

09 June 2004

Mr. Thabo Ndhlovu
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Per fax: (011) 448-2186

Dear Mr. Ndhlovu

PRIMEDIA BROADCASTING'S WRITTEN REPRESENTATIONS ON THE SABC'S APPLICATION FOR THE AMENDMENT OF ITS BROADCASTING LICENCES IN ACCORDANCE WITH SECTION 22 OF THE BROADCASTING ACT, NO 4 OF 1999

INTRODUCTION

1. These representations are made in accordance with the invitation by the Authority to submit written representations in relation to the SABC's application for the amendment of its broadcasting licences in terms of the provisions of section 22 of the Broadcasting Act No. 4 of 1999, which invitation was published in Government Gazette No. 26318 dated 30 April 2004 as amended by Government Gazette No. 26380 dated 19 May 2004. At the outset, we wish to state that Primedia Broadcasting requests an opportunity to make oral representation to the Authority.

2. Primedia Broadcasting's representations are based on the following:
 - 2.1 General/policy framework
 - 2.2 The SABC's interpretation of section 22 of the Broadcasting Act, 1999
 - 2.3 ICASA to ensure fair competition between licensees in the same category

3. General / policy framework

3.1 Primedia Broadcasting welcomes the opportunity to contribute to the regulation of the SABC by the Authority, to ensure that the SABC serves its function as a public broadcasting service. These representations are made, not only from the perspective of a competitor, but also from an industry perspective to ensure that South Africa has a viable and vibrant broadcasting and entertainment industry. As the SABC is a dominant player in the broadcasting industry, its proper regulation would ensure the health, stability and viability of the other players in the industry.

3.2 Primedia Broadcasting also notes that the SABC is silent on Bop TV, Radio Bop and Radio Sunshine. It should be clarified whether the frequencies currently allocated to these services will revert back to the Authority.

4. The SABC's interpretation of section 22 of the Broadcasting Act

4.1 Primedia Broadcasting accepts that the SABC enjoys editorial and journalistic freedom, as should any other broadcasting service that is regulated by the Authority; however, the SABC seems to suggest that this serves as a basis to absolve it from having to comply with a set of licence conditions determined by the Authority¹.

4.2 In supporting its assertion as stated in paragraph 4.1 above, the SABC chooses to ignore the very essence of Government's decision to re-organise its structure. The White Paper² clearly states that the rationale for the re-organisation of the SABC is to ensure that the SABC is held accountable to the people of South Africa with respect to its public service and also to ensure its obligation to comply with relevant regulatory supervision.

4.3 Regulatory supervision over the SABC will not detract from its editorial and journalistic freedom. Regulation will simply serve to give content to such freedom, in order to ensure that the freedom is exercised with due regard to its public service mandate.

4.4 Primedia Broadcasting further submits that the subdivision of the SABC into two separate operational divisions, in terms of section 9 of the Broadcasting Act is not an end in itself. The purpose of the re-organisation into the two divisions is to ensure that each division is enabled to comply with its mandate in terms of legislation and other related instruments. The simple indication by the Authority as to "which of the services will be public broadcasting services and which will be commercially operated" is not the only object of the exercise of the amendment process, as suggested by the SABC³; it is just but the first step in the amendment process.

¹ Pages 33 to 44 and 99 to 105 of the SABC's application, in particular at page 36

² The White Paper on Broadcasting Policy, May 1998, Chapter two

³ Page 39 and 105 of the SABC's application

- 4.5 The obligations set out in sections 10 and 11 of the Broadcasting Act are of a broad nature and they need to be given content and made quantifiable, through licence conditions that are precise and unequivocal. For example, section 10(1)(g) only requires the SABC to “strive to offer a broad range of services targeting particularly children, women, the youth and the disabled...” Such a broad statement of policy requires quantification so that in evaluating the SABC’s programming activities, the Authority would be able to easily determine whether the SABC has complied with its mandate. Primedia Broadcasting also submits that the SABC’s editorial policies also encompass broad statements of policy and would not adequately remedy the absence of licence conditions.
- 4.6 Primedia Broadcasting submits that the Authority must give a purposive interpretation to sub-section 22(2) of the Broadcasting Act. The essence of this subsection is that “irrespective of the contents of the application of the Corporation (since the law enjoins the SABC to apply and does not give the primary responsibility of initiating the amendment to the Authority), the Authority may impose any appropriate licence conditions which are necessary in order to reflect the reorganization of the Corporation into the public service division and the commercial service division”.
- 4.7 Malan J⁴, pronounced as follows: “If... a rigid grammatical construction of the language employed leads to a result which is manifestly absurd, unjust, unreasonable, inconsistent with other provisions, or repugnant to the general object, tenor or policy of the statute, the court will be justified in departing from the literal sense and in modifying or extending it in such a manner as will secure a conclusion which will eliminate such objection and give expression to the true intention of the Legislature.
- 4.8 Consequently, Primedia Broadcasting enjoins the Authority to interpret the provisions of sub-section 22(2) of the Broadcasting Act so as to remove the glaring absurdity that is pointed out by the SABC and to ensure that the true intention of the Legislature is accorded.
- 4.9 The SABC further suggests that it would be sufficient merely for the licence conditions to reflect the obligations as a statement of principle. While Primedia Broadcasting accepts that licence conditions should not be so prescriptive such that they are rigid, inflexible and do not allow broadcasters to respond to exigencies of the business, consequently vague and immeasurable licence conditions would not serve to further the rationale of the reorganization exercise.

⁴ Volschenk v Volschenk 1946 TPD 486, as quoted in *Interpretation of Statutes* by M M Cockram, 1987

5. The Authority must ensure fair competition between licensees in the same category

5.1 Section 2(o) of the IBA Act requires the Authority to ensure fair competition between broadcasting licensees.

5.2 In addition, Government was concerned that if left unregulated, the commercial arm of the SABC would have considerable advantages over other private/commercial broadcasters⁵ and for that reason Government sought to achieve “tangible internal separation of commercial from public broadcast activities” and to ensure that the commercial arm of the SABC is subject to the same regulation as the private/commercial broadcasting industry⁶.

5.3 It is for that reason that Primedia Broadcasting submits that the SABC’s public commercial services must be subject to same regulatory framework as other private/commercial services; that such services should have unequivocal licence conditions that quantify the extent of their obligations, and that they should also be required to give promises of performance that would form part of their licence conditions.

6. Conclusion

Primedia Broadcasting thanks the Authority for the opportunity to comment on this important step in incorporating the SABC into the current regulatory regime.

Yours sincerely,

PHELADI GWANGWA
REGULATORY AFFAIRS MANAGER

⁵ Page 19 of the White Paper

⁶ Ibid