

KAGISO MEDIA LIMITED (“Kagiso”) HEREBY MAKES WRITTEN REPRESENTATIONS TO THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ("ICASA") IN RESPONSE TO THE APPLICATION BY THE SOUTH AFRICAN BROADCASTING CORPORATION LIMITED ("SABC") FOR THE AMENDMENT OF ITS LICENCES IN TERMS OF SECTION 22 OF THE BROADCASTING ACT, 1999

07 June 2004

OBJECTION

WRITTEN REPRESENTATIONS OF KAGISO MEDIA LIMITED ("Kagiso") TO THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ("ICASA") IN RESPONSE TO THE APPLICATION BY THE SOUTH AFRICAN BROADCASTING CORPORATION LIMITED ("SABC") FOR THE AMENDMENT OF ITS LICENCES IN TERMS OF SECTION 22 OF THE BROADCASTING ACT, 1999 ("the Broadcasting Act")

1. Introduction

Section 9 of the Broadcasting Act contemplates that the SABC, as a limited corporation, must be reorganised to consist of two operational divisions, namely, a public service division and a commercial service division. The requirements in relation to the public services provided by the SABC are contained in section 10 of the Broadcasting Act, while those in relation to its commercial services are listed in section 11.

Section 22 of the Broadcasting Act provides that:

"(1) The [SABC] must, within six months after the date of commencement of the Broadcasting Amendment Act, 2002, or [1 October 2003], whichever is the later, apply to [ICASA] for such amendments to its existing licences as are necessary in order to reflect the reorganisation of the [SABC] into the public service division and the commercial service division and its related obligations in terms of this Act and the [Independent Broadcasting Authority Act, 1993 ("the IBA Act")].

(2) The relevant provisions of the IBA Act apply with the necessary changes to the applications referred to in subsection (1) but, irrespective of the contents of the application of the [SABC], [ICASA] may impose any appropriate licence conditions which are necessary in order to reflect the reorganisation of the [SABC] into the public service division and the commercial service division and its related obligations in terms of this Act and the IBA Act." (our emphasis)

ICASA published Government Notice 745 of 2004 in *Government Gazette* No. 26318 of 30 April 2004, stating that it has received an application for amendment to the SABC's broadcasting licences in accordance with the provisions of section 22 of the Broadcasting Act.

The SABC's application was originally submitted to ICASA on 31 March 2004. Additional insertions, providing a financial overview of the SABC, were submitted to

ICASA on 20 May 2004 ("**the SABC Application**"). The SABC Application contemplates a reorganisation of the SABC's services into a Public Service Division and a Commercial Service Division and the consequent amendment of the SABC's licences for sound broadcasting services and television broadcasting services. The deadline for the submission of representations to ICASA on the SABC Application has been extended to 9 June 2004.

Kagiso is an interested party in respect of the SABC Application by virtue of its shareholding in a number of private sound broadcasting licensees in South Africa (namely Jacaranda FM (Pty) Limited, East Coast Radio (Pty) Limited and Radio Oranje (Pty) Limited), as well as its equity interest in Radmark (Pty) Limited.

While section 9 of the Broadcasting Act specifically provides for a reorganisation of the SABC, Kagiso objects to the SABC Application on the basis of the submissions contained in these representations. In particular, Kagiso opposes the SABC Application based on the manner in which the SABC proposes implementing its reorganisation.

2. Proposals contained in the SABC Application

The following proposals and/or statements are included in the SABC Application:

the Commercial Service Division of the SABC will incorporate the sound broadcasting services of 5FM, Good Hope FM and Metro FM, as well as the television channel SABC3. The Public Service Division will then administer the remaining sound and television broadcasting services of the SABC (pages 46, 90-1 of the SABC Application);

the SABC will submit to ICASA its policies relating to compliance with the requirements of sections 10 and 11 of the Broadcasting Act. The fact that the SABC enjoys freedom of expression and journalistic, creative and programming independence implies that it is only the SABC's policies which are subject to review by ICASA, and not the SABC's programming content (pages 42-4 of the SABC Application); and

the licence conditions which should be imposed by ICASA on the SABC's broadcasting services "*should only reflect the broad obligations that are relevant to reorganisation*". The SABC's commercial services are distinct from other commercial services, and accordingly "*should be licensed in a different manner from other commercial broadcasters*" (pages 100-2). Extensive and onerous conditions relating to programme quantity and specificity should not be imposed on the SABC (page 104 of the SABC Application).

