



INTERIM REPORT OF THE AD HOC COMMITTEE ON THE SABC BOARD INQUIRY INTO THE FITNESS OF THE SABC BOARD, DATED 27 JANUARY 2017

The ad hoc Committee on the SABC Board Inquiry having inquired into the fitness of the SABC Board as per the National Assembly resolution of 3 November 2016, reports as follows:

1. Introduction

1.1 The National Assembly (NA) established the ad hoc Committee on the SABC Board Inquiry (the Committee) to inquire *inter alia* into the fitness of the SABC Board to discharge its duties as prescribed in the Broadcasting Act, No 4 of 1999 and any other applicable legislation.

1.2 This followed after widespread concern from the public about the SABC's ability to exercise its mandate as the public broadcaster. In addition, the Board could no longer convene quorate meetings as several non-executive Board members had been removed or had resigned.

1.3 There is *prima facie* evidence that the SABC's primary mandate as a national public broadcaster has been compromised by the lapse of governance and management within the SABC, which ultimately contributed to the Board's inability to discharge its fiduciary responsibilities.

1.4 The SABC has consequently deviated from its mandate as the public broadcaster, and from providing a platform and a voice to all South Africans to participate in the democratic dispensation of the Republic. The SABC has also failed to provide an important platform for community involvement, education and entertainment, reflecting the rich and diverse cultural heritage of South Africa.

1.5 Instead, there appears to have been flouting of governance rules, laws, codes and conventions, including disregard for decisions of the courts and the Independent Communications Authority of South Africa (ICASA), as well as the findings of the Public Protector of South Africa (PPSA). This collective conduct:

- rendered the SABC potentially financially unsustainable due to mismanagement as a result of non-compliance with existing policies and irregular procurement;
- interference in as far as editorial independence which is in direct conflict with journalistic ethics; and
- saw the purging of highly qualified, experienced and skilled senior staff members in violation of recruitment/human resource policies and procedures; purged staff have in many instances been replaced without due consideration for, or compliance with established recruitment policies.

Part A: Background and Methodology

2. Background

2.1 Terms of reference

2.1.1 The inquiry was instituted on 3 November 2016 per a resolution of the NA.

2.1.2 In line with section 15A(1)(b) of the Broadcasting Act the Committee was charged with inquiring into the ability of the SABC Board to discharge its duties as prescribed in that Act. Its terms of reference were limited to considering the:

- SABC's financial status and sustainability;
- SABC's response to *Public Protector Report No 23 of 2013/14: When Governance and Ethics Fail*;
- SABC's response to recent court judgements affecting it;
- SABC's response to ICASA's June 2016 ruling against the decision of the broadcaster to ban coverage of violent protests;

- current Board's ability to take legally-binding decisions following the resignation of a number of its non-executive Board members;
- Board's adherence to the Broadcasting Charter;
- Board's ability to carry out its duties as contemplated in section 13(11) of the Broadcasting Act (No 4 of 1999);
- human resource-related matters such as governance structures, appointments of executives; and the terminations of services of the affected executives; and
- decision-making processes of the Board.

2.1.3 In terms of the resolution the Committee must complete its business, and report to the NA by 28 February 2017.

2.2 Membership

2.2.1 The membership of the multi-party Committee comprised eleven members in total—the African National Congress (six members), the Democratic Alliance (two members); the Economic Freedom Fighters (one member); and other parties (two members).

2.2.2. The following members were selected to serve on the Committee¹:
 Hon. HP Chauke, MP (ANC); Hon. MB Khoza, MP (ANC); Hon. JD Kilian, MP (ANC); Hon. FS Loliwe, MP (ANC); Hon. JL Mahlangu, MP (ANC); Hon. VG Smith, MP (ANC); Hon. P van Damme, MP (DA); Hon. M Waters, MP (DA); Hon. MQ Ndlozi, MP (EFF); Hon. LG Mokoena*, MP (EFF); Hon. N Singh, MP (IFP); Hon. NM Khubisa, MP (NFP); Hon. S Swart*, MP (ACDP); and Hon. NL Kwankwa*, MP (UDM).

2.3 Process

2.3.1 The Committee unanimously elected Hon VG Smith, MP as its chairperson on 15 November 2016, and adopted the approach and the process that the inquiry would follow.

2.3.2 The Committee committed to conduct its hearings in compliance with the requirements of fairness and strict adherence to sections 56, 58 and

¹ The asterisks denote alternate members

specifically section 59 of the Constitution and the relevant rules of the NA. To this end, it agreed to adopt an inquisitorial approach, with evidence being gathered from the relevant state institutions, interest groups and other relevant witnesses (including the Shareholder Representative), and from relevant information/documentation. The inquisitorial approach allowed for a process where members are actively involved in determining facts and deciding the outcome in the matter.

2.3.3 The Committee conducted its processes in an open and transparent manner in line with NA Rule 184(1) pursuant to section 59(1)(b) of the Constitution of the Republic of South Africa (the Constitution). Section 59(1)(b) of the Constitution provides that the NA must conduct its business in an open manner, and hold its sittings and those of its committees, in public, but that reasonable measures may be taken to regulate public access, including access to the media. NA Rule 253(5) as envisaged in section 57(1)(a) and (b) of the Constitution further informed the Committee's processes.

2.3.4 Section 56 of the Constitution, read with the provisions of sections 14, 15 and 16 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No 4 of 2004 (the Privileges Act) was followed in relation to the swearing in and summoning of witnesses.

2.3.5 Adv. Nthuthuzelo Vanara had conducted a series of interviews with potential witnesses in anticipation of an inquiry that would have been conducted by the Portfolio Committee on Communications (the Portfolio Committee). The Committee therefore agreed to appoint him as its Evidence Leader.

2.4 Witnesses

2.4.1 The Committee invited briefings from certain Chapter 9 institutions and evidence from former and current Board members and chairpersons, former and current SABC employees, the Minister of Communications (the Minister), as well as civil society organisations. The hearings took place from 7 to 15 December 2016 and on 13 January 2017.

2.4.2 The Committee received briefings from the following Chapter 9 institutions:

- Auditor General of South Africa (Auditor-General), on the SABC's financial performance and audit outcomes for the period 1 April 2013 and 31 March 2016;
- ICASA, on the Complaints and Compliance Committee's 3 July 2016 decision in relation to the Media Monitoring Project Benefit Trust, SOS Support Public Broadcasting Coalition and the Freedom of Expression Institute's complaint regarding the SABC's decision not to cover violent protests, and the SABC's response to the decision; and
- PPSA, on *Public Protector Report No 23 of 2013/14: When Governance and Ethics Fail*, and the SABC's response to the remedial actions contained in it.

2.4.3 The following former Board members were invited to give evidence relating to their tenure:

- Prof. Bongani Khumalo;
- Mr Tembinkosi Bonakele;
- Ms Rachel Kalidass;
- Ms Nomvula Mhlakaza;
- Mr Ronny Lubisi;
- Mr Vusi Mavuso;
- Dr Aaron Tshidzumba; and
- Mr Krish Naidoo.

2.4.4 Dr Tshidzumba, Ms Mhlakaza and Mr Bonakele declined to participate for various reasons: Dr Tshidzumba was unavailable on the dates on which the hearings were scheduled owing to prior commitments; Ms Mhlakaza declined to participate as she did not wish to testify against a Board she had served on since September 2013; and Mr Bonakele declined to participate as he had resigned from the Board in October 2014 when he was appointed as a commissioner on the Competition Commission.

2.4.5 The following eight journalists who have become known as the "SABC 8" gave written and oral evidence:

- Ms Thandeka Gqubule-Mbeki;
- Mr Vuyo Mvoko;
- Mr Lukhanyo Calata;

- Ms Krivani Pillay;
- Ms Suna Venter;
- Ms Busisiwe Ntuli;
- Mr Foeta Krige; and
- Mr Jaques Steenkamp.

Ms Gqubule-Mbeki, Mr Mvoko, Ms Pillay and Mr Calata represented them at the hearing. Their evidence related, in the main, to the SABC's editorial policy and the victimisation and intimidation of journalists in particular.

2.4.6 Ms Sophie Mokoena (acting SABC Political Editor) would have appeared as a witness but later decided against doing so following consultations with the Evidence Leader. Mr Vuyani Green had initially declined to participate as he did not wish to give evidence against his employer. When he subsequently expressed interest in doing so, the Committee was no longer able to accommodate oral evidence in its programme.

2.4.7 The following former SABC employees were invited to give evidence on the SABC's human resource management and compliance with the Public Finance Management Act, No 1 of 1999 (PFMA) with regard to financial and supply chain management:

- Mr Phil Molefe (former acting Group CEO, July 2011 to January 2012);
- Ms Lulama Mokhobo (former Group CEO, January 2012 to February 2014);
- Mr Itani Tseisi (former Group Executive: Risk and Governance, 2013 to 2016);
- Mr Jabulani Mabaso (former Group Executive: Human Resources, June 2013 to June 2016);
- Ms Madiwe Nkosi (former General Manager: Labour Relations, July 2011 to September 2016);
- Ms Siphon Masinga (Former Group Executive: Technology);
- Mr Madoda Shushu (Former Head of Procurement, April 2013 to October 2016); and
- Mr Jimi Matthews (former Head of News and Group CEO).

