

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case no: /19

In the matter between:

AFRICAN CONTENT MOVEMENT

Applicant

and

SOUTH AFRICAN BROADCASTING CORPORATION

Respondent

APPLICANT'S FOUNDING AFFIDAVIT

I, the undersigned

ROMEO RAMUADA

Do hereby declare under oath and state that:

1. I am an adult male with full legal capacity, who is the Secretary General for the African Content Movement a political party duly registered in terms of section 15 of the Electoral Commission Act 51 of 1996 (ECA) as read with Regulation 2, 3 and 4 of the Regulations for the Registration of Political Parties April 1998 (the Regulations) with address of service being c/o **Smith Tabata Buchanan Boyes** at 24 Blaauwberg Road, Blouberg c/o STBB 105 Boeing Road East, Bedfordview 2007, PO Box 75359, BEDFORDVIEW, 2047 Tel: 011 453 0577 FAX: 011 453 9721, EMAIL: ThabisileD@stbb.co.za;

2. The contents of this affidavit are, save where otherwise indicated or context indicates otherwise, within my personal knowledge and are to the best of my belief both true and correct.
3. Where I make legal submissions, it is done with the advice that I have received from my legal representatives, which advice I accepted. I am duly authorized to bring this application on my behalf.
4. This affidavit, the founding affidavit, was prepared with urgency and in haste. As such there might be typographical errors, lack of numbering and/or other defects, which I request the Honourable Court to condone.
5. I have been also advised that an unsigned version of this affidavit will be served or has been served on the Respondents and to that extent I pray that this Court condones such affidavit for the purposes of service given the urgency of this matter.
6. I have been advised that some of the evidence to which I refer is, by its nature, hearsay. I have never had the opportunity to approach the individuals who have personal knowledge of the facts to confirm hearsay statements to which I refer.
7. I have been advised that not only is the material on which I rely admissible in the circumstances of an urgent application, for reasons which I understand are further a matter for legal argument, but that in any event it would be in the interests of justice for the hearsay statements I make to be admitted, despite their hearsay character given that¹:

7.1. First, in urgent proceedings such as the present, relevant evidence and source documents relating to the decisions to be set aside is in the hands of the respondents

¹*Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620

or persons under their control. As such, gaining access is almost nigh impossible given the adversarial nature between management and the employees of the First Respondent, with some employees who have the information readily at their disposal being afraid of reprisals and/or victimisation.

7.2. Secondly, the hearsay statements relate to matters which have been reported widely in the electronic media, news feeds and newspapers and none of the respondents have repudiated those statements or provided a version contrary to those statements.

7.3. Thirdly, there is no material prejudice which the respondents would suffer, if the hearsay statements are admitted. Any prejudice that may be suffered is slight weighed against the electoral law interests arising from the need to justify the broadcasting of minority political parties launch of election manifestos.

7.4. Fourthly, the present application includes the relief sought in the notice of motion on an urgent basis, and there is a compelling need for this Honourable Court to adjudicate that relief as soon as possible.

8. The matter is urgent and I shall deal with the issue of urgency in the affidavit.

9. The remainder of the affidavit is structured as follows:

9.1. The parties;

9.2. Jurisdiction;

9.3. The purpose of the application;

9.4. Background to the Application;

9.5. The rejection by the SABC to stream live coverage the Applicants Manifesto Launch

9.6. The Effect of the SABC's Decision;

9.7. SABC's Grounds of Rejection and why they are legally Untenable;

9.8. The Right of Freedom of Expression;

9.9. The Right to Access Media by Political Parties;

- 9.10.Urgency;
- 9.11.Public Interest Considerations;
- 9.12.Issue of Costs;

THE PARTIES

10. The African Content Movement (ACM) a political party duly registered in terms of the ECA is the Applicant in this matter. We have a founding constitution which clearly exhibits the beliefs and political aspirations of our political party. (See herein attached **Annexure ACM 1- The Constitution**)
11. The Respondent is **South African Broadcasting Corporation SOC Limited (“SABC”)** situated in Radio Park Building, C/O OFFICE OF THE CEO, ROOM 2801, 28TH FLOOR, RADIO PARK BUILDING, HENLEY ROAD, AUCKLAND PARK, JOHANNESBURG, 2094, PRIVATE BAG X1, AUCKLAND PARK, 2006, JOHANNESBURG, GAUTENG, SOUTH AFRICA.
12. For this application they have chosen their address of service being c/o **MAKAULA ZILWA INC**, Respondent’s Attorneys , Block C Grayston Ridge Office Park, 144 Katherine Street Sandton, TEL: 011 262 0840/20, FAX: 011 262 0790, EMAIL: ssz@zilwa.co.za, REF: V MATIKINCA.
13. The main object of the Corporation is to supply broadcasting and information services and services that are ancillary thereto, to the general public in the Republic of South Africa and beyond its borders and to achieve the objectives as set out in the Broadcasting Act 4 of 1999, as amended, (‘Broadcasting Act’) in accordance with the objectives set out in the Independent Broadcasting Authority Act 153 of 1993, as amended, that are directly relevant to the Corporation.
14. The Respondent has a substantial and direct interest in this matter, as it is a public broadcaster and has on previous occasions during the course of this year flighted the launch of election manifestos for the African National Congress (the majority political

