



**RESPONSE TO**

**MISA's SUBMISSION**

**ON**

**SABC's SECTION 22 LICENCE**

**AMENDMENT APPLICATION**

**19 JULY 2004**

## **1 Introduction**

- 1.1 On 30 April 2004 the Independent Communications Authority of South Africa (ICASA) published in Government Gazette no. 26318 the South African Broadcasting Corporation (SABC) application for an amendment to its broadcasting licences (licence amendment application) as required in terms of section 22 of the Broadcasting Act no. of 1999, as amended (the Broadcasting Act).
- 1.2 On 19 May 2004 ICASA published a subsequent Government Gazette no. 26380 inviting interested parties to make submissions on the SABC'S licences amendment application including the financial information that was not included for scrutiny by interested parties during the period prescribed in the above Government Gazette.
- 1.3 Interested parties had until 9 June 2004 to submit their representations to ICASA and the SABC.
- 1.4 We set out hereunder our comments in respect of the representation received from MISA.
- 1.5 Initially, we must state that the SABC fully supports the view expressed by MISA that the public broadcaster's public funding should be increased in order to meet the public service mandate. The SABC has over the years been asserting this view and will continue to do so, given the financial difficulties it faces. The reorganization of the SABC into public and commercial divisions would not necessarily resolve the financial difficulties of the SABC in meeting its public service mandate.

## **2 Policy framework for public broadcasting**

The policy framework for public broadcasting in South Africa has been under development for over a decade. This policy framework seeks to

establish the role and values of the public broadcaster within the South African broadcasting environment.

Many of the submissions address this policy framework. The key argument in these submissions is in essence the following: broadcasting policy places extraordinary obligations on the SABC because it is a public broadcaster and in order to ensure these obligations are met, the Authority should impose specific licence conditions on the SABC, in excess of what is contained in the licences of commercial operators.

Leaving aside for the moment the parameters of section 22 of the Broadcasting Act, which requires that any licence conditions imposed during this process must be those which are necessary to reflect reorganisation, let us consider the link which is drawn between the SABC's mandate and proposed licence conditions, for it is here that false assumptions are made by various representors. These are:

- that without specific licence conditions, the SABC will have fewer obligations than commercial operators and that it is in the interests of fair competition to set such licence conditions for the SABC
- that licence conditions are required to ensure the SABC delivers on its public mandate.

We will address these in turn.

## **2.1 SABC vs commercial sector obligations**

The first of these assumptions is that without specific licence conditions, the SABC will somehow have fewer obligations than commercial operators. This is patently untrue as with or without specific licence conditions, the SABC's obligations as a public broadcaster far exceed the requirements of the commercial sector.

The SABC agrees with the representations when they cite the Triple Inquiry Report and the White Paper on Broadcasting Policy to demonstrate what is expected of the SABC as a public broadcaster. We are in agreement that our mandate is wide and complex and that more is expected of the SABC than of commercial operators.

The SABC is bound by its Charter to fulfil a wide range of obligations including the following:

- to make services available in all official languages and to be of high quality in all languages
- to reflect the diverse cultural and multilingual nature of South Africa
- to provide significant news and public affairs programming
- to support traditional and contemporary artistic expression
- to provide significant educational programming on topics such as human rights, health, early childhood development, agriculture, culture, religion, justice and commerce.
- to advance the national and public interest
- to include national sports programming as well as minority and developmental sports
- to cater for the spiritual needs of South Africans
- to provide for the needs of the disabled
- to provide programming for children

- to provide programming for youth
- to provide programming for women
- to extend its services throughout the country

No commercial operator is required to fulfil such a broad mandate.

It is, however, precisely because of this mandate that the SABC is granted a unique status, including a somewhat different regulatory regime from other broadcasters, as is captured in the Broadcasting Act.

In this context, the arguments that specific licence conditions are required to ensure fair competition or “balance” the obligations made by the commercial sector, are misleading, and ignore the statutory obligations that the SABC is, in law, enjoined to discharge. The SABC’s ability to compete “unfairly” with the commercial sector is curtailed by its extensive programming obligations and its obligation to provide programming for all audience segments.

