

**HELD AT COMPLAINTS AND COMPLIANCE COMMITTEE**

**SANDTON**

**CASE NO: 77/2015**

In the matter between:

<b>NOW MEDIA (PTY) LTD</b>	<b>First Complainant</b>
<b>EE PUBLISHERS (PTY) LTD</b>	<b>Second Complainant</b>
<b>INTERACT MEDIA DEFINED (PTY) LTD</b>	<b>Third Complainant</b>
<b>TECHNEWS PUBLISHING (PTY) LTD</b>	<b>Fourth Complainant</b>
<b>BROOKE PATTRICK (PTY) LTD</b>	<b>Fifth Complainant</b>
<b>CROWN PUBLICATIONS (PTY) LTD</b>	<b>Sixth Complainant</b>
<b>TE TRADE EVENTS (PTY) LTD</b>	<b>Seventh Complainant</b>
<b>CREAMER MEDIA (PTY) LTD</b>	<b>Eight Complainant</b>

and

<b>SOUTH AFRICAN POST OFFICE LTD</b>	<b>Respondent</b>
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**REPLYING AFFIDAVIT TO THE RESPONDENT'S ANSWERING AFFIDAVIT DATED 20  
MAY 2015**

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I, the undersigned

**ANTON MARSH,**

do hereby make oath and state that:

1. I am an adult male and the Managing Director of Now Media (Pty) Ltd, the First Complainant in the above matter. The First Complainant's principle place of business is at the Now Media Centre, 32 Fricker Road, Illovo.
2. I am duly authorised to depose to this affidavit on behalf of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Complainants (referred to herein as the "Complainants") as confirmed in the resolution signed by all the Complainants and attached hereto marked "**RA1**".
3. The facts herein contained are within my personal knowledge, save where the contents indicate the contrary, and are both true and correct.
4. Where I make legal submissions or refer to relevant authorities I do so on behalf of all of the Complainants and on the advice of our legal representatives, which advice we accept.
5. I request that the contents of each and every annexure to this affidavit be read as if specifically incorporated herein *mutatis mutandis*.
6. The Complainants have read the answering affidavit delivered by the Respondent (referred to herein as "SAPO") and we respond thereto as follows.
7. As a dispute appears to have arisen out of the answering affidavit delivered by SAPO, I am enjoined by the regulations of the Complaints and Compliance Committee ("CCC") to file the Complainants' complaints in the form of an affidavit. Accordingly, I have attached the Complainant's complaints dated 11 December 2014 (the "Complaints") and I, on behalf of all of the Complainants, verify its contents. The Complaints are marked annexure "**RA2**" to this affidavit.

8. The Complainants stand by their Complaints and the contents of this affidavit and they dispute the entire contents of SAPO's answering affidavit.

### **PRELIMINARY MATTERS**

9. I submit that SAPO'S answering affidavit fails to deal with any of the merits of the Complaints levelled against it and instead raises numerous procedural and technical objections, namely prescription, impossibility of performance, vague and embarrassing allegations and a lack of factual material. I have been advised that these procedural and technical objections, whilst finding application in Court action proceedings, are not relevant or applicable to these proceedings.
10. The tone and contents of SAPO's answering affidavit is in keeping with the utter disregard that SAPO has had for the mechanism by which SAPO is meant to be held to account by its Regulator, namely the Independent Communications Authority of South Africa ("ICASA").
11. The Complaints in this matter have been met with numerous delays caused by SAPO. The following chronology borne out of the correspondence between all the parties, clearly displays this contempt:

11.1. on 11 December 2014, the Complaints were lodged with ICASA;

11.2. on 12 December 2014, ICASA acknowledged receipt of the Complaints;

11.3. on 12 December 2014, the Complaints were sent to SAPO;

- 11.4. no response was forthcoming from SAPO until two months later, on 12 February 2015 when a letter was received from SAPO stating that SAPO “*will revert before close of business on 17 February 2015.*” No reasons were provided for this delay in responding;
- 11.5. SAPO then failed to respond to the Complaints as undertaken in their letter or at all;
- 11.6. on 3 March 2015, ICASA informed SAPO that as SAPO is “*not committed to an amicable resolution of the complaints herein*” ICASA will refer the matter to the CCC for adjudication;
- 11.7. on 20 March 2015, the matter was referred to the CCC;
- 11.8. on 10 April 2015, the CCC informed SAPO that it had until 25 April 2015 in which to deliver an answering affidavit;
- 11.9. SAPO failed to deliver an answering affidavit as requested;
- 11.10. on 30 April 2015, the CCC advised that SAPO that it had until 2 May 2015 in which to respond, failing which the CCC would make a decision;
- 11.11. again, SAPO failed to respond;
- 11.12. on 4 May 2015, SAPO informed the CCC that the Complaints are being handled by Johan Naude in the legal department;

