



COMPLAINTS AND COMPLIANCE COMMITTEE

DATE OF HEARING: 17 MAY 2024

CASE NO: 472/2024

DEMOCRATIC ALLIANCE (DA)

COMPLAINANT

V

SOUTH AFRICAN BROADCASTING CORPORATION

SOC LTD (SABC)

RESPONDENT

CCC MEMBERS:

Judge Thokozile Masipa – Chairperson
Councillor Catherine Mushi - Member
Mr Monde Mbanga - Member
Mr Thato Mahapa - Member
Mr Paris Mashile – Member

FROM THE OFFICE OF THE CCC:

Meera Lalla - Acting CCC Coordinator
Amukelani Vukeya – CCC Administrator

LEGAL REPRESENTATION FOR PARTIES

For the Complainant – Anthony Stein SC,
Ofentse Motlhasedi
Eshed Cohen

For the Respondent - Gilbert Marcus SC
Nomfundo Salukazana

JUDGMENT

Judge Thokozile Masipa

INTRODUCTION

- [1] The Complainant in this matter, the DA, a political party contesting the upcoming elections, on 29 May 2024, submitted its political advertisement ("PA") to the SABC for broadcast. It is unclear the exact date on which the DA submitted the PA to the SABC, but it is common cause that the SABC's decision to reject the PA was communicated on 9 May 2024, as per Annexure A of the DA's Complaint.
- [2] Prior to this, the same advertisement, depicting a burning South African flag, had been met with a public outcry when it appeared on various social media platforms and other media.
- [3] On 26 April 2024, the SABC sent correspondence to the DA requesting the DA to alter the advertisement by removing the burning flag. When it became clear that the DA was not amenable to this request, the SABC refused to broadcast it as per the 9 May 2024 letter.
- [4] On 10 May 2024, the DA then brought an urgent complaint against the SABC in terms of regulation 6(6) of the National and Provincial Party Elections Broadcasts and Political Advertisement Regulations 2014 ("Regulations"), which was referred to the CCC for urgent adjudication in accordance with the directives issued by the Chairperson.
- [5] The question before the CCC was "can the SABC refuse to air a political advertisement because the advertisement, in its view, undermines national building, attracts condemnation from government and its officials and offends certain members of the public?"(my emphasis)

[6] In support of their cases, and to assist the CCC in answering the question, counsel for both parties ably made submissions and cited various authorities. Both written and oral submissions assisted greatly and the CCC is grateful for such assistance.

[7] At the outset it must be stated that because of the intricate nature of the case, it was inevitable that the ambit of the argument was wider than envisaged. Although the CCC considered every argument and authorities referred to, for purposes of its decision it has confined itself to what is strictly relevant.

THE PARTIES

[8] The Complainant is the Democratic Alliance (DA), a registered political party which is contesting the upcoming national and provincial elections on 29 May 2024.

[9] The Respondent is the South African Broadcasting Corporation, ("SABC"), a public national broadcaster, which provides public broadcasting services as defined in section 1 of the Electronic Communications Act, 2005 ("the ECA and the Broadcasting Act of 1999 ("the Broadcasting Act").

THE COMPLAINT

[10] The complaint concerns the validity or correctness of a decision by the South African Broadcasting Corporation SOC Limited ("SABC") - a public broadcasting licensee in terms of the Electronic Communications Act 36 of 2005 ("the Act"), to reject a political advertisement by the DA.

[11] Circumstances which led to the lodging of the present complaint are set out in the following chronology of events:

11.1 The DA submitted a political advertisement to the SABC for broadcasting on its broadcasting services. The political advertisement depicts the South African national flag burning with the following message "In these election, for the first time in 30 years, the ANC will lose its majority. But they will do anything to stay in power. Imagine a coalition between ANC and the violent EFF, and the Zuma faction. Under this coalition of corruption life will only get worse. This election is about survival. Unite to rescue SA. Vote DA".

11.2 Following a public outcry that the depiction of the burning flag is an affront to the dignity of the flag and what it represents, in post-apartheid South Africa, the SABC refused to broadcast the advertisement unless it was edited to remove the burning flag. The DA re-submitted its amended advertisement - the advertisement depicted the burning flag and the flag's unfurling from its ashes to a fully restored flag. And the wording will lose in the original version of the advertisement changed to is set to lose "to accommodate SABC's concerns".

