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**MEMORANDUM**

**[Confidential]**

**TO:** Hon E Kholwane, MP  
Chairperson: Portfolio Committee on Communications

**COPY:** Secretary to Parliament

**FROM:** Constitutional and Legal Services Office  
[Dr BE Loots – Parliamentary Legal Adviser]

**DATE:** 8 June 2013

**REF:** C4/2013

**SUBJECT:** CONSIDERATIONS FOR PROCESSING A COMMITTEE BILL  
(AMENDMENT OF THE BROADCASTING ACT 4 OF 1999)



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**INTRODUCTION**

1. The Portfolio Committee on Communications ('Communications') in the meeting held on 4 June 2013 discussed the appointment of a new interim board member for the South African Broadcasting Corporation ('SABC'), in terms of the Broadcasting Act, No. 4 of 1999 ('the Act').
2. During that meeting the issue was raised that Section 15A(3)(b)<sup>1</sup> does not allow sufficient time for the National Assembly ('NA') (through its relevant committee) to give due consideration to the appointment of permanent members of the SABC Board.
3. The appointment of permanent board members (outlined in section 13 of the Act) requires steps to be taken by both an appointing authority (the President) and recommending authority (the NA). The appointment process must facilitate public nominations, ensure transparency and openness and ultimately result in the short-listing of candidates with the necessary skills to promote the objects and principles of the Act. As the SABC Board is the accounting authority of the Corporation, due regard and care must be taken by all role players at every step of the appointment process to evaluate the suitability of candidates as board members. The Committee at the mentioned meeting pointed out that this process should not be unnecessarily rushed in a manner that compromises the effective and efficient functioning of the accounting authority.

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<sup>1</sup> This section allows for an interim SABC Board to only serve for a single non-renewable period "not exceeding six months".

4. As the current interim SABC Board has approximately three months remaining of the legislatively prescribed timeframe, leaving the Committee (and by implication the NA) with insufficient time to secure the appointment of a permanent SABC Board, the Committee indicated that it would like to consider an amendment to section 15A(3)(b) to allow for proper facilitation of the appointment process as outlined in section 13 of the Act.
5. Our Office was subsequently requested to –
  - a. outline the parliamentary procedure that will have to be followed if section 15A(3)(b) is to be amended as a matter of urgency (with due consideration to public participation requirements) by means of a committee bill; and
  - b. provide draft documents that will be required to be tabled by the Committee if a decision is taken as to proceed with an amendment to section 15A(3)(b).<sup>2</sup>

## PROCEDURAL CONSIDERATIONS

### *National Assembly Approval*

6. In terms of rule 230 read with rule 238 of the Rules of the National Assembly ('the Rules'), the NA initiates legislation through its committees acting with permission of the Assembly. To do so, the Committee will accordingly have to obtain permission from the House by tabling a memorandum setting out the particulars, objects and financial implications of the proposed legislation. Attached, as **Annexure A**, is a proposed draft memorandum for the Committee's consideration.
7. Once the memorandum has been tabled the NA can grant permission, refer the proposal back to the Committee for reconsideration or refuse permission for the Committee to proceed with the bill. In the event that the NA grants permission, it can express itself on the desirability of the proposal or make the granting of permission subject to conditions.

### *Preparation of the Bill*

8. Once the NA has granted permission to proceed with the bill, rule 239 determines that the Committee must –
  - a. prepare a draft bill and explanatory memorandum setting out the object of the bill; and
  - b. consult with the JTM for advice on the classification of the bill.<sup>3</sup>
9. A draft amendment bill (with alternative amendment options) and explanatory memorandum is attached, as **Annexure B**, for the Committee's consideration.
10. Although rule 241 allows for the mere publication of an explanatory summary of the bill in the *Gazette* to be sufficient as an initial step prior to the first reading and formal referral of the bill to a committee for consideration and report, that rule also allows for the bill (as introduced) to be published. The latter publication choice would facilitate timely processing of the bill, as rule 241(2) then requires that the bill itself is published in the *Gazette* with a notice of its publication containing "an invitation to interested persons and institutions to submit written representation on the draft legislation". This amounts to a call for public participation.