party); the Democratic Alliance(DA), The Economic Freedom Fighters (EFF) and GOOD, just to mention a few.

JURISDICTION

15.This Honourable Court has jurisdiction to hear and dispose of this matter as it involves a number of constitutional issues and which will need to be disposed off on an urgent basis.

THE PURPOSE OF THIS APPLICATION

16. In this application the Applicant seeks the following:

16.1.**CONDONING** the Applicant's non -compliance with the form, service and time limits prescribed, and directing the matter to be heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court (as amended);

16.2.**THAT** this Honourable Court condone the manner of service of these papers, being by the Attorney of record of the Applicant effecting service on the Respondents, via email, fax and/or through their appointed counsel in this matter given the urgency of this matter;

16.3.**THAT** this Honourable Court condones the service of the unsigned founding affidavit to Respondent to the extent that the signed copy will be produced at the hearing of this matter;

16.4.The rules, time limits, forms and procedures provided for in the Uniform Rules of Court are dispensed with, to the extent necessary, and leave is granted for this matter to be heard as a matter of urgency;

16.5.The Respondent is directed to give live coverage and broadcast of the African Content Movement's election manifesto launch on Saturday 06 April 2019 at Curries Fountain Sports Development Centre, Durban at 12:00pm;

16.6.The Respondent is ordered to advise the applicant on which channel the election manifesto launch will be broadcast by 11:00 on 06 April 2019;

16.7.The Respondent is ordered to pay the costs of this application (if opposed);

16.8.Further and/or alternative relief

BACKGROUND TO THE APPLICATION

17.Our political party was formed in December 2018 and our founding president is Mr Hlaudi Motsoeneng. The party currently has two seats in Gauteng municipalities after local councillors from the Randfontein People's party joined the ACM.

18.We are currently contesting the 2019 general election and our election manifesto launch is scheduled for the 6th day of April 2019 at Curries Fountain Sports Development Centre, Durban at 12:00pm.

19.The elections are scheduled to take place on the 8th day of May 2019.

20.About 285 political parties are contesting the said elections.

21. On the 31st day of March 2019, our president Mr Motsoeneng made a phone call to the Group Executive of News and Current Affairs: Ms Phathiswa Magopeni. The purpose of the phone call was to enquire as to whether the SABC News was going to cover the manifesto launch on SABC2 and the SABC News Channel as the public broadcaster had done with the ANC, DA and EFF.

22.The negative response was that they would cover it as news story as has been the case with all new parties and all other parties with no representation in Parliament.

23. A further letter was written by our head of communications Mr Phuti Mosomane inquiring whether the SABC Channels would be scheduled to do live broadcasts for the manifesto launch scheduled for the 6th day of April 2019 in Durban.

24. On the 4th day of April 2019, seeing that no response was forthcoming from the Respondent, we instructed our attorneys of record to inquire with the SABC as to whether they were to provide live coverage of our manifesto launch. (See attached **ACM-3-Letter dated 4th day of April 2019-STBB**)

25. On the same day after receipt of our letter, the Respondent made contact with our attorneys of record by means of a phone call through Mr Khaya Mwelase and indicated that they await further instructions as to how to proceed our request. This conversation was duly reduced to writing by our attorneys of record and is attached as **Annexure ACM4-STBB-K Mwelase**.

26. Further more in that letter, our attorneys made a clarion call, that we were anticipating to edge an urgent application in the event of their failure to accede to our request.