3. General policy considerations

Kagiso submits that the manner in which reorganisation of the SABC takes place must be in accordance with general policy considerations relating to broadcasting. These policy considerations include the principles laid down in section 2 of the IBA Act, as well as in the Green Paper for Public Discussion on Broadcasting Policy ("**the Green Paper**") and the White Paper on Broadcasting Policy ("**the White Paper**") which preceded the promulgation of the Broadcasting Act. In addition, the Broadcasting Act itself lays down specific policy criteria to be followed by the SABC in its reorganisation.

3.1 section 2 of the IBA Act

The objectives laid down in section 2 of the IBA Act for the regulation of broadcasting activities and which are relevant to the SABC Application are as follows:

to "promote the provision of a diverse range of sound and television broadcasting services on a national, regional and local level which, when viewed collectively, cater for all language and cultural groups and provide entertainment, education and information" (section 2(a));

to promote the development of both public and commercial broadcasting services which are responsive to the needs of the public (section 2(b));

to promote fair competition between broadcasting licensees (section 2(o)); and

to promote the stability of the broadcasting industry (section 2(r)).

3.2 the Green Paper

The Green Paper looked at the South African broadcasting industry and set out key policy considerations aimed at assisting the government in formulating legislation on broadcasting. Section 28(8)(b) of the IBA Act required the Independent Broadcasting Authority to conduct a Triple Inquiry into the Public Broadcasting Service, Cross Media Control, Local Content and South African Music. In terms of the Triple Inquiry Report (reported on in the Green Paper) it was recommended that fairness and proportionality be ensured in the broadcasting industry, competitive playing fields between broadcasters be levelled, diversity and national cultural identity be promoted, the demands of the South African public be met and competition from private broadcasters be encouraged in light of the past SABC monopoly. The Triple Inquiry Report also considered the accountability of public broadcasting services to the public.

3.3 the White Paper

Many of the principles contained in the Green Paper were expanded upon in the White Paper. The White Paper notes that the reformulation of the broadcasting system must be based on a number of principles, including constitutional principles (such as an entitlement to choice and diversity) and public interest (in that broadcasting should be available to all South Africans and cater for the diverse needs of South Africa's population).

As mentioned on page 93 of the SABC Application, reorganisation of the SABC provided for under section 9 of the Broadcasting Act has as its genesis the White Paper. In relation to the SABC, it was stated in the White Paper that:

"[t]he government does not wish to leave the commercial activities of the SABC unregulated, with the attendant risk that it will have considerable advantages over other private broadcasters. Accordingly, the government will restructure the SABC in order to achieve tangible internal separation of commercial from public broadcast activities ..." (our emphasis).

3.4 the Broadcasting Act

As mentioned above, the requirements for a commercial service of the SABC are laid down in section 11 of the Broadcasting Act, and include that:

"(a) [The commercial services provided by the SABC must] be subject to the same policy and regulatory structures as outlined in [the Broadcasting Act] for commercial broadcasting services" (our emphasis).

Chapter V of the Broadcasting Act is headed "Commercial Broadcasting Services". Section 30 of the Broadcasting Act lists the objectives of commercial broadcasting services, and provides as follows:

- "(1) Commercial broadcasting services when viewed collectively-*
- (a) must as a whole provide a diverse range of programming addressing a wide section of the South African public;*
 - (b) must provide, as a whole, programming in all South African official languages;*
 - (c) may provide programming in languages other than South African official languages, where [ICASA] is convinced that such services can be commercially viable;*
 - (d) must within a reasonable period be extended to all South Africans and provide comprehensive coverage of the areas which they are licensed to serve. ..."* (our emphasis)

In light of the provisions of section 11(a) of the Broadcasting Act, it is submitted that the objectives espoused in section 30 must apply equally to any commercial broadcasting services of the SABC.

4. Grounds for objecting to the SABC Application

Kagiso's objections to the SABC Application are based on two legs, namely, the SABC's proposal that it should be licensed in a "different manner" from other commercial broadcasting services; and general policy considerations which will be breached if the SABC Application is implemented in its present form.

4.1 licence conditions for the SABC's commercial broadcasting services

Kagiso reiterates that section 11(a) of the Broadcasting Act states that the SABC's commercial services must be subject to the same policy and regulatory structures which are applied to other commercial broadcasting services. The SABC, however, is proposing that its commercial services be licensed in a "different manner" from other commercial broadcasting services.

