IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, PRETORIA)

Case No: 52160/16

HELEN SUZMAN FOUNDATION	Applicant
and	
THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	1st Respondent
HLAUDI MOTSOENENG: CHIEF OPERATING OFFICER OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	2nd Respondent
MINISTER OF COMMUNICATIONS	3rd Respondent
PROF MBULAHENI OBERT MAGUVHE	4th Respondent
LEAH THABISILE KHUMALO	5th Respondent
VUSIMUZI GOODMAN MOSES MAVUSO	6th Respondent
KRISH NAIDOO	7th Respondent
DR. NDIVHONISWANI AARON TSHIDZUMBA	8th Respondent
NOMVUYO MEMORY MHLAKAZA	9th Respondent
JAMES ROGERS AGUMA	10th Respondent
FRANS LEKOAPA MATLALA	11th Respondent

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INTRODUCTION AND IMPORTANCE OF THIS APPLICATION

1. This is a case which is punctuated with irony. Most vividly, this is one of the few times in media history where a prominent media organisation is fighting freedom of expression advocates, with all its public resources, so as to *curtail*, not further, the remit of what it may permissibly broadcast. But whatever the case may be in the circumstances of a private actor, in the case of a public broadcaster, first respondent's position is insufferable, both as a matter of statute and the Constitution.

2. This application raises issues of paramount public importance, the urgency of which cannot be overstated, which require urgent determination for the sake of our country and our democracy. The application for urgent interim relief has been necessitated by the blatant and deliberate flouting by the national public broadcaster ("**the SABC**" or "**the public broadcaster**") of its duties and obligations under the Constitution, governing legislation and codes as well as a disregard for the constitutional obligations owed to every citizen in the Republic.

3. This application concerns a "policy" which has recently been adopted and implemented by the SABC and has resulted in the public broadcaster censoring the news, not covering at all, or only partially covering, protest action, and reshaping the narrative of certain newsworthy events.

4. In its answering papers, the SABC articulates its policy or practice as follows: "*to avoid … the broadcasting of visuals of the violent protests … which involve the destruction of public institutions. The press release statement does not affect the broadcasting of peaceful and/or violent protests which*

have nothing to do with the destruction of public institutions."[1] In defending this policy, the SABC characterises the policy as an internal editorial instruction, which is permitted by way of alleged absolute editorial control,[2] two historic and factually unrelated (clearly *ex post facto*) factual "justifications"[3] and the prevailing legislative framework. To invoke the language of the Supreme Court of Appeal, the SABC's new reasons are nothing more than an "*ex post facto* rationalisation of a bad decision".[4] There is no place in our law for hindsight efforts to cure palpably constitutional or administrative defects.[5]

5. None of these justifications, however, in any event, is sustainable.

6. In truth, and as is clear from the implementation of the impugned policy ("**the Policy**", as described in 29 below), the public broadcaster has adopted wide-ranging censorship, in defiance of its obligations under the Constitution and legislative and regulatory framework. The SABC has refused to cover various forms of protest action and demonstration, whether violent or not, through the adoption of a blanket and inflexible policy.[6] This refusal amounts to a decision to censor the broadcasting of news that the public is entitled to receive and (together with the Policy), is unlawful, *ultra vires*, and is plainly contrary to the mandate of the public broadcaster.[7]

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[1] AA p 237 - 238, paragraph 4

[2] AA p 237, paragraph 5 and 6; p 254, paragraph 67.1

[3] AA p 245, paragraph 31

[4] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 27

[5] *Commissioner, South African Police Service v Maimela* 2003 (5) SA 480 (T) at 486F-H

[6] FA p 45, para 92

[7] FA p 22, para 9

7. The nature of the public broadcaster's actions, as set out in detail in the founding affidavit,[8] evidenced a pattern of:

7.1 political partisanship;

7.2 refusing, contemporaneously, to cover politically sensitive events or events which portrayed (or had the potential to portray) certain political parties in a negative light;

7.3 refusing to cover such events with visuals or within their proper context; and / or

7.4 reshaping the focus or narrative of certain politically sensitive or motivated protests.

8. Accordingly, the applicant ("**HSF**") attacks not only the Policy, but also the censorship decisions, as defined at paragraphs 92 and 9 respectively of the founding affidavit.

9. The adoption of the Policy, and its implementation through the censorship decisions, amounts to blatant censorship reminiscent of the apartheid era and common to multiple dictatorships where democracy has been stifled or negated. Not only is such action an indefensible infringement of the rights to freedom of expression, access to information and freedom of the press and undermines key constitutional principles, but it is contrary to the statutory mandate of the SABC and other legal and constitutional obligations.

[8] FA p 46 para 97- p 54 para 126

10. The Constitution seeks to ensure that government and the rules and systems it adopts cannot again suppress these rights in the name of political partisanship. As stated by the Constitutional Court:

> "*The apartheid regime sought to dominate all facets of human life. It was determined to suppress dissenting views, with the aim of imposing hegemonic control over thoughts and conduct, for the preservation of institutionalised injustice. It is this unjust system that South Africans, through their Constitution, so decisively seek to reverse by ensuring that this country fully belongs to all those who live in it*".[9]

11. The Constitutional Court has also held recently that:

> "*One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck."*[10]

12. Given the timing of the Policy and the (resultant or otherwise) decisions not fully to cover political and other protests, it is plain that the Policy is underpinned by ulterior purposes and bad faith.

13. In *Khumalo v Holomisa*[11] the Constitutional Court put it thus:

> "*In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility*."

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[9] *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC) at para [49

[10] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) at para [1]

[11] 2002 (5) SA 401 (CC) at para [24] ("***Khumalo***")

14. Being the public broadcaster and an important organ of state, the SABC is charged with especial duties to the Republic and a positive obligation to safeguard the rights in the Bill of Rights and promote fundamental constitutional values and principles.[12] As the Constitutional Court has stressed, "*the SABC, as the public broadcaster provided for and regulated in terms of the Broadcasting Act, has a special function to perform*".[13]

15. The SABC's mandate as public broadcaster permits of no power to withhold information from the public, particularly information which has the potential to shield political figures or entities from public scrutiny at a time when full transparency is required so as to allow for free and fair elections and informed decision-making.

16. It is not open to the public broadcaster to compromise its integrity, the need for accurate and complete coverage and the obligation to present a complete factual picture to the nation. The Policy and censorship decisions are thus unlawful on any basis (and regardless of the purposes or motives). But it seems clear that the purpose of the censorship decision falls outside the ambit of what is permissible in statute and leaves a reasonable apprehension that it is politically motivated and designed to shield politicians and public bodies from scrutiny, including when their actions or omissions have elicited mass public protest. The actions of those responsible for the censorship decision, including the first and second respondents, are the very antithesis of democratic discourse and constitute *mala fides* of the most damaging kind.

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[12] Sections 7(2) and 4(1) of the Constitution

[13] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para 26

17. The respondents have thus diminished the values that underpin our constitutional democracy and infringed upon fundamental constitutional rights.

18. The manner in which the SABC exercises its mandate has a significant impact on the development of our constitutional democracy. If it is scrupulous and reliable in the performance of its legal obligations, it will invigorate and strengthen our fledgling democracy. If it reneges on its duties, we all suffer, and the rights of access to information, freedom of expression and press freedom are gravely imperilled.

19. The SABC has access to enormous public resources precisely to report on the sights and sounds of, *inter alia*, all current affairs events. No other organisation in South Africa has access to these vast resources. This places a greater duty on the SABC to act in a way which recognises actions by all persons in South Africa and provides all relevant information to the South African public in the arena (of live television) in which the SABC is the only publically funded player and part of a small oligopoly of television stations with news channels.

20. The Constitutional Court has previously held that "*freedom of expression to its fullest extent during elections enhances, and does not diminish, the right to free and fair elections*".[14] As the local elections are less than a month away, there is a very real apprehension of irreparable harm to the voting public and the Republic's constitutional democracy, quite apart from the ongoing irreparable harm in the public broadcaster being allowed to propagate half-truths. A major portion of the electorate may be forced to

[14] *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) at para 135

exercise its vote without having been fully informed. Between now and the elections, this Court is the only body that is meaningfully able to provide the appropriate urgent relief necessary to stop the harmful effects of the policy in its tracks. The efforts by other parties to approach ICASA for relief has not had the desired effect: the SABC denies that it is bound by ICASA's ruling and publicly promised to review the ruling (no doubt at its leisure, without any meaningful expedition).

21. Millions of South Africans rely on the SABC for news and information about their country and the world at large, and its conduct in implementing the Policy and censorship decision does violence to our most basic values. Its misconduct must be arrested forthwith; and this Court is the only forum by which that constitutional result might be achieved.

BRIEF FACTUAL BACKGROUND

22. On or about 26 May 2016, the SABC issued a media statement setting out the basis of the policy ("**the media statement**")[15]. As per the media statement, the policy was as follows:

> ***SABC WILL NO LONGER BROADCAST FOOTAGE OF DESTRUCTION OF PUBLIC PROPERTY DURING PROTESTS***
>
> ***Johannesburg- Thursday, 26 May 2016-*** *The South African Broadcasting Corporation (SABC) has noted with concern the recent turmoil arising from violent service delivery protests in various parts of the country. The SABC as a public service broadcaster would like to condemn the burning of public institutions and has made a decision that it will not show footage of people burning public institutions like schools in any of its news bulletins with immediate effect. We are not going to provide publicity to such actions that are destructive and regressive.*
>
> *The SABC is cognisant of the fact that citizens have constitutional rights to protest and voice their concerns on various issues that they are not*

[15] FA p 42 para 83; "FA3" page 115

> *happy with but we also do not believe that destruction of property is the best way to voice those grievances. These actions are regrettable and viewed as regressive on the developments made after 22 years of South Africa's democracy. Continuing to promote them might encourage other communities to do the same. The SABC would like to stress that we will continue to cover news without fear or favour. We will not cover people who are destroying public property.*
>
> *The SABC's Chief Operations Officer, Mr Hlaudi Motsoeneng stated that "It is regrettable that these actions are disrupting many lives and as a responsible public institution we will not assist these individuals to push their agenda that seeks media attention. As a public service broadcaster we have a mandate to educate the citizens, and we therefore have taken this bold decision to show that violent protests are not necessary. We would like to encourage citizens to protest peacefully without destroying the very same institutions that are needed to restore their dignity".*
>
> *The SABC would like to make an appeal to other South African broadcasters and the print media to stand in solidarity with the public broadcaster not to cover the violent protests that are on the rise and in turn destroying public institutions*". (emphasis added)

23. The policy thus appeared to be that the SABC would not, at all, cover violent protests that involved the destruction of public institutions.[16]

24. On 27 May 2016, Motsoeneng was interviewed on Radio 702 in relation to the Policy.[17] Motsoeneng, instead of clarifying the terms of the Policy, merely contradicted the Policy itself (as contained in the media statement) and himself at later instances during the interview (as evidenced by the transcript).