11.3 The DA had no intention of editing its political advertisement
Hence its decision to lodge this complaint.

REASONS FOR THE REJECTION

[12] In a letter dated 9 May, 2024 and addressed to Ms Busisiwe Mashigo of ICASA, the SABC stated the reasons reproduced hereunder:

[13] The letter reads:

1. *"The SABC informs the Independent Communications Authority of South Africa (ICASA) of its decision to reject the Democratic Alliance's (DA) political advertisement in which among other things depicts the burning of the national flag.*
2. *The SABC has been monitoring the outcry from South Africans of all races condemning the advertisement which was issued currently in circulation on various media platforms. Likewise, the SABC believes that the advertisement encourages damage of treasured national symbols. The national flag is not a representation of a political party but the nation at large.*
3. *The SABC has also noted the condemnation of the advertisement by the President of the Republic and other government departments.*
4. *As a responsible public broadcaster, the SABC will not want to be part of fuelling the outrage that is evidenced on divergent media platforms.*
5. *The SABC persuades the Democratic Alliance to amend the advertisement.*
6. *In the spirit of the South African Constitutional values and principles of national unity and nation building., the desecration of the national flag should be condemned.*

7. *The SABC as a public broadcaster, is mandated to promote nation building through its services and the said political advertisement goes against the spirit of nation building.*
8. *The SABC also noted that some of the words used in the advertisement in question are subject to a formal complaint lodged with ICASA against the SABC. Therefore allowing this advertisement to be broadcast will be prejudicial to the SABC.*

We encourage the DA to amend the advertisement and resubmit for broadcast.”

[14] The letter is signed by Nyiko Shibambo, Complaints Specialist, SABC.

[I pause to state that during his submissions, counsel for the SABC, stated that the Respondent had abandoned point 8 as one of the grounds].

[15] The DA alleged that the SABC had no authority or power to reject the advertisement on the grounds it set out and that, therefore, its decision was unlawful.

[16] The SABC, on the other hand, maintained that it was within its powers to reject the advertisement.

THE ISSUE

[17] The issue then was whether the SABC was correct to reject the DA's political advertisement for the reasons it stated.

THE CCC's JURISDICTION

[18] At this stage, it is convenient to deal with the question of whether the CCC has jurisdiction to adjudicate the present matter and the extent of that jurisdiction.

[19] The CCC noted the concern raised by counsel for the SABC that the CCC should not act as a court of review by reviewing the decision of the SABC.

[20] Counsel's concerns are understandable as there is always a possibility that a tribunal might enter into an area which is a preserve of a High Court. However, the CCC is aware that it is a creature of statute, and that it can only perform its functions in accordance with the empowering statute. In terms of the ECA and the Regulations, the CCC has jurisdiction to adjudicate the matter. This conclusion is specifically supported by the Regulations.

[21] Regulation 6(6), (7) and (8) prescribes a complaints procedure for circumstances where a political advertisement is rejected by a broadcast service licensee.

[22] Regulation 6 provides:

"(6) A political party or an independent candidate whose PA [i.e. political advertisement] has been rejected and disputes the rejection, and has no intention of altering or editing the advertisement, may refer the matter to the Authority within forty eight (48) hours of being informed of the rejection. (my emphasis).

[23] The underlined portion above shows, without any doubt, that the CCC has jurisdiction to deal with matters where a political advertisement has been rejected by a broadcast service licensee. The underlined portion also indicates that the political party has a right to refuse to alter or edit its advertisement. The question would be: under what circumstances? The SABC's request that the DA adjust its advertisement was its regulation 6(4)(a) and (b) of the National and Provincial Party Elections Broadcasts and Political Advertisement Regulations 2014 ("Regulations") which affords the political party an opportunity to amend a rejected PA (if it elects to do so)?

THE ADVERTISEMENT

[24] Eimee Franklyn, the marketing director of the DA deposed to an affidavit detailing the nature of the complaint against the Respondent.

[25] To understand the complaint in its entirety, as well as the issues, it is prudent to put the complaint in context.