It is submitted firstly that the prevailing legislation, and in particular section 11(a) of the Broadcasting Act, does not permit ICASA to license the SABC's commercial broadcasting services in a different manner from other commercial broadcasting services. If the SABC is to introduce commercial broadcasting services, these should be subject to the same terms and conditions imposed on private commercial broadcasting services. Moreover, the White Paper envisaged that the SABC's commercial services should be regulated (see paragraph 3.3 of this submission) in circumstances where the competitive playing fields of broadcasters are levelled.

Secondly, Kagiso submits that the SABC has not advanced adequate reasons in the SABC Application as to why it should be licensed in a "different manner". Furthermore, the "different manner" in which the SABC envisages that it should be licensed is not properly described in the SABC Application. ICASA should obtain clarification from the SABC in this regard.

The licence conditions of private commercial sound broadcasting licensees are specific regarding format and programming content. The SABC states in the SABC Application that it is not for ICASA to prescribe the SABC's programming content, but that ICASA should only review the policies of the SABC.

If the programming content of the SABC's commercial services is not determined by ICASA (on application by each licensee comprising the SABC's Commercial Service Division), the SABC will be free to amend the format and content of its commercial broadcasting services as it sees fit. This runs contrary to section 11(a) of the Broadcasting Act, and further will enable the SABC to be advantaged and compete unfairly with private commercial broadcasting services (see paragraph 4.2 below).

In addition, the SABC Application appears to contemplate that the SABC's commercial broadcasting services should not be subject to local content quotas or employment equity/ transformation objectives prescribed by ICASA. We point out that private commercial broadcasting services are subject to such quotas and objectives. Again, the SABC attempts to reason that ICASA should treat its commercial broadcasting services in a different manner from other commercial broadcasting licensees. As submitted previously, this is contrary to the provisions of section 11(a) of the Broadcasting Act.

4.2 general policy considerations and inevitable consequences of the SABC Application

Kagiso submits that the terms of the SABC Application run contrary to a number of the policy considerations set out in paragraph 3 above and, in particular, the principle enshrined in section 2(o) of the IBA Act that fair competition must be ensured between broadcasting service providers.

The promulgation of the IBA Act and the creation of ICASA comprised part of the government's policy to decentralise the broadcasting industry from a sector characterised by a monopoly broadcaster to a competitive commercial sector, by introducing new players into the broadcasting industry and stimulating investment growth and employment opportunities.

The SABC currently occupies a dominant market position in the broadcasting sector, in that it enjoys a 35% to 45% plus share of the relevant markets (see the definition of a "dominant firm" contained in section 1 of the Competition Act, 1998). It is submitted that a reorganisation of the structure of the SABC in the manner contemplated in the SABC Application is likely to result in the SABC being able to abuse its dominant market position and to effectively foreclose on the ability of other commercial sound broadcasting licensees to compete in the relevant markets.

As a consequence of the proposal that ICASA should only be entitled to review the SABC's policies and not its programming content, the SABC would be able to amend the format of a broadcasting service to suit the specific requirements and target audiences prescribed by marketers and advertisers. In addition, this would leave the SABC free to alter the content and transmission of its national sound broadcasting services along regional lines..

The SABC would thus be in a position to adapt its formats in a manner which would enable it to unfairly compete with private commercial broadcasting services, contrary to the "fair competition" principle laid down in the IBA Act. In addition, enabling the SABC to amend its formats, effectively at will, is not in accordance with the principles contained in sections 2(a) and (b) of the IBA Act, in that diversity within the

broadcasting sector would not be encouraged and the varying needs of the public may not be met.

The inclusion of 5FM, Metro FM and Good Hope FM, along with SABC 3 under the proposed Commercial Services Division means that the SABC will be able to offer marketers a national footprint through both radio and television. This will enhance the SABC's ability to sell its commercial radio offering as a package, together with its commercial television offering. The offering available from private commercial sound broadcasting licensees will thus be emasculated, as no other private commercial broadcaster has access to such an extensive footprint, or to multiple distribution channels and outlets in both audio and visual media..

The proposed reorganisation of the SABC will also enable the SABC to cross-promote its commercial radio broadcasting services on its commercial television channel, and vice-versa. The SABC's commercial services will also have access to airtime on the corporation's public service television channels. The SABC will thus be able to pool its distribution channels and offer marketers access to a huge footprint through a number of broadcasting services reaching various segments of the population at a minimal or reduced cost. The SABC will be able to gain an unfair advantage over other commercial broadcasting licensees who cannot offer as extensive a footprint, or as many distribution outlets, at low cost.

