. The roots of what has been dubbed 'a fiasco' (dealt with in more detail in the substance of this chapter) go back to late 2007, when African National Congress (ANC) parliamentarians told journalists that they had been forced by government to support the Presidency's favoured candidates for appointment to the board of the SABC. From then on, newspaper reports on the SABC often read like scripts for soap opera instalments – with intrigues, personal vendettas and power games between board and management, suspension of top personnel (including the GCEO himself) by either side, appeals to the courts and calls for a vote of no confidence against the board as a whole in Parliament.

This led to the Minister of Communications calling for a review of the law, including the board appointment process and a clear delimitation of functions between board and management, and ruling party MPs proposing a Members' Bill to give them stronger powers to remove the board as a whole (and not just individual members).²⁵² The Broadcasting Amendment Bill – giving Parliament the powers to recommend the removal of the whole Board – was introduced into Parliament in July 2008, and brought into effect in March 2009. The board was removed shortly after and replaced by an interim board (generally credited with having brought much needed stability to the institution and drawing up a financial plan to overcome its serious debt burden). A new permanent board was selected by Parliament and appointed by the President at the end of 2009.

2. Definition of public broadcasting

The Broadcasting Act defines public broadcasting as:

- Any broadcasting service provided by the South African Broadcasting Corporation;
- A broadcasting service provided by any other statutory body; or
- A broadcasting service provided by a person who receives his or her revenue, either wholly or partly, from licence fees levied in relation to sound radio sets and in relation to television sets, or from the State, and must include a commercially operated broadcasting service ...²⁵³

This is a technical definition, and the distinctive role for public broadcasting in South Africa is detailed rather in the SABC's Charter. The definition could be strengthened by reference to the Charter and/or other relevant sections of the law. It is also unclear why it would have been necessary in the definition to stipulate the inclusion of a commercial division.

²⁵¹ Australian Broadcasting Corporation Act of 1983, sec 22(8), accessed from <http://scaleplus.law.gov.au/html/histact/10/5029/0/HA000300.htm> (Australian Broadcasting Corporation Act of 1983)

²⁵² Independent On Line (IOL), "MPs seek control of SABC", 25 June 2008, accessed from http://www.iol.co.za/index.php?from=rss_South%20Africa&set_id=1&click_id=13&art_id=vn20080625065805152C183917

²⁵³ Broadcasting Act, Section 2, Definitions

2.1 The Charter and Mandate

Section 6 of the Broadcasting Act (as amended) sets out the Charter of the SABC, whilst Section 7 outlines the objectives of the broadcaster. Other responsibilities relating to specific obligations of the different divisions of the SABC (public and public commercial) are contained in a range of different sections. Any new legislation would be strengthened through collating all such requirements into a distinct remit.

Charter

Section 6(1) compels the SABC to abide by the Charter, whilst Section 6(2) impels ICASA to monitor and “enforce compliance” with the Charter.

While there has been general agreement that the introduction of a Charter strengthens public broadcasting by clearly outlining its mandate, some critics have pointed out that the current remit is not uniquely South African but rather based substantially on mandates for public broadcasters in other countries. The Freedom of Expression Institute (FXI), for example, has argued that ten of the 16 objectives for the SABC are “taken virtually verbatim from the British Broadcasting Corporation’s (BBC) Charter”.²⁵⁴

As societal needs change, it would be worth considering that any new law should call for a regular review of the Charter. This could also provide a forum for ongoing public involvement in defining exactly what public broadcasting means in South Africa.

The different requirements of the Charter are:

- Section 6(3) describes the status of the SABC – emphasising the independence of the Corporation and the right to freedom of expression:

In terms of this Charter, the Corporation, in pursuit of its objectives, and in the exercise of its powers, enjoys freedom of expression and journalistic, creative and programming independence as enshrined in the Constitution.

Thus, whilst the SABC is not specifically mentioned in the Constitution of South Africa, its law gives it constitutional protection in relation to its core business – programming.

- Sub-section 4 states that:

The Corporation must encourage the development of South African expression by providing, in South African official languages, a wide range of programming that –

- (a) reflects South African attitudes, opinions, ideas, values and artistic creativity;
- (b) displays South African talent in education and entertainment programmes;
- (c) provides a plurality of views and a variety of news, information and analysis from a South African point of view;
- (d) advances the national and public interest.

- Section 6(5) requires the Board of the SABC to develop a range of policies through a process of public consultation. These include a news policy, a programming policy, a local content policy, an educational programming policy, a

²⁵⁴ Freedom of Expression Institute, Media Statement: “FXI supports calls for independent Inquiry into SABC and review of Broadcasting Act”, 3 June 2008

policy on universal service, a language policy and a religious policy. The policies, according to legislation, have to be updated regularly through a public process and be submitted to the regulator.²⁵⁵

The Act is not clear on what the regulator's role is in regard to the policies. It merely stipulates that the SABC Board lodge such policies with the Independent Communications Authority of South Africa (ICASA) but does not spell out whether the regulator has to monitor compliance with these, or incorporate them into licence conditions. It should be highlighted though that in any case this was an improvement on the original Bill, which proposed that such policies should be submitted to the Minister of Communications. There was an outcry about the impact of this on the independence of the SABC, and Parliament rejected the proposal.

- A distinction is made in the Act between the editorial policies and “a Code of Practice”. Section 6(8) of the legislation states that the SABC must also develop a Code of Practice that ensures the Corporation and its personnel comply with:
 - the constitutional principle of equality;
 - the equitable treatment of all segments of the South African population;
 - the constitutional requirement of equitable treatment of all South African official languages;
 - the rights of all South Africans to receive and impart information and ideas;
 - the mandate to provide for a wide range of audience interests, beliefs and perspectives; and
 - a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest.

2.2 Objectives

Section 8 of the Act outlines the “objectives” of the SABC. This section includes both mandatory obligations and powers of the Corporation (for example the power to set up archives and acquire intellectual property rights). Separating the two and ensuring all objectives are given equal weight by collating them into a specific section could strengthen the mandate.

Key responsibilities for the SABC outlined in this section are the following:

- It must make its services available throughout South Africa (Sec 8(a)).
- It must provide sound and television services and programmes that educate, inform and entertain (Sec 8(b) and (d)).
- It must be responsive to the needs of all South Africans “including the needs of the deaf and the blind and account on how to meet those needs” (Sec 8(e)).
- The SABC must “nurture South African talent and train people in production skills” (Sec 8(n)).

²⁵⁵ The content of the policies will be dealt with in more depth in subsequent sections of this report.

2.3 Responsibilities specific to public or commercial wings

As mentioned above, the SABC is, in terms of legislation, divided into a public and a public commercial division. The legislation imposes specific obligations on the public wing of the Corporation.

Television licence fees paid by the public can only be allocated to the public division and the Act specifies that there must be an “arms length commercial arrangement” between the public and commercial wings of the SABC. This is emphasised in a range of sections in the Act, including Sec 8A(15)(a) and Section 9(2) which state that the two divisions must be administered and accounted for separately and that assets must be registered with either the public or commercial division and use of such assets by the other wing must be accounted for.

The responsibilities of the public wing are outlined in Section 10 of the Act, which states that the public stations and channels must:

- Make services available to South Africans in all the official languages;
- Reflect both the unity and diverse cultural and linguistic of South Africa and all its cultures and regions to audiences;
- Strive to be of high quality in all the languages served;
- Provide significant news and current affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance, and independence from government, commercial and other interests;
- Include significant amounts of educational programming, both curriculum based and informal educative topics from a wide range of social, political and economic issues, including, but not limited to, human rights, health, early childhood development, agriculture, culture, religion, justice and commerce and contributing to a shared South African consciousness and identity;
- Enrich the cultural heritage of South Africa by providing support for traditional and contemporary artistic expression;
- Strive to offer a broad range of services targeting, particularly, children, women, the youth and the disabled;
- Include programmes made by the Corporation as well as those commissioned from the independent production sector; and
- Include national sports programming as well as developmental and minority sports.

Commercial services are dealt with in Section 11 and have to comply with the same legal and regulatory standards of privately owned commercial services whilst adhering to “the values of the public broadcasting service in the provision of programmes and service”.

In terms of Section 10(3) and 11(1), the SABC submits budgets and business plans for the public division and the commercial division separately to the Minister.

3. The legal status of the SABC

As outlined previously, the Broadcasting Act also provided for the conversion of the SABC into a “public company incorporated in terms of the Company Act, to be known as the South African Broadcasting Corporation Limited”.²⁵⁶ The SABC was converted into a public company in 2004.

²⁵⁶ Section 8A(1) Broadcasting Act

The law emphasises that the State is the sole shareholder of the SABC – and does not stipulate (as argued during parliamentary hearings into the Bill) that this is on behalf of the public. In line with this, the Minister of Communications determines the memorandum and articles of association and there is no injunction for public involvement in the determination of these.²⁵⁷

The corporate model was linked to the division of the SABC into the public and public commercial divisions. According to the White Paper and the Broadcasting Act, this division was aimed at ensuring financial viability, as the commercial wing would have fewer obligations (similar to those of private broadcasters) and therefore supposedly be able to maximise profits, which would be used to cross-subsidise the public wing. The effectiveness of this will be dealt with in chapter 7 of this report.

The corporatisation of the SABC has been criticised. At the time of discussion of the Bill in Parliament, both the Congress of South African Trade Unions (Cosatu) and the Freedom of Expression Institute (FXI) voiced their objections and expressed the fear that this was a precursor to the privatisation of sections of the public broadcaster (the commercial division or parts of it).²⁵⁸

The SABC in terms of the Broadcasting Act (and in line with provisions in the Public Finance Management Act - PFMA) is listed as a Schedule 2 public entity (“Major National Public Entities”) rather than a constitutional institution (a body established by the constitution). According to Treasury guidelines the boards of public entities are appointed by the executive of government rather than the legislature.

The SABC, given the requirements of independence and legislative rather than executive oversight as stipulated by law, should be defined as a constitutional institution rather than a public entity.

3.1 Role of ‘shareholder’

The role of the Minister (on behalf of the State as shareholder) is outlined in the Memorandum and Articles of Association (‘the Articles’).²⁵⁹ It is further elaborated on in the annually signed Shareholder Compact.

Memorandum and Articles of Association

The Articles, in line with company law, set out the relationship between the SABC and its shareholder (the Minister of Communications on behalf of the Government). As noted above, the Minister of Communications has determined the Articles, and there has been no public involvement in this process. The document moreover is not easily accessible, as it is not, for example, posted on the web sites of either the Department of Communications or the SABC.

Before dealing with the specifics of the SABC Articles of Association, it is important to highlight that the Articles, as they are currently written, do not in any way recognise the special nature of SABC as an institution set up by law – or its right to independence. They rather just import requirements and rights of private companies onto the SABC – with no recognition, for example, that the SABC’s board represents the public of South Africa rather

²⁵⁷ Section 8A(2) and (3) Broadcasting Act

²⁵⁸ Cosatu Parliamentary Submission on the Broadcasting Bill, presented to the Portfolio Committee September 1998, accessed from <http://www.cosatu.org.za/docs/1998/broadcbi.htm> March 2008 and

²⁵⁹ Memorandum of Association and Articles of Association, Registration Number of Company:2003/023915/06, 22 September 2006

than the shareholder (directors in commercial companies, for example, are direct nominees of the individual shareholder/s and thus shareholders have the right to give them instructions).

Given this, a thorough legal analysis is necessary to determine whether or not company law in South Africa is appropriate for bodies set up by law, and, if so, how some of its requirements can be adapted to reflect the realities of bodies such as the SABC.

The Articles of the SABC state the main business of the SABC - broadcasting to the public - and note that the Corporation cannot, for example, dispose of any significant part of the SABC or wind up the broadcaster without permission from the Ministers of Communications and Finance. They further outline the requirements of the Public Finance Management Act, No 1 of 1999 (PFMA) and stipulate that the Board “controls the affairs of the Corporation”, in line with relevant legislation. (Article 12.1)

The Articles do not say that the State holds the shares on behalf of the public of South Africa. Whilst reference is made to the Broadcasting Act, there is no word at all on the “journalistic, creative and programming independence” of the SABC.

Stakeholders have raised major concerns about the potential for these Articles to entrench a measure of state control of the SABC.

Critically, one of the key clauses effectively gives the Minister the right to determine the appointments of the three executive members of the Board - the Group Chief Executive Officer (CEO), Chief Financial Officer (CFO) and Chief Operating Officer (COO).²⁶⁰ Article 11.1.2 states:

The non-executive Directors shall, after they have conducted interviews and compiled a short list for preferred candidates, recommend to ... (the Minister) ... the appointment of the preferred candidate to fill any position as the executive Directors of the Corporation.

The Articles further require that the Minister approve of the CEO's employment contract (Article 19.1(a)) and the remuneration of all three executive board members (Article 11.4.2). This is particularly concerning given the designation of the CEO as Editor-in-Chief (see below) – resulting in the Minister being effectively responsible for appointing the editor of the SABC, in contradiction with the stipulation in the Charter that the SABC shall have journalistic independence.

Such clauses appear to contravene the legally enshrined independence of the SABC and should be challenged accordingly. If necessary, it would be of value to raise this with the Constitutional Court for its judgement in the matter.

In addition, the clauses potentially breach the labour and common law principle that ‘those that hear decide’.

In an interview on 12 June 2008, the then Chairperson of the Board, Khanyisiwe Mkonza, said that concerns had been raised in this regard:

I know there have been criticism of this and suggestions that it disempowers us as the board. The board does, however, get involved in the process by recruiting and doing the short-listing and interviewing. The board then has to make a recommendation to the Minister and motivate

²⁶⁰ The FXI in particular has raised concerns about the Articles of Association in a range of fora.

why we are suggesting a particular candidate. In this way the Minister would not consider a candidate not preferred by the board anyway.

South Africa is not necessarily completely unique in this involvement (of the government) and maybe the exception here is the appointment of all top three executive directors. This argument though is linked to the debate around having senior management as members of the board. This is one part of the Broadcasting Act that would have to be reconsidered.

It is worth noting though that consultation with government before appointing executive management had been the practice even before finalisation of the Articles – as shown by the following excerpt from minutes of a Parliamentary meeting in 2000 with the SABC:

Ms Vos (IFP) asked about the vacancies in the SABC and about recruitment. She referred to Dr Maphai's (then Board Chairperson) earlier statement that a list of candidates for the senior positions had to be submitted to Cabinet for approval. She asked why this had to be done when the SABC was not a state broadcaster.

Reply: Dr Maphai replied that the Broadcasting Act did not address the matter. In terms of the corporate governance of parastatals they were required to get Cabinet's approval. Ms Vos wondered if the Board did not have a problem with this in terms of their independence. What would happen if Cabinet rejected a proposal that the Board made?
Reply: Dr Maphai replied that they would have no choice but to abide by Cabinet's decision but they hoped that it would never come to such a situation.²⁶¹

Other articles that potentially limit the SABC's autonomy and/or could be seen as contrary to the Broadcasting Act/PFMA include:

- Article 13 which deals with "vacation of office" of Board members. These clauses go further than the removal clauses in the Act (to be dealt with below);
- Sections dealing with the development of a three-year strategic plan (corporate plan) and submission of the annual report and financial statements to the Minister with no mention of the oversight role of the legislature in this regard (Articles 14.2.1, Article 32). The clauses on the corporate plan/business plan (the two terms are used interchangeably in the document) state that the SABC must "consider" any comments on the plans made by the Minister/State.
- A requirement that the SABC send the Minister monthly management accounts (Article 26.4), whilst Treasury Regulations issued in terms of the PFMA only require quarterly reporting by public entities.²⁶²

Shareholder compact

In terms of Treasury regulations, all public entities listed in Schedule 2 of the PFMA have to sign an annual shareholder compact with the executive authority (Minister).²⁶³

If, as suggested above, the SABC were listed as a constitutional institution in terms of the PFMA it would not be required to enter into such an agreement. Constitutional institutions are governed by specific Treasury Regulations giving them administrative independence from

²⁶¹ Parliamentary Monitoring Group, Communications Portfolio Committee, Minutes: SABC BOARD SIX MONTH REVIEW, 3 October 2000, accessed from <http://www.pmg.org.za/minutes/20001002-sabc-board-six-month-review>

²⁶² Republic of South Africa, National Treasury, *Treasury Regulations for departments, trading entities, constitutional institutions and public entities: Issued in terms of the Public Finance Management Act 1999*, March 2005, Regulation 29.3: Performance Management – hereinafter referred to as the "Treasury Regulations".

the executive of government in recognition of their status. The Broadcasting Act recognises that the SABC is overseen and accountable to Parliament rather than the executive.

For a number of years it was apparent from annual reports that the Minister of Communications and the SABC did not sign any shareholder compact. In December 2009, though, a compact was signed by the chairperson of the interim board and forwarded to the Minister of Communications for his signature.²⁶⁴

According to the Treasury regulations, a shareholder compact “must document the mandated key performance measures and indicators to be attained by the public entity as agreed between the accounting authority and the executive authority”.²⁶⁵

Key points in the unsigned 2007/2008 compact included the following clauses, which were inappropriate and possibly ultra vires as they compromised the independence of the SABC:

- In outlining the relationship between the parties the compact says that each party should have “sufficient freedom of action...to enable ... them to achieve their ... objectives and to carry out their ... functions”,²⁶⁶ but also states that the Shareholder is accountable to Parliament whilst the Board is accountable to the Shareholder “for compliance with the obligations imposed on it in terms of the PFMA”.²⁶⁷ This ignores the role of Parliament.
- The compact “acknowledges” the role of ICASA in regulating the SABC, and states that the Shareholder will “consult” the regulator on any matter relevant to the applicable framework of the SABC.²⁶⁸ This does not appear to sufficiently recognise ICASA’s independence.
- The compact states that if the “Shareholder intends to issue recommendations, policy directives or instructions that while not being contrary to the objectives of the relevant applicable framework of the SABC, will impact on the Corporate Plan”²⁶⁹ the Minister must “give sufficient notice of the new or additional requirements”. The SABC must then give an amended corporate plan to the Minister within 14 days for her consideration and “the SABC shall abide by the decision of the Shareholder”. If the SABC refuses to approve the amended plan, this must be noted but the agreement states that the SABC must “still implement the Shareholder’s decision or instruction”.²⁷⁰

These problematic provisions were removed in the 2009/2010 compact, which is a significant improvement on the previous document. Moreover, an additional clause now states that in the event of a conflict between provisions of the compact and the clause in the Broadcasting Act guaranteeing the SABC freedom of expression and journalistic, creative and programming independence, the latter would prevail.

²⁶³ Treasury Regulations, Regulation 29.2.1

²⁶⁴ Letter from the SABC chairperson to the Minister of Communications dated 15 December 2009

²⁶⁵ Treasury Regulations, Regulation 29.2.2

²⁶⁶ SABC Shareholder Compact, clause 3.1

²⁶⁷ Ibid., clause 3.2 and 3.3

²⁶⁸ Ibid., clause 3.4.2

²⁶⁹ Ibid., clause 3.4.3

²⁷⁰ Ibid., clause 5.2

4. The Board

The SABC is governed by a Board made up of 12 non-executive members and three executive members (the CEO, Chief Operating Officer (COO) and Chief Financial Officer (CFO) “or their equivalents”) (Sec 12 Broadcasting Act).

Nine members of the Board, including either the Chairperson or his/her deputy, constitute a quorum of the Board. (Sec 13(10) Broadcasting Act).

Potential problems/gaps in the legislation around composition of the Board became evident in a 2008 court case between the CEO and the Board over his suspension from duties for alleged non-performance.

The Court found that the meeting of the Board where the decision to suspend him had been taken was invalid, as executive members had not been informed timeously in writing of the meeting as required by the law.²⁷¹ As it is clearly necessary for executive members to be absent from any meetings dealing with, for example, their performance or their conditions of employment, the legislation should be amended either to exclude management from membership of the Board, or to provide for non-executive meetings in certain circumstances. The Australian Broadcasting Corporation Act for example stipulates that the managing director (although a full member of the board) should not be present at certain meetings.²⁷²

4.1 Appointment

The President, on the “advice” of Parliament, appoints non-executive members of the Board after a process of public nomination.

The legislation specifies that the process adopted by Parliament must:

- ensure participation by the public in the process,
- be fair and transparent, and
- that the legislature must publish its shortlist of candidates to be interviewed (Sec 13 (2)).

In practice, the Parliamentary Portfolio Committee on Communications has handled this process on behalf of the National Assembly. It has published an advertisement in newspapers calling for nominations. The short-listing, interviewing and decision-making meetings are all public. Recommendations are then forwarded to the National Assembly for approval before being submitted to the President.

The President decides on the chairperson and deputy chairperson from amongst those recommended by the legislature (Sec13 (3) Broadcasting Act) and sets the term of office for members, though the Act states this may not exceed five years. Board members can serve a maximum of two terms.

The Parliamentary Ad Hoc Committee established to review the independence and oversight of constitutional entities recommended in its report that Parliament and not the President

²⁷¹ South African Press Agency (SAPA), “Mpfu: I’m on my way to work”, 2 June 2008, accessed from <http://www2.mg.co.za/article/2008-06-02-mpofu-im-on-my-way-to-work>

²⁷² Australian Broadcasting Corporation Act of 1983, sec 22(8), accessed from <http://scaleplus.law.gov.au/html/histact/10/5029/0/HA000300.htm>

should decide on who would chair such bodies²⁷³. Whilst the Committee did not include the SABC in its detailed review of such institutions, it does highlight in its appendices that the SABC (amongst other entities) is also given Constitutional protection. Its recommendations should be considered in any drafting of new policies and laws.

Unlike in the case of governing bodies established subsequently, the Act does not provide for continuity, and the terms of all Board members end concurrently. The ICASA Council for example has overlapping terms so that not all councillors leave at the same time.

The Act makes no mention of appointment of executive members of the Board (CEO, COO and CFO). The practice outlined in the Memorandum and Articles of Association is thus not provided for in legislation. In any amendment of the legislation, a clause stipulating that the Board is solely responsible for appointment of the executive management should be inserted.

The appointment process came under scrutiny in the second half of 2007 after members of the ruling party in the Parliamentary Portfolio Committee reportedly complained about being “ordered” by the ANC headquarters whom to select for the board.²⁷⁴ The newspaper article further revealed that a staff member in the Presidency had nominated one of the new board members. The country’s major trade union federation, the Congress of South African Trade Unions (COSATU), together with the Freedom of Expression Institute (FXI) considered challenging the appointment process in court, but decided not to proceed as they were unable to persuade key protagonists to provide affidavits proving political interference.²⁷⁵

As a result of the reports of political and government interference in the board appointment process, alongside concerns about public battles between the board and management of the SABC, there were calls for a review of the legislation. Minister of Communications, Ivy Matsepe-Casaburri, endorsed the need for this in her 2008 budget speech:

It is evident that both the Executive and Parliament will have to review the legislation and appointing processes to ascertain whether this legislation, drawn up at a particular historical time, is relevant for our current historical conjuncture.

The powers given to the appointing authority, the processes of appointing and removing board members, the Public Broadcaster's Charter, and the role of the executive and/or Parliament, clearly need reviewing, without sacrificing the broadcaster's independence but clarifying the nature, content and form of that independence.²⁷⁶

Others have suggested alternative procedures. Commenting in the *Mail & Guardian* newspaper, Wits University journalism professor Anton Harber, for example, said:

²⁷³ Parliament of the Republic of South Africa, *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions: A report to the National Assembly of the Parliament of South Africa*, 31 July 2007, Section 5.2, page xi, (hereinafter *Report of the Ad Hoc Committee*,

²⁷⁴ N. Mafela, B. Boyle, P. Harper and M. Mkhabela; “ANC bullies ram through the SABC Board”, published in the *Sunday Times* on 16 September 2007

²⁷⁵ See K. Brown, “Presidency stands its ground on SABC Board”, *Business Day*, 12 February 2008

²⁷⁶ “Budget Vote speech by the Minister of Communications Dr Ivy Matsepe-Casaburri, National Assembly”, 3 June 2008, accessed from <http://www.info.gov.za/speeches/2008/08060312151001.htm>

Parliament may not be the best way to select a board. The best way I have heard of is the way the first SABC board was selected ... by a panel of 'the good and greatest' chaired by a judge. We need to remove it from party politics.²⁷⁷

Ex editor and journalist, Allister Sparks, in a column in the *Business Day* went further and detailed suggestions for the composition of what he called an Independent Broadcasting Commission, established not only to appoint SABC board members but also, for example, councillors on the regulator:

The precise composition of such a commission should be a matter for public discussion, but to give the gist of my proposal let me suggest the following: a body of 13, chaired by a retired Constitutional Court judge; two practising editors nominated by the South African National Editors' Forum; two teachers of journalism; one representative of the filmmaking industry; the minister of broadcasting; four MPs, at least two representing opposition parties; and two trade unionists.²⁷⁸

4.2 Criteria for appointment

Section 13(4) of the Broadcasting Act sets out the criteria for the appointment of non-executive members of the Board. It states that Board members when viewed collectively must:

- be persons suited to serve on the Board by virtue of their qualifications, expertise and experience in the fields of broadcasting policy and technology, broadcasting regulation, media law, business practice and finance, marketing, journalism, entertainment and education, social and labour issues²⁷⁹;
- be persons who are committed to fairness, freedom of expression, the right of the public to be informed, and openness and accountability on the part of those holding public office;
- represent a broad cross-section of the population of South Africa; (and)
- be persons who are committed to the objects and principles as enunciated in the Charter.

The first clause of this Section is vague and has led to questions being asked about whether or not, for example, a particular Board does indeed include all the identified expertise or experience.²⁸⁰

The clause sets out a finite list of skills required (rather than indicating that the Board should include certain expertise), thus raising questions about why, for example, an understanding of gender or language issues in South Africa would not enhance the Board.

4.3 Disqualification

The clauses dealing with disqualification of Board members are vague – and therefore do not necessarily safeguard the SABC from potential conflicts of interest.

Whilst it is clearly stated that only citizens of South Africa can be appointed, and that no person who has been convicted and sentenced for a crime, or found guilty of corruption or

²⁷⁷ *Mail & Guardian*, "Fixing Fawty Towers", 9 May 2008, p. 6

²⁷⁸ A. Sparks, *Business Day*, "Nation needs a fair SABC to rise out of the ruins", 14 May 2008, accessed from <http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A765974>

²⁷⁹ The Broadcasting Amendment Act of 2009 dropped "frequency planning" from the list in the original act.

²⁸⁰ Cosatu and FXI have for example raised concern that the Board appointed in 2007 does not include representatives of labour. See endnote 24.

dishonesty can sit on the governing structure,²⁸¹ the legislation merely requires disclosure of potential conflicts. Section 17 of the relevant legislation states that a person cannot be appointed unless “the necessary disclosure has been made”. Disclosures specified relate to financial or other involvement in the broadcasting, telecommunications and print media industries. Unlike the ICASA Act, the Broadcasting Act does not prohibit public officials or party political office bearers from sitting on the Board. Board members have to recuse themselves from discussions on any matter if they have a conflict of interest.

It is critical that the Board includes people with experience of broadcasting and a commitment to public broadcasting, and thus it would be foolhardy to exclude all those involved in media or communication. However, the legislation could be strengthened through defining clearly who should be precluded from participating in order to protect the SABC from perceptions or accusations of bias (either political or economic).

Concerns in this regard have previously been raised:

- Ex Board member Cecil Msomi was, while still serving on the SABC, employed as the chief spokesperson of the Premier in KwaZulu Natal – sparking allegations by opposition parties of a conflict of interest. Msomi argued that he was not precluded from sitting on the Board in terms of the legislation.²⁸² However, when he sought reappointment towards the end of 2007, Parliament declined to appoint him after raising concern in his interview about his position in government.²⁸³
- New Board member, Bheki Khumalo, was in 2008 appointed on a contract to provide communication services to one of the government Ministries. He argued that this was only a short-term consultancy and therefore did not affect his membership of the Board. However, according to newspapers, the ANC whip in the parliamentary communications committee disputed this. Khotso Khumalo reportedly stated that there is a potential for a conflict of interest as the Board member could “influence or be perceived as influencing coverage of the (Department) and the ministry”.²⁸⁴
- Concerns were also raised in the media about the participation of a previous chairperson of the SABC, Eddie Funde, in a technology company. The *Financial Mail* for example stated in an editorial: “It cannot be right that Funde and Mpofo (then CEO of the SABC) have commercial interests in technology companies while being in positions to determine what new technology will be suitable for the SABC”.²⁸⁵

4.4 Removal

The clauses on removal of members of the board were extremely vague in the Broadcasting Act of 1999 and made it difficult to ensure accountability of the board. According to the legislation, board members could be removed by the “appointing body” for “misconduct or

²⁸¹ Section 16, Broadcasting Act

²⁸² S. Ngalwa, “KZN spin-doctor’s role at SABC queried”, published in *Daily News*, 19 April 2007, accessed from

http://www.iol.co.za/index.php?set_id=1&click_id=3015&art_id=vn20070419093842618C629529

²⁸³ Ibid.

²⁸⁴ *The Star*, “SABC: fresh board tension”. April 07, 2008, accessed from

http://www.iol.co.za/index.php?set_id=1&click_id=3015&art_id=vn20080407054141494C379385

²⁸⁵ *Financial Mail*, “Get rid of the entire SABC board”, 24 August 2007

inability to perform his or her duties efficiently after due inquiry and upon recommendation of the Board”.²⁸⁶ The Act did not define what would constitute misconduct or inability to perform efficiently. It further did not clearly define the term “appointing body”, which could arguably refer to both the President and Parliament. Further confusion was brought by the condition that a removal could only be on the board’s recommendation – making it impossible, for example, for Parliament to insist on the resignation or removal of a board member who, after appointment, joins the public service, if the board itself perceives no conflict over this.

As mentioned above, the Articles of Association also deal with removal from office. Whilst the clauses in the Articles seem rather to define what would constitute “misconduct or inability to perform his or her duties efficiently”, and do not seem to introduce new motives for removal, it is inappropriate that these should be expanded on in the Articles of Association of a body set up by law (rather than a company). The Articles state that a member of the Board will “cease to hold office” if:

- She or he misses three consecutive meetings of the Board without leave;
- She or he “knowingly is interested in any contract or proposed contract with the Corporation and fails to declare his or her interest as required by the Broadcasting Act”; and
- If her or his estate is sequestrated.²⁸⁷

The unworkability of these clauses came under the spotlight in 2008. In April, the ruling party members of the Portfolio Committee on Communications in Parliament passed a “vote of no confidence” in the entire board of the SABC²⁸⁸. Minutes of the meeting state that the ANC said it “was convinced that the Board was not in a position to execute its fiduciary responsibilities” following concerns about an apparent rift between the Board and SABC management. ANC members of the Committee had earlier stated in the media that they wished certain members of the board would resign.²⁸⁹ As the board had been in office for about four months only at the time of the vote, it seemed premature to take such a hard line, and the move was attributed rather to political battles within the ruling party.²⁹⁰ The decision by Committee members was noted by the full National Assembly rather than adopted – presumably because the implications of such a declaration were unclear.

The process of amending the Broadcasting Act to give Parliament the powers to recommend the removal of the board was then initiated. The resulting Act retained the original grounds for removing the board, but in addition gave the appointing body the powers to remove a board member after due enquiry and a finding calling for removal by the National Assembly. The grounds for removal are failure to disclose a conflict of interest (which brought this

²⁸⁶ Broadcasting Act, Section 15

²⁸⁷ SABC Articles of Association, clause 13.1

²⁸⁸ Parliamentary Monitoring Group, Parliamentary Communications Portfolio Committee, Minutes of a Meeting with the Full Board of the SABC, 30 April 2008, accessed from <http://www.pmg.org.za/report/20070530-meeting-full-sabc-board>

²⁸⁹ N. Mafela and M. Malefane, “SABC 4 Must Quit: ANC”, *Sunday Times*, 20 April 2008. The basis for this was unclear but appeared to be politically motivated. The Board members identified were reportedly those suggested by the office of the President (see endnote 13). President Thabo Mbeki was, subsequent to the recommendation from Parliament on appointment of Board members, defeated in the election for the head of the ruling party by Jacob Zuma. Insinuations in the media seemed to suggest that the named Board members were therefore seen as Mbeki allies by what was dubbed a Zuma “faction” of the ANC.

²⁹⁰ The media and other commentators suggested at the time that this move was part of an attempt by those supporting ANC leader Jacob Zuma to oust Board members seen as aligned to country President Thabo Mbeki. See, for example, F. Haffajee and N. Dawes, “Palace coup at SABC stirs up hornet’s nest in ANC” published in the *Mail & Guardian*, 9 May 2008, accessed from http://www.mg.co.za/articlePage.aspx?articleid=338761&area=/insight/insight_national/ in May 2008

provision into line with those of the Chapter Nine institutions), failure to discharge fiduciary duties, failure to adhere to the Charter, and failure to carry out the duties outlined in the Act. The Act also provides for the suspension of board members during an enquiry, and the appointment of an interim board. The Act also retains the definition of “appointing body” as referring to the President. In the first version of the bill, the “appointing body” was meant to be the President in consultation with the Speaker of the National Assembly; however, the ANC in the Portfolio Committee backed down on this proposed amendment after opposition parties objected to its implications for the separation of powers between the legislature and the executive.²⁹¹

4.5 Roles and responsibilities

The Board, in terms of the Broadcasting Act, “controls the affairs of the Corporation” and is specifically instructed to protect the freedom of expression of the SABC and its journalistic, creative and programming independence.²⁹² It is entrusted with compliance with the Charter and ensuring the broadcaster meets the objectives for public broadcasting in South Africa. In terms of Section 6 of the Act, the Board must also determine a range of editorial policies for the SABC. These are developed through a public process and subject to regular review.

As the SABC is listed as a public entity, the Board is the accounting authority of the SABC and thus responsible for financial management in terms of the Public Finance Management Act, No 1 of 1999 (PFMA)²⁹³ under the guidance of the “designated accounting officer” (the Director General of the Department of Communications). This is notably different from constitutional institutions such as ICASA, which is treated as a Government Department and thus has its own accounting officer (the CEO).

Treasury regulations further define the “executive authority” of a constitutional body as the chairperson of the board of such an institution, rather than the relevant Minister. In practice this means that whilst, for example, a constitutional entity has to submit quarterly financial reports to its board who submits these to Treasury, the SABC would provide such reports to these bodies through the “designated accounting officer” (the Director General of the Department of Communications). The arrangement for constitutional bodies reinforces perceptions of independence from government officials.²⁹⁴

In terms of the Broadcasting Act (Sec 10(4)), the Board is responsible for ensuring that annual reports, including audited financial statements, are submitted to the Minister of Communications for tabling in Parliament. Whilst the Minister in this instance appears to act as a conduit as the SABC itself has to report to Parliament on the annual report and financial statements, that role could be perceived as limiting independence and the SABC should be charged with submitting its annual report to Parliament itself through the Speaker of the House.

The legislation provides for an Executive Committee (which is accountable to the Board and responsible for administration) made up of the three executive members of the Board and up to 11 others.²⁹⁵

²⁹¹ “Speech by Ismail Vadi during the debate on the Broadcasting Amendment Bill”, 19 November 2008, accessed from <http://www.anc.org.za/caucus/docs/sp/2008/sp1119.html> on 16/12/2009.

²⁹² Sec 13(11) Broadcasting Act

²⁹³ Sec 13(13) Broadcasting Act

²⁹⁴ *Treasury Regulations for departments, trading entities, constitutional institutions and public entities*, March 2005

²⁹⁵ Section 14 of the Broadcasting Act

The distinction between oversight and operations is sometimes a fine one, and can be a source of conflict between boards and management. It is necessary for a board to determine strategies and ensure their efficient and effective implementation, whilst not compromising its oversight role by being too involved in operational decisions.

