

OUTA

ORGANISATION UNDOING TAX ABUSE



24 August 2021

OUTA comment on the South African Broadcasting Corporation SOC Ltd Bill, 2021

Submission by the Organisation Undoing Tax Abuse to the Acting DG, Department of Communications and Digital Technologies

Submitted by:

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TO: THE ACTING DIRECTOR-GENERAL
DEPARTMENT OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES

C/O: NONKQUBELA JORDAN-DYANI

Per Email: sabcbill2021@dtps.gov.za

**COMMENTS ON THE PROPOSED SOUTH AFRICAN BROADCASTING CORPORATION
SOC LTD BILL, 2021**

1. INTRODUCTION:

- 1.1 The Organisation Undoing Tax Abuse (OUTA) is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. OUTA was established to challenge the abuse of authority, in particular the abuse of taxpayers' money.
- 1.2 OUTA is a strong promoter of effective legislation that emphasises the importance of maintaining an independent public broadcaster, while ensuring sufficient funding and avoiding endless bailouts. OUTA believes that the SABC should have strong institutional autonomy that is independent of sectional, political, commercial or personal interference.
- 1.3 As a matter of principle, OUTA does not oppose the introduction of new laws and regulations by government, but rather wishes to ensure that these laws and regulations are capable of effective execution and are aligned with the basic principles envisaged in our Constitution.
- 1.4 The South African Broadcasting Corporation SOC Ltd Bill of 2021 (SABC Bill) proposes (amongst other changes) the streamlining of the board of the SABC and reforms that would give the public broadcaster the capacity to improve its management and collect revenue more effectively. Furthermore, the Bill seeks to encourage the recognition of constitutional rights given to each South African citizen.

1.5 The objects of the proposed Bill are to (a) repeal the Broadcasting Act, 1999 as amended, to regulate the South African Broadcasting Corporation SOC Ltd (SABC) and ensure the continued existence of the SABC, (b) in order to provide public broadcasting services in the Republic in the public interest, (c) to provide for its governance and staff and (d) to provide for matters connected therewith.

1.6 While the proposed objectives envisaged are commendable, OUTA is of the opinion that this Bill will not meet some of these objectives. OUTA will hereunder provide comments to some of the main issues identified in the proposed SABC Bill of 2021, published by the Minister of Communication and Digital Technologies for public comment on 16 July 2021.

1.7 OUTA herewith wishes to provide comments on three main issues.

2. OUTA'S COMMENTS:

2.1 THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD BILL, 2021 (SERVICES PROVIDED):

2.1.1 With specific reference to section 9 (Public Services) and section 10 (Commercial Services) in the proposed Bill, there can be no doubt about the SABC's value as a public broadcaster.

2.1.2 According to the SABC's annual report for 2019/20, the public services attract significant viewership (SABC1: 26.2 million viewers; SABC2: 24.8 million viewers; radio stations ranging from Ukhozi FM's 7.6 million listeners and Umhlobo Wenene FM's 5.8 million listeners to XK FM's 3000 listeners), and OUTA strongly supports the diversity in these, for both large audiences and niche audiences.

2.1.3 OUTA agrees with the differentiation between public and commercial services and supports the acknowledgement that public services are frequently not commercially viable and thus the need for the commercial services to subsidise the public services.

- 2.1.4 However, OUTA is concerned that the SABC’s funding crisis may not be adequately addressed by this Bill as the funding sources listed for both public and commercial sections of the SABC remain the same as in the Broadcasting Act, 1999 as amended.
- 2.1.5 With regards to public services, the SABC “may draw revenues from advertising and sponsorships, grants and donations, as well as licence fees levied in respect of the licensing of persons in relation to television sets and may receive grants from the state” (section 9). Oddly, this seems to exclude fees from television licences for businesses or organisations.
- 2.1.6 Regarding commercial services, revenue sources are not specified, apart from making it clear that commercial services “must subsidise the public services to the extent recommended by the Board and approved by the Minister” and that commercial services “must be operated in an efficient manner so as to maximise revenues provided to its shareholder” (section 10).
- 2.1.7 This Bill, as with the Broadcasting Act, requires a separation between the finances of the public and commercial sectors, which we support. However, the recent SABC annual reports do not appear to reflect this coherently.
- 2.1.8 The SABC itself notes in its annual report for 2019/20 (the most recent) that it is unable to provide such a distinction, and therefore fails to do so. Herewith an extract out of the SABC’s annual report:

“The business of the SABC is further defined by the Act into two distinct services namely; the Public Broadcasting Services (‘PBS’) and Public Commercial Services (‘PCS’), which are to be administered separately. Each SABC radio service and television channel is licensed independently by ICASA, and each is required to adhere to its respective license conditions and the provisions of the Broadcasting Act, including the SABC Charter. The SABC has advanced the view that the Broadcasting Act should not contain a distinction between the two services, because in practice it has a unitary model that governs its services. Due to this arrangement, the SABC is unable to account separately for each group of services (PBS 15 radio stations and two TV channels; PCS three radio stations

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and three TV channels).”

2.1.9 OUTA believes this to be unacceptable, as there is no point in having a law which is routinely ignored. OUTA is of the opinion that a workable solution is required, if the public is expected to subsidise the public broadcasting services. However, the SABC should implement this and the Parliament’s Portfolio Committee on Communications should oversee it.

2.1.10 Furthermore, another concern OUTA wishes to raise is the inclination to what OUTA interprets as censorship insofar as “public service” operations are concerned. Local content, educational, and other policies are all good and deserve support, but what if content is controversial and deemed to go against the grain of an arbitrary “national interest”? Is this not inviting political interference and eroding the freedom of journalistic expression?

2.2 THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD BILL, 2021 (THE ACCOUNTING AUTHORITIES):

2.2.1 Regarding section 6 (the Charter of the Corporation), section 11 (the Composition of Board) and section 12 (the Executive Committee). OUTA strongly supports the legislated requirements envisaged in section 6 of the proposed Bill. Section 6 proposes that the SABC remain independent (as enshrined in the Constitution) and also emphasises the need for transparency and public responsibility.

2.2.2 In terms of section 11 and section 12, The Bill reduces the number of members on the SABC Board, from 12 non-executive members to nine, and from three executives to two. While this will undoubtedly save money – and from the Bill’s memo, this appears to be the intent – OUTA questions whether this intent is sufficient.

2.2.3 OUTA notes that while section 12 does not specify a Chief Operating Officer (COO), the SABC executive committee could include the COO among the 11 other

members. The Board is a crucial part of The SABC's governance, and it should not be forgotten that the SABC has been bedevilled by years of bad governance.

2.2.4 Unless reducing the number of board members will strengthen governance, OUTA does not believe it should be weakened. Of particular concern in this regard is the reduction in non-executive board members, as OUTA is of the opinion that greater oversight is needed rather than a reduction.

2.2.5 The board of directors is the accounting authority of the SABC, as contemplated in the Public Finance Management Act (PFMA), which in turn constitutes the fundamental basis of governance standards within the SABC. Therefore, the SABC must be headed and controlled by an effective and efficient board, comprising executive and non-executive directors of whom the majority must be non-executive directors to ensure independence and objectivity in decision making.

2.2.6 By virtue hereof, the board is bound to comply with the provisions of the PFMA, as the SABC's Accounting Authority, particularly the statutory provisions laid down in sections 49 to 55. Failure to comply with its statutory duties as envisioned in terms of sections 50, 51 and 55 renders the board accountable and essentially criminally liable.

2.2.7 With specific mentioned to section 11(2) and (3), OUTA welcomes these provisions as they seem to depart from the Broadcasting Act by prioritising public participation, openness and transparency. However, there are known shortcomings in the National Assembly itself – which may undermine the objective of these provisions. Procedures will need to be established by the relevant organ of the Legislature, and these may be objectionable or ineffective.

2.2.8 OUTA would therefore recommend that the process in itself is designed and implemented in an inclusive manner, where civil society enjoys stronger representation than it ordinarily does in parliamentary public participation processes.

2.2.9 Section 11(5) is particularly welcome in that it will provide for competence, compliance, ethics, merit as well as appropriate values represented by board members (such as freedom of expression, openness and accountability, etc.). Whether the inclusion of public participation in the traditional sense of parliamentary involvement will ensure that the SABC becomes independent of fiscal resources is highly questionable – especially since the rates and amounts (not to mention collectability) of television licences are still unknown and unpredictable.

2.2.10 OUTA questions whether the new governance arrangements provided for in the Bill, as a whole, sufficiently prevent the risk of collusion between the executive committee and the Minister in spite of a board nominated inclusively by Parliament.

2.3 THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD BILL, 2021 (TELEVISION LICENCES)

2.3.1 Section 28 of the proposed Bill deals with television licences. OUTA will provide comments not only on television licences but also on the SABC's current funding problem.

2.3.2 OUTA is of the opinion that television licence fees amount to a tax or revenue in terms of section 77 of the Constitution. The mere fact that a person has to pay a fee for being in possession of a television set whether it is used or not amounts to a tax or levy. One might still argue that where the set is used there is a benefit which accrues to the possessor but to pay for mere possession is akin to paying duty tax.

2.3.3 As such, OUTA is of the view that the determination of television licence fees should be served before Parliament in terms of section 77 read with section 75 of the Constitution and not, as per the proposed Bill, be determined by the Minister per regulation.

2.3.4 Section 77 of the Constitution provides for "Money Bills". A Bill is a Money Bill if it

(a) appropriates money; (b) imposes national taxes, levies, duties or surcharges; (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges. All money Bills must be considered in accordance with the procedure established by section 75 (Section 75 requires that a Bill be passed by both Houses and not by a Minister of the State per regulation).

2.3.5 The fact that section 28(9) of the proposed Bill provides that television licence fees must be used exclusively for the public service of the SABC and that the state may contribute to the funding of the public service of the SABC, also point towards the category within which payments in respect of television licence fees fall.

2.3.6 If there were no television licence fees raised, the funds (not covered by advertising) for the running of the SABC public service, would have to come from Parliament. This source, it is contended, adds to the argument that the source (which includes licence fees) of the public service of the SABC amounts to a tax or revenue and does not fall within the powers of a Minister to determine by way of regulation.

2.3.7 The raising of television licence fees in terms of the proposed Bill and that act mandating the Minister to determine the fees (per regulation), is in conflict with section 77 of the Constitution. Television licence fees amounts to the raising of a tax or levy and the fee must therefore be mandated by Parliament in terms of section 77 read with section 75 of the Constitution.

2.3.8 Furthermore, OUTA is of the opinion that television licence fees are not the answer to the SABC's financial woes and what is instead needed is a clear subsidy for the public broadcasting service. This may possibly involve re-positioning the existing licence fee as such. It would also mean significantly improving collection of these fees, otherwise it is pointless to retain them.

2.3.9 SABC's annual report 2019/20 points out that only 2.5 million licence fees were paid, out of a database of 9.5 million licence holders, providing revenue of just R791 million. This is a significant failure which needs addressing.

2.3.10 Over recent months various suggestions were raised about funding SABC, including household levies. OUTA believes it would have been helpful if the Bill, or the memo to the Bill, had suggested further funding sources for funding the public broadcasting sector.

2.3.11 OUTA is of the opinion that a public service subsidy could perhaps be at least partly covered by a regular annual grant from the fiscus to the SABC. This would avoid the irregular and disastrous last-minute bailouts but provide a more stable revenue stream particularly for the public broadcasting sector.

2.3.12 This could be seen as a grant in the furtherance of democracy. OUTA suggests cutting funding to wasteful programmes and diverting some of this to the SABC. For example, the National and Provincial Legislatures could provide some funding in the furtherance of democracy. These institutions manage to provide hundreds of millions of rands to political parties to support democracy. OUTA believes that some of these funds could be more usefully diverted to the SABC.

3. CONCLUSION:

3.1 In conclusion, OUTA is pleased with the majority of the proposed Bill as it seems to focus on reinforcing provisions for operational and financial accountability.

3.2 OUTA strongly opposes bailouts of state Institutions which squander taxpayer money, but recognises that the SABC is a public broadcaster and should get a certain amount of guaranteed funding from the state. Sufficient guaranteed funding, plus improvement of other sources of revenue, should help avoid the unpredictable bailouts.

3.3 We reiterate that OUTA does not oppose the introduction of new laws and regulations by government, but rather wishes to ensure that these laws and regulations are capable of effective execution and are aligned with the basic principles envisaged in our Constitution.