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DOI: https://dx.doi.org/
10.18820/24150517/
JJS41.v2.2

ISSN 0258-252X (Print)
ISSN 2415-0517 (Online)

Journal for Juridical Science
2016 41(2):14-28

The eternal quest for an independent public broadcaster: What's news?

Abstract

Sec. 192 of the Constitution of the Republic of South Africa, 1996 compels the National Legislature to establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representative of South African society. The purpose of this article is to establish the manner in which the Legislature discharged this constitutional obligation. The bodies appointed and mandated with the execution of this duty are identified, their jurisdiction established and their competency in ensuring that the public broadcaster remains independent in serving the public interest, critically considered. It appears that appropriate structures and procedures are in place to support the independence of the public broadcaster.

1. Introduction

Sec. 192 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) compels the National Legislature to establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representative of South African society. This obligation is discharged by the creation of an independent authority in terms of sec. 3(1) of the *Independent Communications Authority of South Africa Act* 13 of 2000.

The biggest challenge in public broadcasting is to find and enforce a balance between editorial independence and public accountability. The South African Broadcasting Corporation's (SABC) prerogative of editorial independence[1] is guaranteed in terms of its Charter and tempered by its duty to broadcast events of public interest.[2] A legislative framework for public broadcasting is established in terms of the *Broadcasting Act* 4 of 1999 and *Act* 13 of 2000. The Independent Communications Authority of South Africa (ICASA) is charged with the obligation to ensure adherence to the legislative framework.[3]

ICASA fulfilled its obligation through the inception of the Complaints and Compliance Committee (CCC) of ICASA in terms of sec. 17A of *Act* 13 of 2000 and the Broadcasting Complaints Commission of South Africa (BCCSA), which was recognised in 1995 by the Regulator in terms of a

1 *Broadcasting Act* 4/1999:sec. 6(3).
2 *Broadcasting Act* 4/1999:sec. 10(1)(d).
3 *Broadcasting Act* 4/1999:sec. 6(2).

forerunner of sec. 54(3) of the *Electronic Communications Act* 36 of 2005. The latter subsection makes it possible for a society of broadcasters to set up an independent body to deal with complaints from the public. The National Association of Broadcasters set up the BCCSA in 1993 and, in 1995, the Independent Broadcasting Authority recognised it as the body that would, independently, deal with complaints against broadcasters under its jurisdiction.

The rights and duties of the SABC as public broadcaster will be interrogated in terms of the legislative framework, the Charter of the SABC, its Core Editorial Values, and Editorial Policies. The jurisdiction of the BCCSA and the CCC, as guardians of editorial independence and public accountability, will also be investigated with specific reference to the editorial independence of the public broadcaster.

2. Legislative framework

The *Independent Communications Authority of South Africa Act* 13 of 2000 was promulgated in compliance with the directive in sec. 192 of the *Constitution* to establish an independent authority to regulate independent public broadcasting. A juristic person, to be known as the Independent Communications Authority of South Africa, was established in terms of sec. 3(1) of *Act* 13 of 2000. The independence of ICASA is entrenched in sec. 3, which clearly states that ICASA is independent and subject only to the *Constitution* and the law. Further, it must function impartially without fear, favour, or prejudice,[4] and without political or commercial interference.[5]

Act 13 of 2000[6] came into operation after the *Broadcasting Act* 4 of 1999 had set the scene for public broadcasting services. The Preamble to *Act* 4 of 1999 includes a resolution to align the broadcasting system with the democratic values of the *Constitution* and to enhance and protect the fundamental rights of citizens. Sec. 2 of *Act* 4 of 1999 proclaims its objective as the establishment and development of a broadcasting policy in the public interest. A number of objectives are listed to achieve this goal, including the establishment of a strong and committed public broadcasting service that will service the needs of South African society.[7] It is envisaged that a public broadcasting system will, *inter alia,* operate in the public interest and strengthen the spiritual and moral fibre of society.[8]

4 *Independent Communications Authority of South Africa Act* 13/2000:sec. 3(3): "(3) 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."