[26] The DA's advertisement digitally depicts the national flag of South Africa burning then unfurling as fully restored. The advert narrates the following text as a computer generated image of the flag burns, then restoratively unfurls:

"In this election, for the first time in 30 years, the ANC is set to lose its majority. But they will do anything to stay in power. Imagine a coalition between the ANC and the violent EFF, and the Zuma faction. Under this coalition of corruption, life will only get worse. The election is about survival. Unite to rescue South Africa. Vote DA."

THE LEGAL FRAMEWORK

The Electronic Communications Act No 36 of 2005("the ECA")

[27] Section 58 of the ECA specifically regulates political advertising on broadcasting services during an election period.

[28] A "***political advertisement***" is defined by ECA as:

"an advertisement broadcast on a broadcasting service which is intended or calculated to advance the interests of any particular political party, for which advertisement the relevant broadcasting licensee has received or is to receive, directly or indirectly, any money or other consideration."

[29] Section 58 of the ECA specifically regulates political advertising (PAs) on broadcasting services during an election period, while section 59 regulates the party election broadcasts (PEBs).

[30] Section 58(1) of ECA provides that

"A broadcasting service licensee is not required to broadcast a political advertisement, but if he or she elects to do so, he or she must afford all other political parties, should they so request, a like opportunity."

[31] Section 58(3) prescribes that a broadcasting service licensee must act even-handedly.

"In making advertising time available to political parties, no broadcasting service licensee may discriminate against any political party or make or give preference to any political party or subject any political party to prejudice."

[32] Section 58(5) states that:

"a political advertisement must conform to a technical quality acceptable to [ICASA]".

The Regulations

[33] ICASA has promulgated the Regulations to give effect to section 58. Regulation 6 concerns political advertisements broadcasts by broadcasting service licensees (BSLs).

[34] Regulation 6(3) read with Annexure C provides the technical standards and quality that a political advertisement must comply with.

[35] Regulation 6(5) prohibits BSLs from amending or editing political advertisements submitted to them for broadcast.

[36] Regulation 6(9) prescribes what a political advertisement may not contain:

"A political party or an independent candidate that submits a PA to a BSL for broadcast must ensure that the PA does not:

(a) contravene the provisions of the Electoral Code, the Electoral Act, the Constitution, the Act and the Broadcasting Act; or

(b) contain any material that is calculated, or that in the ordinary course is likely to provide or incite any unlawful, illegal or criminal act, or that may be perceived as condoning or lending support to any such act."

[37] The regulation is circumscribed. It only precludes certain content in limited circumstances. The rationale behind regulation 6(9) appears to be that

advertisements should not be aired if those advertisements are illegal or encourage people to engage in illegal conduct.

[38] There are only two circumstances in which a BSL can lawfully reject an advertisement:

38.1 If it contravenes regulation 6(9); or

38.2 if it does not satisfy the acceptable technical quality.

DOES THE SABC HAVE A DISCRETION TO REJECT A POLITICAL ADVERTISEMENT?

Submissions

[39] On behalf of the SABC it was submitted that the SABC has authority to accept or reject a political advertisement on the grounds that it stated.

[40] It cannot be disputed that the SABC has the authority to reject a political advertisement. The question is: under what circumstances?

[41] While, initially, it was not quite clear what the basis of the SABC's rejection was, it transpired, later, that it was relying on what it termed an editorial discretion.

DOES THE SABC HAVE AN EDITORIAL DISCRETION IN RESPECT OF POLITICAL ADVERTISEMENTS?

[42] As an additional ground, it was submitted on behalf of the SABC, that the SABC had an editorial discretion that it exercised to reject the advertisement. According to the SABC, it is entitled to exercise its editorial discretion and independence on content that it is broadcasting.

[It must be noted this ground was not among the reasons that the SABC initially gave for rejecting the political advertisement].

[43] It was submitted by counsel for the DA, correctly, in my view, that the CCC should disregard the new ground as the SABC's decision was based on the grounds stated initially and not on the new ground.

[44] However, even if the CCC was to have regard to what appears to have been an afterthought, this would not assist the case of the SABC for the following reasons:

[45] As said earlier, there are only two legally recognised circumstances in which a BSL can lawfully reject a political advertisement namely:-

if the advertisement contravenes Regulation 6(9) or if it does not satisfy the acceptable technical quality.