- 11.13. on 5 May 2015, the CCC granted SAPO a further indulgence in which to deliver an answering affidavit by 12 May 2015, failing which the Complaints would be sent to the Chairperson of the CCC for adjudication;
- 11.14. again, SAPO failed to deliver an answering affidavit as requested;
- 11.15. on 12 May 2015, SAPO sent an email to the CCC requesting an indulgence;
- 11.16. on 13 May 2015, the CCC granted "*a further and final indulgence of seven days*" and called upon SAPO to deliver an answering affidavit by 16h00 on 20 May 2015;
- 11.17. on 15 May 2015, SAPO requested a further indulgence which was denied by the CCC;
- 11.18. SAPO failed to deliver its answering affidavit by the final deadline at 16h00 on 20 May 2015 but did so at approximately 20h00 on the same day; and
- 11.19. the CCC chairperson delivered a ruling on 21 May 2015 stating that no further extension would be granted to SAPO and that the matter will be set down for hearing.
12. Accordingly, SAPO has failed to respond to the Complaints on 6 (six) occasions and now some six months after the Complaints were delivered they have still not responded to the merits of this matter or even requested condonation from ICASA or the CCC for any of these repeated transgressions over this six month period.

13. This is not an approach that should ever be taken by a State owned entity such as SAPO. At the hearing of this matter our legal representatives will refer to the relevant case law in this regard including the following extracts:

13.1. **Centre for Child Law & Others v MEC of Education, Gauteng & Others 2008 (1) SA 223 (T):** *While I am minded to commend the first respondent for the concessions about the poor state of affairs, I express the concern, I am sure shared by many, about the bureaucratic prevarication intrinsic to the department's litigation strategy. Section 195(1) of the Constitution requires the public administration to respond to public needs quickly and effectively. Increasingly one is a witness to public statements made by politicians and community activists about the slow pace of the delivery of social services to the vulnerable and marginalised sectors of our society. There is a growing sense arising in the general public that the bureaucrats are failing us. I therefore venture the tentative suggestion that in many cases government departments defend litigation against them unnecessarily, and in doing that use resources that might be better applied elsewhere.*

13.2. **Abdi & Another v Minister of Home Affairs & Others 2011 (3) SA 37 (SCA):** *Our courts have on several occasions expressed their disquiet at the failure of government officials, including the Department's officials, to respect the rights of individuals they deal with and to act in accordance with their duties imposed by the Constitution: Eveleth v Minister of Home Affairs and Another 2004 (11) BCLR 1223 (T) paras 45 to 48; Nyathi v MEC for Department of Health, Gauteng and Another 2008 (5) SA 94 (CC) (2008 (9) BCLR 865); Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality, and Others 2008 (4) SA 346*

*(T) para 21; Van Straaten v President of the Republic of South Africa and Others 2009 (3) SA 457 (CC). In the present instance the respondents' officials failed to understand the very object and purpose of the Act it was their duty to apply, causing unnecessary litigation and wasted costs. Had the appellants given timeous notice of an intention to apply for a punitive costs order, such would in all likelihood have been granted.*

- 13.3. ***Van der Merwe and Another v Taylor NO and Others 2008 (1) SA 1 (CC):*** *Section 1 of the Constitution, read with s 195, indeed sets high standards of professional public service as applicants submit. It requires ethical, open and accountable conduct towards the public by all organs of State. These are basic values for achieving a public service envisaged by our Constitution, which requires the State to lead by example. In this case, the State has failed to do so. The remissness on the part of the respondents should not be countenanced. Correctly so, none of the respondents attempted to defend it. In this constitutional era, where the Constitution envisages a public administration which is efficient, equitable, ethical, caring, accountable and respectful of fundamental rights, the execution of public power is subject to constitutional values. Section 195 reinforces these constitutional ideals. It contemplates a public service in the broader context of transformation as envisaged in the Constitution and aims to reverse the disregard, disdain and indignity with which the public in general had been treated by administrators in the past. Section 195 envisions that a public service reminiscent of that era has no place in our constitutional democracy. The remissness on the part of the respondents is not conducive to the current efforts of public service transformation. It must certainly be discouraged.*

14. It is unfortunate that SAPO, a State owned public entity charged to provide an important service to the public on an exclusive basis, has taken this stance particularly as the Complaints were clear, understandable, detailed and very much capable of answering in a constructive manner.