It is also worth noting that the model of licensing which commercial operators are seeking to impose on the SABC, is a model which they themselves have in the past argued is not always appropriate. E.tv, for instance, has on a number of occasions appeared in front of the Authority arguing that certain of its licence conditions unduly constrain its ability to compete effectively. The commercial sector now wishes to see these sort of conditions imposed on the public broadcaster, in addition to its extensive legislative obligations, thereby seeking to limit the potential of the public broadcaster to compete.

## **2.2 Ensuring delivery**

A second assumption in the representations which must be addressed is that without licence conditions such as those which are imposed on commercial operators, the SABC will not deliver on its public mandate. Again this is false and seeks to ignore the SABC's delivery to date as well as the multitude of checks and balances which are built into the legislative framework which governs the SABC. This legislative framework is distinct from that which commercial broadcasters operate within. For commercial broadcasters, the licence issued by ICASA is virtually the only mechanism through which the Authority can ensure compliance. For the SABC, the Broadcasting Act contemplates a number of mechanisms:

- A Charter is set and the Authority is empowered to monitor and enforce compliance with the Charter
- A Board, consisting of representatives acting in the public interest, is appointed
- The SABC is required to develop editorial policies and a Code of Practice
- The SABC is required to allow the public to comment regularly on its services.
- In addition the SABC must also comply with the PFMA, and the Shareholder compact.

In this context, the regulatory regime which is appropriate for commercial broadcasters cannot simply be transplanted to the public broadcaster. To do so would be to ignore the unique status granted the public broadcaster. This unique status is mirrored internationally. As detailed in the SABC's application key lessons from international best practice include the following:

- The public broadcaster is viewed as unique, having different roles and responsibilities from commercial broadcasters. The public broadcaster's mandate is wide and complex. It cannot be quantified easily and it cannot be met wholly on individual services. The nature of its mandate means that fulfilment of the mandate is not necessarily measurable over a limited period. The public broadcaster is thus treated differently by governments and regulators, who do not necessarily impose the approach taken with commercial broadcasters on the public broadcaster.
- The boards of governors of these public broadcasters are entrusted with ensuring the broadcaster's compliance and responsiveness to the public. This reduces the need for detailed licence conditions to govern the broadcaster, which is encouraged to be accountable through its internal policies, set and overseen by its board. In contrast to commercial broadcasters, whose only mechanism of public accountability is through the regulator, public broadcasters have multiple levels of accountability and various instruments available to ensure this accountability. These may include annual reports, dialogue with parliament and the regulator, and public consultation. Public broadcasters are bound to account to the public for their performance, so they often set targets or make promises annually.
- Generally, public broadcasters are given flexibility of obligations/licence conditions and are not faced with extensive and onerous conditions on programme quantity and specificity. Where there is specificity, this is negotiated and agreed by the regulator/government and the public broadcaster.



- There is an approach of building consensus between the board, stakeholders, parliament and regulator on the roles and responsibilities of the public broadcaster, and achievement of the public mandate.
- Public consultation by the public broadcaster is given high priority by governments and regulators, and this assists in ensuring that the broadcaster is responsive to the needs and interests of the public.

In South Africa, this unique status is also reflected in the fact that the SABC is granted a statutory right to programming independence, not given to other broadcasters.

The SABC's unique status is already reflected in its existing licence conditions which were renewed in March 2004. Despite the protests by commercial operators and other groups, contained in the representations on the section 22 application, none of these parties articulated their concerns about the SABC's licences during the renewal process. Nor did the Authority make any finding that the SABC had not delivered on its mandate to date or that the existing licence conditions are insufficient to allow for such delivery.

The SABC in its application also sets out in some detail its public service delivery to date. Representations have not put forward any persuasive evidence to contest this delivery, but yet the argument is made that specific licence conditions are required to guarantee future delivery.

