

# ADVICE NOTE

**To:** Management Committee, The South African National Editors Forum

**From:** Sibusiso Mngadi and Prof Guy Berger

**Date:** July 15, 2024

**Subject:** *Sunday World/GroundUp* Dispute

## A. Source documents

The advice note utilises data sourced from the following documents shared by the Management Committee (“Mancom”) of the South African National Editors Forum:

1. Constitution of the South African Editors Forum (August 22, 2020).
2. Report: “Media Ethics and Credibility Inquiry” (SANEF, January 2021).
3. “Exposed: *Sunday World*’s lucrative partnership with the Lottery” (*GroundUp* and *Daily Maverick*, August 3, 2023)
4. “Editors do not get involved in commercial matters: Arena responds to call for probe” (News24, August 5, 2023).
5. Letter: Request for inquiry into allegations against *Sunday World* (Anton Harber, November 23, 2023).
6. E-mail: Ray Joseph’s communications with SANEF chair Sbu Ngalwa (September 27 and October 4, 2023).
7. “Ray Joseph and *GroundUp*’s unethical pursuits and the journalism of suppositions” (*TimesLive*, February 6, 2024).
8. “*Sunday World* and Lottery corruption: time for an inquiry” (*GroundUp*, February 7, 2024).
9. E-mail: Complaint by Makhudu Sefara against Nathan Geffen et al, Press Council of South Africa (PCSA) (May 14, 2024).
10. E-mail: Fanie Groenewald, Public Advocate, Press Council of South Africa, Makhudu Sefara vs Nathan Geffen and *GroundUp* (May 22, 2024)

## B. SANEF mandate

According to its constitution, SANEF is a professional association, and membership is voluntary, with members joining the Forum in their individual capacities.

The Forum’s operational scope is summarised as follows:

1. **Membership:**
  - SANEF operates on a voluntary basis, with individual professionals joining the Forum.
  - Members include editors, senior journalists, academics, and media workers.
2. **Core functions:**
  - SANEF focuses on three essential functions:
    - **Networking:** Facilitating connections and collaboration within the media industry.
    - **Professional development:** Supporting growth, skills enhancement, and knowledge sharing among members.
    - **Advocacy:** Promoting and defending the interests of journalists and media professionals.

**3. Industry support:**

- SANEF encourages compliance with relevant media industry legislation and regulations. However, it is not an industry association, self-regulatory body or regulator itself.

**4. Stewardship of ethics:**

- SANEF takes a stand for the highest ethical standards in news production and distribution.
- Upholding integrity and credibility is a central tenet of its mission.

**5. Operational boundaries:**

- SANEF acknowledges the legal autonomy of its members' employers and/or businesses.
- SANEF generally refrains from engaging in day-to-day news operations and employer-employee relations.
- SANEF has an obligation to ensure that its members adhere to the provisions of its constitution.

## **C. Disciplinary procedures**

Clause 6.4 of the SANEF constitution states:

*A termination of membership in any category of membership shall be a decision at the discretion of the SANEF Council based on misconduct that:*

*6.4.1 Constitutes a violation of one of the Codes referred to in clause 6.1<sup>1</sup>*

*6.4.2 Brings the Forum or the practice of journalism into disrepute*

The constitution does not elaborate on disciplinary procedures preceding membership termination. Consequently, to give expression to Clause 6.4, there is value for the SANEF Council to consider enhancing the Forum's preferred disciplinary procedures.

Considering the *Sunday World/GroundUp* dispute's context, it is crucial for the SANEF Council to navigate this challenge with sensitivity and adherence to its constitution. Balancing accountability and fairness is essential, especially when addressing alleged violations of the Codes and potential reputational damage.

As the SANEF Council deliberates, transparency and due process should guide its decisions. Upholding the spirit of constitutional democracy ensures that fundamental rights are respected while maintaining the organisation's credibility. In constitutional democracies, retrospective application of policies and rules is generally viewed with caution and subject to stringent scrutiny to ensure it does not violate constitutional principles and/or fundamental rights. If the SANEF Council adopts the proposed disciplinary procedures, complaints would need to be submitted in line with the new processes.