#### **AD PARAGRAPHS 1 TO 8 OF THE ANSWERING AFFIDAVIT**

15. At the outset I wish to bring to the CCC's attention the inappropriateness of the deponent to the answering affidavit. Mr Motsini states that he is employed as a manager in the legal department in SAPO and he alleges that he is authorised and he has personal knowledge of this matter. He fails to attach any evidence of such authorisation. Further I deny that a legal manager would have any personal knowledge of, or any knowledge at all, of the Complaints that have been levelled against SAPO in this matter.
16. As Mr Motsinoni has no personal knowledge of this matter or any answers that could resolve the Complaints, he has chosen to adopt a dilatory tactic often used by defendants in Court proceedings and he has deposed to an affidavit in an adversarial and obstructive manner, which fails to bring ICASA or anyone else into its confidence. SAPO's answering affidavit does nothing to assist in resolving or answering the Complaints lodged in this matter.
17. SAPO has criticised the Complainants for including legal matters in their Complaints and they say "*an affidavit is not a place to canvass legal matters*". However the fact is that the Complaints were not lodged in the form of an affidavit so such a rule is not applicable to the Complaints for this reason alone. Further this entire matter is not subject to any of the rules and practices of Court proceedings and there appears to be no reason why we cannot include legal matters in this affidavit. I have been

advised that it is helpful to include such legal matters, as it will assist in informing all parties of the details and legal context for the Complaints, in addition to the facts, in advance of the hearing. There is certainly no prejudice to anyone in doing so. Accordingly I cannot understand why SAPO would criticise us for our efforts in this regard.

18. Within in the legal context established by the Complainants Mr Motsinoni has failed in his obligation on behalf of SAPO to answer to the Complainants and to ICASA the fact that SAPO's poor service delivery and related issues is well known and has been an ongoing problem from at least 2007.

19. This problem has not improved as evidenced from the following:

19.1 In September 2014, it was reported that SAPO had allegedly wasted R2.1 Billion in irregular expenditure during the previous financial year. I attach a copy of this report marked "**RA3**".

19.2 In October 2014, the chief executive, Chris Hlekane was placed on suspended leave following allegations of mismanaging funds. In November 2014, the entire board of SAPO resigned. Earlier that year, in February 2014, President Zuma announced that the Special Investigation Unit ("SIU") would be investigating allegations of fraud and corruption within SAPO. In June 2015, it was announced that SIU have finalised their investigations into SAPO but details will not be made public until after the findings have been submitted to President Zuma. I attach a copy of various media reports marked "**RA4**".

- 19.3 The SA Post Office Administration Team, which was appointed in November 2014, prepared a plan to make SAPO a profitable and functioning company. According to a press release by SAPO, this plan is called the SA Post Office Corporate Strategic Plan 2015/2016 – 2017-2018 and will transform SAPO into a “*customer-centric company that is competitive and engages commercially-viable business activities*” (Strategic Plan”). The Strategic Plan allegedly contains an extensive diagnosis of the challenges faced by SAPO and proposes various solutions aimed at taking the company from an alleged loss of R1.1 Billion in 2014/2015 to a profit of R1.3 Billion by 2017. I attach a copy of the SAPO press release marked “**RA5**”. I also attach a media report on the Strategic Plan marked “**RA6**”.
- 19.4 The Strategic Plan has been approved by the Cabinet according to a report on 11 June 2015. I attach a copy of the report marked “**RA7**”. However, the Strategic Plan has not yet been made available to the public.
- 19.5 In March 2015, a media report states that the backlog at the Johannesburg Mail Hub is still severe as is apparent from the photographs included in that report. According to the report there have been almost 2000 complaints lodged against SAPO in the last year on [www.hellopeter.com](http://www.hellopeter.com), an online consumer complaints forum. I attach a copy of this report marked “**RA8**”.
- 19.6 A further report states that SAPO has a preliminary net loss of R1.1 Billion for the financial year ending in March 2015. I have attached a copy of this report marked “**RA6**” as referenced above.