25. During the interview, Motsoeneng stated that "*we are going to cover all protest, but…we are not [going to] show those visuals*". This second, and supposedly different, iteration of the Policy contradicts the media statement which states quite clearly that:

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[16] FA p 44 para 85

[17] FA p 44 para 86; "FA4" page 116

"[w]e will not cover people who are destroying public property" ; and

"*the SABC would like to make an appeal to other South African broadcasters and print media to stand in solidarity with the public broadcaster not to cover the violent protests that are on the rise and in turn destroying public institutions*" (emphasis added).[18]

26. It was thus unclear whether violent protests which involved the destruction of public institutions would be covered, but without visuals, or whether such protests would not be covered at all.[19]

27. On the same day, the SABC published a further media statement on its website indicating that it had "clarified" the terms of the Policy ("**the clarification statement**").[20] Again, this statement provides little comfort to the media, the SABC staff who are meant to work under the policy, and the public at large as to the ambit and implementation of the Policy.

28. The clarification statement reads, in relevant part, as follows:

"[the SABC] will still cover protests, but once these turn violent, those aspects will not be aired";

"[the SABC] says it will not provide publicity to such actions, which it describes as destructive"; and

"We will only show the plight of the people and the reason why they are unhappy and all of that. We are not saying we are not going to cover protests".

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[18] FA p 44 para 88

[19] FA p 45 para 89

[20] FA p 45 para 90; "FA5" p 119

29. The decisions and statements set forth in 22 to 28 above will be referred to as "**the Policy**".

30. It is entirely unclear what the precise terms of the Policy are. For instance, it is unclear whether:

30.1 violent protests which do not involve the destruction of public institutions fall outside the Policy;

30.2 whether violent protests which do involve the destruction of public institutions will be covered, but without visuals or with only visuals other than that of the public institution being damaged.[21]

31. This multitude of contradictory and vague statements plainly demonstrates that the Policy is fraught with uncertainty; inherently contradictory; impermissibly vague and open to abuse; and not even the SABC understands the basic and fundamental ambit of the Policy. What the Policy has achieved, however, is a climate of fear and uncertainty, and it has laid the basis for censoring any protest on the pretext of violence while being sufficiently open-ended also to result in the censorship of other protests (even peaceful ones).[22]

32. The SABC, Motsoeneng and the Chairperson of the SABC Board, the fourth respondent, (collectively, "**the opposing respondents**") have attempted to clarify this confusion in their answering affidavit by stating that the SABC only

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[21] FA p 45 para 93

[22] FA p 46 para 94

intends not to broadcast "*visual footage of destruction of public property during protests*".[23]

33. Such *ex post facto* purported clarification confirms the inherent vagueness of the policy as originally cast. And even the impermissible attempt now to recast the policy leaves it unconstitutional: the "clarified" policy in itself is unacceptable as a policy or decision by the SABC. That policy has resulted in the visuals of multiple protests not being covered, including the Tshwane, Cape Town and KwaZulu-Natal protests, set forth in the founding affidavit.

34. What is also clear, however, is that, in fact, the censorship decision is being implemented in a manner which exceeds any of the iterations or versions of the Policy set out by the SABC or Motsoeneng. Simply by way of example, the SABC did not broadcast the peaceful Right2Know campaign against the censorship policies of the SABC. Similarly, Motsoeneng, as Chief Executive Officer of the SABC, has instructed his staff not to report negative news stories about President Jacob Zuma.

35. The damage done by the incomplete and misleading reporting policies and practices by the public broadcaster is serious, ongoing, irreversible and strikes at the very core of our constitutional values of openness, free speech and transparency. Whether in its original (vague and contradictory) manifestation, or in its "clarified" form as suggested in the answering affidavit, or through decisions taken to implement the censorship that is inherent in the Policy, the Policy and its implementation are unconstitutional.

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[23] AA p 236 para 4

THE MANDATE AND FUNCTION OF THE SABC AS PUBLIC BROADCASTER

36. The SABC as the public broadcaster is governed by, amongst other legal instruments, the Broadcasting Act, 1999 ("**the Act**"), the SABC Revised Editorial Policies, 2016 ("**the SABC Editorial Policies**"), the BCCSA Free-To-Air Code of Conduct for Broadcasting Service Licensees, 2009 ("**the BCCSA Code"**) and the SABC's Charter. The nature and mandate of the public broadcaster also means that is subject to especial duties under the Constitution which it owes to the South African public.

The Act

37. The Broadcasting Act, 1999 ("**the Act**") governs the governance and policies of the SABC. The following sections of the Act are relevant to this application.

38. Section 2(a) of the Act states that one of the objectives of the Act is to "*contribute to democracy, development of society, gender equality, nation building, provision of education and strengthening the spiritual and moral fibre of society*".

39. Section 2(d) further states that the purpose of the Act is to establish policies to "*ensure plurality of news, views and information and provide a wide range of entertainment and education programmes*".

40. Section 3(5)(d) states that the programming provided by the South African broadcasting system must "*provide a reasonable, balanced opportunity for the public to receive a variety of points of view on matters of public concern*".

41. Section 6(4) states that:

> *"[t]he [SABC] 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;… (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*".

42. Section 10(1)(d) places a duty on the SABC to "*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*". Section 10(1)(e) states that the SABC must "*include significant amounts of educational programming, both curriculum-based and informal educative topics from a wide range of social, political and economic issues, including, but not limited to, human rights, health, early childhood development, agriculture, culture, religion, justice and commerce and contributing to a shared South African consciousness and identity*".

The SABC Editorial Policies

43. Section 1 of the SABC Editorial Policies states that the SABC Editorial Policies are to be considered when the SABC develops programme policies for its radio stations and television channels.

44. The "*core editorial values of the SABC*" are listed under section 2 of the SABC Editorial Policies, one of which is "*editorial independence*". As stated in the policy, "*the SABC is governed by the Charter [of the SABC], which enshrines the journalistic, creative and programming independence of the corporation [and] the constitutionally protected freedom of expression*".

Another core editorial value is to provide citizens with "*the information needed to participate in building our democracy*".

45. The SABC's policies with regard to news programming are dealt with under section 4 of the SABC Editorial Policies, which provides that the SABC "*occupies a distinctive position of trust in the lives of its viewers*" and prides itself on being "*the most extensive, all-inclusive and diverse news organisation in South Africa*".

46. The SABC also recognises, in section 4, that it has a duty to "*present news and current affairs honestly by striving to disclose all the essential facts and by not suppressing relevant, available facts*" and "*not [to] allow its advertising, commercial interest, political or personal considerations to influence its objectivity when editorial decisions are made. The SABC is not the mouthpiece of the government of the day*" (emphasis added).

47. The SABC includes in its news policy that it must "*[a]im to tell stories from a South African point of view and deal with issues that are important to South Africans*".

The BCCSA Code

48. The BCCSA Code applies to all broadcasting service licensees, including the SABC.

49. Clause 3 of the BCCSA Code states that broadcasters "*must not broadcast material which, judged within context*

> *(a) contains violence which does not play an integral role in developing the plot, character or theme of the material as a whole; or*

(b) sanctions, promotes or glamorises violence or unlawful conduct."

50. Clause 4 prohibits the broadcasting of material which, when judged within context:

> "*(1) … sanctions, promotes or glamorises violence or unlawful conduct based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability;*
>
> *(2) … amounts to (a) propaganda for war; (b) incitement of imminent violence; or (c) the advocacy of hatred that is based on race, ethnicity, religion or gender and that constitutes incitement to cause harm.*"

51. Clause 5 contains a *proviso* to Clauses 3 and 4 and states that these clauses do not apply to:

> "*(1) a broadcast which, judged within context, amounts to a* bona fide *scientific, documentary, dramatic, artistic, or religious broadcast;*
>
> *(2) a broadcast which amounts to a discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or*
>
> *(3) a broadcast which amounts to a* bona fide *discussion, argument or opinion on a matter of public interest.*"

52. Clause 11(2) states that "*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*".

The SABC's Charter

53. The content of the charter of the SABC is set out in section 6 of the Act. As stated in section 6(1) of the Act, the SABC must comply with the charter.

FREEDOM OF EXPRESSION, TRANSPARENCY, ACCOUNTABILITY, RIGHT TO VOTE AND ACCESS TO INFORMATION

54. At its core, this application concerns the enforcement of fundamental constitutional rights and principles. These include the rights to freedom of expression and access to information and the principle of transparency. We deal with each of these in turn.

Freedom of expression, as animated by other rights and values[24]

55. As was articulated in the founding affidavit, the applicant, and all citizens, enjoy the right to freedom of expression, which includes the right to freedom of the press and other media, as well as the freedom to receive or impart information or ideas.

56. The right to freedom of expression is enshrined in section 16 of the Constitution as follows:

"(1) *Everyone has the right to freedom of expression, which includes*

a. freedom of the press and other media;

b. freedom to receive or impart information or ideas;

c. freedom of artistic creativity; and

d. academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to

a. propaganda for war;

b. incitement of imminent violence; or

c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[24] FA p 66 para 174 - p 67 para 176

57. The importance of freedom of expression has been emphasised repeatedly by our Courts. For example, in *Islamic Unity Convention v Independent Broadcasting Authority and others,*[25] the Constitutional Court held at para 28 that "*South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as 'one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members '.*" (references omitted)

58. Moreover, in O'Regan J in *South African National Defence Union v Minister of Defence and Another*[26] held that:

> "[*F*]*reedom of expression is one of a "web of mutually supporting rights" in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.*"'

59. In 2015 in *Democratic Alliance v African National Congress*,[27] the Constitutional Court held as follows:

> "*First, freedom of expression. This court has already spoken lavishly about this right. The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and*

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[25] 2002 (4) SA 294 (CC)

[26] 1999 (4) SA 469 (CC) para [8] at 477E

[27] 2015 (2) SA 232 (CC)

enabling folly and misgovernance to be exposed. It also helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values."[28]

60. Of relevance to freedom of the press, the Constitutional Court in *Khumalo and others v Holomisa*[29] held at para 22 that:

"The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected… As Deane J stated in the High Court of Australia,

> *'. . . the freedom of the citizen to engage in significant political communication and discussion is largely dependent upon the freedom of the media'.*

The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression."