## **D. The *Sunday World/GroundUp* dispute and subsequent events**

**1. Genesis of dispute:**

- The dispute centres on a news article authored by Ray Joseph and Anton van Zyl which was published in *GroundUp* on August 3, 2023: "Exposed: The *Sunday World's* lucrative partnership with the Lottery." *Daily Maverick* republished the article on the same day.
- The content of the article sparked heated discussions within SANEF and in the media.

**2. Ongoing developments:**

- Subsequently, there have been further events regarding the National Lotteries Commission (NLC), *Sunday World*, *GroundUp* and *TimesLive*.
- Despite these developments, the matter remains inconclusive and potentially divisive with SANEF.

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<sup>1</sup> These are: "the Codes of Conduct developed by the Press Council of South Africa and the Interactive Advertising Bureau of South Africa, and the Broadcasting Complaints Commission of South Africa and Independent Communications Authority of South Africa."

### 3. **SANEF panel:**

- In June 2024, SANEF Mancom appointed a three-member panel to review the matter and advise on the need for an inquiry into *Sunday World*, *GroundUp* and affected individuals and institutions.
- The proposed panel comprised SANEF founder members Sibusiso Mngadi (founding secretary general and treasurer) and Professor Guy Berger (former deputy chair), as well as former chair Ferial Haffajee. Haffajee declined participation citing her professional relationship with *Daily Maverick*, which republished the *GroundUp* article which had been the subject of contentious debate.

### 4. **Formal complaints:**

- As of July 15, 2024, the records availed to the panel showed no formal complaints having been received from Makhudu Sefara, Ray Joseph, Nathan Geffen, or their current and/or former employers.
- However, on November 23, 2023, Prof Anton Harber had requested an inquiry into the allegations against *Sunday World*.

The chronology of events to date is as follows:

#### **Ray Joseph's enquiry**

On September 27, 2023, Ray Joseph emailed the SANEF chair, Sbu Ngalwa, the following five (5) questions for the book he (Joseph) was writing on the NLC scandal:

- Is SANEF concerned by the allegations against MANCOM member Makhudu Sefara, especially in light of the Satchwell inquiry?
- In response to questions about *Sunday World* that I sent to Sefara before publication, I received an insulting response that did not deal with the substance of the questions. See <https://bit.ly/456ANZh> for my questions and his response). Does SANEF believe that this kind of response from an editor and a member of SANEF's executive is acceptable?
- Is SANEF concerned by the allegations against *Sunday World*, especially in light of the Satchwell inquiry?
- Has SANEF discussed and/or investigated the allegations made in *GroundUp's* story? (The story was never disputed by *Sunday World* despite them threatening to take legal action prior to publication. They never followed through on their threat once it was published).
- If so, what was the outcome?

#### **Sbu Ngalwa's response:**

On October 4, 2023, Ngalwa responded to Joseph:

"As SANEF we are obviously concerned about any allegations of impropriety or unethical conduct against any journalist or editor. This case is no different. That said, two council members - on separate occasions - also informally raised the issue with me. I indicated that they should bring it up at the upcoming SANEF Council meeting - scheduled for November 2023. I feel that the Council is best placed to discuss the matter as the representative body of SANEF membership.

"But more importantly, SANEF believes that no member is above scrutiny. As the Satchwell inquiry proved, we are not averse to self-scrutiny or having difficult conversations. Makhudu may be a SANEF member, but he is still an individual with his own agency. How he responded to your questions is in no way a reflection of SANEF, as an organisation. He was not speaking on behalf of SANEF but in his personal capacity.

"Obviously, we would appreciate a situation whereas colleagues we can disagree respectfully and in a cordial manner. As someone familiar with our systems and how we work, I would also encourage you to attend the council meeting and bring up the issue, if you so wish.