- 19.7 In April 2015, SAPO allegedly increased its basic postal service rates by 30 to 70 cents and cancelled the “econoparcel” option resulting in an increase from R22.80 to R40.90 for mail of that size. I attach a copy of this report marked “**RA9**”.
- 19.8 It has been reported that small business are suffering as a result of the inept and inefficient postal service as run by SAPO. I attach a copy of various media reports marked “**RA10**”.
- 19.9 SAPO’s financial difficulties have been reported on numerous occasions. According to one report, in April 2015, SAA suspended its contract with SAPO as a result of SAPO’s failure to make payment in terms of the contract. Apparently, this is not the only supplier that SAPO has been unable to pay according to this and other reports. I attach a copy of this report marked “**RA11**”.
- 19.10 According to another report, SAPO failed to honour a settlement agreement with a private party, a creditor of SAPO, in which it undertook to pay R50 Million. As a result of this default, the creditor attached SAPO’s bank accounts. In April 2015, SAPO attempted to release these bank accounts but SAPO’s court application was rejected. Counsel for SAPO admitted that SAPO was unable to pay the debt. I attach a copy of this report marked “**RA12**”.
20. It is also relevant to note SAPO’s performance as compared to other countries. In 2011, an extensive study on the comparison of the efficiency and performance of global postal services was conducted by UK based consulting firm, Oxford Strategic Consulting. The study focused on the Group of Twenty major economies of the world

("G20"). I attach a copy of a table from the study which indicates the performance of the G20's postal service providers, marked as "RA13".

21. SAPO is ranked 17 out of 19 countries and is ranked behind countries such as Argentina, Mexico, Indonesia and India. The study claims that some emerging markets' postal service providers are showing a fast rate of improvement, particularly Brazil and Russia Post. Whereas other countries have shown a declines in delivery efficiency, including the Japan Post, Italian Post and SAPO.
22. Each of the procedural and technical objections raised by Mr Motsinoni on behalf of SAPO will now be dealt with in turn.

#### **AD PARAGRAPHS 9 TO 12 OF THE ANSWERING AFFIDAVIT**

#### **PRESCRIPTION AND LACK OF JURISDICTION**

23. SAPO raised a prescription point because the Complainants allege that SAPO has failed to comply with its statutory obligations since 2007 and more specifically that there has been alleged "*late deliveries for up to several months.*"
24. SAPO relies on section 17C of the ICASA Act, which provides that a complaint must be lodged within 60 days of the complainant becoming aware of the alleged non-compliance.
25. What SAPO is attempting to do here is limit its liability or exposure to only those alleged acts of non-compliance that have occurred within the 60 days prior to lodging the Complaints i.e. from 11 October 2014.

26. SAPO clearly misconstrues the nature of the Complaints by attempting to narrow the Complaints to specific instances of non-compliance. The Complaints address the endemic and chronic failure by SAPO to comply with the applicable legislation, regulations, codes of practices and conditions of its license. The problem is systemic and as such cannot be resolved in a piece-meal fashion. The problem is on-going, continuous and has been an issue since 2007.
27. Furthermore, the term “complaint” is not defined in the ICASA Act and should be given a broad interpretation in order for ICASA to be able to properly perform its regulatory functions.
28. This raises the question of when a complaint is ripe to lodge at ICASA? Should a complainant lodge a separate complaint for each and every instance of continuous non-compliance as and when they occur? Even when such non-compliance is duplicated over and over again? Would it not be prudent to gather all instances of non-compliance and lodge one complaint that takes all these instances into account as the Complainants have done in this instance?
29. SAPO appears to imply that ICASA and the CCC only have the power to investigate any alleged non-compliance within a 60 day window period looking back from the day on which a complaint is lodged. SAPO is alleging that ICASA has no jurisdiction to consider allegations of non-compliance outside of this window period. This is an absurd and unduly restrictive interpretation of section 17C. This section provides the procedure by which a person may lodge a complaint. It does not limit the investigatory powers of ICASA or the CCC. Once a complainant’s “foot is in the door” it may be argued that ICASA has the power to investigate all instances of non-compliance related to the complaint irrespective of when they occurred.