[46] If the Legislature had intended that the BSL's should exercise its editorial discretion over political advertisements it would have said so in clear terms where it specifically deals with political advertisements or section 58 and regulation 6(9), in particular, would not have been introduced. The SABC's position, therefore, is untenable.

IS THE SABC OBLIGED TO FLIGHT POLITICAL ADVERTISEMENTS?

[47] The SABC submitted that it had no obligation to air the DA's political advertisement. Surprisingly, in support of its submission it relied on section 58(1).

[48] In response, the DA, correctly pointed out that section 58 (1) is in two parts and that the SABC seemed to rely on the first part while ignoring the second part.

[49] Section 58(1) reads:

"A broadcasting service licensee is not required to broadcast a political advertisement, but if he or she elects to do so, he or she must afford all other political parties, independent representatives and independent candidates, should they so request, a like opportunity."

[50] The first part of this section is to the effect that a broadcaster does not have an obligation to broadcast political advertisements at all. In other words, he /she has a choice whether or not to air political advertisements.

[51] However, once a broadcaster has made a choice to broadcast political advertisements, he or she no longer has a discretion in the matter.

[52] In terms of s 58(1), once a broadcaster has made a choice to broadcast political advertisements "he or she is obliged to afford all other political parties ... should they so request, a like opportunity."

[53] In the present case, the SABC, though not obliged to broadcast political advertisements, made a choice to broadcast such advertisements. Once it had made that choice, it became obliged to afford all other political parties, including the DA, which submitted its political advertisement to it, a like opportunity.

[54] By rejecting the DA's political advertisement and refusing to broadcast it, the SABC denied the DA such "*like opportunity*" thereby violating the provisions of section 58(1).

[55] Section 58(3) reads:

"In making advertising time available to political parties, no broadcasting service licensee may discriminate against any political party or make or give preference to any political party or subject any political party to prejudice."

[56] It is common cause that one of the reasons for rejecting the DA's political advertisements was that SABC had, *inter alia*, taken into consideration, the views of the President and certain government departments. These were not substantiated, though such failure to substantiate such is immaterial.

[57] The DA submitted that this was not a legally recognised reason to reject a lawful political advertisement. The CCC agrees. There are only two reasons when a political advertisement can be rejected, and the views of the government and its officials is or the public's reception of the Political advertisement are not one of them.

[58] By allowing the views of the President and government officials or the public's reception of the Political advertisement to influence its decision in rejecting the DA's political advertisement, the SABC discriminated against the DA, as a political

party.

RIGHT TO FREEDOM OF EXPRESSION

[59] In *S v Mamabolo* 2001(3) SA 409 (CC) at para 37 the Constitutional Court stated:

"Having regard to our recent past of thought control, censorship and enforced conformity to government theories, freedom of expression - the free and open exchange - 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] It is precisely for the reason above that the SABC's claim that it has overarching power to decide which political advertisement to flight and which to reject cannot be correct.

[61] The SABC relied, *inter alia*, on Section 6 of the Broadcasting Act which provides:

"Charter of Corporation—

(1) The Corporation must comply with the Charter as outlined in this part.

...

(3) In terms of this Charter. the Corporation, in pursuit of its objectives and in the exercise of its powers, enjoys freedom of expression and journalistic, creative and programming independence as enshrined in the Constitution."

[62] In addition, the SABC relied on section 3(1)(a) of the Broadcasting Act which states that the South African Broadcasting system safeguards enriches and strengthens the country's cultural, political, social and economic fabric. Surely, this includes plurality and a diversity of views in a multicultural society, especially during a hotly contested election period.

