

IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

Case No: 2009/51933

In the matter between:

FREEDOM OF EXPRESSION INSTITUTE

Applicant

and

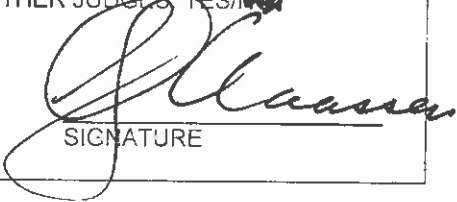
**CHAIR, COMPLAINTS AND COMPLIANCE
COMMITTEE**

1st Respondent

**INDEPENDENT COMMUNICATION AUTHORITY
OF SOUTH AFRICA**

2nd Respondent

SOUTH AFRICAN BROADCASTING CORPORATION 3rd Respondent

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED
24/01/2011	
DATE	SIGNATURE

JUDGMENT

C. J. CLAASSEN J:

- [1] This is a review application. The applicant is the Freedom of Expression Institute (“FXI”). The first respondent is the Chair of the Complaints and Compliance Committee (“the CCC”). This is a committee established by the second respondent, the Independent Communications Authority of South Africa (“ICASA”), a juristic

person incorporated in terms of section 3 of the Independent Communications Authority of South Africa Act 13 of 2000 (“the ICASA Act”). The complaint was laid by FXI against the third respondent, the South African Broadcasting Corporation (“the SABC”), in terms of section 17C of the ICASA Act, which reads as follows:

“17C. Procedure of Complaints and Compliance Committee

- (1)(a) A person who has reason to believe that a licensee is guilty of any non-compliance with the terms and conditions of its licence or with this Act or the underlying statutes may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance.”

The “Authority” referred to in the section quoted above is defined as meaning ICASA, established by section 3(1) of the aforesaid Act which provides:

“3. Establishment of Independent Communication Authority of South Africa

- (1) There is hereby established a juristic person to be known as the Independent Communications Authority of South Africa.”

[2] The CCC dismissed the complaint laid by the FXI against the SABC. Its decision and reasons for such dismissal appear from its judgment handed down on 18 June 2009.¹ It is this decision which the FXI seeks to be reviewed and set aside in this application.

[3] As indicated in this judgment later, it will be seen that the CCC’s reasons for dismissing FXI’s complaints against the SABC turn on matters of law regarding the proper interpretation of its authority as defined in the empowering statutes. It held *inter alia* that, upon its

¹ See Exhibit MM8 at pp 568 – 587 of the record

interpretation of its statutory authority, it had no jurisdiction to entertain the complaints.

- [4] It will also be seen that there are no factual disputes in this application. The CCC was obliged to accept all the evidence produced by FXI in regard to the alleged transgressions of the SABC because the latter had not adduced any **admissible** evidence to the contrary. The CCC, however, found, (i) that the provisions on which the FXI based its complaints, were invalid; and/or (ii) that the facts did not disclose transgressions of the provisions on which FXI based its complaints; and/or (iii) that the CCC did not have jurisdiction over the transgressions about which FXI complained.
- [5] Accordingly, FXI based its application for the review of the CCC's decision on the provisions of section 6(2)(d) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") in that it "was materially influenced by an error of law".

THE FACTS

- [6] The complaints had their origin in events inside the SABC's news department. The SABC had first-hand knowledge of all the facts. The public generally and the FXI in particular, had no first-hand knowledge thereof. The initial complaint was, therefore, unsubstantiated by evidence. However, the chief executive officer of the SABC, Adv. Mpofu, had simultaneously appointed a Commission of Enquiry to investigate these events. This commission was chaired by the former chief executive officer of the SABC Mr Zwelakhe Sisulu who was assisted by Adv Gilbert Marcus SC and

Prof Guy Berger. This Commission of Enquiry heard, recorded and transcribed extensive evidence and rendered a lengthy and comprehensive report to the SABC Board. The SABC, however, attempted to keep this report secret and has never released the original report.

[7] In view of the fact that the FXI did not have first-hand knowledge of all the facts it applied to the CCC for an order directing the SABC to provide it with a copy of the report. The SABC opposed the application on the basis that the CCC could only take account of evidence admissible in judicial proceedings and not merely that which is contained in the report of a Commission of Enquiry. It also submitted that the CCC itself must hear relevant evidence, assess witnesses and make its own factual findings in regard to the complaints. The CCC upheld the SABC's objections and refused to allow the report to be made available and introduced into evidence². It also gave a direction that the FXI should provide evidence that the SABC had contravened the Code of Conduct insofar as its news and comments programmes were concerned.

[8] Pursuant to the CCC's aforesaid direction, the FXI filed a supplementary complaint³ and supporting evidence comprising an affidavit by the former Head of Radio News at the SABC, Ms Pippa Green,⁴ an affidavit by Mr Perlman⁵, a former presenter of the

² In my view, this decision was incorrect. The CCC should at least have order the production of the report. To what extent it may have been introduced as evidence before it, would have depended upon the legal demands of admitting hearsay evidence, a matter which should have been decided *ad hoc* by the CCC in regard to what portions of the report FXI sought to rely on. However, this decision does not form part of this review application and no determination in that regard is necessary.

³ See Annexure MM6 at pp 172 – 234 of the record.

⁴ See Annexure A attached to the supplementary complaint at pp 235 – 273 of the record.

⁵ See Annexure B attached to the supplementary complaint at pp 274 – 381 of the record.

programme “AM Live” broadcast on SAfm, and a research report by Mr Piers Pigou for the Crisis in Zimbabwe Coalition and the Media Institute of South Africa.⁶

- [9] Again the SABC failed to file any admissible evidence in response to the supplementary complaint and evidence. It merely filed a short affidavit by its complaints officer Mr Fakir Hassen⁷. In this affidavit Mr Hassen sought to confirm the contents of a document headed, “The SABC’s Supplementary Response to FXI’s Supplementary Complaint”. In the affidavit of Mr Hassen it is stated that the facts to which he deposes to “are within my personal knowledge unless otherwise stated or as appears from the context, and are true and correct.” He went on in the very next paragraph, however, to make it clear that he had no personal knowledge of any of the facts to which he deposed and that all of it was based on certain sources, the identity of which, he failed to provide, stating:

“The present complaint by the complainant, like all other complaints regarding the respondent (*a reference to the SABC*) or referred to it, has been handled internally by me. I have consulted various records at the respondent and spoken to responsible officials in dealing with the complaints. On the basis of the information obtained in this way I have, with the assistance of the respondent’s legal representatives, compiled a supplementary response to the complainant’s supplementary complaint which I annexed marked ‘SABC1’.”⁸

- [10] I agree with the submission made by Mr Trengove SC for the applicant that the entire document consists of hearsay evidence and in certain instances double hearsay evidence. Mr Hassen failed to annex any confirmatory affidavits from the individuals he approached from whom he obtained information nor did he disclose

⁶ See Annexure C attached to the supplementary complaint at pp 382 – 456 of the record.

⁷ See Exhibit MM7 at pp 526 – 530 of the record.

⁸ See paragraph 3 of Annexure MM7 at p 529 of the record.

the identity of such individuals. In my view, no regard can be had to the attachment to the affidavit of Mr Hassen and it is ruled inadmissible for purposes of this review application.

[11] The aforesaid ruling has further consequences. The SABC's failure to adduce any admissible evidence also gives rise to certain inferences to be drawn against it:

11.1 The FXI's supplementary complaint and evidence were principally directed at the conduct of Dr Snuki Zikalala, the SABC's Director of News. He stood accused of crass manipulation of the SABC's news and current affairs. His failure to respond to the accusations against him, could only mean that he did not deny them or that the SABC and its lawyers had concluded that his denials would not withstand cross-examination. Either way, the only reasonable inference is that Dr Zikalala could not honestly deny the accusations against him.

11.2 The SABC Board also stood accused of serious dereliction of its duties. Its failure to explain itself gave rise to the same inference. It either did not deny the accusations against it or its lawyers had concluded that its denials would not withstand cross-examination. The only reasonable inference is again that the SABC's Board could not honestly deny the accusations against it.