The SABC currently has significant reach and exposure in the broadcasting sector. By enabling marketers to have access to a national footprint and to cross-promote their products over a number of channels, the SABC's reach and exposure will be unmatched in South Africa. This is likely to result in a violation of both the diversity principle (section 2(a) of the IBA Act) and the fair competition principle (section 2(o) of the IBA Act).

The proposed reorganisation of the SABC will also facilitate networking across the SABC channels, as it argues that ICASA should have no say on its content. In particular, the SABC will be able to duplicate content on its various commercial broadcasting services, reducing its cost base and entrenching its advantage over private commercial radio operators. This will enable the SABC to compete unfairly with other commercial broadcasting licensees. Networking by the SABC in this regard is also likely to constitute a breach of the diversity principle.

In the present severely constrained market conditions, a reorganisation of the SABC along the lines proposed in the SABC Application is likely to perpetuate the SABC's monopoly and render it virtually impossible for competing commercial sound broadcasters to survive in the medium to long term. This will amount to a contravention of a number of principles emphasised in the IBA Act, the Green Paper, the White Paper and the Broadcasting Act. In particular, the "diversity" principle will be breached

in that other commercial broadcasting licences will be precluded from competing in the broadcasting industry. Moreover, it will not be possible to promote stability within the broadcasting sector (section 2(r) of the IBA Act). In addition, the proposed reorganisation as described in the SABC Application is likely to be economically detrimental to the broadcasting activities carried out by private commercial broadcasting licensees, and may also result in unequal treatment of such licensees.

We point out that it could not have been the intention of the legislature, in promulgating section 9 of the Broadcasting Act, that the SABC (as the public broadcaster) should be treated in a different manner from other broadcasting services. (This contention is supported by the quote from the White Paper contained in paragraph 3.3 above.) If the legislature had intended for the public broadcaster to be treated differently, this would render the provisions of the Broadcasting Act subject to constitutional challenge. Moreover, Kagiso submits that, in implementing the provisions of section 9, both ICASA and the SABC must act in accordance with constitutional principles.

A public broadcasting mandate has been imposed on the SABC, described in the Green Paper as the provision of a broadcasting service "*which seeks to cater for all audiences, and all tastes in society irrespective of geographic location, class and cultural background*". The public broadcaster is owned by the public, and is accordingly accountable to the public (chapter 4 of the White Paper). It is submitted that the proposed reorganisation of the SABC, contemplated in the SABC Application, will be contrary to the public mandate given to the SABC, particularly in light of the nature of the commercial broadcasting services proposed to be included in the SABC's Commercial Services Division. If these broadcasting services, having national footprints, are no longer public, it is difficult to see how the SABC will be able to continue to provide public broadcasting services in accordance with its public mandate.

Kagiso also notes that the SABC Application does not contain any promises of performance by the SABC to invest in the growth and development of the broadcasting industry in South Africa. In light of the fact that the SABC is a dominant player in the broadcasting sector, and on the basis of the policy considerations listed in the IBA Act as well as the Green Paper and the White Paper, it is submitted that such promises of performance should be specifically incorporated into the SABC Application.

5. Conclusion

Kagiso submits that ICASA should refuse to approve the SABC Application in its current form, for the following reasons:

- 5.1.1 the proposal that the SABC's commercial broadcasting services should be licensed in a "different manner" to private commercial broadcasting services is not only lacking in detail, but is contrary to the provisions of the Broadcasting Act;

general policy considerations which must be taken into account by ICASA when assessing the proposed reorganisation of the SABC include the diversity, fair competition and stability principles espoused in the IBA Act, the Green Paper, the White Paper and the Broadcasting Act. It is submitted that the proposed reorganisation of the SABC contemplated in the SABC Application will entrench the SABC's past monopoly and will enable it to unfairly compete with other commercial broadcasting licensees. Furthermore, the current terms of the SABC Application run contrary to the diversity and stability principles (sections 2(a) and (r) of the IBA Act respectively.

Kagiso trusts that ICASA will take account of the objections raised in this submission, and requests that it be permitted to make further representations at any oral hearings to be conducted by ICASA in relation to the SABC Application.

DATED at JOHANNESBURG on this 7th day of JUNE 2004.

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