61. Similarly, in *MEC for Health, Mpumalanga v M-NET and another,*[30] the Court held that:

"*Freedom of expression lies at the very heart of our democracy, all the more so in the public sector where in the past the government, the Executive and officialdom were protected by a web of statutory and regulatory restrictions upon the freedom of the media to report on matters which might have cast an adverse light on the establishment or State officials whose repressive activities were conducted behind the shield of 'State security'."*

62. It also held that:

"*The enshrinement of the freedom of expression in s 16 of the Constitution now places a much greater emphasis upon the public's right to know and will consequently weigh the scale more firmly in favour of the right to disseminate news and the media's obligation to inform. The information at issue here is of the kind which is essential to*

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[28] At [122]

[29] 2002 (5) SA 401 (CC)

[30] 2002 (6) SA 714 (T) at [19]

> *enable the public to judge the performance of public officials and the politicians responsible for them. As James Madison is reported to have said:*
>
> > 'Nothing could be more irrational than to give the people power and to withhold from them information, without which power is abused. The people who mean to be their own governors must arm themselves with the power which knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.'"[31]

63. As the above authority indicates, and as was set out in the founding affidavit, since the "*right to freedom of expression is not limited to the right to speak, but also to receive or impart information and ideas*", the media assumes a key position in society.[32] "*[T]he media has a duty to report accurately because 'the consequences of inaccurate reporting may be devastating*"'.[33] A critical part of accurate reporting is full and representative reporting.

64. It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press. Indeed, the Supreme Court of Appeal has held that:

> "*The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself.*"[34]

65. The freedom of the press is imperative in two fundamental respects in a democracy: first, the ability of the public to hold accountable those in power and, second, the ability of the public to be informed on matters of public

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[31] At para [27]

[32] *City of Cape Town v South African National Roads Authority* 2015 (3) SA 386 (SCA) para [20]

[33] *Loc cit*

[34] *Midi Television (Pty) Ltd v Director of Public Prosecutions, Western Cape* 2007 (5) SA 540 (SCA), para [6]

interest. A free press represents a necessary condition for holding an open public discourse and for enabling individuals to criticise the government and state authorities and to make informed decisions when exercising their fundamental rights, for example, the right to vote. Censorship is simply inexcusable in a constitutional democracy and freedom of the press, along with freedom of expression, must be jealously guarded.

66. Control by the authorities of the timing of the flow of information and, indeed, whether such information is ever released publically is a formidable power and, if unchecked, may well be abused to prevent criticism of government, or achieve other ulterior purposes.

67. The Constitution only admits of a few limited exceptions to complete disclosure. One is in cases of hate speech or incitement to violence. The opposing respondents opportunistically invoke those provisions in aid, particularly incitement to violence. But the facts and propositions relied upon take the opposing respondents' case no further. There is no evidence or factor which supports the proposition that broadcasting of images of destruction of public buildings incite or promote violence. We deal with incitement of violence under a separate heading below.

68. The respondents, in their efforts to answer the very serious concerns raised by the applicant regarding the policy and its infringement of the right to freedom of expression, seem to suggest that the policy does not so infringe the right since section 16 of the Constitution "*does not extend to incitement or imminent violence*".[35] They go on to describe two historic examples of experiences one SABC journalist has had, which appear to be intended to

[35] AA p 244 para 26 and AA p 252 para 58

illustrate that violence can erupt as a result of the presence of film crews or the broadcast of earlier violence.[36] This amounts to the high-water mark of the defence put up by the respondents to the serious and, we suggest, unanswerable, allegations that the policy infringes the right to freedom of expression. We deal with these two examples more fully below when we analyse the defences raised by the opposing respondents.

69. The respondents simply have not been able to show that the carve-out to section 16 (that the right to freedom of expression does not extend to "*incitement of imminent violence"*) can be used to justify the Policy or the censorship decisions, or that they may be justified on any other basis – or indeed that they were ever thought to be justified on this basis at the time that the Policy was adopted or the decisions to implement it were taken.

70. The right to freedom of expression is reinforced by numerous other rights and values. It is central to the promotion of the principles of accountability and transparency, which are foundational precepts of good governance and administration[37] required under the Constitution. It also reinforces the constitutionally-entrenched right to access to information and the right to vote. Without a free press which reports fully and fairly on the news, the public will not be in a sufficiently informed position to make critical political, financial and social decisions. As the Constitutional Court has held, the right to vote only has meaning and electoral choices are genuine only if all the relevant information is imparted to the electorate and citizens are kept

[36] AA p 245 para 31.2 - AA p 246 para 31.4

[37] Section 41(1)(c) of the Constitution

informed.[38] The public broadcaster, as an organ of state which is intended to give expression to freedom of speech, has an especial, enduring duty to protect and promote each of the rights in the Bill of Rights.

71. The importance of access to information for the exercise of other fundamental rights has been emphasised by our Courts. In *President of the Republic of South Africa and Others v M&G Media Ltd*[39] the Constitutional Court stated that:

> "*The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined*."

72. The right, however, also has intrinsic and instrumental importance. The Constitutional Court in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* has held that:

> "*access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.*"[40]

73. By withholding visuals of public protests, the respondents are plainly infringing the public's right to access to information. The public broadcaster

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[38] *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) at paras [122] to [124]; and *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 (30 September 2015), para [40]

[39] 2012 (2) SA 50 (CC) at para [10]

[40] 2007 (1) SA 523 (CC) at [28]

has a constitutional and legislative duty to provide this access to the public and not to suppress pivotal details of the news. Such suppression and censorship of information imperils the public's ability to be responsible and effective members of our society.

74. Moreover, the realisation of the principles of transparency and accountability in South Africa's democracy would be substantially impaired if the public broadcaster were allowed to continue to implement the censorship decisions and the Policy.[41] Transparency and accountability are requirements of all government conduct, including by organs of state.[42]

75. In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and others*,[43] the Constitutional Court held at para 28 that :

> *"The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy. This was also recognised by the House of Lords in McCartan Turkington Breen (A Firm) v Times Newspapers Ltd that '*(t)he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring*'. A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness."*

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[41] See, for example, *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) at [62], where the Constitutional Court held that:

> "*The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid.*[41] *To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information*."'

[42] Section 41(1) of the Constitution

[43] 2007 (1) SA 523 (CC)

76. The Policy and the censorship decisions plainly impact on all of the above principles and rights individually and as they mutually reinforce one another. The infringement of the right of freedom of expression is manifest.

BREACH OF THE CONSTITUTIONAL REQUIREMENTS AND THE VACUOUS NATURE OF THE DEFENCES

Factual defence of the policy

77. The entirety of the factual defence of the Policy amounts to two experiences one SABC journalist has had, one in 2011 and one at an unspecified time.[44]

78. These two instances in fact offer no support for the Policy at all. They are, factually and chronologically, completely removed from the Policy, do not evidence a need for the Policy's adoption and are, transparently, *post hoc* rationalisations mobilised, for the first time, in these proceedings.

79. It is remarkable to read that actions in 2011, subsequent to the shooting of an unarmed protestor, which actions, on the SABC's papers, did not even involve the destruction of public institutions, somehow justify the adoption of the Policy half a decade later.

80. Similarly, stones being thrown at cars in Qwaqwa, Free State, due to electricity outage protests, did not involve destruction of public institutions or property at all, yet is now mobilised as a factual justification for a blanket ban of visual coverage of destruction of public institutions or property.

81. There is thus clearly no factual link between the purported factual justifications of the Policy and the adoption and implementation of the Policy

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[44] AA p 250 para [31]

in 2016. The factual justifications are dated (in the case of the 2011 events regarding the late Mr Tatane), and undated (in the case of the Qwaqwa protests), did not involve the destruction of public property or public institutions at all (as a trigger for further violence or otherwise), appear for the first time in these papers (being absent as justifications in the answering papers before ICASA) and related to acts completely removed from the destruction of public institutions.

82. The Policy is completely arbitrary in its application:

82.1 it applies to some journalists, but not others, by virtue solely of who the employer of the journalists is (the SABC or a private or international institution). Thus the very news which one person may be prohibited from covering, or from covering with accompanying visuals, may be freely and completely covered by his neighbour;

82.2 it applies to destruction of public property or public institutions, but not to private institutions. There is no reason proffered as to why the destruction of public property or public institutions incites, glamorises, sanctions or promotes violence, but the destruction of private property (perhaps even in the same protest), does not;

82.3 it applies to visuals, but, seemingly, not to content. There is no reason why visuals should be determinative of whether a group would copy a violent protest or be inspired to commit violent acts. Given that such protest still is (even on the SABC's version) reported upon, which reporting includes the facts of the violence and destruction of property, it is unwarranted to argue that the inclusion of visuals will motivate the copying of such actions;

82.4 if the cited intention of the Policy is to prevent the proliferation of violence and crime, then it is unclear why the Policy does not extend to all instances of violence, other instances of criminal conduct, foreign violence or destruction of private property. All of these categories of conduct may comprise visuals of violent protest, including multiple deaths and significant destruction of private property (and possibly public property in other countries). Similarly, if destruction of public property or violence is the issue to be combatted, then why can the SABC freely cover such news provided that it is extra-territorial but not domestic? If the SABC honestly believes that the conduct it reports on, with or without visuals, will inspire the masses to copy such conduct, then why does the SABC report on corruption, crime, racism etc? Its very reporting defeats the argument premised on a pattern of behaviour, and renders transparent the arbitrary nature of the Policy.