30. If SAPO's interpretation were correct, then ICASA's oversight role would be reduced to holding licensees to account only for once-off instances of non-compliance within a 60 day period. ICASA would be unable to truly examine the nature and gravity of the non-compliance as required by section 17E of the ICASA Act.
31. The CCC will necessarily need to examine a period longer than 60 days in order to establish the systemic and chronic nature of SAPO's non-compliance and make an appropriate recommendation to ICASA.
32. SAPO is impermissibly attempting to narrow the nature of the Complaints in an attempt to escape having to answer for its systemic non-compliance. The CCC must not be swayed from properly performing its duties.
33. Further, the rule relied upon by SAPO is a procedural rule and as such non-compliance can be condoned, just as the rules regulating when SAPO should have delivered its answering affidavit are procedural and have been adapted to provide for SAPO's delays. To the extent required or necessary the Complaints respectfully request condonation for the hearing of the Complaints that fall outside the 60 day period. In this regard I have been advised to refer to the case of ***Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2010 (1) SA 333 (SCA)*** in which a review application was brought approximately 50 years after the administrative decision was made, instead of within 180 days as required by PAJA, and yet the applicants were not turned away.
34. It is further my submission that the legislature never contemplated prescription being an obstacle to such Complaints. Prescription has a defined meaning and application in terms of the Prescription Act 68 of 1969 ("Prescription Act"). A "debt" prescribes in terms of the Prescription Act after it becomes "due". I have been advised that the

concept of a “debt” for the purposes of prescription is summarised in **The Law of South Africa** (First Issue) Volume 21 at paragraph 142 as follows: **“142 The commencement of extinctive prescription** *Extinctive prescription commences to run as soon as the debt is due. In the absence of a definition of the term ‘debt’, the courts have held that it must be given a wide and general meaning. So, for the purposes of section 12(1) of the Prescription Act of 1969, the word ‘debt’ includes any liability arising from and being due (debitum) or owing under a contract, but obviously includes delictual debts. Consequently, in its broadest sense, the idea of a ‘debt’ in relation to the Act refers to an obligation to do something, whether by payment or by the delivery of goods and services, or not to do something. The concept of a debt therefore has a proprietary character. There is a vital difference between the coming into existence of a debt and the recoverability thereof. There can be little doubt that the purpose of the legislature in enacting section 12(1) was to crystallize that difference. Prescription begins to run, not necessarily when the debt arises, but only when it becomes due. In *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty)Ltd* the court held that, for prescription to commence running, there has to be a debt immediately claimable by the creditor; in other words there has to be debt in respect of which the debtor is under an obligation to perform immediately”* (my emphasis).

35. The Complainants’ relief in this matter is not contractual or delictual and does not fall within the definition of a “debt” or within the scope of the Prescription Act. Even it is found by a Court to constitute a “debt” the obligations of SAPO are “due” to the public continuously (for as long as it has its license) and so it would be impossible to determine when prescription would commence to run from and to when. Accordingly it is my submission that a defence of prescription finds no application in this matter.

**IMPOSSIBILITY OF PERFORMANCE**

36. The Complainants pre-empted SAPO's defence of impossibility as per paragraph 80 to 82 of their Complaints.
37. SAPO in turn has completely failed to deal with the Complainants' position, which I will summarise for convenience here.
38. The defence of impossibility of performance is not applicable in a complaint of this nature and in this forum. The duties imposed upon SAPO are statutory in nature and in this forum SAPO must account for its non-compliance and not attempt to hide behind impossibility (which in any event is denied).
39. SAPO not only failed to meet its obligations during the period of months of the strike from August 2014 to November 2014. As is detailed above, SAPO has been guilty of non-delivery, poor service and mismanagement for years and this continues to date. If SAPO cannot meet its statutory obligations and if it cannot comply with its license conditions then it should be brought to book and it should lose its exclusivity.
40. Further any reasonable person in the position of SAPO would have foreseen that the prolonged labour unrest would reasonably possibly cause harm to the public that have to use its services as a result of its exclusivity and would have taken reasonable steps to avert such harm, but SAPO failed to take any such steps. A reasonable person would have foreseen the prejudice to the public, and yet SAPO did nothing to assist the public, including the Complainants.
41. I have been advised that the Postal Services Act 124 of 1998 has been examined in two cases: in ***SA Post Office Ltd v Interlink Postal Courier SA (Pty) Ltd 2002 (1)***

**SA 221 (C)** and in the appeal case of ***Interlink Postal Courier SA (Pty) Ltd v South African Post Office Ltd 2003 (5) SA 111 (SCA)***. The factual issue in play was whether the courier company was unlawfully encroaching upon the “*reserved postal service*” of SAPO. The Court *a quo* granted SAPO an interdict restraining the courier company from providing certain services and its decision was confirmed in the Supreme Court of Appeal. The Court *a quo* stated at paragraph 232G - 234C that:

“[the Legislature] *intend to preserve a statutory monopoly for [SAPO]*.”