2.4.8 Mr Matthews originally declined to participate, and could not be accommodated when he indicated willingness to give oral evidence later in the proceedings.

2.4.9 The Group Executive: Governance and Assurance, Ms Theresa Geldenhuys, was invited to give evidence related to her tenure as Company Secretary, from May 2012 to September 2016.

2.4.10 Prof. Mbulaheni Maguvhe was invited to give evidence in his capacity as Chairperson of the Board. In addition, he was requested to furnish the Committee with certain documents relevant to the inquiry. After several delaying tactics including an application to interdict the inquiry, which was later dismissed, Prof. Maguvhe was summoned to provide evidence and to produce the documents referred to above. He resigned subsequent to his appearance before the Committee.

2.4.11 The Minister of Communications, Hon. Faith Muthambi, MP gave evidence related to her role as Shareholder Representative. The Committee was specifically interested in her interpretation of the applicability of the Broadcasting Act and the Companies Act, No 71 of 2008 in respect of the appointment and termination procedures of Board members.

2.4.12 The following civil society organisations gave evidence, in the main related to the SABC's legal mandate, and role as a public broadcaster:

- Media Monitoring Africa;
- Right2Know Campaign; and
- SOS Support Public Broadcasting Coalition.

2.4.13 In the course of the hearings allegations were made relating to the governance failures of previous boards chaired by Dr Ben Ngubane (January 2010 to March 2013) and Ms Ellen Tshabalala (2013 to December 2015), some of which had affected subsequent boards too. Both were therefore invited to give evidence related to their tenures.

2.5 Documentation

2.5.1 The Committee requested the documents listed below from the SABC Board, in preparation for the inquiry:

- Delegation of Authority Framework (DAF);
- minutes and transcripts of sub-committee and Board meetings, if any, at which decisions to procure services from *SekelaXabiso*, *PriceWaterhouseCoopers* and *Vision View* were taken;
- minutes and transcripts of the sub-committee and Board meetings related to the consideration and approval of:
 - o presentation documents to the relevant parliamentary committees,
 - o the *MultiChoice* agreement,
 - o the Implementation Plan responding to the above-mentioned Public Protector's report,
 - o the 90/10 per cent local content for radio and 80/20 per cent local content for television plan/strategy,
 - o the removal of Mr R Lubisi, Ms R Kalidass and the late Ms H Zinde as Board members,
 - o the permanent appointment of Mr Hlaudi Motsoeneng as Chief Operating Officer,
 - o Mr Motsoeneng's appointment as Group Executive: Corporate Affairs,
 - o the bonuses and salary increases paid to Mr Motsoeneng,
 - o the amended Editorial Policy of 2016, and board decisions taken through a round robin process;
- Articles of Association prior to September 2014;
- Board's quarterly reports to the Minister of Communications;
- Governance Review Report prepared by *Sizwe Ntsaluba-Gobodo Auditors*;

- Recruitment Policy of the SABC;
- management report in response to Auditor General of South Africa-findings;
- Chief Audit Executive reports submitted to Audit Committee and Board; and
- SABC Skills Audit report conducted by *PriceWaterhouseCoopers*.

2.5.2 The Committee was severely constrained by the SABC Board's failure to comply with the request for information. The documentation was expected to reach the Committee by 21 November 2016 but this deadline was not met. A summons had to be issued for the Chairperson of the SABC Board and the former Company Secretary to produce the documents. Section 56(a) of the Constitution read with section 14 of the Privileges Act makes provision for summoning a person to produce documents and to appear before the NA or its committees. The summons to produce documents was challenged before the Western Cape High Court on 2 December 2016. Judge Desai ordered that the application be dismissed with costs.

2.5.3 At this stage there was partial compliance with the summons for the delivery of documentation. A second summons was issued which sought to compel the Chairperson of the SABC Board to appear as a witness before the inquiry and to produce the documents which were not delivered in terms of the first summons. It should be noted the Chairperson of the SABC Board through his legal representative informed the Committee that certain documents could not be delivered because they were commercially sensitive. The SABC eventually, on the weekend after the hearings had commenced (9th and 10th December 2016), submitted in excess of 500 emails purporting to be the documents that had been requested. These emails were not indexed and were very voluminous to sort and reconcile. This, in the Committee's view amounted to malicious compliance, aimed at frustrating the Committee's progress.

2.5.4 It should be noted that the Committee does not consider any of the documents it has received as being commercially sensitive as Prof. Maguvhe has alleged.

2.5.5 In addition to the documentation referred to in paragraph 2.5.1 the Committee received written input from several witnesses and interested/affected parties. The transcripts of proceedings are available upon request.

3. Regulatory Framework

Both the Broadcasting Act and the Companies Act govern the affairs of the SABC. The extent and scope of the applicability of each piece of legislation was considered by the Committee, with particular regard to the issue of the removal of Board members.

3.1 Removal of Board members in terms of the Broadcasting Act

3.1.1 Section 15 of the Broadcasting Act deals with the issue of the removal of Board members and provides for two distinct processes in this regard.

3.1.2 The first process is in terms of section 15(1)(a) ("section 15(1) (a) removal process"). In terms of this process, the President may remove a member of the SABC Board on account of misconduct or inability to perform his or her duties efficiently after due inquiry and recommendation by the SABC Board. In terms of the section 15(1)(a) process the President has exclusive and discretionary powers and the role of the SABC Board is limited to conducting an enquiry and making a recommendation for the removal of a particular Board Member.

3.1.3 The second process is outlined in section 15(1)(b) of the Broadcasting Act ("section 15(1)(b) removal process"). In terms of this section, the President must remove a member of the SABC Board from office after a recommendation for removal by a committee of the NA is adopted by a resolution of that House. In terms of the section 15(1)(b) removal process the President is obliged to remove a Board member on the recommendation of the NA and does not enjoy the discretionary powers provided for in the section 15(1)(a) process.

3.2 Removal of Directors in terms of the Companies Act

3.2.1 Section 71 of the Companies Act provides for the removal of directors subject to specific procedural requirements in subsection 71(2). The procedure is set out in the relevant memorandum of incorporation (MOI).

3.3 Resolving the apparent conflict between the Broadcasting Act and the Companies Act

- 3.3.1 It is clear that the Broadcasting Act and the Companies Act provide apparently conflicting requirements and processes for the removal of Board members. The question thus arises as to which legislation must be applied.
- 3.3.2 The common law provides that where a conflict between legislation emanating from the same legislature occurs, the later and more specific act must prevail. In the past the Broadcasting Act prevailed over the 1973 Companies Act in so far as it was both the later act and the more specific act. However, the promulgation of the 2008 Companies Act altered this position as the Companies Act became the later legislation.
- 3.3.3 The Broadcasting Act makes specific reference to the applicability of the Companies Act. Section 8A(5) of the Broadcasting Act states that “With effect from the date of conversion the Companies Act applies to the Corporation as if it had been incorporated in terms of the Companies Act on that date, save to the extent stipulated in this Act.”. In other words, the Companies Act applies to the affairs of the SABC except in respect of the sections of the Companies Act which are specifically listed in the Broadcasting Act as not being applicable. The issue of the removal of directors is not listed as an exclusion.
- 3.3.4 Notwithstanding that the term “stipulated” as used in section 8A(5) lends itself to a limited interpretation in so far as it appears to only refer to the specific sections that are excluded in terms of section 8A(6), this interpretation would give rise to legal absurdities.
- 3.3.5 A more liberal interpretation is that the effect of section 8A(5) of the Broadcasting Act is that it provides for the applicability of the Companies Act to the extent that the Broadcasting Act makes no provision in respect of a specific matter that is otherwise generally dealt with in the Companies Act. In other words, if a matter is dealt with specifically in the Broadcasting Act then notwithstanding that such a matter is also dealt with generally in the Companies Act, the Broadcasting Act will apply.

3.3.6 This more liberal interpretation is supported by common law principles of legislative interpretation including legislative purpose. The common law provides that the starting point in reconciling two pieces of legislation is to avoid conflict where possible through a systematic interpretation. Two maxims that find application in this regard is as follows:

- *Lex posterior derogat priori*: in terms of this maxim, a later law amends or repeals an earlier law to the extent of such conflict or inconsistency.
- *Generalia specialibus non derogant*: in terms of this maxim later general law does not amend or repeal an earlier specific law except, to the extent that such conflict or inconsistency, allows for the earlier special law to operate as an exception to the later general law.