83. A further own-goal is scored by the SABC. It contends – with a straight face, and as part of its affidavit setting out the nature and defence of the respondents – that "*[a] distinction must be drawn 'covering' news and 'broadcasting' news.*"[45] It suggests that "*covering*" news relates "*to attending at the scene, taking video footage and/or photographs and obtaining information at an event*", while "*broadcasting*" is "*the actual reporting and/or publicizing of the news on the basis of the information collected by the reporter*", and that such broadcasting is "*necessarily preceded by editorial*

[45] AA p 247 para 23.3

decisions in terms of the SABC prescripts".[46] Importantly, the SABC then stresses in its answer that:

> "*The SABC continues to cover all relevant news as it has always done, however, in line with its prescripts, it has made an editorial decision not to broadcast scenes of destruction of public institutions …*" (emphasis in the original).[47]

84. For an organisation with such vaunted concern for stoking destruction of property through its coverage of violent protests (and hence purportedly justifying its editorial decision not to "broadcast" such scenes), it is then remarkable to read that the SABC *continues to cover such scenes*; in its words: "*attending at the scene, taking video footage and/or photographs and obtaining information about an event*". For it is precisely the "coverage" (which SABC insists continues) which Mr Sebego suggests was and is the cause of the violence and destruction of property. According to the SABC's evidence:

> "*Mr Sebego had personally spent about a week in Ficksburg, where several buildings were torched due to anger that followed the killing of the Late Mr Tatane. The Residents or service delivery marchers were aware of the presence of the SABC television crew with its cameras in the areas and in most cases would ask the crew to follow them as they went on the rampage. Mr Sebego had observed how excited the marchers would become as they would cheer when they saw the SABC television crew with their cameras. … Another notable incident was in Qwaqwa, Free State Province, where residents were protesting against electricity outages in the area. Upon seeing the SABC television crew with cameras, they would start indiscriminately throwing stones at cars and their leaders would request that the SABC crew follow them as they proceeded with their conduct.*"[48]

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[46] AA p 247 para 23.3

[47] AA p 247 para 23.4

[48] AA p 251 paras 31.1 and 31.4

85. The Policy is meant to stop violence by an editorial decision not to *broadcast* violence; yet the SABC's own evidence is that the *coverage* of the violence (which continues unabated – "The *SABC continues to cover all relevant news as it has always done*) is what stokes the destructive and violent tendencies of service delivery protestors.

86. This inside-out and irrational arbitrariness underscores the unlawful and *ultra vires* nature of the Policy. As the Constitutional Court held in *S v Makwanyane*:[49]

> "*The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution. Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow*."

87. Moreover, it is clear that, even on the SABC's version, the Policy is, and will be, wholly ineffective and thus cannot achieve its own purpose (even if that purpose is an after-the-fact attempt at rationalising the indefensible):

87.1 based on the anecdotal "evidence" referred to in the answering affidavit, the mere presence of the SABC's cameras incites violence or greater violence; this is, on the SABC's version, completely unrelated to whether public institutions are being targeted or destroyed. This alleged proliferation of violence thus has little to do with whether the destruction of a public institution is being broadcast or not;

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[49] 1995 (3) SA 391 CC para [156]

87.2 given that other news outlets are covering the same protests, with cameras (and would presumably responsibly fill the vacuum created by the absence of the national broadcaster at such events), the SABC's refusal visually to cover the protests will be of little moment, and there is no causal link between the Policy and its stated objectives - it will not prevent further violence, even if the SABC is correct (and the fact that the KZN, Tshwane and Cape Town protests all occurred after implementation of the Policy evidence the Policy's failure to achieve its stated purpose);

87.3 if visuals of violence truly beget violence, then there is no reason for giving primacy to the destruction of certain public institutions or public property over the proliferation of other violent or unlawful conduct. Again, considering that other forms of violent and unlawful conduct, both domestic and international in nature, are covered, with visuals, by the SABC and other responsible media outlets, it is clear that the Policy, even on the SABC's version, will have no tangible effect on this alleged visual incitement of violence;

87.4 moreover, on the SABC's version, it covered the Tshwane protests in full, only reducing coverage at night when a police escort could not be secured to enter the townships.[50] If this is correct, then clearly the SABC recognises either that its Policy is insupportable or that the Policy will have no actual effect regarding any proliferation of violence.

88. The Policy is in any event an excuse for broader and more insidious forms of unaccountable state censorship. In the short time that the Policy has been in

[50] AA p 254 para 67

place, it has already been implemented in ways which span beyond its stated remit. By way of example, the Right2Know Campaign protest, on the face of the Policy, would fall outside the ambit of the Policy. This protest was not, however, broadcast,[51] leading to complaints from within the SABC, as well as seemingly contributing to the resignation of Mr J Mathews, the erstwhile acting chief executive officer of the SABC.[52] These complaints made it clear that editorial policies / the Policy were being abused so as to censor information. Clearly, the censorship decisions are being implemented in various guises. The unspoken scope and terms of these censorship policies are thus impermissibly vague, subject to abuse and render the Policy and censorship decisions not sufficiently clear, accessible or precise that those who are affected by it can ascertain the extent of their rights and obligations.

89. One searches in vain for a scintilla of rational factual justification of the Policy and its implementation in the answering affidavit. It is submitted that the absence of any actual factual justification for the Policy and its implementation is fatal, particularly so when one considers that the implementation of the Policy infringes upon the constitutional rights of others.

Legal Defence of the Policy

90. The SABC's legal defence of the Policy and its implementation rests on the following pillars:

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[51] FA p 50 para 105 - 108

[52] "FA9" p 131

90.1 Clause 4(5) of the licence issued to the SABC affords the SABC, in respect of its news and current affairs programming, "*full control in respect of the contents of such programming*";[53]

90.2 Clause 14 of the Code of the Broadcasting Complaints Commission of South Africa provides that no licensee shall broadcast material which "*judged in context:*

> *Contains gratuitous violence in any form i.e. violence which does not play an integral role in developing the plot, character or theme of the material as a whole;*
>
> *Sanctions, promotes or glamorises violence*;"[54] and

90.3 Section 16(2) of the Constitution provides that the right to freedom to receive or impart information or ideas does not extend to incitement of imminent violence.[55]

91. The above represents the best belated efforts by the respondents to posit a legal defence of the Policy and its implementation.

92. Full control in respect of the contents of its own programming can never, in and of itself, permit of unconstitutional or unlawful conduct. Instead, the SABC's control of programming is obviously disciplined by law: assuming it may edit such broadcasting, that must be a lawful exercise of its discretion and power in implementing editorial policies. It was thus incumbent upon the SABC to justify the implementation of the Policy factually, and, to the extent

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[53] AA p 242 - 243 para 23.5

[54] AA p 243 para 25

[55] AA p 244 para 26]

that constitutional rights are implicated, justify either the limitation of such rights, or establish that the implementation of the Policy falls within the exception created in section 16(2) of the Constitution.

93. The SABC fails woefully at every level in this regard.

Editorial control does not mean absolute power to limit constitutional rights

94. Whatever may be the scope of the SABC's entitlement to edit its own content, it does not include the ability to act unconstitutionally. The Constitutional Court has already decided that the media "*thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression."*[56]

95. The SABC does not have the power (editorial or otherwise) to:

95.1 act unconstitutionally;

95.2 censor news that affects the public;

95.3 through censorship, display a skewed or incomplete portrayal of news; or

95.4 through censorship, create a distorted narrative so as to achieve an ulterior purpose, such as shielding political parties or leaders from criticism or withholding politically pertinent information on the eve of local elections.

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[56] *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) para [24]

96. Society has a right to receive accurate and complete coverage of the news. The opposing respondents' failure to acknowledge this right, while disturbing, confirms their wanton disregard for their own constitutional mandate.

97. Indeed, the very ability of each citizen to be a responsible and effective member of society "*depends on the manner in which the media carry out their constitutional mandate. The media thus rely on freedom of expression and must foster it*."[57]

98. It has been well-expounded that the press is to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public's right to a healthy unimpeded media.[58]

99. It is thus not open to the press, or to the legislature, to adopt policies or impose laws which render the press, and especially the public broadcaster, an Orwellian tool of indoctrination and deception, beholden to its master's voice, as opposed to the truth. [59]

100. The SABC's argument, taken to its logical conclusion, is that it can, through its editorial policies and powers, effectively become the "thought-police", censoring information so as to shape a narrative for ulterior purposes, as opposed to fairly and objectively informing the public of news.

101. As stated by the Constitutional Court:

> "*Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression —*

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[57] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para [24]

[58] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para [54]

[59] Supra note 12

> *the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore, we should be particularly astute to outlaw any form of thought-control, however respectably dressed*."[60]

102. The public broadcaster is thus never at liberty to adopt or implement an otherwise unlawful editorial policy. Accordingly, the SABC's recordal of this power is no defence at all - instead, it must demonstrate that the adoption and implementation of the Policy is lawful.

103. Its inadequate and unsuccessful attempts to do so under the Code and Constitution are considered below.

Coverage of violence as an aspect of news does not constitute gratuitous violence or promote, sanction or glamorise such violence

104. By broadcasting visuals of violent protests, the media does not "promote" or "glamorise" such violence (as is claimed by the SABC), but rather complies with its duty and right to inform the nation of events of public importance. This duty to inform is heightened at politically sensitive times such as the current run-up to the local elections taking place next month.

105. If the SABC was to persist with this defence, it was incumbent upon the SABC to put up evidence indicating why visual coverage of the destruction of public property or public institutions, in the context of the protest, was gratuitous, or sanctioned, promoted or glamorised violence. No factual evidence has been put up.

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[60] *S v Mamabolo* 2001 (3) SA 409 (CC) para [37]

106. Viewed in context, visuals of such violence are an essential part of the material, required to give the viewer / recipient a proper appreciation of the events being covered. It is often the case that the news may include disturbing stories with distressing visuals - however, in no way does the mere broadcast of such visuals amount to glamorisation, promotion or sanctioning of the conduct covered.

107. If this truly was the case, it would mean that no violent movie, documentary, news bulletin, cartoon or the like may ever be shown to anyone; and news (international or local) which reported on events (no matter their importance globally or domestically) that contained or suggested violence (however that may be defined) would be rendered non-newsworthy. The suggestion is risible.

108. Gratuitous violence is "*violence which does not play an integral role in developing the plot, character or theme of the material as a whole*". Where, as in the Tshwane protests, for example, the violence is an essential and core tenet of the protests, and is related to and is the manifestation of the public's deep discontent with service delivery, its coverage is clearly not gratuitous. The visual broadcasting of the violence instead is the news itself; it is a core component of an event of great public interest, and an aspect of which the public has the right properly to be apprised.

109. The SABC has, moreover, disingenuously, been highly selective in its selection of clauses in explaining its statutory mandate, which selection does not do it credit.

110. At the outset, the provisions against broadcasting violence and hate speech appear at clause 3 of the Code.

111. The broadcasting of violence is expressly permitted in the exceptions to clause 3 and 4, contained in clause 5 of the BCCSA Code, which provides that those prohibitions do not apply to a *bona fide* documentary broadcast or a "*bona fide discussion, argument or opinion on a matter of public interest*".