[12] The SABC's failure to file any admissible evidence had the following implications:

12.1 This matter must be determined on the basis of the FXI's evidence alone; and

- 12.2 The FXI's evidence is reinforced by irresistible inferences that neither Dr Zikalala nor the SABC can honestly deny the accusations against them.

The Evidence

[13] The evidence reveals a number of incidents in which the SABC's News Management and Dr Zikalala in particular, manipulated its news and current affairs, that they dishonestly tried to cover up this manipulation when it was publicly revealed and that the SABC's Board subsequently failed to take any action when the manipulation and dishonest cover-up was exposed by its own Commission of Enquiry.

[14] I will now deal with the instances of misconduct relied upon by FXI.⁹

The Zimbabwe Elections 2005

[15] The first incident concerns the SABC's coverage of the Zimbabwe elections in April 2005. The normal way in which the SABC Radio News covers elections in neighbouring SADC countries, is as follows:

⁹ In this regard, I leant heavily on the heads of argument provided by Mr. Trengove as I found it to be a correct summarised reflection of the evidence. Mr. Trengove is commended for the concise and very helpful heads of argument in this regard.

- 15.1 A small group of reporters is sent to the neighbouring country about ten days before the elections to do “establishing” stories to give South African listeners a deeper sense of the country concerned.¹⁰
- 15.2 About a week before the elections, a larger group of reporters with various language and story skills, joins the initial group and begins to report systematically on the political campaign.¹¹
- 15.3 The political editor drives the daily coverage and reports to the Head of Radio News. They also liaise with regional editors, current affairs executive reporters and bulletin editors around the country. If there are special arrangements to be made, they do so.¹²
- [16] Dr Zikalala interfered with this process in the coverage of the Zimbabwe elections. He made his views about Zimbabwe clear in the run-up to the elections when he condemned Cosatu’s attempt to visit Zimbabwe.¹³ He said that: “Cosatu had no business visiting that country,” because it was “a sovereign state.”¹⁴ He did not seem to have any qualms, however, about the fact that an SABC parliamentary reporter visited Zimbabwe at the same time on a Zanu-PF sponsored trip.¹⁵
- [17] As the Zimbabwe elections approached, Dr Zikalala personally visited Zimbabwe to negotiate the terms upon which the SABC would cover the elections. Ms Green was specifically forbidden from

¹⁰ Green p 254 paras 16.3.2 and 16.3.3.

¹¹ Green p 254 para 16.3.4.

¹² Green p 254 para 16.3.4.

¹³ Green p 252 para 16.3.1.

¹⁴ Green p 253 para 16.3.1.

¹⁵ Green p 253 para 16.3.1 read with p 240 para 15.

accompanying him. He did not report back to her on the outcome of the negotiations. She was later also specifically forbidden from going to Zimbabwe to oversee the coverage of the elections.¹⁶

[18] When Ms Green later tried to make arrangements for their “advance team” of reporters to go to Zimbabwe to cover the elections, she was told that this was not allowed under the agreement Dr Zikalala had negotiated and that they could only go there two days before the election itself. This arrangement concluded by him was unsatisfactory because the reporters could not possibly establish whether the elections were free and fair if they only arrived on the eve of the actual voting. It was essential to cover the campaign itself. They eventually managed to get one reporter into Zimbabwe about five days before the election itself.¹⁷

[19] Immediately after the elections and on about 5 April 2005, Dr Zikalala attended an editorial meeting at which Ms Green congratulated the reporters for producing credible stories on the Zimbabwe elections under difficult circumstances.¹⁸ He, however, said the following at this meeting:

19.1 He threatened to “take action” against Ms Green if any reporter reported what he considered to be any “opinion” on Zimbabwe¹⁹;

¹⁶ Green p 255 para 16.3.5.

¹⁷ Green p 255 para 16.3.6.

¹⁸ Green p 256 para 16.3.8.

¹⁹ Green p 257 para 16.3.8.

19.2 He expressly forbade the views of certain members of civil society on Zimbabwe namely Mrs Elinor Sisulu, Mr Moeletsi Mbeki, Mr Trevor Ncube and Catholic Archbishop Pius Ncube²⁰; and

19.3 He also said that it was untrue to report that there was a food shortage in Zimbabwe because he had stayed at the Sheraton Hotel in Zimbabwe and “had no problem ordering fresh bread rolls, bottled water and whisky through room service.”²¹

[20] Immediately after this meeting, Ms Green protested to Dr Zikalala in a letter dated 5 April 2005.²² She *inter alia* said the following:

20.1 She recorded that Dr Zikalala had threatened to take action against her and the National Bulletin Editor, Vusi Sithole, for any “opinion” reported on Zimbabwe;

20.2 She recorded that Dr Zikalala had “expressly forbade the views of members of civil society on the situation in Zimbabwe, naming two specific individuals: Elinor Sisulu and Moeletsi Mbeki. She protested and explained why both these people were important voices on Zimbabwe;

20.3 She recorded that he had also forbade the views of Archbishop Pius Ncube and publisher Mr Trevor Ncube on radio and television. Ms Green protested that the prohibition was indefensible and that she “cannot see how we can possibly fulfil our public broadcasting mandate and agree to this.”

²⁰ Green p 257 para 16.3.9.

²¹ Green p 257 para 16.3.9.

²² Green p 258 para 16.3.10; letter 5 April 2005 Annexure PG1 p 270.

20.4 Ms Green argued that Dr Zikalala's conduct violated the SABC's Editorial Code and concluded as follows:

"In short, your instruction not to use Moeletsi Mbeki, Archbishop Pius Ncube, Trevor Ncube or Elinor Sisulu, all legitimate figures, is so unreasonable that I cannot carry out or implement it. I think it is morally wrong, professionally wrong and ethically wrong, and violates not only our Editorial Code but the entire spirit of our Constitution."

[21] Dr Zikalala's only response to Ms Green's letter was a one line e-mail the following day which reads as follows:

"I don't think that I will have the time and energy to be involved in such arguments."²³

[22] Ms Green says that she regards Dr Zikalala's restrictions as a violation of the SABC's Editorial Code and the Broadcasting Act.²⁴ She adds that it is "particularly pertinent that Dr Zikalala excluded the views of those who were intimately knowledgeable about Zimbabwe and who were critical of President Mugabe's government."²⁵ She concludes, however, that the "real point" was to manipulate the SABC's coverage of the Zimbabwe elections as follows:

"The real point though was to intimidate producers and editors sufficiently that they would not easily use any commentator or even report that could be interpreted as critical of the Zimbabwe government. To that extent his edict worked effectively: I had several calls from producers of current affairs shows for the next several days inquiring whether they may use this or that commentator, even economists who mentioned the high inflation rate or economic dysfunction in our neighbouring country."²⁶

²³ Green p 263 para 16.3.11 and e-mail 6 April 2005 Annexure PG2 p 272.

²⁴ Green p 267 para 16.3.13.

²⁵ Green p 267 para 16.3.13.

²⁶ Green p 268 para 16.3.14.

[23] Mr Pigou concluded in his research report that the resultant coverage of the Zimbabwe election had been seriously flawed. He highlighted the following flaws in his conclusion:

23.1 “Our assessment of the coverage provided strongly suggests that, in a number of areas, the SABC’s television coverage did not live up to this ideal (of coverage ‘in a fair and balanced manner’) and instead provided a somewhat selective insight into election related issues.”²⁷

23.2 “The SABC’s coverage in this regard was very poor. No meaningful examination was made, for example, of the harassment and abuse that has been consistently meted out against the opposition MDC and its support base. Even MDC members of parliament have been arrested and tortured, yet the SABC chose to ignore the relationship between these experiences and the elections. The role of the security forces was not examined or even raised as a problem, even though documentary evidence routinely fingers particular security force and intelligence units in the perpetration of gross human rights violations. Widespread allegations of the political manipulation of food aid were not carefully examined, outside of reporting that SABC’s reporters could not find evidence of this. We do know what efforts were made to follow-up on this story. ETV, however, managed to piece together a 30-minute special on the subject during the same period.”²⁸

23.3 “Indeed, it is important, however, to draw a distinction between the general reportage and the central role that was played by SABC Africa’s anchor, Hope Zinde. Her remarkable editorial commentary and analyses, which appeared to continue unrestricted throughout her time at the Harare Sheraton was at times incoherent, often partisan and generally uninformed. Unlike reports from the field, her contributions could not be vetted for ‘balance, fairness and accuracy’ as it was largely broadcast live.