5 *Independent Communications Authority of South Africa Act* 13/2000:sec. 3(4): "(4) The Authority must function without any political or commercial interference." The Independent Broadcasting Authority was established in 1994 and ICASA is the successor of that body.

6 *Independent Communications Authority of South Africa Act* 13/2000.

7 *Broadcasting Act* 4/1999:sec. 2(l).

8 *Broadcasting Act* 4/1999:sec. 3(1)(b).

The phrase 'public broadcasting services' is defined in the *Act* to include any broadcasting service provided by the SABC, or a broadcasting service provided by any other statutory body, or a broadcasting service provided by a person who receives his/her revenue, either wholly or partly, from licence fees levied in respect of the licensing of persons in relation to sound radio sets and in relation to television sets, or from the State.[9] Public broadcasting service is defined in the *Electronic Communications Act* 36 of 2005[10] as any broadcasting service provided by the SABC or other public state-owned enterprises. While the *Act* provides for different categories of public broadcasters, the SABC is the only public broadcaster and the national broadcaster.

In terms of sec. 8A(2) of the *Broadcasting Act*, the old broadcasting corporation (SABC) is transformed into the South African Broadcasting Corporation Limited (the Corporation), a public company with the State as its sole shareholder. It is not stated explicitly that the Board manages the Corporation, but it can be accepted that the Board fulfils a similar role to the Board of Directors of a public company. Provisions to the effect that the Board controls the affairs of the Corporation[11] and that the Board is the accounting authority of the Corporation confirm this supposition.[12]

The Charter governs the Corporation.[13] The provisions of the Charter are contained in sec. 6 of the *Act*. ICASA monitors the Board's compliance with the Charter.[14] The Board must prepare and submit within three months, after the conversion of the Corporation policies that will ensure compliance with ICASA's Code of Conduct, the Corporation's licence conditions, and the objectives of *Act* 4 of 1999.[15] The Corporation enjoys freedom of expression and journalistic, creative and programming independence in fulfilling its objectives and in the exercise of its powers.[16] The Corporation is limited by the requirement that it maintain a high standard of accuracy, fairness and impartiality in news and programmes dealing with matters of public interest.[17]

The Corporation is compelled to develop a Code of Practice to ensure compliance with the constitutional principle of equality as well as equitable treatment of all segments of the South African population and all official languages. The Code must further speak to the rights of all South Africans to receive and impart information and ideas, and provide for a wide range of audience beliefs and perspectives.[18]

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9 *Broadcasting Act* 4/1999:sec. 1.
10 *Electronic Communications Act* 36/2005:sec. 1.
11 *Broadcasting Act* 4/1999:sec. 13(11).
12 *Broadcasting Act* 4/1999:sec. 13(13).
13 *Broadcasting Act* 4/1999:sec. 6(1).
14 *Broadcasting Act* 4/1999:sec. 6(2).
15 *Broadcasting Act* 4/1999:sec. (6)(5)(a).
16 *Broadcasting Act* 4/1999:sec. 6(3).
17 *Broadcasting Act* 4/1999:sec. 6(8).
18 *Broadcasting Act* 4/1999:sec. 6(8).

The SABC as public broadcaster is expected to provide a public service. The *Act* provides directives towards achieving this goal.[19] One of the guidelines obliges the Corporation to provide significant news and public affairs programmes which are fair and impartial, and demonstrate high standards of journalism and unbiased coverage, while simultaneously maintaining balance and independence from government, commercial and other interests.[20]

A perusal of the resolutions, guidelines and objectives expressed in the Preamble to the *Broadcasting Act* and subsequent sections, leads one to infer that the Legislature set out to create the perfect public broadcasting model. The ideal public broadcaster is, therefore, owned by all citizens and tasked with a social obligation to correct past broadcasting injustices by aligning public broadcasting principles with constitutional values, while simultaneously providing broadcasting services in the public interest in an independent, unbiased and balanced manner. The Legislature balanced out these obligations by acknowledging the public broadcaster's right to freedom of expression, journalistic, creative and programming independence and thus ticked all the boxes for an independent public broadcaster. The manner in which the ever-present tension between editorial independence and public accountability is dealt with in the Editorial Code and the respective policies as well as the ability of the CCC and the BCCSA to enforce these policies will determine whether the Legislature will succeed in achieving its goal.