27. The Respondent latter made contact by means of a correspondence through their Head of Legal Advocate Vanara and in that letter they indicate that they would cover it as news story. (Attached as **Annexure ACM5-Letter from Vanara**). The wording was as follows:

We confirm that you granted us an indulgence to respond to your letter by 16:00 this afternoon, in a telephonic conversation between your Aviwe and our Mr Mwelase. Our instruction is to inform you that the leader of the African Content Movement, Mr Motsoeneng, called the the Group Executive of News and Current Affairs: Ms Phathiswa Magopeni, on Sunday 31 March 2019. He inquired whether the SABC News was going to cover the manifesto launch of his party live on SABC2 and the SABC News Channel. The response was that the manifesto laugh is to be covered

as a news story, as it has been the case with all new parties and all other parties with no representation in Parliament.

This is an editorial decision that takes into account, among others, resource constraints and equitable treatment of political parties contesting the elections. Additionally, as per ICASA regulations, there is no obligation on the SABC to provide live coverage to any political party.

Our instruction is thereof, that the African Content Movement launch will be covered, based on the SABC;s editorial decision, as news story.

28.This regrettably did not seat well with us as we felt our constitutional rights as political party had been grossly violated.

29. We then instructed our attorneys to save a notice of an urgent application (See Attached **Annexure ACM6**)

THE REJECTION BY THE SABC TO STREAM LIVE COVERAGE OF THE APPLICANTS MANIFESTO LAUNCH

30.The South African Broadcasting Corporation ("SABC") has rejected to give live coverage to our manifesto launch despite affording other political parties such as the ANC, EFF, DA and GOOD same live coverage.

31.This is in contravention of Regulation 4 of the Regulations on Party Election Broadcasts , Political Advertisements, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters read in conduction with section 16 of the Constitution Act 108 of 1996 (the right to freedom to expression).

32.Regulation 4 reads thus;

- (1) PEB(s) must only be broadcast during the election broadcast period:**
- (2) A party that intends to broadcast a PEB must submit same to the broadcasting service licensee at least five (5) working days prior to the broadcast thereof;**
- (3) A public broadcasting service licensee must permit a PEB during an election broadcast period:**

33.Our party is duly registered and therefore entitled to broadcast a party election broadcast (PEB) and such, our election manifesto launch falls in the parameters of such a definition.

34.Our PEB by way of the manifesto is within the election broadcast period .

35.The public broadcaster by denying such party election broadcast in the main is unconstitutional and untenable.

36.First, the potentially huge influence of the electronic media on the electorate makes it imperative that political parties have some form of access to the electronic media over and above the general access generated by news and current affairs programming.

37.If we accept that a free and fair election requires a well-informed electorate and if we further accept that voters in an effective democracy have a right to be informed. political parties should be given some access to the most effective medium of communication in order to inform the electorate of their policies and programmes through their election manifestos . Where responsibility for informing the electorate is left to journalists on news and current affairs programmes, the dangers of favouritism and manipulation become more acute. thereby potentially depriving the electorate of their right to know. An outright ban on the access of political parties to electronic media is therefore unacceptable.

38.Second, At the same time a mechanistic allocation of free air time in exact proportion to the strength of each party as it is reflected in its number of members elected to the legislature. will not be satisfactory. The requirement that any allocation of funds will also have to enhance multi-party democracy, means that unrepresented parties or parties with very small representations should also be given some free access once they have been able to demonstrate the seriousness of their mission. Allocating free time to incumbents only, will stifle competition from new rivals and will not enhance multi-party democracy.

THE EFFECT OF THE SABC'S DECISION

39.The SABC is no ordinary private broadcaster. The SABC is an organ of state. It is accordingly obliged to "*respect, protect, promote and fulfil the rights in the Bill of Rights.*"²It is directly bound by the rights in the Bill of Rights³.

40.The SABC is the only public broadcaster in the country. It belongs to and is controlled by South Africans. It provides a public service in its broadcasting.

41.Section 6(4) of the Broadcasting Act provides:

The Corporation must encourage the development of South African expression by providing, in South African official languages, a wide range of programming that-
(a) reflects South African attitudes, opinions, ideas, values and artistic creativity;
(b) displays South African talent in education and entertainment programmes;
(c) offers a plurality of views and a variety of news, information and analysis from a South African point of view;
(d) advances the national and public interest."

42.We submit that the special role of the SABC in respecting, protecting, promoting and fulfilling the rights to freedom of expression and political activity is particularly important

² section 7(1) of the Constitution

³ section 8(1) of the Constitution

in an election year. This is a time when contesting political parties in the country join issue in public debate, as they inform and persuade voters in order to allow them to exercise an informed choice when they cast their ballot.

43. Thus by not covering the election manifesto launch of ACM, our party is prevented from getting access to more than half the members of the electorate meant to be targeted by the manifesto launch and entitled to properly exercise their political rights.