112. Further, news items broadcast by the SABC are specifically catered for in clause 11. This clause states that news must be reported "truthfully, accurately and fairly" (clause 11(1)) and "*news must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by: Distortion, exaggeration or misrepresentation: (b) Material omission; or (c) Summarisation*" (clause 11(2)).

113. A policy that prohibits the showing of specific types of news stories, where certain facts are omitted completely or not covered visually, is a material departure from the facts by way of material omission and misrepresentation. The SABC is not mandated to be the political or moral guardian of the public.

114. The SABC argues that it has stopped showing visuals of destruction of public property or public institutions, as "*this would not prove necessary in developing the plot, character or theme of the material as a whole*".[61]

115. Where, however, the fact of violent protest is itself news, and is the means by which a protest is conducted, this violence cannot be separated out from the event itself: without it the plot, character or theme of the material as a whole is rendered colourless and distorted and misrepresented.

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[61] AA p 242 para 23.4

116. The Code contains certain express restrictions on what the news may not cover:

116.1 11(7) - "*The identity of rape victims and other victims of sexual violence must not be divulged in any broadcast, whether as part of news or not, without the prior valid consent of the victim concerned*";

116.2 11(8) - "*Broadcasting service licensees must advise viewers in advance of scenes or reporting of extraordinary violence, or graphic reporting on delicate subject-matter such as sexual assault or court action related to sexual crimes, particularly during afternoon or early evening newscasts and updates*";

116.3 11(9) - "*Broadcasting service licensees must not include explicit or graphic images or language, related to news of destruction, accidents or sexual violence which could disturb children or sensitive audiences, except where it is in the public interest to include such material*."

117. It is telling that violent protest, and destruction of property (be it public or private) are not identified as separate categories of conduct which require special treatment, forewarning or censorship. Indeed, only where the violence is of such a nature that there are graphic images of destruction that could disturb children or sensitive audiences can such material not be broadcast, provided that it is in the public interest not to broadcast the material. And the Code in these terms confirms the obvious: that violence (including sometimes extraordinary violence) is newsworthy and must be shown (subject only in the case of extraordinary violence to a warning to viewers).

118. No case has been made out as to why the covering, with visuals, of service delivery and other protests with political overtones or genesis are not in the public interest, especially given the proximity to local elections. Similarly, no case has been made out that the visuals constitute graphic images of destruction that would be disturbing to children or sensitive viewers.

119. Clearly these are, in fact, matters of great public interest. Not only has there been significant news coverage of these events, with visuals, by numerous other media outlets (both international and domestic),[62] but there was significant public protest that these events were not covered (which is indicative of public interest in these events more fully being covered). Moreover, given the nature of the protests, coupled with the proximity to local elections, the public broadcaster bears a duty to cover these events in the public interest, to allow for informed decisions come election time. After all, one of the primary responsibilities of the public broadcaster is to keep South Africans apprised of the developments within their country; to contribute to democracy, provide a plurality of views and allow the public to receive a variety of views on matters of public concern. This includes a duty to "*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".*[63]

120. Moreover, the test for whether a broadcast amounts to incitement to violence has been addressed by the BCCSA. It is clear that the duties not to sanction,

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[62] FA p 48 para 103.1.1 and p 49 para 103.2.3

[63] Section 10(1)(d) of the Broadcasting Act, 1999. Also see FA p 37 - 42 para [60] - [82] for an overview of the legislative framework of the SABC, which informs its duties as public broadcaster

promote or glamorise violence do not apply to situations where the broadcast itself does not incite people to violence.

121. The broadcasting of violent protests does not amount to incitement of violence, even on the SABC's own version. This has been confirmed in a number of decisions of the Broadcasting Complaints Commission of South Africa ("**BCCSA**"). In *National Commissioner v e.tv* BCCSA case 05/2010 and cited with approval in *Jobson v SABC (SAfm) and another* [2010] JOL 26336 (BCCSA) it was held that the words "*sanctions, promotes or glamorises violence*" mean that there must be an incitement to violence as interpreted by the Appellate Division in *S v Nkosiyana*:[64]

> "*The purpose of the inquiry is whether the broadcast, judged in context, 'sanctions, promotes or glamorises violence'. In this regard, see S v Nkosiyana*[65] *where Holmes JA states that 'an inciter is one who reaches and seeks to influence the mind of another' - a test that excludes the reaction of the person who is sought to be incited. Although the learned Judge of Appeal said this within the context of a criminal prosecution, we are of the opinion that it is equally applicable to the language in clause 14(ii). The test is whether the news insert 'sanctions, promotes or glamorises violence', without any reference to its effect.*"[66]

122. On the SABC's version the rationale for the Policy is that the SABC will not broadcast criminal conduct of this nature and the presence of the news cameras leads to the protestors themselves escalating the destruction to property. The broadcast itself does not, even on the SABC's version, incite members of the public observing the broadcast of the protests to partake in violence; rather, as we have highlighted earlier, it is the coverage of the

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[64] 1966 (4) SA 655 (A) 659

[65] at 659

[66] *Jobson v SABC (SAfm) and another* [2010] JOL 26336 (BCCSA) at 5

violence by the SABC's cameras – which coverage, the SABC insists in its answering affidavit, continues "as it has always done".[67]

123. The reaction of the viewer or the effect of the broadcast is, no matter how severe, not sufficient to constitute incitement. The broadcast of violent service delivery protests thus does not constitute incitement to violence - there is no instruction that, suggestion that or attempt to convince the viewers to partake in violence; there is no attempt to influence the mind of the viewer. The attitude of those already protesting when they see the presence of cameras does not amount to the "incitement of violence" referred to under the Code.

124. Moreover, it is not for the SABC to adopt a paternalistic or protectionist approach on behalf of the public - instead, as held by the Constitutional Court:

> "*Ultimately, however, what is central to the issue is not the responsibility and rights of the SABC as a broadcaster. What is at stake is the right of the public to be informed and educated as is acknowledged in the Preamble to the Broadcasting Act*."[68]

125. The act of inciting others to imminent violence thus requires a concerted effort, by the author of the material in question, or a co-conspirator, to reach the mind of the audience and convince or persuade the recipient to commit violence. There must be an attempt to influence the mind of the audience.[69]

126. No evidence has been put up that the protestors, much less the SABC, by partaking in or broadcasting violent conduct, are attempting to influence the

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[67] AA p 247 para 23.4

[68] *SABC v National Director of Public Prosecutions & others* 2007 (1) SA 523 (CC) para [26] - [28]

minds of others similarly to participate in violence. The object of the protests has never been portrayed as being to inspire the masses to riot or revolt. Instead, the protests have all had clearly defined objectives and causes, relating to service delivery or political nominations.

127. The broadcast and coverage of public action which includes violence thus does not constitute gratuitous violence, does not promote, sanction or glamorise such violence and is an important aspect of accurate coverage and broadcasting of public discontent.

The Policy and its implementation are contrary to the mandate of the SABC

128. At the level of principle, the Policy, and indeed censorship of any news, is contrary to the mandate of the SABC as a public broadcaster in a constitutional democracy. As was stated by the Constitutional Court in *South African Broadcasting Corp Ltd v National Director Of Public Prosecutions And Others* ("***SABC v NDPP***") 2007 (1) SA 523 (CC) at para [28]:

> "*The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy. This was also recognised by the House of Lords in McCartan Turkington Breen (A Firm) v Times Newspapers Ltd that '*(t)he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring'*. A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.*"

129. It is not in the interests of democracy for information that involves frustration on the part of members of the public regarding the functioning of government

to be withheld from the general public. The public has the right to know that violent and other protests are occurring and to be informed fully of all the facts surrounding such protests. Withholding such information from the public, whom the SABC is meant to represent and in whose interests it should be operated, is not in the spirit of nation-building as envisaged by section 2 of the Act.

130. Indeed, all members of the public require a properly functioning public broadcaster in order to be fully functioning members of society. The need for public information and awareness of information flows from the nature of democracy.[70]

131. The public broadcaster thus has a heightened duty to inform in a democratic society. A decision to withhold information from the public that is vital to it exercising constitutional rights is thus contrary to its mandate as public broadcaster.

132. The Policy and the censorship decision clearly fall short of the very purpose and objectives to the Act. The Policy is contrary to section 2(d) of the Act, which requires the SABC to "*ensure plurality of news, views and information.* Section 3(5)(d) states that programming provided by the South African broadcasting system must "*provide a reasonable, balanced opportunity for the public to receive a variety of points of view on matters of public concern*." This is reiterated in section 6(4)(c) of the Act, which also makes the principle applicable to "*news, information and analysis*". It is thus not for the SABC to act in a paternalistic (and patronising) fashion and to make the decision on

[70] *SABC v NDPP* para [28]. See also *Khumalo* at para [22] - [24]

what it considers is in the best interests of the public, or to reshape the news so as inaccurately or incompletely to cover an important aspect.[71]

133. The SABC must, especially in news stories, provide a balanced opportunity for the public to receive all information and points of view and to make their own decisions on whether to accept the content or exercise the choice not to view it.[72] The SABC must undertake its mandate in such a way, under section 6(4)(d), that "*advances the national and public interest*". This does not mean that the SABC is the supreme moral arbiter and is at liberty to choose what it believes is in the public interest. This is not its mandate. Its mandate is to report accurately on the facts in an unbiased manner. The media statement clearly reveals a political and moral bias on the part of the SABC.[73] The Constitutional Court and the SCA have noted that the media has a duty to report accurately, because the *'consequences of inaccurate reporting may be devastating*'. [74] It thus goes without saying that the media must be permitted to report accurately on news events.

134. As was stated in *MEC for Health, Mpumalanga v M-Net and another* 2002 (6) SA 714 (T) at para [27]:

> "*It is of the very essence of news that, as the word implies, current events should be brought to the attention of the public as soon as possible. This is especially the case where malpractices and failure to deliver social services are revealed which amount to a failure to comply with the constitutional obligations resting on the shoulders of the administration and the executive*".

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[71] FA p 56 para 134

[72] FA p 56 para 135

[73] FA p 56 para 136

[74] See *Cape Town City v South African National Roads Authority And Others* 2015 (3) SA 386 (SCA) at para [20] and Khumalo at para [24]

135. Section 10(1)(d) of the Act places a duty on the SABC to "*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*". By censoring all coverage of violent public protests (and seemingly other non-violent protests), the SABC is broadcasting news that is clearly not balanced and rather represents the views of certain members of the SABC management or other stakeholders. This is plainly not in the public interest and therefore it is in breach of its duty under section 10(1)(d). The Policy is antithetical to editorial independence, amounting to instructions to journalists as to what may or may not be broadcast or reported. The effect of the Policy on freedom of expression is discussed further below.

