

SOUTH AFRICA / JUDGMENT

**Democratic Alliance v South
African Broadcasting Corporation
SOC Limited (20/33806) [2020]
ZAGPJHC 391 (11 December 2020)
[2020] ZAGPJHC 391**

COURT

South Gauteng High Court, Johannesburg

BEFORE

R Strydom

CASE / FILE NUMBER

20/33806

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER

JUDGES: YES/NO

(3)

REVISED:

YES/NO

CASE NO: 20/33806

In the matter between:

DEMOCRATIC

ALLIANCE

Applicant

and

SOUTH AFRICAN

BROADCASTING CORPORATION

SOC

LIMITED

Respondent

JUDGMENT

STRYDOM J,

Introduction

[1] This matter came before me in the urgent court on Thursday 29 October 2020. The applicant, the Democratic Alliance (“the DA”) sought the following relief against the respondent (“the SABC”):

“1. The forms and service and ordinary time periods provided for in the Rules are dispensed with and this application is dealt with as one of urgency in terms of Rule 6(12).

2. Directing the respondent to broadcast live on its channel SABC2 the following events that will occur at the applicant’s Federal Congress to be held on 31 October and 1 November 2020:

2.1 the opening ceremony and speeches on 31 October 2020 from 09h30 to 10h30 or at such alternative time that may occur within an hour of the scheduled time;

2.2 the announcement of the new Federal Leader of the applicant and their acceptance speech on 1 November 2020 from 13h00 to 14h00 or at such alternative time that may occur within an hour of the scheduled time.

3. In the alternative to prayer 2 above, the decision of the respondent to refuse to broadcast the events

described in prayers 2.1 and 2.2 above live on its channel SABC2 (“the decision”) is reviewed and set aside.

4. If the order in prayer 3 is granted, then the decision is substituted with a decision to broadcast live on the SABC’s channel SABC2 the events described in prayers 2.1 and 2.2 above.

5. The respondent is to pay the costs of the application, including the costs of two counsel, on the attorney and client scale.

6. Further and/or alternative relief.”

[2] The court considered the urgency of the matter, which the respondent argued to be self-created, and found that the matter was sufficiently urgent to be heard on the Thursday of the urgent week.

[3] Considering that the relief which was sought was for a mandatory interdict to broadcast events which would have taken place on the Saturday and Sunday of that week, the court granted the application in terms of prayers 1, 2 and 5 of the notice of motion, save to order costs of two counsel on a party and party scale.

- [4] When the court granted the order, the court indicated to the parties that should any one of the parties require written reasons for the order, a request for such reason should be made.
- [5] On or about 11 November 2020, the respondent requested reasons for my decision. On the same day, my registrar replied to the respondent's attorney informing them that reasons would be provided in due course. On 4 December 2020, a further email was received by my registrar in which the respondent's attorney made a follow up on the "status of our request to be provided with the reasons in this matter". After the order was made, and the broadcast took place on 31 October and 1 November 2020, there was no further urgency in the matter and there was no reason why the respondent should have pressurised this court for a judgment which was less than a month outstanding after the request was made for the provision of reasons for the order. Litigants must have consideration for the position and workload of judges dealing with many other matters besides the matter of a specific litigant. Needless to mention that steps can be taken, through the correct channels, if judgments are delayed for too long but this was not the case in this matter.

Urgency

- [6] The question whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the absence to obtain substantial redress at the hearing in due course. The SABC's attack against the urgency of the matter was not aimed against this principle but rather it was argued that the urgency was self-created.
- [7] The court must nevertheless be satisfied that the matter was sufficiently urgent to the extent that if the relief is not granted, the DA would not obtain substantial redress at the hearing in due course.
- [8] The DA's Federal Congress would have taken place on 31 October and 1 November 2020. If this application was not considered and an order made, if entitled thereto, before then, the opportunity to broadcast live on terrestrial channels the DA's Federal Congress would have been lost forever.
- [9] The court was satisfied that if the matter was not heard and considered, the DA would not have obtained substantial redress at a hearing in due course as the matter would have become moot.
- [10] As stated hereinabove it was argued on behalf of the SABC that the urgency was self-created. It was averred that the DA should have come to court before it addressed correspondence to the SABC on 2 October 2020, and/or, that the DA's correspondence of 20 October 2020 was a delaying tactic. Considering that 10 days passed before the DA's attorneys wrote to the SABC, the letter was designed to engineer urgency.
- [11] To consider this argument, the court would have to consider the sequence of events:

11.1 On 14 September 2020, the DA addressed correspondence to the SABC in which it requested the live public broadcasting of the DA's Federal Congress.