3.3.7 In terms of these principles the starting point is that where a conflict exists the later law will trump the earlier law. This general rule must however be applied with the proviso that unless the later law is the specific law, the earlier law must be applied. In the matter at hand the special or specific law is the Broadcasting Act and it therefore takes precedence over the general law being the Companies Act, notwithstanding that the Broadcasting Act is the earlier law. This is supported by the fact that the Broadcasting Act, on the question of the removal of Board members, is specific, more concrete and takes better account of the particular features of the context in which it is to be applied than the Companies Act.

3.3.8 The application of the special law does not extinguish the relevant general law. The general law will remain valid and applicable and will, in accordance with the principle of harmonisation, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.

Part B: Summary of Evidence

4. Governance

4.1 Separation of Powers

Roles and Responsibilities of the Minister of Communications

- 4.1.1 The SABC has since 1994 become an important medium through which freedom of expression is realised as envisaged in the Constitution and the Charter of the Corporation contained in Chapter IV of the Broadcasting Act. The SABC plays an important role in contributing to democracy, the development of society, gender equality, nation-building, the provision of education and strengthening the spiritual and moral fibre of society by ensuring a plurality of news, views and information and providing a wide range of entertainment and education programmes. The SABC has over the last ten years however experienced a plethora of challenges resulting from a collapse of good governance.
- 4.1.2 The Minister's role, responsibilities and authority are derived from sections 91(2), 92(3)(b) and 96(2) of the Constitution, sections 2.1, 2.2 and 2.3 of the Executive Ethics Code, and sections 13(b), 17(1)(c)(i)(ii), 17(2)(e) and 17(3) of the Privileges Act.
- 4.1.3 Witnesses suggested that the Minister at times interfered in the Board's business in the guise of holding the SABC accountable to the Shareholder Representative, and in so doing disregarded the Board as the primary mechanism to promote accountability. This was most notable in the circumstances surrounding the permanent appointment of Mr Motsoeneng as Chief Operating Officer (COO) soon after the Minister took office in July 2014.
- 4.1.4 Evidence from witnesses including the Minister, revealed that in many instances the Broadcasting Act was disregarded as the principal act governing the affairs of the public broadcaster. Notwithstanding section 8A(5) of the Broadcasting Act, provisions of the Companies Act were in some instances given preference. This was seemingly done to empower the Minister to become involved in the SABC's operational matters. Many witnesses also gave

evidence to illustrate how the MOI had been used to trump the Broadcasting Act, for the same purpose as mentioned above.

4.1.5 According to section 13 of the Broadcasting Act the appointment of the board chairperson and the deputy chairperson, as well as that of the executive and non-executive directors' rests with the President on the recommendation of the NA. Section 15(1) of the Act empowers the President to remove a member from office on account of misconduct or inability to perform his or her duties. This section also empowers the President to remove Board members in the event that a committee of the NA makes an adverse finding and recommends that a member be removed from office. These provisions were disregarded in the dismissal of Ms Kalidass, Mr Lubisi and the late Ms Hope Zinde.

4.2 Broadcasting Amendment Bill [B39-2015]

4.2.1 The Broadcasting Amendment Bill (the Bill) was tabled in the NA on 4 December 2015, and is being processed.

Objects of the Bill

- 4.2.2 The main objective of the Bill is to amend the principal Act so as to:
- delete the definition of "appointing authority";
 - amend the procedure for the appointment and removal of non-executive members of the Board;
 - reduce the number of non-executive directors in the Board;
 - provide for the appointment of a nomination committee to make recommendations to the Minister of Communications ("the Minister") for the appointment of non-executive members of the Board;
 - reconstitute committee of the SABC;
 - amend the procedure regarding the removal and resignation of non-executive members of the Board; and
 - amend the procedure for the dissolution of the Board, and for the appointment of an interim Board.

New procedure for appointment of non-executive Board members

4.2.3 Clause 3 of the Bill seeks to amend section 13 of the Act by introducing a new procedure for the appointment of Board members. Should the amendments be

passed, the Minister will take over the role the NA currently plays in the appointment of non-executive Board members.

- 4.2.4 The Bill proposes that a nomination committee be appointed to make recommendations to the Minister for the appointment of non-executive Board members. In appointing the members of the nomination committee, the Minister must ensure that the committee is broadly represented and that members have the necessary skills, knowledge, qualifications and experience to serve on the committee.
- 4.2.5 The Bill further provides for the re-appointment of non-executive Board members to maintain institutional stability and continuity. Non-executive members will be eligible for re-appointment to the Board for a further period not exceeding three years.
- 4.2.6 The change in the composition of the Board necessitates the proposed amendment of the quorum for decision-making purposes and for voting of the chairperson.

Dissolution of the Board and appointment of an interim Board

- 4.2.7 Clause 6 of the Bill seeks to substitute section 15A in order to provide a new procedure for the dissolution of the Board and the appointment of an interim Board. The proposed amendments provide that the President may, after due enquiry and on the recommendation of the panel contemplated in section 15(3), dissolve the Board if it fails to discharge its fiduciary duties, fails to adhere to the Charter referred to in section 6 or fails to carry out its duties contemplated in section 13(11).
- 4.2.8 The Bill further provides for a panel to investigate the grounds for the dissolution of the Board, compile a report of its findings and make recommendations to the President. Upon the dissolution of the Board, the President must appoint an interim Board, consisting of persons referred to in section 12(b) of the Act and five other persons, to manage the affairs of the corporation for a period not exceeding six months. The President must designate one of the members of the interim Board as the chairperson and the other as the deputy chairperson, both of whom must be non-executive

members of the interim Board. A quorum for any meeting of the interim Board is seven members.

4.3 Fiduciary duties

4.3.1 The mission of the SABC Board is to fulfil the requirements of the SABC Charter in accordance with the strategic objectives of the Government and the requirements of the Broadcasting Act, whilst achieving its commercial and public mandate.

4.3.2 The Board is ultimately accountable and responsible to the Shareholder for the performance and affairs of the SABC. The Board must therefore retain full and effective control of the SABC and must give strategic direction to the SABC's management. It is responsible for ensuring that the SABC complies with all relevant laws, regulations and codes of business practice.

4.3.3 In addition, the Board has a responsibility to the broader stakeholders, which include the present and potential beneficiaries of its products and services, clients, lenders and employees. The Board therefore constitutes the fundamental base of corporate governance in the SABC.

4.3.4 Individual directors and the Board as a whole, both Executive and Non-Executive, carry full fiduciary responsibility in terms of:

- sections 77, 214 and 215 of the Companies Act;
- sections 10(4) and 25 of the Broadcasting Act; and
- sections 49, 50, 51, 83, 84, 85 and 86 of the PFMA.

4.3.5 The common law principle, *lex specialis derogate legi generalis* is applicable with the Broadcasting Act being the applicable and specific law, over the Companies Act which is the general law.

4.3.6 The current MOI cannot be used as basis for interpretation as it is under dispute. Accepting the MOI would be tantamount to giving it the status of having repealed provisions of the Broadcasting Act. Moreover, during evidence gathering, the Committee received three MOIs, one undated and unsigned; a

second, dated 20 September 2013 and signed by the Minister; and a third, dated 20 September 2013 and signed by the Minister and Prof. Maguvhe.

- 4.3.7 The Broadcasting Act is undoubtedly specific to the SABC, and is therefore the primary law applicable to the public broadcaster.
- 4.3.8 The duties of the SABC board are generally covered in several sections of the Broadcasting Act. Section 13(11) in particular, states that "...the board controls the affairs of the Corporation and must protect matters referred to in section 6 (2) of this Act." Section 6(2) relates to the enforcement of the SABC Charter.
- 4.3.9 The Broadcasting Act is silent on the detail of the fiduciary duties of the board, and what action must be taken should a board not fulfil such duties. Sections 50 and 51 of the PFMA however details the fiduciary duties of boards (accounting authorities) of public entities such as the SABC. Sections 83 to 86, detail what action must be taken against a board that fails to discharge its duties. Sections 76, 77, 214, 215, 216 and 217 of the Companies Act are also applicable.
- 4.3.10 Evidence during the inquiry confirmed and in some instances revealed that the challenges faced by the Board which including instability, dysfunction and political interference, had impeded the Board's ability to hold the SABC executives accountable. Coupled with this, instability at senior management level has had a significant impact on the SABC's ability to fully execute its mandate.
- 4.3.11 Evidence heard from all former Board members of the most recent Board, including former group chief executive officers, revealed that the Board was often divided along two lines.
- 4.3.12 Evidence by most former Board members who gave evidence suggested that the Minister was at the centre of the appointment and removal of Board members, and curtailed the functions and responsibilities of the Board through amendments of the MOI which in turn impacted on the roles and responsibilities as outlined in the DAF, and in so doing contravened the Broadcasting Act.

5. Report of the Auditor General of South Africa

5.1 Audit Findings

The following audit outcomes spanning the last three financial years—2013/14, 2014/15 and 2015/16—were highlighted by the Auditor-General.

5.1.1 The SABC received qualified outcomes with findings for the 2013/14, 2014/15 and 2015/16 financial years. A qualified opinion refers to an outcome where the entity failed to produce credible and reliable financial statements and, had material misstatements on specific areas in their financial statements which could not be corrected before the financial statements were published.