"I have also spoken to Makhudu about the allegations and suggested that he deal with the matter at Council. That way we can also have his side of the story. He has agreed to do that. So, I would not want to pre-judge the process but to give the Council the opportunity to deal with it."

#### **Ray Joseph's clarification and purpose:**

On October 4, in another email to Ngalwa, Joseph wrote:

"As I explained, the reason I sent the query is that I will be addressing the *Sunday World/Sefara* issue in a chapter about media capture and the behaviour of some media. So, to be clear, I was not lodging a complaint with SANEF when I sent my questions. I was seeking comment in light of the well-publicised findings of the Satchwell enquiry. SANEF has now responded to my questions, for which I thank you."

**Anton Harber’s request for inquiry:**

On November 23, 2023, Harber wrote to Ngalwa to request “an inquiry into allegations against *Sunday World*.” “In light of the findings and recommendations of the SANEF inquiry into media ethics, it is imperative that SANEF hold an inquiry into these allegations. Do they have merit? If they do, then who are the individuals responsible? What remedial actions, if any, should be taken? If SANEF turns a blind eye to these serious allegations, it will be accused of not taking seriously media ethics, ignoring the recommendations of its own inquiry and sheltering the corrupt.

“This inquiry needs to be chaired by people external to SANEF. The reason for this is that one of the people implicated in the article is a former editor of *Sunday World* and current MANCOM member of SANEF, Makhudu Sefara. It is unlikely that SANEF, with the close friendships inside the organisation, would be able to conduct an internal inquiry with sufficient credibility. It would also be prudent for Mr Sefara to recuse himself from any discussion about this inquiry.”

**Makhudu Sefara’s complaint to the PCSA:**

On May 14, 2024, Makhudu Sefara lodged a complaint with the Press Council of South Africa against Nathan Geffen and *GroundUp*:

“The first part is a condonation application and the special circumstances that relates to matters explained below.

“The second part is in relation to the import of words used and omitted in their published work/story (offending article) and the harm this has caused – but was also intended to cause. The third part relates to a discussion at the SANEF Council meeting of February 2024 at which it was decided that a complaint should be referred to the Press Council (of South Africa) to look into possible editorial breaches relating to *Sunday World*’s relationship with the National Lotteries Commission (NLC).”

**PCSA decision:**

On May 22, 2024, PCSA public advocate Fanie Groenewald declined to accept Makhudu Sefara’s complaint because it was not lodged within the PCSA’s prescribed twenty working days after the date of publication that gave rise to the complaint:

“The suggested investigation” into the NLC advertising in *Sunday World* and related ethical issues fall outside the jurisdiction of the Press Council. To make it very clear, the Press Council has declined emphatically to be involved in any such investigation.

“Secondly, regarding your complaint about the *GroundUp* article of 3 August 2023: Your complaint was lodged on 14 May 2024, 183 working days after the publication of the article, thus 163 working days late. (I have given you the benefit of the doubt and have not included the days after 15 December 2023 when the Press Council was closed). In your brief motivation for condonation of the lateness you refer to the SANEF council meeting of 10 February 2024, where it was “decided that this matter be brought to the Press Council’s attention”. Even if I were to accept this as a good and satisfactory explanation for the delay (which I am not), you still took another sixty-one working days to lodge the complaint.

“To condone such a lateness would be completely unprecedented. I am thus declining to accept your complaint due to its lateness.”

## E. Jurisdictional scope

**1. SANEF mandate:**

- SANEF’s primary mandate is to uphold the institution of free and independent media and advocate for its interests.
- The Forum does not have a role in day-to-day news operations or enquiries into individual editors’ editorial decisions.

**2. Editorial independence:**

- SANEF’s existence is rooted in defending editorial independence.
- Editorial independence is a precondition for professional journalism and ensures that journalists can objectively report on issues that matter to the public.
- It is crucial for maintaining credibility, transparency and trust with the audience, ensuring that journalists can report objectively without external interference.