11.2 On 28 September 2020, the SABC denied the DA's request. In this correspondence the SABC acknowledged that there is a long-standing practice of previous DA Federal Congress' being transmitted live on SABC2. It indicated that SABC2 now will only live-broadcast events of national importance to ensure minimal disruption and "displacement of revenue-generating programming on the channel". It emphasised that "every effort is being made to optimise whatever opportunity is still available to generate revenue, in order to sustain its public mandate obligations". It indicated to the DA that the SABC News Channel is now the channel which it says is responsible to broadcast events such as the DA Federal Congress.

11.3 The stance taken by the SABC prompted the DA to respond to the SABC on 2 October 2020 in which Mr Ivan Meyer, on behalf of the DA, noted an appeal against the SABC's decision. Various grounds were stated.

11.4 A week later, on 9 October 2020, the SABC responded and ostensibly dismissed the appeal.

11.5 On 19 October 2020, the DA's attorneys addressed correspondence to the SABC on behalf of the DA. In this letter it was pointed out that a commitment to broadcast on satellite news is insufficient as not all South Africans have access to satellite broadcast and demanded commitment to free-to-air terrestrial coverage of portions of the Federal Congress as requested.

11.6 The SABC responded on 21 October 2020. It was again stated that the decision to consider all party-political coverage for live transmission on the dedicated news platform, namely the SABC news channel and digital platforms, is informed by the precarious financial situation that is confronting the Corporation. It stated that every effort is being made to use whatever opportunities still available to generate revenue, to sustain public mandate obligations.

11.7 On 23 October 2020, the DA filed this application and in the notice of motion required from the SABC to file an answering affidavit on or before 17h00 on Tuesday 27 October 2020.

11.8 The SABC filed an answering affidavit and this was followed by a replying affidavit on behalf of the DA.

[12] I am of the view that the DA acted reasonably in attempting to engage with the SABC before coming to court. None of the DA's correspondence was engineered or a delaying tactic. I can find no reason why the DA would have adopted such an approach.

[13] As far as the delay between the period 9 October 2020 and 19 October 2020 is concerned, when the DA had to instruct attorneys to advise on a way forward, I am satisfied that the DA acted with the necessary expedience. Attorneys were instructed on 14 October 2020 and a few days thereafter the attorney sent a letter of demand. Moreover, there was a delay of more or less similar duration between the letter written by the DA on 14 September 2020 and the SABC's answer to it dated 28 September 2020. When faced with a legal issue, clients must internally decide what stance they should take. Then they must instruct attorneys who again instruct counsel. All of this takes time and delays are to be expected. This court is satisfied that the urgency was not self-created but that the delays were caused by the DA rather attempting to resolve the issue without the intervention of court.