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<sup>2</sup> Draft documents will be attached as annexures and referenced within the body of the opinion where relevant.

<sup>3</sup> In the current context, the proposed amendment to section 15A(3)(b) would qualify as a section 75 bill (with due regard to the provision of the Constitution of the RSA, 1996, specifically Schedule 4).

11. Publication of the bill together with a call for submissions would allow the Committee to facilitate public participation in a manner that enables speedy processing of the amendment.

### **Facilitation of Public Participation**

12. There is no set prescript as to the form public participation should take. The Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and Others*<sup>4</sup> (in considering the scope of section 72 of the Constitution that resembles that of section 59 in tone) highlighted the following considerations –
  - a. Public participation refers to the facilitation of public involvement in the legislative process and calls for steps to be taken by Parliament to ensure that such involvement can be realised.<sup>5</sup>
  - b. In doing so, a constitutional balance is called for between the representative and participatory democratic elements which both inform the legislature's constitutional duties: "It imposes a special duty on the legislature and pre-supposes that the legislature will have considerable discretion in determining how best to achieve this balanced relationship."<sup>6</sup>
  - c. The required degree of public participation that is left to discretion of Parliament, as long as the opportunity granted for public participation is reasonable. The context (scope, importance, impact) of every bill (and the processing it requires) will inform the degree of participation that is regarded as reasonable in the circumstances.<sup>7</sup>
13. Although rule 249 (dealing with committee processing of bills) calls for "the Assembly committee to which the bill is referred... [to] arrange its business in such a manner that interested persons and institutions have an opportunity to comment on the bill", the rule 241 step can be interpreted as facilitating the rule 249 requirement if the NA refers the bill to the committee that introduced the bill.<sup>8</sup> It would be for the Committee then to determine (with due consideration to the scope and importance of the bill) what steps should be taken to reasonably supplement the rule 241 call for comments.
14. In doing so, the Committee will still be giving expression to the constitutional obligation assigned to the Legislature to facilitate public participation.

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<sup>4</sup> 2006 (12) BCLR 1399 (CC).

<sup>5</sup> *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) at 1443.

<sup>6</sup> *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) at 1443.

<sup>7</sup> *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) at 1444 with reference to *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at par 630: "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

<sup>8</sup> As the Committee is the relevant Committee exercising oversight of the department that acts in terms of the Act, it is foreseen that the Committee will also be regarded as the relevant NA committee to process the bill.

## **CONCLUSION**

15. The Committee has the power to process the amendment sought by means of a committee bill, provided that the NA grants permission for it to proceed.
16. The process allowed for the processing of committee bills is flexible enough (within Parliament's rules) to facilitate public participation and amend the Broadcasting Act, 1999 before the current period of the interim SABC Board lapses if the Committee (and its Select Committee counterpart) prioritises the processing of the bill.



**Dr BE Loots**

**Parliamentary Legal Adviser**

## ANNEXURE A



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

### COMMITTEES

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### Memorandum

[For attention]

**TO:** Hon M Sisulu, MP  
Speaker of the National Assembly

**FROM:** Hon E Kholwane, MP  
Chairperson: Portfolio Committee on Communications

**DATE:** 11 June 2013

**SUBJECT:** MEMORANDUM IN TERMS OF RULE 238 OF THE RULES OF THE NATIONAL ASSEMBLY BY THE PORTFOLIO COMMITTEE ON COMMUNICATIONS

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The Portfolio Committee on Communications ('the Committee') is hereby requesting the permission of the House in terms of Rule 238(1) for the introduction of the following legislation in the House:

#### **(a) Purpose of the Bill**

The purpose of the bill is to amend the Broadcasting Act, 1999 (Act No. 4 of 1999) in order to extend the section 15A(3)(b) prescribed six month period for which an interim South African Broadcasting Corporation ('SABC') Board can be appointed so as to grant the recommending authority (the National Assembly) and the appointing authority (the President) sufficient time to give due consideration to the appointment of permanent board members.