5.1.2 In 2015/16 the areas of qualification had been reduced but irregular, fruitless and wasteful expenditure—which has escalated considerably—remains an area requiring urgent intervention.

5.2 Irregular Expenditure

5.2.1 Irregular expenditure refers to expenditure incurred owing to non-compliance with applicable legislation and is incurred when proper processes are not followed². Such expenditure does not necessarily imply that money was wasted or that fraud had been committed, but is rather an indication that legislation and prescribed processes were not followed. This legislative requirement is aimed at ensuring that procurement processes are competitive and fair.

5.2.2 Irregular expenditure was misstated as follows: -

- The SABC and group incurred expenditure in contravention with supply chain management (SCM) requirements for both the current and prior years that were not included in irregular expenditure note. The understatement amounted to R35,1 million. This contravened Section 55 (2)(b)(i) of the PFMA which states that the annual report and financial statements must include the particulars of any material losses through criminal conduct and any irregular, fruitless and wasteful expenditure that occurred during the financial year;

² PFMA, Act No 1 of 1999.

- The SABC did not have supporting documents in place to identify irregular expenditure. Supporting documents to verify the disclosed irregular expenditure of R141, 4 million to test these for compliance with SCM regulations were not provided for audit purposes. Irregular expenditure incurred in periods prior which was not disclosed was also reconsidered. In 2015, supporting documents to the value of R23, 9 million to test compliance against SCM regulations were not provided for audit purposes. This is in contravention with Section 55(1)(a) of the PFMA which states that the accounting authority must keep full and proper records of the financial affairs the public entity. Section 28(1)(a) of the Companies Act states that a company must keep accurate and complete accounting records in one of the official languages of the Republic;
- The table below shows irregular expenditure incurred in 2014, 2015 and 2016. In 2014, the SABC incurred irregular expenditure to the amount of R990,7 million; R2,4 billion was incurred in prior years but discovered in 2014, resulting to a cumulative figure of R3,4 billion. R441,2 million was incurred in 2016. In addition to this, R322,3 million was incurred in prior periods but only identified in 2016, resulting in the escalation of irregular expenditure to R5,1 billion.

	2014 (R'000)	2015 (R'000)	2016 (R'000)
Opening balance	1 231	3 376 809	4 385 138
Add: Irregular expenditure identified in the current year relating to prior years	2 399 775	1 732 127	322 282
Expenditure previously disclosed as irregular re-verified in the current year		(1 113 081)	
As restated		3 995 855	4 707 420

Add: Irregular expenditure-current year	990 694	389 283	441 223
Irregular expenditure not condoned		4 385 138	5 148 643
Less: Amounts recoverable	(14 891)		(117)
Irregular expenditure awaiting condonation	3 376 809	4 385 138	5 148 526

Irregular expenditure for the SABC Group

5.2.3 The SABC incurred the following types of irregular expenditure:

- No original tax clearance on the date of the award;
- Payments without contracts;
- Spilt orders- relates to instances where procurement of goods and services was deliberately spilt into parts or items of lesser value to avoid complying with SCM policy and regulations;
- Inadequate contract management;
- Over invoiced contracts – relates to instances where payments made exceeds the approved contract amount;
- Procurement process not followed/ inadequate deviation from the SCM policy and
- Deviation from the Delegation of Authority Framework.

5.2.4 R25,7 million of the irregular expenditure incurred in the current financial year was incurred as a result of contravention of SCM legislation. The Auditor-General further notes that the SABC has not fully implemented its SCM policy.

5.2.5 The Auditor-General reported findings on awards to persons in the service of the state and their close family members. Although these are not prohibited, compliance with the legislation and policies was tested to ensure that conflicts of interest did not result in contracts being unfairly awarded or unfavourable price quotations being accepted. The findings were as follows:

- 2 awards to the value of R716,690 were made to officials who did not submit declarations of interest;

- 71 awards to the value of R150,7 million were made to close family members, partners and associates of the SABC; and
- 2 awards to the value of R3,5 million were made to persons in the service of other state institutions.

5.2.6 The Auditor-General found that fifteen awards to the value of R6,9 million were procured without inviting at least the minimum prescribed number of written price quotations from prospective suppliers, and the deviation was not approved by a properly delegated official. Contracts to the value of R2,1 million were procured without inviting competitive bids - the deviations were approved even though it would have been practical to invite competitive bids.

5.3 Fruitless and wasteful expenditure

5.3.1 Fruitless and wasteful expenditure is expenditure that was made in vain and that would have been avoided had reasonable care been taken³. The table below shows fruitless and wasteful expenditure for the SABC for 2014, 2015 and 2016. An amount of R34,7 million in fruitless and wasteful expenditure was incurred in 2016 and a total of R92,5 million in fruitless and wasteful expenditure awaits condonation.

	2014 (R'000)	2015 (R'000)	2016 (R'000)
Opening balance		42 000	58 299
Add: Fruitless and wasteful expenditure- current year	54 600	16 154	34 678
Add: Fruitless and wasteful expenditure- prior years		1 014	
Fruitless and wasteful expenditure not condoned		58 168	92 977
Less: Amounts recoverable	(12 600)	(869)	(516)
Fruitless and wasteful expenditure	42 000	58 299	92 461

³ Ibid

5.3.2 The fruitless and wasteful expenditure incurred relates to settlement amounts paid as a result of cancellation of employment contracts; salaries paid to employees while they were on suspension with no evidence to confirm that investigations were conducted; and salaries paid to employees whilst they were on suspension but the investigations were not conducted as soon as the suspension came into effect.

5.4 Compliance with laws and regulations

5.4.1 The SABC failed to comply with the applicable laws and regulations in its financial management. The Auditor-General noted instances of non-compliance with laws and regulations. The following instances were identified:

- Financial statements submitted for auditing were not prepared in accordance with International Financial Reporting Standards (IFRS) as required by Section 55(1)(b) of the PFMA and Section 29(1)(a) of the Companies Act. Material misstatements identified by auditors were subsequently corrected, but the uncorrected material misstatements and supporting documents that could not be provided resulted in the financial statements receiving the qualified opinion.
- Goods, works or services were not procured through a procurement process which is fair, equitable, transparent and competitive as required by section 51(1)(a)(iii) of the PFMA. Sufficient appropriate audit evidence could not be obtained that the procurement systems or processes complied with the requirements of a fair SCM system as envisaged in Section 51(1)(a)(iii) of the PFMA.
- Section 51(1)(b)(ii) of the PFMA requires that effective steps are taken to prevent irregular, fruitless and wasteful expenditure;

- Proper control systems to safeguard assets were not implemented as required by Section 50(1)(a) of the PFMA which states that the accounting authority must exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity.
- Disciplinary steps were not taken against officials who made and permitted irregular, fruitless and wasteful expenditure as required by Section 51(1)(e) (iii) of the PFMA.

5.4.2 Adequate performance management systems were not in place to ensure that the performance of all staff was measured regularly. The following shortfalls were identified in the recruitment policy:

- competency assessments were not conducted;
- criminal record checks to be conducted for every employee; and
- citizenship verification to be conducted;

5.4.3 An assessment of Human Resource management revealed the following deficiencies:

- increase in vacancy rate from 3.1 per cent to 7.4 per cent in 2015/16;
- senior management vacancy rate increased from 8% per cent in 2014/15 to 14,7 per cent in 2015/16; and
- vacancy rate in 2015/16 at finance division was 5.07 per cent, and internal audit 4 per cent.

5.4.4 An assessment of human resource management identified the following:

- that appointments were made in posts that had not been advertised; and
- that new appointees did not have the required qualification and experience for posts.

5.5 Consequence management

5.5.1 The Auditor-General noted the lack of consequence management at the SABC. Forty-four alleged cases of fraud and corruption were reported through internal mechanisms in prior years, and 13 in the current year. Nineteen cases resulted in disciplinary action in prior year, and 9 in the current financial year. Only three

cases from the previous year, and one in the current financial year were referred to law enforcement agencies.

5.6 Going concern

5.6.1 During the audit of financial statements for the year ended 31 March 2016, the following material uncertainties were noted which cast significant doubts on the entity's going concern assumptions:

- The cash reserves of the SABC have been deteriorating in the last two years. In 2014 cash and cash equivalents amounted to R1, 4 billion. This decreased to R1 billion in 2015 and R874, 7 million in the current financial year. Revenues need to increase significantly in order for the SABC to return to profitability. The cash balances after year-end have deteriorated. The bank balance moved from R874, 7 million at the end of March 2016 to R837, 8 million at the end of April 2016. This represents a 4.2 per cent decrease in one month. The balance decreased further in May to R703, 8 million which is a 16 per cent decrease. The balance after also showed a significant decrease in cash reserves to R 548,7 million (per SAP general ledger) which is a 22 per cent decrease. This is a decrease of 37 per cent in cash in just four months. Incorporated in the cash reserves at year-end is the Government Grant restricted cash of R167, 4 million which is for conditional migration, and not for the operational use of the entity.
- Revenue increased slightly with operational expenditure increasing faster than revenue which casts doubt on the budgeted net profit of R3, 4 million for the 2016/17 financial year.
- The SABC reported recurring losses for the past financial years. Losses are driven by employee costs, broadcasting costs and signal and distribution costs. Professional and consulting fees increased significantly, by 45 per cent.