Of course, it is important to raise and pose controversial questions and positions, but the overall impression created by Zinde’s comments and general disposition was that the situation in Zimbabwe had been fundamentally misrepresented by her colleagues in sections of the South African and the ‘Western’ media, and that...neither these representations of the situation (nor) the pervasive perceptions of fear and mistrust felt by many Zimbabweans, were rooted in reality. This general viewpoint was echoed in Dr Zikalala’s interview (with President Mugabe) which strongly suggests that Zinde’s commentary was met with general approval further up the editorial ‘chain of command’.”²⁹

23.4 “It is our contention that the SABC’s television coverage of Zimbabwe’s 2005 parliamentary elections (wittingly or unwittingly) gave succour to this agenda as part of a pattern of selective reporting about the Zimbabwe situation. As such, the SABC did not (as its editorial policy makes provision for); provide ‘information

²⁷ Pigou p 447.

²⁸ Pigou p 448.

²⁹ Pigou pp 450 – 451.

that is substantial, and analysis that is meaningful to ordinary, enquiring South Africans so that they can form their own opinions.”³⁰

[24] This evidence, uncontradicted as it is, establishes, in my view, a justified conclusion as the only reasonable inference to be drawn there from, that Dr Zikalala unlawfully manipulated the news coverage of the Zimbabwe elections. This inference could only have been countered by an affidavit from Dr Zikalala denying the allegations aforesaid. The absence of such an affidavit is quite conspicuous.

The Zembe Incident (Protests against Kwazulu-Natal Premier S’bu Ndebele)

[25] Mr Mandla Zembe was a young and highly talented SABC reporter who covered an ANC rally at a stadium in KwaMashu on the outskirts of Durban on 16 June 2005.³¹ Drama was expected because it was two days after President Mbeki had dismissed Deputy President Zuma from his cabinet. The Kwazulu-Natal Premier Mr S’bu Ndebele addressed the rally but was booed and pelted with plastic bottles and other objects. He found it hard to complete his speech. At the end he had to be escorted from the podium by his bodyguards who held a metal table over him to protect him against the missiles pelted at him.³² Mr Zembe filed stories on this incident throughout the day.³³

[26] Just after the 6 p.m. news bulletin, Dr Zikalala called Ms Green and instructed her to institute disciplinary proceedings against Mr Zembe

³⁰ Pigou pp 452 and 453.

³¹ Green p 241 para 16.1.1.

³² Green p 241 para 16.1.4.

³³ Green p 242 para 16.1.4.

the following day. When she asked why, he replied that he was in the TV “visuals room” and there was no evidence that the Premier had been booed or pelted.³⁴ Ms Green called Mr Zembe to check the story and he confirmed that it was accurate.

- [27] Only a few seconds of the mayhem was shown on the 7 p.m. English television news bulletin.
- [28] The Premier arrived at the SABC and demanded to be given airtime to deny that he had been pelted. He was allowed to do so on a current affairs show and was again given “considerable airtime” on the 10 p.m. television news bulletin despite the fact that his denials were manifestly false.³⁵
- [29] When Mr Zembe returned to his newsroom, he found the Premier’s armed bodyguards walking around the newsroom in intimidating fashion.³⁶
- [30] Ms Green says that this incident violated the SABC’s Editorial Code in that its reporter Mr Zembe “was intimidated not only by the Premier’s bodyguards but by the MD of news himself who threatened him with a disciplinary hearing for reporting the truth.”³⁷ The substantial airtime given to the Premier “also served to distort the truth of what happened”.³⁸

³⁴ Green p 242 para 16.1.4.

³⁵ Green p 243 para 16.1.5.

³⁶ Green p 243 para 16.1.5.

³⁷ Green p 244 para 16.1.8.

³⁸ Green p 244 para 16.1.8.

- [31] In my view this uncontroverted evidence establishes that Dr Zikalala also interfered with the news coverage of this incident.

The Slier Incident (Reporting on the death of Yasser Arafat)

- [32] Ms Green and the Head of TV News Mr Matthews appointed Ms Paula Slier as a freelance correspondent for both radio and television news in the Middle East. She was an award-winning SABC television reporter who also reported well for radio. She had previously been a full-time reporter with the SABC. She had proved herself to be an objective and sensitive reporter on the Middle East. She had reported fully and fairly on both sides of the Middle Eastern conflict. Her reportage on the plight of the Palestinians had been such as to prompt a complaint from the Israeli ambassador.³⁹
- [33] It appeared in early November 2005 that the PLO leader Mr Yasser Arafat was gravely ill and might pass away. Ms Green and Mr Matthews assigned Ms Slier to cover the story. She stationed herself near the PLO compound in Ramallah where she had excellent contacts and from where she filed regular reports. Mr Arafat was at that stage in a hospital in Paris.⁴⁰ Ms Green arranged for the story to be covered from the hospital in Paris through Reuters, Al Jazeera and the BBC. Ms Slier's presence at Ramallah, however, gave them an edge in their coverage.⁴¹
- [34] About a week before Arafat's death, Ms Green briefed Dr Zikalala on these plans. He reacted sharply to the assignment of Ms Slier,

³⁹ Green p 245 para 16.2.1.

⁴⁰ Green p 245 para 16.2.2.

⁴¹ Green p 246 para 16.2.3.

saying she was “biased and slanted” in her coverage. When asked why, he could not give any rational basis for it and merely said that “I do not want to embarrass **my government** over Arafat”.⁴² (Emphasis added)

- [35] On 9 November 2005 Al Jazeera ran a report that Mr Arafat had passed away but his spokesman in Paris denied that this was so. Ms Green arranged for both sides of this story to be covered. Ms Slier reported on it from Ramallah.⁴³
- [36] Immediately after Ms Slier’s report, Dr Zikalala called Ms Green and threatened to dismiss her for “insubordination” if they used Ms Slier on any of their radio bulletins or current affairs shows.⁴⁴ When Ms Green tried to explain, Dr Zikalala shouted, “I’m not going to engage with you. I don’t want to listen to anything you have to say. And now I’m going to close this phone.” Dr Zikalala cut off the conversation as he said he would. Ms Green reported this conversation to the then CEO of the SABC Mr Peter Matlare the following day.⁴⁵
- [37] After his conversation with Ms Green, Dr Zikalala instructed the National Bulletin Editor Mr Sithole to put the following notice on the SABC’s internal news network system:

“Urgent note: All desks

The MD of News Dr Snuki Zikalala, has directed that no material or story supplied by journalist Paula Slier should be used by SABC news desks until

⁴² Green p 246 para 16.2.4.

⁴³ Green p 247 para 16.2.6.

⁴⁴ Green p 247 para 16.2.6.

⁴⁵ Green p 248 para 16.2.6.

further notice. Dr Zikalala says this instruction applies to all units of SABC news.⁴⁶

- [38] Later that evening Ms Green received a “puzzled” sms from Ms Slier which read:

“Pippa, hi, am at compound and wanted to file but traffic (*the SABC staff that captures stories from reporters in the field*) have been instructed to take nothing from me, what’s going on?”⁴⁷

- [39] Ms Green concludes that Dr Zikalala’s banning of Ms Slier’s reports was unjustified and as a result of it,

“our viewers and listeners were denied the possible original reports...that an informed South African reporter was able to do for a domestic audience whom she knew well.”⁴⁸

The Karima Brown Incident

- [40] Ms Karima Brown is a former executive producer of AM Live on SAfm and is now the Business Day’s political editor. In March 2006 Dr Zikalala imposed a blanket ban on any use of Ms Brown as a commentator and analyst on AM Live.⁴⁹

- [41] Mr Perlman first learnt of this ban on 28 March 2006 when Ms Brown was scheduled to be a guest on his show and colleagues told him of the ban.⁵⁰

- [42] Mr Perlman discussed the matter with Mr Phetoe, the Acting Head of Radio News, the following day.⁵¹ Mr Phetoe confirmed that they

⁴⁶ Green p 248 para 16.2.7.

⁴⁷ Green p 249 para 16.2.8.

⁴⁸ Green p 252 para 16.2.12.

⁴⁹ Perlman p 278 para 10.