### **2.3 Conclusion**

The Broadcasting Act, as amended, is the legislative conclusion

of many years of discussion and consultation on the appropriate policy framework for public broadcasting. This legislative framework was preceded by a number of policy papers and is consistent with the principles established in those papers. In the final analysis, however, it is the legislative framework and not the policy papers which inform it, with which the SABC must comply.

In its section 22 amendment application, the SABC has set out a model for this compliance, having regard to its extensive public mandate and its unique status as a public broadcaster.

The representations have failed to demonstrate in what respect this model is out of keeping with the policy framework for public broadcasting. The SABC maintains that it is fully consistent with this framework.

### **3    Legal context**

#### **3.1    Introduction**

3.1.2                    Arising from the policy framework, the licence amendment application has a very particular statutory context. It is that the amendment application has been necessitated by the new section 22 of the Broadcasting Act, 4 of 1999, introduced in terms of the Broadcasting Amendment Act, 64 of 2002.

3.1.3                    That section requires that the SABC makes application for "such amendments" to its existing licences as are necessary "in order to reflect their re-organisation of the corporation in to the public service division and the commercial service division and its related obligations in terms of this Act and the IBA Act."

3.1.4                    There can be little doubt that ICASA has jurisdiction, in the present proceedings, to consider only such

amendments by the SABC which are brought in terms of section 22(1) of the Act; and that, in turn, is limited to an application to amend the existing licences, only to the extent that is necessary in order, by means of such amendments, to reflect their re-organisation of the SABC, and its *"related"* obligations.

3.1.5 Before the amendments effected by the Broadcasting Amendment Act No. 64 of 2002, section 9(1) of the Broadcasting Act, 4 of 1999, provided that the SABC had to consist of two separate operational *"entities"*, being a public service, and a commercial service.

3.1.6 After its amendment, section 9 provides that the SABC must consist of two separate operational *"divisions"*, namely a public service *"division"*, and a commercial service *"division"*.

3.1.7 Before the amendment, section 9(2) provided: "The public and commercial services of the Corporation must be separately administered." After the amendment, section 9 (2) provides: "The public and commercial service divisions must be separately administered and a separate set of financial records and accounts are to be kept in respect of each such division."

3.1.8 Plainly the application for the licence amendment application is required to deal with the change within the SABC of its public service, to a public service division; its commercial service to a commercial service division; and the requirement that now, as distinct from before, a separate set of financial records and accounts are to be kept in respect of each of these two divisions.

## 3.2 **The scope of section 22**

### 3.2.1

The scope of the application is expressly limited by the terms of section 22(1) of the Broadcasting Act. It is not a general application for a new licence. Nor is it a general application for the amendment of licensing conditions. This application is restricted in its terms to being one for “**necessary**” amendments to the existing licences in order to reflect the statutorily required reorganisation of the SABC into two operational divisions. The changes that may be sought in an application under this provision are those that are required by the situation. In other words without them the separation between the two divisions will not be reflected in the SABC’s licences. What this means is that the application contemplated by section 22 is not intended to deal with related or incidental or merely potentially beneficial matters. It must be confined to those changes that a separation between the two divisions demands.

### 3.2.2

The notion that the application for amendment is limited in this fashion is similarly reflected in the provisions of section 22(2) of the Broadcasting Act. Whilst that makes the provisions of the Independent Broadcasting Authority Act (the IBA Act) applicable to the application that is qualified by the emphatic word of reservation “but” and goes on to provide that:

“...irrespective of the contents of the application of the Corporation, the Authority may impose any appropriate licence conditions **which are necessary** in order to reflect the reorganisation of the Corporation into the public service division and the commercial service division and its related obligations in terms of this Act and the IBA Act.”

3.2.3 In other words the powers of the Authority to impose licence conditions are limited in precisely the same language as the obligation of the SABC to apply for amendments to its existing licences.

3.2.4 When one relates that back to the application for amendment of the existing licences and the power of the Authority to impose appropriate licence conditions one sees that the application for amendment of the licences and any conditions imposed will revolve around ensuring that the SABC licences adequately reflect the statutory requirement in section 9 of its operations being divided into two divisions that are to be administered separately.