3. Policies adopted by the SABC to comply with legislative imperatives

The *Act* is instrumental in creating the structure and guidelines in terms of which the public broadcaster has to operate. However, in order to give effect to the provisions of the *Act* and to comply with ICASA's Code of Conduct, its licencing conditions and the objectives of the *Broadcasting Act*, the Corporation has to develop an Editorial Code and policies to deal with the day-to-day running of the public broadcaster.[21] The Board is compelled to submit a number of policies to ICASA within a prescribed period of time after its conversion from the old corporation to the new public company.[22] These policies include a news editorial policy as well as policies in respect of programming, local content, language, religion, universal service and access, and educational subjects. Public participation is compulsory for the development of these policies.[23]

The SABC developed an Editorial Code, which is underpinned by a number of constitutional values including, *inter alia*, editorial independence.[24]

19 *Broadcasting Act* 4/1999:sec. 10.
20 *Broadcasting Act* 4/1999:sec. 10(1)(d).
21 *Broadcasting Act* 4/1999:sec. 6(5)(a).
22 *Broadcasting Act* 4/1999:sec. 6(5)(a).
23 *Broadcasting Act* 4/1999:sec. 6(6).
24 *Broadcasting Act* 4/1999:sec. 6(3).

The Editorial Code contains the various commitments required of editors in serving the principle of editorial independence as it relates to SABC programmes, of which two are quoted below in view of their relevance to the events that unfolded recently:

> We report, contextualise, and present news and current affairs honestly by striving to disclose all the essential facts and by not suppressing relevant, available facts, or distorting by wrong or improper emphasis.
>
> We do not allow advertising, commercial, political or personal considerations to influence our editorial decisions. The SABC is expected to provide information and as part of this duty should evaluate, analyse and critically appraise government policies and programmes. The SABC is not the mouthpiece of the government of the day, nor should it broadcast its opinion of government policies, unless they relate directly to broadcasting matters.

While the Code is a manifestation of a shared will to give expression to editorial independence, the *SABC Editorial Policies: Core Editorial Values of the SABC*[25] comprises an explanation of the Mandate of the SABC in terms of the Charter,[26] a list with a number of its core values which are aligned with constitutional values and its editorial policies in respect of language, local content, children, violence, news and public events as well as events of national interest, to name but a few.[27]

The editorial policy is informed and underpinned by the values expressed in the *Constitution*, relevant legislation, the Charter, licencing conditions of the respective SABC stations, and regulations issued by ICASA from time to time. Cognisance is also taken of the Code of Conduct for Broadcasters set by the BCCSA.[28] ICASA's obligation as the highest broadcasting authority to regulate broadcasting services[29] and the mandated acceptance of the Code of the Broadcasting Complaints

25 http://www.sabc.co.za/wps/wcm/connect/3bb9fc8044341da1a563e7c4173d8502/Editorialpolicies_rev.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=3bb9fc8044341da1a563e7c4173d8502 (accessed on 10 August 2015). The Editorial Policies of the SABC were revised during February 2016, resulting in the removal of the Editorial Code. Phumzile Van Damme (DA National Spokesperson/Shadow Minister of Communications) commented on the revision of the Policies on the website of the Democratic Alliance on 9 May 2016 and pointed out that the Editorial Code of the SABC which "… formed the set of values and principles, which underpinned all the SABC's programming and affirmed its commitment to editorial independence" was removed, leaving the COO of the SABC in total control of the SABC's content and programming. As these policies are not yet available on the SABC's website nor in the public domain, the discussion of the Editorial Policies is based on the information which was available at the original time of writing this article.

26 *Broadcasting Act* 4/1999:sec. 10.

27 http://www.sabc.co.za/wps/wcm/connect/3f5c4c0041e1e6e3ba41fb539363829 (accessed on 31 August 2016). A summary of comments on the policies, which were in existence at the time of writing this article, are provided.

28 *SABC Editorial Policies*:3.