Different boards of the SABC have in the past been accused of meddling in management²⁹⁶, though it appears there has not been an in-depth evaluation of the validity of such assertions. The number of Board meetings held however could indicate an over-involvement of the governance structure in operations. According to the 2006/2007 annual report, there were 46 meetings of the Board and its sub-committees during the financial year. This compares with media company Naspers (a multi-national company including print, subscription television and internet divisions), which held 15 board and sub-committee meetings in 2006 according to the company's annual report for that year.²⁹⁷ According to the 2007/2008 annual report, the number of meetings increased to 50 (including sub-committee meetings).²⁹⁸

Whilst the SABC has approved a Board Charter and a delegation of authority framework (outlining for example that the CEO can only approve spending up to R15 million),²⁹⁹ the distinction between strategy and implementation is not always clear, with conflict emerging between the board and senior management over these issues in 2008.

Obviously legislation would be strengthened by outlining more clearly the role of the board versus that of management. It is also evident that the blurring of the different roles is exacerbated by making the board the accounting authority (rather than declaring that the CEO should be the accounting officer). This determination gives the board particular financial responsibilities and makes them directly accountable for any mismanagement. Constitutional entities however (as noted earlier) have their own accounting officer (normally the CEO of the institution).

4.6 Sub-committees

The Act stipulates that the Board must establish a public service sub-committee as well as a commercial service sub-committee – presumably to ensure separate administration of the two divisions. These sub-committees are responsible for reporting on the achievements of the two divisions of their mandate/s and operational plans (Sec 14(12)(a)).

No other sub-committees are mandatory, and the Board can decide on establishment as necessary. According to the 2008/2009 annual report, the SABC Board has established nine other committees including an audit committee, finance committee, news committee, risk committee, technology committee, human resources committee, remuneration committee, 2010 committee (FIFA World Cup) and procurement committee.

²⁹⁶ Journalist, writer and commentator William Gumede has for example asserted that the Board “seems to be routinely interfering in the management of news, appointments of editorial staff and even meddling in the commissioning of stories and documentaries.” Gumede made this assertion in a paper entitled “Democracy, transformation and the media: The role of the media in strengthening democracy”. Commentator Karima Brown has made similar allegations. After the resignation of one Board member in 2005 after she had been found by an internal commission to have instructed a spokesperson to release a statement without reference to the CEO, Brown alleged in a commentary published in the *Business Day* that board membership “has all but become full time employment” (13 December 2005).

²⁹⁷ Naspers Annual Report 2006, *Corporate Governance Overview*, accessed from http://sites.naspers.com/2006_Annual_report/directorate.htm#board

²⁹⁸ SABC Annual Report 2007/2008, p. 30

²⁹⁹ South African Broadcasting Corporation, *Delegation of Authority Framework*, Policy No: GG/002/03/N, approved on 27 June 2003

4.7 Oversight

The Parliamentary Ad Hoc Committee to review constitutional and related institutions explored the nature of oversight of such entities. Its findings are pertinent when reviewing institutional structures of the SABC given the specific protection of its editorial and programming independence in line with the Constitution.

The Committee noted that oversight is critical to ensuring that any public institution fulfils its legislative mandate effectively but that “due consideration must be given to ensure that the oversight role ... and mechanisms ... do not infringe on ...independence”.³⁰⁰ Citing various Constitutional Court judgements on the issue of independence, the report stresses that a “sharp distinction” needs to be drawn between such institutions and the Executive (i.e. Cabinet members or public officials). Parliament, it notes, should be responsible for such oversight.

As pointed out previously, government is the sole shareholder of the SABC. The relationship between the shareholder and the broadcaster is therefore governed not only by the Act, but also by the Memorandum and Articles of Association. Certain clauses of the Articles give the Minister a role in the administration of the broadcaster, and thus potentially impinge on the SABC’s operational independence.

In terms of the Broadcasting Act and the Public Finance Management Act the SABC Board is accountable to Parliament (as the appointing body) as well as to the regulator, ICASA. The legislation further specifies certain powers for the Minister of Communications.

ICASA is responsible for issuing the SABC’s licence conditions and thus its oversight role is mainly to monitor the Corporation’s compliance with these. In addition, the regulator must monitor and ensure compliance by the SABC with its Charter. The editorial policies of the broadcaster also have to be lodged with ICASA.

SABC presents its three-year plan and annual budget for approval to Parliament. The Portfolio Committee on Communications holds hearings to discuss plans and budgets, which fall under the Department of Communications. The SABC then accounts to Parliament on meeting its mandate and expenditure of budget allocations. However, the Corporation does not submit its annual report and audited financial statements to Parliament directly but through the Minister, who has to table these within seven days of receiving them if Parliament is in session, or within seven days of Parliament reconvening if it is not in session (Sec 28 Broadcasting Act).

While the legislation asserts the SABC’s independence from political, commercial and other pressures, the Broadcasting Act also ascribes a number of other roles to the Minister:

- The Minister determines the Memorandum and Articles of Association for submission to the Registrar of Companies (Sec 8A(2));
- The Minister sets the television licence fees (Sec 40) by regulation;
- The Corporation must draw up financial regulations for approval by the Minister after consultation with the Minister of Finance (Sec 18);
- The Minister has to approve of investments of any surplus of the SABC (Sec 18(5));
- The Minister has to approve of the extent of the subsidy of the public division by the commercial wing, on the recommendation of the Board (Sec 11(d)).

³⁰⁰ *Report of the ad hoc Committee*, Section 3.2, pp. 15-16

It is important in this context to highlight that the Constitutional Court has ruled on the issue of independence of institutions and their funding. In a 1999 judgement (*New National Party vs Government of the Republic of South Africa and Others*), the Court found that independence does not mean that institutions can set their own budgets but that it is for Parliament and not the executive arm of government to provide for funding “reasonably sufficient” to enable such entities to fulfil their mandates.

In light of such findings, any review of the law will have to evaluate whether or not such roles of the Minister in any way limit, or can be perceived to infringe on, the SABC’s “journalistic, creative and programming independence” as required by Section 6(3) of the Broadcasting Act.

Perhaps though what is potentially more problematic, as it may be difficult to prove, is the way a board interprets its relationship with and obligations to government versus its responsibility to ensure independence and to serve and represent the public. As this is not detailed in any public documents, this may vary from board to board.

There were – repeated though unsubstantiated - allegations that the 2008 SABC Board members were allied to the government (led by President Thabo Mbeki), whilst some senior managers were supportive rather of the ruling party (headed by ANC President Jacob Zuma who defeated Mbeki in party elections in December 2007), and that conflict at the broadcaster was based on such divisions.³⁰¹ Following the politically charged controversies around this board and its eventual removal, there have been no consistent allegations of political bias levelled against the interim board, which has gone quietly and efficiently about addressing the multiplicity of problems at the broadcaster.

However, the interim board attracted controversy in its last days in December 2009, when it appointed a new CEO, former Chief Operating Officer Solly Mokoetle. According to a newspaper report³⁰², members of the new SABC Board objected to having this choice imposed on them and asked why it should not have been their responsibility to appoint the CEO who will work under their supervision. The new board subsequently denied that any of its non-executive members had objected to the appointment and expressed its support for the new CEO.

4.8 Accountability and transparency

Members of the public can submit complaints about non-compliance with the licence conditions or Charter to ICASA for further investigation. The SABC also has to draft its editorial policies through public consultation, and ICASA procedures encourage and facilitate public involvement in the finalisation of licence conditions.

Whilst such mechanisms do provide for public participation and (to some degree) oversight by the public of the public broadcaster, the legislation does not detail mandatory mechanisms to ensure that the SABC consults listeners and viewers or is directly accountable to them.

The SABC itself conducts regular research and analysis into listener and viewer needs and responses to programmes. Its Editorial Code furthermore lists transparency as one of the core editorial values, stating that the “SABC ensures that the principles of honesty, openness and transparency are core to every aspect of its relationships with shareholder, stakeholders,

³⁰¹ See for example: SAPA, “SABC run like a spaza shop”, 7 May 2008, accessed from <http://www.24.com/news/?p=tsa&i=908195>

³⁰² *Sunday Times*, 3 January 2010

suppliers and the public” (though the order of listing these relationships is possibly instructive).

Despite this commitment, the SABC has been accused of covering up and hiding issues from the public. It refused, for example, in 2006 to release the full findings of an internal Commission of Inquiry into alleged blacklisting by the SABC of commentators and tried (unsuccessfully) to interdict the *Mail & Guardian* from placing a leaked copy of the report on its web-site.³⁰³

This, amongst other things, has prompted calls for specific mechanisms to be put in place to ensure accountability to the public. The Freedom of Expression Institute (FXI), for example, in a Memorandum for SABC Management submitted in 2006 demanded that the “SABC must work with our organisations to establish forums for regular consultation of our communities by the SABC. This will allow for our communities to be consulted and for the SABC to be able to fulfil its objective of citizenship empowerment”.³⁰⁴

There are several possible mechanisms to ensure more transparency and accountability to the public. The British Broadcasting Corporation’s 2006 Royal Charter³⁰⁵ and Agreement³⁰⁶, for example, have put in place specific measures:

- The Charter specifically states that the BBC’s governance structure (the Trust) is accountable to licence fee payers.
- The document specifies that the Trust must “carefully and appropriately assess the views of licence fee payers”.³⁰⁷ The Charter states that a protocol for public engagement must be developed through a consultative process which must, amongst other things, detail how the Trust will “actively seek the views of, and engage with, licence fee payers”.³⁰⁸
- The Charter sets out six Public Purpose Remits and the Trust is required annually to publicly outline what measures it proposes taking to meet these Remits and how it will measure and assess performance.
- Before any significant changes are made to any service (or a new service is introduced) a Public Value Test must be conducted.³⁰⁹ This includes an assessment of the public value of the change and a market impact study – the results of which must be published.
- There are also specific requirements on transparency and openness that state that the Trust must ensure “that the principal points of its proceedings and the reasons and key considerations behind important decisions ... are made public”.³¹⁰

³⁰³ See *News24* story, “SABC denies MG blacklist report”, published on 14 October 2006, accessed from http://www.news24.com/News24/South_Africa/News/0..2-7-1442_2013756.00.html

³⁰⁴ Freedom of Expression Institute, “Memorandum for SABC Management”, 16 November 2006, accessed from <http://www.fxio.org.za/pages/Media%20n%20ICTs/Submissions/MemoSABCNov2006.html> in April 2008

³⁰⁵ The Royal Charter of the British Broadcasting Corporation, 19 July 2006, accessed from http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/royalchartersealed_sept06.pdf

³⁰⁶ Department for Culture, Media and Sport Broadcasting, An Agreement between Her Majesty’s Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation, presented to Parliament July 2006

³⁰⁷ BBC Royal Charter, Article 23(c)

³⁰⁸ BBC Royal Charter, Article 26

³⁰⁹ Clauses 26-28 of the Agreement

³¹⁰ BBC Royal Charter, Article 27

- In addition the Trust has to establish Audience Councils to ensure that “the diverse perspectives of licence fee payers” are brought to bear on the work of the BBC. The Charter specifies that four such audience councils must be established in the different geographical areas the broadcaster covers and that the purpose of these bodies is to “engage with licence fee payers”. The Trust has to consult with the Councils.
- The BBC has also previously been bound by certain formats for reporting to the public. It has been required to make an annual public statement of account setting out, amongst other things, how it has met its objectives, details of research and consultation undertaken and the amount of money spent on each genre of programming as well as on programming for the different regions that it broadcasts to.

5. Profile of the SABC

5.1 Stations and channels

The SABC runs 18 radio stations (15 of which fall under the public broadcasting division) and three television channels (one of which is licensed as a public commercial service). A further two regional channels have been licensed but are not on air – pending financing for these. Provision has been made for these channels on the digital multiplex reserved for the SABC.

ICASA does not specifically define the target audience of any of the SABC stations and channels in their licence conditions – unlike in the case of private and community players. The conditions are fairly generic (with some differences in Schedule B relating to coverage area and Schedule C of the licence relating to Special Conditions). The only reference to target audience in the licences (for both public and public commercial services) is contained in Schedule C of the individual conditions entitled “General Requirements”. This states:

The Licensee shall, during the South African performance period, provide programme material that caters for all sectors of South African society and shall provide information on and relevant to the following:

- 4.7.1 people living with disabilities;
- 4.7.2 health-related issues;
- 4.7.3 gender issues; and
- 4.7.4 all age groups.

The licence conditions further do not specify the breakdown between speech and music for public radio services – again unlike conditions for community and commercial radio stations.

5.1.1 Public service broadcasters

The SABC public wing comprises 15 radio stations, including 11 full-spectrum services broadcasting in each of the official languages, a station broadcasting in the Northern Cape in !Xu and Khwe, a service for the Indian community and one targeting the Eastern Cape. Two of the three national television channels also fall under the public wing – as well as the two regional television services which are yet to broadcast.

Public radio stations

The following list is in alphabetical order. The stations are described both in terms of SABC's promotional material and in relation to their licence conditions.

Ikwewezi FM

Ikwewezi broadcasts in isiNdebele. SABC states on its web-site that the station is "positioned to improve the lives of its listeners by keeping them in touch with current issues while catering for the needs and tastes of the Ndebele people".³¹¹ There are apparent discrepancies between the station's promotional material and branding and licence conditions issued by ICASA. Whilst ICASA's documents and policies suggest that all public service stations shall be full spectrum and target all sectors of the defined audience³¹², SABC states that the station "targets 25-49 year olds in LSM 4-8" (the economically active middle class).

Lesedi FM

Lesedi FM broadcasts in seSotho to the Free State and other provinces. SABC states that the station "strives to reconcile traditional values with the freedom to express cultural roots whilst fusing these into the modern world". The station offers news, information, talk and drama amongst other programmes.³¹³

Ligwalagwala FM

Ligwalagwala FM is the siSwati service of the SABC. The Corporation describes the station as speaking to "young, aspirational, upwardly mobile black people living in Mpumalanga ... its listeners are progressive and brand-conscious". This again seems to contradict ICASA licence conditions, which stipulate that the station should target all members of the community.

Lotus FM

Lotus FM targets the Indian community in KwaZulu Natal, Gauteng, the Western Cape and Port Elizabeth. It broadcasts predominantly in English, but according to licence conditions, must also provide programming in Hindi, Tamil, Urdu, Gujarati and Telegu.³¹⁴ Whilst ICASA specifies as with others that the station must cater for all sectors of society, SABC describes Lotus FM as catering "for the needs of the progressive South African Indian community ... between the ages of 25-34 (core) and 35-49 (secondary) in the LSM 7-10 segment".³¹⁵

Motsweding FM

Motsweding FM broadcasts in Setswana. SABC brands the station as offering "a highly interactive environment with its listeners, providing a perfect mix of news, music, current

³¹¹ Accessed from

<http://www.sabc.co.za/portal/site/sabc/menuitem.3eb4c4b520e08a22f22fa121a24daeb9/>

³¹² Schedule C, Ikwewezi Licence Conditions

³¹³ This is reflected in the profile of the station on the SABC web-site and ICASA licence conditions for the service.

³¹⁴ Clause 3, Schedule C, Lotus FM Licence Conditions

³¹⁵ Accessed from

<http://www.sabc.co.za/portal/site/sabc/menuitem.3eb4c4b520e08a22f22fa121a24daeb9/>

affairs, talk shows, education, sport, weather and traffic.”³¹⁶

Munghana Lonene FM

Munghana Lonene broadcasts in xiTsonga. The SABC again describes the station as focusing on a particular segment of the xiTsonga speaking population rather than all members of this community. It states that the “station has been positioned to reach audiences within the LSM 4-8, 25-49 year-old market living in metropolitan and rural African communities. The programme mix is to “edutain”. The station format offers an equal split between music and talk”.³¹⁷

PhalaPhala FM

The station broadcasts in Tshivenda. There are again apparent contradictions between the branding for the station and ICASA requirements. SABC states that the station “talks to young aspirational and upwardly mobile black people living mainly in the Northern Province and broadcasts in Tshivenda. It is mostly a music station with a small degree of talk: 80% of the music being South African, with a fair amount of R&B and Hip-Hop”.³¹⁸

Radio Sonder Grense (RSG)

RSG is a national Afrikaans language station. The SABC states that the station “targets the modern, progressive Afrikaans-speaking community regardless of colour and race. It seeks to attract forward-thinking Afrikaans-speaking people between the ages of 25 and 49 years from the upper LSM's (7-10)”³¹⁹. This indicates that the station is focusing on the wealthy economically active Afrikaans population, rather than all Afrikaans speakers - a significant proportion of whom are not white and/or wealthy.

Radio 2000

The station is licensed as a “facility service” and has to include education, sport, and religious programming as well as music in a range of genres in all official languages.³²⁰ It broadcasts nationally from Johannesburg. As a facility service it airs live important events – such as the President’s State of the Nation Address.

SAfm

SAfm is the SABC’s national English language public radio station. The Corporation says that the station “draws its audience from LSM's 7-10. Its core listeners fall into the age bracket 30-49. The station has also actively sought a 'diverse' audience (currently 61% black vs 39% white”)³²¹.

³¹⁶ See endnote 27 above

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ Ibid.

³²⁰ Schedule 3, Radio 2000 Licence Conditions, Licence Number PBSR 13/2004

³²¹ Ibid.

Thobela FM

Thobela FM is a Sepedi radio station broadcasting in Gauteng, Limpopo Province and Mpumalanga. SABC states that the station's "core target market fits into the 25-49 year age group in LSM 4-8".³²²

tru FM

SABC describes tru FM as "the gateway to regional consumers in the Eastern Cape". It says that the station broadcasts in English (60 per cent of the time) and isiXhosa (40 per cent)³²³. Whilst ICASA says the station broadcasts to all South Africans of all ages in its target area³²⁴, SABC describes the station as the SABC's only youth service (ages 16-24).³²⁵ Licence conditions specify that the station must include programming for children as well as current affairs programmes, educational programmes and informal knowledge building programmes.

Ukhozi FM

The station broadcasts in isiZulu. SABC states that the station "keeps its Zulu speaking audiences connected to their cultural identity in a modern world-context". It has the largest audience of any station in South Africa (see audience figures below) and the SABC claims that it is the second biggest radio station in the world and the largest radio station in Africa.³²⁶

Umhlobo Wenene FM

The station broadcasts in isiXhosa. Most of its audience is in the Eastern Cape though it also broadcasts in the Western Cape, Gauteng, and Eastern Cape. Umhlobo Wenene FM is the second largest station in South Africa.³²⁷

X-K FM

X-K FM is described by the SABC as a community station. It broadcasts for 12 hours a day in the KhoiSan languages of !Xu and Khwe. The station focuses on the community surrounding Platfontein in the Northern Cape and first started broadcasting in February 2004.³²⁸

Public television

The two national public television channels are SABC 1 and SABC 2.

The SABC defines SABC 1 as "the reflector of issues that impact on the youth and youthful at heart".³²⁹ ICASA does not define a particular target audience (such as the youth), but requires that the channel broadcast in Nguni languages³³⁰ and English.

³²² Ibid.

³²³ The percentage division between English and isiXhosa is taken from CKI FM licence conditions

³²⁴ Licence Conditions, CKI FM, Section 4.8, Licence Number PBSR 23/2004

³²⁵ Information accessed from the station's web site <http://www.trufm.co.za>

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ SABC 2006/2007 Annual Report, Programming Section, PBS Television, p. 4, accessed from <http://vcnstatic.sabc.co.za/VCMStaticProdStage/CORPORATE/SABC%20Corporate/StaticDocument/Annual%20Reports/Annual%20Rep%202006/programming.pdf>

³³⁰ Nguni languages include IsiZulu, isiXhosa, SiSwati and Isindebele.

SABC 2 is licensed to broadcast in Afrikaans, the SeSotho languages³³¹, XiTsonga, Tshivenda and English. SABC describes the station as the “family channel”.³³²

The SABC has been licensed to provide a further two regional television services (SABC 4 and SABC 5) – though licences for these two language services covering the North and South of the country respectively will only be issued once the broadcaster has assured funding for these from Treasury.

The public commercial services are subject to the same terms and conditions as private commercial stations and channels – but have to adhere to the values of public broadcasting (Sec 11 Broadcasting Act).

5.1.2 Public commercial services

There are three public commercial radio stations:

- *5fm* is a national music station broadcasting predominantly in English. It is licensed as a contemporary hit radio station.³³³
- *Metro FM* also broadcasts in all major cities of South Africa in English and is licensed as an Urban Contemporary music station.³³⁴ SABC describes the station as

the largest National Urban Commercial station in South Africa ... The station's core genre, R&B, is the most popular music genre amongst South Africans between 16 and 34. It epitomises Black success and leadership with attitude. Its listeners are high achievers with a lot of style, confidence, potential and the enviable ability to feel at home in a non-racial South Africa.³³⁵

- *Good Hope FM* broadcasts in English and Afrikaans in the Western Cape and is licensed as a Contemporary Hit Radio Rhythmic service.³³⁶

SABC 3 (which broadcasts in English) is the designated public commercial television channel. According to the SABC, the channel's footprint is largely in the metropolitan areas of South Africa. Its core target audience is defined by the Corporation as LSM 7-10 (the wealthy), “with LSM 5-6 being the secondary target audience”.³³⁷

6. Organisation

According to section 14 of the Broadcasting Act the affairs of the Corporation are administered by an Executive Committee (Exco) which includes the Group Chief Executive Officer (CEO), Chief Operating Officer (COO), Chief Financial Officer (CFO) and a maximum of 11 other members. The Exco is accountable to the Board.

³³¹ SeSotho languages include SeSotho, SeTswana and Sepedi.

³³² SABC 2006/2007 Annual Report, Programming Section, PBS Television, p. 5

³³³ Schedule 3, 5fm Licence Conditions, Licence Number PBSR 14/2004

³³⁴ Schedule 3, Metro FM Licence Conditions, Licence Number PBSR 15/2004

³³⁵ Accessed from

<http://www.sabc.co.za/portal/site/sabc/menuitem.3eb4c4b520e08a22f22fa121a24daeb9/>

³³⁶ Schedule 3, Section 3, Good Hope FM Licence Conditions, Licence Number PBSR 18/2004

³³⁷ SABC Annual Report 2007, p. 65

There are 4 353 positions at the SABC according to the 2008/2009 annual report and a total staff complement of 4 098 (3 524 permanent and 574 fixed-term contracts), an increase from 3 755 in 2007/2008.³³⁸

It was not possible to investigate in depth the ratio of management to staff at the SABC, but in informal discussions concerns were raised that the SABC might be too top heavy. There are also perceptions that the ratio of managers to staff is lowest for departments dealing with administration as against those related to programming or individual stations and channels. Information contained in annual reports seems to confirm the validity of such concerns. The 2005 annual report, for example, listed 15 members of Exco³³⁹, while the 2007 report³⁴⁰ indicated there were 20 members³⁴¹, and this figure dropped to 16 members according to the 2007/2008 report,³⁴² while the 2008/2009 report listed 20 members (noting that seven of these are invitees to Group Executive meetings).³⁴³

The SABC has gone a long way towards transforming the profile of the staff to make it more representative of the population. In its 2007/2008 annual report it notes that the percentage of black staff in the corporation increased from 58.2 per cent in 2001 to 74 per cent in 2008, and that in March 2008, 66 per cent of all managers were black (compared to 41.4 per cent in 2001).³⁴⁴

South Africa has also set itself a target for employment of people with disabilities within the public service. SABC however falls short of this target (2 per cent of all employees by 2010) and looks unlikely to achieve it. Its statistics state that as of March 2007, 0.58 per cent of its employees had disabilities (compared to 0.44 per cent the previous year). The annual report does not disaggregate this data in terms of gender or management.³⁴⁵ No figures are provided in its 2008/2009 annual report.

SABC boasts that its news and current affairs department is “the biggest news gathering organisation in Africa”.³⁴⁶ The news division (which services the public and public commercial wings) has 13 editorial offices around the country³⁴⁷, a staff of 972 people and a network of correspondents around South Africa.

By 2008, there were 13 news bureaus around the world, and the-then head of news Snuki Zikalala told newspapers in 2008 that the broadcaster planned to have a total of 20 international bureaus by 2010.³⁴⁸ However, these offices proved to be a significant drain on the broadcaster’s resources, and by 2009 eight of them had been closed down.³⁴⁹

³³⁸ SABC Annual Report 2008/2009, p. 83

³³⁹ SABC Annual Report 2005, p. 14

³⁴⁰ SABC Annual Report 2007, p. 33

³⁴¹ Whilst this appears to contravene the legislative requirements on the size of the Exco, the Annual Reports indicate that certain of these are “invitees”.

³⁴² SABC Annual Report 2007/2008, pp. 18-20

³⁴³ SABC Annual Report 2008/2009, pp. 95-98

³⁴⁴ SABC Annual Report 2007/2008, p. 53 (the 2008/2009 report is silent on these matters)

³⁴⁵ SABC Annual Report 2006/2007, p. 52

³⁴⁶ SABC Annual Report 2006/2007, p. 73

³⁴⁷ SABC Annual Report 2008/2009. P. 47

³⁴⁸ D. Mametse, “SABC news seeks a new advantage”, *City Press*, 16 February 2008, accessed from http://www.news24.com/City_Press/Finance/0,,186-246_2272063,00.html. The article quotes Zikalala stating that bureaus would be launched in Brazil, China, Jamaica and Ethiopia in 2008 and a further seven in 2009.

³⁴⁹ I. Da Silva, “Broke” SABC closes five foreign news bureaus’, BizCommunity.com, accessed from <http://www.bizcommunity.com/Article/196/15/39676.html> on 12 November 2009

6.1 The role of the Group Chief Executive Officer

The Group Chief Executive Officer is, in terms of the editorial policies of the SABC, also the editor-in-chief of the broadcaster. The policy document entitled *The SABC's Mandate: Powers, Functions, Rights and Obligations*, spells out a process of what it calls "voluntary upward referral". The policy gives responsibility to individual producers and commissioning editors for editorial control, but states that if necessary (if "any difficulty arises" or if they are "unsure of anything") they should "consult" their direct supervisor. The document states that this "process of voluntary upward referral could extend as far as the Group Chief Executive Officer".

The policy also requires that "even when specific editorial advice is not asked for, programmes or news items that are controversial, or likely to have an extraordinary impact, should be reported in advance to the senior news and programming executives".

They may in turn report the matter to top management. If a producer or editor does not do this, the policy document specifies that they will be held responsible for the editorial decision made.

The mandate document further clarifies the role of the GCEO in this regard:

The role of editor-in-chief ... should not be confused with the functions of the Heads of Radio, Television, News, Sport and Education or of the other editors and station and channel managers employed by the SABC. The GCEO's role is not to make day-to-day programming or newsroom decisions. However, the Board of the SABC delegates responsibility, and holds accountable the GCEO for the performance of all news and other programmes ...³⁵⁰

The SABC states that this policy should be a "mutually empowering, nurturing and developmental approach for all the staff involved. It is not meant to shift editorial decision-making upwards; it is intended ... to underpin collective decision-making".

This policy was developed through extensive public consultation before finalisation by the Board.³⁵¹ The designation of the CEO as Editor-in-Chief was criticised in a number of submissions on the draft policies. The South African National Editors' Forum (SANEF), for example, stated:

The ... larger concern of Sanef is that the GCEO of the SABC has, arguably, as his (sic) core responsibility, the business wellbeing of the corporation. This duty does not sit easily with editorial responsibilities ... Sanef is aware that (other public broadcasters) operate with their Director Generals also being Editor-in-chief ... (However such broadcasters) ... have a different business model to SABC, meaning that there is far less potential conflict of interests between their business and editorial operations than could be the case in our country ... (T)he SABC is faced with earning the vast bulk of its revenue in the marketplace. Even the public

³⁵⁰ South African Broadcasting Corporation, *The SABC's Mandate: Powers, Functions, Rights and Obligations*, p. 4, "Editorial Responsibility and Upward Referral", accessed from <http://vcmstatic.sabc.co.za/VCMStaticProdStage/CORPORATE/SABC%20Corporate/Document/About%20SABC/Legislative%20%26%20Regulatory%20Organs/mandate.pdf>

³⁵¹ There were close to 1000 submissions on the draft policies. The original draft proposal on upward referral was toned down in response to critical submissions (see G. Berger, "It's a Matter of Control", published in the *Mail & Guardian* on 4 February 2004 and accessed from http://www.mg.co.za/articledirect.aspx?area=mg_flat&articleid=41837)

service stations and channels are expected to bring in some advertising. (This) means ... that there are huge pressures on the GCEO to ensure that advertising targets are met ...³⁵²

Despite such inputs the Board confirmed this delegation of responsibility for editorial decisions to the CEO in the final policy. They did however amend the upward referral clauses. The draft described such referrals as mandatory, for example, while upward referral is voluntary in terms of the final policy.

Nevertheless, there is potential given this structure for commercial (or other) rather than editorial considerations to be given priority. This concern is heightened by the fact that the CEO is effectively appointed by the Minister – which impacts negatively at the very least on perceptions of independence. Even if sole responsibility for his/her appointment was given to the Board though, the inevitable link that the CEO has to both the executive of government and Parliament suggests that in order to ensure that the SABC adheres to the imperative of journalistic independence (both in reality and in terms of perceptions), final decision making powers related to any news issues should vest in the head of news.

6.2 Salaries

The salaries of executives at the SABC are published in the annual reports – as required by the PFMA. According to the 2008 Annual Report, the CEO earned just under R4.58 million for the financial year ending 31 March 2008. This includes a basic salary of R1.8 million and a performance bonus of R2.14 million, as well as pension fund contributions and allowances.

In order to assess this, it is important to benchmark the salary against those of others in government or public entities (including bonuses). During that year the President of the country earned just under R1.2 million, the Governor of the Reserve Bank R2.83m and the Director General of a government department just under R1m.³⁵³ CEOs of other parastatals earned between R1m (Lottery Board) to just under R7m (Transnet and SAA).³⁵⁴

According to a study published by the South African National Editors Forum and Gender Links in 2007³⁵⁵, SABC newsroom salaries are the second highest of all media companies surveyed.³⁵⁶ The survey (conducted in 2006 and 2007) found that the average newsroom annual salary is R210 798 (R17 566.50 per month) and that SABC pays above this average.³⁵⁷

This average media salary is slightly below the average professional monthly salary across all industries of R18 096, according to an online salary survey conducted by careers24.com.³⁵⁸ Media salaries are higher though than those of teachers and educators (R13 787), but lower than salaries paid in Information and Communication Technology (R21 062).

³⁵² South African National Editors' Forum, "SANEF comment on SABC Editorial policies", accessed from http://www.sanef.org.za/press_statements/277577.htm

³⁵³ The Independent Commission for the Remuneration of Public Office Bearers, *Executive Summary of the Recommendations on the Remuneration of Public Office Bearers*, March 2007, p. 31

³⁵⁴ *Ibid.*, p. 32

³⁵⁵ South African National Editors' Forum and Gender Links, *Glass Ceiling Two: An Audit of Women and Men in South African Newsrooms*, 2007

³⁵⁶ Eight newsrooms participated in the study. The SABC and commercial radio Kaya FM were the only broadcasters so the benchmarking does not include national free-to-air broadcaster, e.tv.

³⁵⁷ Note that it is difficult to extract the average SABC newsroom salary as the figures for individual newsrooms are disaggregated according to gender. Both men and women in the SABC earn above the average however.

³⁵⁸ Careers24.com, *Salary Survey 2007*, accessed from www.careers24.com

6.3 Training

The SABC has its own training department and has developed links with a range of external training organisations to increase skills - including Big Fish film and television school, the National Electronic Media Institute of South Africa (established by government) and Rhodes University.

6.4 Skills challenges

The SABC – like other media organisations in South Africa – faces challenges in recruiting and retaining skilled staff at all levels of the organisation. Unlike others, however, staff concerns, alleged management abuses and details of supposed intrigues are regularly scrutinised and featured in the pages of newspapers. While the print media have suggested that what they term “an exodus” from the newsroom is due to bad management and/or political interference³⁵⁹, the public broadcaster has denied this and described it as a natural movement to “greener pastures”.³⁶⁰ Both have acknowledged that the SABC is the obvious poaching ground for new broadcasters, and that, for example, the licensing of new subscription television channels has resulted in staff leaving.

What is clear is that the SABC is a complex organisation, difficult to describe accurately and concisely. In some areas the broadcaster excels, regularly winning international and local awards for its programming. On the other hand there appear to be legitimate organisational concerns that need to be addressed. The following summary of successes and challenges perhaps provides some insight into this complexity:

Skills shortages were a major challenge in transforming the SABC from a state into a public broadcaster. There were few other radio broadcasters and only two other television channels prior to the re-regulation of broadcasting in 1994. None of the other television channels produced news and there were limited skills in production of television in languages other than English and Afrikaans. There was virtually no experience in public broadcasting. The broadcaster has managed to some extent to make up for these shortcomings – and to develop new broadcasting talent.

- Despite stories of mass resignations, SABC’s turnover is lower than the national average. SABC states in its 2008 Annual Report that staff turnover for the financial year ending 31 March 2008 was 7.5 per cent. A Deloitte and Touche *National Remuneration Guide for 2007* based on data gathered from approximately 300 South African companies reportedly found that the average turnover for 2006 was 12.3 per cent.³⁶¹ The SABC figures do not provide a breakdown of turnover per department or region.
- There has been little stability at a senior management level. No Chairperson of the Board of the SABC has ever stood for a second term and since 1993 there have been six different chairs of the SABC. Changes in the board seem to precipitate a change-over of the executive leadership. Since 1994 the broadcaster has had five different

³⁵⁹ See for example E. Naidu, “Top Reporters Flee SABC Newsroom”, published in the *Sunday Independent* on 27 November 2005; C. Motsepe, “SABC bosses hold urgent meeting on staff exodus”, published in *City Press* in 4 March 2007

³⁶⁰ SABC’s head of news, Snuki Zikalala, and the SABC spokesperson Kaizer Kganyago have both on numerous occasions denied a skills drain at the broadcaster. See for example “No walkout, SABC claims” published in the *Citizen* on 5 March 2007 and D. Memetse, “SABC news seeks a new advantage”, published in *City Press Business* on 16 February 2008.

³⁶¹ *MoneyWeb*, “General staff receive inflation-linked increases”, 6 June 2007, accessed from <http://www.moneyweb.co.za/mw/view/mw/en/page1639?oid=139333&sn=Detail> in May 2008

CEOs and a range of acting chief executives as managers have resigned prior to the end of their contracts. This gives a perception of different eras at the SABC – with concomitant changes in emphasis and strategy (as well as consultants guiding the vision).

- Similarly, the list of journalists and editors who have been at and left the SABC is long and illustrious. These include current press ombudsman Joe Thlooe, ex-editor, commentator and writer Allister Sparks, editor of the *Financial Mail*, Barney Mthombothi, former *City Press* editor Mathatha Tsedu, *Mail & Guardian* editor Ferial Haffajee, senior journalist and award winning investigative journalist Jacques Pauw, current events commentator Max du Preez, morning radio talk show host Tim Modise, respected journalist John Perlman, award winning presenter Nikiwe Bikitsha, journalist and researcher Pippa Green, head of Telkom Media's news Jimi Matthews and *Business Day* political editor Karima Brown. Many of these left amidst speculation that the environment was not conducive to "good journalism".
- There have been accusations that with the departure of experienced staff, standards have dropped. Former television editor Charles Leonard (now news editor at *Business Day*), for example, has written a stinging attack on the impact such resignations have had on the SABC:

(T)here was nobody senior on the input side to ensure journalistic and technical quality. With some exceptions, the standards dropped radically, with blue pictures, jump cuts, fuzzy pictures, poor audio and irrelevant washed-out file pictures the order of the day ... The journalism became even worse.³⁶²

Internal SABC investigations suggest that the public broadcaster needs to address issues, amongst other things, around management and skills in the newsroom:

- In 2006, newspapers in South Africa, citing sources and quoting from leaked documents, stated that the SABC blacklisted certain commentators on the basis of their political views. The SABC appointed a Commission (including ex SABC CEO, Zwelakhe Sisulu and leading media advocate Gilbert Marcus) to investigate these allegations. Whilst the substance of the findings of the Commission will be dealt with in Chapter 8, it should be mentioned here that the Commissioners also (very diplomatically) highlighted concerns about management style in the newsroom.