3.2.5 The licences must simply reflect what the statute in any event requires. Of course if there are provisions in the existing licences that are incompatible with such a division then it would be necessary to amend the licences to remove them or alter them in a manner that would render them compatible with the requirements of the statute, which in our view is not the case.

In either event the need for amendment cannot be taken to provide the occasion for a complete review and revision of the SABC's licence by the Authority.

3.2.6 Section 22(2), however, is concerned with the situation where the Authority seeks to impose additional conditions over and above the amendments sought by the SABC. It may only do so where it believes that the amendments proposed by the SABC do not go far enough to reflect the requisite purpose. In our view the SABC has fully discharged this obligation in its licence amendment application.

### 3.3 **Re-organisation**

3.3.1 The meaning of the word “reorganisation” as contemplated in section 22(1) relates only to those changes that have to be brought about in the administration of the SABC in consequence of giving effect to section 9 of the Broadcasting Act. The underlying assumption is that the old corporation was operated and administered as a single entity.

In terms of section 9 the SABC is now required to have two separate operational divisions, namely the public service division and the commercial service division and to administer these separately.

3.3.2 To achieve that result the Legislature contemplated that some levels of reorganisation of the SABC would have to occur. Section 22 refers to that reorganisation, namely, the reorganisation consequent upon the division of the SABC into two separate divisions.

3.3.3 Section 9(1) contemplates that the public service division and the commercial service division will be “operational” divisions. In other words it is concerned not with the administration of the SABC’s activities as a whole but solely with the operational aspects thereof. What it contemplates is that the provision of the public service, that is the service that is required to operate in terms of section 10 of the Broadcasting Act, shall for operational purposes be separated from the commercial service which operates in terms of section 11 of the Broadcasting Act. These operational divisions are to be “separately administered” and a separate set of financial records and accounts is to be kept in respect of each such division. That does not, however, mean that the broadcasting activities of the SABC must be separated into two hermetically sealed divisions.

3.3.4 Taking the matter of separate sets of financial records by way of example, there is no reason to create two separate accounts departments. It suffices for the accounts to be kept in such a way that separate financial records and accounts may be produced in respect of each operational division.

Presumably the purpose of this is to identify on the one hand what the costs are of providing the public service and on the other whether the commercial services are being run profitably. The purpose cannot be to prevent cross-subsidisation of the public service by the commercial service because section 11(1)(d) specifically provides that such cross-subsidisation is to take place.

What is required is that the accounts that the Board is required to keep in respect of each division (sections 10(4)(a) and 11(3)(a)) must be in such a form that they are capable of being audited separately from those of the other division and the SABC as a whole.

3.3.5 There are other areas of the SABC's activities which will likewise necessarily have to remain on a consolidated basis. The legal department provides an example of this. So does the Human Resources Department. The fact that the operational activities of the SABC are divided in the manner required by the Broadcasting Act does not mean that the persons employed in the different divisions are to be treated as being employed by different employers. They will be employed by the SABC and their terms and conditions of employment will in many cases no doubt be determined by way of collective bargaining between the SABC and their representative trade unions. The Broadcasting Act does not require that these activities be divided and apportioned between the

divisions. All of this is clear from section 26 of the Broadcasting Act.

3.3.6 The SABC is a company and as such its management is vested in its Board constituted in terms of section 12 of the Broadcasting Act. Its day to day operations are to be dealt with by the three executive officers referred to in section 12(b). Therefore each operating division must report to the Board via the appropriate executive, who would presumably be the Chief Operations Officer and ultimately the Group Chief Executive Officer.

3.3.7 As with any organisation there must be appropriate levels of interaction between different divisions and appropriate levels of executive authority to resolve disputes, ensure decisions are taken and oversee their implementation. The executive responsibilities for co-operation and coordination between the services are vested in a functionary below the level of the Chief Operations Officer and the Group Chief Executive Officer but ultimately reporting to them, either directly or indirectly through a person in a superior position.