*....the obvious intention of the Act, namely to preserve the statutory monopoly of the applicant” (my emphasis).*

42. The point is that SAPO holds a monopoly in respect of various postal services to the exclusion of all others. This may not be anti-competitive in the legal sense but factually it limits or rather prevents any competition by other service providers to provide these same services to the public, such as courier companies. In the interest of justice, fairness and with due regard to the intention and purpose of the applicable legislation, it cannot be denied that with such powers and entitlement granted exclusively to SAPO, comes great responsibility to the public and SAPO should not be permitted to hide behind “*impossibility of performance*” of its obligations and duties for years from 2007 to date, or at all.

**AD PARAGRAPHS 15 TO 17 OF THE ANSWERING AFFIDAVIT**

**VAGUE AND EMBARRASSING ALLEGATIONS**

43. By alleging that the Complaints are vague and embarrassing, SAPO is attempting to use the concept of excipiability, a remedy only available to defendants in Court action proceedings.
44. The concept of excipiability arises out of the rules of Court, which govern the litigation procedure in our Courts. Although, what ICASA and the CCC are legislated to conduct may be *quasi*-litigious in nature, it would be wholly inappropriate to treat these type of complaints in the same manner as pleadings in Court actions for the following reasons.
- 44.1. the applicable legislation and regulations do not provide or allow for a defence of excipiability in such proceedings;
- 44.2. ICASA has been established to, amongst other things, regulate postal matters in the public interest as per section 2 of the ICASA Act. In order to perform this function, ICASA has been given certain powers as per section 4 of the ICASA Act, which includes the power and the duty to investigate and adjudicate upon complaints submitted in terms of this Act, the underlying statutes, and licence conditions;
- 44.3. SAPO is taking an unduly adversarial approach in its answering affidavit. This approach is not in line with the inquisitorial nature of the complaints' procedure, which is part of the investigatory and advisory role played by the CCC and the regulatory role played by ICASA; and
- 44.4. in any event the Complaints are clear and detailed and there can be no confusion as alleged. In addition we have provided further information and details as requested in this affidavit and all the parties will be given an

opportunity to make representations and fully ventilate the matter at the hearing of the Complaints. The allegations of excipiability are nothing more than a red herring in these proceedings.

45. The complaints' procedure for this matter has been examined and summarised as per paragraphs 51 to 64 of the Complaints attached hereto marked "RA2".
46. The Constitutional Court pronounced on the nature of the complaints' procedure in the matter of the ***Islamic Unity Convention v Minister of Telecommunications and Others 2008 (3) SA 383 (CC)***. The Court was gripped with determining the constitutionality of the powers of the predecessor to the CCC. In this regard, the Court stated at a paragraph 47:

*"To 'investigate' or 'inquire into' a complaint means more than simply to sit back and decide on the complaint on an adversarial basis in the same way as a criminal court. The term 'investigate' means to 'search or inquire into' or 'examine', while 'inquire' means to 'seek knowledge of (a thing) by putting a question' or to 'request to be told' "(my emphasis).*

47. The Court elaborated further on the role played by the predecessor to the CCC and stated that:

*"I agree with counsel for the respondents that the inquisitorial role is an inherent aspect of regulatory authority, which in this case the BMCC represented. Licensees in the broadcasting industry are part of a regulatory realm, which requires that they abide by their concomitant responsibilities. They accept as a condition of their licences 'that they will adhere to the same reasonable controls as are applicable to their competitors'. **The BMCC***

***fulfilled its objects of conducting investigations into complaints by engaging in a fact-finding exercise so as to be able to make a finding, which it then forwarded to ICASA. What was required was for the scheme, created in terms of the impugned provisions of the IBA Act and the Complaints Procedures, to ensure fairness.***” (my emphasis)