The report found, amongst other things, that the then head of news, Snuki Zikalala (whose contract with the SABC has since come to an end), "appears to intervene at a micro-level inappropriate to his level of management". Whilst acknowledging that there were differing opinions amongst witnesses on morale in the news department, the Commission recommended that the Board "take close cognisance" of concerns raised about management style and issues of communication. The Commission pointed out that micro-management seemed to stem from a lack of trust by senior management in staff, but suggested that this be addressed through ongoing training. The report further said that a number of concerns had been raised about the Cape Town news office, and suggested that these be investigated further.

According to a report by the Board and management to the relevant Parliamentary Portfolio Committee in February 2008, the head of news was given a verbal warning and counselling to address concerns about his management style. Members of the

³⁶² C. Leonard, "Commander Zikalala and SABC's corridors of fear", *Business Day*, 9 May 2008, accessed from <http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A763323> in May 2008

Portfolio Committee voiced doubt over the appropriateness of this censure given the severity of the allegations.³⁶³

- An earlier internal probe (led by advocate Thlaresang Mkhwanazi and Head of the School of Journalism and Media Studies at Rhodes University, Guy Berger) dealt with the failure by the SABC to include footage of the Deputy President being booed at a rally in 2005. Whilst the final report cleared the SABC of political bias, it highlighted structural weaknesses in the news department, poor news judgement and bad journalism as some of the reasons for the non-coverage of the booing. The report further raised issues of corporate governance, alleging that a Board member had instructed the spokesperson of the organisation to make a false statement.³⁶⁴

7. Conclusions and recommendations

In many ways the SABC is a microcosm of policies and politics in South Africa. As the first institution to be democratised after the end of apartheid, the experiences of the public broadcaster offered insights for others into the complexity of transformation of state entities into public institutions.

The African Commission on Peoples' and Human Rights Declaration of Principles on Freedom of Expression states in Article 6 that:

State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- Public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- The editorial independence of public service broadcasters should be guaranteed.

The SABC is, in terms of law, accountable to the public through the legislature rather than government. Non-executive members of the Board are appointed by Parliament and the legislation provides for the SABC to account on how it is meeting its mandate to the legislature.

Its editorial independence is guaranteed in its Charter, which clearly stipulates that the broadcaster enjoys freedom of expression "and journalistic, creative and programming independence as enshrined in the Constitution". The board is charged with protecting this autonomy.

However, whilst the SABC is governed by a Board, which in theory is both protected against interference through the above injunctions, and acts as the guardian of such independence, the power given to the shareholder (the Minister of Communications) through the Articles of Association to, for example, effectively appoint the executive management, impinges on and limits this freedom. As outlined in detail in the subsequent chapter, the public broadcaster's

³⁶³ Parliamentary Monitoring Group, Minutes, *Sisulu Report: Briefing by SA Broadcasting Corporation*, 26 February 2008, accessed from <http://www.pmg.org.za/report/20080226-sisulu-report-briefing-sa-broadcasting-corporation-premier-soccer-lea>

³⁶⁴ J. Letlape, "Internal Probe clears SABC on coverage of rally", 5 September 2005, accessed from <http://www.sabcnews.com/entertainment/other/0,2172,111780,00.html>

dependence on advertising revenue further potentially impacts on its autonomy from commercial interests.

Finally, the experience of the SABC shows that legal safeguards alone do not ensure dynamic public broadcasting responsive only to the needs of viewers and listeners. As noted, even before the introduction of the Articles of the Association, the board of the SABC “consulted” government about appointment of the CEO. It is critical therefore to build in effective mechanisms for accountability and transparency and ensure that the leadership of the broadcaster is committed to the principles of public broadcasting.

Recommendations

The SABC plays an important role in South Africans’ lives. The following recommendations will assist in ensuring that the public broadcaster meets the public’s expectations:

- There is a need to review the White Paper on broadcasting through a participatory process involving the public in debate about what exactly they want from a public broadcaster.
- This should include a review of the legal status of the SABC (including an evaluation of whether or not a Pty Ltd is the appropriate structure for such a statutory body) and of the division of the Corporation into public and public commercial wings. In the event that the current corporatised structure is found to be appropriate, the necessary adjustments must be made to legislation (specifying, for example, that the shareholders are the public of South Africa). The aim should be to protect the SABC’s independence and reflect its statutory status.
- In line with this, an SABC Act should be drafted, capturing the decisions in the White Paper. Sections of the current Broadcasting Act dealing generally with broadcasting or with the community or commercial sectors, should be incorporated into the Electronic Communications Act (if not already captured).
- As an important cornerstone of democracy, the SABC should be given the same status and protections in the Act as those awarded to constitutional entities and should be listed as a constitutional institution (rather than a public entity). The necessary changes should also be made to the Public Finance Management Act and Broadcasting Act.
- The SABC Charter should be reviewed in order to capture the objectives for public broadcasting determined through the consultative process. It should be decided whether or not the Charter should be separated out from the law and be made subject to regular review.
- The appropriate oversight provisions should be evaluated taking into consideration the need for the SABC to be accountable and its independence. Provisions such as those suggested by the Parliamentary Ad Hoc Committee to review constitutional institutions could be considered to enhance the SABC’s independence. Such measures would include strengthening the oversight role of Parliament rather than the executive.
- In the review of the White Paper and in drafting a new Act, the following issues, amongst others, should also be explored extensively:

- The appointments procedure of the Board must be reviewed in order to ensure its credibility and legitimacy and to protect the process from political interference. A range of different options should be considered in order to enhance such credibility – including the establishment of an independent appointment panel.
- The ideal composition of the Board should be evaluated in relation to its defined role and be broadly discussed and debated. This should include decisions on whether or not executive members should be included as full members of the Board, and if so how.
- The option of staggered terms of office for Board members should be considered to provide for continuity and greater independence.
- The clauses on disqualification should be reviewed to protect the SABC from actual and perceived conflicts of interest as well as from accusations of political bias.
- Legislation should specify that the Board is solely responsible for appointment of the CEO and other senior managers.
- The distinct roles of the Board and the executive should be clarified in order to ensure that the Board does not get involved in the day-to-day running of the SABC (or be perceived to be involved in it).
- Specific and feasible mechanisms binding the SABC to transparency, openness and accountability to the public should be considered. These could include specific clauses detailing the SABC's obligations to television licence holders as detailed above.

In relation to the internal structure of the SABC:

- A review/evaluation of why CEOs and Chairs of the Board change so regularly should be conducted in order to address any issues faced and ensure stable leadership of the SABC.
 - A proper audit of the structure and organogram should be undertaken in order to determine the appropriate staffing of the SABC and address concerns of centralisation of management.
 - This should include a review of how best to structurally protect programming from commercial or political pressures (whether real or perceived). The decision to make the CEO the editor-in-chief should be reviewed in consideration of these imperatives.
- There needs also to be an organisational audit to determine the reasons for alleged low morale and resignations of key staff members in order to develop plans to address these. The SABC should ideally be the preferred employer of news and production staff.
 - There should be ongoing assessment of the training needs of staff at the SABC to ensure members are equipped to deal with the challenges in delivering on the broadcaster's mandate.

Funding of the South African Broadcasting Corporation

Adequate funding is critical to innovative public broadcasting. However, sufficient funds alone do not ensure credible and distinctive programming that is responsive to the needs of all citizens, rather than the demands (or whims) of politicians, advertisers or managers of the broadcaster. Funding also needs to be secure to ensure the broadcaster is not influenced (even inadvertently) by market or political vagaries and is able to develop creative long-term strategies to meet defined public goals.

The ideal funding model has been the subject of much debate in South Africa (as elsewhere in the world) since the early 1990s. The focus in the country, however, has been predominantly on the *ratios* of public to commercial funding rather than on the most appropriate *mechanisms* to secure adequate funding. These debates, moreover, have not had any effect on the dependence by the SABC on advertising and sponsorship revenue.

In addition, new considerations, such as the introduction of digital broadcasting and possibilities arising from increased access and take-up of broadband, may require a review of both the needs and funding models for public broadcasting. Such new technologies have prompted evaluations of funding for broadcasters internationally.

In 2008, for example, the UK communications regulator, the Office of Communications (Ofcom), began a review of public service broadcasting by calling for comment on a paper outlining threats and opportunities to public service content on television. Ofcom states that it is critical in the process to evaluate the best funding mechanisms to meet audience needs in a new digital environment, given audience fragmentation across different platforms (including over the internet) and declining commercial revenue.³⁶⁵

France has also recently announced a shake-up of public broadcasting funding. In January 2008, President Nicolas Sarkozy declared that advertising on public service television would be phased out completely by 2011. In June 2008 a parliamentary commission established to

³⁶⁵ United Kingdom, Office of Communications, *Second Public Service Broadcasting Review: Phase One: The Digital Opportunity*, 10 April 2008 accessed from http://www.ofcom.org.uk/consult/condocs/psb2_1/

fine tune his proposals declared that advertising during prime time on public television would be phased out from January 2009. According to the plan, lost revenues will be replaced by taxes collected from internet, mobile phone and commercial broadcasting companies.³⁶⁶

1. Overview

When addressing questions around funding of public broadcasting in South Africa it is important to consider the broad history of funding of the SABC. Unfortunately the frequent changes in the leadership of the SABC described in the previous chapter, as well as changes in the management of the Department of Communications, have affected institutional memory, making it difficult in certain instances to obtain insights into decisions.

The following are some of the key decisions/milestones affecting public broadcast funding:

- **Pre 1994:** The SABC is a state broadcaster focusing on the narrow interests of the apartheid government – despite the fact that it is funded primarily through advertising. According to a report by the Freedom of Expression Institute (FXI), the 1994 SABC annual report indicated that licence fees accounted for 20 per cent of all revenue, and advertising income made up 74 per cent of revenue.³⁶⁷ Advertising was allowed on television from 1978 (two years after its introduction in South Africa).
- **1995:** The then regulator, the Independent Broadcasting Authority (IBA), issues the Triple Inquiry Report (see chapter three) and makes proposals on the viability of public broadcasting:
 - The SABC should be funded through a mix of advertising and sponsorship, licence fees, government grants and “other income such as merchandising their products and leasing facilities”. No recommendations are made on the ratio of the different revenue streams.
 - The funding mix and alternative options for collecting fees should be reviewed in 1998.³⁶⁸
 - Parliament should provide funding on a triennial basis for:
 - The cost of provincial splits³⁶⁹ on radio and television services;
 - The cost of increasing African language and local content television programming on the SABC;
 - The cost of funding educational programming - including that of conducting a viability study into the desirability and viability of dedicated educational stations/channels.

The proposal by the IBA was to streamline the SABC and sell off eight regional radio stations³⁷⁰ and one television channel. It was recommended that the SABC be

³⁶⁶ D.S. Morrison, “[France To Tax Mobile, Internet And TV Revenues To Fund Public Broadcaster](http://www.moconews.net/entry/419-france-to-tax-mobile-internet-and-tv-revenues-to-fund-public-broadcaster/)”, 25 June 2008, Bloomberg, accessed from <http://www.moconews.net/entry/419-france-to-tax-mobile-internet-and-tv-revenues-to-fund-public-broadcaster/>

³⁶⁷ Freedom of Expression Institute, *The Broadcasting Independence Handbook: Lessons from the South African experience, 2008, Part Three: Post apartheid public broadcasting: An overview of the independence of the SABC*, p. 26, ISBN: 978-0-620-40300-9 (hereinafter referred to as FXI, *The Broadcasting Independence Handbook*)

³⁶⁸ This review was never carried out by the IBA as it was overtaken by the Green and White Paper process initiated by Government.

³⁶⁹ Provincial splits are essentially transmitter splits allowing content specific to a province or area to be broadcast only to that area. The IBA found that such splits were a more cost effective option than establishing more services and/or channels.

allowed to keep national commercial stations *Metro* and *5FM* as they provide “crucial revenue”. The revenue generated by the sale of stations would be invested in the SABC to assist in the restructuring of the broadcaster.³⁷¹

- **1996:** Parliament ratifies the Triple Inquiry Report. However, it decides in response to SABC lobbying that no television channels should be sold and only six of the regional commercial services be put up for sale³⁷². The sale of the stations is finalised later in the year. The IBA awards licences based on diversity of ownership and promises of performance rather than to the highest bidder. National Treasury keeps the funds raised (R510.1m) – leaving SABC without the revenue from the commercial services or the benefits of the sale.³⁷³ The SABC objects strongly to the claiming of the profits by government - to no avail.
- **1997:** The SABC, according to its annual report, records a deficit of R64 million – attributed to the expanded mandate and a shift away from the broadcaster by advertisers.³⁷⁴ The broadcaster warns Parliament that the deficit could grow to an estimated R650 million if the broadcaster is not restructured and streamlined.³⁷⁵

The then responsible Minister, Jay Naidoo, notes that government will, in the short term at least, fund certain public interest programmes at SABC, including regional radio splits, educational broadcasting, African language programming and South African content (in line with IBA recommendations) and introduce a three year funding model. He indicates however that it is important that the SABC moves towards self-sufficiency.³⁷⁶

The SABC implements recommendations from international consultancy McKinsey to cut costs in light of government pressure to be self-sufficient:

- About 1 400 jobs are shed.
- Certain public programming (including local content) is axed from prime time in favour of more commercially viable programmes (such as international sitcoms and less costly South African programmes including game shows).
- SABC decides to outsource all production except news and current affairs.³⁷⁷

³⁷⁰ *Kfm* (a commercial station in the Western Cape), *Highveld Stereo* (a station in Gauteng), *Jacaranda FM* (a commercial service in Gauteng), *OFM* (a station in the Free State), *Radio Algoa* (in the Eastern Cape), *East Coast Radio* (in KwaZulu Natal), *Radio Good Hope* (a commercial station in Cape Town) and *Radio Lotus* (a station targeting the Indian community in KwaZulu Natal and Gauteng)

³⁷¹ Independent Broadcasting Authority, *Report on the Protection and Viability of Public Broadcasting services; cross media control of Broadcasting Services and Local Television content and South African music*, August 1995

³⁷² SABC was allowed to keep *Good Hope FM* and *Radio Lotus*.

³⁷³ Independent Broadcasting Authority, “Press Statement: IBA concludes sale of SABC regional stations”, 20 September 1996, accessed from

http://www.info.gov.za/speeches/1996/960925_0x03896.htm

G. Reddy, *Mail & Guardian*, “Making waves on the air”, 30 May 1997, accessed from

<http://www.chico.mweb.co.za/mg/art/reviews/97may/29may-iba.html>

³⁷⁴ F. Haffajee, *Mail & Guardian*, “SABC’s Radical Changes”, 20 June 1997, accessed from

<http://www.chico.mweb.co.za/mg/art/reviews/97june/19june-sabc2.html>

³⁷⁵ African National Congress, Daily News Briefing, “SABC-McKinsey: Standards will not be lowered: SABC”, 14 March 1997

³⁷⁶ Republic of South Africa, Minister Jay Naidoo: Briefing on delivery achievements of posts, telecommunications and Broadcasting, Parliamentary Media Briefing, 11 February 1997

³⁷⁷ F. Haffajee, *Mail & Guardian*, “SABC’s Radical Changes”, 20 June 1997, accessed from <http://www.chico.mweb.co.za/mg/art/reviews/97june/19june-sabc2.html>

Towards the end of the year, the Green Paper on Broadcasting is launched by government for public comment. The paper asks for submissions on the “realistic proportion of revenue from advertising, transactions and public funds” for the public broadcaster.³⁷⁸

- **1998:**

- The Minister of Communications states that the SABC has to be self-sufficient due to “budget constraints of this government”. “This government,” he says, “is not going to give it more money”.³⁷⁹ He announces that government funding for the SABC would be cut by 41 percent (from R235 million in the 1997/98 financial year to R141 million in the 1998/99 budget).³⁸⁰
- The Broadcasting White Paper is published. A new funding model is mooted, dependent on the division of the SABC into public and commercial arms. The paper states:

Funding sources for the public broadcaster will consist of licence fees, grants, advertising and sponsorship. Advertising revenue of the public arm of the SABC will be less than that of the commercial arm. It is likely that cross-subsidisation of this arm from dividends paid by the commercial arm of the SABC will also be required, as may be some degree of budget supplementation from the general revenues of the Government. The public broadcasting arm of the SABC will also be allowed to sell advertising time, but such services cannot obtain their predominant form of revenue from advertising ...

The paper also stipulates that the separation into public and public commercial divisions will be a “precursor” to possible “privatisation of, or the introduction of private equity to, the SABC’s commercial services”. It stipulates that the commercial arm will provide dividend payments to the Minister who will reallocate these as necessary to the public broadcasting arm. “Any surplus will be paid into the National Revenue Fund.”³⁸¹

- Television fees paid to the SABC for possession of a television increase by 10 per cent (from R189 to R208 per annum).

- **1999:**

- The Broadcasting Act (No 4 of 1999) is promulgated and separates the SABC into public and a commercial wing. Section (10)2 states the public wing is funded by “advertising and sponsorship, grants and donations, as well as licence fees ... and may receive grants from the State”. Section 11(d) says the commercial wing must subsidise the public division “to the extent recommended by the Board in consultation with the Minister”. This division must be run efficiently so as to “maximise the revenue to be provided to its

³⁷⁸ Republic of South Africa, Ministry for Posts, Telecommunications & Broadcasting, *Broadcasting Policy: A Green Paper for Public Discussion*, November 1997, accessed from <http://www.info.gov.za/greenpapers/1997/broadcst.htm>

³⁷⁹ Republic of South Africa, Ministry for Posts, Telecommunications and Broadcasting, “News Release: Minister reaffirms SABC’s editorial independence,” 20 February 1998, accessed from http://www.info.gov.za/speeches/1998/98310_699811023.htm

³⁸⁰ Republic of South Africa, “Speech given by Jay Naidoo, Minister for Posts, Telecommunications and Broadcasting, on the occasion of the Budget Vote for the Department of Communications”: Parliament, 13 May 1998, accessed from

http://www.info.gov.za/speeches/1998/98a13_4169811225.htm

³⁸¹ Department of Communications, *White Paper on Broadcasting Policy*, May 1998, Chapter Two: Public Broadcasting, pp. 19-20

- shareholder (the government)". Section 18(7) states that any dividends to be paid to the shareholder must be paid into the National Revenue Fund.³⁸²
- In terms of the new legislation the SABC now has to abide by the Public Finance Management Act (PFMA) which, amongst other things, sets criteria for financial reporting in order to hold public bodies more accountable (including requiring bodies to report for example on senior executive salaries).
 - Regional splits on SABC television are discontinued after funding from the government was stopped.³⁸³
- **2000:** SABC records a deficit of R28.1 million for the 1999/2000 financial year.³⁸⁴ Government approves a new three-year funding plan for the SABC.³⁸⁵
 - **2001:** SABC cuts in expenditure (including on public interest programming in prime time) bear dividends and the broadcaster posts a R5.3 million surplus for the 2000/2001 financial year.³⁸⁶
 - **2002:**
 - The Broadcasting Amendment Act is promulgated. Amongst other things, amendments are made to clauses outlining the process of corporatising the SABC.
 - The Act also stipulates that a further two public regional channels must be licensed which would cater for languages other than English and Afrikaans. Legislation states that these channels will be funded through money appropriated by Parliament and via grants, donations and sponsorships, and tasks the regulator with determining the "extent to which these services may draw revenue from advertising".³⁸⁷
 - The ruling party, the African National Congress (ANC), adopts a resolution at its national conference stipulating that government must "move towards establishing a publicly funded model of the public broadcaster" and "increase its funding of the public broadcaster" in order to reduce dependence on advertising.³⁸⁸
 - The SABC announces that it has stabilised its business and records a R7 million profit.³⁸⁹
 - **2003:**
 - Television licence fees are increased again for the first time in five years, this time by eight per cent (from R208 to R225 per annum).
 - New licence fee regulations strengthen the licence fee collection mechanisms by, for example, ensuring that no person can buy a television set without proof of a TV licence.

³⁸² Republic of South Africa, Broadcasting Act, No 4 of 1999

³⁸³ South African Broadcasting Corporation, 'Ten Years', 2004, accessed from

<http://www.sabceducation.co.za/VCMSStaticProdStage/CORPORATE/SABC%20Corporate/Document/About%20SABC/The%20SABC%20In%20Detail/tenyears.doc>

³⁸⁴ C. Tleane and J. Duncan, Freedom of Expression Institute, *Public broadcasting in the era of cost recovery: A critique of the South African Broadcasting Corporation's crisis of accountability*, 2003, ISBN 1-919855-25-4, p. 12, accessed from

<http://www.fx.org.za/PDFs/Publications/SABC%20Book.pdf>

³⁸⁵ Interview with Joe Mjwara, ex Deputy Director General of the Department of Communications

³⁸⁶ See endnote 20

³⁸⁷ Broadcasting Amendment Act, No 64 of 2002, Section 22A

³⁸⁸ African National Congress, *Resolutions adopted by the 51st National Conference of the African National Congress*, Stellenbosch, 16-22 December 2002, accessed from

<http://www.anc.org.za/ancdocs/history/conf/conference51/index.html>

³⁸⁹ See endnote 20

- In a policy paper on the public regional channels, the regulator (now restructured and named the Independent Communications Authority of South Africa – ICASA) announces that these services will not be allowed advertising. The Position Paper also prohibits the use of English on the channels.³⁹⁰
- **2004:** The SABC corporatisation process is finalised. One of the financial implications is that the SABC is now liable to pay company tax.
- **2005:**
 - SABC announces an after-tax profit of R194 million for the 2004/2005 financial year.³⁹¹
 - ICASA issues new licence conditions for SABC services, in line with the Broadcasting Act. For the first time, the SABC has to comply with limitations on advertising on television (bringing it in line with conditions for commercial broadcaster *e.tv*). The licence conditions state that television channels may not broadcast an average of more than 10 minutes per hour of advertising calculated annually, and that they may not air more than 12 minutes of advertising in any one hour. No distinction is made between public and public commercial channels – potentially negating the suggestion in the Broadcasting White Paper that there should be less advertising on public services.³⁹²
 - ICASA also announces that it will not issue the licences awarded to the SABC’s two proposed regional television channels (SABC 4 and SABC 5) “pending the SABC securing appropriate and sufficient funding, to the satisfaction of the Authority”.³⁹³ It relaxes its earlier rule on no advertising on the two channels.
- **2006:** The SABC announces an after-tax profit of over R382 million.
- **2007:** The SABC announces an after-tax profit of R183million. - At the ANC National Conference in December 2007, another resolution demanding an increase in public funds for the SABC is passed. The resolution is more specific than the 2002 one – probably in reaction to the non-implementation of the previous decision. The resolution stipulates that government must increase funding for the SABC from “the current 2 (two) per cent (of revenue) to a minimum of 60 per cent by 2010”.³⁹⁴
- **2008:** The SABC announces an after-tax profit of R321 million.
- **2009:**
 - The SABC announces an after-tax loss of R790 million.
 - The Department of Communications introduces the Public Service Broadcasting Bill, which proposes a radical change to the SABC’s funding

³⁹⁰ Independent Communications Authority of South Africa, *Regional Television Broadcasting Services: Position Paper*, 26 November 2003

³⁹¹ South African Broadcasting Corporation, Media Release, “Yet another successful financial year (05/06) for the SABC”, 30 August 2006

³⁹² Independent Communications Authority of South Africa, “Public Broadcasting Television Licence: SABC 1”, “Public Broadcasting Television Licence: SABC 2”, and “Public Broadcasting Television Licence: SABC 3”, Schedule 3, Sub-Section 4: Advertisements

³⁹³ Independent Communications Authority of South Africa, “Application by the South African Broadcasting Corporation (SABC) in terms of Section 22A of the Broadcasting Act no 4 of 1999 for two regional television services”, 15 June 2005, *Government Gazette*, Notice 945 of 2005

³⁹⁴ African National Congress, *ANC 52nd National Conference 2007 – Resolutions*, Polokwane, December 2007, accessed from <http://www.anc.org.za/ancdocs/history/conf/conference52/index.html>

model. It proposed that in future, funds for public broadcasting are to be paid into a Public Service Broadcasting Fund, to be administered by the Media Development and Diversity Agency (MDDA). All broadcasters would be allowed to apply for funding through this mechanism. Public broadcasting should be funded from personal income tax (not more than 1 percent), money appropriated from Parliament, contributions from broadcasting services licencees, contributions from business and money accruing to the Fund.³⁹⁵

- The interim SABC board implements a stabilisation plan to address the myriad problems facing the broadcaster, including the resolution of a wage dispute with staff, a plan for payment of critical debt, cost reduction and increase of revenues.³⁹⁶

2. Sources of funding

The SABC is predominantly reliant on commercial income (advertising and sponsorship). According to the most recent annual report (2008/2009), the funding mix for operations for that year (ending 31 March 2009) was:

Commercial funding	77% (R3.663bn)
Licence fee income	18% (R865m)
Government allocation	2% (R106m)
Other (including sale of merchandise, rental of studios, etc.)	3% (865m)

This excludes the R150 million allocation from government for implementation of the technology plan.³⁹⁷ By the end of the financial year, R23m of this grant had been received.

As indicated above, the dependence on commercial revenue pre-dates the advent of democracy and the transformation of public broadcasting in 1994. Whilst the increased mandate and alleged advertiser caution in light of changes at the SABC initially resulted in the corporation running at a loss, the broadcaster declared high profits from 2004 to 2007 – attributed by SABC’s executive to more effective management. For the 2007/2008 financial year the broadcaster reported that profit after tax grew by 75.8 per cent, but this could be attributed exclusively to a recognition of a Pension Fund surplus. If this profit were stripped out, the actual operating profit amounted to R43 million.³⁹⁸

The high profits years coincided with an advertising boom, which slowed down due to the economic downturn starting in 2007. In 2006/2007, for example, the total media adspend grew by 16 per cent (or by R3 billion to about R23 billion) according to advertising research group Nielsen Media Research. Adspend in television over this period grew by 22 per cent

³⁹⁵ Public Service Broadcasting Bill, *Government Gazette* no. 32553

³⁹⁶ SABC interim Board, second briefing to Parliament, 2 November 2009

³⁹⁷ In 2005, Government allocated R700m to SABC to upgrade its equipment, to be disbursed over five years.

³⁹⁸ SABC Annual Report 2007/2008, p. 23

and in radio by 12 per cent.³⁹⁹ Yet in 2007/2008, the growth percentages of media adspend declined considerably. Television adspend in particular increased by a mere 6 per cent while radio remained almost steady with a 13 per cent growth rate.⁴⁰⁰ Given its dependence on advertising, SABC is very vulnerable to any reduction in advertising income. The reduced growth rate contributed to the 0.7 percent decrease in commercial revenue in 2009.⁴⁰¹ The Interim Board Chairperson Irene Charnley pointed out, though, that this decrease and the subsequent deficit was also due to management failures and leadership instability.⁴⁰²

At the same time, licence fee income has gone up significantly as a result of the introduction of amendments to the Broadcasting Act and related regulations which increased the SABC's capacity to enforce compliance with the law. The Minister of Communications promulgated the new regulations in 2004, and licence fee revenue jumped from a total of R395 million in that year to R568 million in 2005 when the regulations became effective (44 per cent).⁴⁰³ It increased again significantly in 2006 (to R739 million or by another 30 per cent from 2005), but dropped slightly in the following financial year. The SABC noted in its 2007/2008 annual report that television licence fee revenues came under pressure due to the absence of a rate increase, and the cost of collection increased as a greater portion of revenue came from collections from default licence holders.⁴⁰⁴ However, according to the broadcaster's 2008/2009 annual report, licence fee revenue again increased slightly by 0.7 per cent.

This has led to a range of stakeholders stating that the over-reliance by the SABC on commercial funding is problematic. The ruling African National Congress has also added its voice to those calling for a publicly funded SABC – though government has not as yet implemented decisions by the party, nor given any indication of whether or how it will adhere to the call for public funding to increase to 60 per cent of total revenue by 2010/11.

Instead, despite evidence that revenue was under pressure and expenditure was increasing, the budget vote for the Ministry of Communications has continued to reflect that the SABC would be profitable and therefore not provided for an increase in government appropriations. Such upbeat forecasting seemed to continue, even when both the SABC and the Ministry must have had an indication that the corporation was facing deficits given apparent increased expenditure and reductions in revenue.

The 2009 budget vote of the Ministry of Communications released in February 2009, for example, stated that the SABC would continue to be profitable, forecasting a profit of R485m in the year ending March 2009.⁴⁰⁵ In the discussion of the department's budget in the Portfolio Committee on Communications there was no indication of concern about the SABC's financial state of health.⁴⁰⁶

³⁹⁹ The Nielsen Company, "Audit Bureau of Circulations of South Africa: Adspend Trends", Powerpoint presentation, 14 February 2007, accessed from <http://www.abc.org.za/Manager/ClientFiles/CuteEditor/Images/ABC%20Final%20Feb%2008%20a.pdf>

⁴⁰⁰ The Nielsen Company, "Audit Bureau of Circulations of South Africa: Adspend Trends", Powerpoint presentation, 26 February 2009, accessed from <http://www.abc.org.za/Manager/ClientFiles/CuteEditor/Images/ABC%20Feb%2009%20PPT.ppt>.

⁴⁰¹ SABC Annual Report 2008/2009, pp. 8-9

⁴⁰² SABC Annual Report 2008/2009, p. 4

⁴⁰³ SABC Annual Report 2004, p. 47 and SABC Annual Report 2007, p. 25

⁴⁰⁴ SABC Annual Report 2007/2008, p. 23

⁴⁰⁵ Republic of South Africa, National Treasury, *National Budget Review 2009: Estimates of Expenditure: Communications budget, Vote no 24*, accessed from <http://www.treasury.gov.za/documents/national%20budget/default.aspx>

⁴⁰⁶ "Communications Department Strategic Plan and Budget 2008/2009", minutes of Portfolio Committee on Communications meeting, 11 March 2008, accessed from <http://www.pmg.org.za/report/20080311-communications-department-strategic-plans-budget-200809> on 14/11/2009.

Shortly after, however, newspaper reports started to emerge of a financial crisis at the broadcaster. The extent of the deficit was only confirmed in December 2009 when the SABC released its audited financial statements, and reported a financial loss of R910 million in the 2008/2009 financial year.⁴⁰⁷

The Corporation stated in Parliament that it had developed a plan to return to profitability and had applied for a government bank guarantee to secure a loan of R1.473 billion. The application was approved based on the plan presented by the SABC. In terms of the guarantee, the SABC has to report regularly on its progress in meeting revenue and expenditure targets so government can ensure that the guarantee is not called on.⁴⁰⁸

A new draft Public Service Broadcasting Bill published in October 2009 proposes that direct parliamentary appropriations and television licence fees be replaced by an earmarked tax on income. This tax is to be allocated to a Public Service Broadcasting Fund managed by the Media Development and Diversity Agency. The fund would not only provide subsidies to the SABC, but also to other broadcasters for public service programming. The draft bill also proposes a cap on commercial revenue, stipulating that this may not exceed the income from the PSB Fund and other non commercial revenue. At the time of writing, the tax model did not seem likely to be enacted into law as officials from National Treasury stated publicly that they would not consider such an earmarked tax.

2.1 Commercial revenue

In the 2007 Annual Report, former Group Chief Executive Officer, Dali Mpfu, singled out the predominance of commercial funding as “the single most important issue facing the corporation and all those who care for a true public service broadcaster which is accountable to the public and neither inherently susceptible to commercial nor state power”.⁴⁰⁹

Since 1994, a range of stakeholders including civil society organisations, media commentators, other broadcasters, and even the ruling party have echoed this sentiment. Some of the identified challenges associated with this dependence on commercial revenue include:

- The resultant over-emphasis on cheaper programmes (whether foreign programmes or less costly local formats) and/or genres which will attract more advertising (such as programmes targeting those with higher incomes) and audiences being regarded as consumers rather than citizens. As media commentator Anton Harber has highlighted, this plays out in a “daily tug of war between commercial and public service interests”.⁴¹⁰

This tendency is in part countered by tight licence conditions (introduced by ICASA in 2005) and regulations such as those on South African content. These set out minimum percentages for local programming in different genres and stipulate the minimum number of hours each week that must be dedicated to particular types of programming (such as education, drama, children’s programmes and news and information). Licence conditions also set out specific requirements for prime time programming.

⁴⁰⁷ SABC Annual Report 2008/2009 Page 9

⁴⁰⁸ “SABC Board welcomes R1.4billion bank guarantee”, BuaNews, 25 November 2009

⁴⁰⁹ SABC Annual Report and Financial Statements 2007, Group CEO’s statement, pp. 15-16

⁴¹⁰ A. Harber, “Tread carefully on SABC funding”, *Business Day*, 24 January 2008, accessed from <http://www.theharbinger.co.za/wordpress/2008/04/17/tread-carefully-on-sabc-funding/> (hereinafter referred to as A. Harber, “Tread carefully on SABC funding”)

However, as can be seen in ICASA's reasons for decisions on a range of matters (including South African content quotas, sports rights and the SABC's licence conditions), the effects any rules will have on the viability of the SABC are carefully considered before imposing requirements. The regulator cannot, given the current reality, ignore the impact any rulings could have on the SABC's sustainability.

- The impact advertising has on the amount of actual time devoted to key programmes such as news and current affairs. Former Head of SABC news Snuki Zikalala has, for example, lamented that the actual amount of news aired in a half hour prime time bulletin is closer to 22 minutes than 30 – given the time taken up by advertising. This affects the number of stories which can be covered, and the depth of coverage of individual stories.⁴¹¹ SABC Chief Financial Officer Robin Nicholson, however, noted in an interview that this has been countered to some extent by an increase in the number of bulletins aired by the SABC.
- The potential effect sponsorship can have on choice and content of programmes. Whilst ICASA regulations on advertising and sponsorship⁴¹² as well as SABC's own editorial policies emphasise that the broadcaster must retain editorial control of sponsored programmes, there have been concerns raised regarding adherence to this. The South African Communist Party (SACP), for example, in its submission on the draft editorial policies of the SABC in 2003, highlighted instances where it believed that the broadcaster's editorial integrity had been compromised. One example given was a financial literacy programme⁴¹³ sponsored by two financial institutions. The party complained that the programme did not deal broadly with financial issues facing the target audience but rather consisted of an "hour-long advertisement of a range of products and services" offered by the sponsors.⁴¹⁴ More recently, media critic Brendan Seery has complained about a sponsor's prominence in a television programme dealing with the environment. He wrote in an article in June 2008 that "Hybrid Living", airing during prime time on one of the SABC channels and sponsored by Toyota, focused excessively on Toyota products and that "there is no distinction made between the genuine content and the ad plugs ..."⁴¹⁵
- Given the SABC's dominance in broadcasting, commercial operators have raised concerns that the emphasis on commercial income limits the number of other broadcasters that can be viable in South Africa, and therefore diversity. Broadcasting's (radio and television) share of adspend according to AC Nielsen was 51 per cent of the total in 2009.⁴¹⁶ SABC's share of this is predictably high (accounting, for example, for 69 per cent of all free-to-air television adspend in 2008⁴¹⁷) given the number of channels and stations it airs compared to commercial and community operators.

⁴¹¹ Zikalala has highlighted this at a range of conferences including at an SABC conference on the funding of public broadcasting held on 24 March 2006 in Johannesburg.