5.7 The role of the Board in relation to financial management

5.7.1 The Board failed in discharging the following of its duties with regard to the SABC's financial management, and sustainability:

- Investigating all irregular, fruitless and wasteful expenditure to establish misconduct, fraud or losses that should be recovered and, where deemed necessary, to recover these expenditures as required by section 50(1) of the PFMA which highlights the fiduciary duties of accounting authorities and Section 51(1)(b)(ii) which lists the responsibilities of accounting authorities of public entities which includes taking effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure as well as losses resulting from criminal conduct. Section 51(1)(e) states that accounting authorities must take effective and appropriate disciplinary steps against any employee who:
 - o contravenes the PFMA;
 - o commits an act which undermines the financial management and internal control system; and
 - o makes or permits irregular, fruitless and wasteful expenditure.
- The Board failed to discharge its duties as contemplated in the PFMA and failed to take effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure as well as failed to act against employees who incurred these expenditures.
- The Board failed to ensure that an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective was in place as required by Section 51(1)(a)(iii).
- The Board has a responsibility according to Section 51(1)(c) of the PFMA to ensure that all assets are safeguarded. The Auditor-General highlighted that proper control systems to safeguard assets were not implemented as required by Section 50(1)(a) of the PFMA.
- The Board failed to ensure that the SABC has and maintains an effective and transparent system of financial and risk management, and

internal control as required by Section 51(1)(a)(i) of the PFMA. The internal control environment is weak which allowed employees to permit irregular expenditure.

- The Board failed to submit the necessary documents to the Auditor-General which limited the scope of the audit into irregular expenditure. Section 54(1) of the PFMA obligates the accounting authority to submit to the Treasury or the Auditor-General documents, explanations and motivations as may be prescribed or as the Auditor-General may require.

5.7.2 According to section 86(2) of the PFMA “an accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55”.

6. Supply Chain Management

6.1 Background

The SABC’s supply chain management was marred by contraventions of supply chain policies and regulations, as well as the purging of officials such as Ms Nompilo Dlamini, the former Supply Chain Manager (August 2008 to January 2015) and other staff members. Other officials, including Mr Shushu, resigned as their ability to discharge their duties efficiently was severely constrained.

6.2 Mr M Shushu - oral evidence

6.2.1 Mr Shushu’s evidence pointed to following contraventions:

- The circumvention of supply chain processes and regulations in relation to, for example, the *SekelaXabiso* company which was appointed to supply audit services and assist with resolving irregular expenditure; and the *Vision View* contract for the acquisition of a studio valued at of R43 million.

- Payments were made without contractual obligations having been fulfilled, and in some instances where no valid contracts were in place.
- Irregular payments were made to certain providers such as Talent Africa which was irregularly appointed to recruit a Group CEO and CFO; a legitimate process was initially undertaken by the Group Executive: Human Resource and the Head: Supply Chain Management but this process was halted by the Board sub-committee on Governance and Ethics i.e. the Board interfered in operational SCM matters and excluded the SCM unit.
- Supply chain management-deviations were approved for transactions which did not warrant the use of an emergency clause e.g. the *Lorna Vision* contract which was sourced to collect TV licence fees. This contract did not meet the requirements of a deviation: for a deviation to apply, it must be proven beyond reasonable doubt that it is a sole source situation or it was impractical to source the goods. Tests are done to verify impracticality or sole source situations. This did not apply to this contract.
- There were transactions where payments were escalated, and the payments made to suppliers were more than the contract amount. Mr Aguma had done an unauthorised transaction who when he was the CFO. Initially, the contract was for R8,2 million but it escalated by 17 per cent to R10 million when invoicing was done.
- There was an amendment of the DAF, which gave executive directors the authority to approve up to R10 million, while the Head: SCM could only approve up to R5 million. This may have been done to allow executive directors to appoint preferred bidders. A substantial number of transactions with irregularities were reported after the approval of DAF.
- There was abuse of power by executives by changing reporting lines to render SABC's governance structures weak. Mr Shushu highlighted instances where executives such as the Mr Aguma, who was the CFO

at the time and the COO at the time, Mr Motsoeneng, abused their power and committing the organisation to millions of rands.

- Assurance providers had collapsed: the Internal Audit unit, the Audit Committee and the Board were ineffective and did not ensure that supply chain processes were adhered to.

6.3 Ms N Dlamini - affidavit

- 6.3.1 In her written evidence, Ms Dlamini highlighted certain supply chain irregularities including the involvement of Board members in operational issues.
- 6.3.2 The SCM reporting lines were changed from the CFO to COO which meant that procurement decisions could be taken by the COO or his office through Ms Sully Motsweni. These decisions were not supported by Ms Dlamini as they contravened supply chain processes.
- 6.3.3 Functions were duplicated as external providers were appointed even though the same services were already available internally. Mr Motsoeneng requested her to appoint a company to recover VAT from SARS over a period of 10 years at a management fee of 35 per cent, yet the SABC had its own internal unit responsible for this function. Dick Foxtan, a public relations firm, was appointed to be the spokesperson and publicist of the Group CEO despite the fact that the SABC had its own internal spokesperson. The company was paid a R350 000.00 per month retainer plus additional fees.
- 6.3.4 The VAT contract was estimated to be between R250 million and R500 million but the DAF did not provide any individual at the SABC, or even the Board the authority to approve such an amount.
- 6.3.5 Supply chain specialists were compromised and severely constrained because suppliers concluded contracts directly with the then COO, Mr Motsoeneng. Mr Nazeem Howa, a New Age Media Group representative had instructed her to issue an appointment letter for the New Age Newspaper–subscription, but she would not cooperate.

6.3.6 The issue of interference by the Board and unclear demarcation of roles between the Board and executives was mentioned by Ms Dlamini again as **Dr** Ngubane had unexpectedly attended a Bid Committee meeting where he informed her she could not tell the Board who should award tenders to.

6.4 Mr I Tseisi - oral evidence

6.4.1 Mr Tseisi alluded to contracts which were awarded irregularly and with little regard for SCM regulations. These were raised with the Board as identified risks, and included the *SekelaXabiso* and *PriceWaterhouseCoopers* contracts.

6.5 Organisation Undoing Tax Abuse – written submission

6.5.1 According to documents submitted to motivate for the deviation from normal procedures in the acquisition of the multi-purpose set, the SABC claimed that the insurance claim process had not yielded any positive results, thereby creating a false impression in order to have the deviation approved.

6.5.2 There was no evidence that the construction and architectural design was approved by the Construction Industry Development Board (CIDB) as is required by section 13 of the SABC's Supply Chain Management Policy First Review.

6.5.3 An emergency clause applies to urgent cases where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical. Lack of proper planning does not constitute an urgent case. The SABC had sufficient time and knowledge of the 2015 Rugby World Cup and the state of studios 1 and 2 prior to the deviation request, therefore the urgency claim was not valid.

6.5.4 The Head of Sport misrepresented the fact when he stated that studios 1 and 2 were destroyed in the Henley fire. Only studios 5 and 6 were affected.

6.5.5 Mr Motsoeneng, as chair of the Operations Committee approved the *Vision View* contract and unlawfully cancelled the tender the Bid Adjudications Committee had approved and recommended to the Group EXCO. This resulted in an irregular and unauthorised deviation process.

7. Suspicious transactions

7.1 *MultiChoice* agreement

7.1.1 The agreement between pay-tv channel *MultiChoice* and the SABC has been surrounded by controversy since its inception. Three main issues sparked the controversy: the lack of transparency in the processing of the agreement; the “sale” of SABC archives which would result in the establishment of an entertainment channel *SABC Encore*; and the fact that the “sale” renders the two channels that broadcast SABC content inaccessible to the majority of South African citizens who do not have access to pay-tv.

7.1.2 From the information that was available to the Committee it is evident that the *MultiChoice* agreement was well underway by the time the 2013 Board was appointed. Evidence by a former Board member indicates that upon their appointment to the interim Board, they were presented with numerous documents for Board members’ information. These included, amongst others, the commercial and master channel distribution agreement between the SABC and *MultiChoice*. Minutes provided to the Committee by Ms Kalidass, indicate that the interim Board had granted provisional approval of the proposal/agreement on 12 June 2013.

7.1.3 Some Board members raised concerns around the legal aspects of the contract between the SABC and *MultiChoice*, drawing attention to section 8 read with section 2 of the Broadcasting Act which related to the powers, objectives and parameters within which the SABC could operate, in particular. Based on these provisions it was suggested that the deal was unlawful.