29 *Independent Communications Authority of South Africa Act* 13/2000:sec. 2(a).

Committee[30] ensure compliance with the public broadcaster's Charter, but more importantly uphold the independence of public broadcasting as envisaged in the *Constitution* and legislation.

The reader of the SABC's editorial policies document is advised to peruse the respective editorial policies in conjunction with the Mandate of the SABC as set out in Chapter 2 of the policy document, the programming policy in Chapter 3, and the news, current affairs and information programming policy. The News, Current Affairs and Information Policy is introduced with an undertaking by the SABC to uphold the independence of its news division. The sincerity of its commitment is emphasised by its intention to develop internal guidelines for news reporters on how to embed independence in news reporting and how to deal with potential conflicts in the newsroom.[31] The right to freedom of expression comes with the concomitant duty to uphold the highest professional and ethical standards when reporting news.[32] The SABC's editorial staff are exhorted to present news programmes in a fair and balanced manner, underlining the importance not only of the SABC being accurate, fair, impartial and balanced in its reporting, but also of being perceived as such by viewers. If balance is not achieved (for whichever reason), the disadvantaged individual or institution must be given an opportunity to present his/her or its version of events.[33]

The policy addresses a number of other topics, including guidelines on how economic and business news should be reported[34] and how elections[35] should be covered. News staff are guided on the manner in which interviews[36] should be conducted and the approach to be followed with investigative journalism.[37] The importance of respecting the individual's privacy and dignity in line with constitutional values is emphasised.[38] Payment for information is forbidden and news staff should always be mindful of restrictions on sponsorships of news, current affairs and information programming.[39] It is clear why the rest of the policies should be read with the news policy, as these directives are based on values that are applicable across the board.

4. Values, policies and reality

30 *Broadcasting Act* 4/1999:sec. 3(5)(f); *Electronic Communications Act* 36/2005:sec. 54.
31 *SABC Editorial Policies*:19, 34.
32 *SABC Editorial Policies*:20.
33 *SABC Editorial Policies*:21.
34 *SABC Editorial Policies*:22.
35 *SABC Editorial Policies*:24.
36 *SABC Editorial Policies*:21.
37 *SABC Editorial Policies*:22.
38 *SABC Editorial Policies*:23.
39 *SABC Editorial Policies*:22, 25.

While legislation, policies and Codes of Practice provide the structure for an independent public broadcaster, the attainment of the goal is, ultimately, contingent upon the individuals who have to implement the rules and regulations. The nature of public broadcasting eventually leads to situations where standards of impartiality and balance are trumped by pragmatic considerations of personal survival and political expediency. When complaints concerning the editorial independence of the SABC were lodged at the BCCSA and the CCC, respectively, it transpired that both tribunals were of the view that the editorial independence of the SABC was not justiciable.

4.1 Rogers v SABC 2003 (4) BCLR 439 (BCTSA)

The editorial independence of the SABC was questioned as early as 2003. In *Rogers v SABC*,[40] the complainant, a well-known person in broadcasting, approached the Broadcasting Complaints Commission because, in its news coverage of the Arms Deal, the SABC did not refer to the fact that allegations of corrupt dealings had been made against the then Deputy President and were being investigated. This information was published in a newspaper, which reported that the Deputy President rejected the rumours as mischievous. The complainant was of the opinion that the BCCSA, in light of the history of the public broadcaster (SABC) under the previous regime, should institute sanctions at the first suggestion of censorship by the SABC. He argued that the SABC's decision not to report on the pending investigation constituted censorship.[41] The complainant contended that the SABC is vulnerable to governmental interference and censorship, as the CEO of the SABC Board is appointed by the President, and that the matter for decision is an example of such interference. The representative of the SABC vehemently denied this allegation.

The Chairperson held that the BCCSA is bound by its own Broadcasting Code and that only complaints in terms of the Code can be entertained.[42] In his view, the Code was aimed at material broadcasts, in other words, programmes that have already been broadcast. In this instance, Clause 2 of the Code will be applicable, as the clause deals with the requirement of balance in news programmes. The Tribunal found that the mere omission by the SABC to broadcast news of an event of public importance does not amount to a contravention of Clause 2 of the Broadcasting Code.