⁴¹² Independent Broadcasting Authority, *Advertising, Infomercials and Sponsorship Regulations*, 1999 – R426/99

⁴¹³ *Wena Namali Yako (You and your money)*

⁴¹⁴ South African Communist Party, "Submission on the Draft Editorial Policies of the South African Broadcasting Corporation", 13 June 2003

⁴¹⁵ B. Seery, "Sneaky product placements", published in the *Saturday Star* on 28 June 2008

⁴¹⁶ The Nielsen Company, "Audit Bureau of Circulations of South Africa: Adspend Trends",

Powerpoint presentation, 26 February 2009, accessed from

<http://www.abc.org.za/Manager/ClientFiles/CuteEditor/Images/ABC%20Final%26Feb%2009%20a.pdf>

⁴¹⁷ AdDynamix January to December 2008, quoted from: Submission by e.tv (PTY) Limited on the Public Service Broadcasting Discussion Document to the Department of Communications 31 August 2009, accessed from http://www.doc.gov.za/index.php?option=com_docman&task=doc_view&gid=117

The head of commercial television channel *e.tv*, Marcel Golding, echoed the concerns raised by many private broadcasters when he spoke at a conference on fair competition:

The sheer size of the SABC provides it with a distinct uncompetitive advantage. With three (free-to-air) television channels and 21 radio stations, it is able to offer advertising packages which other broadcasters cannot match. It is also able to monopolise the audience by using its multiple channels to promote its services. It is the only broadcaster in the country which operates national commercial radio services which provides it with a sizeable advantage over its private sector competitors.⁴¹⁸

The contradictions resulting from the SABC's legislative obligation to deliver on its public mandate whilst relying on commercial funding are further exacerbated by its licence conditions. As noted above, these do not distinguish between the number of minutes of advertising allowed on the public or commercial divisions (despite the White Paper on Broadcasting's declaration that commercial funding for the public wing should not be the most dominant source of revenue). SABC's public services are allowed the same amount of advertising as its commercial services – and the same as private free-to-air channel *e.tv* (a maximum of 12 minutes per hour).

In fact, judging from SABC rate cards, advertising on public television service SABC 1 is substantially more expensive than on the commercial channel SABC 3 – reflecting the higher audience figures. The November 2009 rate cards for the channels show that a 30 second advertising slot during primetime news (7.30pm) on public channel SABC 1 would cost R71 000, whereas a slot during primetime news on commercial channel SABC 3 would cost R42 000.⁴¹⁹

Whilst SABC does not provide a breakdown in its financial reports of the profitability of individual channels and stations, it would seem from the above that the public television channels may be more profitable than the commercial one. Competitor *e.tv*, citing AdDynamix figures for 2008, points out that the SABC derives more than two-thirds (68 per cent) of its advertising revenue from public service channels SABC1 and SABC2 and the remaining 31 per cent from its commercial channel SABC 3.⁴²⁰

2.2 Licence fees

In terms of the Broadcasting Act (Section 27), all owners of a television set or any device capable of receiving a television signal (for example, an enabled mobile phone) have to have a television licence. No fee is payable for possession of a radio set.

The licence is renewed annually in advance, and only one licence is needed per owner - regardless of the number of television sets they possess. Organisations and businesses, however, need to have a separate licence for each set. Dealers in television sets have to have a separate dealers' licence.

The fee is determined by the Minister of Communications in regulations – on application by the SABC (Section 40 of the Broadcasting Act).

⁴¹⁸ M. Golding (CEO *e.tv*), "Promoting competition in a protected economy", paper presented to a conference on competition and development organised by the Competition Commission, 2003

⁴¹⁹ *SABC 1* and *SABC 3* advertising rate cards, accessed from <http://www.sabcgroupsales.co.za/new/site.asp?page=ratecards.asp&nav=tv>

⁴²⁰ Submission by *e.tv*, op.cit.

The SABC is responsible for collection of fees and ensuring compliance with the law. Sections 27(3) and (4) of the Act set out penalties the corporation can impose for failure to possess a valid television or dealer licence:

- If a person has owned the television for over three years without a television licence, they have to pay double the fee owed.
- If the transgression is for under three years, the person is liable for a fine of 10 per cent of the licence fee for every month of default.
- If a dealer sells a television set to a person who does not possess a television licence, the dealer has to pay a fine of between R3 000 to R10 000.

Section 27(8) of the Act stipulates that licence fees can only be used to subsidise the public wing of the SABC (both radio and television).

The regulations on television licence fees, promulgated by the Minister in 2004, empowered the SABC to more effectively collect licence fees by requiring that dealers cannot sell a television set without proof that the buyer has a valid licence. Dealers have to submit monthly and annual reports of television sets sold – including details of the names, addresses and ID numbers of purchasers.

The regulations also set out the fees for different categories of user:⁴²¹

- Domestic users, businesses and dealers have to pay R225 per annum.
- People who receive either a state pension or social grant for disability or as a war veteran and any person over the age of 70 have to pay R65 a year.
- Public schools are exempted from payment of the fee.

There is, however, no built-in inflation linked increase in these regulations or in the law, and since 1994, the television licence fee has only been increased three times (in 1996, 1998 and 2004). The SABC regularly states in its annual reports that attempts to increase the licence fees have failed; however, no details are given of specific refusals by the Minister of any applications. In the 2007 Annual Report Chief Financial Officer Robin Nicholson states that should there not be regular increases of fees, “growth in net revenue will begin to decline and is likely even to decline as a percentage of revenue”, a prediction that was confirmed by the 2008 Annual Report.⁴²²

The SABC has also complained about having to pay Value Added Tax (VAT) on television licence income and asked for this to be scrapped. CFO Robin Nicholson expanded on this in an interview for this research:

The VAT that is included in the licence fee amounts to roughly R110m. Should the licence fee be collected by a non profit entity (Section 21 company) established by the SABC, we would not have to pay the VAT and if licence fees remained the same this money would be added to the general SABC pot.⁴²³

Whilst the SABC has increased compliance with the legal requirement to possess a television licence, it has been a difficult and costly process. Under apartheid, in protest against state control of broadcasting, there was a mass boycott of paying licence fees to the SABC and it has been challenging to turn this culture of non-payment around. In addition, poverty (alongside other factors) results in defaults once people have bought the initial licence.

⁴²¹ Ministry of Communications, *Regulations regarding television licence fees*, Notice 151 of 2004, published in Government Gazette no 25959 on 28 January 2004

⁴²² SABC Annual Report 2007, p. 25

⁴²³ Robin Nicholson was interviewed on 25 June 2008

The SABC estimated in 2008 that there are about 8.6 million television households in South Africa.⁴²⁴ According to the 2007 annual report, the number of licence holders stood at about 5.3 million (just under half of whom were fully compliant, with others only partially paid up or defaulting), and no figures are given in the 2008 and 2009 annual reports. Whilst the SABC has not provided new estimates of piracy rates since its 2004 annual report (which stated that piracy stood at about 38 per cent)⁴²⁵, it seems from a rough calculation using the 2007 figures that about 33 per cent of television households do not possess a television licence at all (and are therefore not logged on SABC databases). Of the 62 per cent of households that are on the databases, just over 50 per cent are either defaulting or only partially paid up.

Nicholson predicted that the percentage of defaulters will increase as South Africans face increasing financial challenges due to high inflation.

Despite this, and even though increases in fees have not matched inflation, the SABC has, through ensuring compliance with the law, increased the contribution of licence fee revenue to overall revenue. Licence fee income accounted for 15 per cent of total revenue in 2004, 17 per cent in 2008⁴²⁶ and 18 per cent in 2009.⁴²⁷ The increase in television penetration due, among other things, to economic growth and the extension of electricity and television networks, has also contributed to this.

This state of affairs will however be difficult to maintain as collection costs increase in line with inflation. In the 2008 annual report, Nicholson wrote that income from television licence fees for the period April 2007 - March 2008 dropped by one per cent, compared to an increase of one per cent in commercial revenue. Direct licence fee collection costs meanwhile grew, although the report did not say by how much.

In his interview for this research, Nicholson noted that, as of June 2008, it cost the SABC close to R110 out of the licence fee of R225 per year to collect the fee from defaulters. "This makes it still worthwhile for us as we get about R115 as well as the penalties applicable. If we do not receive an increase though in the licence fee, the costs of collection could outweigh the benefits."

The challenges related to collection of licence fees, among other things, have resulted in calls for a review of the licence fee as a mechanism for funding.

- The IBA in its Triple Inquiry Report suggested that other mechanisms should also be looked at, such as a tax on purchase of cars with radios. It rejected the idea of a proposed tax on electricity because the number of different agencies responsible for collecting electricity fees (including the national electricity company Eskom and local municipalities) would make it difficult to manage and enforce.
- The Freedom of Expression Institute (FXI) and Media Monitoring Africa (MMA, known as the Media Monitoring Project until 2008), among others, have proposed that a broadcasting tax should be considered which would be collected by the South African Revenue Service (SARS) together with income and company taxes. MMA suggested that the tax be set by SARS on recommendation by the broadcasting regulator.⁴²⁸ It

⁴²⁴ Ibid.

⁴²⁵ SABC Annual Report 2004, p. 110

⁴²⁶ SABC, Annual Report 2004 and Annual Report 2007

⁴²⁷ SABC Annual Report 2008/2009, p. 11

⁴²⁸ Media Monitoring Project, "Presentation to the Independent Communications Authority of South Africa: SABC Licence Amendment Application", 17 September 2004, accessed from http://www.mediamonitoring.org.za/Portals/0/MMP_ICASA_SABC_Presentation.pdf

was argued that this would also ensure increased subsidisation by wealthier South Africans.⁴²⁹

- The South African Communist Party (SACP) in its submission on the SABC's editorial policy proposed that the fee be scrapped altogether:

Funding the SABC through the TV Licence Fees is inappropriate; the collection process is expensive, and is unlikely to improve given the rise in unemployment levels and low wages for the majority of employed workers. When the poor cannot afford to pay for these licences, they are criminalised. TV License Fees are also a form of regressive taxation which is not linked to employment status and income levels.⁴³⁰

Chief Financial Officer Robin Nicholson says the SABC is well aware that there are people who cannot afford the fee.

We do not go after poor people given this but focus our efforts on those defaulters who are wealthy and can well afford the fee. As inflation is increasing in South Africa we know there will be more and more people who default on payment of their annual television licence due to poverty. In light of this, we are suggesting that government consider statistics on income and exempt people who cannot afford to pay the licence fee from payment. At the same time though, the government should pay over to the SABC a subsidy for low income earners so that we do not bear this cost.

In August 2009, the Minister of Communications approved an 11 per cent television licence tariff increase from R225.00 to R250.00 annually as from 1 August 2009: only the third tariff increase in the past eleven years. According to the SABC, had it been allowed annual inflation-related tariff adjustments since 1998, the current R250.00 fee would now stand at R426.00.⁴³¹

2.3 Public funds

Direct allocations

Direct government allocations to the SABC account for an insignificant proportion of overall revenue (two per cent in the 2007/2008 financial year, excluding funding for the digital technology plan) – despite the broadcaster's increased mandate due to transformation.

As US scholar Robert Horwitz notes in research on the SABC, a lack of funding from the fiscus has negatively affected the public broadcasting vision in South Africa since 1994:

... the dismal (SABC) budget situation inherited from the last white government doomed even the positive feature of this vision (of transformation). With housing, education, and health care desperately in need of public monies, and with a sizeable portion of the budget precommitted to honoring state pensions as per the transition agreements, the government declined to allocate funds to an institution that had a proven source of funding.⁴³²

⁴²⁹ Independent Broadcasting Authority, Triple Inquiry Report, p. 84

⁴³⁰ South African Communist Party, "Submission on the Draft Editorial Policies of the South African Broadcasting Corporation", 13 June 2003

⁴³¹ "Television licence tariff increase approved by the government", SABC press release, 4 August 2009, accessed from <http://www.sabc.co.za/> on 14/11/2009

⁴³² R.B. Horwitz, "Negotiated Liberalization: Stakeholder Politics and Communication Sector Reform in South Africa", 2001, accessed from <http://www.arxiv.org.html/cs/0109097>

Whilst government allocations are approved by Parliament as part of the Department of Communications allocation on a triannual (rather than annual) basis, as recommended by the then IBA in its Triple Inquiry Report, there appear to be no specific criteria for their determination. Thus, for example, it is difficult to analyse whether or not ongoing funds are allocated to specific projects (such as transmission costs and/or particular programme genres such as education) and on what basis levels of funding are decided upon.⁴³³

Government funding to the broadcaster has fluctuated. In her 1999/2000 budget the Minister of Communications noted that the subsidy of over R200 million would be reduced to just over R68 million in 2002/2003⁴³⁴; however, since then the allocation has gone up again in recent years.

A recommendation by the ANC in 2002, stipulating that the SABC must be predominantly funded by public revenue, also had no effect on the SABC's budget. Joe Mjwara was the Deputy Director General responsible for broadcasting in the Department of Communications (DoC) at the time.⁴³⁵ He says the reluctance by Treasury to consider implementing the ANC resolution was due to a combination of factors:

Treasury was reluctant to provide a subsidy to an entity that they saw as self-sufficient. They would ask if there was a specific legal requirement to fund the SABC and did not understand the social needs that were being neglected due to the over-reliance on commercial funding.

At the same time the SABC did not assist us, as their budget applications did not clearly define what aspects of their mandate public funds would contribute to, nor the implications on their mandate of limited public funding ... Despite suggestions made to, for example, restructure the programming line-up during prime time to ensure a better language reflection and include regional broadcasting splits, the SABC fought against these and advocated for the status quo ...

It seemed that when the SABC spoke about public funding, it was just talking about an additional source of revenue to do the same commercialised broadcasting ... It was difficult, given this, to argue with Treasury that the public broadcaster could not meet its legislative mandate without more funding. The SABC never, for example, showed how it would look and sound different with increased public funds ... There has to be a public broadcasting model that is different to that expressed by how the SABC looks and sounds.⁴³⁶

Mjwara says that the White Paper on Broadcasting and the Broadcasting Act were aimed at addressing some of these issues, by ensuring that the SABC was given a clear legal mandate through its Charter and that compliance with this and licence conditions would be monitored by the broadcasting regulator. The Act was also aimed at involving the public both in drafting editorial policies and, via ICASA processes, in setting the licence conditions. The legislation, moreover, provided for greater financial accountability by requiring adherence to the Public Finance Management Act and company governance rules. "The legislation has gone some way towards ensuring this", he says. "However it is time to review the policy and legislative framework alongside the funding model."

At the ANC's policy conference in December 2007, the party resolved that the percentage of public funding for the public broadcaster should be increased incrementally to a minimum of

⁴³³ This excludes those funds allocated for SABC's technology plan which are identified by government as a once-off allocation of R700m.

⁴³⁴ National Treasury, 2000 *National Expenditure survey: Communications Budget*, accessed from http://www.treasury.gov.za/documents/national%20budget/2000/ene/vote_26.pdf

⁴³⁵ Mjwara was at the Department of Communications from 1997 to 2005

⁴³⁶ Interview with Joe Mjwara, Previous Director General Multi Media, Department of Communications, held on 25 May 2008

60 per cent of revenue by 2010. Yet this resolution had little noticeable impact on the SABC's budget. The 2009 budget of the Minister of Communications grants the SABC an additional R20 million in the 2009/2010 financial year (a 7 per cent increase). For the following years the vote envisages a further increase of R88m for the 2010/2011 financial year (29 per cent) and then a 35 percent drop in 2011/2012 (from R388 million to R252 million).⁴³⁷

The budget vote estimated SABC's expenditure for the 2010 financial year to be close to R5.66 billion and still predicts that the bulk of this will be covered by advertising revenue (R4.1 billion), with funding from the fiscus therefore only amounting to about 4.7 per cent of income.

Other government funding

Government departments do fund the SABC outside of the public allocation through, for example, purchasing advertising and sponsoring programmes.

In terms of the Public Finance Management Act, the SABC has to report on income from related parties – including all national government departments and major public entities, but excluding provincial and local government. This income amounts to approximately R249 million for the 2008/2009 financial year (seven per cent of commercial revenue) – though it is not clear how much of this can be attributed to programme sponsorship and production and how much to advertising.

Government is listed by Nielsen Media Research as one of the top ten advertisers in the media - ranking 5th in 2008.. Whilst figures on how this is allocated differ, there are indications that radio stations broadcasting in official languages other than English are key beneficiaries of this spend.

According to Nielsen (which measures total adspend) the print sector receives the largest proportion of these funds (47 per cent), presumably due to the large number of job vacancies advertised. Radio also attracts a significant portion (31 per cent) and 18 percent of the government advertising money is spent on television.⁴³⁸

The Government Communication and Information System (GCIS), however, states that of the R206m of advertising that it bought on behalf of other government departments in the 2007/2008 financial year, 44.2 per cent accrued to radio, 22.8 per cent to print and 22.06 per cent to television.⁴³⁹

Individual government departments also sponsor specific programmes. GCIS has for example partnered with SABC to produce and air a 13-part television and radio series, *Azisha Ke! Opportunity Knocks*. According to the 2007 budget speech of the then Minister in the Presidency, Essop Pahad, the GCIS was responsible for the production of the

⁴³⁷ Department of Communications, Budget Vote No 24

⁴³⁸ See endnote 28

⁴³⁹ Minister Essop Pahad, "Address on the occasion of the Government Communication and Information System Budget Vote (No 7) 2008", delivered in the Parliament of South Africa on 8 May 2008, accessed from [http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F2008%2F08051416071001.htm%40SpeechesandStatements&q=\(\(e+pahad\)%3CIN%3ETitle\)++%3CAND%3E\(+Category%3Cmatches%3Es+\)&t=E+Pahad%3A+Government+Communication+and+Information+System+Dept+Budget+Vote+2008%2F09](http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F2008%2F08051416071001.htm%40SpeechesandStatements&q=((e+pahad)%3CIN%3ETitle)++%3CAND%3E(+Category%3Cmatches%3Es+)&t=E+Pahad%3A+Government+Communication+and+Information+System+Dept+Budget+Vote+2008%2F09)

programme which he said was aimed at expanding “access to information about economic opportunities provided by second economy initiatives and programmes”.⁴⁴⁰

In addition, Ministers and top government officials apparently sponsor journalists to attend and cover international and national events that the SABC would otherwise not have the means to report on.

2.4 Cross subsidisation

One of the key motives for the separation of the commercial and public channels and stations in the SABC, according to the White Paper, was to reduce the commercial influence on public programming. It was further envisaged that the commercial wing would cross-subsidise the public wing.

This vision, however, does not seem to have worked in practice.

It is not clear how the SABC decided which channels would be deemed commercial (though the radio stations selected were more obviously commercial, if not money making, even before the introduction of the Act) - those who were in decision-making positions in the SABC at the time of finalising this report have all left the broadcaster so there is limited institutional memory. As noted already, however, there is the curious fact that one of the two public channels, SABC 1, actually commands higher advertising rates than the commercial channel SABC 3, and it thus seems unlikely that there would have been any subsidisation by SABC 3 given this.

Whilst SABC annual reports clearly state (as required by law) that the public funds have not been utilised to subsidise the commercial division, there is no indication in these documents if there has been any subsidisation by the commercial wing of the public services.

Nicholson confirmed in an interview that there had not been a formal hand-over of funds from the commercial division to the public wing. He also pointed out that it is very difficult to separate the two units completely:

It is impractical. How for example do we allocate the shared overheads to the different divisions? If for example a commercial radio station is using the same transmitter in an area as some of the public service stations, how do we decide which of the stations pays what costs for that transmitter? In some ways it is just guess work.

According to statements by both the SABC and the Department of Communications during the process of developing the White Paper, an economic study had shown that the model of cross-subsidisation would reduce the public wing’s dependence on advertising revenue. However, this economic study was not made available to other stakeholders and it is therefore hard to assess the causes of the apparent failure of this model.

2.5 Other grant funding

SABC public programmes are funded by other organisations – including donor organisations and corporate social responsibility funds. Many of the programmes financed in this way have

⁴⁴⁰ Minister in the Presidency, Essop Pahad, *Government Communication and Information System Dept Budget Vote 2007/08*, 15/05/2007, accessed from http://www.polity.org.za/article.php?a_id=109161

won international awards for excellence – providing evidence of the quality that could be aired with sufficient means.

Programmes which have been funded in this way over recent years include:

- *Heartlines* – This eight part television series focused on eight different generally shared moral/societal values through individual stories. It was produced in partnership with the SABC and primarily sponsored by First National Bank through its social investment fund. Additional funding was provided by the Nelson Mandela Foundation, the John Templeton Foundation, World Vision, the Open Society Foundation and the Tides Foundation.⁴⁴¹ Episodes of the series have been selected to be screened at a range of international film festivals and have won both local and international awards.
- *Soul City* and *Soul Buddyz* – These radio and television edu-dramas focused on health and development and were produced by the Soul City Institute. The Institute is funded by a range of international and local donors including BP, the Department of Health, the European Union, Development Cooperation Ireland, Royal Netherlands Embassy, the United Kingdom’s Department for International Development, Pefpar, De Beers and the Department of Public Service and Administration.⁴⁴²
- *Tsha-Tsha* – a drama focusing on HIV/AIDS produced for the SABC by the Centre for Aids, Development, Research and Evaluation. It was funded by USAID.
- *Masupatsela Trailblazers* – A documentary programme which focused on individuals and communities tackling HIV/AIDS creatively. The series, which was aired on radio and television, was sponsored by USAID, among others.

3. Expenditure

The table below highlights key expenditures (and percentage changes from previous years).

Table 7: Key expenditure budget lines

Expenditure	2009 (% change)	2008	2007	2006	2005	2004	2003
Programme and broadcast costs ⁴⁴³	R1.955bn (9%)	R1.92bn (22.5%)	R1.57bn (17%)	R1.34bn (2%)	R1.31bn (15%)	R1.14bn (6%)	R1.083bn (13%)
Signal distribution	R444m (17.5%)	R378m (13.9%)	R332m (5%)	R315m (5%)	R300m (5%)	R286 (8%)	R264 (16%)
Employee costs	R1.637bn (15.2%)	R1.493bn (38.24%)	R1.1bn (9%)	R990m (21%)	R816m (6%)	R771m (17%)	R657m (6%)

⁴⁴¹ Information accessed from <http://www.heartlines.co.za>

⁴⁴² Information accessed from <http://www.soulcity.org.za>

⁴⁴³ Broadcasting costs according to CFO Robin Nicholson include the salaries of presenters on television and radio

Marketing	R263m (4%)	R253m (-0.4%)	R254m (42%)	R179m (29%)	R139m (7%)	R130m (16%)	R112m (4%)
Licence collection costs	R176m (15.8%)	R152m (26.7%)	R120m (10%)	R109m (45%)	R75m (19%)	R63m (2%)	R62m (24%)
General and admin costs	R611m (63.4%)	R469m (-16.1%)	R559m (54%)	R390m (5%)	R371m (26%)	R294m (10%)	R267m (8%)
Equipment costs (including software)	R194m (38.6%)	R138m (-6.8%)	R148m (15%)	R129m (1%)	R128m (52%)	R84m (-8%)	R91m (23%)
Income tax	R123.49m	R52.86m	R76.3m	R162.9m	R96.2m	-	-
Total expenditure	R4.746bn (7%)	R4.41bn (8%)	R4.1 bn (19%)	R3.46 bn (10%)	R3.15bn (13%)	R2.78 bn (10%)	R2.54 bn (11%)
Profit for the year	(R790m)	R321.3m	R182.8m	R382.9m	R194m	R1.6m	(R149.8)

Source: SABC 2009, 2008, 2007 and 2006 Annual Reports

As can be seen from these figures, administrative costs (rather than programming costs) went up significantly in 2006/2007 – accounting for the overall increase of 19 per cent in expenditure against a revenue increase of only 8 per cent. The figure decreased by 2008, only to balloon again by 2009. The SABC has attributed the spending increases to investment in technology and increased marketing costs due to the repositioning of its channels in line with new licence conditions. Media analysts, however, have raised concerns that this might indicate a new general trend towards increased spending.⁴⁴⁴ It also needs to be pointed out that the general costs for the year 2006/2007 included a close to 200 per cent increase in expenditure on consulting (up from R44 million in 2005/2006 to R132 million), although this line item decreased by 2008. Expenditure on professional and consulting fees was included as a separate line item in the 2008/2009 Annual Report, which showed that the SABC had spent 38.2 per cent more on these services than in the previous year.

The SABC CFO Robin Nicholson concurred in an interview that the SABC needs to focus on increasing its efficiencies and that costs could be brought down and overheads reduced: “In addition we could for example much more effectively exploit those rights that we own and increase the contribution they make to the revenue.”

It is important to emphasise, however, that the spending increases are not only on administration. The reported expenditure on South African content also went up – as did expenditure on news. The 2007 Annual Report claimed that spend on foreign content for that year accounted for 17 per cent of total content spend (compared to 20 per cent in 2006 and 30 per cent in 2005).⁴⁴⁵ According to the 2007/2008 Annual Report, the 22 per cent increase in amortisation and impairment⁴⁴⁶ of programming, film, sports rights and broadcast costs was driven by the extended mandate, in particular news and local programming.⁴⁴⁷ According to the 2008/2009 Annual Report, foreign programming accounted for as much as 46 per cent

⁴⁴⁴ See for example M. Motloung and T. Mabanga, *Financial Mail*, “Broadcasting Dirty Laundry”, 9 June 2008, accessed from <http://blogs.fm.co.za/?wpmu-feed=posts>

⁴⁴⁵ SABC Annual Report 2007, p. 26

⁴⁴⁶ Impairment is where the total profit estimated to be generated by a capital asset over a period is compared with its book value, and a gain or loss is posted depending on the difference.

⁴⁴⁷ SABC Annual Report 2008, p. 26

of total content expenditure, which means that the SABC spent considerably less on local content in that financial year.⁴⁴⁸

Reporting

Whilst the financial statements meet financial reporting requirements, neither they nor the annual reports provide clear information on details of spending that would assist the public to understand exactly how public funds are used – and thus help to make the SABC more accountable to citizens. They do not, for example, outline the percentages spent on administration versus programmes, or comparative spending on programming in the different languages (a fair measure of equitable treatment). They further do not break down spending per station or channel – which would be important given perceptions expressed by amongst others the FXI that administration and head office are consuming a disproportionate percentage of funds.

In fact, the extent of analysis of the financial information provided in the CFO's report has decreased markedly over the past few years. In 2004, for example, the annual report provided detailed segmental analysis indicating, among other things, the breakdown between revenue and expenditure between the public and commercial services and between television and radio.⁴⁴⁹ Such information was not included in the 2008 report. The 2006 annual report indicated how licence fee revenue was allocated (including how much was expended to support overheads and the exact amounts allocated to the public radio stations and the two SABC public television channels).⁴⁵⁰ This breakdown too was not contained in the 2008 reports. However, the 2009 Annual Report does include revenue and expenditure breakdowns for the public services and public commercial services.

An analysis of the figures provided seems to indicate that administration costs are increasing as a percentage of total expenditure, whilst the percentage allocated to programming costs is decreasing.

Table 8: Percentage of expenditure per budget line

Line item	2009 (percentage of overall expenditure)	2008	2007	2006	2005	2004	2003
Programme and broadcast costs	41.2%	43.5%	38.3 %	38.7 %	41.6%	41%	42.5%
Signal distribution	9.4%	8.6%	8%	9%	10%	10%	10.4%
Employee costs	34.4%	33.8%	26.8%	28.6%	26%	27.7%	25.87%
Marketing	5.6%	5.7%	6.2%	5.2%	4.41%	4.7%	4.4%
Licence	3.7%	3.4%	2.9%	3.2%	2.4%	2.3%	2.4%

⁴⁴⁸ SABC Annual Report 2009, p. 12

⁴⁴⁹ SABC Annual Report 2004, p. 44

⁴⁵⁰ SABC Annual Report 2006, p. 36

collection costs							
General and admin costs	12.9%	10.6%	13.6%	11.3%	11.8%	10.6%	10.5%

Source: Own calculation⁴⁵¹

Table 10 shows that the percentage of consolidated administration costs has grown by close to ten per cent from 2003, and that since the 2008/2009 financial year (2008 in the table) the percentage of spend on such operational costs has been exceeding that on programme costs by between 6-8 per cent. In 2003, by contrast, the percentage spent on programme and broadcast costs exceeded that of administration.

Table 9: Percentage of expenditure on consolidated administrative costs versus programme costs

Expenditure description	2009	2008	2007	2006	2005	2004	2003
Programme and broadcast costs	41.2%	43.5%	38.3 %	38.7 %	41.6%	41%	42.5%
Administration costs (including employee costs, general costs and marketing)	52.9%	50.1%	46.6%	45.1%	42.21%	43%	40.8%

Source: Own analysis

Since the Public Finance Management Act has been in force at the SABC, the broadcaster has been compelled to detail costs related to irregular, fruitless and wasteful expenditure. However, no information at all is given on the circumstances in which fruitless expenditure was incurred, and irregular expenditure and criminal cases are only briefly referred to. Overall, the losses accrued through such irregularities amounted to R65.1m in 2006/2007. Most of these were losses related to fruitless expenditure (defined as expenditure made in vain that could have been avoided had reasonable care been exercised) - a total of R54m. Although a significant amount, the only information provided is that disciplinary action is being taken in "cases 6 and 7"⁴⁵² and the minutes of the Parliamentary Monitoring Group (PMG)⁴⁵³ give no indication that Parliament scrutinised these amounts or asked for further clarification. There is also no word about progress in cases covered in the 2006 annual report, which stated that outstanding recoveries amounted to about R6.2m. According to the 2008 annual report, the SABC ran up R40.6m in "fruitless and wasteful expenditure". There is evidence in the 2009 Annual Report of some success in recovering such expenditure.⁴⁵⁴

Given the absence of detailed information, it is impossible to analyse what is classified as fruitless expenditure. Robin Nicholson (SABC CFO) said that costs incurred, for example, in putting together a bid for a subscription licence which was withdrawn on the eve of the

⁴⁵¹ Note that the percentages do not add up to 100% as certain budget lines are not included in the analysis, including income tax and equipment purchases.

⁴⁵² SABC Annual Report, Financial Statements, Note 42, p. 44

⁴⁵³ PMG is an NGO which minutes all Parliamentary Committee meetings

⁴⁵⁴ SABC Annual Report 2008/2009, pp. 70-71

hearings into applications in 2007, would not be regarded as fruitless expenditure as they “were not wasteful”.⁴⁵⁵

This is debatable. The SABC, according to newspaper reports, stated that the reason for its withdrawal was that it wanted rather to be a content supplier to those awarded licences.⁴⁵⁶ Such a decision makes business and strategic sense for a public broadcaster and it seems that this conclusion could have been reached before submitting the application and incurring the costs of finalising the application. These costs, according to unconfirmed sources, included consulting fees which ran into millions.

Such apparent misjudgements are particularly concerning given recent expenditure hikes at the SABC as highlighted above.

The previous board has also been accused of wasting money in its extended and unsuccessful legal battle against the former SABC CEO Dali Mpofu. The board lost with costs a court challenge against its suspension of the CEO in May 2008 after the judge found that there had been procedural irregularities. It also lost an application to challenge the decision. Newspapers have estimated the costs incurred in the process as R5m⁴⁵⁷ – not counting the payout that the interim board granted to Mpofu when he finally left the broadcaster in mid 2009.

Joe Mjwara, previous head of broadcasting in the Department of Communications, said in an interview that one of the difficulties with the SABC is its sense of a lack of accountability on spending:

The SABC has tended to view the funds it collects through advertising and sponsorship as its money to do what it wants with. It does not recognise that it is accountable for the commercial revenue as this is collected through management of a public asset.

4. Conclusion and recommendations

The resolution of the public broadcasting funding conundrum is perhaps the core public broadcasting issue that needs to be resolved in South Africa.

As reflected above, funding issues have been at the heart of tussles over the role the public broadcaster should play in the country since the process of transformation of the SABC commenced in 1993. Various attempts and proposals to resolve the funding dilemma (by the regulator, government and the ruling party, among others) have not been successful in ensuring that the SABC is appropriately and adequately funded to meet its legislative mandate “in a manner that protects (it) from arbitrary interference” as required by Article 6 of the Declaration of Principles on Freedom of Expression of the African Commission on Human and Peoples’ Rights. Instead the over-reliance on commercial income has meant that the broadcaster is forced to consider audience ratings over public need.

There are no quick fixes, however – and perhaps the failure of existing mechanisms can at least partly be ascribed to the apparent absence of a thorough and holistic economic

⁴⁵⁵ Interview with Robin Nicholson, 25 June 2008

⁴⁵⁶ T. Mochiko, “Sentech pulled out of pay tv licence to save face”, published in *Business Report*, 17 September 2007, accessed from <http://mybroadband.co.za/news/Telecoms/1330.html>

⁴⁵⁷ ‘Dali Mpofu cost the SABC more than R22 million’, South African Press Association, 17 August 2009, accessed from <http://www.ofm.co.za/news.asp?nid=3236> on 14 November 2009

analysis of the SABC's needs and an in-depth review of the impact of different funding models.

The issues surrounding funding and autonomy are complex. It would be simplistic, for example, to reduce them to the maxim "s/he who pays the piper calls the tune". The problems highlighted in this chapter cannot be solved just by insulating the SABC from its sources of funding. The SABC has often been seen to be 'kow-towing' to the ruling party (or particular cliques or individuals within the ANC) - despite government's paltry contributions to the broadcaster.

Given all of this, it would be rash, based only on this research, to propose final solutions on the best funding mechanisms for public broadcasting in South Africa. Rather than recommend yet another set of seemingly ideal but untested models, it is recommended that an in-depth economic scoping exercise be conducted, including a review of the pros and cons of different models in the South African context. Such an evaluation should ensure the participation of all stakeholders in developing the best mechanisms for funding of public broadcasting in this country.

It will also be critical during this exercise to determine the actual needs of the SABC in relation to its mandate – and to ensure transparent accounting in order to build the necessary trust amongst the public, government and advertisers essential to securing its income. The predicted reduction in available advertising spend and the potential increase in the number of television licence fee defaulters given an economic downturn in the country also need to be noted.

Outlined below are some considerations that should guide this evaluation.

- The development of any model should be underpinned by the following principles:
 - The need to protect the SABC from either perceptions or the reality of political or commercial interference or manipulation through funding.
 - The imperative of enabling the public broadcaster to plan with certainty, whilst moderating demand-driven pressures for funding by the SABC
 - The importance of establishing a durable and justifiable level of funding, taking into account new contexts such as the migration to digital broadcasting.
 - The importance of maximising transparency – so that the SABC itself, other broadcasters and the public are aware of the motives for funding allocated by the state and through any fees/taxes paid by the public.⁴⁵⁸

The research should be undertaken as part of a total review of all government and regulatory policies – including the Triple Inquiry Report, the White Paper on Broadcasting and the Broadcasting Act. The economic analysis of funding should be fed into any new policies and/or legislation to ensure that the mandate of the broadcaster is not only relevant but also viable both immediately and in a new digital environment. The overall review should include:

- Another look at proposals made in the Triple Inquiry Report to streamline the SABC and thus increase cost effectiveness. New opportunities arising from digital migration should be taken into account, such as the potential

⁴⁵⁸ These ideals underpin the debates on broadcasting in many countries around the world. The formulation here though is adapted from a study done by the New Zealand Ministry of Culture and Heritage in December 2005 entitled *Mechanisms for setting broadcasting funding levels in OECD countries*. The research was conducted by the School of Communication, Unitec, New Zealand and was accessed from <http://www.mch.govt.nz/publications/broadcast-funding/MCH-OECD-Funding-Report.pdf>.

development of additional channels and mechanisms to assist the SABC to meet its mandate on, for example, delivery of programming in all official languages.

- A re-evaluation of the effectiveness of the separation of the SABC into public and public commercial arms. As noted above, a primary motivation for this division was to provide for cross-subsidisation of public broadcasting and thus reduce its reliance on commercial income. This, however, has not been effective.

Such evaluation must also reconsider the legal status of the SABC as, again, the original motivation for corporatisation was based on commercialising certain aspects of the broadcaster.