#### **(b) Objects of the Bill**

The Bill seeks to amend section 15A(3)(b) of the Broadcasting Act, 1999 (Act No. 4 of 1999) to extend the time period for which an interim SABC Board can be appointed.

#### **(c) Financial Implications for the state**

No additional financial implications are foreseen, as the extension of the amendment of the time period for which an interim SABC Board is appointed amounts to a technical amendment.

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**SE Kholwane, MP**  
Chairperson, Portfolio Committee on Communications

ANNEXURE B

REPUBLIC OF SOUTH AFRICA

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# BROADCASTING AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76);  
explanatory summary of Bill published in Government Gazette No.      of 2013)  
(The English text is the official text of the Bill)*

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(PORTFOLIO COMMITTEE ON COMMUNICATIONS)

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[B —2013]

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## ANNEXURE B

### GENERAL EXPLANATORY NOTE:

[     ] Words in bold type in square brackets indicate omissions from existing enactments.

       Words underlined with a solid line indicate insertions in existing enactments.

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### BILL

To amend the Broadcasting Act, 1999 to extend the time period for which an interim board can be appointed to control the affairs of the Corporation as legislatively prescribed.

Be it enacted by the Parliament of the Republic of South Africa as follows:-

#### Amendment of section 15A(3) of Act 4 of 2009

Comment [BE1]: DRAFT OPTION 1

1. Section 15A of the principal Act is hereby amended by the substitution for subsection (3)(b) of the following subsection –

“(b) The interim Board –

- (i) must be appointed within 10 days of receiving such recommendation; and
- (ii) is appointed for period of six months, which period can be extended for another six months by the appointing body upon recommendation of the National Assembly.”

#### Amendment of section 15A of Act 4 of 2009

Comment [BE2]: DRAFT OPTION 2

1. Section 15A of the principal Act is hereby amended by the substitution in subsection 3(b) of the word “six” for the word “twelve”.

Comment [BE3]: This is an arbitrary number inserted for purposes of illustration only. If Draft Option 2 is preferred the number inserted will reflect the policy decision taken by the Committee

#### Short title and commencement

2. This Act is called the Broadcasting Amendment Act, 2013 and comes into operation on a date fixed by the President by proclamation in the *Gazette*.



## **ANNEXURE B**

### **MEMORANDUM OF OBJECTS ON THE BROADCASTING AMENDMENT BILL, 2013**

#### **1. OBJECTS OF THE BILL**

The Bill seeks to amend section 15A(3)(b) of the Broadcasting Act, 1999 (Act No. 4 of 1999) to extend the time period for which an interim South African Broadcasting Corporation Board can be appointed.

#### **2. DISCUSSION OF THE BILL**

##### **Clause 1**

The proposed amendment to section 15A(3)(b) of the Broadcasting Act, 1999 (Act No. 4 of 1999) seeks to provide for an extension of the prescribed six month period for which an interim South African Broadcasting Corporation Board can be appointed so as to grant the recommending authority (the National Assembly) and the appointing authority (the President) sufficient time to give due consideration to the appointment of permanent board members.

##### **Clause 2**

Clause 2 provides for the short title.

#### **3. FINANCIAL IMPLICATIONS**

No additional financial implications are foreseen, as the extension of the amendment of the time period for which an interim board is appointed amounts to a technical amendment.

#### **4. PARLIAMENTARY PROCEDURE**

5.1 The Committee is of the opinion that this bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in sections 74 or 76 of the Constitution applies.

5.2 The Committee is of the opinion that it is not necessary to refer this bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.