136. The Policy is also contrary to the SABC's very own editorial policies; the BCCSA Code and the SABC's charter.

137. Section 4 of the SABC Editorial Policies states that the SABC recognises that it "*occupies a distinctive position of trust in the lives of its viewers*" and prides itself on being "*the most extensive, all-inclusive and diverse news organisation in South Africa*". It further recognises that it has a duty to "*present news and current affairs honestly by striving to disclose all the essential facts and by not suppressing relevant, available facts*". The SABC is purposely undermining this undertaking by censoring important events that affect our democracy and is acting directly contrary to its pledge "*not [to] allow its advertising, commercial interest, political or personal considerations to influence its objectivity when editorial decisions are made*".

138. The Policy is thus clearly contrary to the SABC's mandate as public broadcaster and the SABC cannot be permitted to continue to implement the policy.

The Policy is not a policy

139. As a last-ditch "defence", it is alleged by the opposing respondents that the media statement is not a policy at all, but rather "*merely an editorial decision for which the internal editors are responsible in relation to the control of the flow of the news and information from SABC*".[75]

140. This construction is not only self-defeating, but flies in the face of the media statement itself, as well as the SABC's version before ICASA.[76]

141. The media statement contains the following, on an official SABC letterhead:

> "*The SABC as a public service broadcaster … has made a decision that it will not show footage of people burning public institutions like schools in any of its news bulletins with immediate effect. We are not going to provide publicity to such actions that are destructive and regressive… we therefore have taken this bold decision to show that violent protests are not necessary".*[77]

142. Clearly, the media statement reflects a policy of the SABC, as a whole. Whether it is seen as a policy or an editorial decision is, however, of no moment, as whatever "*it*" is, is being implemented apace, and is having enormous adverse consequences for the Republic, both in terms of what the public sees and the fate of the SABC's personnel.[78]

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[75] AA page 238 para 9

[76] RA page 331 para 37

[77] "FA3" p 115

[78] RA page 331 para 39

No defence in relation to majority of censorship decisions

143. No opposition, defences or justifications are mobilised in respect of any of the censorship decisions, bar the Policy.

144. To the extent that this lack of opposition stems from an assertion that no cause of action exists outside of the Policy or media statement, the SABC fundamentally misconstrues the HSF's case. The HSF did not challenge merely the media statement or the Policy, but acted, prudently, to challenge what appeared to be undue interference with, and political partisanship of, the public broadcaster.

145. These actions, which far exceeded the stated effect of the Policy, on the SABC's version, combined with the statements of Motsoeneng,[79] made it necessary for the HSF to ensure that effective relief was sought so as to safeguard the independence of the SABC and compliance with its especial role as the public broadcaster, and deal with a wide variety of unlawful conduct emanating from the public broadcaster.

146. It would be cold comfort to the HSF (and the Republic) for the media statement or the Policy to be overturned, only for the SABC to implement a parallel policy, iteration of the Policy or censorship decision going forward (which would fall outside of the scope of a narrow challenge only to the media statement), or not to implement any specific policy but simply persist with its illicit practices.

147. To the extent that the SABC has elected not to oppose or put up any case in relation to the censorship decisions, this must be seen as acquiescence in

[79] FA p 120 paras [120 - 121]

the HSF's case that these censorship decisions are unlawful and cannot be justified.

148. Accordingly, the relief sought by the HSF in relation to these censorship decisions falls to be granted.

THE ICASA PROCEEDINGS

The question of internal remedies does not arise

149. Part A is an application for urgent relief, and not a review (under PAJA or otherwise). The question of exhaustion of internal remedies thus does not arise. In any event, as Part B is a principle of legality review, there is no peremptory requirement to exhaust internal remedies as contained in section 7(2) of PAJA. Our courts have held that the mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted.[80] There must be a clear legislative or contractual intention to that effect.[81] Even then, there is no general principle at common law that an aggrieved person may not go to court "*while there is hope of extra-judicial redress*".[82]

150. In addition, our courts have held that the existence of a fundamental illegality does away with the common law duty to exhaust internal remedies

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[80] *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 503B. See also Hoexter, Administrative law in South Africa, First Edition, 2007 ("**Hoexter**") at page 479

[81] *Jockey Club of South Africa v Feldman* 1942 AD 340 at 351 -2. See also *Ntame v MEC for Social Development, Eastern Cape* 2005 (6) SA 248 (E) at paragraph 32 where Plasket J found (in the context of section 10 of the Social Assistance Act, 1992) that nothing in that act pointed to an obligation on the aggrieved party to exhaust the internal remedy in question before approaching a court

[82] Van den Heever JA in *Bindura Town Management Board v Desai & Co 1953* (1) SA 38 (A) at 362H. See also Hoexter at page 479

altogether.[83] A court will condone a failure to pursue an available remedy where the remedy is illusory or inadequate.[84] As set forth below, ICASA has already handed down its order which the SABC has no intention of obeying.

151. It is both unrealistic and unjustifiable to expect an aggrieved person to pursue every possible avenue provided for by law, such as recourse to a Chapter 9 institution such as the Public Protector or ICASA, before approaching the courts for relief.[85] In the context of deciding whether the applicant was under a duty to exhaust internal remedies, De Wet J in *Golube v Oosthuizen and another*[86] observed that "*the mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies*".

152. The HSF does not bring these proceedings as an alternative to, or as a repetition of, the proceedings currently before ICASA. Substantially different relief is sought, relating to a different cause of action, where both the relief sought and cause of action fall within this Honourable Court's jurisdiction.

153. In any event, as set forth above, there is no obligation on the HSF to approach a Chapter 9 institution instead of a court. ICASA exists as an additional remedy in certain circumstances. The HSF is not a party to the ICASA proceedings.

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[83] See Lawrence Baxter, Administrative Law (1984) at p 723. See also Daniel Malan Pretorius "The Wisdom of Solomon: The Obligation to Exhaust Domestic Remedies in South African Administrative Law" (1999) 116 SALJ at p 125. The illegality need not even be fundamental: for example, in *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA (T) at 372G-H, Southwood J noted that the duty will 'seldom be upheld', especially where the applicant's complaint is the illegality of a decision

[84] See *Mahlaela v De Beer NO* 1986 (4) SA 782 (T). See also Hoexter at p 479

[85] Hoexter at p 480; [2005] 2 All SA 429 (E)

[86] 1955 (3) SA 1 (T), 4F-G

154. In any event, given the time periods involved, ICASA may offer no effective relief inasmuch as Part A is concerned.

155. The opposing respondents' reliance on ICASA processes is also disingenuous, as ICASA has already declared the Policy unlawful, and has ordered it be set aside, with retrospective effect. The SABC's reaction has been to state that no entity can tell it how to operate, it will take the matter to the Constitutional Court if necessary, ICASA's findings are not binding and there will be no change in the SABC's implementation of the Policy.

156. Now to suggest that the ICASA hearing disposes of urgency and that this court should not entertain the urgent interdict application[87] is thus a remarkable proposition, and one indicative only of a desire to preserve an unlawful Policy for as long as possible. Having rejected ICASA's findings and made it clear that they will not be abiding by them, it does not lie in the mouth of the opposing respondents to invoke the ICASA process in their aid. To force the applicant go through the motions of internal processes (which, in any event, do not even amount to a true internal remedy vis-à-vis the application) is an exercise in deflection and delay. These are the same respondents who refuse to abide by the ICASA Order / remedy, and who through their conduct have demonstrated that the ICASA Order / remedy is illusionary, whilst cynically and simultaneously claiming that ICASA is the appropriate body to deal with the issues raised in this application.

157. Whether or not the ICASA proceedings constitute a veritable internal remedy, our courts have, in the past (*albeit* in the context of PAJA), resisted the temptation of dismissing a case of national interest and importance on a

[87] AA p 240 para 20

technical ground.[88] There is no reason why the same resistance should not apply to internal remedies under the principle of legality and the common law. If any doubt exists in the realm of internal remedies under PAJA or the common law, our courts generally incline to an interpretation of the facts and the law which that promotes, rather than hampers, access to court.[89] This case, with respect, screams out for that inclination.

Concurrent jurisdiction

158. At best for the respondents, ICASA enjoys concurrent jurisdiction with this Honourable Court over those aspects of the Broadcasting Act which are regulated by ICASA.

159. The opposing respondents state, at paragraph 20 of the Answering Affidavit, that "*there is no urgency in entertaining this matter more particularly that it is already attended to by the ICASA whose function and authority is to regulate the SABC's licence*". The opposing respondents state further, at paragraph 83 of the Answering Affidavit, that there was no "*reason for the applicant to come to the above Honourable Court, more particularly [because] the matter is being handled by a competent body with a specialised authority to deal with the matter in terms of legislation*". Consequently, so the argument goes, "*the SABC was correct in saying that it should await the outcome of the ICASA matter, which order has now been handed down. There was no basis upon which the applicant had to approach the above Honourable Court*".

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[88] *Earthlife Africa v Director General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 C paras 24 and 32

[89] *Ibid* at para 44

160. First, an argument which suggests that this Court should defer to ICASA and allow any challenge to the Policy / censorship decisions to be dealt with exclusively by that body is misconceived. The Court in this matter clearly has jurisdiction and it is, as a general principle and in the absence of a statutory or constitutional impediment, not entitled to decline to hear cases properly brought before it in the exercise of its jurisdiction.[90] Nothing in the empowering legislation of ICASA excludes the jurisdiction of the Court in preference to ICASA and this Court should be loathe to defer to ICASA in the present circumstances. This is particularly so where, as here, the entirety of the case (including the relief sought) made out before Court could not be finally determined before ICASA. If preference is afforded to ICASA in those circumstances, the Court would be acting contrary to section 34 of the Constitution.

161. Second, there is a final determination by ICASA. The respondents have unequivocally stated that they have no intention to abide by the ICASA Order, pending the final outcome of a threatened review of that Order. The ICASA Order has thus been rendered ineffective by the respondents, and any reliance on the ICASA proceedings by the respondents is plainly illusory, contradictory, and self-serving. The opposing respondents, in any event, cannot have it both ways. They cannot both fail to confirm that they will implement the ICASA Order in full *and* assert that the ICASA process is a relevant internal remedy which can give substantive relief which would substitute for the interim relief sought in this application. It is plain that the

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[90] *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others 2013 (5) SA 484 (SCA)*

opposing respondents are simply trying to contrive a situation where any and all determinations of the legality of their conduct are perpetually delayed.