Having dealt with balance in terms of Clause 2 of the Code, the Chairperson stated that the real question is whether the BCCSA has

40 *Rogers v SABC* 2003 4 BCLR 439 BCTSA.

41 *Rogers v SABC* 2003 4 BCLR 439 BCTSA:441. It should also be borne in mind that the SABC has to broadcast events of public interest. Guidelines in this respect are set out in its *Policy on News, Current Affairs and Information Programming*, which is discussed under heading 4 above.

42 Mr Rogers averred that the BCCSA could pronounce on internal censorship as it falls within the parameters of freedom of speech, which is the underlying constitutional value upon which the functioning of the Commission is based.

jurisdiction if a matter of public (controversial) importance is not broadcast by the SABC. He came to the conclusion that that would be a programming issue and would, therefore, fall outside the BCCSA's jurisdiction.

It is submitted that the decision in *Rogers* is correct. The SABC's editorial decisions do not fall within the jurisdiction of the BCCSA. The objective of the clauses in the Code for Broadcasters, which deals with news and current affairs, is to ensure that the requirements set out in sec. 10(1)(d) of *Act* 4 of 1999 are adhered to.[43] Clause 11 of the Code provides detailed directives for broadcasters in respect of news programmes. Clause 11(1) and (2) speaks specifically to the requirement of fair and unbiased coverage and stipulates that broadcasting service licensees must report news truthfully, accurately and fairly, in the correct context and in a fair manner, without intentional or negligent departure from the facts.[44] While the decision that the BCCSA cannot decide on programming issues is supported as correct, the question is if not the BCCSA, then who?

4.2 The Freedom of Expression Institute

On 26 May 2006, the Freedom of Expression Institute (FXI) released a press statement voicing its concern about the growing trend of self-censorship at the SABC. The statement was issued as a direct consequence of the SABC's decision not to air a documentary on the then President, Thabo Mbeki, which was scheduled to be broadcast later that week.

The statement referred to newspaper reports indicating that sources suggested that the programme was cancelled after a member of SABC management had an informal meeting with the Communications Department of the Presidency.[45] The FXI also criticised what, in their opinion, was the disrespectful manner in which the SABC treated the public in rescheduling the programme. The press statement highlighted the increasing difficulty the public broadcaster was experiencing at the time in maintaining a balance between editorial independence and public accountability.

Matters came to a head when the FXI approached the CCC of ICASA in respect of allegations of news manipulation by the news editor in the

43 Sec. 10(1)(d) reads as follows: "provide significant news and public 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."

44 Clause 11(2): "News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by: (a) Distortion, exaggeration or misrepresentation; (b) Material omissions; or (c) Summarisation'. Clause 13 of the Code deals with reporting controversial issues of public interest. In terms of this clause broadcasters are obliged to make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot."

45 https://www.ifex.org/south_africa/2006/05/26/fxi_concerned_about_growing_trend/ (accessed on 22 August 2015).

newsroom of the SABC.[46] The functions of the CCC are set out in sec. 17B of *Act* 13 of 2000. The CCC must investigate, hear if appropriate, and make a finding on all matters referred to it by the Authority (ICASA), complaints received by the Committee, and allegations of non-compliance with the *ICASA Act* or underlying statutes.

The Committee was of the opinion that editorial decisions taken during the production stage of news programmes cannot be questioned by the CCC (ICASA) as that would be an infringement of the SABC's right to editorial independence in terms of the Charter. The CCC can only adjudicate the final product once it has been broadcast.