#### 3.4 **The term “related obligations”**

3.4.1 Sections 22(1) and (2) go on to refer to “its related obligations in terms of this Act and the IBA Act”. When one construes the language of section 22 this is something distinct from the reorganisation of the SABC into two separate divisions. The section says that the amendments to the SABC’s existing licences must be those which are necessary in order to reflect two things. The first is the reorganisation as discussed above. The second is the “related obligations” of the SABC in terms of the Broadcasting Act and the IBA Act.



They are not defined in section 1 of the Broadcasting Act. The “related” obligations are those obligations imposed under the Broadcasting Act and the IBA Act that relate to the reorganisation of SABC into a public service division and a commercial service division.

3.4.2 The IBA Act pre-dates the amendment to the Broadcasting Act brought about by the Broadcasting Amendment Act 64 of 2002. It is difficult to see therefore how any obligations under the IBA Act can be related to the SABC’s reorganisation, bearing in mind that the obligations under the latter Act did not contemplate such a reorganisation. The IBA Act makes no reference to the division of the SABC’s activities into a public service division and a commercial service division. It simply provides in section 1 under the definition of “public broadcasting service” that this means any broadcasting service provided by the old Corporation and “shall include a commercially operated broadcasting service” provided by the old Corporation. There is some difficulty therefore in seeing what obligations may be imposed by the IBA Act that are related to the reorganisation of the SABC into two divisions.

3.4.3 Under the IBA Act the SABC provides a public broadcasting service, including its commercial operations, and is the holder of a public broadcasting licence. There are no obligations owed by the SABC under the IBA Act that relate to its reorganisation into two divisions under the Broadcasting Act. It seems that the reference to this in terms of section 22 is drafting superfluous.

3.4.4 In other words the draftsmen inserted this provision *ex abundante cautela* simply to cover the situation that if there were provisions of the IBA Act that bore upon the

separation of the SABC's operations into two divisions then there should be consequential amendments to the SABC's public broadcasting licence under the IBA Act in order to reflect that situation.

- 3.4.5 This is a well-established canon of construction that a statute should not be construed, if that can be prevented, in such a way that its provisions are superfluous, void or significant. However, the rule is not absolute and one is not entitled in the search for meaning to read into the statute some power or provision that is not there.

Commissioner for Inland Revenue v Shell Southern Africa Pension Fund 1984 (1) SA 672 (AD) at 678C-F.

As has been pointed out there are examples where words or a provision are inserted in a statute simply in order to avoid doubt.

Maphosa v Wilke en andere 1990 (3) SA 789 (T) at 799B-D.

- 3.4.6 It seems that these words were simply inserted to ensure that if there is a provision of the IBA Act that bears upon the situation of separating SABC's activities into two divisions then consequential amendments to SABC's licence will have to be made to accommodate that.

However, there does not appear to be any provision in the IBA Act that has such an effect.

### 3.5 **The process**

- 3.5.1 Reverting to the procedure that must be followed in regard to the amendment of the SABC's licence contemplated in terms of section 22 it is expressly

provided in section 22(1) that SABC must apply to the Authority for such an amendment. Of course, there is nothing in the IBA Act that deals with an amendment of a licence in these circumstances. For example the provisions of section 52(1) of the IBA Act contemplate amendments to licences in circumstances far removed from those under section 22 of the Broadcasting Act. It is for that reason that section 22(2) provides that the relevant provisions of the IBA Act apply to the application “with the necessary changes”. The purpose of that is to make the procedures contemplated under section 52 applicable to the application for amendment without the Authority being constrained by the provisions of section 52(1) in its consideration of the application. That consideration must take place squarely within the framework and subject to the constraints provided by section 22 of the Broadcasting Act.

3.5.2 The SABC's licence amendment application of its broadcasting licences, is made in terms of s.52(1)(c) of the Independent Broadcasting Authority Act, 153 of 1993.