- [63] According to the SABC, any content, including advertisements, must be broadcast, in accordance with the SABC's objectives as stipulated in the Broadcasting Act. Under the Act, the SABC has developed policies relevant for determining what should be broadcast on its broadcasting services.
- [64] The submission above has no merit. If "any content" included political advertisements, then there would have been no need for Section 58(4) and(5) as well as Regulation 6(9).
- [65] The provisions of ECA and the applicable regulations make it clear that political advertisements are different from other content. That is why they are catered for separately in the ECA.
- [66] Lending credence to the above is that the ECA specifically prohibits a BSL from editing a political advertisement.
- [67] There is another reason why the SABC's submission cannot be sustained, and it is this: Although the SABC stated that it had developed policies around the Broadcasting Act empowering it to act the way it did, no specific policy was referred to and no policy document was attached.
- [68] An additional factor that the SABC overlooked is this critical aspect: In terms of Regulation 6(13), "*A BSL that broadcasts a PA must ensure that all PA broadcasts are clearly identified through a standard prerecorded concluding message (tail disclaimer)*".
- [69] This is further to the provisions of Regulation 6(10) which provides that "*A political party or an independent candidate that submits a PA for broadcast to a BSL, is deemed to have indemnified the BSL against incurred costs, damages, losses, and third-party claims arising from the broadcast thereof.*"
- [70] Consequently, the broadcast, by the SABC, of a PA which the SABC does not agree with, does not automatically buttress a conclusion that the broadcast of such a PA will result in negative repercussions for the broadcaster. Without any cogent case set out for such a conclusion, it remains conjecture.

[71] Lastly, the SABC sought to rely on the negative application of section 16 in respect of the Right to Freedom of Expression. To paraphrase, the SABC contended that the right extends to the right not to be compelled to express that which the SABC does not agree with. In support of this assertion, the SABC sought to rely on various case law from international and some jurisprudence. Without a comprehensive discussion of those authorities relied upon, it suffices to say this: The authority relied upon is clearly distinguishable from the present matter in so far as the SABC is a public Broadcaster, exercising a public power, and not a private Broadcaster existing within a milieu of other private broadcasters. Context is everything. This view is also supported by the dictum quoted by the SABC in *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at para 125, wherein the Constitutional Court recognized "*[the ability to form and express opinions – particularly controversial or unpopular views, or those that inconvenience the powerful]*". However, this is would have been material if it was necessary to even go into the content of the DA's advert, which for purposes of this judgement, I deem it not necessary. But out of an abundance of caution, an exploratory assessment of the proverbial rabbit hole shows it would not have been a fruitful exercise in any event.

[72] In my assessment, nothing in the SABC's stated reasons or oral arguments made in the hearing engages the provisions of section 16(2) of the Constitution to imply that the DA's PA would or amount to hate speech deserving if censure.

CONCLUSION

[73] We are here dealing with political advertisements Section 58(1) and 58(3) are the relevant provisions applicable to this matter. Subsections (4) and (5) are the only provisions in section 58 that regulate the content or form of political advertisements. These subsections expressly require only technical and legal compliance.

[74] The wording in regulation 6 is also straightforward and leaves no room for doubt.

74.1. Regulation 6(3) read with Annexure C provides the technical standards and quality that a political advertisement must comply with.

74.2. Regulation 6(5) prohibits BSLs from amending or editing political advertisements submitted to them for broadcast.

74.3. Regulation 6(9) provides political advertisements must be technically compliant and not encourage unlawful, illegal or criminal acts.

[75] There is no other provision in Regulation 6 which concerns the content of political advertisements.

[76] Contrary to the SABC's submissions, no provision in the ECA or Regulations empowers the SABC to exercise its discretion to refuse to air a political advertisement which is lawful. The ECA and the Regulations clearly circumscribe the grounds on which the SABC may refuse to air a political advertisement.

FINDING

[77] Accordingly, the CCC finds that the SABC contravened Section 58(1) and 58(3) of the ECA, read with the Regulations, in that it refused to broadcast the DA's political advertisement when there was no legal basis to do so.

RECOMMENDATIONS

[78] Regulation 9 of the Regulations provides that a BSL may be fined up to R1 million for breach of the Regulations.

[79] In making its recommendation to the Authority in terms of section 17E the CCC has, *inter alia*, taken into consideration the prejudice caused to the DA from the time the SABC refused it an opportunity to broadcast its political advertisements.

[80] Accordingly the CCC recommends to the Authority to

80.1. direct the SABC to desist from its conduct of refusing to broadcast the DA's political advertisement.

80.2. direct the SABC to comply with its duties under the ECA and air the DA's advertisement.

80.3. direct the SABC to pay a fine of R500 000 (five hundred thousand rand) for the contravention. The amount is to be paid in full within 7 days of the issuing of this judgment.

TMMasipa

Date: 22 May 2024

Judge Thokozile Masipa
Chairperson of the CCC