The issues to be decided

- [14] On a perusal of the papers and after hearing counsel, it has become clear that the true issue between the parties was not whether the SABC should broadcast the DA's Federal Congress and the acceptance speech of its new leader, but rather whether the broadcast should have taken place on live free-to-air terrestrial broadcast which, in this case, would have been on SABC2. The SABC had in fact agreed to cover live the Federal Congress and announcement of its new leadership as requested by the DA but it had agreed to do so on its dedicated News Channel, radio and digital platforms combined with regular news coverage on free-to-air news bulletins ("the tendered coverage").
- [15] It was argued on behalf of the DA that according to the SABC's policy on news and editorial content, it is required to provide full and extended live coverage of the event on free-to-air terrestrial television, i.e. on SABC2. Further, that for an event of such major national significance and political import, any other approach would be inconsistent with the SABC's public broadcast duties. The tendered coverage, which is largely not covered by a free-to-air channel, will result in the broadcast not reaching the wider public as only a small section of the population has access to satellite and digital television platforms.
- [16] The main reason for refusing to broadcast the requested content on free-to-air terrestrial television was that this will result in a significant displacement of revenue-generating programming. It was stated that the SABC is under financial distress and should take every opportunity to generate revenue. This was the reason for refusing to broadcast the content live on SABC2. In the respondent's answering affidavit, and in argument before this court, further reasons were advanced why the broadcast could not be made live on SABC2. It was argued that the DA now wishes to dictate to the SABC which channel the Congress ought to be broadcast on. It was submitted that this demand on the part of the DA impacts adversely on the independence of decision making of the national broadcaster and its editorial freedoms, whilst, there is no obligation or prescription in its policies for live coverage to be done on free-to-air television channels. The DA wants to dictate to the SABC how to apply its own editorial policies whilst, how it should broadcast, is the decision of the SABC Newsroom. It also impacts on the broadcaster's constitutional right to freedom of expression. It was pertinently stated in the heads of argument filed on behalf of the SABC as follows:
- "The DA has the right to have its Congress broadcast by the SABC, it does not however, have the right to dictate or stipulate on which channel its Congress should be broadcast, in particular when one has consideration for the SABC's 2020 editorial policy which clearly sets out the new approach and standard for the coverage of political events."*
- [17] The relief the DA is seeking is for final interdictory relief. To obtain such relief the DA had to show a clear right for such relief, that if such relief is not granted it will suffer irreparable harm and that it has no satisfactory alternative remedy.

Clear right

[18] Section 16 of the Constitution guarantees the right to freedom of expression, including the freedom to receive and impart information or ideas (my underlining).

[19] In *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others*[1] the Constitutional Court described the importance of the right as follows:

“[23] ... [F]reedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

[24] This Court has also highlighted the particular role in the protection of freedom of expression in our society that the print and electronic media play. Thus everyone has the right to freedom of expression 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. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. 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.”

“It should also be noted that the SABC, as the public broadcaster provided for and regulated in terms of the Broadcasting Act, has a special function to perform.”[2]

“The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy.”[3]

[20] The SABC also referred to the *SABC v NDPP* matter, *supra*, but in the context that the SABC has a freedom of expression which entails a right to maintain its editorial independence. This argument I find to be flawed in the current context. In the context of the factual matrix of this matter, the question was rather whether the public at large was entitled to receive the information pertaining to the Federal Congress of the DA and not whether the SABC had the freedom to decide what should be broadcast on its live free-to-air terrestrial broadcast.

[21] In *Khumalo and Others v Holomisa*,[4] the Constitutional Court held:

“[24] 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. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of

their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16”.

- [22] The question that immediately arises is whether the SABC will fulfil their constitutional mandate if they broadcast the Federal Congress by way of excerpts on regular news coverage on free-to-air news bulletins, excerpts on radio and on SABC’s news channel which is a digital platform. The excerpts on the news channel will likely be very brief.
- [23] It is the DA’s case that only a small fraction of viewers have access to satellite television channels and digital platforms. SABC news channel (channel 404 on DSTV) is available only to those who are able to afford a satellite dish and expensive subscription. The digital platforms are only accessible by those who have smart devices capable of accessing such platforms and sufficient data to stream online content. By contrast, SABC2 is free-to-air and is available to millions of people because the SABC is the public’s, most accessible, broadcaster. Therefore, so it was argued, the SABC’s duty and obligation to provide news and information to as many people as possible requires this event of national importance to be broadcast on its free-to-air terrestrial channel.
- [24] In answer to the allegations pertaining to the size of the audiences, the SABC merely denied these allegations. It stated that the DA has no right to choose a channel on which its events must be broadcast. The SABC failed to give any indication on how large a portion of the public would have access to a SABC2 broadcast as opposed to the satellite and digital news channel. Accordingly, the court must accept the applicant’s evidence that only a fraction of the population would be able to access the latter whilst millions of people will have access to the broadcast on SABC2.
- [25] Consequently, it is my view that the right to freedom of expression contained in section 16 of the Constitution, and more particularly the right to freedom to receive information, which is of importance to the general public in a democratic society, would not be served by a broadcast on digital or satellite platforms which only is available to a minority of citizens of this country.
- [26] In terms of section 7 of the Constitution, the SABC has a positive obligation to respect, protect, promote and fulfil constitutional rights.
- [27] The SABC’s constitutional duty towards citizens is reflected and given effect in its own Editorial Policies 2020. The SABC must adhere to its own policies and the Broadcasting Act[5], which must be interpreted “through the prism of the Constitution.”[6]
- [28] Section 2 of the Broadcasting Act provides inter alia that its object is to develop a broadcasting policy in the public interest and for that purpose to:

28.1 Contribute to democracy;[7]

28.2 Safeguard, enrich and strengthen the political fabric of South Africa;[8]

28.3 Ensure plurality of news, views and information;[9]

28.4 Establish a strong committed public broadcasting service which will service the needs of all South African society.[10]

[29] In the Editorial Policies, 2020 (“the 2020 Policy”), clause 5.15 deals with national events and schedule changes. These clauses should be quoted in full.

“5.15 National events and schedule changes

5.15.1 The SABC gives full or extended live coverage of events of national importance. In scheduling these events, editorial staff should take into account that they inevitably result in schedule changes. Such events may include the opening of Parliament, the budget speech, state occasions such as visits by foreign dignitaries and category-designed funerals; major commemorative occasions, and the proceedings of commissions of inquiry.

5.15.2 Other events that may warrant live coverage and involve scheduling and programming changes include major Parliamentary debates, the opening of provincial legislatures and significant conferences of the major political parties. Live coverage of events of national importance requires approval of heads of the relevant platforms, in consultation with senior management. (My underlining).

5.15.3 When an event of national importance is of a party political nature, editorial staff are to ensure that the SABC policies on objectivity, accuracy, fairness, impartiality and balance are adhered to.”

[30] On an analysis of clause 5.15, it indicates that:

30.1 The SABC must give full or extended live coverage of events of national importance.

30.2 Such coverage inevitably results in schedule changes.

30.3 Events which may warrant such coverage include significant conferences of the major political parties.

30.4 When an event of national importance is of a political nature, the SABC policies on objectivity, accuracy, fairness, impartiality and balance must be adhered to.

[31] It should be noted, yet again, that the broadcast requested by the DA would fall under the category of a conference of a major political party. The DA is the official opposition in this country. This is not disputed on the papers before this court. Should the coverage only be accessible to a small section of the population, full or extended live coverage of the event would not be achieved.

- [32] In my view, the 2020 Policy provides legal support for the DA's case. Full or extended live coverage of what transpires at its Congress will only be achieved by broadcasting the event of national importance on live free-to-air terrestrial television, which the DA has shown to be through the SABC2 channel. The DA has shown, on a balance of probabilities, that the broader population of people of this country, who have access to television, have access to the SABC2 channel and not to satellite and digital platforms.
- [33] The SABC failed on the papers to make out a case in its answering affidavit that its tendered coverage will similarly reach a wider audience. Counsel for the SABC endeavoured to indicate in his heads of argument, with references to the Broadcast Research Council's 2019 report on television audience measurements, Google Analytics and Youtube Analytics that the tendered coverage would reach a wide audience. The court cannot rely on this hearsay information which was not alluded to in the answering affidavit. It may very well be that a case could have been made out that the tendered coverage could have met the criteria stipulated in clause 5.15.1 to give full and extended coverage of events of national importance but this was not the case before this court.
- [34] For the DA to have requested full and extended coverage, as envisaged in the 2020 Policy, cannot be interpreted to mean that it interfered with the SABC's editorial policy and "editorial independence of the newsroom, and editorial integrity of SABC News"[11] as was argued before this court. Moreover, this matter did not concern the content of what was to be broadcasted but rather on which channel the provided content was to be broadcasted.
- [35] It is the SABC's case that although the DA has a right to have its congress broadcast by the SABC, it does not however have the right to dictate or stipulate on which channel its congress should be broadcast. In my view, the DA's request is for the broadcast to be available to the widest audience and to achieve this it needs to be on a free-to-air terrestrial broadcast which happens to be SABC2. No other option is available. Any editorial discretion to broadcast it on another platform would simply mean that this broadcast would not reach the widest audience as possible.
- [36] The SABC, in refusing the request of the DA to live broadcast the Federal Congress and their new leader's acceptance speech on SABC2, advanced financial concerns as its main reason for its decision. This approach is contrary to the 2020 Policy. Clause 5.3.11 reads as follows:
- "5.3.11 The staff may not allow their professional judgement to be influenced by pressures from political, commercial or other section of interest." (My underlining)*
- [37] The only reason which the SABC provided in its correspondence to the DA was a potential disruption and displacement of revenue-generating programming on SABC2. This is not permitted by its Editorial Policies.