The CCC directed the FXI to provide evidence that the SABC had contravened the Code of Conduct insofar as its news and comments programmes were concerned. The CCC pointed out that the FXI could not produce one instance to show that the blacklisting influenced the impartiality of a programme. The Commission could not find bias as a result of the blacklisting when observing the final product, as the plurality of views were inevitably covered by the spectrum of programmes that were broadcast. The complaint was dismissed,[47] as the CCC was of the opinion that it had no jurisdiction in the matter.[48]

The FXI subsequently approached the South Gauteng High Court with an application for review and setting aside of the CCC's dismissal of the complaint.[49] In view of the ruling of the CCC that it has no jurisdiction in the matter, the FXI based its review application on sec. 6(2)(d) of the *Promotion of Administrative Justice Act* 3 of 2000 (*PAJA*) in that the CCC "was materially influenced by an error of law".[50]

The SABC's Director of News stood accused of interference and manipulation in the newsroom and the SABC Board of a dereliction of duties. Neither the Director nor the Board denied the accusations which led the Court to infer that he and the Board were not in a position to deny the accusations and, therefore, that the application would be decided on the FXI's version of events.[51]

The FXI complained about a number of events, which, according to them, illustrated the Director's bias in managing news reporting at the SABC. The Court dealt with the incidents on an individual basis. Two incidents are mentioned in detail.[52] The first event concerned the coverage

46 It was alleged that the news editor blacklisted certain independent commentators.
47 *Freedom of Expression Institute v Chair, Complaints and Compliance Committee and Others* 2011 ZAGPJHC 2:par. 3.
48 The CCC can hear complaints against licensees on the terms and conditions of their licences; the *ICASA Act*; or the underlying statutes defined in sec. 1, which include the *Broadcasting Act* and the *Electronic Communications Act*.
49 *Freedom of Expression Institute v CCC*:par. 2.
50 *Freedom of Expression Institute v CCC*:par. 5.
51 *Freedom of Expression Institute v CCC*:paras. 11-12.
52 The other instances concerned a SABC reporter, who filed reports on an ANC rally at a stadium in KwaMashu on 16 June 2005. He reported that the Premier

of the Zimbabwean election during April 2005. The Director made his views clear before the elections.[53] He personally visited Zimbabwe to negotiate the terms upon which the SABC would cover the elections and barred the political editor from joining him.[54] Reporters were not allowed to interview certain civil organisations in Zimbabwe, and he also identified individuals whose opinions on the election should not be sought.

In a second case, a woman who was an award-winning SABC television reporter was appointed as a freelance correspondent in the Middle East. In November 2005, it appeared that the PLO leader Mr Yasser Arafat was critically ill and might pass away. The correspondent was asked to cover the story and the Director was briefed about this one week before Arafat's death. He was not pleased about the assignment. When Al Jazeera ran a report that Mr Arafat had passed away, which his spokesman in Paris denied, the political editor arranged for both sides to be covered by the correspondent. Immediately after this report was broadcast, the political editor was called in and threatened with dismissal for 'insubordination', if she and her colleagues used the correspondent on any of their radio bulletins or current affairs shows.[55]

On 20 June 2006, *The Sowetan*[56] published a report highlighting the blacklisting of independent commentators on the SABC. Later on the same day, the SABC issued a public statement denying that any blanket bans were imposed on independent commentators, but explained that the newsroom accepted a proposal that guidelines be devised on the use of commentators after problems were encountered with some independent commentators and analysts.[57] The general impression was that this was a cover-up by the SABC.

The CCC held that all actions relating to the screening of the final product fell under the Code of Practice under the *ICASA Act*, but not those relating to the production stage. Therefore, the CCC, as a creation of the *ICASA Act*, could only entertain complaints regarding the final product when it has been broadcast. SABC personnel performed the

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was booed off the stage. The Director instructed that a disciplinary proceeding be instituted against the reporter, as his reports were incorrect (which was not the case). The Director also imposed a blanket ban on any use of a certain person as a commentator and analyst on AM Live in March 2006. *Freedom of Expression Institute v CCC*:paras. 25, 40.

53 He made his views about Zimbabwe clear in the run-up to the elections when he condemned COSATU's attempt to visit Zimbabwe. He said that: "COSATU had no business visiting that country", because it was "a sovereign state". *Freedom of Expression Institute v CCC*:par. 16.

54 He did not report back to her on the outcome of the negotiations. Later, she was specifically forbidden to go to Zimbabwe to oversee the coverage of the elections. *Freedom of Expression Institute v CCC*:par. 17.

55 *Freedom of Expression Institute v CCC*:paras. 32-36.