⁵⁰ Perlman p 278 paras 10 – 12.

⁵¹ Perlman p 280 para 13 and p 281 para 15.

could not use Ms Brown because Dr Zikalala was extremely unhappy about the fact that Ms Brown had co-written a story about President Mbeki which Business Day had to retract after its publication. Mr Phetoe said that he and Dr Zikalala would not allow Ms Brown to use AM Live to “rebuild her reputation”.⁵²

[43] Mr Perlman mentioned his concern about the matter in an e-mail to his executive producer, Mr Steven Lang, on 9 May 2006.⁵³ Mr Lang reported to Mr Perlman that he had forwarded his e-mail to Mr Phetoe who had in turn forwarded it to Dr Zikalala.⁵⁴

[44] Mr Perlman and his co-presenter Ms Bikitsha discussed the matter with Mr Phetoe on 21 June 2006. Mr Phetoe again said that they could not use Ms Brown because of her Mbeki story in Business Day.⁵⁵

[45] Mr Perlman says that Ms Brown’s article on President Mbeki in Business Day could not have been the reason for the ban imposed on her because,

- the article was published in Business Day in August 2005, some seven months before the ban was imposed;⁵⁶
- Ms Brown had since then twice appeared on his show without any demur from Dr Zikalala and Mr Phetoe;⁵⁷ and

⁵² Perlman p 281 para 15.

⁵³ Perlman p 286 para 19; e-mail 9 May 2006 Annexure JP7 p 337.

⁵⁴ Perlman p 287 para 21.

⁵⁵ Perlman p 282 para 17.

⁵⁶ Perlman p 283 para 18.1.

⁵⁷ Perlman p 284 para 18.2.

- no such ban was imposed on Ms Brown's co-author of the Mbeki article, Mr Mde.

Mr Perlman infers "that there are other reasons for keeping Ms Brown off air which we have not been informed about."⁵⁸

The Aubrey Matshiqi Incident

- [46] Mr Aubrey Matshiqi is a well-known political commentator. He was often used in that capacity on various current affairs programmes on the SABC including Mr Perlman's show.
- [47] When Mr Perlman discussed the banning of Ms Karima Brown with Mr Phetoe on 29 March 2006, he asked him whether there was anybody else with whom News Management was unhappy. Mr Phetoe said that there was disquiet about Mr Matshiqi because he had been quoted in the Sowetan as saying that the conflict between President Mbeki and Mr Zuma "could lead to civil war".⁵⁹
- [48] In early May 2006 Mr Perlman was told by a member of his production team that they could not use Mr Matshiqi on their programme.⁶⁰ Mr Perlman raised the matter with his producer Mr Lang in an e-mail on 9 May 2006.⁶¹ He asked for "some clarity on this issue, in particular who exactly is on the list of people not to use and why". Mr Lang forwarded the e-mail to Mr Phetoe who in turn

⁵⁸ Perlman p 283 para 18.1.

⁵⁹ Perlman p 290 para 24.

⁶⁰ Perlman p 289 para 23.

⁶¹ Perlman p 289 para 23; e-mail 9 May 2006 Annexure JP7 p 337.

forwarded it to Dr Zikalala.⁶² None of them ever contradicted the assertion that there was such a ban.⁶³

[49] Mr Perlman says that Mr Phetoe's explanation for their disenchantment with Mr Matshiqi, namely that he had been quoted in the Sowetan as saying that the conflict between President Mbeki and Mr Zuma "could lead to civil war", could not be true because,

- The Sowetan article had been published some seven months earlier on 24 October 2005;⁶⁴
- Mr Matshiqi had clarified what he had said in a follow-up article published in the Sowetan a few days later on 1 November 2005;⁶⁵ and
- Mr Matshiqi had since been a guest on Mr Perlman's show on three occasions without any demur from Mr Lang, Mr Phetoe or Dr Zikalala.⁶⁶

[50] On 25 May 2006 Mr Perlman and his team asked Mr Lang for clarity on the question whether they were allowed to use Mr Matshiqi.⁶⁷ The following day, the team preparing the Midday Live show, lined Mr Matshiqi up as a guest but Mr Lang reported to them that Mr Phetoe had said that they could not use him.⁶⁸

[51] On 30 May 2006 Dr Zikalala sat in on the AM Live show and joined the team for a meeting after the show. He told them that the SABC

⁶² Perlman p 290 para 25.

⁶³ Perlman p 290 para 25.

⁶⁴ Perlman p 291 para 26; Sowetan article 24 October 2005 Annexure JP9 p 340

⁶⁵ Perlman p 291 para 26; Sowetan article 1 November 2005 Annexure JP10 p 342

⁶⁶ Perlman p 291 para 27

⁶⁷ Perlman p 292 para 28

⁶⁸ Perlman p 293 para 29

did not want to use Mr Matshiqi because he was an independent analyst who was not attached to any institution or research body and consequently did not have the resources for proper research.⁶⁹ Confirmation of this attitude is to be found in the SABC media statement dated 20 June 2006.⁷⁰ Mr Perlman says that he does not accept this explanation because it had never been a problem in the past, either with Mr Matshiqi or other independent commentators in the same position such as Mr Protas Madlala and Dr Somadoda Fikini,⁷¹ who were analysts and commentators in a similar position.

The SABC's dishonest cover-up (The events on 20 and 21 June 2006)

- [52] The Sowetan first broke the story of Dr Zikalala's blacklisting of independent commentators on the SABC on 20 June 2006.⁷²
- [53] Mr Perlman and five of his colleagues were perturbed about the matter and addressed a letter to their CEO Advocate Mpofo later the same day.⁷³ They said their concern was "rooted in the fact that this story is fundamentally correct".
- [54] Later the same day the SABC issued a public statement in response to the Sowetan article.⁷⁴ Mr Perlman says that the facts in the statement must have come from the SABC's News Management headed by Dr Zikalala.⁷⁵ The statement was a patently dishonest attempt to cover-up the truth. Dealing with each of the sub-

⁶⁹ Perlman p 295 para 31

⁷⁰ See Annexure JP8 at p 338.

⁷¹ Perlman pp 295-6 para 31

⁷² Perlman p 299 para 36; Sowetan article 20 June 2006 Annexure JP13 pp 348-9

⁷³ Perlman p 299 para 36; Letter 20 June 2006 Annexure JP14 p 350

⁷⁴ Perlman p 300 para 38; Statement 20 June 2006 Annexure JP8 p 338

⁷⁵ Perlman p 306 para 44

paragraphs of the media statement, the comments that follow upon each sub-paragraph are, in my view, quite justified:

- 54.1 “The SABC would like to state that the News Division has not imposed any blanket bans on the use of individual commentators by our current affairs programmes as reported by the Sowetan today.”

Mr Perlman says that this statement was “blatantly false and a deliberate attempt to mislead the South African public on an issue of critical importance”.⁷⁶ That was indeed so. Dr Zikalala had by then blacklisted many individual commentators including Ms Elinor Sisulu, Mr Moeletsi Mbeki, Mr Trevor Ncube, Archbishop Pius Ncube, Ms Paula Slier, Ms Karima Brown and Mr Aubrey Matshiqi.

- 54.2 “After a number of problems experienced with experts and analysts, and some public feedback received by the SABC, a **proposal** was taken at a News Management meeting to devise **policy guidelines** on the use of commentators. These problems did not relate to commentators’ views on the succession debate or any specific topic or person, but to occasions where it was clear that commentators were sometimes ill-informed, providing viewers and listeners with analyses based on facts that were either incorrect or out of date”. (Emphasis added)

These statements were also false. It was not true that there was no more than a “proposal”. Dr Zikalala had already blacklisted many people for which he had advanced diverse excuses. The only thing these blacklisted individuals had in common was that they were all perceived to be less than friendly to the governing party under the leadership of President Mbeki.