### 3. **Unintended precedent:**

- Investigating an editor's editorial decision could set an unintended precedent.
- It could lead to a flood of enquiries/investigations whenever news consumers disagree with editorial decisions.

### 4. **Learnings from the Sunday World/GroundUp dispute:**

A key learning from the *Sunday World/GroundUp* saga is that having a clearly defined process is crucial for ensuring fairness and transparency when addressing serious breaches. The dispute highlights the importance of having robust procedures in place for SANEF to uphold its standards and maintain ethics and the integrity of journalism and its members.

- **Clear definitions:** Clearly define what constitutes a serious violation of the codes and what actions bring journalism and/or SANEF into disrepute.
- **Structured process:** Establish a structured process for handling complaints, including:
  - **Initial review:** An independent Review Committee to assess the validity of complaints.
  - **Investigative panel:** A panel to conduct thorough investigations if the complaint warrants further attention.
- **Decision-making:** Ensure decisions on membership termination or other disciplinary actions are made by a two-thirds majority of the Council, as proposed in the amendment.
- **Transparency and accountability:** Maintain transparency in the process and ensure all parties are given a fair opportunity to present their case.
- **Documentation:** Keep detailed records of all proceedings, decisions, and the rationale behind them.
- **Communication:** Clearly communicate the outcomes and any actions taken to all relevant parties.

## F. Way forward for SANEF to elaborate potential disciplinary procedures

The panel presents two proposals below that would entail (i) adopting an amendment to the SANEF constitution, and (ii) adopting rules of procedure for a disciplinary procedure. The first, if accepted, would entail a change to the constitution to ensure a voting threshold for a measure as serious as termination of membership. As per SANEF rules (see footnote<sup>2</sup>), constitutional changes require a two-thirds majority at a general meeting and three weeks' notice.

### (i) Proposed amendment to the SANEF constitution

#### ***Current constitution:***

**6.4.** A termination of membership in any category of membership shall be a decision at the discretion of the Council based on misconduct that:

**6.4.1** constitutes a serious violation of one of the codes referred to in Clause 6.1 and/or

**6.4.2** brings the Forum or the practice of journalism into disrepute.

#### ***Proposed amendment:***

**6.4.** A termination of membership in any category of membership shall be a decision at the discretion of two-thirds of the membership of the Council, based on misconduct that:

**6.4.1** constitutes a serious violation of one of the codes referred to in Clause 6.1 and/or

**6.4.2** brings the Forum or the practice of journalism into disrepute.

**6.4.3** The Council may decide, in lieu of termination of membership, to issue a reprimand, a reminder, or a warning to the member(s) concerned, to suspend membership or certain privileges of membership for a defined period, and/or to issue a public statement concerning the matter.

### (ii) Draft SANEF complaint handling procedure

1. **Scope:** This process does not cover cases where members seek SANEF action on systemic issues such as industry ethics, nor does it apply to purely editorial and journalistic judgments of editors.
2. **Applicability:** This procedure concerns complaints about current SANEF members made by other current SANEF members, where actions are deemed to have violated the Forum's constitution.
3. **Preconditions:** Complaints will only be considered if direct, bilateral, and bona fide communications among the parties have not resolved the dispute.
4. **Submission:** Any member making a formal complaint must submit it in writing to the SANEF Mancom using a template that aligns with these provisions.
5. **Identity disclosure:** The complainant must disclose their identity to Mancom but may request anonymity. Mancom has the discretion to grant or deny this request. Regardless, the complaint itself must be transparent to SANEF Council members.
6. **Constitutional relevance:** All complaints must reference relevant clauses in the constitution.
7. **Detailed motivation:** The complaint must provide detailed motivation, substantiating the grievance and documenting efforts made to resolve the matter bilaterally.
8. **Redress sought:** The complaint should clearly outline the redress being sought from SANEF.