56 Mabuza 2006.

57 The editorial policy on News, Current Affairs and Information deals with this aspect. *Freedom of Expression Institute v CCC*:par. 23.

blacklisting and, consequently, the SABC has to deal with it by instituting disciplinary proceedings.[58]

In determining whether the CCC erred in its ruling that it did not have jurisdiction in the matter, the Court proceeded to consider the relevant provisions in SABC 3's television licence. Paragraph 2.5 of Schedule C provides, *inter alia*, that the licensee should, in the production and presentation of news and current affairs programmes, have full control of the contents of the programme and meet the highest standards of journalistic professionalism.[59]

The Court interrogated sec. 6(3) of *Act* 4 of 1999, which guarantees editorial independence to the SABC. Judge Claassen was of the opinion that, when sec. 6(3) is read in context with secs 6(4) and 6(8) of *Act* 4 of 1999, it is clear that editorial independence is tempered by the directives expressed in these sections.[60] Sec. 6(8)(f) requires a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest. Sec. 10(1)(d) of *Act* 4 of 1999 specifically provides that coverage in news and public affairs programmes by the public broadcaster should meet the highest standards of journalism and should be unbiased, impartial, balanced and independent from interference by third parties and other interests.[61] He dismissed the CCC's argument that its jurisdiction on editorial decisions taken by the SABC is precluded by sec. 6(3) as flawed, as it is clearly conditional upon the directives in sec. 10(1)(d) of *Act* 4 of 1999.

The Court criticised the notion that a distinction should be drawn between the production and presentation stage of a programme, as the result of such distinction is unacceptable. It is highly improbable that a programme, which is biased in the production stage, will comply with principles of fairness, impartiality and balance in the presentation stage. "The conduct of the Director, in effect, amounted to pre-censorship. One can never establish whether a programme is balanced, objective or fair if some relevant views and/or perspectives had been censored".[62]

The Court did not agree with the view of the CCC that the SABC should monitor its own compliance to the Charter. Third persons have no *locus standi* in SABC proceedings. If the SABC institutes disciplinary procedures (against the news editor, in this instance), the complainant (the FXI) will not be able to participate in the proceedings. The Court held that the SABC was subject to ICASA in respect of programmes in the production stage as well as the final product.[63]

58 *Freedom of Expression Institute v CCC*:paras. 30-31.
59 *Freedom of Expression Institute v CCC*:paras. 30-31.
60 As provided for in the Charter of the SABC. *Freedom of Expression Institute v CCC*:par. 35.
61 The SABC's broadcasting licence also requires "the highest standard of journalistic professionalism".
62 *Freedom of Expression Institute v CCC*:par. 40.
63 *Freedom of Expression Institute v CCC*:par. 33.

Based on the duty of the SABC to provide significant news and public affairs programmes which are fair and impartial, and demonstrate high standards of journalism and unbiased coverage, as set out in sec. 10(1 (d) of *Act* 4 of 1999, the Court came to the conclusion that the CCC was materially influenced by an error of law, in that it misinterpreted secs. 6(3) and 10(1)(d) of the *Broadcasting Act*. The judgement was found reviewable in terms of the provisions of sec. 6(2)(d) of *PAJA*.[64]

5. On achieving the elusive balance between editorial balance and public accountability

The FXI succeeded in overturning the finding of the CCC through a tortuous procedure. To what avail, one may ask? The review was granted five years after the original complaint was rejected. By then, circumstances had changed in the country and at the SABC. A new President was in power, many events of public importance have been covered (or not), and new concerns were raised about the SABC's editorial decision.