- 54.3 “A **discussion document** was drafted by News Management, which would assist in establishing what kind of analysts was appropriate, in terms of expertise and experience to comment on a relevant topic to be discussed on a current affairs programme.” (Emphasis added)

⁷⁶ Perlman p 301 para 38

This statement was also false in two respects. It was firstly not true that the issue had not proceeded beyond a mere “discussion document”. Dr Zikalala had already blacklisted a number of people. It was secondly not true that there was a discussion document at all. Mr Perlman says that he had never seen such a document and neither had his producers Mr Lang and Ms Dlamini.⁷⁷ He points to further evidence which makes it clear that the statement that there was a discussion document was devoid of any truth.⁷⁸ Mr Perlman categorically stated that two senior managers in the News Department, Mr Lang and Ms Dlamini, “openly said they had not seen them (*discussion documents*) either.” It is significant that the SABC has made no attempt to produce such a document in these proceedings.

- 54.4 “The SABC subscribes to freedom of speech in its policies and we strive to give the South African public a diversity of opinions and voices on any topic discussed.”

This was a rather cynical distortion of the true facts in light of a false cover-up of Dr Zikalala’s blacklisting.

- 54.5 “The discussion paper is just that, a discussion paper. Nothing has been made into policy and the SABC wonders where these sources within and outside the SABC got the false information that this was now policy at the news department. SABC’s policies are determined by the Board of the SABC not by departments.”

This was a repetition of the earlier statement and is equally devoid of truth.

⁷⁷ Perlman p 310 para 49

⁷⁸ Perlman p 310 paras 49 – 58

[55] The SABC's statement was issued in the name of its spokesperson Mr Kganyago. Mr Perlman interviewed him on his show the following day, 21 June 2006.⁷⁹ Mr Kganyago repeated the lie again and again, that there was no blacklist but merely a "discussion document",⁸⁰ "a proposal,...a discussion paper",⁸¹ "a discussion document",⁸² "just a matter of a discussion document...and that is exactly that, a discussion document",⁸³ and "just a discussion document".⁸⁴

[56] The interview ended dramatically when Mr Perlman put to Mr Kganyago that it was not true that there was no more than a discussion document because he knew from personal experience that there was an existing instruction at the SABC that certain people could not be used:

"JP: Mr Kganyago I, I, I can confirm for you, this is existing practice.
 KK: Like I say, from the information that I have this is a...ehh, the news department people have indicated to me that this is merely a discussion document.
 JP: Mr Kganyago it is happening in practice that certain people are no longer used on SABC by instruction.
 KK: Like I am saying, errr, it is very clear, you have that and you are saying...are you saying it from experience?
 JP: Yes.
 KK: ...that what has happened to you...
 JP: Yes.
 KK: Or, or...that, that's the unfortunate part. Like I said, I am not in the newsroom but I went...
 JP: (interrupting) Yes, I am."⁸⁵

⁷⁹ Perlman p 302 para 41; Transcript 21 June 2006 Annexure JP15 p 351

⁸⁰ Annexure JP15 p 351 para 4

⁸¹ Annexure JP15 p 353 para 2

⁸² Annexure JP15 p 353 para 4

⁸³ Annexure JP15 p 353 para 6

⁸⁴ Annexure JP15 p 354 para 3

⁸⁵ Annexure JP15 p 354 paras 4 – 12

[57] The SABC has never refuted these dramatic statements Mr Perlman made on air.

The SABC Board's failure to take action

[58] On 29 June 2006 the CEO of the SABC, Adv Mpofo, appointed a Commission of Enquiry chaired by its former CEO Mr Zwelakhe Sisulu, assisted by Adv Marcus SC and Professor Berger.⁸⁶

[59] As stated earlier, the Sisulu Commission heard, recorded and transcribed the evidence of witnesses who included Dr Zikalala. It is stated in the supplementary complaint lodged by FXI that it "is common cause that the Commission based its findings on undisputed evidence, some of which was given by the SABC itself".⁸⁷ In its response⁸⁸, the SABC acknowledges that the oral evidence which was heard by the Commission of Enquiry was not tested by cross-examination. To my mind, that implies that the evidence before the Commission was left uncontradicted. In this context, I find the statement in the SABC's supplementary submission spurious where it is alleged that "the SABC has not accepted all the findings of fact by the Commission as correct".⁸⁹ No admissible evidence was placed before the CCC (nor before this court) justifying such statement.

[60] The Commission of Enquiry upheld the substance of the complaints including those relating to,

⁸⁶ See the copy of the Sisulu Commission of Enquiry, Terms of Reference dated 29 June 2006 attached to the SABC's answering affidavit.

⁸⁷ See para 4 of the Supplementary Complaint at p 175

⁸⁸ See para 30 of the Supplementary Response at p 543

⁸⁹ See para 30 of the Supplementary Response at p 543

- the Zimbabwe elections;⁹⁰
- the Slier incident;⁹¹
- the Brown incident;⁹² and
- the Matshiqi incident.⁹³

[61] After the Commission had rendered its report, the SABC attempted to keep it secret. It went to the lengths of attempting to interdict the Mail & Guardian from publishing the report on their website.⁹⁴ However, the copy of the report, Annexure MM2,⁹⁵ obtained by the Mail & Guardian was not a copy of the original report. Be that as it may, the SABC has not attempted to indicate in what respects the Commission's report, obtained by the Mail & Guardian, differed from the original. I have, therefore, no reason to doubt the correctness of the copy, Annexure MM2, attached to the founding affidavit, nor am I persuaded by the argument advanced by counsel for the respondents, that MM2, being not a copy of the original, should be disregarded. How and from whom such copy was obtained by the Mail and Guardian is irrelevant to the present application.

[62] As stated earlier,⁹⁶ the Board failed to take any decisive steps to discipline Dr Zikalala for his transgressions and to prevent the recurrence of them.⁹⁷

⁹⁰ FXI's original complaint p 49 para 51; Green p 263 para 16.3.12

⁹¹ FXI's original complaint p 44 para 32; FXI's supplementary complaint p 202 para 44; Green p 249 para 16.2.9 and p 251 para 16.2.11

⁹² FXI's original complaint p 48 paras 48-9; FXI's supplementary complaint p 211 para 65

⁹³ FXI's original complaint p 47 paras 43 – 45

⁹⁴ FXI's supplementary complaint p 231 para 102; SABC's supplementary answer p 565 para 104 – 109

⁹⁵ See pages 57 to 134 of the record

⁹⁶ See paragraph [13] above

⁹⁷ FXI's original complaint p 38 paras 5 – 8 and p 5 para 16; FXI's supplementary complaint p 175 paras 6 – 9 and p 178 para 14

THE SABC'S TRANSGRESSIONS

The Legislative Framework

- [63] Section 192 of the Constitution provides 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.”
- [64] ICASA is the independent authority contemplated by section 192. It is a creation of the ICASA Act. Its primary objective in terms of section 2(a) is to,
“regulate broadcasting in the public interest and to ensure **fairness and a diversity of views** broadly representing South African society, as required by s 192 of the Constitution.” (Emphasis added)
- [65] The CCC is an organ of ICASA established in terms of section 17A (1) of the ICASA Act.
- [66] Section 17C(1)(a) provides that anybody may complain to the CCC if they have reason to believe that the holder of a broadcasting licence is guilty of non-compliance with,
- the terms and conditions of its licence;
 - the ICASA Act itself; or
 - “the underlying statutes” which are defined in section 1 to include the Broadcasting Act and the Electronic Communications Act.
- [67] The further relevant provisions of the ICASA Act are as follows:

“17B. Functions of Complaints and Compliance Committee

The Complaints and Compliance Committee –

- (a) must investigate, and hear if appropriate, and make a finding on –
- (i) all matters referred to it by the Authority;
 - (ii) complaints received by it;...”

Subsection (ii) clearly envisages that any person or body may refer complaints to the CCC.

“17D. Findings by Complaints and Compliance Committee

- (2) The Complaints and Compliance Committee must recommend to the Authority what action by the Authority should be taken against a licensee, if any.”

[68] These functions of the CCC were previously performed by its predecessor, the Broadcasting Monitoring and Complaints Committee under the Independent Broadcasting Authority Act 153 of 1993. The Constitutional Court held in the Islamic Unity Convention case⁹⁸ that it was “an administrative tribunal performing an administrative function when investigating and adjudicating complaints” and that “there can be no question that the adjudication of a complaint constitutes administrative action as contemplated by the Promotion of Administrative Justice Act”.⁹⁹

FXI’s causes of complaint

[69] In argument, Mr Trengove restricted the case of FXI to the alleged transgressions by the SABC of,

- its own licence conditions; and

⁹⁸ *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC)

⁹⁹ Para 46

- section 10(1)(d) of the Broadcasting Act.