7.1.4 Mr Naidoo, a practising attorney testified that he had assessed the legality of the agreement and had, towards the end of 2013, advised the Board that the contract was unlawful. His evidence was corroborated by other former Board members. In light of the above, the then Chairperson of the Board proposed that a second opinion, which ultimately contradicted Mr Naidoo’s, be sought.

- 7.1.5 According to evidence, the terms of the agreement include that *MultiChoice* would use the SABC's archived material on condition that a particular position on set-up control be adopted. Secondly, that the person who had signed the agreement on behalf of the SABC, was not authorised to do so.
- 7.1.6 ICASA first dealt with the *MultiChoice* matter in July 2013, when it became concerned that it would stifle competition in the industry. They referred the matter to the Competition Commission. In about October 2013, after various engagements between ICASA and the affected parties, ICASA's legal department furnished the Council with a legal opinion which concluded that the Authority's integrity and credibility would be compromised if it lodged a complaint against one party involved in the debate around whether set-top boxes should be encrypted. ICASA accordingly withdrew its referral. Caxton and CTP Publishers and Printers and others, as interested parties, then referred the complaint to the Competition Commission. The application was dismissed by the Competition Tribunal on 11 February 2016. Having noted the Committee's concerns about whether the sale of the SABC archives was in violation of section 8(j) of the Broadcasting Act, ICASA sought a legal opinion responding specifically to this concern. The opinion, which ICASA is still to consider, found that the SABC has indeed violated section 8(j) although not on grounds queried by the Committee.
- 7.1.7 A recurring theme in the inquiry was the apparent connection between *MultiChoice* and the SABC's agreement, and the SABC's policy on Digital Terrestrial Television (DTT), and in particular set-top box encryption. Evidence suggests that the SABC, along with the government, had supported encryption. In 2007 the SABC developed a strategy for encryption, which cabinet later adopted as the official government policy. Evidence from a variety of witnesses revealed that the *MultiChoice* agreement required that the SABC rejects its original position in support of set-top box encryption. By 2014, the SABC had begun to advocate for non-encryption in spite of the significant benefits set-top box encryption would have for free-to-air broadcasters, including itself. Encryption would have given the SABC a competitive edge over its biggest rival, *MultiChoice's* DStv.

7.2. New Age Media arrangement

- 7.2.1 Mr Masinga gave evidence about an unscheduled meeting with Mr Howa, representing the New Age Media Group, the parent company of ANN7, which had been convened by Mr Motsoeneng. At the meeting he was presented with a three-page bid to rebrand SABC News using SABC resources including its reporters, while The New Age (TNA) would retain the advertising revenue. Despite attempts to do so, the agreement was never signed.
- 7.2.2 The Committee heard conflicting evidence regarding the SABC's involvement in the TNA Breakfast Briefings. Mr Molefe testified that Mr Motsoeneng had initiated meetings with Mr Tony Gupta in July 2011 to discuss a possible business agreement between the SABC and the TNA Media Group. In the main, discussions centred around entering into an memorandum of understanding (MOU) in terms of which the SABC would allow TNA to air live broadcasts of its breakfast briefings on Morning Live; a "huge" subscription to the New Age, for newspapers to be distributed in the SABC's national and provincial offices; for a stake in the SABC's news channel which was still in the pipelines at that time. Mr Molefe testified that he had not agreed to any of the proposals.
- 7.2.3 Dr Ngubane contradicted Mr Molefe's claims, and indicated that Mr Molefe himself had approved the New Age subscription, and that he had initiated the talks with the TNA Media Group which had resulted in the TNA Breakfast briefings being aired during Morning Live.
- 7.2.4 Mr Mvoko gave evidence that SABC resources were diverted to fund ANN7, a rival news channel. He indicated that *Morning Live* resources were diverted to pay for the production costs associated with the TNA Breakfast briefings. The SABC did not generate any revenue from the briefings. This contradicted evidence from Dr Ngubane who insisted that the TNA arrangement made good business sense and that there was no cost to the SABC.

7.3 Vision View

7.3.1 Mr Shushu in his evidence stated that a flood of irregular transactions were introduced after the amendment of the DAF. These included the above-mentioned *Vision View* contract which was approved by the Board via round robin on 31 July 2015. He confirmed that the Board's approval came after the agreement had already been signed. The office responsible for SCM was consulted or involved in the process.

8. Human Resource-related matters

8.1 Executive Appointments

8.1.1 The SOS Support Public Broadcasting Coalition submitted that different interpretations of who should appoint the SABC's CEO, CFO and COO have arisen because the Act was not explicit as far as who the appointing authority should be. The organisation is of the firm view, however, that in light of the SABC's mandate as an independent public broadcaster its executive directors should not be appointed by a political authority. The organisation gave evidence that the MOI was amended irregularly to compensate for a lacuna in the Broadcasting Act around who should appoint these top senior managers.

8.1.2 During her evidence the Minister insisted that amendments to the MOI were effected in accordance with both the Broadcasting Act and the Companies Act. She stated that although legislation did not require her to do so, the Ministry had consulted the Board on the amendments as a courtesy before they were submitted to Companies and Intellectual Property Registration Office (CIPRO). She had also briefed the Portfolio Committee on the MOI in June 2015. According to the Minister, neither the Board, nor the Portfolio Committee had raised any reservations about the impact of the amendments or the manner in which they were processed.

8.2 Appointment of Mr H Motsoeneng as COO

8.2.1 Some former Board members testified that the process to appoint Mr Motsoeneng permanently in the position of COO was done hastily, in a manner which had highlighted the above-mentioned division among Board members. Many witnesses expressed disbelief that despite the Public Protector's damning findings against the then acting COO, the majority of the members voted for his permanent appointment. Mr Mabaso's evidence confirmed that

he, as the Chief Executive: Human Resources, had not been included in discussions around this appointment.

8.2.2 Evidence presented suggested that this appointment was done in contravention of the SABC's recruitment policies and procedures. Many witnesses further alluded to the Minister having exercised undue pressure to ensure Mr Motsoeneng's permanent appointment.

8.2.3 The Minister, in her own evidence, explained that she had emphasised the urgency with which the long-vacant senior management posts had to be filled. She could however not allay suspicions that the Board was pressurised to make the appointment, and that in so doing the Board had failed to uphold its fiduciary duties. Evidence was presented that despite recruitment policies and procedures, and despite the Public Protector's findings that Mr Motsoeneng was not qualified for that position, the Minister had nonetheless endorsed the Board's decision to appoint him, within hours of having received the recommendation.

8.2.4 Ms Tshabalala, who was the Board chairperson at the time, explained that in addition to the Board's uncertainty with regard to the implementation of the Public Protector's recommendations, the Board had been swayed by a legal opinion from Mr Motsoeneng's attorney's which suggested that because he had been acting for a long period of time, the SABC would face some legal risk if it did not appoint him permanently. According to Ms Tshabalala, the Board nevertheless considered more than one candidate and came to the conclusion that Mr Motsoeneng would be most suitable.

8.2.5 Ms Tshabalala pointed out that the Board had also been under pressure from the Portfolio Committee to fill all executive positions. Although the Portfolio Committee had by no means advised that policies and procedures be flouted, the Board had understood that immediate action was expected.

8.2.6 The evidence suggests that the Board was deeply divided on this matter, not least because some were of the view that Public Protector's findings and remedial action had to be accepted and implemented.

8.3 Purging, suspensions and dismissals

- 8.3.1 Evidence heard corroborated the Public Protector's findings that the SABC has for several years been losing highly-skilled, highly-experienced and highly-qualified staff as a result of the abuse of power and systematic governance failures involving irregular termination of employment of several senior employees at the SABC. The Public Protector's report detailed how the systematic purging of senior staff members had resulted in huge financial losses which were paid out in settlement agreements where contracts had been terminated irregularly.
- 8.3.2 Ms Nkosi's evidence indicated that labour relations specialists' advice would be ignored, and that those senior employees who refused to cooperate would be dismissed with no regard for the applicable employment policies, procedures or labour laws. These matters were seldom tabled before the Board for their consideration and approval.
- 8.3.3 While the Committee does not have an exhaustive list of those who had been purged, most former senior managers who have appeared before the Committee, had parted with the SABC for reasons one way or the other related to their refusal to cooperate when policies and procedures were being flouted. If the Board was aware of the 'purges' it did not speak out against the self-inflicted brain drain. Some of the dismissals would be challenged at the Commission for Conciliation, Mediation and Arbitration (CCMA), and others would be settled out of court with the SABC still paying enormous amounts in settlements.
- 8.3.4 Many witnesses linked the unlawful dismissals to the new MOI which conferred the Board's powers to the executives, thereby reducing the Board to an instrument that merely ratifies the decisions taken by the executive.
- 8.3.5 These unprocedural dismissals were not restricted to the administration, but extended to the news room too. The most recent dismissals took place in July 2016 when eight experienced and skilled journalists, the "SABC 8" were suspended and then summarily dismissed because they had disagreed with an editorial decision to not broadcast images of violent protests which involved the destruction of public property, and which their opinion amounted to self-

censorship. Although the SABC reinstated seven of the eight with no explanation, Mr Mvoko has not had his contract with the SABC renewed.