- A review of all relevant licence conditions and regulations in light of any new policy and legislative requirements. This should include an evaluation of programming requirements and of advertising limitations.
- A thorough analysis needs to be done of the actual funding needs of the SABC – given its mandate. Financial costs must be linked to public interest value and traceable to enhanced delivery of services. This could include a study into how other countries benchmark public broadcasting funding, taking into consideration not only inflation, but also possible new imperatives.
- A workable mechanism for evaluating and determining ongoing levels of funding for the broadcaster (and, for example, appropriate licence fees or other levies) and for the distribution of such funds needs to be devised. This should include an analysis of the pros and cons of both existing and alternative mechanisms in relation to the principles outlined above. This review could consider a number of options:
 - The strengths, weaknesses and appropriateness of the existing mechanism of determining funding levels via the Board, Minister, Treasury and finally Parliament. The different roles of each structure and their capacity to effectively evaluate proposed budgets and spending should be analysed. Note must be taken of the fact that concerns regarding the capacity of parliamentarians to properly scrutinise and consider funding needs of institutions were highlighted as one of the shortcomings of the parliamentary allocation system by the ad hoc committee established to review oversight by the legislature of constitutional bodies.
 - The pros and cons of adapting the present Parliamentary allocation system in order to strengthen the legislature's role in determining appropriate levels of funding. The SABC budget and proposed allocation from government could, for example, be considered separately from that of any particular government department, as recommended by the ad hoc committee, and be tabled as part of the Speaker's budget.

Parliament could also set funding levels for a set period (say five years) at the same time as determining a charter or remit for the broadcaster for that period.

In any case the capacity of Parliament to adequately determine appropriate funding levels should be assessed – alongside the potential in South Africa for the ruling party to influence funding amounts given its majority in the legislature.

- The advantages and disadvantages of establishing an independent public broadcasting agency/fund managed by an autonomous board responsible for assessing appropriate public funding (including government allocations and licence fees) for the SABC. The establishment of such an intermediary body has been proposed by the Southern African Broadcasting Association (SABA) in its policy document on public broadcasting in the region entitled *On the move*.⁴⁵⁹ Such a body could either set or make binding recommendations on funding allocations for the SABC to Parliament – thus ensuring an arms length funding relationship between government and the broadcaster. However, possible limitations associated with establishing another bureaucracy and the potential difficulties in attracting sufficient independent expertise on funding for broadcasters to such an entity would have to be carefully considered. South Africa already has examples of funding structures (such as the Universal Service and Access Agency) whose effectiveness is viewed with scepticism due to such shortcomings.
- The strengths and weaknesses of giving the responsibility of setting public funding amounts (government allocations and licence fees) to an existing agency such as the Independent Communications Authority of South Africa (ICASA). It should be noted, however, that ICASA is viewed by some analysts as already overburdened and weak. The regulator could also be seen by the public broadcaster as competing with it for public funds, and questions about the appropriateness of regulating the SABC and the broadcasting sector as a whole whilst determining the funding levels of one licensee should be weighed up.
- The value/public benefit of supporting only the SABC through licence fee revenue over establishing a discretionary fund available on application to any broadcaster promoting public programming. Whilst this might not seem feasible, given the need to, for example, support the SABC's drive for universal access, it is important to consider in order to again focus on why public funding is essential.
- Combinations of the above (and other mechanisms) could also be considered.
- Alongside discussion on *mechanisms*, it is also important to review the *means of funding* (i.e. licence fees, fiscal funding, commercial revenue, etc.) and the ratios of different revenue streams. Taking costs into account, a new funding model should be developed after thorough review of the effectiveness of existing and alternative sources of revenue:
 - Ensuring inflation-linked increases of relevant revenue streams in line with purchasing power parity is critical. This should be built into any policy and law/regulation.
 - The licence fee model should be evaluated and other possible options explored (in consideration of effectiveness and efficiency, collection costs and fairness). As noted above, other options include imposing a broadcasting tax collected as part of income tax, or via a tax on motor vehicles or as a levy on electricity. Another international model is a levy on audio-visual software and

⁴⁵⁹ Southern African Broadcasting Association, *On the Move: Section E: The funding of public broadcasting*, accessed from <http://www.saba.co.za/pages/challenges.htm>

hardware which is distributed to the public broadcaster (Turkey).⁴⁶⁰ As all taxes are handed over to Treasury, a means of ring-fencing these funds would have to be developed should such options be viable.

- Should the current licence fee model be considered the most appropriate means of funding, suggestions from the SABC about establishing a Section 21 company to remove obligatory VAT payments on licence fees should be considered. Proposals on broadening the scope of who qualifies for an exemption/concession of fees should also be examined – alongside the recommendations on a government subsidy to cover these shortfalls.
- The value and impact of a tax/levy on other broadcasters or on advertising income in the media should be considered. This would need to take into account the effect of such a levy on the viability of broadcasting/media industry as a whole.

The SABC has reportedly included this as a possible new source of revenue in an as yet untabled proposal to Parliament. Such a tax, however, would only be viable if SABC's dominance of adspend was reduced through strict limitations on advertising revenue at the Corporation. Other levies on broadcasters (including licence fees and contributions to the Universal Service Fund) would also have to be considered – and if necessary exemptions/reductions on these tariffs allowed.

In informal discussions during this research, several commercial broadcasters indicated that such an option would be worth exploring, as limiting the SABC's share of adspend would potentially benefit them. Note that in some countries (such as Canada) spectrum fees paid by other operators are used as a source of funding for the public broadcaster.⁴⁶¹

- The extent and nature of funding from the fiscus should be evaluated. This should not, however, be a simplistic review of ratios (as proposed by the ANC), but be linked, for example, to public value deliverables and/or shortfalls in revenue:
 - The feasibility of earmarking specific budget lines for funding by the fiscus (such as signal distribution and infrastructure, including preparation for digitalisation) should be considered. This would remove any perceptions of manipulation of funds by government. Specific programming, such as educational content, might also be considered for support.
 - All existing funding and support from government (including advertising, sponsorship and in kind support) should be calculated so as to determine the precise current extent of the government subsidy. The possibility of including all such amounts in the fiscal allocation in order to promote transparency should be considered. This could

⁴⁶⁰ Unitec School of Communication, New Zealand, *Mechanisms for setting broadcasting funding levels in OECD countries: Research and Analysis Report prepared for Te Manatu Taonga/Ministry for Culture and Heritage*, December 2005, accessed from <http://www.mch.govt.nz/publications/broadcast-funding/MCH-OECD-Funding-Report.pdf>

⁴⁶¹ Ibid.

- reduce the potential for perceptions or accusations of interference in editorial independence by government.
- In her interview for this research, the then chairperson of the Board suggested that it might be worthwhile to explore spreading the fiscal allocation across the different government departments, rather than locating it in one unit. Thus, for example, each department could contribute a percentage of their budget towards realising the public mandate. Such options should be further explored.
 - Concessions could also be considered such as an exemption from corporate tax or VAT (as proposed by the SABC).
- Finally, it is critical that mechanisms to ensure transparency are built in to any new model. Awareness of what criteria are used to determine funding levels and how the impact of this is measured, alongside specific mechanisms to promote accountability by the broadcaster, will ensure legitimacy of and support for any funding mechanisms. In line with this, specific proposals on how to ensure awareness of the funding process and on how the SABC should report on expenditure and progress against goals should be incorporated into any new policy/law. These could include the requirement, for example, to report on the percentages of funds allocated to programming for specific language groups – in order to enhance understanding of the value of public funding.

Programming

Since the appointment of the first independent board in 1993 which marked the start of the SABC's transformation from a state to a public broadcaster, programming has undergone major changes and great strides have been made to turn the former mouthpiece of the apartheid system into a full spectrum broadcaster giving a voice to the diversity of opinions, while promoting a common national identity.

In recent years, though, the SABC has been beset by controversies about its programming decisions, with criticism focussing especially on former Managing Director of News and Current Affairs, Snuki Zikalala, for being too close to the government and the ruling ANC.⁴⁶² These criticisms intensified in 2006, when the SABC took a decision not to show a scheduled documentary on the-then President Mbeki. Allegations also surfaced of the existence of a politically motivated "blacklist", where commentators critical of the government were reputedly excluded from SABC news and current affairs programmes. An internal commission of enquiry into the matter later found that such exclusions had indeed taken place on grounds that were not defensible in terms of journalistic norms and standards.

The SABC also attracted accusations of self-censorship when it withdrew a drama on circumcision entitled "Umthunzi weNtaba" after complaints from traditional leaders,⁴⁶³ and decided not to screen a documentary on satire on its current affairs programme "Special Assignment".⁴⁶⁴

The purpose of this chapter is to analyse whether the SABC's programming is indeed complying with its public broadcasting mandate. It includes an analysis of the types of formats used on SABC stations, and whether they meet the requirement for the SABC to be

⁴⁶²G. Wanneburg, "SABC battles image of state mouthpiece", *Independent Online*, accessed from http://www.int.iol.co.za/index.php?set_id=1&click_id=139&art_id=qw1125657361836B253 on 22 November 2009

⁴⁶³ TVSA News Desk, "SABC1 suspends controversial Umthunzi weNtaba", accessed from <http://www.tvsa.co.za/default.asp?blogname=news&articleID=4542> on 22 November 2009

⁴⁶⁴ "SABC pulls Special Assignment doccie on Zuma, Zapiro", *Mail & Guardian Online*, accessed from <http://www.mg.co.za/article/2009-04-14-sabc-pulls-special-assignment-doccie-on-zuma-zapiro> on 22 November 2009

a full spectrum broadcaster. The chapter also considers the adequacy of the SABC's editorial policies, and particularly whether they comply with the principles of public broadcasting.

In order to test whether the SABC is providing programming that is in the public interest, the chapter includes a comparative analysis of two SABC stations (SABC 1 – TV -and Ukhozi FM - radio) and two commercial stations (e.tv and Talk Radio 702). The latter have, to different extents, built their brands on distinguishing themselves from the SABC and underlining their political independence. While the SABC's blacklisting saga played itself out in the media, e.tv, for example, ran a series of advertisements promoting itself as a station that carried "zero per cent propaganda".⁴⁶⁵

1. Types of formats on SABC stations

Television

News and current affairs, incorporating panel formats and live transmission are dominant features of the schedule of all SABC television channels. On SABC 1, 30-minutes news services are offered at 17.30 in SiSwati and Ndebele and at 19.30 in isiZulu. SABC 2 has news in Tshivenda/ Tsonga at 17.30, in Afrikaans at 19.00 and in Sesotho and Sepedi at 20.30. On SABC 3, news is offered in English only at 19.00. SABC 3 is the only channel to offer a briefer (15 minutes) night news service (at 22.00).

The SABC's flagship morning current affairs programme is flighted on SABC 2 from 6.00 to 8.00, and includes news. SABC 3 has a current affairs programme between 5.00 and 7.00 called "World Today", with a strong focus on business news, market updates, and human interest stories.⁴⁶⁶

The main current affairs programmes are shown on Sunday evening. SABC 1 offers an interactive panel show in isiZulu called "Asikhulume" where viewers can phone in and pose questions to the panel. "Fokus" is broadcast in Afrikaans on SABC 2 and "Interface" on SABC 3; both make provision for viewer input via sms, but do not have a phone-in facility. SABC 1 offers a current affairs programme in African languages focussing on issues affecting the youth.⁴⁶⁷ SABC 3's award winning investigative programme "Special Assignment" is flighted on Tuesdays. Other current affairs programmes include a programme summarising the most recent Parliamentary debates, and "180 degrees", which is flighted on SABC News International as well.

Local and foreign human interest interactive talk shows are also offered on SABC television, including "3 Talk with Noeleen", "Dr. Phil", and the "Oprah Winfrey show". Other formats include live transmission of various events, including sports events, films, music and variety programmes and dramas.

Local and foreign soaps are a very prominent feature of SABC television. The foreign soaps include American productions like "The Bold and the Beautiful" and "Days of our Lives". Popular local soaps are "Isidingo", "Generations", "Muvhango", and "7de Laan".

⁴⁶⁵ G. Wanneburg, op.cit.

⁴⁶⁶ 'The world today', SABC 3 programmes, accessed from <http://www.sabc3.co.za/shows/3214> on 7 October 2009

⁴⁶⁷ 'Cutting edge', SABC 1, accessed from <http://sabc1tv-co-za.win15.gldns.net/sabc1/cuttingedge.html>.

Product placement, a covert form of advertising, is a controversial feature in some of the local soaps. Clover SA, a manufacturer of milk products, for instance, has secured a product placement deal with “7de Laan” and “Muvhango”, where in the words of the company “...the Clover brands are elaborately woven into plots with a Stimuli account executive [the below-the-line agency responsible for the product placement] ensuring the seamless integration of the product into the script”, leading to the creation of “consumption occasions” for its products.⁴⁶⁸

The largest concentration of viewing for children is to be found on SABC 1. Between 06.00 and 07.00, children’s programming includes formats such as variety programmes, storytelling and news. A news programme called “Kid’s News” was introduced in March 2006, and targets children aged between eight and twelve; it aims to conscientise children about the world around them and relate current events to their lives.⁴⁶⁹

Another children’s programme on SABC 1 uses the international format “Sesame Street” adapted for a South Africa setting. Called “Takalani Sesame”, the programme combines education and entertainment, and is a multimedia initiative designed to convey educational messages on numeracy, literacy and life skills to young children.⁴⁷⁰ “*Magic Cellar*” is another example of a children’s programme flighted on SABC 1. It is billed as Africa’s first three dimensional animation production, and is intended “...to give African children an understanding of their own culture” through the medium of animation. According to the producers of the programme, Morula Pictures, the stories are based on African folktales, collected in part from interviews conducted with elders in villages across South Africa.⁴⁷¹ Yet another children’s programme geared towards early childhood education is the “Molo Show”.

SABC 2 and SABC 3 offer a mix of local and foreign animated children’s programmes such as “Care Bears”, “Fun Pack”, “Fun Factory”, “Superman” and “Ed, Eddy and Eddy”. Game show formats are also used for children’s programming. For instance, SABC 1 has a game show called “Kids are all right”, where adults are invited to compete against gifted children.⁴⁷²

Variety programmes are also targeted at older children and young teenagers, mainly in the eight to thirteen bracket. YoTV, which is produced by large production house, Urban Brew, offers a variety of programmes such as YoTV Wildroom, which is an interactive variety show where six callers are invited to give inputs to shape the show, such as choosing videos and becoming involved in games.⁴⁷³

SABC television also has educational programmes specifically for school learners. One of these, on SABC 1, is “Study Mate”, a support programme provided by the SABC in partnership with the Department of Education. It is an extension of the supplements provided by the Department, and is geared to helping final year pupils to prepare for their matric examinations. The format consists of daily lessons provided by teachers and curriculum specialists.⁴⁷⁴

⁴⁶⁸ “Stimuli signs Clover up for More”, BizCommunity.com, accessed from <http://www.bizcommunity.com/Article/196/12/27718.html> on 22 November 2009

⁴⁶⁹ I.S. Da Silva, ‘SABC launches changes to news and current affairs programmes’, BizCommunity.com, accessed from <http://www.bizcommunity.com/Article/196/15/9611.html> on 5 October 2009

⁴⁷⁰ ‘Takalani Sesame: South Africa’, The Communications Initiative Network, accessed from <http://www.comminit.com/en/node/114190/36> on 6 October 2009

⁴⁷¹ ‘Morula pictures productions’, accessed from <http://www.morula.co.za/productions.htm> on 6 October 2009

⁴⁷² ‘Kids are all right’, SABC 1, accessed from <http://www.sabc1tv.co.za/new1/kidsarealright.html> on 7 October 2009

⁴⁷³ ‘YOTV Wildroom’, accessed from <http://www.tvsa.co.za/showinfo.asp?showid=495>.

⁴⁷⁴ ‘Switch on the TV and study, mate!’, SABC education media release, 1 June 2009

Radio

On radio, all stations have news, current affairs and informational programmes, some of which include phone-in programmes. Music and talk show formats tend to dominate the public commercial stations. Radio 2000 has struggled to identify its niche, but was repositioned in April 2008 to include a mix of music and public service content, and to prepare it for its role as the official SABC radio broadcaster for the 2010 FIFA World Cup. The main format for the public service programmes are interviews combined with phone-in programmes.⁴⁷⁵

The public commercial stations mostly opt for a contemporary hit radio format. 5 FM relies mainly on music programmes fronted by prominent disk jockeys, which may also include interviews and a live phone-in component, as well as humorous, controversial skits. Metro FM offers a mix of music and radio talk show formats, as well as a dedicated radio talk show on sport. Goodhope FM is described by the SABC as an interactive lifestyle radio station, which includes a mix of R&B, pop, ballads, contemporary jazz and dance and old school.⁴⁷⁶

The SABC public service radio stations offer a mix of formats. Given that most of the African language radio stations claim to target the 16-49 age group in the main⁴⁷⁷, they opt mostly (but not exclusively) for talk show and music formats.

- Ukhozi FM and Umhlobo Wenene offer news and current affairs, interactive phone-in talk shows, sport, weather and traffic. Music covers a spread of genres, including jazz, R&B, kwaito, house, gospel and African traditional.⁴⁷⁸
- Lesedi FM offers news, information, talk and drama, as well as music appealing to the youth, as well as gospel and seSotho traditional and contemporary music.⁴⁷⁹
- As Ligwalagwala FM seeks to target a younger, more upwardly mobile audience and its line-up offers news and current affairs, education (including phone-in learner support programmes), music and talk-show formats.⁴⁸⁰
- Motsweding claims to be an highly interactive station, offering news, current affairs, music, phone-in programmes, education, sport, weather and traffic.⁴⁸¹
- Mughana Lonene and Phalaphala rely heavily on music and talk show formats (with the former offering 80 percent local music), while Thobela FM offers music, information, education and entertainment. Faith-based programmes, involving interviews with prominent religious leaders, are also included in many of the stations' line-ups, as are public service announcements.
- As Tru FM aims to target a young upwardly mobile consumerist audience, it relies heavily on music and talk show formats.⁴⁸²

⁴⁷⁵ 'Radio 2000 reveals its new line-up changes', SABC Corporate, accessed from <http://www.sabc.co.za/>.

⁴⁷⁶ SABC radio stations, accessed from <http://www.sabc.co.za> on 9 October 2009

⁴⁷⁷ South Africa's public broadcasting radio stations', accessed from <http://medioclubsouthafrica.com/index.php> on 7 October 2009

⁴⁷⁸ 'South Africa's public broadcasting radio stations', accessed from <http://medioclubsouthafrica.com/index.php> on 7 October 2009

⁴⁷⁹ 'About us: Lesedi FM', accessed from <http://www.lesedifm.co.za/> on 26 October 2009

⁴⁸⁰ 'Programme lineup: Ligwalagwala FM', accessed from <http://www.ligwalagwalafm.co.za/> on 26 October 2009

⁴⁸¹ SABC radio stations, accessed from <http://www.sabc.co.za> on 26 October 2009

⁴⁸² 'Station profile: TruFM', accessed from <http://www.trufm.co.za>, on 26 October 2009

English language SAfm relies heavily on talk radio shows hosted by popular anchors, with live interactive programming dominating the schedule. Afrikaans language Radio Sonder Grense uses similar formats, but plays more music than SAfm. Current affairs programmes of one to two hours duration, including live interviews with key newsmakers, are flighted in the morning, at lunchtime and in the afternoon. Lotus FM, targeting the Indian community, uses a music and talk-show format.

Channel Africa broadcasts on shortwave and the internet and calls itself “The Voice of the African Renaissance”. Its programme line-up is dominated by news and current affairs relevant to the African continent, interviews with prominent figures, and SABC informational material re-packaged for a wider, African audience. The station also has an infotainment programme called “Tam Tam Express”, which blends entertainment with serious political debate on the current issues of the day.⁴⁸³

2. Programming/ editorial policies and guidelines of the SABC

The SABC has editorial policies, developed in terms of the Broadcasting Amendment Act promulgated in 2003. Initially, the Minister of Communications was meant to approve these policies, but after a public outcry about the impact this would have on the SABC’s editorial independence, this requirement was removed.

In terms of the Act, the SABC Board had to prepare and submit the policies to ICASA within three months of the date of conversion of the SABC to a public company. The policies are generally meant to ensure compliance with the SABC’s licence conditions and the Act’s objectives. More specifically they are supposed to contain the following: a news editorial policy, programming policy, local content policy, educational policy, universal service and access policy, language policy and religious policy. The Act also requires public participation in the development of these policies.⁴⁸⁴

The SABC released draft editorial policies for public comment in April 2003 and convened public meetings in various provinces. There was a large public response. In total, 920 written submissions were received (of which 847 came from individuals and 73 from organisations).⁴⁸⁵ The final version was released in 2004, and is due to be revised. However, owing to the upheaval and changes at board and top management level described above, this revision had not yet been done at the time of writing.

The policies as they stand emphasise from the outset that one of the core editorial values of the SABC is editorial independence. This includes journalistic, creative and programming independence of the SABC’s staff and is necessary to protect the freedom of expression of the SABC’s audiences.⁴⁸⁶ The editorial code states that the SABC is independent from the government, and is not the mouthpiece of the government of the day⁴⁸⁷.

⁴⁸³ ‘Channel Africa’, accessed from <http://www.channelafrica.org/> on 26 October 2009

⁴⁸⁴ Broadcasting Amendment Act no 64 of 2002, section 6

⁴⁸⁵ G. Berger, ‘Reconciling editorial independence and public accountability issues in public broadcasting service: editorial policies at South Africa Broadcasting Corporation’. Presentation to Asia Media Summit Kuala Lumpur, 9-11 May 2005. Session on ‘The state of public service broadcasting, one year after the BBC crisis’. Accessed from <http://guyberger.ru.ac.za/Teaching/SAMedia/index.htm> on 28 September 2009

⁴⁸⁶ ‘Core editorial values of the SABC’, SABC editorial policies, p. 3, accessed from <http://www.sabc.com/> on 5 October 2009

⁴⁸⁷ ‘Editorial code of the SABC’, SABC editorial policies, p. 4, accessed from <http://www.sabc.com/> on 5 October 2009

The news policy commits the Corporation to providing news and current affairs that draws on the diversity of South Africans and the full spectrum of opinions, perspectives and comment.⁴⁸⁸ The policy states that the presentation of the full spectrum of opinion should also guide the selection of guests, analysts and specialist commentators, as they should be selected to represent the diversity of opinion in society.⁴⁸⁹ The policy further suggests that the SABC can use public opinion surveys to ensure that it remains in touch with wider public opinion.⁴⁹⁰

The editorial code of the SABC explicitly states that “we do not allow advertising, commercial, political or commercial considerations to influence our editorial decisions”: a commitment that is repeated in the news, current affairs and information programming policy.⁴⁹¹ The news policy commits the newsroom to develop internal guidelines to entrench its independence, and to deal with potential conflicts of interest.⁴⁹²

News and current affairs programming is required to be fair and balanced, and not to take sides, although the policy cautions that “fairness does not require editorial staff to be unquestioning, nor the SABC to give every side of an issue the same amount of time”.⁴⁹³ The policy does make provision for a right of reply, when a damaging critique of an individual or institution has been presented.⁴⁹⁴

In order to contributing to economic, social and cultural development by providing a credible forum for democratic debate, the editorial code commits the SABC to building a strong democracy by ensuring that listeners have access to relevant, reliable, and available facts.

However, the policies also commit the SABC to serving the national and the public interest: the former term has been controversial in South Africa, as it has been read by the Media Institute of Southern Africa (MISA) as inference to journalists to report uncritically on government performance.⁴⁹⁵

While the policy on news and current affairs commits the SABC to evaluating, analysing and critically appraising government policies and programmes, it does not spell out an explicit watchdog role where the broadcaster holds those in power in every sector of society accountable.⁴⁹⁶

The policies recognise that there may be a tension between providing a range of opinions on matters of public interest, and the offense that may be taken by sections of the audience at what they may find to be disturbing content. In this regard, the policies recognise that a Constitutional Court judgement specifically protects speech that shocks, disturbs and offends, and that the SABC must not censor such material. Such material is to be preceded by audience advisories and be screened at appropriate times during the watershed period.⁴⁹⁷

⁴⁸⁸ ‘News, current affairs and information programming’, SABC editorial policies, p. 19-22, accessed from <http://www.sabc.com/> on 28 September 2009

⁴⁸⁹ Ibid., p. 22

⁴⁹⁰ Ibid., p. 23

⁴⁹¹ ‘News, current affairs and information programming’, SABC editorial policies, op.cit., p. 20

⁴⁹² ‘News, current affairs and information programming’, SABC editorial policies, p. 19, accessed from <http://www.sabc.com/> on 5 October 2009

⁴⁹³ Ibid.

⁴⁹⁴ Ibid., p. 21

⁴⁹⁵ Media Institute of Southern Africa, submission to the Parliamentary Portfolio Committee on Communications on the Broadcasting Amendment Bill, 17 November 2009

⁴⁹⁶ ‘News, current affairs and information programming’, op.cit., p. 20

⁴⁹⁷ ‘Programming’, SABC editorial policies, pp. 9-10, accessed from <http://www.sabc.com/> on 28 September 2009

However, as has been noted in Chapter 6, the controversial upward referral clause in the editorial policy, which gives the broadcaster's chief executive the final say on editorial matters, can lead to commercial or political influences (or at the very least the perceptions of such) being brought to bear and unduly influencing editorial decisions.

In order to avoid such a blurring of competencies and safeguard the principle of editorial independence, the chairperson of the Interim Board, Irene Charnley, reportedly decided to clearly distinguish the roles of Group Chief Executive Officer and Editor-in-Chief. As *Business Day* editor Peter Bruce has argued, "that's just what was needed. Former GCEO Mpofu had both titles and was a disaster. The two jobs are entirely different. The Editor-in-Chief is there to protect the reputation of the organisation and its journalism. The GCEO is there to create a business platform for the journalists to do their jobs".⁴⁹⁸ Accordingly, all references to editorial responsibility were stripped out of the advertised job description for the new GCEO, appointed in December 2009. This, however, does not change the official policy of upward referral - it is still included in the SABC's editorial policies which can only be changed through a public process.

A key principle of freedom of expression recognised in the editorial policy is the right of journalists to protect their confidential sources of information. It further states that "if the protection of a source were to become a legal matter, the SABC would not advise its employees to refuse to obey a court order, but would make its legal counsel available for advice and to present legal arguments in court to protect the source".⁴⁹⁹

Freedom of expression is also recognised in other areas of the SABC's editorial policies. The programming policy notes that freedom of expression is at the heart of the SABC's programmes, and that this is necessary to provide programme makers with the space to innovate.⁵⁰⁰ In order to provide access to a wide range of information and ideas from various sectors of society, the programming policy states that the SABC aims to meet the needs of all its audience segments, including the young and old, urban and rural, and all languages and religions.

The SABC claims to take the interests of minority audiences, such as followers of minority religions⁵⁰¹, into account, but the policies do not make explicit mention of reflecting current social, political, philosophical, religious, scientific and artistic trends.

The programming policy further requires the SABC to contribute to nation building by providing spaces for the sharing of experiences and building a sense of national identity.

The language policy recognises the fact that if freedom of expression is to be advanced, then the public broadcaster must promote the right to receive and impart information in the languages of choice of viewers and listeners.⁵⁰² It also emphasises the need to support development of South African languages as a contributor to national development⁵⁰³ and commits the SABC to address the marginalisation of indigenous languages by attempting to mainstream them in the Corporation's programming.⁵⁰⁴

⁴⁹⁸ P. Bruce, 'The thick edge of the wedge', *Business Day*, 21 September 2009

⁴⁹⁹ *Ibid.*, p. 5

⁵⁰⁰ 'Programming', SABC editorial policies, op.cit., p. 7, accessed on 5 October 2009

⁵⁰¹ 'Religious broadcasting, SABC editorial policies', p. 45, accessed from <http://www.sabc.com> on 28 September 2009

⁵⁰² 'Language', SABC editorial policies, p. 26, accessed from <http://www.sabc.com/> on 5 October 2009

⁵⁰³ 'Language', SABC editorial policies, p. 26, accessed from <http://www.sabc.com> on 28 September 2009

⁵⁰⁴ 'Language', SABC editorial policies, op.cit., p. 26

The religious policy requires the SABC to contribute to a common South African-ness, as well as the moral regeneration of South Africa.⁵⁰⁵

The editorial policies recognise the importance of promoting and developing local content. The local content policy commits the SABC to supporting the South African music and production industries by airing local content, which in turn “assists in furthering important public interest goals such as nation-building and reconciliation”.⁵⁰⁶ The policy further notes that the SABC is committed to meeting local content obligations as spelt out by the Broadcasting Act, which requires the SABC to develop and protect national and regional identity and display South African talent, as well as to offer a plurality of South African views.

To this end, the SABC is expected to support the production of local content, particularly by historically disadvantaged individuals, and to adhere to specific quotas for local television content, independent productions and South African music.⁵⁰⁷

In line with these requirements, the SABC commits itself “to ensure that local television content is a significant and visible part of its schedules” in line with the quotas set by ICASA. These commitments must be taken into account when the SABC develops strategic plans, key performance indicators, business plans and budgets, and programming strategies.⁵⁰⁸

The local content policy places heavy emphasis on meeting ICASA’s local content quotas, but sets a few additional requirements. With regard to radio, the SABC must publicise local musicians through interviews, reviews and promotion, and must further stage live events each year in partnership with South African artists.⁵⁰⁹

With respect to television, the policy commits the SABC to showcasing television content from the African continent, especially on the public service television channels. A separate policy and set of procedures on procurement of local content, which would detail the SABC’s policies and procedures, is to be developed. This has since been done and local content is being commissioned and acquired by the SABC’s Content Hub.⁵¹⁰ The policy commits the SABC to engaging with the industry to support the development and transformation of the local production industry.⁵¹¹

The policy notes the difficulties the SABC faces in implementing all these requirements, given the high cost of local content relative to foreign content, and also the challenges faced by its mixed funding base that require it to consider questions of commercial viability.

The editorial policies also have a section on universal service and access. This notes that the broadcaster has obligations to redress past imbalances in programming, and to work towards making its services available throughout South Africa. In order to give effect to the requirements of the Broadcasting Act to achieve universal service and access, the policy identifies particular aims, which include ensuring the following:

- that every South African has access to a broadcasting service;

⁵⁰⁵ ‘Religious broadcasting’, SABC editorial policies, op.cit., p. 45

⁵⁰⁶ ‘Local content’, SABC editorial policies, p. 41, accessed from <http://www.sabc.com/> on 5 October 2009

⁵⁰⁷ Ibid., p. 41

⁵⁰⁸ Ibid., p. 42

⁵⁰⁹ Ibid., p. 44

⁵¹⁰ Message from Chief Operating Officer Solly Mokoetle, SABC briefs 2005 from the Content Hub, accessed from

<http://vcnstatic.sabc.co.za/VCMStaticProdStage/CORPORATE/SABC%20Corporate/Document/Com%20guidelines.pdf> on 7/01/2010.

⁵¹¹ Ibid., p. 43

- that the radio services provide a wide range of programming in every official language;
- that audiences have access to a range of radio services in a variety of languages (which, the SABC admits, is a longer-term goal);
- that at least two public service television channels, offering a range of programming in a variety of languages, are available in 90 per cent of the country.⁵¹²

The policy notes that convergence presents a range of new challenges for universal service and access, and that digital migration should not lead to viewers being cut off from the broadcasting signal entirely. It also requires SABC management to develop an annual local content action plan, outlining the goals and resources required.⁵¹³

3. Types of programmes on other broadcasters

This section considers the extent to which non-SABC broadcasters provide public interest programming, and focuses specifically on e.tv and Radio 702. Public interest programming could be defined as programming that is informative, educational, enhances governance (including the electoral process), encourages political discourse and engagement in local community affairs, and serves sections of the audience that are often neglected, such as children, minorities and individuals with disabilities.⁵¹⁴

E.tv

As mentioned in chapter four, e.tv is licenced as a broad spectrum station, and has significant South African content obligations. According to e.tv's licence, the station's predominant language of broadcast is English, but the station is required to provide two hours of news and information programming per week in a wide range of official languages other than English, and reflecting local, regional and provincial events and developments. The licence conditions forbid the excessive use of a single language, other than English. Overall the station is required to broadcast nineteen hours of information programming per week, and four hours of programming in languages other than English.

E.tv is also meant to broadcast two and a half hours of South African drama a week, of which at least two hours and twenty minutes should be in prime time. At least ten per cent of the aggregate broadcasting time of South African drama must be broadcast in languages other than English, providing that a single language does not dominate programming. With regard to children's programming, at least sixteen hours of programming must be broadcast per week during times when large numbers of children are likely to be watching. Twenty per cent should be in languages other than English, providing that a single language does not dominate.

The station is required to commission programming from different provinces, to reflect provincial diversity, cultures and characters. Of the 45 per cent local content it is required to carry in prime time, only 15 per cent should be repeats. E.tv is also required to broadcast

⁵¹² 'Universal service and access', SABC editorial policies, p. 38, accessed from <http://www.sabc.com/> on 5 October 2009

⁵¹³ Ibid., p. 40

⁵¹⁴ 'The public interest standard in television broadcasting', Benton Foundation, accessed from http://www.benton.org/initiatives/obligations/charting_the_digital_broadcasting_future/sec2 on 21 November 2009

animations reflecting African and South African culture and lifestyles, programming which is meant to promote South African culture and talent.⁵¹⁵

Repeated requests were made to obtain the station's editorial policy for news and current affairs for the purposes of this research – unfortunately to no avail. Therefore, an analysis of the station's policy was not possible.

E.tv's schedule starts with "Morning News Today", which runs from 6.00 am to 8.00 Monday to Friday and covers politics, sport, business, health, entertainment, weather and traffic updates. Viewers are encouraged to interact with the programme's hosts by phoning in.⁵¹⁶ At 8.00 a 30-minutes African language edition of the news is offered. E.tv also broadcasts a 13.00 half-hour roundup of the main news stories, entitled "News Day". At 18.00 the station broadcasts another half-hour news bulletin in African languages, and the main English-language news bulletin ("News Prime Time") follows at 19.00.

E.tv's flagship current affairs programme is called "Third Degree", and is inextricably linked in the public mind with its presenter, Deborah Patta, whose forthright interviewing style has been criticised for being "unobjective", "immature" and "aggressive".⁵¹⁷ Patta has been at pains to distinguish the approach of e.tv's news and current affairs division from that of the SABC, which, she maintains, panders to those in positions of authority. According to Patta:

Our reporters, camera operators and video editors are well-trained, professional journalists, as such are highly sought after. As a general rule, we refrain from employing SABC journalists because they tend to lack a proper understanding of journalism and ethics. We pride ourselves on developing fresh talent and practicing independent journalism that holds no one's brief. SABC journalists often behave like government spokespeople, and that's why the flow is generally in their favour and not vice versa. We could employ many of their journalists but we simply don't want to.⁵¹⁸

"Third Degree" has been known to address controversial topics that the SABC appeared reluctant to tackle, in the process providing an important counterpoint to SABC current affairs. For instance, the programme flighted a controversial documentary on the Thabo Mbeki era and Aids deaths, made originally for the SABC's "Special Assignment". 'Entitled "The Prince of Denial", the documentary investigated the impact of the former President's Aids denialist policies on ordinary South Africans living with the virus. The producers claimed the SABC took too long to make a decision about flighting the programme, and they eventually decided to offer it to e.tv instead.⁵¹⁹

A relatively new addition to the station's line-up, which would certainly qualify as public interest content, is "The Big Debate". The programme was launched in February 2009 and follows a "town-hall style" debating format, recorded in various parts of the country. Panellists are required to interact with audiences, which give audiences direct access to decision-makers. Programmes have included debates on corruption, leadership, black economic empowerment, media freedom, service delivery and other topics. What is noteworthy is that

⁵¹⁵ Individual broadcasting service licence No. 001/commercial/TV/Sept/08, ICASA, issued on 17 December 2008

⁵¹⁶ "Sunrise: rise and shine", accessed from <http://www.etv.co.za/extended/index/sunrise/> on 22/11/2009.

