

**BEFORE THE INDEPENDENT COMMUNICATIONS AUTHORITY OF  
SOUTH AFRICA**

In the matter between:

**FREEDOM OF EXPRESSION INSTITUTE**

Complainant

and

**THE SOUTH AFRICAN BROADCASTING CORPORATION**

Respondent

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**COMPLAINANT'S REPLY**

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**1. INTRODUCTION**

- 1.1. The Freedom of Expression Institute ("FXI") lodged its complaint against the South African Broadcasting Corporation ("SABC") on the grounds that the SABC had failed to comply with various statutes that govern broadcasting in general, and public broadcasting in particular.

1.2. The SABC has filed its answer to the complaint lodged by the FXI and in many respects, its answer fails to deal with the specific complaints. In essence, the SABC simply and at a level of generality, states that the complaint is not valid<sup>1</sup>. This answer by the SABC, we submit, is unmeritorious and patently not borne out by the facts, some of which are common cause. In this regard, we reiterate every specific complaint contained in the summary of the complaint<sup>2</sup>.

## **2. THE SABC HAS FAILED TO ANSWER THE COMPLAINT**

2.1. In an attempt to answer the complaint that the SABC has violated its license conditions and statutes, including the Constitution, the SABC argues that:

“No specific references are made to programmes broadcast which are alleged to have contravened license conditions and statutory obligations.”

2.2. This answer is simply incorrect. Apart from the references to the specific findings of the Commission of Enquiry in regard to certain incidences of non-compliance, FXI’s complaint makes reference to

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<sup>1</sup> See: Page 1 of SABC’s answer dated 5 March 2007

<sup>2</sup> See Summary of Complaint: 20 February 2007

the Special Assignment programme. Any allegation that there has been no reference to programmes is at best mistaken, and at worst simply disingenuous.

- 2.3. The SABC concedes that certain commentators were removed, but argues that other commentators were used in their place. The irrationality of the decision to 'blacklist' certain commentators is part of the findings of the Commission, which findings have been accepted by the SABC. We submit that the SABC has failed to demonstrate why such conduct is not in violation of both its license conditions and the relevant statutes.
- 2.4. Furthermore to suggest that because the "...SABC has over the last year received no other complaint..." there cannot have been non-compliance on its part, is simply unsustainable.
- 2.5. The SABC in its answer also ventures into a wild allegation, whose basis is not stated, that "It is the SABC's submission that the FXI is using the ICASA complaint as a vehicle to argue its views on the SABC's lack of appropriate response to the Commission's finding". The FXI agrees with the SABC's characterization that there has been "...a lack of appropriate response" to the Commission's findings, but denies as without merit any suggestion that it is using

the complaint to simply argue or air its views. This assertion is denied as simply mistaken and incorrect. Rather than just canvass its views, the FXI is placing before ICASA, legitimate complaints about the SABC's violation of the following statutes:

- 2.5.1. The Constitution of the Republic of South Africa, Act No. 108 of 1996 ("the Constitution");
  - 2.5.2. The Broadcasting Act No. 4 of 1999 (as amended, "the Broadcasting Act"); and
  - 2.5.3. The Independent Communication Authority Act No. 13 of 2000 (as amended, "the ICASA Act")
- 2.6. It is noted that the SABC makes no attempt to deal specifically with the complaint that in its conduct it has violated section 16 of the Constitution. Other than its denial, which is couched at a level of generality, the SABC provides no answer in this regard.
- 2.7. We submit that the jurisdiction of ICASA to hear a complaint of this nature is clear and cannot be questioned. Specific complaints regarding the SABC's non-compliance and violation of certain provisions of relevant statutes are contained in the complaint. We

submit that the SABC has failed to provide an answer to such complaints.

- 2.8. It appears that the SABC does not view its conduct as non-compliance at all, even though such has been found by a commission of enquiry established to investigate such matters.

**“LATENESS OF THE LODGING OF THE COMPLAINT”**

- 2.9. The SABC also seeks refuge in section 17C (1) (a) of the ICASA Act by suggesting that the complaint has been lodged out of time. In this regard, the following is submitted:

- 2.9.1. Firstly, it is denied that this complaint can be said to have been lodged out of time;
- 2.9.2. Secondly, the SABC’s contentions that since the non-compliance came into the public domain in October 2006, lodging the complaint on the date on which it was lodged falls outside the statutory time frames simply misses the following points:

- 2.9.2.1 The FXI indeed raised its concerns about the non-compliance as early as October 2006, but expected the SABC to deal with the matter effectively, speedily and properly;
- 2.9.2.2 The FXI also respects the authority of ICASA of its own accord and in terms of powers given to it, to deal with the issues raised by the Commission, sooner rather than later;
- 2.9.3. It was only when the FXI realized that no visible and effective efforts were being made by the SABC to deal with the issues raised by the Commission that it sought to lodge its complaint;
- 2.9.4. It has become clear that the issues raised in the complaint continue to plague the SABC and to undermine public broadcasting in general. There is evidence to this effect and should it be required, the FXI would like the opportunity to table such evidence before ICASA.
- 2.9.5. The FXI trusted that the SABC would properly and speedily attend to the issues that were obviously affecting the execution of a constitutional mandate. Until the SABC demonstrated that it was not taking seriously the issues raised by the Commission, it would have been premature to formally lodge a complaint;

- 2.9.6. It was also when it became clear that ICASA was not publicly confronting the SABC on the concerns raised by the Commission.
- 2.9.7. In light of the above, it is submitted that the SABC's reliance on section 17C (1) (a) of the ICASA Act is simply misplaced. It cannot be said that this complaint has been lodged out of time.
- 2.9.8. If the Authority is of the view that this complaint has been lodged out of time and in conflict with section 17C (1) (a) of the ICASA Act, the FXI respectfully requests condonation in that regard.

### **3. CONCLUSION**

- 3.1. The FXI's preliminary reply may be summarized as follows:
- 3.1.1. The FXI stands by all the allegations made in the complaint lodged on 20 February 2007;
- 3.1.2. Even at this preliminary stage, the SABC has failed to answer legitimately the concerns raised in the complaint;

- 3.1.3. The SABC's contention that the FXI's complaint is not supported by any specificity in regard to the programmes containing the non-compliance, it is submitted that the SABC's claim is not borne out by the facts, some of which are repeated in the complaint itself;
- 3.1.4. The SABC's reliance on section 17C (1) (a) is misplaced and cannot apply in the present circumstances. It is well within the powers of ICASA to consider this complaint;
- 3.1.5. In the event that ICASA is of the view that the complaint was indeed lodged out of time, the FXI respectfully requests condonation for such lateness.
- 3.1.6. The FXI submits that the contention by the SABC that "...ICASA cannot entertain the complaint" is simply incorrect.
- 3.1.7. The SABC has made no attempt to respect its statutory mandate. Even in its answer the SABC has not answered the complaint about the violation of its statutory mandate.
- 3.1.8. The FXI reserves the right to supplement this reply should it deem necessary, as well as make oral argument at the hearing thereof.