8.4 Performance Management

8.4.1 Mr Mabaso testified that the SABC did not have a proper performance management system in place, and that performance agreements had not been entered into with its senior management and other employees. This is corroborated in the Auditor-General's findings. Notwithstanding that, millions of rands in "performance" bonuses has been paid to senior and junior employees. In the case of senior managers, bonuses were often paid without seeking the Board's approval.

8.4.2 In addition, witnesses also reported that the management had announced that cash bonuses would be awarded to some employees and freelancers. This was done haphazardly, without due process being followed, or budgetary provision for such awards having been made.

9. Editorial Independence

9.1 Editorial Policies

9.1.1 Editorial independence is central to quality journalism. Editorial interference undermines the prescripts of the Broadcasting Act, inhibiting citizens from making informed judgments on topical issues. Editorial independence and institutional autonomy are absolutely essential components of public broadcasting, and therefore the safeguards in place to ensure ethical and quality journalism should not be compromised.

9.1.2 Subsections 6(8)(d), (e) and (f) of the Broadcasting Act state that the corporation must develop a code of practice that ensures that the services and personnel comply with the rights of all South Africans to receive and impart information and ideas; the mandate to provide for a wide range of audience interest, beliefs and perspectives; and a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest.

9.1.3 The inquiry heard evidence of the disregard of journalistic values and ethics. Evidence from the "SABC 8" gave an account of how the announcement in

2013 that the SABC would henceforth report “70 per cent positive news and 30 per cent negative news” had affected unbiased reporting and contravened the most basic of journalistic ethics. This policy undermined core principles of truth and was one of the many attempts by senior management to undermine quality journalism in favour of content that would yield positive spin-offs.

9.1.4 According to the “SABC 8”, the crisis as far as providing independent and credible news and current affairs programmes to the vast majority of citizens and residents has been a concern for a long period. It was particularly pronounced through the month of July 2016 which preceded South Africa’s local government elections. During this time an editorial decision by the SABC was announced banning the airing of violent footage. Journalists were suspended and summarily dismissed for challenging editorial directives which in effect required journalists to self-censor. Although seven of the eight journalists were reinstated shortly after their dismissal, they informed ICASA that the editorial interference was continuing unabatedly.

9.1.5 Evidence was also heard from the “SABC 8” that journalists and editors were discouraged from covering the election campaigns of opposition parties. In some cases journalists were informally requested to give certain individuals within the governing party more positive coverage.

9.1.6 The Minister denied that she had interfered in the editorial policy or the newsroom, as the “SABC 8” had indicated. She also dismissed their recommendation that an internal ombud be established.

9.2 Editorial Review process

9.2.1 When the SABC last reviewed its editorial policy in 2004, a draft editorial policy was released for public consultation. When the policy was reviewed in 2015, the same level of intensive public consultation did not occur, despite what the Broadcasting Act requires. This matter is currently under investigation by ICASA.

9.2.2 The revised editorial policy is problematic for several reasons – it gives the COO of the SABC, control of the SABC’s content and programming, making him or her the Editor-in-Chief. Another problematic inclusion in the revised policy is that it makes the principle of “upward referral” mandatory

and the COO's decision on all editorial issues, final. Editors and journalists are threatened with severe consequences should they not refer "contentious" matters to their superiors and Mr Motsoeneng. This is a complete about-turn from the old policy, where it was made clear that it is not management's role to make day-to-day programming and newsroom decisions and although not ideal, upward referral was largely voluntary. It is a basic principle in many news organisations worldwide that editorial decisions should to be made by news editors, and not management, in order to insulate news decisions from any commercial or political considerations.

9.2.3 The Minister denied that the review of the editorial policy had been irregular. In her evidence she emphasised that section 5A of the Broadcasting Act had been complied with. The proposed amendments were translated into all eleven official languages and placed on the SABC's website. The SABC had consulted in 2013 and early 2014 when the initial review was conducted. In her view the Board had ensured that sufficient public comment was sought in the development of the policy. More than 30 organisations participated in stakeholder engagements held across the country, and in the 17 public hearings which were held across all nine provinces. In addition, the SABC had considered 216 written submissions from individuals and organisations. The Board had approved the policy for implementation, and ICASA was duly informed.

9.3 Regulatory compliance

9.3.1 Section 4(3)(d) of the ICASA Act states that the Authority must develop and enforce license conditions consistent with the objects of this Act and the underlying statutes for different categories of licenses. The Act in section 17E(2) empowers the Complaints Compliance Committee (CCC) to direct the licensee to desist from any contraventions; to direct the licensee to take such remedial or other steps in conflict with the Act or underlying statutes as may be recommended by the CCC as per section 17E(2)(b)(c).

10. Public Protector Report No 23 of 2013/14: *When Governance and Ethics Fail*

10.1 Board's response to the report

10.1.1 Mr Naidoo gave evidence, which was corroborated by other former Board members, that the Public Protector's interim report which Ms Tshabalala, had received in December 2013, was never tabled in the Board or any of its sub-committees. When the matter was raised in a meeting of the Board in February 2014 shortly after members became aware—through the media—of the release of the final report, Ms Tshabalala confirmed that she had received the interim report but had thought that, as it was addressed to her, it was not for the entire Board's consideration.

10.1.2 Further evidence indicated that after the Board became aware of the final report, Ms Tshabalala had ruled that each of the Board sub-committees would consider the findings and recommendations relevant to them, and make recommendations to the Board as to how to respond. Consensus could not be reached as to how to respond to the remedial action contained in the report: some Board members thought that they should be implemented, while others disagreed. This uncertainty was further fuelled by the public debate at that time about the binding nature of the Public Protector's remedial actions.

10.1.3 The Human Resource sub-committee had recommended that disciplinary proceedings be instituted against the then acting COO as most of the Human Resource-related findings related to him. In relation to the finance-related remedial actions, the former Chairperson of the Audit Sub-Committee, confirmed that that sub-committee had agreed that further investigations be undertaken before disciplinary action could be instituted.

10.1.4 According to some Board members, Ms Tshabalala had unbeknown to them, appointed Mchunu Attorneys to draft an opinion on the report. Although former Board members confirmed that the Board had at the time agreed to request a legal opinion as to whether the recommendations were binding, the Board had not agreed that the legal opinion—which in reality was not a response, but countered all the Public Protector's findings—be submitted as the SABC's formal response.

10.2 Disciplinary action against the then acting COO

Many of the findings related directly to the actions of the then acting COO, and the Board agreed that disciplinary charges would be instituted against him. The appointment of a chairperson and an evidence leader to preside over the disciplinary hearing was done via round robin. The members of the disciplinary committee were also changed about three times before the hearing commenced. The evidence file that the Public Protector had compiled to support the disciplinary proceedings, and which the SABC had requested, was never collected from that office or referred to during the proceedings.

11 Contradictory Evidence

In many instances the evidence provided by witnesses was contradictory. The Evidence Leader has been requested to analyse the contradictory testimonies, and on conclusion of this exercise, Parliament's Legal Services Office will make appropriate recommendations.

Part D: Findings

12. Governance

12.1 Fiduciary Duties

12.1.1 At the commencement of the inquiry, the Board was dysfunctional since only three non-executive Board members were in office. As a consequence, the Board could not call quorate meetings. Furthermore, some non-executive Board members who were removed from the Board, challenged their irregular removal through a legal process. In addition, all three of its executive directors were acting in their posts. The Committee was presented with overwhelming evidence that the Board had failed to carry out its duties. Board leadership, most notably chairpersons, appear to have failed to provide leadership which had prevented the CFO, COO and CEO from carrying out their operational duties. This had rendered the work environment unbearable which in turn led to a costly skills exodus, ill-informed policy decisions, loss of competitiveness, the SABC's compromised fiscal position, reputational risk and a complete breakdown in governance. In short, the Board had failed to monitor and enforce

compliance with the Charter of the Corporation or to act in the SABC's best interest, and in so doing had contributed to the SABC's administrative and financial instability.

12.1.2 Prior to the resignation of the last three non-executive members, the remaining members had continued to refer to themselves as Board, and despite the fact that they did not form a quorum, they had continued to take and implement decisions.

12.1.3 The Board had not objected to the irregular amendment of the MOI, which effectively transferred their responsibilities to the executive directors of the Board, and was an attempt to centralise power in the Ministry. The lack of resistance to the amendment demonstrated their flawed understanding of the Board's duties and responsibilities, and of the relationship between the Board, the Shareholder Representative, and the Administration.

12.1.4 Sound corporate governance principles encourage active co-operation between corporations and stakeholders and underline the importance of recognising the rights of stakeholders established by law or through mutual agreement. Evidence related to the *MultiChoice* agreement and the 90/10 local content policy, suggests that there was inadequate, and in some instances no consultation, with key stakeholders including Parliament and the broader public.