⁵¹⁷ I. Da Silva, "Programme praised, Patta panned", BizCommunity.com, accessed from <http://www.bizcommunity.com/Article/196/66/38100.html> on 22 November 2009

⁵¹⁸ D. Mwanambuyu, 'SABC's gain is e.tv's pain', BizCommunity.com, accessed from <http://www.bizcommunity.com/Article/196/66/33625.html> on 21 November 2009

⁵¹⁹ "Documentary: SABC 'took too long'", News24.com, accessed from http://www.news24.com/Content/SouthAfrica/News/1059/28e386a0731b4a0b932638951e92820b/17-11-2009-03-16/Documentary_SABC_took_too_long on 21 November 2009

the programme is not funded directly by e.tv, but by philanthropic organisations the Open Society Foundation, Atlantic Philanthropies and the Ford Foundation.⁵²⁰

Soaps – both foreign and local - occupy prominent places on the station's schedule. E.tv's two local soaps "Rhythm City" and "Scandal" are strongly youth and entertainment-orientated, with little apparent public interest content (although both are partly multilingual). Foreign soaps include "Silk Stalkings", "The Young and the Restless" and "Sunset Beach".

E.tv also has a number of children's programmes, including "Cool Catz", which is described by the station as "a funky, fun studio based show" targeting a pre-school audience, and includes a mixture of animation and real life acting.⁵²¹

Other programmes that feature prominently on e.tv are American productions like "Judge Judy", "America's Next Top Model", "Ripley's Believe it or Not" and "Cheaters". The station's schedule during the day is heavily dominated by infomercials, especially in the morning, and repeats of other programmes, especially e.tv's own soaps.

Talk Radio 702

Talk Radio 702 is a commercial station broadcasting on FM in the Gauteng province, and is also available via webcast. It is a broad spectrum station, but focuses especially on news, sport, business and actuality programming, as well as phone-in debates. The station started out as a Top 40 music format station in 1980, but as demand for independent news grew, it evolved into a 24-hour news-based and talk-show format station, and pioneered "702 eyewitness news", a service encouraging listeners to phone in news. Full news bulletins are broadcast every hour and headlines every half-hour.⁵²² The station used to broadcast on the AM frequency, but was granted a licence to broadcast on FM in 2007 after the station won the argument with ICASA that it was being prejudiced by lack of access to an FM frequency.

The station's licence conditions are very straightforward. The station is described as a talk-based service in English, with a maximum of 15 per cent of music programming. Its licence requires it to broadcast news every hour daily, and its news services must include news material from sources other than itself. The station does not have an editorial policy, and claims to be guided by its licence conditions and the BCCSA's Code of Conduct.

Talk Radio 702 has built its brand on independent journalism and been praised for its news agenda-setting interviews and responsiveness to current events. In 2007 BBC Africa awarded 702 the title of 'Radio Station of the Year', for its showcasing of the first African film to win an Oscar, a press conference involving Jacob Zuma and a Johannesburg Town Forum ahead of the 2006 Municipal Elections.⁵²³

⁵²⁰ "The Big Debate", BizCommunity.com, accessed from <http://www.bizcommunity.com/Article/196/66/32473.html> on 22 November 2009

⁵²¹ "Cool Catz", accessed from http://www.etv.co.za/extended/index/cool_catz on 22 November 2009

⁵²² 'Radio 702', Wikipedia, accessed from http://en.wikipedia.org/wiki/Radio_702.html, on 21 November 2009

⁵²³ 'BBC Africa Radio Awards announces Southern Africa regional winners', BBC press release, accessed from http://www.bbc.co.uk/pressoffice/pressreleases/stories/2007/05_may/26/africa.shtml on 21 November 2009

4. Analysis of programmes

Programme schedules for the week of 2 to 8 November 2009, from 6.00 to midnight, were analysed for the following stations: e.tv, SABC 1, Talk Radio 702 and Ukhozi FM. The purpose of the analysis was to help pinpoint the differences, if any, between the programming and programming priorities of the two public SABC stations and the two private broadcasters by answering three main questions:

- What are the predominant programme formats/genres on the major radio/TV stations?
- What are the predominant languages in which radio/TV programmes are broadcast?
- What is the ratio of local to foreign content on major radio/TV stations?

E.tv

The station devoted most time on weekdays to drama/ comedies (up to 5 hours per day), followed by news and current affairs. Movies and sport dominated the weekend schedules. Dramas offered were both local and foreign productions in roughly equal measure. Two local dramas (“Rhythm City” and “Scandal”) were repeated between 9.00 and 10.00, but the foreign programmes were not. The local dramas contained a mix of English and African languages.

News bulletins accounted for 130 minutes of the schedule on weekdays, and 35 minutes over weekends. English news dominated; where African languages were featured, three African languages were grouped together in the same programme (Zulu, Xhosa and Sotho). No current affairs programmes were offered over the weekend.

Other frequently featured genres included children’s programmes, sport and quiz/ game/ reality shows. Sports programming became more prominent over the weekend, while quiz/ game/ reality shows were offered predominantly on weekdays. Fifty percent of children’s programming was local. A large amount of sports programming was devoted to WWE wrestling games - difficult to classify strictly as sport as they are in fact a blend of sport and entertainment genres.

E.tv also carried adult content over the weekend on its late night slots.

The schedule contained very few programmes focusing on youth and women. Educational programmes, culture/ media/ arts programmes and faith-based programmes were rare. A 30-minute faith based programme was shown on Saturday, but very early in the morning (at 06.00), when viewer numbers would be very low. Faith-based programming became more prominent on Sunday, with a total airtime of 210 minutes. Most faith-based programmes focused on the Christian religion.

Movies were offered mostly over the weekend, accounting for 210 minutes on Friday, 360 minutes on Saturday, and 330 minutes on Sunday. All movies were foreign productions.

Infomercials were also featured at different times during the day, especially in the morning.

Overall, e.tv’s programmes were predominantly local during weekdays, with locally produced material constituting 52 per cent of the programming monitored.⁵²⁴ Local content decreased considerably over the weekend, owing to the prominence of foreign movies, with a mere 23

⁵²⁴ Of the 1080 minutes monitored per day, between 520 and 610 minutes were devoted to local programming during weekdays, 275 minutes on Saturday and 215 minutes on Sunday.

per cent of programming being local. In total, 38 per cent of e.tv's programming over the period was local (the local content quota prescribed by ICASA is 35 per cent).

SABC 1

SABC 1's programme schedule was notably more varied than e.tv's, and included news, current affairs, dramas (including soaps), music shows, quiz/ game shows, talk shows, educational programmes, children's programming, youth programming, sports, faith-based programming and infomercials. Repeats featured quite prominently, accounting for 32 per cent of the schedule on Monday alone. Most programmes were local, with the station achieving an 85 per cent local content rate on the weekdays monitored, and an 87 per cent local content rate over the weekend: well above the station's local content quota of 55 per cent.⁵²⁵

The single biggest genre on the schedule was drama/ comedy, with many programmes being repeats. Six of the nine programmes in this genre were local, most of them in English, while others were presented in a mix of English, Zulu, Xhosa and Sesotho.

The next most prominent genres, especially on weekdays, were children's and educational programmes with between seven and ten such programmes being run, accounting for between 208 and 238 minutes each day. Most of these were local, and all of them save one were entirely in English. The exception, "Takalani Sesame", a local adaptation of the US-American "Sesame Street", contained a mix of English, Zulu, Xhosa and Sesotho.

Three news programmes (Isiswati/Ndebele news, Zulu news and news for children) accounted for 90 minutes of the schedule each weekday. "Kid's News" was particularly noteworthy for its multilingual content in English, Zulu, Sesotho, Xhosa and Venda.

There are a number of talk-based current affairs programmes, most of them also shown as repeats. The Thursday schedule contained the relatively new current affairs programme "Cutting Edge", which was repeated on the following Tuesday. The programme was described by the SABC at the time of its launch as "...an investigative programme for Africans produced by Africans in African languages".⁵²⁶ Yet the programme schedule referred to the programme as being in English.

Music accounted for between 60 and 90 minutes per day, with a range of musical tastes being catered to - from choral music to youth dance styles and the most popular music of the week.

There were just over an hour of infomercials a day.

There were no faith programmes during weekdays, with the exception of a repeat of "Spirit Sundae" on Wednesday, and brief reflections for a period of two minutes. However, 150 minutes were devoted to faith-based programmes on Sunday, spanning a variety of faiths.

Sports programming featured most prominently over the weekend, accounting for 223 minutes on Saturday and 251 minutes on Sunday. Sports programming during the week (one or two slots each day) focused primarily on soccer. Friday's sports magazine programme "Sports Buzz" covered a variety of sporting codes.

⁵²⁵ Of the 1080 minutes monitored per day, between 780 and 1010 minutes of SABC 1's programme schedule was devoted to local content on weekdays, 871 minutes on Saturday and 1008 minutes on Sunday.

⁵²⁶ "Cutting edge", accessed from <http://www.tvsa.co.za/forum/calendar.php?do=getinfo&day=2008-5-8&e=2756&c=1> on 21 November 2009

Programming aimed specifically at women was entirely absent from the schedule, as was programming focusing on culture, media and the arts. SABC 1 also fared badly when it came to flighting fresh, contemporary movies, especially local productions. No movies were featured during the week while Friday's and Saturday's movies were old and oft-repeated US-American action films.

Talk Radio 702

The station's programming followed a standard format during weekdays. From Monday to Friday, the schedule was dominated largely by news and current affairs (420 minutes), all in English, with news accounting for 120 minutes. Chat shows made up 540 minutes of the schedule and covered mostly human interest and lifestyle topics, blended with some current affairs content.

Infomercials were run every hour and a total of 234 minutes per day was spent on advertising.

The weekend format was very different, and focused more on music - especially Saturday (a total of 840 minutes), with a predominance of "solid gold" tracks as well as jazz - and phone-in programmes. The Sunday schedule contained less music (540 minutes in total), again mostly "solid gold" material. The day began with a four-hour breakfast show which focused on news, sports, business, entertainment, health and personal finance, and ended with a faith-based programme. According to the station's programme schedule, this programme "offers a non-denominational but multi-dimensional approach to philosophic, moral and religious topics and issues drawn from our daily lives".⁵²⁷

Ukhozi FM

The programme line-up of the isi-Zulu language station Ukhozi FM was much more varied than that of Radio 702, offering news, sports, talks shows and features with a specific focus on government delivery of basic services like water and electricity and the work of municipalities in this regard, drama, curriculum support for learners, educator support, educational programming on personal finance, local and international music, health programming and public service announcements.

Music accounted for 140 minutes of the schedule on most weekdays, occupying slots in the morning, at lunchtime, and late at night. More space was given to music from Friday evening onwards to Sunday.

There was a considerable amount of women's programming, with three slots daily totalling 105 minutes.

The station had five-minutes news updates every hour, as well as a 25-minutes current affairs programme at lunchtime on weekdays. Talk shows on topical issues were offered several times a week as was a daily drama series of 35 minutes duration. Sport was another regular feature of the schedule, with a daily prime time slot between 19:05 and 19:30. A weekend sports review was broadcast every Monday.

⁵²⁷ Talk Radio 702 programme schedule, accessed from <http://www.702.co.za/onair/lineup.asp> on 19 November 2009

The following conclusions can be drawn from the analysis of programme schedules:

- The schedules of both TV stations are dominated by dramas/ comedies, especially 'soaps', with SABC 1 carrying more local dramas than e.tv. Both channels tend to repeat soaps, with such repeats being particularly evident on SABC 1.
 - SABC 1 generally broadcasts far more local content than e.tv.
 - SABC 1's line-up is distinctly different from e.tv's, with the public broadcaster offering a much greater variety of programming. SABC 1 also seems to be more adventurous in pushing the boundaries of various genres ("Kid's News" being a case in point). E.tv's programming was heavily entertainment-orientated, and its schedule was particularly thin when it came to genres often associated with public interest television, such as youth programming, women's programming, educational programming, and programming on arts, culture and media.
 - Both TV stations devote a considerable amount of time to news and current affairs, but SABC 1 is particularly strong on news in African languages.
 - Local films are notably absent from the line-ups of both stations, which tend to rely on older and very familiar foreign films.
 - Both stations offer little to nothing in the documentary genre.
 - With respect to faith-based programming, SABC 1 has a greater focus on interfaith programming and faiths other than Christianity, whereas e.tv's line-up is biased towards the Christian faith.
-
- As a full spectrum radio station, Ukhozi FM has a greater variety of programming than Radio 702, which is a talk format station.
 - Ukhozi FM has a particularly strong focus on women, learners and educators.
 - Ukhozi FM has insufficient slots for in-depth news and current affairs.
 - Radio 702 offers little for groups who are vulnerable to marginalisation by commercial programming, such as women, children and the youth.

In regard to news and current affairs programmes the following general observations were made:

- There was virtually no international news on the public broadcasting stations SABC 1 and Ukhozi FM. Commercial stations e.tv and Talk Radio 702 carried international stories but not to any significant extent. No current affairs programme covered international events.
- SABC 1 and Ukhozi FM had a strong focus on development news during the week, with many slots devoted to stories on the delivery (or lack of delivery) of basic services by the various arms of government. Such stories were noticeably absent in the news programmes of e.tv and Talk Radio 702.
- All stations exhibited a tendency to rely mainly on official and expert sources for their sound bites, although SABC 1 showed a more consistent trend towards a greater diversity of sources, especially in the coverage of development related stories.
- SABC 1 and Ukhozi FM demonstrated a greater sensitivity towards regional sources of news and information over the period monitored, but the bulk of news across all stations was sourced from Gauteng and the Western Cape.
- Ukhozi FM news bulletins focused on development-related stories and provincial events and their current affairs programmes veered towards infotainment. Many of the main national stories of the week were not covered.

5. Audience research

An audience research survey published in April 2009 by the Steadman Group⁵²⁸ focused on audience behaviour and attitudes towards radio and television broadcasters. A face to face, quantitative survey was conducted using a fully structured questionnaire. The sample size was 1500, selected to be representative of the South African population.

The survey found that radio and television set penetration was roughly level, with nine out of 10 households possessing sets. According to the results, 78 per cent of South Africans use television “daily or most days” as their source for news and current affairs, 62 per cent use radio, 31 per cent newspapers and 17 per cent the internet. 44 per cent of respondents said radio was their “preferred source”, while 28 per cent chose television, 11 per cent newspapers and seven per cent the internet.

Asked if they had ever listened to public radio stations, 84 per cent of the respondents said they had. The public radio stations that most respondents claimed to have ever listened to are Metro FM at 38 per cent, Ukhozi (31 per cent), Umhlobo Wenene (28 per cent), SAfm (21 per cent) and 5 FM (20 per cent). Among those who listen to these stations, Metro FM was accorded the highest satisfaction rating of 41 per cent, followed by Ukhozi FM and Umhlobo Wenene FM at 33 per cent and 29 per cent respectively; SAfm had 22 per cent, and 5 FM and Motswedding tied at 21 per cent each. Commercial radio stations were listened to by 61 per cent; those with fair satisfaction levels based on the “somewhat satisfied” and “very satisfied” ratings are Khaya FM (27 per cent), YFM (26 per cent) and Jacaranda FM (26 per cent). Community radio stations by their very nature score lower overall listenership figures. Only 31 per cent said they had ever listened to any of these stations. Of these, Jozi FM enjoyed a satisfaction level of 31 per cent and the station closest to it was Soshanguve at 11 per cent.⁵²⁹

With respect to the reasons for listening, 58 per cent of the respondents strongly agreed that they listened to radio for entertainment, with 56 per cent listening for information about “country news and events” and 52 per cent for educational reasons. Respondents also rated “politics”, “local music” and “family affairs” as reasons for listening to radio. With respect to programme preference, about a third mentioned “local news”, with others mentioning “local music”, “religious programmes” and “international music”. Key areas requiring more airtime in the opinion of respondents include health and well-being, entertainment, local and African culture programmes as well as faith issues.⁵³⁰

Respondents noted significant differences in types of programming between community, public and commercial radio. In their view community radio demonstrated strong emphasis on human rights, local sports, children’s issues and local politics. Commercial radio, however, tended to de-emphasise such issues, with public radio pursuing a middle path.⁵³¹

With respect to ratings on independence, public radio was considered to be less independent than commercial or community broadcasting services. 61 per cent of respondents felt that public radio was not controlled by the government, compared to 69 per cent for commercial radio and 70 per cent for community radio.⁵³² In spite of the fact that public radio scored relatively low on its independence rating, 50 per cent of respondents felt strongly that these stations provided accurate information that they trusted and believed, with a further 24 per

⁵²⁸ ‘Audience research survey. Final report – South Africa’, April 2009, The Steadman Group, Kampala

⁵²⁹ Ibid., pp. 16-19

⁵³⁰ Ibid., pp. 19-20

⁵³¹ Ibid., p. 20

⁵³² Ibid., p. 21

cent of respondents agreeing somewhat with this statement. Regions showing the greatest confidence in public radio were KwaZulu-Natal and Limpopo, with an agreement rating of over 80 per cent, whereas those with the least confidence came from the Eastern Cape and Western Cape.⁵³³

The majority of respondents (80 per cent) felt that community radio provided the widest variety of programmes in local languages followed by public radio services (73 per cent) and commercial stations (68 per cent). Three quarters of listeners say that all types of radio stations offer a wide variety of programmes.⁵³⁴

With respect to television, the channel with the highest 'top of mind' awareness was SABC 1 which is known by nine out of every ten people in urban and rural areas. Spontaneous awareness of the other public stations, SABC 2 and SABC 3, was above 70 per cent, but these are more "top of mind" in urban areas. The most well-known commercial channel was e.tv, with an 80 per cent spontaneous awareness score, while subscription services DSTV and MNET scored 38 per cent and 30 per cent respectively.

Four out of five people who have ever watched SABC1 continued to do so on a regular daily basis while over half of SABC2 and SABC3 viewers also claimed to have watched the stations "yesterday". E.tv was watched by two-thirds of its audience on a daily basis; it is more popular than SABC 2 and 3 in KwaZulu-Natal, but lost out to them in Mpumalanga, Northern Cape and North West provinces.⁵³⁵

Most respondents (65 per cent) watch television for entertainment, followed by wishing to be updated about current events (64 per cent), and education (55 per cent). Politics, humour, relationship matters, local music, religious affairs and controversial issues were also common reasons cited for watching television.

Respondents said they would like to see more entertainment (53 per cent), programming on faith issues (41 per cent), health and wellbeing (39 per cent), African culture (33 per cent) and local culture (29 per cent). Both men and women felt that programmes based on entertainment and faith issues needed more airtime. Female respondents advocated for more programming on health and wellbeing, local and African culture and customs. Urban dwellers more than their rural counterparts wished to see more coverage of local, African and global politics as well as human rights topics.⁵³⁶

With respect to satisfaction levels, SABC 1 (69 per cent) and e.tv (60 per cent) received the highest ratings. Two-thirds of the respondents feel that both public and private television provide adequate local news. Public television achieved a particularly high ranking for educational programming (87 per cent), compared to private television (78 per cent). 55 per cent of SABC viewers say they are satisfied with that broadcaster's promotion of local drama compared with 43 per cent for commercial television. 48 per cent of SABC viewers said that SABC is reflecting local culture and way of life compared with 38 per cent for commercial TV.

62 per cent of respondents felt that SABC is independent from government compared with 68 per cent for commercial television.⁵³⁷ In regard to impartiality and credibility, both types of television are seen by a majority as trustworthy: 72 per cent of respondents judge SABC's news as "impartial", with slightly more (74 per cent) of e.tv viewers giving that assessment for

⁵³³ Ibid., p. 24

⁵³⁴ Ibid., pp. 22-23

⁵³⁵ Ibid., p. 29

⁵³⁶ Ibid., pp. 31-32

⁵³⁷ Ibid., p. 36

the commercial broadcaster. Asked whether the news are “accurate” and could be trusted and believed, 74 per cent of SABC viewers and 76 per cent of e.tv viewers agreed.

Most respondents (81 per cent) felt that the most acceptable method of funding the public broadcaster was through commercial sources such as advertising. This was followed by 79 per cent of respondents who felt that state funding was justified, whereas 67 per cent felt that the broadcaster should be funded from licence fees. Most said that all three options should be combined.⁵³⁸

Regarding trustworthiness, the public broadcaster was slightly more trusted than its private competition. 57 per cent of respondents gave public television a score of 5 or 4 out of 5, as did 56 per cent for public radio; with the figures being 54 per cent and 51 per cent for the commercial TV and radio broadcasters respectively.⁵³⁹

6. Feedback and complaints procedures

According to the Broadcasting Amendment Act of 2002, the SABC must provide suitable means for regular inputs of public opinion on its services and ensure that such public opinion is given due consideration.⁵⁴⁰ The Act also requires the SABC to ensure that there is public participation in the development of its editorial policies, and to invite and consider public inputs in this regard.⁵⁴¹ To this end, several stations offer blogs where listeners can post comments. The SABC also has discussion forums on all of its stations and channels. Apart from these measures, it is not clear how the SABC goes about ensuring that regular inputs from the general public are indeed received and taken up.

The SABC is a signatory to the codes of conduct of the Broadcasting Complaints Commission of South Africa (BCCSA), which receives complaints on broadcast content, and the Advertising Standards Authority (ASA), which receives complaints on advertisements aired. With respect to the BCCSA, the SABC carries promotional material regularly on all services across radio and television, in all official languages, to remind audiences about their rights and obligations in terms of the BCCSA Code of Conduct and the process for lodging complaints.

In addition to this, complaints are sometimes received directly by the SABC and dealt with internally by the Public and Regulatory Affairs division. The SABC claims that it strives in all instances to have a 72-hour turnaround on all complaints received, unless more detailed investigation is required. Suggestions received regarding programme content are referred to the relevant channel or content provider for consideration.

The SABC keeps a detailed record of every complaint received, how it was handled and the eventual outcome. Its annual report gives a summary of the number of complaints received annually.⁵⁴²

According to the 2008/9 annual report, a total of 112 complaints against SABC services were received and finalised by the BCCSA. Of these complaints, 106 were dismissed. The SABC was found to be in contravention in six cases. Nine complaints were received by the Advertising Standards Authority (ASA), and one case was heard by the CCC of ICASA (the

⁵³⁸ Ibid.

⁵³⁹ Ibid., p. 40

⁵⁴⁰ Section 6(7), Broadcasting Amendment Act, No. 64 of 2002

⁵⁴¹ Section 6(6), Broadcasting Amendment Act, No. 64 of 2002

⁵⁴² Correspondence with Fakir Hassen, Acting General Manager, Special Projects, SABC, on 28 October 2009

FXI complaint into the alleged blacklisting of commentators). While the annual report notes that the SABC did receive internal complaints, it does not give any details or figures.

7. Conclusions and recommendations

The SABC has made significant strides in realising its mandate of being a full spectrum broadcaster, providing information, education and entertainment, in spite of its funding challenges. The broadcaster has excelled in certain programming areas, such as children's programming. The SABC also offers predominantly local fare, and has created an appetite for local content among its audience. However, it should be noted that the commissioning of local content has been heavily affected by the financial crisis at the broadcaster, leading to production houses retrenching staff or even closing down.⁵⁴³

The SABC has also developed an impressive set of editorial policies using a consultative process that helped to build public ownership of the document. The policies largely capture the principles of public broadcasting.

In the area of news and current affairs the SABC offers distinctive programming that sets it apart from its commercial counterparts. In its choice of material it is relatively more sensitive to regional dynamics, and gives more attention to rural audiences and women. Development-orientated news and programming, and news focussing on service delivery questions, is also taken more seriously by the SABC compared to its commercial counterparts. Of all broadcasters only the SABC comes close to doing justice to programming in African languages. These differences are noted and appreciated by audiences, as the findings of the audience research show.

In spite of these positive findings, other research has found that SABC is skewing – deliberately and openly so – a large part of SABC programming towards audiences in the upper income brackets. It is doubtful, therefore, whether all South Africans are indeed finding their experiences represented on the public broadcaster. Formats and genres that prioritise the tastes of the young and upwardly mobile are very prominent. The evolution of story lines in dramas such as “Muvhango” and “Isidingo” away from grittier reflections of South African life, and towards being aspirational showcases for middle class lifestyles, raises questions about the inclusive nature of the local content the SABC is championing.⁵⁴⁴

The SABC is also bedevilled by editorial timidity, which detracts from its efforts to offer distinctive, cutting edge public service programming, in particular with regard to potentially controversial or politically sensitive issues. Yet this has not detracted from many listeners and viewers recognising the central role of the broadcaster in their lives.

⁵⁴³ I. Da Silva, “‘Death’ of local content: SABC sets record straight”, BizCommunity.com, accessed from <http://www.bizcommunity.com/Article/196/15/39402.html> on 22 November 2009

⁵⁴⁴ ‘Turning points in television policy and practice since 1990’ (co-authored chapter with Ian Glenn), in W. Chuma and D. Moyo, *Policing the Fourth Estate: Media Policy in SADC*. Tshwane: Unisa Press, 2009 (forthcoming)

Recommendations

The following recommendations may assist in ensuring that the SABC meets its programming mandate:

- So far the regulator, ICASA, has not publicly released any report on the SABC's compliance with its licence conditions, so there is no way of verifying objectively whether the broadcaster is meeting its programming mandate. ICASA must be made to account to Parliament's Portfolio Committee on Communications as to why it has not released these reports, and must be put on terms to finalise and release them. The regulator must introduce clear regulations to deal with the commissioning of local content as soon as possible, and the extent of delivery on local content obligations must be evaluated.
- The SABC's editorial policies are due to be revised. The broadcaster needs to undertake widespread consultation on these policies, following a public review of the extent to which it delivered on its existing policies. In order to bring the policies into line with the principles of public broadcasting, the following changes should be considered:
 - The policies need to include a strong statement on the watchdog role of the SABC, mandating the broadcaster to hold those in power in every sector of society accountable.
 - While the policies in a range of areas underline the need to cater for all audiences, the requirements of poor and marginalised audiences, who are often neglected by commercial services, should be given more emphasis.
 - The roles of the GCEO and the editor-in-chief should not be conflated and their respective responsibilities be clearly delineated.
- The programme analysis in this chapter pointed to some weaknesses in the programming of the SABC. The following recommendations are made in this regard:
 - While the SABC's editorial policies commit the broadcaster to freedom of expression, practice does not follow policy. The SABC seems to have great trouble in stomaching controversial programming. In this regard, the editorial policies should simply be implemented.
 - ICASA needs to investigate and, where necessary, restrict the number of repeats taking place on SABC services. For example, a large amount of space dedicated to drama is being used for repeats, which limits innovation in this popular genre.
 - Product placement should be either banned or clearly marked as such.
 - The SABC needs to commission more children's programmes in African languages.
 - The SABC needs to give serious consideration to giving more support to the local film industry, rather than using its channels to flight out-of-date foreign films.

- The lack of documentaries and features on the SABC's schedule is a significant weakness that needs to be addressed, and such programmes should be prioritised for public funding. At the very least, the SABC should urgently direct existing resources towards this neglected genre.
- Ukhozi FM, which is extremely popular and plays a key informational role for its listeners, needs to give serious consideration to more in-depth news and current affairs slots, to enable the broadcaster to air topical issues adequately.
- The news and current affairs analysis pointed to a number of weaknesses that need to be addressed:
 - The paucity of international news on SABC 1 and Ukhozi is worrying, and further monitoring should establish the extent to which this is a general problem across SABC services. The SABC will not serve the informational needs of its audiences without adequate coverage of international events. Current affairs programmes on topical international issues should also be included in the programme line-ups.
 - The SABC needs to pay particular attention to ensuring adequate coverage of controversial issues. If SABC news in particular is to restore its editorial integrity in the wake of bruising controversies, then it needs to report robustly on such issues.
 - SABC stations should resist the tendency of relying predominantly on official and expert sources. They should take care to promote a diversity of sources.
 - SABC stations should place more emphasis on sourcing news from outside Gauteng and the Western Cape. The broadcaster has a huge news machine at its disposal, and this could be used to promote a de-centralisation of the news agenda.
 - At the same time, stations such as Ukhozi FM should resist the temptation to broadcast regional news only. Such an approach will lead to audiences being ill-informed about stories of national and international importance.
 - In short: SABC news needs to strike a more appropriate balance between international, regional and local news.

Perceptions of and Expectations towards the SABC

The purpose of this chapter is to assess how the public broadcaster is being perceived by various role players in the country and what they expect from its services. A particular focus is placed on their interpretations of the problems besetting the SABC, the causes of the problems, as well as proposed solutions.

The public debate on these issues gained additional momentum when the Minister of Communications gazetted a highly controversial Public Service Broadcasting Bill on 28 October 2009. (The bill will be examined more closely in chapter 10.)

1. Political parties

For reasons of space only the views of the top four political parties are discussed here (that is, the four parties which scored the most votes in the 2009 national elections). Other political parties have also been vocal on – and more often than not critical of - the performance of the SABC. They include the Independent Democrats (ID), the African Christian Democratic Party (ACDP) and - although it is not a registered political party – the ANC alliance partner, the South African Communist Party (SACP).

African National Congress

The ANC has developed a systematic critique of the SABC since 2002, when it formulated a media policy for its 51st National Conference. In this policy, the party took a long range view, arguing that the SABC had made great strides in transforming itself from a state to a public broadcaster. However, in the party's view the commercial nature of its funding base hampered further transformation. The policy argued for the need to establish a publicly funded media system by the year 2012. This model was necessary "in order for the public

and community media to serve as vehicles to articulate the needs of the poor, rural people, women, labour and other marginalised constituencies”.⁵⁴⁵

The party's critique of public broadcasting for its next national conference in 2007 was not nearly as categorical on the need for a publicly funded media system, although it did reiterate its argument for public funding to be made available for the SABC. To this end, the conference resolved that public funding should be increased from the current two per cent to as much as 60 per cent by 2010, to enable the public broadcaster to fulfil its mandate properly. The ANC also resolved that the SABC should increase its support for local content that is consistent with the values of the Constitution, and that it should focus especially on women, the disabled and the youth. Furthermore the President should ensure that future SABC boards be broadly representative of the South African population.⁵⁴⁶

Given the perceptions of close associations between the ANC and the SABC during former President Thabo Mbeki's term of office, the ANC under Zuma's presidency has been very vocal in its criticisms of the SABC News and Current Affairs Department, accusing its then-Managing Director Snuki Zikalala of failing to understand the broadcaster's mandate, and calling for the non-renewal of his contract.⁵⁴⁷ His contract was, in fact, not renewed. The Zuma-led ANC also supported the removal of the board appointed by Mbeki in 2007, and their replacement by an interim board to stabilise the operations of the SABC and to restore a measure of proper corporate governance over the broadcaster.⁵⁴⁸

Democratic Alliance

The DA's main concern with the SABC has been what it perceives to be its closeness to the ANC, rather than a critique of the broadcaster's funding base, and its impact on the public service mandate. In 2006, the party labelled the broadcaster the “propaganda arm of the ANC”, which it considered symptomatic of a broader contempt of press freedom displayed by the ANC. The DA has criticised executive appointments for being motivated by the ANC's desire to control the SABC, rather than by a concern for competence. This, it said, led to skewed coverage in the broadcaster's news, designed to protect the ANC from embarrassment.⁵⁴⁹ The DA also opposed the removal of the 2007 board as a politically inspired power grab by the ANC, while being extremely critical of the performance of the management. More recently the DA has supported the privatisation of the SABC as a solution to its woes, and has opposed the granting of a government guarantee to enable the broadcaster to borrow money.

Inkatha Freedom Party

The IFP's concerns over the SABC, voiced through its spokespeople on Parliament's Portfolio Committee on Communications, seem to be related mostly to the broadcaster's coverage of the party and the independence of the SABC from government and the ANC.

⁵⁴⁵ African National Congress. 2002. Media in a democratic South Africa. *Umrabulo* Number 16. August 2002. Downloaded on 20 November 2009 from

<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo16/media.html>.

⁵⁴⁶ “ANC 52nd National Conference 2007 – resolutions”, accessed from

<http://www.anc.org.za/ancdocs/history/conf/conference52/index.html> on 22 November 2009

⁵⁴⁷ “ANC statement on the SABC”, accessed from

<http://www.anc.org.za/ancdocs/history/conf/conference51/index.html> on 22 November 2009

⁵⁴⁹ “‘His Master's Voice’: the SABC as Propaganda Arm of the ANC”, Democratic Alliance position paper on the SABC, 28 June 2006

The IFP has attributed the crisis at the SABC to a lack of appropriate financial, technical and human resources⁵⁵⁰, and supported the removal of the 2007 Board on the basis that it no longer commanded the confidence of the entire Portfolio Committee. It has decried political interference in the affairs of the SABC by the ANC, which it felt has been a contributing factor in the crisis. For this reason it has advocated for a truly independent board consisting of media professionals and academics without party political affiliations.⁵⁵¹

Congress of the People

Cope has been very active in commenting on the crisis at the SABC since its launch in 2008, and its comments have been largely critical. Press statements have focussed primarily on the extent of the SABC's independence from the ANC-led government. Initially the party had opposed the removal of the SABC Board, and argued that management should be held to account for the crisis as well⁵⁵², but it gave qualified support for the move later on in the process. COPE has criticised the Public Service Broadcasting Bill submitted for public discussion in late 2009 as an attempt by the ANC to turn the SABC into its propaganda machine, with the new funding model seeking to "...[create] irrevocable dependence on state (ANC) patronage".⁵⁵³ The party rejected the trend towards increased taxes on the public, and called for the broadcaster to be funded from advertising, with contributions from the national budget.

2. Civil society

In civil society, there has been an outpouring of sentiment about the state of the SABC, most of it negative. A sample of views of civil society stakeholders is summarised below:

Save the SABC Coalition (SOS)⁵⁵⁴

The Coalition was formed in June 2008 as a grouping of civil society organisations to respond to the immediate crises facing the SABC, and to encourage civil society to recommit itself to the values of public broadcasting. The Coalition represents a number of trade unions including the Congress of South African Trade Unions (COSATU), the Communications Workers Union (CWU), the Creative Workers Union of South Africa (CWUSA), the Federation of Unions of South Africa (FEDUSA); independent producer organisations including the South African Screen Federation (SASFED); and a host of non-governmental and community-based organisations including the Freedom of Expression Institute, Media Monitoring Africa (MMA), the South African Chapter of the Media Institute of Southern Africa (MISA) and the National Community Radio Forum (NCRF); as well as a number of academic and independent experts.

SOS believes that the SABC is not fulfilling its mandate as a public broadcaster, but admitted that the evidence for this assertion was anecdotal, given that the SABC has not been systematically monitored, as it should have been. The SABC does not meet SOS's

⁵⁵⁰ "Budget speech: Communications", Suzanne Vos, IFP, 24 May 2007

⁵⁵¹ "National Council resolutions", National Council meeting, IFP, 16-17 May 2008

⁵⁵² "SABC Board chair resigns, Cope wants forensic investigation", *BizCommunity.com*, accessed from <http://www.bizcommunity.com/Article/196/15/37008.html> on 28 November 2009

⁵⁵³ "New Bill prepares SABC to become part of ANC propaganda machine", undated press statement, COPE

⁵⁵⁴ The group re-named itself in November 2009 to SOS: Supporting Public Broadcasting

expectations of what a public broadcaster should be, which includes setting the standard for broadcasting in the country, championing local content, furthering the goals of a participatory developmental state, ensuring institutional autonomy as well as editorial and programming independence, diversity of voices, public accountability, and a commitment to universal service.

According to SOS, the most recent crisis at the SABC was precipitated by a complete breakdown of corporate governance, with management and the board contributing to the problem in different ways. In the immediate past under GCEO Dali Mpofu's watch, expenses had increased significantly, especially consultant and staff costs. The oversight structures had also contributed to the crisis by failing to play their roles effectively; these structures, in the view of the Coalition, include ICASA, the Portfolio Committee on Communications and the Department of Communications.