162. This Honourable Court is seized with the matter and has the necessary jurisdiction to grant the urgent relief sought by the applicant. Indeed, as we now turn to highlight, between now and the election it is imperative for this Court to decide on the issues presented in this matter, and to arrest the unlawful Policy and its implementation by the respondents.

IMPERATIVE FOR INTERIM RELIEF

Urgency [91]

163. The respondents argue that there is no urgency in this matter as these proceedings were launched a month after the proceedings before ICASA were launched and over a month after the media statement was released. It is submitted that the respondents have misconstrued the test for urgency in this matter.

164. The media statement was released on 26 May 2016. These proceedings were launched three court days later on 1 July 2016. During the weeks between when the media statement was released and these proceedings were launched, the SABC attempted to clarify its Policy (as seen in annex "**FA5**" of the founding affidavit). There was, however, still much confusion as to how the Policy would actually be implemented. It is our submission that it was not the Policy in itself that triggered these proceedings, but rather the implementation of the Policy. The applicant therefore had to postpone the

[91] FA p 72 para 201 - p 73 para 206.

launching of these proceedings in order to determine and analyse how the SABC would be implementing the Policy.

165. Furthermore, the Tshwane, KwaZulu-Natal, Cape Town and Right2Know protests all occurred during the time between when the media statement was released and these proceedings were launched. It was imperative that the SABC's lack of sufficient coverage of these protests be included in the applicant's founding papers as this formed the basis of this application. Until the applicant could determine the exact manner in which the Policy was to be implemented, it would have been premature to approach this Honourable Court for temporary relief. This application was thus launched as soon as possible after it was clear how the respondents would be implementing the Policy.

166. The respondents further argue that these proceedings are not urgent because the matter has already been brought before the CCC of ICASA. It is respectfully submitted that there is no reason why the applicant should be prevented from seeking relief before this Honourable Court. There is no obligation on the applicant to exhaust every conceivable avenue of redress, as the CCC of ICASA (much like the Public Protector) is merely *a* forum that the litigant has the option of turning to, as is this Honourable Court.

167. In *Gcaba v Minister of Safety and Security and Others*[92] the Constitutional Court held, in the context of the labour disputes, that when speaking of a court for labour and employment disputes, one "*refers to labour- and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts, like the*

[92] 2010 (1) SA 238 (CC)

High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies."[93]

168. Similarly, the CCC of ICASA is created by the ICASA Act and may only hand down certain remedies as specified in section 17E (2) - (4) of the ICASA Act. Therefore any remedy not provided for in the ICASA Act, but which is available to a litigant in common law, may be sought from the courts. The relief sought by the applicant, such as an interdict or review and setting aside of the Policy, are not permissibly granted by ICASA under the ICASA Act.

169. Furthermore, the second respondent has stated to the media that the SABC will not abide by ICASA's ruling. Such a statement only exacerbates the urgency of these proceedings. It is clear that the SABC will not comply with ICASA's ruling and does not consider the ruling binding on it. The SABC has not only fully implemented and continues to implement the Policy, but it also has used the Policy to dismiss its detractors from the SABC: the journalists who were dismissed on 18 July 2016.

170. The applicant has acted in the most prudent manner in launching this litigation.

171. As per the Court in *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*:[94]

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[93] 2010 (1) SA 238 (CC) at para 73. See also *Steenkamp and Others v Edcon Ltd* 2016 (3) SA 251 (CC) at para 52

[94] 2011 JDR 1832 (GSJ) para [9]

> "*The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application*" (emphasis added).

172. In the absence of urgent interim relief, the applicants will not be afforded substantial redress in due course. Although the Policy may, eventually, after years-long gauntlet of appeals, be withdrawn, until such time – and importantly, in the lead up to the local elections in early August – the SABC will be permitted to censor the news and withhold visuals of violent public protests, thereby infringing the public's rights to freedom of expression, transparency and information. The risk of further harm should be mitigated without any further delay.

173. Accordingly, urgent interim relief is required to guard against irreparable harm.

Irreparable Harm[95]

174. The SABC is entrusted with an enormously important power in our constitutional democracy. As the public broadcaster, the SABC is the first and only source of information for millions of citizens in our country and for as long as it remains dysfunctional, it will be unable to fulfil its constitutional and legislative duty.[96] By shirking its duty to the public, the SABC is unlawfully depriving the public of information it requires to make informed decisions.

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[95] FA p 68 para 181 - p 70 para 190

[96] *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) at para 49

175. By withholding vital information about events of political and national significance, the public remains ignorant and unaware of this information. The public is continuously and on a daily basis being disempowered with every instance of censorship committed by the respondents.

176. Every day that the Policy is implemented or the censorship decision perpetuated is a day on which the public is deprived of vital information of political and national significance. Each instance of significant and newsworthy information that is deliberately withheld from public disclosure is an instance of the South African electorate and the broader populace effectively being kept in the dark about important issues of the day. Worse still, each moment that the public remains uninformed and ignorant of significant events of clear national importance due to the intentional suppression of information through the Policy is, effectively, lost and cannot be recovered in due course.

177. It would be of little assistance, and indeed cold comfort, to learn of important factual developments around protest action in South Africa days, weeks or even months after the action has ceased and any consequences thereof have already been felt. It is simply not good enough for the public only to be informed of important developments after the fact or to be 'caught up' on relevant news later on, and it is clear that the on-going harm that inherently flows from censorship could thus never be repaired in due course should the censorship decisions ultimately be uplifted.

178. This withholding and suppression of information is causing irreparable harm to the public and that the urgent relief sought by the applicants is necessary to prevent even further harm.

179. The abuse of such enormous powers has implications at a national level, and in many instances an abuse cannot be undone once it is performed. Such irreversible consequences alone constitute irreparable harm.[97]

180. The Constitutional Court has held that "*freedom of expression to its fullest extent during elections enhances, and does not diminish, the right to free and fair elections*".[98] Due to the fact that the local elections are less than a month away, there is a very real apprehension of irreparable harm to the voting public and the Republic's constitutional democracy. A major portion of the electorate will be forced to exercise their vote without having been informed of events of national importance.

181. In considering interim relief against the exercise of a statutory power, the Constitutional Court has previously noted that irreparable harm results where an action has "*irreparable consequences and an immediate and final effect in the sense stated in* Metlika Trading".[99]

182. *Metlika Trading*[100] held that orders that were "*intended to have immediate effect, they will not be reconsidered at the trial and will not be reconsidered on the same facts by the court a quo…are in effect final orders*." Whilst dealing primarily with whether an interim order was nonetheless appealable, the pronouncements are useful as to what constitutes irreparable harm.

183. If the actions result in irreparable consequences, which will or cannot be reconsidered, then this renders such irreparable consequences a class of

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[97] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) ("***ITAC***") at para [58]

[98] *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) at para 135

[99] *ITAC* at para [58]

[100] *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* 2005 (3) SA (1) (SCA), para [24]

irreparable harm. The Constitutional Court has held that, even where judicial intervention may intrude into the domain of the executive, a Court may do so "*when irreparable harm is likely to ensue if interdictory relief is not granted*".[101]

184. The SABC's Policy results in editorial decisions that have an immediate and irreparable effect. Furthermore, the continued harm caused by the SABC's insistence on enforcing its Policy is not reversible in nature. One can never undo the damage caused by not providing accurate and contemporaneous news reporting – the effects on democracy, on the right to vote, on freedom of expression and the right to receive information, are accordingly ongoing and can only be arrested now (and continuing and future harm prevented) by the order the applicants seek from this Court urgently.

185. The SABC's Policy is causing irreparable harm to the Republic, and interim relief is urgently required to mitigate such harm in the immediate future.

No alternative remedy[102]

186. In light of the nature of the harm traversed above, there is clearly no alternative remedy.

187. It is submitted that the only remedy available is to interdict the implementation of the Policy and its implementation which allows the SABC unlawfully to censor and withhold the free flow of information to the public so as to prevent further harm caused by unlawful censorship.

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[101] *ITAC* at para [101].

[102] FA p 71 para 198 - 200.

188. In any event, having regard to the statements made by Motsoeneng and the SABC in response to the ICASA ruling, it is clear that the SABC will not withdraw its Policy even though ICASA has ordered them to do so. There is thus no effective alternative remedy. Before the upcoming elections the order sought from this Court remains the only realistic means available urgently to stop the unconstitutional attack on media freedom and the public's right to receive information.

189. And, in any event, the existence of any power by ICASA to order the respondents to withdraw their Policy does not oust the jurisdiction and power of this Court to grant the relief sought in this application.

Balance of convenience[103]

190. The harm caused by the SABC's Policy is serious and irreparable and will result in grave consequences for the country. On the other hand, no conceivable harm could be caused to the respondents by the granting of the interim relief sought.

191. Should the interim relief not be granted, however, the harm identified herein will become exacerbated and will result in a major portion of society exercising their right to vote without having access to information of national importance which may affect the manner in which their right to vote is exercised.

192. The necessity for the interim relief outweighs any potential adverse effects (of which, it is submitted, there are none) on the respondents should Part A of this application be granted.

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[103] FA p 70 para 191 - p 71 para 197

193. In the circumstances, I respectfully submit that the strength of the applicant's rights, the limited impact on the respondents should the relief be granted, and the devastating and irreparable harm that will be suffered by the applicants and the public should it not, all point to the need for the relief sought to be granted. The applicants therefore submit that the balance of convenience overwhelmingly favours the granting of the relief sought in this application.

COMPARATIVE JURISPRUDENCE

194. As we have indicated above, press freedom and freedom of expression constitute a cornerstone of the realisation of the Constitution's principles of democracy, rule of law, accountability, transparency and good governance.

195. South Africa's Constitution is not alone in seeing these principles as foundational to the constitutional project and the very promise of democracy. These principles have been repeatedly confirmed by various international and regional courts, tribunals and bodies, continental and regional bodies within Africa, and domestic courts across the world, aside from other actors.