48. The ICASA Act read with the CCC Regulations provide that once a complaint has been duly lodged it will be investigated by ICASA and the CCC. Part of the investigation process is to gather all substantiating evidence. Neither ICASA nor the CCC has requested any further information from the Complainants. The information requested in SAPO’s answering affidavit has been included in this affidavit and its annexures.
49. The complaint’s procedure is tiered and requires engagement from all parties at a number of occasions. In summary, I understand the process to be as follows: ICASA will receive a complaint, notify the respondent, request a response, request further information if necessary and refer the matter to the CCC for hearing. Similarly, the CCC has the power to investigate a complaint, summon witnesses to appear, request the submission of relevant documentation, hold a pre-hearing conference and adjudicate the matter. At the hearing of the matter the CCC may question any person before it. After the hearing, the CCC must submit the record, its finding and recommendations to ICASA. ICASA must then decide on the order to be made.
50. When viewed holistically, it is readily apparent that the purpose of the tiered complaints’ procedure is to properly ventilate and deal with allegations of non-compliance. Parties to this procedure should be as transparent and forthcoming as possible in order for the CCC and ICASA to perform its functions. SAPO has failed in this regard.

51. It is also relevant to point out that SAPO is well aware of its delivery and performance statistics and its management and financial issues from 2007 to date. It has been the subject of many enquiries and administration. Much of this information has been withheld from the public. The Complainants only have access to the information they have received from their customers, media reports and their personal experiences. SAPO has in its possession all the information required to evaluate whether the Complaints have any merit or not. SAPO should have produced this information and answered the merits of the Complaints instead of attempting to hide behind technicalities.

**AD PARAGRAPHS 18 TO 19 OF THE ANSWERING AFFIDAVIT**

**NO FACTUAL MATERIAL TO SUPPORT**

52. SAPO alleges that the Complainants have made various wide-ranging allegations of non-compliance without averring the material facts on which these allegations are based. Here, SAPO is once again attempting to narrow the complaint to specific instances of non-compliance presumably in order to deal with each in a piecemeal fashion. In this regard, SAPO has once again failed to appreciate the systemic and chronic nature of the Complaints.
53. The Complaints have been recorded in detail in the lengthy complaint document lodged in December 2014 and attached hereto.
54. As no dispute was in play at the time of lodging the Complaints, the Complaints were not lodged in the form of an affidavit or evidence.

55. Now that a dispute has arisen and documents requested, the Complainants have provided these below and the matter will be ventilated at the hearing wherein each party has the right to make the representations required for this matter to be decided.

#### **FURTHER FACTS AND EVIDENCE**

56. The Complainants have made the following complaints against SAPO and its operations nationally and the Complainants further provide the documentation as listed below in support thereof.

57. There have been regular work stoppages at Witspos and other SAPO mail distribution centres in Pretoria, Cape Town, Port Elizabeth and Bloemfontein having significant impacts on the Complainants.

57.1. In this regard, I have attached two letters and email correspondence from SAPO. The first letter is undated and unsigned but provides details regarding "*unprotected industrial action*". A copy is attached marked "**RA14**".

57.2. The email correspondence is from Ashraf Miller, a key accounts executive in SAPO, dating between 3 November 2014 and 25 November 2014 and has been attached marked "**RA15**". This correspondence shows the extent of the strike action and in particular shows that Gauteng was the region most badly affected by the strike. Further, it shows that on 25 November 2014, SAPO announced that the strike had ended.

- 57.3. The second letter is dated 21 January 2015 from Isaac Rapsiwa, an accounts manager in SAPO, attached marked "**RA16**". This letter states as follows: "[SAPO] *is back in full operations following the end of four month long strike it experienced in 2014*". It further states that "*More business-centric methods are underway...*" without providing any details of such methods.
- 57.4. The Complainants call upon SAPO to divulge these plans, openly and honestly before the CCC.
58. There have been late deliveries of up to several months, and in some cases complete non-delivery of the Complainants' post and of the Complainants' monthly statements.
- 58.1. In this regard, I attach various emails and letters from clients' of the Complainants stating that they have not received their subscriptions, marked "**RA17**".
- 58.2. The issue of late/non-delivery is very serious for the following reasons. Publishers, such as the Complainants, produce magazines that contain news articles. These should be considered to be perishables as old news is no news at all. When post is delivered late it results in loss of readership and a consequent loss of sale of advertisements. Further, there is an issue with regard to proof of non-delivery as the Complainants are only informed of this by their own customers who take the initiative to complain.
59. Clients of the Complainants have cancelled or failed to renew their subscription and there has been an associated loss of subscription revenue due to repeated late

delivery of up to several months and in some cases complete non-delivery, of the Complainants' post and publications.

59.1. In this regard, I attach various emails from clients' of the Complainants stating that they wish to cancel their subscriptions or not renew their subscriptions as marked "**RA18**".