In order for the crisis to be addressed SOS has argued for the development and implementation of sound financial systems, proper investigations into allegations of corruption, employment of a new GCEO, CFO and Chief Operations Officer (COO), and the organisation of a financial rescue package. It also believes that the crisis cannot be resolved by rushing through legislation, and that the stabilisation of the SABC could be achieved adequately under the existing legislation. Rather, a proper review of the 1998 White Paper on broadcasting in light of all developments over the past decade should take place before developing any new laws.⁵⁵⁵ This process would include as a first step a "Green Paper" being published to canvas public opinion. On the basis of such wide and thorough consultation a "White Paper" would then formulate policy, and this, in turn, would inform the bill.

Media Monitoring Africa (MMA)

MMA monitors SABC content – and has been doing so since 1993 - and is therefore in a unique position to make judgements about the extent of the broadcaster's delivery on its mandate.

According to MMA, the SABC is not fulfilling its objectives sufficiently, and although it is providing a range of services, and more local content than other broadcasters, it "has a long way to go in this regard".⁵⁵⁶ Self-censorship is an ongoing problem, according to the MMA, which it attributed to "...a fear of being bold".⁵⁵⁷ MMA has recognised some innovative programmes such as "Kids News", but expressed concern about the programme being under-resourced, leading to an over-reliance on adult content.

The MMA rates the SABC's performance best in the provision of basic services, such as radio in African languages, as well as local content on SABC 1. The organisation also recognised the SABC's fair and comprehensive coverage of the April 2009 elections. Overall, it says, the SABC's news coverage is "a million times better"⁵⁵⁸ than it was under apartheid. However, the SABC's quality of information left much to be desired, and the broadcaster could do more to link South Africa to the continent.

The MMA has attributed the crisis at the SABC to a "perfect storm" of political upheavals, mismanagement, absence of effective systems and structures, corruption, loss of credibility in the eyes of the public, a failure of oversight structures, and "...a great dollop of greed of

⁵⁵⁵ Correspondence with Kate Skinner, co-ordinator, Save our SABC Coalition, on 22 November 2009

⁵⁵⁶ Correspondence with William Bird, 27 November 2009

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid.

the most disgusting order by some of the employees who cared not a jot that they were screwing the public to be rich”.⁵⁵⁹

COSATU

The Congress of South African Trade Unions (COSATU) has been highly critical of political and economic influences on the broadcaster. For over a decade, the congress has argued that the broadcaster does not have commercial independence from advertisers.

In 1998, in response to the Department of Communication’s proposal to corporatise the SABC, COSATU argued that the SABC was incapable of achieving financial self-sufficiency. Corporatisation would therefore lead to “cherry picking”, with the broadcaster focussing on profitable programming, which would decrease access of marginalised audiences. In 2002, in response to the Broadcasting Amendment Bill, the trade union argued that its earlier concerns had been vindicated as the broadcaster exhibited what it called “rampant commercialisation”, which compromised its ability to achieve its mandate. COSATU noted the poor coverage of labour issues, the pro-business nature of the commentary on economic issues, the inadequate development of local content programming and the failure to reflect South Africa’s cultural and linguistic diversity.⁵⁶⁰

In the build-up to the ANC’s 2007 conference, COSATU criticised what it perceived to be the broadcaster’s bias towards the Mbeki administration. In a veiled reference to the perceived political sympathies of then-Managing Director of News and Current Affairs, Snuki Zikalala, the body said in its end of the year statement for 2006: “We shall continue to defend the role of SABC as a public broadcaster, not as a player in the political wars that are happening in the Alliance and in society as some of its senior executives want it to be”.⁵⁶¹ Since then, it has been tracking events at the SABC very closely, commenting on a range of editorial matters that it considered to be examples of bias: statements which culminated in its call for the board to be removed on the basis that it was unrepresentative and politically biased.⁵⁶²

Independent producers

The independent production industry has become extremely vocal about the crisis at the SABC, as it has been heavily affected by it.⁵⁶³ In November 2009 independent producers estimated that the broadcaster owed the sector R60 million in payments for commissioned material, resulting in a number of companies having to lay off staff or even facing bankruptcy. They also accused the broadcaster of cutting back on local content quotas.⁵⁶⁴ In a letter to the Arts and Culture Minister Lulu Xingwana, the South African Screen Federation expressed deep concern about what it termed an industry depression, and attributed this to the financial and management crisis at the SABC. The organisation has also voiced its unhappiness with the fact that ICASA has not monitored the SABC’s licence conditions adequately, and has not done so for the past seven years. The federation has called for an evaluation of local content compliance and of the regulations, with a view to the regulator increasing these requirements. Another sore point for the industry is what it perceives to be unfair intellectual

⁵⁵⁹ Ibid.

⁵⁶⁰ “Cosatu submission on the Broadcasting Amendment Bill”, submitted to the Portfolio Committee on Communications, 18 September 2002

⁵⁶¹⁵⁶¹ “Cosatu year-end statement for 2006”, 22 December 2006, accessed from <http://www.cosatu.org.za/show.php?include=docs/pr/2006/pr1222.html> on 22/12/2006.

⁵⁶² Cosatu was invited to contribute its views to this report, but did not respond.

⁵⁶³ U. Vos “Independent TV producers give new SABC Board support”, *Citizen*, 5 July 2009

⁵⁶⁴ “SABC, independent producers discuss new pay plan”, *Business Day*, 6 November 2009

property arrangements, whereby the SABC claims all property rights, preventing producers from being able to exploit content to compensate for what they regard as low rates of payment from the broadcaster.⁵⁶⁵

Another very vocal stakeholder in the recent debate is the Television Industry Emergency Coalition, a grouping of independent production companies, including the South African Screen Federation (SASFED), the Independent Producers Organisation (IPO), the Producers Alliance, the Documentary Filmmakers Association (DFA), the Writers Guild of South Africa (WGSA) and the Communication Workers Union (CWU). The Coalition was formed to address the impact of the SABC's financial crisis on the independent production sector. It has argued for, amongst other things, the following:

- A structural overhaul of the SABC, with a broad review of policy and management, and an end to the appointment of "political Boards", which, the group claims, has eroded the core functioning of the broadcaster and distorted the management of it;
- The appointment of skilled executive management;
- A review of the terms of trade with the independent production sector, which it regards as biased in favour of the broadcaster (especially its intellectual property arrangements);
- An end to excessive bureaucracy.⁵⁶⁶

On the whole, members of the emergency coalition feel that the SABC is not fulfilling its role as a public broadcaster effectively, and they attribute the problem to bad management and almost non-existent oversight. Head of Communications of SASFED, Marc Schwinges, has argued that the way the broadcaster interacts with the sector is not in the public's interest, and that producers should have had shared rights long ago, which would have led to higher quality local content. Local content requirements, he says, have not been independently verified and wasteful expenditure and personal enrichment have plagued the broadcaster. The sector also objects to what it refers to as "meddling in independent content streams and internally produced content for political objective ... which is hardly appropriate for a public broadcaster".⁵⁶⁷

SASFED has argued that the SABC has not built collaborative relationships with relevant role players and that it has not been philosophically committed to a progressive notion of public broadcasting. The broadcaster has also been described as unable to conceive of audiences outside of market prescripts.⁵⁶⁸

A further concern is that the SABC may be setting a poor example for other broadcasters in Africa. This is particularly worrying as South Africa is still widely looked to as the model for public broadcasting on the continent.⁵⁶⁹

SASFED has proposed that the SABC board and management should be committed to the following criteria:

- appreciation of the dynamic, full spectrum role of public television in society and an overriding commitment to public service and the public interest;
- impeccable governance competencies;

⁵⁶⁵ "Sasfed submission to the Minister of Arts and Culture", 26 October 2009

⁵⁶⁶ "Industry's manifesto to SABC", Screenafrica.com, 4 June 2009, accessed from <http://www.screenafrica.com/news/television/172423.htm> on 28 November 2009

⁵⁶⁷ Correspondence with Marc Schwinges, SASFED, TVIEC and DFA, 28 November 2009

⁵⁶⁸ Correspondence with Feizel Mamdoo, SASFED, 30 November 2009

⁵⁶⁹ Correspondence with Marc Schwinges, op.cit.

- commitment to a co-determining and collaborative role by relevant role players and interests;
- commitment and accountability to a renewed, optimally shared vision of public broadcasting services;
- resolute independence from untoward state, party-political and civil constituency interests;
- a dynamic appreciation of the concepts of public service obligations and development;
- a bold commitment to free and diverse expression;
- unquestioned commitment to local content and independent commissioning regulations;
- commitment to conducive terms of trade with the independent production sector, including money for value and just property rights recognition;
- commitment to a bold, dynamic and visionary commissioning structure;
- ability to effect a credible, competent and responsive management and operational structure.⁵⁷⁰

3. Employees of the SABC

Employee organisations active at the SABC have also made their voices heard in the debate on the state of the broadcaster. The only exception has been the Media Worker’s Association of South Africa, whose public pronouncements have been patchy and confined mainly to wage-related rather than policy issues.⁵⁷¹

Communication Workers Union (CWU)

The CWU has 1024 registered members at the SABC, and is a COSATU affiliate. According to the union, the SABC has refused to accept its proposal for a recognition agreement.

The CWU Shop Steward’s Council feels that producers are instructed to show people who are “aspirational”, and not to address grassroots stories that may show up poor service delivery. The SABC, therefore, is not fulfilling its mandate, “rather it is frustrating the poor by not telling their story”. While it is performing well in producing programmes based on internationally franchised formats, such as “Strictly Come Dancing” and “South Africa’s Got Talent”, it is doing badly on developing innovative local programming. The union has also accused the content hub – the central commissioning unit - of “becoming a haven for deployees [of the ruling party], and people who enrich themselves”, and that it should be disbanded, which will allow each channel to have their own commissioning editors. Furthermore, the union criticised the SABC’s tendency to buy state-of-the-art equipment prematurely, before the technology has stabilised, leading to investments in inappropriate technology. Other problem areas include the loss of assets, sheltered employment of “dead wood” and the existence of corruption.⁵⁷²

Broadcasting and Electronic Media Allied Workers Union (BEMAWU)

The union claims to represent over 1000 members in the media sector, particularly in the SABC. While BEMAWU has mostly been active on conditions of employment at the

⁵⁷⁰ Correspondence with Feizel Mamdoo, SASFED, 30 November 2009

⁵⁷¹ “Mwasa set to help avert SABC strike”, *Business Day*, 7 July 2009

⁵⁷² Ibid.

broadcaster, it has also made pronouncements on policy issues. For instance, the union has been extremely critical of the Public Services Broadcasting Bill, stating that between 1200 and 1500 employees will lose their jobs if the Bill is signed into law. This, it says, is because shortfalls in the collection of income tax will have a knock-on effect on the broadcaster, which would be exacerbated if advertising revenue is capped. The union has called for a reconsideration of the Bill's funding model, and the retention of the television licence collection system with a public funding top-up. The union has also criticised the top-heavy nature of SABC's management, and has called for cost cutting of wasteful expenditure at this level.⁵⁷³

4. Conclusions and recommendations

The findings of this chapter jar noticeably with those of the HSRC research referred to in chapter six, which ranked the SABC the second most trusted institution between 2003 and March 2008. This strongly suggests that the SABC's credibility has plummeted from 2007 onwards.

The recent crisis at the SABC has shown that South Africans are passionate about their public broadcaster and there are high levels of civil society mobilisation around the broadcaster. What unites views across the political spectrum, and state and civil society, is the deep unhappiness with the SABC. In fact, it is difficult to find positive views about the broadcaster in the recent public debate. The most positive views were expressed by those organisations that are taking a long range view of the SABC's transformation to a public broadcaster, giving credit for the fact that the broadcaster had undergone substantial changes in the right direction. Most of the views expressed, however, point to a widely held public sentiment that the broadcaster has undergone a relapse of late.

There are widely differing views on the causes of this malaise, as well as solutions offered. Many attribute the problems to poor governance, or more specifically bad management. A few organisations such as COSATU, the ANC and MMA have attempted deeper analyses of the reasons why the SABC is not fulfilling its mandate, with the first two concluding that the broadcaster lacks independence from commercial sources of funding.

The ANC has pursued long range resolutions to change the broadcaster's funding base: resolutions that have crystallised into the Public Services Broadcasting Bill. Yet a significant blind spot in the ANC's analysis is its failure to propose measures to enhance the SABC's political independence.

Political commentator Adam Habib has argued that it is not coincidental that several parastatals are being wracked by crisis at the same time, including the SABC, Eskom and South African Airways. He argued that the crisis had its roots in the Mbeki administration, which deployed ANC members to parastatal boards, blurring the boundaries between government, supervisory boards and executive management. These deployees, he said, also infused a corporate ethic into the parastatals, where profitability rather than sustainability was the operative word, and development outcomes were almost totally ignored. In his view the collapse of governance at the SABC demonstrates the incompatibility of the corporate model with the mandate of a public service broadcaster.⁵⁷⁴

⁵⁷³ Open letter – request for granting more time, Hannes du Buisson, President, Bemawu, 27 November 2009

⁵⁷⁴ A. Habib, "Power crisis is rooted in history of poor governance", *Sunday Times*, 15 November 2009

Recommendations

- The negative sentiment against the SABC is so prevalent that the broadcaster's problems cannot be addressed without substantial public involvement. Imposed solutions will simply not work. The Department needs to subject the proposed Public Services Broadcasting Bill to a proper Green Paper/ White Paper process, so that a thorough analysis can be undertaken of the causes of the SABC's crisis, and evidence-based policy solutions be developed.
- Mechanisms of public participation in the SABC's governance and programming are essential. Regular stakeholder forums need to take place with the board, which should be required to meet with stakeholders if a substantial number of signatures are submitted in support of this request. The board should also be required to hold report-back meetings.
- The ANC is the only political party with a relatively clear media policy, and the policy has been made available for public scrutiny. The party is pursuing these policy positions in its work in Parliament and government, which gives its approach to the SABC a measure of consistency and predictability. The same cannot be said for other political parties. This makes it difficult to discern what they actually stand for in relation to public broadcasting. All political parties should be enjoined to develop media policies that include sections on public broadcasting so that the electorate can engage with their policy pronouncements on the broadcaster, and hold them to account for their performance in government and parliament.
- As a matter of urgency, the SABC needs to review its intellectual property arrangement with independent producers, to allow them to exploit the content they have produced. Independent production companies can not be expected to continue without income while the SABC sorts out its funding crisis and a collapse of the industry would have disastrous consequences for public broadcasting in the future.

Broadcasting Reform Efforts

During the course of 2008 and 2009, the political environment in South Africa changed profoundly.

Particularly momentous was the September 2008 recall of the President of the Republic, Thabo Mbeki, by the ruling African National Congress (ANC), six months prior to the end of his term of office and a general election. His removal from office followed his being replaced by Jacob Zuma as head of the party at the ANC's national conference in December 2007.

The April 2009 elections (national and provincial) again resulted in an overwhelming victory for the ANC, with Jacob Zuma becoming President of the Republic and the appointment of a number of new ministers, among them party heavyweight and trusted Zuma ally, retired army chief General Sphiwe Nyanda, as the Minister of Communications.

Changes at the political level have affected broadcasting policy and the public broadcaster profoundly. The SABC in many respects was the first institution in South Africa to feel the tremors resulting from the drawn out power struggle between Mbeki and Zuma and their respective supporters and clearly demonstrated that the SABC is not immune to political interference despite the legal institutional safeguards in place to protect its independence. The Parliamentary declaration of no confidence in the Board of the broadcaster and the subsequent proposed amendment to clauses of the Broadcasting Act empowering MPs to dissolve the governing body were widely regarded as one of the consequences of the internal battles within the ruling party (see chapter six).⁵⁷⁵ The Public Service Broadcasting Bill gazetted in October 2009 looks set to change the broadcasting landscape even further.

1. Previous and current broadcasting reform efforts

South African broadcasting was radically transformed with the advent of constitutional democracy in 1994. In this transformation process, civil society groups played a leading role. The apartheid era state controlled monopoly was broken up into a three tier broadcasting

⁵⁷⁵ See for example I. Lekota, 'SABC's soap of soaps', *The Times*, 8 May 2008, accessed in June 2008 from <http://www.thetimes.co.za/News/Article.aspx?id=762129>

system overseen by an independent regulator. This has resulted in a range of new broadcasters taking to the air and greater diversity for many viewers and listeners.

Since then, further changes have been made to the policy and legal environment for broadcasting with the introduction of the Broadcasting Act in 1999, the amendment to this law in 2002 and legislation to prepare for convergence in the communications sector in 2005 (the Electronic Communications Act).

The 1999 Broadcasting Act responded to the need to review apartheid era policy, and to repeal the Broadcasting Act of 1976, in order to ensure that the broadcasting system was imbued with constitutional values, such as freedom of expression and respect for diversity of views.

However, by the early 2000's, it became clear that the transformation of the SABC had taken a problematic turn. While the broadcaster had managed to stabilise its finances after a financial crisis in 1999/ 2000, it did so at the expense of aspects of its mandate (especially its multi-lingual mandate), leading to a public backlash against the Corporation's excessive commercialisation. The introduction of the 2002 Broadcasting Amendment Bill represented the government's attempt to tighten accountability⁵⁷⁶, and to clarify the SABC's mandate through the development of an editorial code of practice and editorial policies, to be approved by the Minister of Communications. The latter provision was removed after a public outcry.

However, the fundamental principles of independent regulation, a three-tier system and diversity of ownership and content have not changed with new policies or legislation. This is at least in part due to the constitutional protection of freedom of expression and the independence of the regulator which have thwarted attempts by the Minister of Communications to gain more control over the Independent Communications Authority of South Africa (ICASA). (See chapter five)

Although the re-regulation of broadcasting in South Africa is generally seen as having been successful, it has become apparent that there is a need to review the existing policies and laws – both to address shortcomings identified during their implementation and in preparation for the new multi-channel era of digital broadcasting. It is also evident that there is a need to focus on ensuring that structures established, such as the regulator, have the will, capacity and resources to fulfil their mandates.

Aspects of these policies and laws are being reviewed at the time of writing, so the question of reform is definitely on the public agenda. Two fundamental issues under discussion are the inadequate financial controls at the SABC, as well as the problematic nature of the SABC's predominantly commercial funding base.

Furthermore there has been growing unhappiness with the composition of the SABC Board, as well as with the manner in which it is appointed, which lends itself to politicisation of the process (see chapter six). In 2007, these issues came to a head when a coalition of civil society organisations wrote to the then-President Thabo Mbeki requesting him not to appoint the board he was about to appoint, on the basis that there had been political interference in the selection process. The coalition also pointed out that the individuals selected were not representative of a broad cross-section of the population, because they did not include

⁵⁷⁶ J. Duncan and C. Tleane, *Public broadcasting in the era of cost recovery: a critique of the SABC's crisis of accountability*, Johannesburg: Freedom of Expression Institute, 2002, pp. 165-184

working class representatives or representatives from communities of interest such as journalism or labour.⁵⁷⁷

Mounting evidence of poor financial management led to Parliament's Portfolio Committee on Communications arguing for a further amendment to the Broadcasting Act to give it the powers to recommend to the President the removal of the SABC Board. As outlined in chapter six, the existing clauses on the removal of the board were vague, and needed to be reconsidered. The Portfolio Committee was particularly concerned that it could not recommend the removal of the board as a whole on grounds of misconduct or non-performance.

The Broadcasting Amendment Bill was introduced into Parliament in July 2008, and after a hurried debate on its contents, brought into effect in March 2009. The Act gives Parliament the powers to pass a resolution calling for the removal of the board and for the dissolution of the board, and the resignation of individual board members. The Act also allows the President to appoint an interim board, after a selection process undertaken by the Portfolio Committee. The grounds for removal of board members are more far-reaching than they were in the Broadcasting Act, and include failure to discharge fiduciary duties, failure to adhere to the Charter, and failure to control the affairs of the Corporation.⁵⁷⁸

As the process around the bill unfolded, board members began to resign. By the time the committee came to considering the status of the board in terms of the bill, it was already apparent that the board was dysfunctional. The committee convened a hearing into the status of the board in June 2009. At that hearing, the SABC revealed that it was experiencing a major cashflow crisis, and projected a deficit of R800 million.

The committee recommended the removal of the board, and an interim board was appointed. A new permanent board was selected in September 2009. Once again, the selection process was not without its controversies, though, with the leader of the Independent Democrats, Patricia de Lille, bemoaning the fact that the ANC imposed names on the committee, again leading to a politicisation of the process.⁵⁷⁹ Media expert Anton Harber criticised the fact that there was no serious attempt to reach consensus on the names; however, he noted that the list contained a good range of skills and experience and the individuals appeared to represent a cross-section of the population.⁵⁸⁰ A key obstacle to reform, then, appears to be the abiding tendency of the ANC caucus in the portfolio committee to impose its will on the other parties, hampering a complete buy-in of the process.

The interim board has been credited with stabilising the SABC. During its tenure, the interim board had to address the findings of a damning auditor-general's report, which found the following:

- An organisational culture prevailed at the SABC that showed a complete disregard for the prescripts of the SABC's procurement and tender policy, relevant legislation and regulations of National Treasury.
- There appeared to be numerous cases of conflict of interests by SABC employees doing business with the broadcaster.

⁵⁷⁷ 'Letter to Mbeki opposes SABC Board appointments', BizCommunity.com, accessed from <http://www.bizcommunity.com/Article/196/66/18786.html>.

⁵⁷⁸ S. 15A of the Broadcasting Amendment Act, No. 4 of 2009

⁵⁷⁹ 'SABC Board nominees named', News24, accessed from <http://www.news24.com/Content/SouthAfrica/News/> on 9 November 2009

⁵⁸⁰ A. Harber, 'How the new SABC Board was chosen', *The Harbinger*, accessed from <http://www.businessday.co.za/Articles/Content.aspx?id=77610> on 8 November 2009

- There were selected examples of alleged gross abuse of benefits, such as that of petrol cards by senior executive managers.
- There was a gradual breakdown in the lines of accountability and proper financial reporting.⁵⁸¹

This report prompted the Department of Communications to release a statement promising, rather ominously, to 'tighten the screws' on the SABC through its shareholder compact agreement with the SABC. This was to include assessing the roles and authority allocated to executive and senior managers, requesting monthly management accounts and operational reports from the SABC, active and permanent Departmental participation in the various committees of the SABC board, and ensuring that all major decisions are approved by the Department 'where necessary'.⁵⁸²

Another factor in the pressure for reform has been the lack of capacity of ICASA to address the mounting crisis at the SABC. Throughout the controversies around the performance of the SABC board, the regulator remained silent, leading to critics accusing it of being toothless. There is also evidence that the regulator has failed to exercise its most basic monitoring functions, such as monitoring the SABC for compliance with its licence conditions. The last available report in this regard (2006/7) was withdrawn after the SABC complained about its methodology.⁵⁸³ Hence, ICASA's deficiencies made it easier for the SABC to evade accountability, which, in turn, led to pressure mounting for an overhaul of the public broadcasting landscape.

In July 2009, the Department of Communications released a Public Service Broadcasting Discussion Document as part of the process towards the amendment of the Broadcasting Act. Members of the public were invited to give comments on the document, which included a series of over 70 questions on the future of public service broadcasting.⁵⁸⁴

The discussion document noted that more than ten years had passed since policy and legislative changes were made to the broadcasting landscape, and that convergence as well as the crisis at the SABC highlighted the need for a review. It quoted the former Minister of Communications, Ivy Matsepe-Casaburri, stating that "the powers given to the appointing authority, the processes of appointing and removing Board members, the Public Broadcaster's Charter, and the role of the executive and/or Parliament, clearly needs reviewing, without sacrificing the broadcaster's independence but clarifying the nature, content and form of that independence".

In the paper, the Department asked fundamental questions about the SABC, including what the mandate of the broadcaster should be in the light of convergence, how the mandate should be funded, and what would be the most appropriate governance structures to ensure accountability. Despite the short period of a few weeks given for comments from the public, a

⁵⁸¹ 'Members of Parliament back action against South African Broadcasting Corporation (SABC) employees' (press statement), South African government information, accessed from <http://www.search.gov.za/info/> on 10 November 2009

⁵⁸² 'Statement by Department of Communications on the Auditor-General's report on the SABC', accessed from [http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F2009%2F09092310351001.htm%40Gov&q=\(+\(dc.Date%3E%3D2009%2F01%2F01\)%3CAND%3E\(dc.Date%3C%3D2009%2F12%2F31\)+\)%3CAND%3E\(+Category%3Cmatches%3Es+\)&t=Communications+on+Auditor-General's+report+on+South+African+Broadcasting+Corporation+\(SABC\)](http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F2009%2F09092310351001.htm%40Gov&q=(+(dc.Date%3E%3D2009%2F01%2F01)%3CAND%3E(dc.Date%3C%3D2009%2F12%2F31)+)%3CAND%3E(+Category%3Cmatches%3Es+)&t=Communications+on+Auditor-General's+report+on+South+African+Broadcasting+Corporation+(SABC)) on 9 November 2009

⁵⁸³ 'Compromised Icasa toothless against SABC?', BizCommunity.com, accessed from <http://www.bizcommunity.com/Article/196/15/37876.html> on 3 November 2009

⁵⁸⁴ 'Public service broadcasting: repositioning broadcasting for national development discussion paper', July 2009, Government Gazette No. 32420

total of 32 submissions was received.⁵⁸⁵ Many organisations argued for a more comprehensive policy review rather than focusing on the SABC alone.

2. Public Services Broadcasting Bill

At the end of October 2009 the Department released a Public Service Broadcasting Bill, which introduced significant policy shifts.

The preamble to the bill notes “that South Africa is a developmental state” without providing any definition. The bill is meant

to align the broadcasting system to (a) the developmental goals of the Republic for the benefit of the citizens and create a strong and sustainable funding model concomitant with this developmental objective, (b) the democratic values of the Constitution and to enhance and protect the fundamental rights of citizens.

The Broadcasting Act of 1999 had sought to align the broadcasting system “with the democratic values of the Constitution” only.

The preamble of the bill goes on to say “that public broadcasting is not the sole responsibility of public broadcasting services”.

The bill proposes a new funding model by setting up a public service broadcasting fund. This fund is to be fed from personal income tax (not exceeding one percent of total income) instead of the current licence fee, money appropriated by Parliament, and contributions from broadcasting licencees and business (also not exceeding one per cent of annual turnover)⁵⁸⁶. The fund is to be administered by the Media Development and Diversity Agency (MDDA)⁵⁸⁷, and

must be utilized exclusively to fund-

- (a) the public service division of the corporation [i.e. SABC], including regional television and international broadcasting services;
- (b) content development;
- (c) community broadcasting services;
- (d) signal distribution by a common carrier to ensure universal access;
- (e) the Broadcasting and Signal-distribution Museum⁵⁸⁸;
- (f) for the payment of subsidies to any broadcasting licensees pursuing public services broadcasting as defined in this Act; and
- (g) such other public services broadcasting uses determined from time to time by the Minister after consultation with the Minister of Finance.⁵⁸⁹

In December 2009, the Minister of Finance rejected the idea of a dedicated tax for public broadcasting which obviously had not been canvassed with his department. This rejection may well lead to this proposal being stillborn. Also, because the bill appears to be a money bill, i.e. one that “appropriates money or imposes taxes, levies or duties, it may well be unconstitutional in that only the minister responsible for national financial matters may introduce a money bill.⁵⁹⁰

⁵⁸⁵ S. Nyanda, 'Time to set the record straight on the public broadcaster', *Business Day*, 6 November 2009

⁵⁸⁶ Public Service Broadcasting Bill 2009, section 4

⁵⁸⁷ *Ibid.*, section 5

⁵⁸⁸ The bill establishes such a museum under section 40

⁵⁸⁹ Public Service Broadcasting Bill 2009, section 6 (1)

⁵⁹⁰ “Written representations by the Civil Society Coalition: Save our SABC – Reclaiming our Public Broadcaster, on the Public Service Broadcasting Bill”, 17 November 2009

The bill does not change the ownership structure of the SABC and mentions “its shareholder” several times⁵⁹¹, implying that government is to remain the sole shareholder.

The bill maintains the current split of the SABC into a public service division and a commercial service division and introduces a third, namely an international broadcasting service division⁵⁹². The bill proposes that the public commercial services (merely referred to as the SABC's commercial services) contribute to the funding of the public services through a system of cross-subsidisation, a scheme that has been shown not to work in the past (see chapter seven).

The bill introduces significant levels of control by the “Minister” (presumably of Communications) over broadcasting:

- The minister is to approve the criteria for allocation of public service broadcasting funding⁵⁹³, and he may also publish regulations “detailing the contributions to the Fund”:
 - (a) The contributions by the different sectors;
 - (b) The contribution levels by the different income groups;
 - (c) Categories of exemptions;
 - (d) Validity of the contributions; and
 - (e) Other public service broadcasting initiatives to benefit from the Fund.⁵⁹⁴
- Chapter 9 describes in detail the “role of the Minister” who is “ultimately responsible for the effective monitoring of the implementation of this Act”. To this end he/she “may establish an advisory body to assist him/her in performing” this function: “the nature, terms of such body and its conditions and composition must be determined by the Minister”:

Upon establishment, the body shall monitor and advise the Minister on the implementation of Public service broadcasting matters including-

- (a) mandate fulfillment by the different broadcasters, particularly public and community broadcasting services;
- (b) funding matters;
- (c) signal distribution;
- (d) policy and regulations
- (e) local content matters and/or
- (f) any other matters that may be critical to the successful implementation and within the scope of this Act and public service broadcasting in general.⁵⁹⁵

At present, ICASA is responsible for most of the above, monitoring of compliance in particular.

- Section 38 gives the minister the power to make “interventions” and to direct “any of the entities specified in this Act to take any action pursuant to (sic) Public Service Broadcasting if the entity is unable to perform its functions as prescribed in this Act”. This means that the minister can issue “a directive” to public and community broadcasters to take “steps which must be taken to remedy the situation” and may,

⁵⁹¹ For example: Public Service Broadcasting Bill 2009, section 14(2) (c)

⁵⁹² Ibid., section 11

⁵⁹³ Ibid., section 7 (1)

⁵⁹⁴ Ibid., section 47 (2) (3)

⁵⁹⁵ Ibid., section 36 (4)

expressly “excluding the Authority [ICASA]”, “recommend that penalties or fines be imposed by the Authority”. ICASA then has to determine the penalties or fines. – Under current law, ICASA exercises these responsibilities independently of the Minister.

- Section 39 deals with “intervention by the Minister in respect of the Corporation [SABC]”:

The Minister may, subject to this Act and the ECA [Electronic Communications Act], instruct the Board [of the SABC] to take any action specified by the Minister if the Corporation-

- (a) is in financial difficulty or is being otherwise mismanaged;
- (b) is unable to perform its functions effectively;
- (c) has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under this Act or related Act;
- (d) has failed to comply with any law;
- (e) has failed to comply with any directive given by the Minister under this Act; or
- (f) has obstructed the Minister or a person authorised by the Minister in performing a function in terms of this Act.

In cases where the board fails to comply with such instructions the Minister “after having afforded the Corporation a hearing” may “write to the Appointing Authority (the President of the Republic), or the Authority [ICASA] to take appropriate action”. Such action may include “recommendations for replacement or removal of the Board member(s) by Parliament”.

- The charter of the Corporation contained in the bill introduces a performance management system for the board “to evaluate the performance of the chairperson and other members of the Board”. This system is to be established by the Minister “in consultation with the National Assembly”. “The evaluation of the performance ... must be conducted by a panel constituted by the Minister, in consultation with the National Assembly for that purpose”.⁵⁹⁶

In view of the fundamental policy shifts implicitly proposed by the bill, the Department has been criticised for rushing the legislative process, and asked to give the public more time than the originally allotted few weeks to make substantial responses. The sheer speed with which the Department is seeking to make fundamental changes could well be a key obstacle to lasting reform, as this speed may lead to a lack of buy-in by the public and even by government itself.

It will be useful to compare the bill to the recommendations made in chapters six and seven of this report. This will allow for an evidence-based assessment of the bill’s strengths and weaknesses.

- Regarding the policy framework, it is clear that the bill introduces fundamental policy shifts, yet this is not declared explicitly. The recommendation that the bill should be put through a proper Green Paper/ White Paper process is still highly relevant, in order to consider the proposed changes carefully and situate the bill within the overall communications landscape.
- The bill leaves the legal status of the SABC as a corporate entity unchanged saying in the charter that the SABC “shall continue to exist as a body corporate”⁵⁹⁷ making

⁵⁹⁶ Public Service Broadcasting Bill 2009, Charter of the Corporation, section 3.10

⁵⁹⁷ Ibid., section 1.1

the corporation accountable “to the shareholder and the public at all time”⁵⁹⁸, with the “shareholder” not specifically defined by the bill. Chapter 8 of the proposed SABC Charter acknowledges the existence of “articles of Association outlining the relationship between the Board and the Minister” and states that “it is expected that content of the Articles shall be revised consistent with this Charter and the Act”. The findings and recommendations in chapter six challenge the appropriateness of the SABC remaining a PTY Ltd. The bill also entrenches the separation of the broadcaster’s services into public and public commercial ones. Going on past experience, however, there is no basis to believe that this split, and the resulting cross-subsidisation of the latter by the former, is working.

- The SABC has not been given the same status and protections as those awarded to constitutional entities. There is clearly no attempt being made on the part of the Department to list the SABC as a constitutional institution, rather than a public entity (its current status). There is also no visible attempt to amend the Public Finance Management Act accordingly.
- The extensive powers of the minister in regard to public service broadcasting in general gives the minister the right to establish his/her own monitoring system. Thus the bill dis-empowers ICASA rather than strengthening the regulator so that it can really fulfill its mandate.
- The rights of the minister in regard to the SABC to strip the board of its ability to take remedial steps independently of the minister if problems occur at the broadcaster, establishes the minister as a super-board. In addition, the panel to evaluate the performance of the board – appointed by the minister – re-enforces this power and fundamentally undermines the board’s independence and accountability to Parliament as the representative of the people.
- There is confusion in the bill about what constitutes the charter. The charter should contain a statement of the public mandate of the SABC. Issues such as the procedures for the appointment and removal of the board, the role of the executive management and reporting and accounting procedures should be dealt with in the broadcasting act, not the charter.

The existing charter is extremely thin on what the mandate of the SABC actually is, which implies that the consultation process on this important document has been inadequate, and has not translated into a charter that genuinely represents a South African vision for public broadcasting.

- Procedures for the appointment and removal of the board are dealt with in different places: appointment procedures in the bill, and removal procedures in the charter. This is confusing. The removal procedures remain essentially unchanged from the Broadcasting Amendment Bill.
- The clauses on disqualifications for membership on the board are too weak, as they do not protect the SABC from actual or perceived conflicts of interest as well as from accusations of political bias. Office bearers with the state and/or political parties should not be allowed to serve on the board.