3.5.3 That sub-section provides as follows:

*"52 Amendment of Broadcasting Licences*

*(1) A broadcasting licence may be amended by the Authority only –*

*(a) ...*

*(b) ...*

*(c) if requested thereto by the broadcasting licensee, and then only if and insofar as the proposed amendment –*

- (i) *does not militate against orderly frequency management;*
- (ii) *will not prejudice any other broadcasting licensee; and*
- (iii) *will not be inconsistent with the provisions of this Act or with any agreement or convention contemplated in paragraph (b); ..."*

### 3.6 **Specific licence conditions**

3.6.1 The main features of the structure established for the SABC in terms of the Broadcasting Act is as follows:

3.6.1.1 First, a Charter for the SABC is laid down in the Broadcasting Act. This is not provided for in respect of any of the other broadcasters. The Charter exacts from the SABC an extensive range of detailed obligations. These range from the range of programming that is to be provided (section 6(4)(a) – (d)), to a host of objectives (section 8) which include the obligation to provide services other than broadcasting services, to provide and disseminate information in a wide variety of media, to establish and maintain libraries and archives, to organise concerts and shows; to collect news and information from all over the world, to carry out research and development work, and amongst other things to develop and extend the SABC's services beyond the borders of South Africa.

3.6.1.2 No such obligations are imposed on any of the other broadcasters.

- 3.6.1.3 Second, ICASA is obliged not only to monitor the SABC in relation to its compliance with the statutory Charter; it is also obliged to enforce compliance (section 6(2)).
- 3.6.1.4 No such extensive degree of statutory invasion exists in respect of any of the other broadcasters.
- 3.6.1.5 Third, the SABC is obliged to prepare and submit written policies dealing with seven different matters to ICASA that will show how the SABC intends complying with ICASA's code of conduct (section 6 (5)(a)).
- 3.6.1.6 No such statutory obligation exists in respect of the other broadcasters.
- 3.6.1.7 Fourth, the statutory mechanism established in terms of the Act for the control by ICASA of a wide range of the SABC's objectives by means of scrutiny and review of the written policies to be prepared and submitted to ICASA, is unique.
- 3.6.1.8 No such statutory mechanism exists in regard to the other broadcasters.
- 3.6.1.9 Fifth, the SABC is obliged to provide suitable means for regular inputs of public opinion on its services, and in addition to ensure that such public opinion is given due consideration (section 6(7)).
- 3.6.1.10 No such inroad exists in respect of any of the other broadcasters.
- 3.6.1.11 Sixth, in addition to providing written policies to ICASA, the SABC is obliged also to provide a code of practice which, being part of its Charter, is subject to monitoring and enforcement by ICASA (section 6(8)).

- 3.6.1.12 Seventh, although the SABC is obliged in terms of section 11(1)(d) of the Broadcasting Act to subsidise its public services by means of its commercial services, this may not occur otherwise than on an arms length commercial basis (section 8A(13) – (15) of the Broadcasting Act).
- 3.6.1.13 No such financial constraint exists in regard to the commercial broadcasting services to be provided by the other broadcasters.
- 3.6.2 This extensive range of detailed obligations is imposed on the SABC as one juristic entity, and not on either one or the other of the two operational divisions specifically.
- 3.6.3 Whether the SABC discharges these obligations through its commercial service division or its public service division, or both, does not concern the legislature: it exacts simply that the SABC discharges those obligations.
- 3.6.4 It follows therefore that there can be little doubt that the position of the SABC is statutorily unique. A specific structure is established for it, which does not exist in respect of the other broadcasters, and whereby a wide variety of statutory obligations in the public interest is imposed on it. The Broadcasting Act establishes also a mechanism whereby the SABC's compliance with the obligations is monitored and enforced by ICASA.
- 3.6.5 On the other hand it is plain that the SABC is obliged, in pursuing its statutory obligations and objectives, to act on the basis of programming independence as provided for in section 6(3) of the Broadcasting Act.
- 3.6.6 This addresses the arguments made by MISA regarding the need for the SABC to be “appropriately regulated”. In the SABC’s view such regulation must be consistent with

the structure established for the SABC in the Broadcasting Act.