196. For example, the African Commission on Human and Peoples' Rights ("**African Commission**") stated in *Scanlen & Holderness v. Zimbabwe* that:[104]

> "*[P]ublic order in a democratic society demands the greatest possible amount of information. It is the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole that ensures this public order.*" (emphasis added)

[104] African Commission on Human and Peoples' Rights ("ACHPR"), Scanlen & Holderness v. Zimbabwe, Comm. No. 297/05 (2009), par. 110

197. In *Law Offices of Ghazi Suleiman v. Sudan*,[105] the African Commission cited the Inter-American Court of Human Rights' opinion in Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism as follows:[106]

> "*[F]reedom of expression is a cornerstone upon which the very existence of a society rests. It is indispensable for the formation of public opinion. It is also a conditio sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.*" (emphases added)

198. In *Kenneth Good v. Republic of Botswana*,[107] the African Commission cited *Handyside v. the United Kingdom*, where the European Court of Human Rights ("**European Court**") said that free expression:[108]

> "*constitutes one of the essential foundations of such a [democratic] society, one of the basic working conditions for its progress and for the development of every man. [...] It is applicable not only to ' information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.*" (emphasis added)

199. The vital role the media has to play in the circulation of information and ideas in a democratic society has been confirmed time and again by the European Court. In *Lingens v Austria* the Court emphasised the link between a free press and free political debate in a democratic society:[109]

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[105] ACHPR, *Law Offices of Ghazi Suleiman v. Sudan*, Comm. No. 228/99 (2003), par. 49

[106] Inter-American Court of Human Rights ("IACtHR"), *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 (1985), par. 70

[107] ACHPR, *Kenneth Good v. Republic of Botswana*, Comm. No. 313/05 (2010), par. 197

[108] European Court of Human Rights ("ECHR"), *Handyside v. The United Kingdom*, App. No. 5493/72 (1976), par. 49

[109] ECHR, *Lingens v. Austria*, App. No. 9715/82 (1986), par. 42

> "*Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.*" (emphases added)

200. The United Nations Human Rights Committee made very clear in its General Comment 34, which is an authoritative statement of the Committee's decisions regarding the freedoms of opinion and expression, that a free press is essential for a democratic society:[110]

> "*A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.*
>
> *[…]*
>
> *The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint.*" (emphasis added)

201. Also in its decisions, the UN Human Rights Committee has stressed[111]

> "*the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media*".

202. So too, UNESCO has stated that "freedom of expression and access to information are crucial building blocks for democracy, development and dialogue."[112]

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[110] General Comment 34, pars. 13 & 20

[111] UN Human Rights Committee, *Rafael Marques de Morais v. Angola*, Comm. No. 1128/2002 (2005), par. 6.8

[112] UNESCO, *Pressing for Freedom*, (2013), p. 7, available at http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/pressing-for-freedom-20-years-of-world-press-freedom-day/

203. Continental bodies have also emphasised that the free circulation of information, in which the press performs a crucial role, is a crucial element for democracy within Africa.

204. The African Commission's Declaration of Principles on Freedom of Expression in Africa, adopted by Resolution in October 2002[113], underlines this principle as follows:[114]

> "*Considering the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy.*
>
> *[…]*
>
> *[T]he African Commission on Human and Peoples' Rights declares that:*
>
> ***I The Guarantee of Freedom of Expression***
>
> *1. Freedom of expression and information, including the right to seek, receive and impart information and ideas […] is a fundamental and inalienable human right and an indispensable component of democracy.*" (emphasis added)

205. The African Union's African Charter on Democracy, Elections and Governance calls on State Parties to commit themselves to "*[p]romoting freedom of expression, in particular freedom of the press,*" so as to "*advance political, economic, and social governance*"[115].

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[113] Resolution 222 to modify the Declaration of Principles on Freedom of Expression to include Access to Information and Request for a Commemorative Day on Freedom of Information, available at http://www.achpr.org/sessions/51st/resolutions/222/

[114] *Id.* at Preamble &Article 1(1)

[115] African Union, African Charter on Democracy, Elections and Governance, Article 27(8)

206. The Resolution to modify the Declaration of Principles on Freedom of Expression, passed by the African Commission in May of 2012, has similarly acknowledged the central role of free access to information:[116]

> "*Underlining that access to information is essential for the recognition and achievement of every person's civil, political and socio-economic rights, and as a mechanism to promote democratic accountability, and good governance[.]*"

207. Likewise, African regional communities have acknowledged the importance of press freedom for democracy and good governance in a number of its protocols. For example, the Economic Community of West African States ("**ECOWAS**"), in its Protocol on democracy and good governance lists as one of its constitutional principles that "freedom of the press shall be guaranteed".[117]

208. Given the established importance at the international and regional level of the principle to a proper functioning democracy, it is little surprise to find the principle of a free and independent media respected, promoted, protected and fulfilled in domestic legal systems around the world, including within Africa, as a central component of democracy.

209. The United States Supreme Court in the landmark defamation case of *New York Times v Sullivan* 376 US 254 (1964) emphasised the fundamental importance of political speech in the context of a national commitment that "debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly

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[116] African Commission, Resolution to Modify the Declaration of Principles on Freedom of Expression to Include Access to Information, Resolution 222, Preamble

[117] Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security, Art. 1(k), available at http://www.comm.ecowas.int/sec/en/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf

sharp attacks on government and public officials". In his concurrence in *New York Times v. United States* (403 U.S. 713, 717), Justice Black held that:

> "*The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.*"

210. Following the lead of the United States, courts in most democracies agree that political expression and democratic accountability and participation are at the core of the protection of freedom of expression.[118] As the English courts have stated:[119]f

> "*In a free and democratic society it is almost too obvious to need stating that those who hold public office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind*".

211. We highlight the regional and comparative law to stress that South Africa's constitutional protections of freedom of expression echo the internationally accepted importance of that freedom to the very notion of democracy itself. We also stress that there is good reason for this, since it is accepted, as put by the South African High Court in *Mandela v Falati* 1995 (1) SA 251 (W), 259, that while "*[i]n a free society all freedoms are important, … they are not equally important. Political philosophers are agreed about the primacy of the freedom of speech. It is the freedom upon which all the other freedoms depend; it is the freedom without which the others would not long endure*". The same point was expressed by the United States Supreme Court in *Palko*

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[118] See, for example, *Lingens v Austria* (1986) 8 EHRR 407 (European Court of Human Rights); *Theophanous v Herald and Weekly Times Ltd* (1993-4) 182 CLR 104 (Australia)

[119] *Derbyshire County Council v Times Newspaper* [1992] 3 All ER 65, 80 (CA), quoting *Hector v Attorney General of Antigua and Barbuda* [1990] 2 All ER 103, 106

v Connecticut 302 US 319, 327 (1937), finding that freedom of expression is "*the matrix, the indispensable condition on which nearly every other freedom depends.*"

212. Accordingly, when considering the justifications advanced by the respondents for the impugned policy, a most stringent and urgent scrutiny is called for. For the reasons given elsewhere in these submissions, those justifications are woeful. What makes them all the more lamentable is that they are advanced by a media house itself (in the form of the national broadcaster – which has heightened obligations to protect and give effect to the right of freedom of expression). They are an affront not only to South Africa's domestic constitutional obligations, but would also be an embarrassment to and a violation of South Africa's regional commitments to freedom of expression. They would not, with respect, pass muster in any self-respecting constitutional democracy.

JUSTIFICATION FOR PUNITIVE COSTS[120]

213. The opposing respondents' defences are so transparently without merit that their opposition to the Part A relief (and their foot-dragging efforts to avoid the hearing of this matter on the urgent roll this week) was clearly a stratagem to delay the administration of justice and vex the HSF. This correspondence before this Court and the applicants' replying affidavit demonstrates that the opposing respondents failed not only to meet any of the reasonable deadlines set forth in the notice of motion, but also the deadlines for filing answering papers prescribed by the opposing respondents themselves.

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[120] RA p 344 para 87 - 92

214. They are no ordinary litigants: our courts have repeatedly confirmed that the commencement, defence and conduct of litigation by the government or its departments constitute the exercise of public power. This power must therefore be wielded with great care and in a manner consistent with the public interest.[121] It certainly does not permit the State – here represented by the respondents – to cynically place contradictory versions before the Court regarding the import of ICASA as a viable internal remedy[122] and to attempt to delay the proceedings by failing to comply with the trite rules on urgent proceedings in this division.

215. The respondents' conduct in litigation – and the decision whether to advance a particular defence or take a particular legal point – must be informed by the values of the Constitution and must seek to promote (rather than frustrate) the just determination of legal disputes.[123]

216. It is therefore improper for an organ of state to take an unfounded, technical point to defeat a valid claim. As the Supreme Court of Appeal held in the *Ngxuza* case:[124]

> "*When an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which*

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[121] See, generally, I Gough 'Government's Duty to be a Model Litigant' (May 2012) *De Rebus* 43–5. For an example of a case where the court suggested that there are limits to how the State litigates, see *Centre for Child Law v MEC for Education*, *Gauteng* 2008 (1) SA 223 (T) at 225G–226A, where Murphy J criticised what he described as 'the bureaucratic prevarication intrinsic to the department's litigation strategy', adding that some government departments appear to defend litigation unnecessarily, when such resources could be better applied elsewhere. See also the SCA's criticism of the State's litigation conduct in *Abdi and Another v Minister of Home Affairs* 2011 (3) SA 37 (SCA)

[122] *Reuters Group Plc and Others v Viljoen NO and Others* 2001 (2) SACR 519 (C) at paras 43 to 47: "*It is indeed a sad day when senior members of the prosecuting authority themselves make contradictory statements and mislead the Court*"

[123] See *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC) at para 49; *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at paras 78-80

[124] *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at para 15

> *commands all organs of State to be loyal to the Constitution and requires that public administration be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard.*"

217. The opposing respondents' conduct was plainly designed not only to prejudice the HSF, but also, transparently, to push out the hearing of this manifestly urgent matter.

218. The opposing respondents' conduct, both in the adoption/implementation of the Policy and in their approach to this litigation, does violence to their duties to protect and promote the Constitution and the rights in the Bill of Rights and to fulfil their statutory mandate. Moreover, as officers and organs of State, their conduct is contrary to their constitutional mandate and duty, under section 165(4) of the Constitution, to assist and protect the Courts and ensure access to Courts (where they have attempted to frustrate the HSF's right meaningfully to access Court).

219. The above, the HSF submits, warrants the award of punitive costs on the scale as between attorney and own client, including the costs of two counsel.

CONCLUSIONS

220. There is no basis in law or fact for the imposition or implementation of the Policy or the censorship decisions and substantial, irremediable harm will be caused to the public and the Republic should the opposing respondents be allowed to continue to abuse their powers and resources unchecked.

221. The HSF submits that the relief sought in Part A of the notice of motion should be granted, together with punitive costs.

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20 July 2016