⁵⁹⁸ Ibid., section 3.3. (e)

- According to the bill, the Group Chief Executive Officer, Chief Operating Officer and Chief Financial Officer are not to be members of the board anymore. This should clear up the current confusion, and possible conflicts of interest, in their roles.
- The charter makes provision for the minister to be consulted about these three appointments, which gives the Minister a say in the appointment process.⁵⁹⁹ The legislation should make it clear that the Board is solely responsible for all appointments to senior management positions.
- The GCEO is expressly designated the editor-in-chief⁶⁰⁰. This, as has been shown, is not only untenable if the broadcaster's editorial independence is to be safeguarded, but by implication also means that the Minister will still have indirect control over the SABC's most controversial decisions.
- No provision has been made in the bill for staggered provision of terms of office of board members.
- An attempt has been made in the bill to clarify the role of executive management vis-à-vis the board. The charter says that "the affairs of the Corporation are administered by an executive committee ... appointed by the Board".⁶⁰¹ It further states as a general principle, without any qualification, that the "Executive management shall take instructions from the Board"⁶⁰². This may not give the executive the necessary level of independence from the board to ensure an appropriate separation of powers. Therefore, the potential for the blurring of lines still exists. The bill should spell out clearly that the board is not expected to play an operational role.⁶⁰³
- Measures to enhance the SABC's public accountability are to be put in place, which are welcome. For instance, the charter must undergo a process of renewal at least every ten years. In addition, ICASA must conduct six monthly public reviews of the extent to which the SABC is meeting the terms of its charter, and the board is also required to set up an advisory board. However, more specific accountability measures could be added, and consideration should be given to those outlined for the BBC in chapter five.
- The reviews and audits suggested in this survey's chapter five remain acutely relevant - such as the review of the causes of leadership instability, a proper audit of the organogram of SABC staffing to address concerns of centralisation of management, a review of how best to structurally protect programming from commercial and political interference, an audit into the low morale at the SABC and an assessment of its training needs. These reviews are essential to ensure that the new bill does indeed address internal weaknesses, to the extent that this is appropriate.
- Regarding the proposed new funding model, a number of issues need to be clarified before any reasonable determination can be made. At present it is open to question how much funding the SABC could expect in terms of such a model - and how much is envisaged to be made available to other broadcasters, how requisite funding levels are to be determined, what the percentage split between the various sources of

⁵⁹⁹ Ibid., section 3.11.1(2)

⁶⁰⁰ Ibid., section 5 (1)

⁶⁰¹ Ibid., section 3(12)

⁶⁰² Ibid., section 2.2. (1)

⁶⁰³ Ibid., section 3.11.1

funding is likely to be and whether the strengths, weaknesses and appropriateness of the existing mechanisms to determine funding levels have been reviewed adequately. The lack of clarity on the role of ICASA in protecting the viability of the SABC is of particular concern, as it would seem that the bill marginalises the regulator even further on these questions. The recommendations in chapter seven give essential pointers in this regard.

- The separation between public and public commercial services, and the cross-subsidisation of the public by the commercial division which is entrenched in the bill, still needs to be reviewed. The fact that the Minister is to determine the amounts to be used for cross-subsidisation violates the independence of the board.

All in all, the bill falls far short of the African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa 2002 which states that public broadcasters should be

- accountable to the public through the legislature rather than the government;
- governed by a board which is protected against interference, particularly of a political or economic nature;
- adequately funded in a manner that protects them from arbitrary interference with their budgets.

3. Future of public broadcasting

The current and lively debate in South Africa on the value and future of public broadcasting focuses particularly on the following areas:

- Funding of public broadcasting

After the release of the Public Service Broadcasting Bill in October 2009 the initial media focus was on the fact that television licence fees would be scrapped, which has been described as 'good news for some customers'.⁶⁰⁴ However, when it became clear that this collection system would be replaced by payment through income tax collection, commentators such as *Business Day* journalist Ray Hartley captured an increasingly strident public sentiment that tax money would be used to fund an institution that, in Hartley's words, '...is manifestly unable to run its books, control its spending or stop corruption'.⁶⁰⁵

Arguments in response make the case for the bill's funding proposal as being fair, effective and more cost effective way of collecting money for the SABC⁶⁰⁶, and that it would benefit the poor. It is difficult to say what direction the debate is taking, but it is clear that there needs to be much more work undertaken to convince the public that their taxes will be well spent on public broadcasting.

⁶⁰⁴ 'TV licence fees to be scrapped', MyBroadband, accessed from <http://mybroadband.co.za/news/Telecoms/10257.html>

⁶⁰⁵ R. Hartley, 'SABC tax: a philosophy for a failed state' (blog), accessed from <http://blogs.timeslive.co.za/hartley/2009/11/02/sabc-tax-a-philosophy-for-a-failed-state/> on 9 November 2009

⁶⁰⁶ I. Vegter, 'Sure, fund the SABC with tax', ITWeb, accessed from http://www.itweb.co.za/index.php?option=com_content&view=article&id=27676:sure-fund-the-sabc-with-tax&catid=160:it-in-government on 9 November 2009

An enduring theme in respect of funding has been around the privatisation of the SABC. The Democratic Alliance (DA) has argued that the SABC should not receive any public funding but rather be privatised. The DA has argued further that the SABC's financial woes, when considered together with similar crises at other public enterprises, pointed to the fact that the government was unable to run its parastatals effectively. It argued that this trend was hardly surprising as "non-privatised entities were prone to corruption as decision-making was made for political and personal gain, rather than economic reasons".⁶⁰⁷ While the Zuma administration is unlikely to agree to suggestions to privatise part of or the whole SABC, this argument could gather momentum if significant public funding for the broadcaster is not forthcoming.

- Independence and accountability

A considerable amount of public debate has focused on the editorial independence and integrity of the SABC, especially during the period when Snuki Zikalala was Managing Director of News and Current Affairs, when the SABC was widely accused of being biased towards the ANC. In the wake of controversies around editorial independence in 2007, COSATU General-Secretary Zwelinzima Vavi also argued that the SABC was showing clear signs of reverting back from a public broadcaster to a state broadcaster.⁶⁰⁸

The SABC redeemed itself somewhat with its coverage of the 2009 national elections, as there was no evidence of bias from monitoring reports in favour of any political party, despite accusations by the ANC in the run-up to the elections that the broadcaster was biased towards COPE.⁶⁰⁹

- Legal structure of SABC

Too little public debate has focused on the legal structure of the SABC, and specifically on whether the SABC should remain a public company or revert back to being a statutory body without a corporate share structure. Save the SABC Coalition raised concerns about the legal structure in its submission to the Public Service Broadcasting Discussion Paper, but stopped short of recommending the de-corporatisation of the SABC.⁶¹⁰ Unfortunately, it would seem that there is little interest in the public domain in pursuing this line of argument.

- Public mandate

There is also insufficient public debate on the most appropriate public mandate for the SABC. The one organisation that has been extremely active in raising concerns about the impact of the current financial crisis on the SABC's local content obligations is the Television Industry Emergency Coalition (TVIEC), referred to in the previous chapter. It has held extended protests outside the SABC building to draw attention to the fact that 'a country without a platform for its stories to be told would lose its culture, as well as its power to educate and entertain'.⁶¹¹ The South African Screen Federation (SASFED) has also

⁶⁰⁷ 'SABC should be privatised, says DA', *Mail & Guardian* online, accessed from <http://www.mg.co.za/article/2009-08-13-sabc-should-be-privatised-says-da> on 11 November 2009

⁶⁰⁸ 'Cosatu: SABC becoming government mouthpiece', *Journalism.co.za*, downloaded from <http://www.journalism.co.za/index.php> on 11 November 2009

⁶⁰⁹ J. Duncan, 'Desperately seeking depth: the media and the 2009 elections', in R. Southall and J. Daniel, *Zunami! The 2009 South African elections*, Konrad Adenauer Foundation and Jacana Media: Johannesburg, 2009, pp. 224-226

⁶¹⁰ 'Written representations by the Civil Society Coalition – Save our SABC – Reclaiming our Public Broadcaster, on the Public Service Broadcasting Discussion Paper, undated paper

⁶¹¹ 'Coalition to protest against SABC's cutting local content', *Mail & Guardian*, 25 August 2009

expressed concern that the diversity of opinion in society is not being represented sufficiently by the SABC, especially the voices of the poor.⁶¹²

The trade union movement, especially the Congress of South African Trade Unions, has expressed concern for some time that the SABC is not fulfilling its public service mandate. For instance, the National Union of Metalworkers of South Africa (NUMSA) has argued for the SABC to broadcast live all Premier Soccer League matches 'in the interests of the poor who are followers of soccer and consumers of SABC'.⁶¹³

- Convergence

Another part of the debate on the future of the SABC which has been taking place mainly in academic circles, concerns the implications of convergence for the broadcaster. For instance, media academic Guy Berger has argued that public service broadcasting needs to be conceptualised as public communications, given that convergence implies a shift away from linear one-to-many broadcasting, and towards interactive participatory media where consumers can potentially become producers of media content (or 'pro-sumers'). He notes that in developed countries, young people are shunning television, and relying far more on interactive online and mobile media, which is leading to public broadcasters having to review their mandates. At the same time, convergence has opened up the possibility of public service content being produced by a network of content producers, not just public broadcasters. These shifts require a fundamental re-think about how public broadcasting is conceptualised. Public service broadcasters internationally, and state-owned broadcasters regionally, face three possible scenarios in the long-term: demise, where public service broadcasters fail to take advantage of new media possibilities and wither into irrelevance; diversity, where state-owned broadcasters make a partial transition, but as one of many broadcasters producing public service content; and driving change, where public service broadcasters use new media to reinvent the communications landscape.⁶¹⁴

4. Conclusions and recommendations

The public broadcasting environment in South Africa is changing fast and a number of important developments, involving the introduction of two bills and one discussion paper relating directly to the SABC (and two others relating indirectly to it) have been happening in a space of eighteen months. Clearly the change in leadership of the ANC has opened up spaces for major changes to the face of public broadcasting. It remains to be seen whether these changes will lead the SABC towards being a proper public broadcaster with access to a stable source of public funding, or whether the SABC will revert to being a state broadcaster of the Zuma administration.

There are some positive signs for public broadcasting, especially in relation to public funding and the attempt to enhance public accountability. However, it is disturbing that the government is seeking to use the most recent crisis at the SABC to – in its own words – 'tighten the screws' on the broadcaster.

Perhaps even more disturbing is the fact that the radical changes the Department of Communications seems to have in mind are being rushed, which undermines public

⁶¹² S. Niewoudt, 'Battle over the future of public broadcaster', *Inter Press Service*, downloaded from <http://deepdishwavesofchange.blogspot.com/2009/02/media-south-africabattle-over-future-of-14.html> on 11 November 2009

⁶¹³ Press statement by NUMSA national spokesperson, Castro Ngobese, 19 August 2009

⁶¹⁴ G. Berger (ed), *Beyond broadcasting: the future of state-owned broadcasters in Southern Africa*, Grahamstown: Highway Africa and Friedrich Ebert Stiftung, 2009, pp. 7-13

consultation. The Broadcasting Act of 1999 was also rushed, which led to ill-considered measures being implemented, such as cross-subsidisation. It would seem that the Department has not learnt the lessons from this experience. It is important to ensure that a proper review of public broadcasting includes and involves a range of stakeholders – including different sectors of civil society. It is also imperative that such a review analyses the past and what has led to the predicament the SABC presently finds itself in.

In any event, the recent crises at the SABC, and policy responses to them, should not divert attention away from the international debates around public broadcasting. It is clear that the nature of the beast is undergoing changes, and unless a long-range view is adopted, the SABC, and indeed the very vision of public communications may land up being marginalised, unless forward planning takes place now to secure its place in the converged environment.

Recommendations

The shift in power in the ANC and, by default, the various crises at the SABC have opened up policy spaces for a thorough-going review of public broadcasting in South Africa. That policy space must be used to maximum effect, and the following recommendations are made to that end:

- The manner in which the Department of Communications introduces draft legislation for debate needs to be reviewed. Too little time is given for proper consideration of the policy implications of many changes. This approach has led to the implementation of ill-considered measures that have had negative long-term effects on the SABC. The Department needs to give sufficient time for debate, or it risks destabilising the broadcaster even further, and alienating the public.
- If fundamental policy shifts are going to be effected, then they need to be subjected to a proper policy review, in the form of a Green Paper/ White Paper process. While the Department may argue that the bill gazetted in October 2009 flowed from a discussion document that involved public consultation, the manner and pace of consultation does not seem to have been adequate.
- The SABC's independence from the government of the day must be beyond question. Greater government intervention as envisaged in the new bill will only damage the integrity of the broadcaster further. Instead the role of the board needs to be strengthened to make it strictly responsible for matters within its purview. The recommendation that the SABC receive the status of a Chapter Nine institution is critical to the realisation of its independence.
- A public campaign must highlight the importance of enhancing the capacity of ICASA. Without a strong regulator, with the appetite to address the wrongs at the broadcaster, the fight for an independent public broadcaster will not be won.
- The oversight role of the Portfolio Committee also needs to be strengthened, and Members of Parliament need to be held to account by their political parties and the broader public if they do not play their oversight role effectively. Oversight requires a particular set of skills and knowledge, such as interpreting information presented in annual reports, and being able to ask the right questions about gaps in information. The committee also needs dedicated research capacity, and further needs to be more proactive in involving a greater diversity of stakeholders, which may involve decentralising Parliamentary hearings. Oversight visits should be conducted to institutions such as ICASA and the SABC.

- Civil society needs to build its own capacity to influence the development of broadcasting, to handle the complex international debates on convergence and public broadcasting, and make policy and practical proposals to ensure that the SABC is able to take advantage of the possibilities presented by convergence.
- Civil society has won some arguments for practical measures to enhance public accountability, but needs to undertake much more work to make public accountability a meaningful alternative to state accountability. This is especially so with regard to the SABC's finances, more particular if significant public funding is to be made available to the broadcaster.

Overall Conclusions and Recommendations

This survey is timely for South African public broadcasting. At the beginning of 2010 a window of opportunity exists for a thorough review of the sector, and for the development of proposals to improve public broadcasting. At the same time the public broadcaster is so beset with problems relating to governance, management and funding, that it will take enormous resolve to set it on the right path.

South Africa has made significant strides in achieving transformation targets that the young democracy set for itself, but poverty and inequality are still rife. While millions of South Africans have been lifted out of absolute poverty, primarily by social grants, significant numbers of those lucky enough to hold down a job and earn an income remain in the lower income brackets. Continuing poverty, increasing inequality, racism, crime, political intolerance, xenophobia and corruption are impacting negatively on social stability.

There is media freedom in South Africa, but it needs to be defended on an ongoing basis. The overall legal framework guarantees the right of all South Africans to freedom of expression, and some courts have made insightful judgements when balancing the different rights in the constitution against freedom of expression. However, this is not necessarily the norm and there are apparently divergent views in government and the judiciary on the value of freedom of expression versus other rights. Numerous draft laws have been introduced that limit freedom of expression, and some have even been signed into law. While the pull towards independent public broadcasting remains strong, there have been growing and disturbing attempts by government to introduce elements of state broadcasting under the guise of tightening accountability.

South Africa also has a highly uneven media landscape, with many people in remote rural areas who still do not enjoy access to a diverse range of information. Penetration of print media is highest amongst wealthier communities, while radio has the greatest reach of any media, although television usage has grown rapidly. Internet usage is still underdeveloped.

A huge number of South Africans have only limited access to a diverse range of information and opinion in the language of their choice, which also serves to diminish their chance of exercising one of their important constitutional rights. While South African legislation, policy

and practice do encourage a diverse commercial and community sector, there are still too few stations broadcasting in languages other than English, and whilst there are a range of services available to people within the bigger cities, there is little choice of content for those in other towns and in rural areas.

Over the years the regulator has proactively encouraged the development of community radio stations in the most disadvantaged areas, but it has delayed licensing more commercial radio services. This has limited the growth of new broadcasting companies essential to ensuring a level playing field for all three tiers of service providers, given the SABC's size and reach and concomitant dominance of available broadcasting advertising spend.

Digital broadcasting could have the potential to enhance the ability of all stakeholders to meet the identified objectives of broadcasting in South Africa. In order to achieve this, however, it is necessary for government to proactively determine the parameters and strategies for migration from analogue transmission. So far, though, the decisive leadership essential to ensure that the migration process will address the needs of all South Africans has not been provided by the Department of Communications.

If the regulatory framework in South Africa is assessed against accepted codes and agreements, such as the African Commission on Peoples' and Human Rights Declaration of Principles on Freedom of Expression in Africa, it becomes apparent that most of these provisions are indeed met, at least technically. However, concerns have been raised about an apparent erosion of the independence of the regulator, ICASA, through the increased role of the Minister of Communications.

Financial and other constraints potentially inhibit ICASA's ability to regulate the sector effectively and fairly. The regulator faces ongoing litigation from those with the means to challenge decisions, and has limited funds to defend itself in protracted court battles. This inevitably favours those with resources (the established broadcasters). An additional concern arises from perceptions that the regulator does not have sufficient expertise in broadcasting and that growth of the industry is being hindered by this.

The regulatory framework provides for both self-regulatory and statutory processes for complaints against broadcasters. It is up to broadcasters to decide which adjudicatory system they will adhere to. Both options provide for public participation in the selection of adjudicators of complaints and public processes for adoption of codes.

SABC's services are central to many South Africans who rely on the broadcaster as a significant source of news and information⁶¹⁵. Therefore it is all the more important that the multiple problems at the SABC be addressed decisively.

The continental standards and benchmarks referred to above emphasise the need to transform state broadcasters into public broadcasters, to be governed by an independent board and where editorial independence is guaranteed. The SABC is, in terms of law, accountable to the public through the legislature rather than government. Non-executive members of the board are appointed by Parliament and the legislation provides for the SABC to account on how it is meeting its mandate to the legislature. Furthermore, its editorial independence is guaranteed in its charter, and the board is charged with protecting this autonomy.

The SABC is indeed governed by a board, which in theory is both protected against interference through the above injunctions, and acts as the guardian of such independence. However, some members of the board have in the past been appointed at the behest of the

⁶¹⁵ See summary of audience research in chapter eight

ruling party or the government. More importantly, the power given to the shareholder (the Minister of Communications) through the Articles of Association, which, for example, allows him or her to effectively appoint the executive management, impinges on and limits this independence. The public broadcaster's dependence on advertising revenue further potentially impacts on its autonomy from commercial interests. The Public Services Broadcasting Bill gazetted in October 2009 seeks to address the problem of the SABC's over-reliance on advertising, but does not inspire confidence that the trend towards greater government control will be reversed.

The experience of the SABC shows that legal safeguards alone do not ensure dynamic public broadcasting responsive only to the needs of viewers and listeners. It is critical therefore to build in effective mechanisms for accountability and transparency and to ensure that the leadership of the broadcaster is committed to the principles of public broadcasting.

The resolution of the public broadcasting funding conundrum is one of the core public broadcasting issues that need to be resolved in South Africa. Various attempts and proposals (by the regulator, government and the ruling party, among others) have not been successful in ensuring that the SABC is appropriately and adequately funded to meet its legislative mandate "in a manner that protects (it) from arbitrary interference" as required by Article 6 of the Declaration of Principles on Freedom of Expression of the African Commission on Human and Peoples' Rights. Instead, the over-reliance on commercial income has meant that the broadcaster is forced to consider audience ratings over public need.

There are no quick fixes, however – and perhaps the failure of existing mechanisms can at least partly be ascribed to the apparent absence of a thorough and holistic economic analysis of the SABC's needs and an in-depth review of the impact of different funding models.

It would be rash to propose final solutions on the best funding mechanisms for public broadcasting in South Africa. Rather than recommend yet another set of seemingly ideal but untested models, it is suggested that an in-depth economic scoping exercise be conducted, including a review of the pros and cons of different models in the South African context. Such an evaluation should ensure the participation of all stakeholders in developing the best mechanisms for funding of public broadcasting in this country.

It will also be critical during this exercise to determine the actual needs of the SABC in relation to its mandate – and to ensure transparent accounting in order to build the necessary trust amongst the public, government and advertisers essential to securing the broadcaster's income.

Regarding programming, the SABC has made significant strides in realising its mandate of being a full spectrum broadcaster, providing information, education and entertainment, in spite of its funding challenges. Yet, given the skewing of SABC programming towards upper income groups, the question is whether all South Africans are really served by the public broadcaster.

The public broadcasting environment in South Africa is changing with lightning speed. Most disturbingly, these changes are being rushed, which undermines public consultation. What the recent crises at the SABC have shown, however, is that South Africans are passionate about their public broadcaster and there are high levels of civil society mobilisation around the broadcaster: a positive feature of recent developments around the SABC. However, what unites views across the political spectrum, and state and civil society, is the deep unhappiness with the SABC.

This debate should not divert attention away from the international debates around public broadcasting. It is clear that the nature of public broadcasting internationally is undergoing changes, and unless a long-range view is adopted, the SABC, and indeed the very vision of public communications, may land up being marginalized. Forward planning needs to be done now to secure the place of public communications in the converged environment.

Recommendations

Media legislation in general

- The media and human rights organisations need to themselves initiate and be part of ongoing awareness campaigns in order to increase understanding amongst all South Africans that freedom of expression is critical for all citizens - and is not only the purview of the media itself. Campaigns for the review of all apartheid-era laws should be intensified.
- At the same time, the media and civil society need to continue to scrutinise proposed new laws and/or amendments to existing laws and engage with the legislative process to ensure that proposed provisions do not negatively impact on freedom of expression.
- Discussion and debate between the judiciary and editors needs to continue to assist in limiting conflicting judgements.
- The review mechanisms in the Promotion of Access to Information Act need to be strengthened to allow for efficient and effective implementation.
- More funding for the Media Diversity Development Agency is essential. At the same time, the MDDA Act should be strengthened to allow the agency to address limits to media diversity generally.
- The Competition Commission should be formally requested to investigate allegations of unfair competition in the press sector, and there should be increased co-operation between the MDDA and the Competition Commission to promote media diversity.
- The press, together with all stakeholders, needs to review its self-regulatory structures and codes to, for example, consider equipping such structures with powers to impose penalties for violations of the code. The Press Council should also intensify public awareness campaigns to ensure readers and audiences know about the code and mechanisms for lodging complaints.
- In order to promote black economic empowerment in the press, the print media industry should urgently consider drafting its own media charter in terms of the sectoral Broad-based Black Economic Empowerment Charter.

Broadcasting landscape

- The MDDA Act should be reviewed to enable the agency to commit more resources to research into media diversity issues and to facilitate the development not only of

community radio but also the development of other broadcasting services in what are seen as unviable markets. This would require more resources to be allocated to the MDDA.

- Amendments to the Electronic Communications Act on ownership and control of broadcasting services should be considered by government and parliament taking into account any recommendations arising from the review of ownership and control rules by ICASA. In addition, the White Paper on Broadcasting must be reviewed to assess the relevance of existing policy on ownership and control, to look holistically at whether measures in place to increase diversity have been effective, and where necessary, the EC Act should be amended. Debate should not only centre on the recommendations to be made by ICASA to existing clauses limiting ownership (if any), but should also explore other ways to increase diversity of ownership in what are seen as non-viable markets/areas. For example, ownership limitations could be relaxed in order to lure existing media companies to assist in establishing stations outside of the cities. This could also encourage the growth of new black media companies. Specific attention should be paid to the dominance of the SABC in the commercial broadcasting arena.
- Debate should not only centre on the recommendations made by ICASA regarding existing clauses limiting ownership, but should also explore other ways to increase diversity of ownership in what are seen as non-viable markets/areas. Specific attention should be paid to the dominance of the SABC in the commercial broadcasting arena (given the corporation's division into public and commercial wings).
- ICASA as well as civil society organisations should review the diversity of news across the different stations to assess whether or not current measures are ensuring access to diverse and original news on radio, or if there is an over-reliance on news agencies for content.

Digital migration policy

- Government should officially extend the date for switch-off of the analogue signal beyond 1 November 2011.
- The entire framework for broadcasting in South Africa should be reviewed in light of the move to digital broadcasting (including the White Paper on broadcasting and the Broadcasting Act). The introduction of a Public Services Broadcasting Bill in the absence of a review is inappropriate. Clauses relating, for example, to limitations on the number of free-to-air terrestrial television channels which a private broadcaster can offer become irrelevant in a multi-channel environment. The same goes for provisions in legislation regarding the number of public channels the SABC offers – and the division into public and public commercial channels.
- Government must finalise its STB Manufacturing Strategy – and ensure that provisions will emphasise the need for STBs to be affordable. The policy for subsidising set top boxes (STBs) for poor families needs to be developed beyond a mere statement of intention and principles. A comprehensive plan must also include proposals for assisting audiences with installation and operation of STBs where necessary.

- The Digital Dzonga must be fully operationalised and have clearly outlined powers and responsibilities to allow it to act decisively. It must also be provided with an adequate budget to enable it to carry out its mandate effectively.
- A mass awareness campaign must be launched as soon as possible to ensure that consumers know how they can view digital television channels and what benefits this will have for them. It is important to ensure that any information released is consistent and accurate.
- ICASA must as soon as possible finalise its South African content requirements in a multi-channel environment.

Broadcasting legislation

- All stakeholders need to be vigilant about potential breaches of the independence of ICASA by government, political parties or vested interests. Any breaches must be publicised and challenged.
- The recommendations made by the Parliamentary ad hoc committee on enhancing the independence of constitutional and parliamentary bodies should be adopted and, where necessary, amendments made to legislation and practice. This includes removal of the Minister's role in the appointment and dismissal of ICASA councillors and recommendations regarding the funding and oversight of the regulator.
- The composition of the ICASA council should be reconsidered to determine if it is necessary to specifically stipulate that a certain proportion of councillors must have broadcasting experience and expertise.
- The adequate resourcing of the regulator needs to be addressed. This has been acknowledged in many government and civil society forums, but alternative mechanisms for funding have not yet been put in place. The arguments of government that financing the authority through fees paid by industry would compromise its independence seem baseless. These fees are determined through regulation and not arbitrarily. Licensees are required to pay fees as prescribed regardless of the popularity or otherwise of the authority's decisions.
- Adequate financing would assist ICASA to properly monitor compliance with provisions to ensure diversity and public interest requirements. This is essential if the regulator is to be effective in ensuring that the principles and objectives of broadcasting are met.
- The process of reviewing ICASA decisions should be debated further. Court processes are slow and costly and inevitably favour those with more resources. It may be worth considering alternative review processes which could be used to resolve disputes before people resort to the courts.

Legislation for and organisation of the public broadcaster

- There is a need to review the White Paper on broadcasting through a participatory process involving the public in debate about what exactly they want from a public broadcaster. This should include a review of the legal status of the SABC. In line with

this, an SABC Act should be drafted, capturing the decisions in the White Paper. Sections of the current Broadcasting Act dealing generally with broadcasting or with the community or commercial sectors, should be incorporated into the Electronic Communications Act (if not already captured).

- As an important cornerstone of democracy, the SABC should be given the same status and protections in the Act as those awarded to constitutional entities and it should be listed as a constitutional institution (rather than a public entity). The necessary changes should also be made to the Public Finance Management Act and Broadcasting Act.
- The SABC Charter should be reviewed in order to capture the objectives for public broadcasting determined through the consultative process.
- The appropriate oversight provisions should be evaluated taking into consideration the need for the SABC to be accountable and its independence.
- In the review of the White Paper and in drafting a new Act, the following issues, amongst others, should also be explored extensively:
 - The appointments procedure of the SABC board must be reviewed in order to ensure its credibility and legitimacy and to protect the process from political interference.
 - The ideal composition of the board should be evaluated in relation to its defined role and be broadly discussed and debated.
 - The option of staggered terms of office for board members should be considered to provide for continuity.
 - The clauses on disqualification should be reviewed to protect the SABC from actual and perceived conflicts of interest as well as from accusations of political bias.
 - Legislation should specify that the board is solely responsible for appointment of the GCEO and other senior managers.
 - The distinct roles of the board and the executive should be clarified in order to ensure that the Board does not get involved in the day-to-day running of the SABC (or be perceived to be involved in it).
 - Specific and feasible mechanisms binding the SABC to transparency, openness and accountability to the public should be considered.

In relation to the internal structure of the SABC:

- A review/evaluation of why GCEOs and chairs of the board change so often should be conducted.
- A proper audit of the structure and organogram should be undertaken in order to determine the appropriate staffing of the SABC and address concerns over centralisation of management.
- This should include a review of how best to structurally protect programming from commercial or political pressures (whether real or perceived). The decision to make the GCEO the editor-in-chief should be reversed in consideration of these imperatives.
- There needs also to be an organisational audit to determine the reasons for alleged low morale and resignations of key staff members.

- There should be ongoing assessment of the training needs of staff at the SABC to ensure members are equipped to deal with the challenges in delivering on the broadcaster's mandate.

Funding of the public broadcaster

- The development of any funding model should be underpinned by the following principles:
 - the need to protect the SABC from either perceptions or the reality of political or commercial interference or manipulation through funding;
 - the imperative of enabling the public broadcaster to plan with certainty, whilst moderating demand-driven pressures for funding by the SABC;
 - the importance of establishing a durable and justifiable level of funding, taking into account new contexts such as the migration to digital broadcasting;
 - the importance of maximising transparency – so that the SABC itself, other broadcasters and the public are aware of the motives for funding allocated by the state and through any fees/taxes paid by the public.
- Research should be undertaken as part of a total review of all government and regulatory policies – including the Triple Inquiry Report, the White Paper on Broadcasting and the Broadcasting Act. The economic analysis of funding should be fed into any new policies and/or legislation to ensure that the mandate of the broadcaster is not only relevant but also viable both immediately and in a new digital environment. The overall review should include:
 - another look at proposals made in the Triple Inquiry Report to streamline the SABC and thus increase cost effectiveness;
 - a re-evaluation of the effectiveness of the separation of the SABC into public and public commercial arms;
 - a review of all relevant licence conditions and regulations in light of any new policy and legislative requirements. This should include an evaluation of programming requirements and of advertising limitations.
- A thorough analysis needs to be done of the actual funding needs of the SABC – given its mandate. Financial costs must be linked to public interest value and traceable to enhanced delivery of services.
- A workable mechanism for evaluating and determining ongoing levels of funding for the broadcaster (and, for example, appropriate licence fees or other levies) and for the distribution of such funds needs to be devised. This should be preceded by an analysis of the pros and cons of both existing and alternative mechanisms in relation to the principles outlined above. The following aspects need to be looked at:
 - the strengths, weaknesses and appropriateness of the existing mechanism of determining funding levels via the board, Minister, Treasury and finally Parliament;
 - the pros and cons of adapting the present Parliamentary allocation system in order to strengthen the legislature's role in determining appropriate levels of funding;
 - the advantages and disadvantages of establishing an independent public broadcasting agency/fund managed by an autonomous board responsible for assessing appropriate public funding (including government allocations and licence fees) for the SABC;

- the strengths and weaknesses of giving the responsibility of setting public funding amounts (government allocations and licence fees) to an existing agency such as ICASA;
 - the value/public benefit of supporting only the SABC through licence fee revenue over establishing a discretionary fund available on application to any broadcaster promoting public programming.
 - Combinations of the above options (and other mechanisms) could be considered.
- Alongside discussion on *mechanisms*, it is also important to review the *means of funding* (i.e. licence fees, fiscal funding, commercial revenue, etc.) and the ratios of different revenue streams:
 - Ensuring inflation-linked increases of relevant revenue streams in line with purchasing power parity is critical. This should be built into any policy and law/regulation.
 - The licence fee model should be evaluated and other possible options explored (considering their respective effectiveness and efficiency, collection costs and fairness).
 - Should the current licence fee model be regarded as the most appropriate means of funding, suggestions from the SABC about establishing a Section 21 company to remove obligatory VAT payments on licence fees should be considered.
 - The value and impact of a tax/levy on other broadcasters or on advertising income in the media should be considered.
 - The extent and nature of funding from the fiscus should be evaluated. This should not, however, be a simplistic review of ratios (as proposed by the ANC), but be linked, for example, to public value deliverables and/or shortfalls in revenue.
 - Concessions could also be considered such as an exemption from corporate tax or VAT (as proposed by the SABC).
 - It is critical that mechanisms to ensure transparency are built in to any new model. Awareness of what criteria are used to determine funding levels and how the impact of this is measured, alongside specific mechanisms to promote accountability by the broadcaster, will ensure legitimacy of and support for any funding mechanisms.

Public broadcasting programming

The following recommendations may assist in ensuring that the SABC meets its programming mandate:

- ICASA must be made to account to Parliament's Portfolio Committee on Communications as to why it has not released any report on the SABC's compliance with its licence conditions, and must be put on terms to finalise and release them. The regulator must introduce clear regulations to deal with the commissioning of local content as soon as possible, and the extent of delivery on local content obligations must be evaluated.
- The SABC's editorial policies are due to be revised. The broadcaster needs to undertake widespread consultation on its new policies, following a public review of the extent to which it delivered on its existing policies. In order to bring the policies

into line with the principles of public broadcasting, the following changes should be considered:

- The policies need to include a strong statement on the watchdog role of SABC news.
 - While the policies in a range of areas underline the need to cater for all audiences, the requirements of poor and marginalised audiences, who are often neglected by commercial services, should be given more emphasis.
 - The roles of the GCEO and the editor-in-chief should not be conflated and their respective responsibilities be clearly delineated.
-
- The paucity of international news on some channels needs to be addressed, and further monitoring should establish the extent to which this is a general problem across SABC services.
 - SABC stations should place more emphasis on sourcing news from outside the two economic and political hubs, Gauteng and the Western Cape.
 - The lack of documentaries and features on the SABC's schedule is a significant weakness that needs to be addressed, and such programmes should be prioritised for public funding. The broadcaster should also direct existing resources towards this neglected genre.
 - ICASA needs to investigate and, where necessary, restrict the number of repeats taking place on SABC services.
 - The SABC needs to commission more children's programmes in African languages.
 - The SABC needs to give serious consideration to how it supports the local film industry, to address the problem of its channels being used to flight out-of-date foreign films.
 - SABC stations should resist the tendency of relying on official and expert sources only. They should take care to promote a diversity of sources.
 - At the same time, regional stations such as Ukhozi FM, that tend to have a large footprint in a particular region, should resist the temptation to broadcast regional news only.
 - There should be more in-depth news and current affairs slots on Ukhozi FM, to enable the broadcaster to air topical issues adequately.
 - Given that non-SABC stations do produce public interest programming, but not nearly to the same extent as the SABC, these stations should be offered financial incentives to produce such programming by giving them access to a pool of funding for public service programming.
 - Product placement should be either banned or clearly marked as such.

Public perceptions of and expectations towards the SABC

- The negative sentiment against the SABC is so prevalent that the broadcaster's problems cannot be addressed without substantial public involvement. Imposed solutions will simply not work. The Department needs to subject the proposed Public Services Broadcasting Bill to a proper Green Paper/ White Paper process, so that a thorough analysis can be undertaken of the causes of the SABC's crisis, and evidence-based policy solutions be developed.
- Mechanisms of public participation in the SABC's governance and programming are essential. Regular stakeholder forums need to take place with the board, which should be required to meet with stakeholders if a substantial number of signatures are submitted in support of this request. The board should also be required to hold report-back meetings.
- The ANC is the only political party with a relatively clear media policy, and the policy has been made available for public scrutiny. The same cannot be said for other political parties. This makes it difficult to discern what they actually stand for in relation to public broadcasting. All political parties should be enjoined to develop media policies that include sections on public broadcasting so that the electorate can engage with their policy pronouncements on the broadcaster, and hold them to account for their performance in government and parliament.
- As a matter of urgency, the SABC needs to review its intellectual property arrangement with independent producers, to allow them to exploit the content they have produced. Independent production companies can not be expected to continue without income while the SABC sorts out its funding crisis and a collapse of the industry would have disastrous consequences for public broadcasting in the future.

Broadcasting reform efforts

- The manner in which the Department of Communications introduces draft legislation for debate needs to be reviewed. Too little time is given for proper consideration of the policy implications of many changes. This approach has led to the implementation of ill-considered measures that have had negative long-term effects on the SABC.
- If fundamental policy shifts are going to be effected, then they need to be subjected to a proper policy review, in the form of a Green Paper/ White Paper process.
- The SABC's independence from the government of the day must be beyond question. Greater government intervention as envisaged in the new bill will only damage the integrity of the broadcaster further. Instead the role of the board needs to be strengthened to make it strictly responsible for matters within its purview. The recommendation that the SABC receive the status of a Chapter Nine institution is critical to the realisation of its independence.
- A public campaign must highlight the importance of enhancing the capacity of ICASA. Without a strong regulator, with the appetite to address the wrongs at the broadcaster, the fight for an independent public broadcaster will not be won.
- The oversight role of the Portfolio Committee also needs to be strengthened, and Members of Parliament need to be held to account by their political parties and the broader public if they do not play their oversight role effectively.

- Civil society needs to build its own capacity to influence the development of broadcasting, to handle the complex international debates on convergence and public broadcasting, and make policy and practical proposals to ensure that the SABC is able to take advantage of the possibilities presented by convergence.
- Civil society has won some arguments for practical measures to enhance public accountability, but needs to undertake much more work to make public accountability a meaningful alternative to state accountability. This is especially so with regard to the SABC's finances more particular if significant public funding is to be made available to the broadcaster.