Before the decision in *Institute for Freedom of Expression v CCC*, the possibility of achieving a balance between editorial independence and public accountability in public broadcasting, as envisaged in the *Broadcasting Act*, seemed remote. The two statutorily created guardians of independent broadcasting could not ensure compliance with the Charter, as each was of the opinion that the SABC's editorial decisions were not justiciable and, therefore, did not fall within their respective jurisdictions. The public broadcaster's editorial independence was seemingly inviolable. Consequently, it appears that it was impossible for ICASA to fulfil its mandate to monitor and enforce the SABC's compliance with the Charter.[65]

Judge Claassen changed this untenable position by finding that the editorial independence of the SABC is not absolute. He concluded that the SABC is a public broadcaster funded by the taxpayer to provide fair, unbiased and balanced news coverage. It may not use public money to take political sides or promote party-political objectives.[66] While this is the practical reality of public broadcasting and while many things can be expressed in monetary value, it is submitted that the true value of editorial independence lies in the values it represents – freedom of speech and freedom to receive information. Editorial independence is a prerequisite for independent public broadcasting, but it does not trump public accountability. The condition, upon which the public broadcaster is granted editorial independence, is that of impartial, unbiased and balanced reporting, which condition, if it breaks the loss of editorial independence, will be the consequence of its crime and the punishment of its guilt.[67]

64 *Freedom of Expression Institute v CCC*:par. 99.
65 *Broadcasting Act* 4/1999:sec. 6(2).
66 *Freedom of Expression Institute v CCC*:par. 34.
67 Loosely based on a quotation from a speech by John Philpot Curran given before the Irish Privy Council in 1790: "The condition upon which God hath

6. Conclusion

It can safely be concluded that the jurisdiction of the CCC and the BCCSA, as the respective guardians of independent public broadcasting, has been properly demarcated. Editorial independency remains the coveted prerogative of the broadcaster, but, when perceived as failing in its objective, may be scrutinised by the CCC in terms of sec. 6(2) of the *Broadcasting Act*. Public accountability is enforced by the BCCSA in terms of its Code, and the clause dealing with the requirements for news and current affairs is based on the requirements set out in sec. 10(1)(d) of the *Broadcasting Act*. The conclusion is borne out by the decision of the CCC in the recently reported case of *MMM v The SABC*.[68]

MMM lodged a complaint at the CCC against the Chief Operations Officer of the SABC who issued a directive on 26 May 2016 in terms of which the SABC's news division was prohibited from broadcasting violent protests against service delivery.[69] The Chairperson of the CCC stated that the CCC was obliged to establish whether the broadcaster has overstep when it receives a complaint against the SABC. If the CCC finds that this is indeed the case,

> ... it makes a finding on the merits against the SABC and then puts forward an appropriate order to the Council of ICASA within the terms of section 17D(3) and 17E(2) of the ICASA Act 2000. The Council then considers that order and, if it agrees with it, makes the order.[70]

The presiding officer emphasised the importance of the role of the SABC as public and national broadcaster,[71] pointing out that it is the duty of the CCC to determine whether the statement, which forms the basis of the complaint, is in conflict with either the *Broadcasting Act* or the SABC's licences. It would suffice if the statement is in conflict with any of the two.[72]

The CCC concluded that the order by the SABC, as set out in the policy statement of 26 May 2016, is in conflict with its duties as public broadcaster and invalid from its inception in terms of the *Broadcasting Act* 1999 read with secs 39(2) and 16(1)(a) and (b) of the *Constitution*. It is also in conflict

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given Liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime, and the punishment of his guilt".

68 *The Trustees for the time being of the Media Monitoring Project Benefit Trust and others v South African Broadcasting Corporation Soc Limited* [2016] JOL 36314 (CCC).

69 *MMM v The SABC*:par. 4.

70 *MMM v The SABC*:par. 2.

71 *MMM v The SABC*:par. 10: "... the role of the public broadcaster is critical in empowering every citizen to be able to exercise her or his right to freedom of expression. They can only exercise this right if they have the opportunity to be informed. There is no gainsaying that this role is particularly important in the South African environment, given that large numbers of South Africans receive their news primarily from the SABC''.

72 *MMM v The SABC*:par. 15.

with the licence conditions of the SABC.[73] The CCC upheld the complaint and recommended that the Council, in terms of sec. 17E(2)(c) of the *ICASA Act* 2000, directs the SABC to withdraw its resolution as contained in its statement of 26 May 2016,[74] thus asserting its authority to ensure balance between editorial independence and public accountability.

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73 *MMM v The SABC*:par. 21(i).
74 *MMM v The SABC*:par. 21.

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