[70] FXI did not persist in its contention that the SABC's conduct violated ICASA's Code of Conduct for Broadcasters. The SABC is exempted from compliance with the Code in terms of section 54(3) of the Electronic Communications Act 36 of 2005 by virtue of its membership of the Broadcasting Complaints Commission of South Africa.

The SABC's licence conditions

[71] In this section of the judgment it will be necessary to consider whether the CCC rightly disregarded the licensing provisions and, if not, whether the acts complained of did transgress the licensing provisions.

[72] The SABC has been awarded licences for television broadcasting in respect of SABC 1¹⁰⁰, SABC 2¹⁰¹, SABC 3¹⁰² and a radio broadcasting licence in respect of SAfm.¹⁰³ In respect of "News and Current Affairs" programmes there are certain licensing provisions which are common to all of the four abovementioned licences. For ease of reference I will quote the relevant provisions in the SABC 3 television licence where Schedule C provides the following:

"2.5 News and current affairs¹⁰⁴

¹⁰⁰ See p 660 of the record

¹⁰¹ See p 673 of the record

¹⁰² See p 686 of the record

¹⁰³ See p 699 of the record

¹⁰⁴ See p 696/7 para 2.5

The Licensee shall, in the production and presentation, of its news and current affairs programming:

- 2.5.1 exercise full editorial control in respect of the contents of such programming;
- 2.5.2 include matters of international; meet the highest standards of journalistic professionalism;
- 2.5.3 meet the highest standards of journalistic professionalism;
- 2.5.4 provide fair, unbiased, impartial and balanced coverage independent from governmental, commercial or other interference; and
- 2.5.5 provide reasonable opportunity for the public to receive a variety of points of view on matters of public concern.¹⁰⁵

[73] The licence conditions apply to the “production” as well as to the “presentation” of its news and programming. The CCC drew a distinction between the production of a programme and the presentation thereof. It held that the production of a programme related to the activities of the personnel prior to the screening of the completed programme. The presentation of the completed product related to the actual broadcast thereof on the air. Assuming, without deciding, that the words “production” and “presentation” as used in the licence condition have these different meanings ascribed to them by the CCC, it is necessary to see how such meanings affect the jurisdiction of the CCC to deal with complaints. The reasoning of the CCC why the complaints were beyond their jurisdiction to entertain is somewhat convoluted but, as I understand it, their reasoning was as follows. They were of the view that all actions relating to the screening of the final product fall under the Code of Practice under the ICASA Act. Since the CCC was a creation of the ICASA Act, it, too, had only jurisdiction to hear complaints regarding the actual screening on air of final programmes. It held that all conditions in the

¹⁰⁵ Similar provisions are to be found in respect of the television broadcasting licences for SABC1 in its Schedule C at p 671 of the record; SABC 2 in its Schedule C at p 684; and SA FM in its Schedule C at p 708 of the record

licence dealing with the actions of personnel in the process of the production of any programme were beyond their jurisdiction and fell within the disciplinary jurisdiction of the SABC and its Board in terms of the Charter of the Broadcasting Act. It concluded that any condition in the SABC's licence dealing with the preparation of any programme conflicted with the programming independence guaranteed in section 6(3) of the Broadcasting Act. It held that the complaints related to the conduct of "blacklisting" which is an action of personnel performed prior to the actual broadcasting on air of the final product. As such, the CCC had no jurisdiction to deal with FXI's complaints.

- [74] It remains to be seen if the interpretation of the underlying statutes by the CCC, is correct. The first statutory enactment to be considered is the *Charter* of the SABC as contained in section 6 of the Broadcasting Act. The relevant sub-sections are:

"6 Charter of Corporation

...

- (3) 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.
- (4) 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) offers 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.

- (5) (a) The Board must prepare and submit to the Authority not later than three months after the date of conversion, policies that will ensure compliance with the Authority's Code of Conduct as prescribed **and with the Corporation's licence conditions** and with the objectives contained in this Act, including:
- (i) **news editorial policy;**
 - (ii) programming policy;
 - (iii) local content policy;
 - (iv) educational policy;
 - (v) universal service and access policy;
 - (vi) language policy; and
 - (vii) religious policy.
- (b) ...
- (6) ...
- (7) ...
- (8) The Corporation must develop a Code of Practice that ensures that the **services and the personnel** comply with –
- (a) the constitutional principle of equality;
 - (b) the equitable treatment of all segments of the South African population;
 - (c) the constitutional requirement of equitable treatment of all official languages;
 - (d) **the rights of all South Africans to receive and impart information and ideas;**
 - (e) the mandate to provide for a wide range of audiences interests, beliefs and perspectives; and
 - (f) **a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest.**" (Emphasis added)

[75] The reasoning of the CCC why it found that it had no jurisdiction to entertain the complaints is to be found in paragraph [13] of its judgment¹⁰⁶ which reads as follows:

"[13] The preparation of the programme falls within the guaranteed section 6(3) journalistic, creative and programming independence, and only the product may be adjudicated by the CCC when it applies the Broadcasting Code. Licence conditions of the SABC, which are referred to in section 6(5), also fall within the jurisdiction of the CCC. However, any reference in the licence conditions of the SABC which includes jurisdiction of ICASA as to the preparation of programmes clashes with section 6(3) of the Act and the Act would, of necessity, prevail. The *Charter* clearly intends that ICASA (and, thus, also the CCC) has jurisdiction over the product and not the preparation. The preparation falls within the jurisdiction of the SABC Board. 'Plurality' or views is a relative concept and the mere fact of a blacklist – even when based on political preference – is not conclusive as to the absence of such plurality. Plurality can only be judged with

¹⁰⁶ See Record p 581

reference to all the broadcasts of the SABC and the present matter, where especially blacklisting is before the CCC, does not justify further enquiry into this aspect over a broader spectrum. In any case, once again, it is what the public sees and hears which counts. It is common cause that even the programme selected by the FXI as a result of the CCC's having afforded it an opportunity to provide it with examples where the balance requirements of the Broadcasting Code were affected, do not demonstrate such absence of balance."

[76] In my view, the aforesaid reasoning is fundamentally flawed. If correct, it would mean that the SABC may with impunity manipulate and distort the preparation of its news and current affairs coverage and publically lie about it when they are caught out having done so. It is the lying about such pre-screening shenanigans and the shameful protection of the SABC of the personnel responsible, that needed to be investigated and rectified if found proven. Surely, no one can confidently suggest that such rectifying and disciplinary actions were to be performed by the wrongdoer itself? It amounts to the SABC being accuser and judge in its own cause, a concept which is anathema to basic legal and constitutional principles. If the SABC is to be regarded as the watchdog and disciplinarian, then who disciplines the SABC? Surely the intention of the legislature was to answer this question: the CCC of course. The contention that the SABC was expected to deal with the type of complaints lodged by FXI in terms of its disciplinary rules is, in effect, to equate the complaints with an internal labour dispute, which it clearly was not. The complainant is a third party beyond the jurisdiction of labour law principles applicable to staff employed by the SABC. Furthermore, outside parties have no remedy against the SABC and its staff with regard to complaining about the conduct of it and/or its staff, since no such remedy is made available to outside parties by the SABC's constitution. Thus, if neither the SABC nor the CCC had jurisdiction to entertain the complaints, then who had the appropriate

jurisdiction? In my view it would render nugatory the clear intention of the legislature in establishing the CCC for the purpose of hearing and deciding all complaints against the SABC and making recommendations to the SABC in regard thereto in much the same way as the Sisulu commission of Inquiry did. It should be borne in mind that outside parties have no remedy, statutory or otherwise, by which the SABC Board can be forced to appoint such a Commission of Inquiry. What would have happened if the Board did not of its own volition appoint a Commission of Inquiry? On the CCC's interpretation, outside third parties would have had no remedy of any kind to address any distortions in the preparation of the SABC's news and commentary programmes. In my view, the interpretation contended for by the CCC renders nugatory the entire scheme of the underlying statutes relating to how complaints are to be dealt with.