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### Section 10:

Any clause of the constitution may be amended by a resolution passed by a two thirds majority of voting members present in person at an annual general meeting or special general meeting provided that at least three weeks' notice of the meeting, specifying the proposed constitutional changes, is given to members. In addition, the Council shall be entitled to effect such amendments to the Constitution as may be required in order to enable the Constitution to comply with any laws, or to enable effect to be given by the Council to the intentions of this Constitution. In the event that an amendment is effected by the Council, such amendment shall be deemed to have been ratified as required in terms of this Constitution unless such amendment is opposed by a two thirds majority of voting members within ten days of notification to such members of the change in question.

**(iii) Preliminary Process: Review Committee**

1. **Appointment:** Upon receipt of a complaint, SANEF Mancom appoints an independent Review Committee consisting of at least two members, who are either founding members or former members that have not held SANEF office within the previous five years.
2. **Assessment:** The Review Committee assesses whether the complaint should be dismissed or warrants further attention, and if the latter, determines the appropriate level of further attention.
3. **Evaluation criteria:** In reaching its conclusions, the Review Committee evaluates the issue based on:
  - **Serious violation threshold:** Clear breach of member obligations and responsibilities as per the SANEF constitution, including the scale and frequency of the alleged violations, inferred intentions, and the likely impact on society and media.
  - **Reputation impact:** The extent to which the Forum or journalism practice has been brought into disrepute, including explicit implications of the Forum, scale and frequency of alleged violations, inferred intentions, and the impact on society and media.
  - **Programmatic priorities:** Alignment with SANEF's agreed priorities.
  - **Evidence feasibility:** The likelihood of finding sufficient evidence.
  - **Budgetary implications:** Potential costs of any investigation.
  - **Timetable:** An optimal timeline if further process is envisioned.
4. **Reporting:** The Review Committee presents a report on its assessment along with recommendations to SANEF's Mancom.
5. **Decision reporting:** Mancom's decisions on next steps must be included in its report to the next Council meeting.
6. **Council involvement:** Mancom may defer decision-making to a scheduled or extraordinary meeting of the Council.

**(iv) Investigative Panel**

1. **Decision on further process:** Depending on the decisions deemed appropriate by Mancom (or Council, as the case may be), the complaint may be dropped or referred for further process.
2. **Terms of reference:** In the event of further process, Mancom must draw up a set of terms of reference and budget for an Investigative Panel and identify respected individuals with known integrity and no conflicts of interest (from inside or outside SANEF membership) to constitute this panel.
3. **Convenor selection:** The Panel members will choose a convenor to liaise with Mancom.
4. **Investigation method:** The Panel will decide on the method of its investigation, considering budgetary and evidentiary factors, and whether it will solicit submissions, conduct interviews, and/or convene hearings.
5. **Confidential participation:** The Panel may decide to entertain confidential participation in its investigation. In such cases, the decision and the reasons must be recorded in the Panel's report. The Panel should regard any confidential testimony with caution.
6. **Response opportunity:** The Panel must afford the accused SANEF member or their appointed representative an opportunity to respond in writing to the complaint, and this response must be included in the Panel's report.
7. **Findings and recommendations:** The Panel must make a finding on the complaint and any mitigating or exacerbating circumstances, and recommend corresponding action (or not), in terms of the (amended – t.b.c.) SANEF constitution.
8. **Council consideration:** This recommendation by the Panel will be for the consideration of the Council, which will then take a final decision. [In terms of the proposed Amendment above, t.b.c), this decision will require a two-thirds majority if the recommendation is for termination of membership].
9. **No right of appeal:** There is no organisational right of appeal to the general membership in relation to the final decision of the Council.
10. **Legal authority:** SANEF does not have the legal authority to stand in the way of any member's private pursuit of litigation, although the Forum encourages members to use its internal processes and to accept the decisions of the Council.

*ABOUT THE PANEL: Prof Guy Berger, a former UNESCO senior director, is an expert in media and Internet policy issues. Sibiso Mngadi, a former vice president of The Coca-Cola Company, is a senior partner at leading global corporate advisory firm Groupe ADIT*