44. By making the sad pronouncements, the SABC has infringed on a number of rights:

44.1. The right to free expression enshrined in s 16 of the Constitution; and

44.2. The right to campaign for a political party enshrined in s 19(1)(b) of the Constitution.

45. Running our manifesto launch as a story is prone to manipulation and editing of content which we feel is vital in our electioneering mandate.

46. We submit that the rejection cannot be justified. The reasons provided by the SABC for the rejection are utterly inadequate.

47. The rejection is more aligned in protecting the fierce competition against the ANC which controls the reins at the broadcaster.

THE SABC'S GROUNDS OF REJECTION AND WHY THEY ARE LEGALLY UNTENABLE

48. The SABC's grounds of refusing live coverage are contained in the letter marked Annexure ACM5.

49. First ground cited by Mr Vanara is that it has been the practice not to cover new parties and parties with no representativity in parliament .

50. This argument is archaic and improper as GOOD has been covered by the SABC and its a political party still "wet behind the ears".

51. A fortiori, the decision is unconstitutional as it violates the right to the freedom of expression and by denying us such coverage, we are unable to express our views to the electorate at large.

52. The second ground is that there are resource restraints and yet wherever President Ramaphosa is coughing out the election manifesto its being followed daily by the SABC and he is receiving live coverage. That excuse needs to fall by the way side.

53. The third ground is equitable treatment of political parties contesting the elections. The more the denial is lopsided as other parties have been given the opportunity of live coverage and makes a mockery of the word excuse.

54. The fourth ground is that there is no obligation as per ICASA regulations, which is not true. Regulation 4 makes it obligatory for them to give us live coverage.

55. All these grounds are patently unconstitutional .

THE RIGHT TO FREEDOM OF EXPRESSION

56. Section 16 of the Constitution provides:

Freedom of expression

(1) Everyone has the right to freedom of expression, which includes-

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to-

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

57.The live coverage of manifesto launch gives effect to the right to freedom of expression and any inroads to such right is untenable.

58.Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm.

59.Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression - the free and open exchange of ideas - is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.

THE RIGHT TO ACCESS MEDIA BY POLITICAL PARTIES

60.Every political party has the right to access the media and such right can be well achieved by allowing parties to broadcast live their party manifestos.

61.One of the basic assumptions regarding the state regulation of access to the media during election campaigns, is that electronic broadcasting - through radio, but particularly through television - is the most influential exert over community opinion and culture and therefore the most politically sensitive medium of communication in a modern democratic state.

62.Almost all democracies subsidise the broadcasting of political party propaganda on radio and television during elections campaigns.

63.The absence of free air- time may potentially poison the well of political parties. as the parties may become hostage to the big money interests sponsoring their election campaigns. This is a problem which has become more acute with the advent of electronic media as this has hugely inflated the cost of elections.

64.Such access can only be well derived thought the public broadcaster.

65.Denying ACM such access does not agur well for the right to access media.

URGENCY

66.The matter is urgent as we have debited the clear rights as enshrined in the Constitution and mainly the right to freedom of expression through our political manifesto.

67.There is no other alternative remedy as the SABC is the only public broadcaster through which we can exercise such right.

68.There is no prejudice on the SABC as they have been able to flight the party manifestos of other political parties by doing live feeds.

69.The irreparable harm is that we can only launch our manifesto once and much effort has been put in ensuring it proceed on the 6th day of April 2019.

PUBLIC INTEREST CONSIDERATIONS

70.The right of freedom of expression of political parties is not protected for the sake of the parties themselves. It is in the interests of the public to be able to receive the information that is imparted through political manifesto launches. The right of the public to receive information and be informed lies at the heart of political manifestos.

71.We submit that a prior restraint of a political manifestos is even more drastic because it goes to the core of the purpose of the protection of freedom of speech. In the

circumstances, the most powerful and cogent justification would be required to render the SABC's decision permissible.

72.The need for public information and awareness flows from the nature of our democracy.

CONCLUSION

73.We therefore pray for an order in terms of the Notice of Motion

DEPONENT

THUS SIGNED AND SWORN TO at _____ on this ____th day of April 2019. The deponent having acknowledge that the deponent knows and understands the contents of this affidavit, that the oath which the deponent has taken in respect thereof is binding on the deponent's conscience, and that the contents of this affidavit are both true and correct.

I certify further that the provisions of Regulation R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, have been complied with.

COMMISSIONER OF OATHS

NAME:

ADDRESS: