

PUBLIC SERVANT OR CENSOR?

The South African Broadcasting Corporation in the Era of Political Television Advertising

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ABSTRACT

Political television advertising is becoming an important feature of democratic elections and essential to election campaign strategies. In this article we take a close look at the role the South African Broadcasting Corporation (SABC) is playing in the new era of political television advertising ushered in in 2009. We focus our analysis on the banning by the SABC of election advertisements by two major opposition political parties before the 2014 elections. The country's regulator, the Independent Communications Authority of South Africa (Icasa) upheld the decision of the SABC when the two parties filed complaints. The banning of the advertisements and Icasa's decision are assessed on two important principles for public broadcasting – editorial independence and public accountability. We argue in this article that the action by the public broadcaster undermines freedom of expression and the credibility of both the SABC and Icasa, especially when contextualised within other controversial editorial decisions taken by the broadcaster over the years. Further, we argue that laws governing political advertising in South Africa are constitutionally problematic and contain contradictions in how they should be applied and implemented by both broadcasters and Icasa. We conclude by arguing for a review of these laws.

INTRODUCTION

South Africa held its fifth general election on 7 May 2014 to elect a new National Assembly and provincial legislatures.¹ Although 33 parties registered for the election, the campaign was waged among three major parties – the governing African National Congress (ANC), the Democratic Alliance (DA) and a newcomer, the Economic Freedom Fighters (EFF). The ANC, supported by its Tripartite Alliance with the Congress of South African Trade Unions (Cosatu) and the South African Communist Party (SACP), has won the majority of seats since 1994. With the economy in decline and an increase in service delivery and labour protests² since the last general election, in 2009, the stakes were very high in the 2014 election. Another important, if not symbolic aspect of the election is that it marked the 20th anniversary of South Africa's transition from apartheid to democracy.

This article analyses the banning by the South African Broadcasting Corporation (SABC) of election advertisements placed by two political parties, the DA and the EFF. We have chosen to focus on the SABC because it is, for many in the country, the only source of news and information. It therefore plays a critical public information role, which is necessary for democracy.

South Africa has four television companies – the SABC, the free-to-air Etv, the Digital Satellite Television (DSTV) and TopTV. Although all broadcasters, both commercial and community, are obliged to ensure that the public receives adequate information during elections, public broadcasters have a primary obligation in this regard. Public information about elections is provided through news, current affairs programmes, special election programmes and direct access political broadcasts. In this article we focus on television political advertising, whose informative effect in ideologically contested elections such as that in South Africa in 2014 exceeds that of television news and current affairs (Zhao & Chaffee 1995). Television is also a medium that, to a greater degree than others, relies on quickly understandable sound bites (Glaser & Salmon 1991).

Thus, political television advertisements convey political issues in an efficient and easily digestible way (Freedman, Franz & Goldstein 2004). Studies have also suggested that advertising allows candidates to reach uninterested and unmotivated citizens, those who pay little attention to news reports, debates and other campaigns (Kerns 1995, cited in Sindane 2010, p 24). Political advertising

1 The country follows a proportional representation with closed list system approach in both national and provincial elections. Voters elect parties, not individual candidates. The president of the country is nominated by a party and elected by the National Assembly after the elections (Kotze 2009).

2 At the time of the elections in May 2014, 80 000 miners in the platinum-producing region of the Northwest province, who are members of the Association of Mineworkers and Construction Union (AMCU), had been on strike for nearly four months. In 2012 during a strike at Marikana Lonmin Platinum Mine 34 miners were gunned down by police and 10 other people died in various ways.

is also important to political parties as it gives them control over their messages, unlike news coverage and debates, whose content is determined, mediated and controlled by media houses (Kaid & Holtz-Bacha 2006). Such control is particularly tight in the case of newscasts, as electoral controversies and political events are brought to public attention via journalistic mediation: indeed, the journalists directly shape coverage by calibrating the tone – selecting one form of language over another.

Increasingly, therefore, political parties around the world are relying on political television advertising and, more recently, social media, to communicate with and persuade voters to accept their leadership.

Political television advertising is a relatively new phenomenon in South Africa. It was introduced during the 2009 national and provincial elections and therefore there is very little research on the subject. The study by Sindane (2010) remains the only substantive research. In this study Sindane analyses the phenomenon and its implications for democracy, by focusing on images and discourses in the advertisements. Her concern is to determine the extent to which South Africa's political advertisements on television commodify politics. Previous research on political advertising in South Africa focused on billboards, newspapers and radio (eg, Fourie & Froneman 2003; Fourie 2008). Our article, therefore, departs from previous studies by focusing on the SABC's handling of political television advertising and on the regulations that apply to it.

Regulations for political advertisements on television were drawn up by the regulator, the Independent Communications Authority of South Africa (Icasa) in 2008. A key element of Icasa's regulations prohibits the editing or altering of party advertisements and the rejection by broadcasters of an advertisement without sound reasons (Sindane 2010). Controversially, in the 2014 elections, as this article discusses, the SABC banned advertisements from the DA and the EFF on the grounds that they had the potential to incite violence. This decision was upheld by Icasa after the two parties lodged complaints with the regulator.

We argue that the banning of the advertisements undermines freedom of expression and the credibility of both the SABC and Icasa. The bans should not be looked at in isolation, but form part of other controversial decisions the public broadcaster has taken over the years that impinge on its editorial independence. We further argue that laws governing political advertising in South Africa are over broad and constitutionally problematic and a review is necessary to avoid entrenching a worrying precedent for future decisions about party political advertising. In addition, the way in which these regulations are applied and implemented by both Icasa and the SABC is highly contradictory.

The article is structured as follows: first we map out literature on media, elections and political advertising. Secondly, we discuss the theoretical framework

underpinning our analysis and arguments. Thirdly, we provide the context of television political advertising in South Africa. Fourthly, we analyse critically the banning of the DA and EFF advertisements and the implications of the banning for the SABC's editorial independence and public accountability. We conclude by discussing the need for a reform of South Africa's electoral laws and offer suggestions about how this can be done.

MEDIA, ELECTIONS AND POLITICAL ADVERTISING: MAPPING THE MAIN ARGUMENTS

One of the basic requirements to be met by a liberal democratic regime is the ability to carry out regular, free, and most importantly, fair elections (Dahl 1973; Morlino 1998). Fair elections clearly involve the necessity to provide citizens with fair, balanced, and objective information to enable them to come to an informed and rational decision about which leader or party to vote for. Media, therefore, play an indispensable role in the proper functioning of democracy.

Much research (Hallin & Mancini 2004; Strömbäck 2008; Esser & Strömbäck 2014) shows that the communication media are becoming increasingly important in influencing the way in which the democratic process today unfolds. In this respect, some scholars (Seymour-Ure 1974; Hallin & Mancini 2004; De Albuquerque 2013) have noted that the media should no longer be conceived of as merely a neutral tool, a channel of communication by and through which politicians disseminate their proposals and make their agendas publicly known. Rather, the media have become key players in the democratic game (Altheide & Snow 1979; Butler & Ranney 1992; McQuail 1992; Mazzoleni & Schulz 1999).

The impact of the media on the political process is particularly evident during elections. Although in this time of digital technology the traditional media are not the only source of information during elections, they still play an important role in informing the citizenry and influencing the political agenda, particularly in developing countries, where the majority of people still rely on mass media for information.

The media play varied roles in enabling full citizen participation during elections, *inter alia*, educating voters about how to exercise their democratic rights, providing a platform for political parties to communicate their message and debate each other and monitoring and scrutinising the electoral process.

The impact of the media on the political process in any country is particularly evident during election campaigns. There are a number of reasons for this. Some of them are inherently part of the phenomenon of electoral advertising or campaigning, whereas others pertain to – and are a consequence of – the profound changes that are currently facing the way in which politics today is communicated to citizens.

With respect to the first set of reasons, it should be noted that election campaigns are among the most contentious moments in the political life of a democratic country. It can be said that during the campaign phase the issues that divide the players (the political parties) are far greater than those that unite them. In other words, during the campaign the political debate is likely to evince higher levels of polarisation than are evident during non-election periods. The reason for this is that the actions of the political parties are primarily – if not uniquely – aimed at maximising popular consensus, in the hope that this support will translate into electoral success. It is not by chance that one of the most common and effective terms used to signify electoral competition in modern democracies is *horse race* (Serini, Powers & Johnson 1998; Hallin 1992).

In addition to the inherent characteristics of electoral competition, in the past decade election campaigning has undergone significant changes, which have caused the media to become even more influential in the way campaigns are fought. A considerable number of scholars refer to these transformations by making use of concepts like *personalisation* and *spectacularisation* (Kriesi 2012; Poguntke & Webb 2007; Glaser & Salmon 1991; Swanson & Mancini 1996; Xifra 2011). While Western democracies are facing the downside of political personalisation and the *Americanisation* of election campaigning (Swanson & Mancini 1996; Xifra 2011), in many African countries issues of political patronage, media polarisation and ethnicity still remain major concerns during elections and, as a result, there is very little research in Africa focusing on political advertising and its effects on democracy during elections. The overwhelming majority of research into political advertising has been conducted in the United States, where the phenomena of personalisation and spectacularisation highlighted above are most evident.

Some scholars (McNair 2011; Merritt 1984; Kaid 2008) have raised concerns about the effects of political advertising on political processes, with some of them raising a number of concerns about the introduction of the term advertising (and the logic that underpins its functioning) into the politic sphere. More specifically, it is argued that the development of political advertising would contribute to the reinforcement of a process of commodification of politics, which some authors see as hardly compatible with a well-functioning, healthy democracy.

In this regard it is particularly worth reporting the role political advertising, according to McNair (2007, p 89), plays in today's democracies, as it illustrates the process of transforming politics into a commodity to sell.

Advertisements function, therefore, by making commodities mean something to their prospective purchasers; by distinguishing one product from another, functionally similar one; and by doing this in a manner which connects with the desires of the consumer.

Narrowing the focus of our argument, another aspect worth highlighting is that advertising per se, irrespective of whether or not it is of a political nature, has a natural connection with commercial television. Indeed, advertising is one of the major sources of income for most commercial broadcasters. It is even more vital for free-to-view broadcasters, which is to say, those privately-owned commercial networks that do not provide pay-per-view content and do not rely on viewers' subscriptions (Curran 1981). Therefore, political advertising involves a contradiction that is not easy to solve.

On the one hand, this tool for political promotion is naturally intertwined with commercial broadcasting. On the other, it is not ordinary advertising, it is political advertising, which automatically bestows on it a dimension of public interest and significance (Kaid & Holtz-Bacha 2006). Such a contradiction is further exacerbated if attention shifts from commercial broadcasting to public service broadcasting. In fact, in this case, according to the welfare state theory that inspires the birth and establishment of public television, television viewers should no longer be seen as consumers but as a public, whose general interests need to be pursued and achieved (Calabrese & Burgelman 1999). As can be easily imagined, the necessity to cater to public interest is likely to collide with the logic on which political advertising builds. Therefore, because of the several critical aspects related to political advertising on television, which have been brought out so far (a low degree of editorial control over political messages, a tendency to favour the development of a process of political commodification and a contradiction between political advertising and public interest), regulation plays a crucial role in shaping the way in which advertising processes and procedures play out.

Regulatory approaches, however, are not uniform across the world, as democratic countries have paved different and sometimes divergent roads to regulation of political communication. For example, in the United States (US), there are no specific limitations on the airing of political advertisements on television: parties and candidates are not required to comply with any campaign spending threshold and may purchase as many advertising spots as they consider necessary for their campaign strategy. In addition, as far as advertising is concerned (and consistent with the commercial nature of America's media system), television networks and broadcasters do not have to abide by any particularly strict provisions, they are only compelled to comply with legal requirements of fairness, objectivity and impartiality when covering politics in as 'newscasts, news events, documentaries, and on-the-spot news events' (Centre for Law and Democracy 2012, p 2). While a network that sells an advertising spot to one candidate 'must offer the same amount of airtime, with the same audience size, to all other candidates at the same rate', should the other candidates be unable to afford the expenditure, 'the media outlet is under no obligation to give them airtime' (Centre for Law and Democracy 2012).

The American regulatory framework is among the most 'permissive' in the world (Centre for Law and Democracy 2012). Other countries have a far stricter approach, which often translates itself into a complete ban on political advertising. Not surprisingly, this is the case in one of the countries with the strongest tradition of public service television, the United Kingdom (UK). Unlike in the USA, in the UK a political advertising market has never developed. In fact, paid political advertising is de facto banned (Scammell & Langer 2006). In the UK election advertising takes the form of party election broadcasts (PEBs), 'rationed blocks of free airtime' whose allocation is carried out with the aim of achieving an 'appropriate balance between the parties' (Scammell & Langer 2006, p 68). However, although they differ considerably from political advertisements, PEBs share with them the fact that they do not require any journalistic mediation to be aired. The introduction of a PEB-centred system was considered to be a useful way of untying television election campaigning from the availability of financial resources.

THE SITUATION IN SOUTH AFRICA

Political advertising in South Africa began with the first democratic elections, in 1994, when it was permitted on billboards, radio, newspapers and posters, but was prohibited on television (Sindane 2010). Televised election advertising was believed to be a potent form of persuasion (Teer-Tomaselli 2006). Party election broadcasts, political advertisements (PAs), and the 'equitable treatment of political parties' were first referred to in the Electronic Communications Act (ECA), 2005. This piece of legislation de facto introduced a ban on broadcasting PEBs and PAs (although a set of extremely rigid exceptions applied), and empowered Icasa to regulate election campaigning and ensure that the principle of political pluralism was complied with.

As stated above, political advertising on television was introduced just before the 2009 national and provincial elections. The regulation for PEBs and PAs were promulgated in *Government Gazette* No 31602 of 14 November 2008 as 'Regulations: Party election broadcasts, political advertisements, the equitable treatment of political parties by broadcasting licensees and related matters', Icasa, Notice 1419 and came into force in March 2009.

South Africa's political advertising regulatory framework may be looked at as a hybrid case which can be placed halfway on an hypothetical continuum, whose poles are represented by the American (highest degree of political advertising liberalisation) and British (absolute ban on political advertising broadcasting) models, though, on closer examination, it seems to lean towards the British one.

According to the Electronic Communications Act, Chapter 1, a PEB is 'a direct address or message broadcast free of charge on a broadcasting service and which

is intended or calculated to advance the interests of any particular political party'. On the other hand, the ECA states that the term 'political advertisement' identifies

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

Therefore, as can be seen, both PEBs and PAs are primarily intended to 'advance the interests of any particular political party'. However, while the end may be identical, the means by which it is attained differ considerably. In fact, while the broadcasting of PEBs does not involve any cost to political parties and is exclusively dependent on the airtime allocation policy that is implemented, in the case of PAs, political parties must purchase airtime from the broadcasting service licensee in which they are interested.

In this respect, therefore, South Africa's legal framework tends to be closer to that in the US, as in both countries the broadcasting of paid political advertisements is allowed by law. There is, however, a further aspect that is worth highlighting. According to the ECA, only public service broadcasters have an obligation to allocate a certain amount of airtime to broadcasting PEBs.

Commercial and/or community broadcasters are allowed to broadcast PEBs upon request, in which case they must comply with the same set of rules as applies to public television and radio networks. In principle, obliging public service broadcasters to broadcast free-of-charge political messages seems consistent with the public service remit to which these networks are required to adhere. Having said that, the distinction between public service and other (commercial/community) broadcasters cannot be found in relation to PAs. Indeed, in the case of PAs, public and privately owned broadcasters are referred to as 'broadcasting service licensees', without any distinction as to their *nature*.

Therefore, it is interesting to note that, in certain circumstances, public and private networks can (and do) enjoy the same status. However, in view of the anomalous funding model (as opposed to other public broadcasters) upon which the SABC relies, this is only an apparent contradiction. In fact, the broadcaster draws the bulk of its financial resources from the sale of advertising space (SABC Annual Report 2013), thus preventing the SABC from airing political advertisements or compelling it to broadcast them free of charge is likely to put at stake the broadcaster's core business.

As far as airtime allocation policy is concerned, PEBs are distributed among all the political parties 'contesting seats in the National Assembly'. Icasa has set

up a formula for calculating allocation. Because this formula is primarily based on a *pro rata* mechanism (which takes into account the number of seats each party is contesting as well as the number of seats each party holds in Parliament at the time of the election) it tends to give an advantage to those parties that already hold a dominant position in the political spectrum. This tendency is further reinforced by the fact that the major political parties have access to comparatively larger amounts of financial resources to invest in political advertisement broadcasting.

That said, in addition to providing a regulatory and interpretative framework for two different forms of television electoral promotion, Icasa attempts to deal with possible disputes that might arise between political parties and networks. As will be shown, not only did such disputes arise throughout the 2014 election campaign in South Africa, they also inspired a very lively (and sometimes harsh) debate about how effectively the principle of equitable treatment of political parties was implemented by the SABC during the campaign.

In the regulatory framework Icasa reaffirms what is already stated in the Electronic Communications Act of 2005: political advertisements and party election broadcasts can only be aired during the official election period, namely 'the period commencing with the date on which the election day is proclaimed and ending on the day immediately following upon the day on which candidates of any of the political parties are declared elected'. Political parties must submit the advertisements for consideration by the broadcasting service licensees and, while the licensees are not allowed to 'edit or alter' advertisements once they have been accepted, they can reject them, should they not be considered suitable for broadcast.

If a broadcasting service licensee decides to reject a particular PA it must provide Icasa with a written document in which it gives reasons for the rejection. If a party believes that there are insufficient grounds for the rejection it may appeal to Icasa within 24 hours of being informed of the rejection, which is exactly what happened during the 2014 election campaign.

THEORETICAL FRAMEWORK

In order for public broadcasting to be able to accomplish fully its democratic mission it must adhere to a number of requirements. These include editorial independence, public accountability, universal service and access, programme diversity and pluralism. However, two core values that are commonly shared by public service broadcasters worldwide are editorial independence and public accountability (Tleane & Duncan 2003). If the foundations of independence and accountability are not present the ability of the broadcaster to fulfil its public service role will be severely impeded. Hence, the independence and accountability

of a PSB directly affect its functioning. Editorial independence entails making editorial decisions without being controlled by outside forces and this means that programming and related decisions should be free from interference that prevents them from fulfilling their public mandate (Warren 1998, cited in Berger & Juuko 2007, p 95). Public broadcasters are accountable to the public through independent governing and regulatory bodies.

It is of paramount importance that broadcasters operating in a democratic country, irrespective of their public or private status, comply with *editorial independence*. This is especially crucial during particularly controversial phases such as election campaigns. Nevertheless, because of its public nature, public service broadcasting is naturally exposed to a wide range of pressures from political and institutional actors. While a certain degree of involvement by these actors is unavoidable in the sphere of publicly owned media, when state and party intrusiveness is particularly high it can become a threat to editorial independence.

This situation can prove especially worrying in those countries, like South Africa, in which a controversial tool such as political and electoral advertising is allowed on public television and in which public service broadcasting is highly politicised. In fact, if a broadcaster is heavily politicised, providing it with discretionary powers that enable it to decide what is or is not acceptable does not necessarily result in editorial independence. Although the broadcaster might act and deliberate within legal boundaries, it will not necessarily enjoy what Hanretty (2010) calls '*de facto* independence'.

Therefore, a prerequisite for editorial independence is structural independence from political parties and any other bodies who are potentially able to affect a public broadcaster's freedom. A scenario in which broadcasters enjoy a high degree of autonomy but are nonetheless strongly politicised may generate unclear and contentious situations in which suspicions and doubts about the broadcaster's impartiality and objectiveness are likely to emerge, especially, as will be shown, when the main opponents of the ruling party are directly affected by the broadcaster's decisions.

It is important to acknowledge that electoral advertising is a very particular, if not unique, form of political promotion. In this respect, if political advertising is to be allowed on national television, a 'light-touch' approach should be adopted in order to prevent state overregulation in the media sector favouring and fostering the establishment and development of self-regulatory practices. One of the most effective ways in which the state can affect the media is by trying to discipline the sector's activities minutely. A high degree of state intervention / intrusiveness in the media can have significant implications for, and pose serious problems for the degree of freedom and independence enjoyed by those who operate in that system (Hallin & Mancini 2004).

Light-touch regulation can, however, generate an equally blurred regulatory environment if it is not accompanied by the fulfilment of a second principle: *public accountability*, which is another element of public service broadcasting (Hoynes & Croteau, 2002). In this respect, as stated above, privately owned media have a natural tendency to try to attract the largest audience. This objective can (and often does) conflict with the necessity to deliver high-quality content. Although some argue that the media, irrespective of their nature, should aim to fulfil the public interest, private media are not (nor can they be expected to be) strictly accountable to the public.

The case is clearly different when it comes to public service broadcasters, who, ideally, are accountable to the general public. The justification for this principle does not only – and not necessarily – lie in the nature of the source of the network’s funding – not all public broadcasters are exclusively funded from the public purse, most of them rely on a mixed model, with the SABC drawing the bulk of its resources from commercial advertising and sponsorship (Tleane & Duncan 2003; SOS 2012).

The justification for PSB’s special regime of accountability is the process of democratic enhancement to which public television is called on to contribute. However, it is not sufficient to provide solid normative grounds in order for the principle of media accountability to be fulfilled, certain structures need to be established and certain procedures enforced for the mechanism of accountability to function correctly.

In this respect, in today’s democracies a key role is played by independent regulatory authorities such as Icasa, although, here again, the simple establishment of an authority does not guarantee editorial accountability. At least two minimum criteria should be met in order for these bodies to be credible: independence and effectiveness. In this respect, Icasa displays significant flaws.

The Freedom of Expression Institute (FXI) and SOS Coalition: Support Public Broadcasting highlight the institution’s particularly worrying dependence on the government for funding, administration, and the appointment of its members (FXI 2008; SOS 2012). Furthermore, its mandate is characterised by unclear provisions, which raise doubts about how effective it can be in discouraging illicit behaviour. Icasa does not have the power, prior to the submission of an advertisement to the licensee, to determine whether or not it meets the necessary requirements to be broadcast, this evaluation is left exclusively to the broadcaster. Icasa can only act in the capacity of a tribunal, to which the parties can resort should they believe that their rights have been violated and only after the advertisement has been submitted to (and rejected by) the broadcaster.

However, in this case too, the problem of the *tribunal’s* independence arises. Icasa’s strong degree of politicisation is likely to undermine the credibility and

legitimacy of its judgements, especially when they favour the ruling party. Therefore, it is paramount for its impartiality and accountability to be guaranteed if political and institutional actors are to maintain credibility as public servants.

THE BANNING OF THE DA AND EFF ADVERTISEMENTS: IMPLICATIONS FOR EDITORIAL INDEPENDENCE AND PUBLIC ACCOUNTABILITY

According to section 57 of the Electronic Communications Act (2005), election campaigning in South Africa may begin in earnest when the president announces the date of the election. Although parties had already started campaigning for Election 2014 in early 2013, mediated political advertising only started in February 2014, when President Jacob Zuma gazetted the date of the elections.

The ANC, the DA and the EFF dominated the media space. According to research by Media Monitoring Africa, the three parties collectively enjoyed nearly 80% of the media coverage in the seven weeks leading up to the elections. Equally, most of the political advertisements flighted by broadcasters, including the SABC, belonged to these three parties. The DA launched its first televised advertisement, entitled 'Ayisafani iANC [the ANC is not the same]' on 8 April 2014. The advertisement turned the spotlight on police violence, with Mmusi Maimane, the DA's candidate for Gauteng provincial premier, saying, 'the police are killing our people', as a photograph of a police officer firing rubber bullets at two unarmed people is shown. The SABC banned the advertisement on the grounds that it incited violence against the police. The South African Police Service (SAPS) filed a complaint with Icasa, which was upheld, and the DA was ordered to remove the 'offending part' of the advertisement.

The second 'Ayisafani iANC' advertisement starts with Maimane saying, 'they tried to silence us but this is actually what they are afraid of', then focuses on job creation and the growth of the DA over the years. The SABC again banned the advertisement and the DA leader, Helen Zille, intimated that the reason for the ban was the statement 'they tried to silence us'.

The EFF advertisement, 'Now is the Time for Economic Freedom', comments on the mine workers killed by the police in 2012 at Marikana in North West province, the controversial road e-tolls introduced by the government in 2013³ and includes in the text the words 'destroy the e-tolls physically', and the saga

3 E-tolls, intended to fund a R20-billion highway upgrade programme, went live in Gauteng in December 2013 provoking a huge outcry from the public because they were introduced without public consultation. It is argued that SA National Roads Agency Limited and the government did not comply with the law when they introduced the system.

of the public funds improperly used by President Zuma for the renovation of his private residence in Nkandla in KwaZulu-Natal.⁴

The SABC banned the advertisement, which was due to be aired on 20 April, because it contravened section 4(12b) of Icasa's regulations on party elections broadcasts in that the advertisement contained words which were likely to incite unlawful, illegal or criminal acts. The section states that a PEB must not 'contain any material that is calculated, or in the ordinary course, is likely to provoke or incite any unlawful, illegal and criminal act, or that may be perceived as condoning or lending support to any such act'. Both the DA and the EFF lodged complaints with Icasa's complaints and compliance committee, which ruled against the airing of the advertisements unless they were amended to remove the 'offending' text.

THE SABC, EDITORIAL INDEPENDENCE AND ELECTORAL DEMOCRACY

It goes without saying that public broadcasting plays an important role in promoting electoral democracy. This role can only be effectively realised when the broadcaster has editorial independence. In the case of the SABC, editorial independence is compromised by both its legal structure and its funding model. The Broadcasting Act converted the SABC into a public company in 2004, making the state, through the Minister of Communications, the sole shareholder in the corporation. The same Act also created 'public' and 'public/commercial' divisions within the SABC aimed at ensuring financial viability, with the commercial wing cross-subsidising the public wing (R2K 2011). In reality however, both wings of the SABC rely heavily on advertising. The legal structure and funding model means that the SABC is caught between state and commercial interests.

Over the years, the editorial independence of the corporation has been questioned in relation to cases such as the 2006 'blacklisting saga',⁵ the last minute cancellation of an interview by Metro FM in 2009 with three political commentators, the banning of a fast food advertisement depicting the polygamous arrangement of President Zuma and his family, the refusal by the SABC to show a documentary on political satire featuring cartoonist Jonathan Shapiro (known

4 The Nkandla Saga (or Nkandlagate as the media have termed it) refers to the so-called security upgrades at President Zuma's private residence. The country's public protector found that the president had spent more than R200-million of taxpayers' money on the upgrades.

5 In 2006 the *Sowetan* broke a story alleging that the SABC was blacklisting the use of certain journalists and commentators because they were perceived to be unfriendly to then President Thabo Mbeki. The SABC denied the story, but John Perlman, presenter at the time of the *AM Live* current affairs show on SABC station SAfm, confronted the SABC spokesperson, Kaizer Kganyago, on air, confirming that a ban did, indeed, exist. Dali Mpofu, then GCEO of the SABC, appointed an independent commission of inquiry to look into the matter. The commission confirmed some instances of blacklisting and self-censorship.

as Zapiro), the canning in 2013 of the current affairs programme 'Big Debate', the instruction to news staff to not report the booing of President Zuma at the Nelson Mandela memorial event in Gauteng and the failure to flight a pre-recorded interview with Jonathan Shapiro. All these cases seemed to bolster the perception that the ruling party interferes with editorial decisions at the SABC.

The banning of the DA and EFF advertisements once again focused the spotlight on the SABC, but it also draws attention to the role of the public broadcaster in an electoral democracy. A public broadcaster has an obligation to ensure that the public receives adequate information during an election through, news and current affairs programmes, special election programmes, direct access political broadcasts and commercial political advertisements.

It is important to note that the three banned advertisements dealt with critical issues – the Marikana Massacre of 2012, increasing police brutality, the imposition of e-tolls and the Nkandla case. These issues had dominated South Africa's political landscape for some time and the SABC as a public broadcaster should have ensured that the general population had access to a broad spectrum of views on issues of public concern and should therefore have allowed a vibrant debate on these issues in the run-up to the election. According to the MMA's preliminary report on the 2014 elections, the SABC gave four reasons for banning the advertisements:

- 'It is our view that the reference in your television advertisement to police killing our people is cause for incitement to action against the police services.
- 'The Electoral Code of Conduct includes a clause prohibiting the publication of false information about other candidates or parties. We believe this can also be extended to information that has not yet been tested and confirmed in a court of law, such as the allegations in your advertisement regarding the Nkandla matter.
- 'The Code of Advertising Standards Authority of South Africa does not permit attacking another product to promote your own. The ASA does not have jurisdiction over political advertising permitted during the Election Period, but it is our view that the Complaints and Compliance Committee of Icasa, which then assumes jurisdiction, is most likely to apply the same principle.
- 'We are also of the view that the SABC will not permit personal attacks on any party member or leader by any other party, as is being done in your advertisement in respect of President Jacob Zuma. We do not have any concern about generic statements regarding matters such as corruption or lack of service delivery, but do not believe that

it is correct to pin such issues on any specific person, whether the President or anyone else.'

From these reasons it is clear that the SABC had no solid ground for banning the advertisements. In terms of Article 19 of the South African Constitution, 1994, any restrictions on freedom of expression

must be necessary and, given the fundamental importance to a democratic society of free political debate during election campaigns, this implies that an election broadcast may be subject to prior censorship only where it is virtually certain that the broadcast would cause immediate, irreparable and substantial harm.

In respect of the second and fourth reasons, political parties are inclined, due to their nature, to promote partisan views which are characterised by strident tones, particularly during election campaigns. Such views are sometimes likely to result in attacks on political opponents. This is one of the forms in which today's democratic discourse unfolds in advanced democracies, as negative campaigning is conceived of as one of the ingredients of political pluralism.

For example, in the US, a country in which political advertising is one of the primary tools of political promotion, all political parties make use of negative campaigning. The first and third reasons are highly speculative, have no basis in law and give the impression that the SABC is protecting state institutions and the presidency. In its Election Guidelines, adopted in 1999 and used in all subsequent elections, the SABC states that it has 'a primary responsibility to ensure that the needs, questions and concerns of ordinary citizens are covered fully in its broadcasts' and that it will not 'shy away from robust debate on controversial issues'.

PUBLIC ACCOUNTABILITY IN QUESTION: A CRITICAL LOOK AT THE RELATIONSHIP BETWEEN ICASA AND THE SABC

The SABC is accountable to the public through its board of governors and Icasa. The regulator's role is to keep the SABC in check and evaluate whether the broadcaster is fulfilling its public service responsibilities and complying with its charter. The role of Icasa in general elections is articulated in the ECA and includes the promotion of an environment of open, fair and non-discriminatory access to broadcasting services to ensure that a diverse range of sound and television services are provided and developed nationally, regionally and locally.

Icasa's decision to uphold the ban gives the impression that the regulator is shielding the SABC and deferring to political authority (Duncan 2014). While the ruling was technically correct as per s 4(12B) of its regulations and the advertisements amounted to what might be termed 'negative campaigning', the SABC's decision to ban them and Icasa's ruling undermine the freedom of expression guaranteed in the Constitution and remove the opportunity for robust debate expected during elections.

While all parties sign and agree to abide by a code of conduct set out by the Electoral Commission of South Africa (IEC) this should not mean that robust debate and strong views should be discouraged. Indeed, it is during an election period that politicians are more likely to be more strident in their views and critiques of parties. It is during this time that citizens expect to hear political parties asserting and putting their views and policies forward, yet the SABC removed the ability of voters to decide for themselves whether to accept or dismiss the opposition parties' criticism (MMA Press Statement 2014).

Icasa's regulatory oversight of the SABC has been questioned in the past. Govenden (2009), in a study of the authority's effectiveness in its regulation of the SABC, found that Icasa had adopted a regulatory practice that could be considered 'silent', especially in cases of editorial bias towards those in authority and controversial practices like the 'blacklisting' saga mentioned above. Icasa's institutional weakness and lack of independence are among the factors that hinder its ability to regulate the SABC effectively (Govenden 2009 Moyo & Hlongwane 2009; Fokane & Duncan 2002).

TENSIONS IN MEDIA ELECTORAL LAWS AND SUGGESTIONS FOR REFORM

Icasa's decision brought into sharp focus the contradictions and tensions among the various electoral laws in South Africa. While the Electoral Code of Conduct serves as a basis for promoting tolerance by ensuring 'a public commitment that everyone has the right to freely express his or her political beliefs, to challenge and debate the political beliefs of others, and to freely canvass and campaign', the Icasa elections regulations undermine free speech by including broad provisions on incitement to violence. In relation to this, Duncan (2014, n.p) states:

Icasa's regulations, and their recent application, demonstrate that the broadcasting framework is not really designed to facilitate electoral competition: If it was, then it would be much more accommodative of the kind of 'cut and thrust' speech that is usually the stuff of competitive elections.

In addition, Duncan states that, in the case of the DA advertisement, the photograph of police shooting rubber bullets at a protestor had been published before and did not incite violence against the SAPS. Similarly, the EFF's call to destroy e-tolls had been in the public domain since 22 February, when the party's election manifesto was launched, and no violence had resulted from the statement.

A close look at the regulatory framework of PAs and PEBs reveals a considerable imbalance between the nature of the duties by which broadcasters and political parties are required to abide. Broadcasters may reject PAs provided they supply written reasons for doing so. On the other hand, political parties that intend to broadcast an advertisement 'must ensure' that the proposed advertisement does not 'contravene the provisions of the Electoral Act, the Electoral Code, the Constitution, the [Electronic Communications] Act and the Broadcasting Act' and does not incite or provoke unlawful or illegal acts. However, while it is clearly stated which codes and pieces of legislation the political parties should be careful not to contravene, there is no clear indication of how political advertisements should be shaped in terms of form and content.

On the one hand, the lack of more specific guidelines might be intended to provide the parties with the freedom to choose how best to promote their political platform. On the other hand, in doing so, the law gives the broadcasting service licensees a significant amount of discretionary power, enabling them to decide if and to what extent an advertisement complies with the abovementioned provisions and principles and, ultimately, whether or not to broadcast it.

It is not surprising that a normative framework that displays these characteristics is more likely to lead to controversy among the parties when a political advertisement is rejected. The degree of contentiousness is particularly high in South Africa because the country's political spectrum is characterised by an imbalance between the parties as a consequence of its one-party-dominant structure. This is probably the primary reason why the question of the way the television representation of political parties is dealt with is especially crucial.

Understanding the way in which such representation is managed can certainly be helpful in shedding light on how election campaigns are run in today's South Africa. Equally, it can contribute to a better understanding of the role of the media in shaping and influencing the balance of power between South Africa's institutional, political, and social actors.

In view of this scenario a number of elements should be taken into consideration if attempts are to be made in the future to reform South Africa's political and electoral communication structures and procedures.

Firstly, the decision in 2009 to allow the broadcasting of political advertising was a markedly liberal approach to electoral communication. However, if political advertising is to be allowed, the regulations should be shaped accordingly. As

observed above, advertising is a very particular form of political promotion and during elections parties are likely to promote partisan views and attack political opponents. It is therefore suggested that a lighter-touch approach be adopted, allowing political parties more freedom to determine the contents of their advertisements and avoiding automatically considering inappropriate forms of negative campaigning. Introducing light-touch regulation, however, does not necessarily imply adopting a *laissez-faire* approach, such as that in the US.

Secondly, while Icasa does provide a set of broad guidelines and instructions about how political advertisements should be structured, the implementation of the rules (as well as the decision whether or not to broadcast the advertisements) is entirely up to the broadcasters and Icasa may only be brought in when a dispute arises. It is suggested that the regulation that enables the licensee to decide whether or not to broadcast an advertisement be modified and that Icasa should retain the power to conduct an assessment prior to the advertisements being submitted to the licensees. In this way it might be possible to avoid controversies, as the suitability of an advertisement would be assessed beforehand by an impartial, independent party.

Thirdly, in order for the suggested reforms to be credible and effective, Icasa's independence and impartiality should be above suspicion. This is the main reason why, prior to undertaking any attempt to reform the procedure of submission, evaluation, and acceptance/rejection of political advertisements, it is necessary to reshape the provisions that currently regulate Icasa's appointments, administration, and financing.

CONCLUSIONS

The dawn of political television advertising in South Africa has brought new dynamics to election campaigning and has expanded the opportunities for political parties to communicate their message. While, over the years, South Africa has provided a model for public service broadcasting in the region, its independence is increasingly eroded by alleged cases of political censorship and financial mismanagement. The banning of political advertisements discussed in this article raises yet another spectre of censorship and there are indications that the country's media election laws, most specifically political advertising regulation, need to be reviewed. As we have shown, there are tensions and contradictions among the different laws in this field.

This article maintains that the extensively debated cases of the banning of the DA's and EFF's political advertisements cannot and should not be looked at as two unfortunate and isolated episodes. Rather, they seem to fit into a political scenario which displays a number of shortcomings in regard to two particular aspects: the effectiveness of regulation and democratic accountability.

With regard to the first, it should be noted that exceedingly intrusive and minute regulation does not necessarily result in an effective and virtuous system, especially when it comes to political/electoral advertising. Political advertising allows parties the possibility of freely disseminating and publicising their proposals by making use of the language and style of communication they consider most appropriate, and of bypassing journalistic mediation. The particular way in which it works means that political advertising is, by definition, unfit to be inserted into a detailed normative framework.

The complete absence of any mediation between politicians and constituency sets political advertising apart from other strategies of political promotion. For this reason state regulation should not be conceived as replacing journalists as a mediating agency in a crucial process within a country's democratic life, such as election campaigns. There is a need for further study of the regulation of political television advertising in South Africa. Secondly, it has been argued that the potentially beneficial effects that might derive from the adoption of a renewed regulatory framework could be nullified if reforms in regulation are not accompanied by a profound rethinking of the governance and procedures of the SABC – a process that would be essential to the effective implementation and functioning of the mechanism of democratic accountability.

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