59.2. The First Complainant's subscription revenue alone has dropped 18% over the last year, from R 355 000 to R 292 000.

60. There have been late payments and in some cases complete non-payment, of the Complainants' advertising invoices, subscription invoices, general invoices and statements due to non-delivery by SAPO.

61. Extra time, effort and costs have been incurred by the Complainants by having to email invoices and statements to its customers where such customers have accepted this form of delivery.

61.1. In this regard, I attached statements from Crown Publications CC indicating the types of extra costs that have been incurred, as marked "**RA19**".

62. Complainants have incurred further costs associated with having to hand deliver invoices with tearsheets, and publications to physical addresses to advertisers and other customers, as proof of publishing due to non-delivery of SAPO.

62.1. In this regard, I attached a quote from MBC Consulting (Pty) Ltd indicating the types of extra costs that have been incurred, as marked "**RA20**".

- 62.2. I have attached a costs breakdown from the Third Complainant who have incurred costs of the sum total of R193 000.00 to date, as marked "**RA21**".
63. Further substantial costs have been incurred by the Complainants who have been forced to make alternative distribution arrangements for the post and publications to be sent to subscribers and readers.
- 63.1. In this regard, I attached two invoices from Mailwise Holdings (Pty) Ltd indicating the types of extra costs that have been incurred, as marked "**RA22**" and an email from Crown Publications (Pty) Ltd detailing the clients who have not received certain titles and making an alternative distribution plan, as marked "**RA23**".
- 63.2. Further, I have also attached a breakdown of costs incurred by the First Complainant in the sum total of R221 276.46 for the period November 2014 until March 2015 marked "**RA24**".
64. There has been a loss of readership (and therefore advertising revenue) due to having to make alternative distribution arrangements for posts and publications to be sent to subscribers and readers particularly outside of the major metropolitan areas of South Africa.
65. Extra time, effort and cost have been incurred by the Complainants in having to obtain the correct physical addresses of thousands of readers and advertisers in the major metropolitan areas of South Africa in order to make alternative distribution arrangements where possible.

- 65.1. In this regard, I have attached two employment agreements dated October 2014 and April 2015 indicating that Creamer Media (Pty) Ltd took on staff in order to, amongst other things, monitor and maintain a subscriber database, as marked **"RA25"**.
- 65.2. Further, I attach a breakdown of costs incurred in the sum of R 30 538.68 by the First Complainant who took on a researcher to attend to these tasks during April and May 2015, as marked **"RA24"** referred to above.
66. SAPO has failed to reply to numerous attempts to discuss the situation as requested in numerous emails and telephone calls including to the Minister and his predecessors.
- 66.1. In this regard, I have attached email correspondence from the Third Complainant to SAPO during the period June 2012 to March 2013, as marked **"RA26"**.
67. Complainants have faced serious difficulties in selling advertisements as the Complainants can no longer guarantee that their publications will reach the promised circulation. Similarly, Complainants have had difficulties in obtaining future advertising contracts for all the reasons outlined above.
- 67.1. In this regard, I have attached various emails dated between January and February 2015 indicating that clients' of the Complainants are reluctant to purchase advertising marked **"RA27"**.
68. To add insult to injury, the Complainants are being billed by SAPO for the delivery of items that the Complainants know were not delivered. The Complainants have no

way of accurately assessing the extent of the non-delivery other than through feedback from their customers as detailed above. However, SAPO is in possession of this information and despite knowing that certain items have not been delivered SAPO callously charges the Complainants nonetheless.

69. The Complainants have received many, many complaints from customers verbally, face to face or telephonically, arising out of SAPO's non-delivery or delayed delivery. I can state this to be true under oath in this affidavit (as I do) but it is of course no possible to attach this evidence to an affidavit. Accordingly in addition to all of the above, representatives of the Complainants will be available at the hearing of this matter to testify to the surrounding details and circumstances of all the Complaints listed herein, should this be required of them.

#### **RELIEF SOUGHT**

70. The Complainants deny that SAPO has the right to supplement its answering affidavit or file any further affidavits. However, should the CCC allow SAPO the right to supplement, the Complainants reserve their right to reply thereto.
71. The Complainants stand by the relief sought in their Complaint as per paragraphs 83 to 90 thereof and call upon the CCC to make an appropriate recommendation in the circumstances.

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**ANTON MARSH**