[38] Accordingly, I am of the view that the SABC's decision to refuse to broadcast relevant portions of the DA's Federal Congress on SABC2 violated its Editorial Policies and its constitutional and statutory duties to provide news and information, including coverage of events of national importance, to as many people as possible. In my view, the DA has shown a clear right for the relief it is seeking.

Irreparable harm

[39] I am of the view that if the relief is not granted, the public and the DA will suffer irreparable harm, particularly if the broadcast only takes place on the SABC news channel and on digital platforms. This will only be accessible to a fraction of people - those who have access to expensive satellite subscriptions or smart devices with sufficient access to data to live stream - and not to the wider public. The vast majority of the South African public will only have access to excerpts on regular news coverage on free-to-air news bulletins and excerpts on radio and digital platforms. The greater South African public will lose the opportunity to be informed of the views of the official opposition of this country.

[40] The SABC did not indicate what irreparable harm it would suffer if the broadcast takes place on SABC2, save by stating that it must focus on revenue-generating programming. The SABC has provided no factual evidence to indicate to what extent it would suffer financially. Moreover, it is untenable to argue that the SABC will suffer irreparable harm if it loses two hours' worth of revenue-generating broadcasting time.

No satisfactory alternative remedy

[41] The DA had no alternative satisfactory remedy and the SABC has not provided any argument in this regard.

Conclusion

[42] When the order was granted, I was satisfied that the DA has met the requirements for the relief it was seeking and there was no need to consider the alternative relief which was the review of the decision of the SABC. Costs were ordered to follow the result but in my view, no case has been made out for costs on a punitive scale. The cost of two counsel was awarded on the basis of the complexity of the matter which, inter alia, involved constitutional issues. Both parties employed two counsel.

[43] The order I made is not repeated herein and this judgment should be read with the order of court, attached hereto, and marked with an "X".

R STRYDOM

JUDGE OF THE HIGH COURT

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 11 December 2020.

Date of Hearing:

29 October 2020

Reasons

requested:

11 November 2020

Date reasons delivered: 9 December 2020

Counsel for the applicant: Adv Nick Ferreira and Adv Katherine Harding

Counsel for the respondent: Adv FJ Nalane SC and Adv L Makapela

[1] South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others

[2006] ZACC 15; 2007 (1) SA 523 (CC).

[2] South African Broadcasting Corporation Limited v National Director of Public Prosecutions and others supra at para 26.

[3] South African Broadcasting Corporation Limited v National Director of Public Prosecutions and others supra at para 28.

[4] Khumalo and Others v Holomisa 2002 (5) SA 401 (CC).

[5] Broadcasting Act 4 of 1999

[6] Makate v Vodacom Ltd 2016 (4) SA 121 (CC) at para 87; Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) at para 28

[7] Section 2(a)

[8] Section 2(b)

[9] Section 2(d)

[10] Section 2(l)

[11] Clause 3.1.3 of the 2020 Editorial Policies.

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