[77] The SABC cannot be equated with a private citizen or broadcaster who is entitled to freedom of expression.¹⁰⁷ The SABC is a public broadcaster funded by the taxpayer to provide the highest standards of journalism and fair, unbiased, impartial and independent news coverage. Whereas a private citizen or broadcaster may freely take political sides and promote party political objectives, a public broadcaster may not use public money to do so.

¹⁰⁷ See the SABC POLICY: NEWS, CURRENT AFFAIRS AND INFORMATION paragraph 1 on page 499 of the record where the following is stated: "The SABC occupies a distinctive position of trust in the lives of its viewers and listeners. We are the most extensive, all-inclusive and diverse news organisation in South Africa. The SABC considers it a duty to provide consistent, relevant, useful and top-quality information and analysis on which all South Africans can rely as they discuss and deliberate, form opinions and build a common future."

[78] Section 6(3) cannot be interpreted in isolation as the CCC seems to have done. The remaining provisions of the Broadcasting Act make this quite clear:

78.1 Section 6(4) provides that the SABC must provide a wide range of programming that “reflects South African attitudes, opinions, ideas, values and artistic creativity” and “offers a plurality of views and a variety of news, information and analysis from a South African point of view”.

78.2 Section 6(5)(a) obliges the SABC to adopt policies “that will ensure compliance with the Authority’s Code of Conduct as prescribed and with the Corporation’s licence conditions and with the objectives contained in this Act”.

78.3 Section 6(8) obliges the SABC to adopt a Code of Practice that ensures that both the services it provides and its own personnel comply with a range of standards including “a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest”.

[79] In addition section 10(1)(d) states the following:

“10(1) The public service provided by the Corporation must –

...

(d) 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.” (Emphasis added)

[80] In my view, the concept of “the highest standards of journalism” is defined by what follows thereafter in the sub-section, namely it must

contain “fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests”. In the context of the SABC as public Broadcaster, it encapsulates what would be regarded as good journalism. What is good journalism generally, will depend upon many other considerations, to mention only a few:

- the nature of the particular subject being journalistically examined;
- the level of interest it engenders;
- the public or section of the public whose interests are at stake;
- the language used;
- the checking of sources of information and accuracy of reporting;
- the level of importance of the subject;
- morality and changing community views in regard thereto;
- legal considerations;
- monetary considerations;
- whether it is generated by a private, public or governmental enterprise.

[81] In the SABC’s **EDITORIAL CODE OF PRACTICE**¹⁰⁸ the core editorial values of the SABC are set out as being equality, editorial independence, nation building, diversity, human dignity, accountability, and transparency.

[82] Furthermore, the SABC’s own **EDITORIAL POLICY: NEWS, CURRENT AFFAIRS AND INFORMATION**

¹⁰⁸ Pages 486 and 487 of the record

PROGRAMMING¹⁰⁹ recognises that its right to freedom of expression is subject to these duties imposed on it as a public broadcaster:

“The SABC’s right to freedom of expression comes with an **obligation: the duty of every member of its news staff to uphold the highest professional and ethical standards.**¹¹⁰

...

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.**¹¹¹

...

“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.¹¹²

...

Given our history, and that South Africa is part of Africa, we see it as our responsibility to endeavour to represent Africa and **African stories fairly and diversely.**¹¹³

...

Since they are professionals, SABC journalists and other news staff have personal opinions, beliefs and preferences arising from social, educational, cultural and other forms of nurturing. South Africa’s apartheid past, and individuals’ experiences in contesting and living under it, also accentuates differences that could create unfairness and partiality, or perceptions of such bias. **It is the responsibility of SABC journalists and editorial staff to ensure that these forms of individual and collective nurturing do not lead to any form or perception of inequity or prejudice.**

In order to meet the required standard of objectivity it is the responsibility of SABC news staff to be aware of such personal opinions, beliefs and preferences, and to take them into account in gathering and transmitting news. SABC reporting should be, and be seen to be, accurate, fair, impartial and balanced. Our audiences have the right to expect SABC news and current affairs programming not to reflect the personal views of editorial staff.¹¹⁴

¹⁰⁹ Pages 499 to 509 of the record

¹¹⁰ Page 500 para 6 of the record

¹¹¹ Page 500 para 7 of the record

¹¹² Page 500 para 8 of the record

¹¹³ Page 501 para 5 of the record

¹¹⁴ Page 501 paras 8 and 9 of the record; see also *Zillie v Johnson and Another* 1984 2 SA 186 (W) at 196H.6y

...
SABC news staff are expected to present issues fairly, and to not to take sides afford the public access to the full range of views on a subject.¹¹⁵

...
The SABC's principle of providing the full spectrum of opinions, perspectives and comment also applies to selection and use of guests, analysts and specialist commentators. This requires editorial staff to choose, as participants, people who have a wide range of views, opinions and perspectives, and are drawn from all over the country. Such people should be required to declare any vested interest they may have in the matter to be discussed.¹¹⁶ (Emphasis added)

[83] As discussed below, Dr. Zikalala's proven conduct contravened almost all of the above editorial principles, whereas the conduct of Ms Green and Mr Perlman sought to uphold the above principles. The subsequent conduct of the SABC also negated these principles. It is also clear from the above extract that the standards set out in the editorial policy traverse both the pre-broadcast activities and the actual broadcast of the completed product and sets out in great detail the duties of both individuals and the SABC. The CCC was, therefore, quite wrong to disregard the SABC's own licence conditions as *pro non scripto* insofar as they impose pre-broadcast requirements on the SABC. Had it not done so, the CCC would inevitably have concluded that the SABC was in fact in breach of those requirements.

[84] The CCC accepted that the licence conditions were valid and binding on the SABC insofar as it set requirements for its news and current affairs programming. It absolved the SABC, however, because it held that FXI had not demonstrated that the SABC's conduct had distorted

¹¹⁵ Page 502 para 2 of the record

¹¹⁶ Page 504 para 5 of the record

its news and current affairs programmes in breach of the licence conditions.¹¹⁷

[85] Ms Green's evidence established that the real point of Dr Zikalala's interference "was to intimidate producers and editors sufficiently that they would not easily use any commentator or even report that could be interpreted as critical of the Zimbabwe government" and that this stratagem "**worked effectively.**"¹¹⁸ Mr Pigou's evidence established that the SABC's **coverage of the elections had been poor and one-sided.**¹¹⁹

[86] Dr Zikalala's blacklisting of commentators perceived to be critical of the government of the day, was clearly designed to silence their voices by not allowing them on air. His purpose was obviously to manipulate the SABC's news and current affairs programmes by excluding these critical voices from them. To suggest that his blacklisting might not have had an effect is quite incorrect. It is obviously impossible to point to any particular programme and say that it was a distortion of the truth because the blacklisted commentators were not on it. The truth could only have been established if both sides of the story had been aired. But the impact of their blacklisting which was intended and designed to manipulate the SABC's news and current affairs coverage by silencing critical voices, necessarily and inevitably had that effect.

[87] The conduct of Dr Zikalala, in effect, amounted to pre-censorship. One can never establish whether a programme is balanced, objective

¹¹⁷ CCC's Main Judgment p 581 paras 12 and 13

¹¹⁸ Green p 268 para 16.3.14

¹¹⁹ Pigou pp 447 – 453

or fair if some relevant views and/or perspectives had been censored. It is noteworthy that the learned author of the CCC's judgment, in his book "Censorship in South Africa" at p 19 refers to the fact that pre-censorship on publications, films and other material should "if necessary, be made use of only in times of war or martial law". The learned author's conclusion at p 20 of the aforesaid book, which would also be applicable to pre-censorship of television and radio programmes, are insightful where he refers to Milton's argument as quoted from *Areopagitica* (1644) (Hales ed 1917) 5 and 50 where it is said:

"Books (films, plays) are not absolutely dead things, but do contain a potencie (sic) of life in them to be as active as the soul was whose progeny they are...As good almost kill a man as kill a good book; who kills a man kills a reasonable creature, God's image; but **he who kills reason itself, kills the image of God**, as it were in the eye. A state which dwarves its men, in order that they be more docile instruments in its hands...will find that with small men no great thing can really be accomplished." (Emphasis added)

[88] The learned author also refers to a quote from Jefferson as quoted by Boyd "Subversive of What?" in Downs (ed) *The First Freedom* (1960) 224 where it was said:

"I have sworn upon the altar of God eternal, hostility against every form of **tyranny over the mind of man**...If there be any among us who wish to dissolve this union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where **reason is left free** to combat it." (Emphasis added)

The conduct of Dr Zikalala amounts, sadly, to a "tyranny of the mind of man" by disallowing views expressed contrary to his political opinion and that of the government of the day, and that process, he "killed reason" instead of allowing reason to be "left free".

- [89] The SABC's broadcast of its dishonest denial of the existence of the blacklisting was in itself a deliberate lie told on air. It directly affected the honesty and integrity of the SABC's news programmes.
- [90] In my view, it is clear that the SABC's conduct violated the requirements of the licence conditions, even if one were to conclude, as the CCC did, that it only applied to the SABC's broadcasting of the end-product and not also to the manner in which it was made.

Section 10(1)(d) of the Broadcasting Act

- [91] Section 10(1)(d) of the Broadcasting Act is in the first place a final product specification which lays down standards with which the SABC's news and public affairs programmes must comply. But it also has pre-broadcast implications for the way in which the SABC presents its news and public affairs programmes:
- 91.1 It says that the SABC's news and public affairs programmes must "meet the highest standards of journalism". Those standards speak in the first place to the conduct of journalists (as referred to previously in this judgment¹²⁰) and only in the second place to the qualities of their product.
- 91.2 It says that the SABC must provide "fair and unbiased coverage". This is in the first place a final product specification but it inevitably also has pre-broadcast implications. A broadcaster, who deliberately skews and distorts the production in the pre-broadcast stage of its

¹²⁰ See paragraph [80] above.

programmes in pursuit of an illegitimate ulterior purpose, inevitably produces an end-product which is biased.

91.3 The section lastly requires “impartiality, balance and independence from government, commercial and other interests”. These are again mixed pre-broadcast and final broadcast requirements. The requirements of “impartiality” and “balance” are in the first place concerned with the end-product. The requirement of “independence” on the other hand, is clearly a pre-broadcast requirement.

[92] The CCC dismissed FXI’s complaint under section 10(1)(d) for the reasons in paragraph 16 of its judgment.¹²¹ After citing the entire section 10 the CCC held as follows:

“[16] The only paragraph which is applicable is paragraph (d) as quoted above. In spite of its reference to the “highest standards of journalism” it is still the *provision* (of the service) which is the subject of the duty. These standards are included in the Broadcasting Code and, in so far as news and commentary are concerned, regulations 34, 35, 36 and 37 are dominant. All these regulations pertain to the product which is seen or heard by the public. Nevertheless, it would be academic to dwell on the Broadcasting Code itself, since the CABC, in so far as the Broadcasting Code is concerned, falls under the jurisdiction of the Broadcasting Complaints Commission of South Africa in terms of section 54(3) of the Electronic Communication Act 2005. Furthermore, it is, in any case common cause that the programmes selected by FXI do not, as much, amount to a contravention of any of the said regulations.”

[93] The reasoning is hard to follow but it seems that the CCC argued as follows:

93.1 The subject-matter of the duty imposed by section 10(1)(d), is the provision of the SABC’s service.

¹²¹ CCC Main Judgment p 583 para 16

93.2 The standards imposed by section 10(1)(d), are expressed in regulations 34, 35, 36 and 37 of ICASA's Code of Conduct for Broadcasters.

93.3 These regulations "pertain to the product which is seen or heard by the public" and not to the manner in which it is made.

93.4 The SABC is in any event exempted from compliance with the Code for Broadcasters in terms of section 54(3) of the Electronic Communications Act by virtue of the SABC's membership of the Broadcasting Complaints Commission of South Africa.

[94] This reasoning is, in my view, fundamentally flawed. The CCC's assertion that it pertains only "to the product which is seen or heard by the public" is clearly wrong. It is for instance incompatible with the requirement of section 10(1)(d) that the SABC provide news and public affairs programming "which meets the highest standards of journalism". This requirement speaks to the conduct of the people who make the programmes. It cannot sensibly be read as a requirement confined to their end-product.

[95] The CCC seems to have interpreted section 10(1)(d) on the basis of its interpretation of regulations 34 to 37 of ICASA's Code of Conduct for Broadcasters. But it is impermissible to interpret an Act of Parliament on the basis of regulations made under it. This court for instance said in *Amalgamated Engineering Union* that "one must be careful not to interpret an Act by means of a regulation."¹²²

¹²² *Amalgamated Engineering Union of South Africa v Minister of Labour* 1965(4) SA 94 (W) 96D; *Moodley v Minister of Education* 1989(3) SA 221 (A)

[96] The CCC's ultimate conclusion seems to have been that the SABC is not bound by section 10(1)(d) because regulations 34 to 37 of ICASA's Code of Conduct give effect to section 10(1)(d) and the SABC is not subject to ICASA's Code.

[97] But this reasoning is with respect absurd. Section 10(1)(d) is expressly applicable to the SABC as a public broadcaster. ICASA's Code is subordinate legislation made under a different Act, namely section 54(1) of the Electronic Communications Act. It is not tailor-made for the SABC and applies to all broadcasters. The SABC is exempted from it in terms of section 54(3) of the Electronic Communications Act only because it is a member of the Broadcasting Complaints Commission. To suggest that, because it is exempted from compliance with the Code, the SABC is also relieved of its duties under section 10(1)(d) of the Broadcasting Act, is quite startling and obviously wrong.

CONCLUSION

[98] In my view, the SABC's conduct clearly violated both its licence provisions as well as the provisions of section 10(1)(d) of the Broadcasting Act. I say this for the following reasons:

98.1 Dr Zikalala's politically motivated manipulation of the SABC's coverage of the Zimbabwe elections violated the SABC's duties to,

- meet the highest standards of journalistic professionalism: and
- "provide fair, unbiased, impartial and balanced coverage".

98.2 Dr Zikalala's instruction to Ms Green to institute disciplinary proceedings against Mr Zembe for reporting the truth about the KwaMashu rally and the extended coverage given to the Premier's account which the SABC knew to be untrue, violated the SABC's duties to,

- "meet the highest standards of journalistic professionalism"; and
- "provide fair, unbiased, impartial and balanced coverage independent from governmental...interference."

98.3 Dr Zikalala's politically motivated blacklisting of Ms Elinor Sisulu, Mr Moeletsi Mbeki, Mr Trevor Ncube, Archbishop Pius Ncube, Ms Paula Slier, Ms Karima Brown and Mr Aubrey Matshiqi violated the SABC's duties to,

- "meet the highest standards of journalistic professionalism";
- "provide fair, unbiased, impartial and balanced coverage independent from governmental...interference"; and
- "provide a reasonable opportunity for the public to receive a variety of points of view on matters of public concern."

98.4 The SABC's dishonest attempt to cover-up its blacklisting of these commentators and particularly its false public denials of the blacklisting, violates its duties to,


- "meet the highest standards of journalistic professionalism" and
- "provide fair, unbiased, impartial and balanced coverage."

[99] In my view, the CCC was materially influenced by an error of law in that it misinterpreted section 6(3) and section 10(1)(d) of the Broadcasting Act. This court is therefore entitled to regard the CCC's judgment as reviewable in terms of the provisions of section 6(2)(d) of PAJA.

[100] For the aforesaid reasons I make the following order:

1. The decision of the Complaints and Compliance Committee (CCC) of the Independent Communication Authority of South Africa on 18 June 2009, dismissing the applicant's complaints against the third respondent, is reviewed and set aside.
2. The matter is referred back to the CCC to determine the complaints afresh.
3. The CCC which determines the complaints afresh must be constituted so as not to include anybody who participated in the original decision reviewed and set aside.
4. The respondents are ordered jointly and severally to pay the applicant's costs including the costs of two counsel.

DATED THE 24th DAY OF January 2011 AT
JOHANNESBURG



C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv W. Trengove SC, Adv M. Sikhakhane
Counsel for the First and Second Respondents: Adv T. Motau SC
Counsel for the Third Respondent: Adv V. Soni SC

Attorney for the Applicant: Webber Wentzel
Attorney for the First and Second Respondents: Mkhabela Huntley Adekeye Inc
Attorney for the Third Respondent: Mabuza Attorneys

The application was argued on 24 November 2010