12.1.5 The Committee concurs with former Board members that, had both the Board members been inducted into their new roles upon taking office, and received training with regard to their respective roles and responsibilities, many of the challenges may have been averted.

12.1.6 The Committee has noted that much of the decline was the result of senior managers having tolerated the gradual erosion of good governance and sound financial management, until such time that it directly affected them. This failure to object to/resist had contributed to the widespread non-compliance with, for example, SCM and labour policies and procedures, and the disregard for the regulatory framework within which the SABC operated.

12.1.7 The Board failed to ratify operational decisions that impacted directly on the public broadcaster's mandate, its financial management and competitiveness.

12.1.8 Despite the Company Secretary having served in the position for a long period of time, and having been highly-experienced and highly-qualified, former Board members reported an unusually large number of special meetings convened at short notice and without proper notification or adequate documentation, and frequent round-robin decision-making. This contradiction appears to point to deliberate attempts to—particularly in matters on which Board members may have had divergent views—stifle Board discussion and to manipulate the Board's decision-making.

12.2 Financial Management and Sustainability

12.2.1 The Committee noted with concern statements by the SABC's senior management and Prof. Maguvhe, that the SABC was not accountable to Parliament as it only received a small percentage of its budget from the fiscus. Regardless of its commercial activities, the SABC remains a public entity, funded from the public purse, and is, in terms of the PFMA, accountable to Parliament.

12.2.2 In 2015/16 the Auditor-General reported fruitless and wasteful expenditure with a cumulative value of R92.8 million. The SABC Board had failed to discharge its duties as required by the PFMA in that it had failed put in place effective measures to prevent irregular, unauthorised, and fruitless and wasteful expenditure.

12.2.3 The Committee notes with concern the evidence about the SABC's financial management and sustainability. There appears to be a looming financial crisis. In addition, there is reference in the management letters that point to material uncertainty on the going concern assumptions. In this regard, the funding model is of concern, particularly in light of the SABC's mandate as a public entity and a commercial enterprise. The corporation may be at risk of becoming technically insolvent.

13. Role of the shareholder representative

13.1 Amendment of the MOI

13.1.1 The MOI as it stands empowers the Minister, as the appointing authority, to remove directors in line with the Companies Act. It also gives the Minister undue access to the SABC's administration thereby compromising the SABC's independence.

13.1.2 The irregular amendment of the MOI as well as the proposed amendments to the Broadcasting Act, demonstrate efforts to concentrate power in the Ministry by curtailing and removing the powers of both the Board as the accounting authority, and Parliament's role in the appointment and removal of non-executive Board members.

13.1.3 The Committee reiterates that the Broadcasting Act, is specific to the SABC, and is therefore the primary law applicable to the public broadcaster. It is evident that the Broadcasting Act and the Companies Act have been used interchangeably to suit the Minister's desired outcomes. The Committee is concerned that both the Board, the Shareholder Representative and at times the Portfolio Committee had agreed to, or supported decision-making which disregarded this act's supremacy.

13.2 Removal and appointment of Board members

13.2.1 The Minister's role in the removal of non-executive members—either through dismissal or resignation—is noted with concern.

13.2.2 That Committee also notes from Board minutes of a meeting that took place on 7 July 2014, that the Minister may have, covertly or overtly, pressurised the Board to appoint Mr Motsoeneng in the COO position.

13.2.3 In both instances the Minister may have contravened section 96(b) and (c) of the Constitution, section 15(1) of the Broadcasting Act, section 2.1(b) and (d) of the Executive Code of Ethics, and section 17(e) of the Privileges Act.

14. Suspicious transactions

14.1 *MultiChoice*

14.1.1 Section 8(j) of the Broadcasting Act requires the SABC to establish and maintain libraries and archives containing materials relevant to the objects of the Corporation and to make these available to the public with or without charge. The *MultiChoice* agreement therefore potentially contravenes the provisions of the Act too.

14.1.2 A significant section of the country's population does not have access to DSTV, and can therefore not view the archival material aired on *SABC Encore* and *SABC News*. This is particularly problematic in light of the SABC's public mandate to educate, entertain and inform.

14.1.3 The Committee could not establish with confidence whether the content of the archives of the public broadcaster remained in the SABC's possession, or the extent to which *MultiChoice* has access or pays for access to the archives. According to Ms Geldenhuys's evidence *MultiChoice* has purchased the right to air the material, but does not own the archives. This contradicts evidence by former executives and Board members.

14.1.4 The SABC's sudden about turn with regards to set-top box encryption appears to have been the result of conditions imposed by the *MultiChoice* agreement. It appears that the "purging" of the Group Executive: Technology was partly due to his implementation of the Board-approved strategy supporting encryption, which he had opposed.

14.1.5 The SABC archives are a public asset. There appears to be insufficient disclosure and transparency in the manner in which the *MultiChoice*-agreement was negotiated. The manner in which the contract was crafted appears to have serious legal implications in respect of access to public information.

14.1.6 At the time of reporting, the *MultiChoice* transaction was the subject of a court case.

14.2 *SekelaXabisa*

14.2.1 The SABC was well equipped to provide the services procured from *SekelaXabisa*. The Committee noted that the evidence—suggests some irregularity in the company's appointment, and that procurement procedures may have been circumvented in awarding the contract.

14.3 *Vision View*

14.3.1 The Committee notes with concern possible irregularities around the manner in which the Vision View agreement, which cost the SABC R42 million, was awarded. The evidence heard suggests that plans to use internal capacity to “beef up” equipment had been abandoned in favour of the Vision View transaction.

15. Human Resource Management

15.1 Irregular appointments and dismissals

15.1.1 The Committee notes with concern evidence that pointed to a number of irregular appointments and dismissals, across all levels within the SABC.

15.1.2 The Committee notes with concern the appointment—outside of the relevant employment processes—as COO of a candidate who has had an adverse finding made against him by the court as well as the Public Protector. In addition he did not meet the most basic criteria, and was appointed without following the relevant employment processes. This points to the Board and/or its sub committees' failure to exercise effective oversight of the administration specifically in relation to matters of financial and human resource management. The evidence further suggests that the Board had allowed itself to be unduly influenced to approve this irregular appointment which has had far-reaching consequences.

15.2 Victimisation and Intimidation

15.2.1 The SABC Board made no meaningful intervention to put a halt to the intimidation and threats the “SABC 8” were subjected to. Neither Prof. Maguvhe nor the Minister appeared to view the threats, which had been widely reported, and which were subject to police investigation, in a serious light. Prof. Maguvhe

went to the extent of expressing ignorance of their labour dispute. The attacks and acts of victimisation continued throughout most of the inquiry.

15.2.2 Evidence that the State Security Agency (SSA) had been monitoring/intercepting communication between employees is noted with serious concern. This irregular use of state resources, is a concern particularly because neither senior managers nor Board members have been vetted as is required.

16. Response to the Public Protector Report No 23 or 2013/14 And ICASA rulings

16.1 Compliance

16.1.1 As is evident from the report presented by the Public Protector, the Board had gone to great lengths to avoid implementing the Public Protector's remedial action. They instead relied on a legal opinion by a firm of attorneys. In a similar vein it had failed to ensure that the SABC complied with ICASA's ruling with regard to the decision not to broadcast violent protests.

16.1.2 The Committee further notes that the SABC Board had on 19 April 2016, almost two years after the report was released agreed to take the report on review.

17. Accountability

17.1 SABC's response to the inquiry

17.1.1 The SABC's efforts to thwart the inquiry, which culminated in the walk-out of the hearings on 7 December 2017, was in essence a boycott of a Parliamentary process, and confirmed the former Chairperson and the SABC's disregard and rejection of Parliament's oversight authority which is enshrined in the Constitution. The Committee further notes the Minister's failure to take action in response to the former Board Chairperson and the SABC's senior management's contempt for Parliament and a parliamentary process.

17.1.2 The refusal to provide Parliament with certain information, under the pretence that such disclosure to a parliamentary committee would compromise its

commercial interests, further illustrates their resistance to parliamentary scrutiny, and their refusal to account.

18. Journalistic Ethics and Editorial Independence

The Committee heard evidence which illustrated the extent to which journalistic ethics at the SABC had been compromised. The SABC employs a corps of highly-experienced, highly-qualified and dedicated journalists. The gradual erosion of editorial independence and expectation of self-censorship stands in direct contradiction to the SABC's obligation to report in a manner that is accurate, fair and responsible. The Board had therefore failed in its responsibility to ensure the SABC's compliance with standards set out in the Broadcasting Charter, which has undoubtedly contributed to the SABC's loss of revenue and listenership.

19. Parliamentary oversight

The Committee acknowledges that Parliament may have relinquished its constitutional duty to hold the Executive and consecutive SABC boards to account. This may have rendered Parliament complicit in the gradual decline of good governance, accountability and commitment to public broadcasting at the SABC.

For comment