

PRESENTATION ON LEGAL INSTRUMENTS WHICH GOVERN ENTITIES UNDER THE DEPARTMENT OF COMMUNICATIONS

DATE: 17 JUNE 2015

PRESENTATION OUTLINE

- INTRODUCTION
- BROADCASTING ACT NO. 4 OF 1999
- COMPANIES ACT NO. 71 OF 2008
- PUBLIC FINANCE MANAGEMENT ACT NO. 1 OF 1999
- THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT NO. 108 OF 1996
- ICASA ACT NO. 13 OF 2000
- BRAND SA TRUST DEED
- MDDA ACT NO 14 OF 2002
- FILM AND PUBLICATION ACT NO. 65 OF 1996
- ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005
- CONCLUSION

BROADCASTING ACT NO. 4 OF 1999

- In order for one to understand the Broadcasting Act “Act”, one should first consider the aims of the said Act, which are amongst other things the following:-
 - To replace the Broadcasting Act of 1976;
 - To establish a new broadcasting policy for the Republic;
 - To amend certain provisions of the Independent Broadcasting Authority Act of 1993;
 - To clarify the powers of the Minister in regard to policy formulation and the Authority powers with respect to the regulation and licensing of the broadcasting system;
 - To provide for classes of broadcasting activities in the public interest and for that purpose to provide a Charter for South African Broadcasting Corporation Ltd;

fact that the board is the accounting authority of the Corporation.
board, quorum of board meetings, committees of the board and the
Assembly, terms of office, appointment of the Chairperson of the
Directors of the SABC by the President on the advice of the National
Directors enunciated the process of appointing Non-Executive

- **Section 13**

- This section deals with the composition of the board.

- **Section 12**

- Assembly are sections 12, 13, 14, 15.
The Most relevant sections of the Act to the work of the National

- To establish a human resource capacity in policy development and
to provide for matters connected therewith.
Body;
To establish the South African Broadcasting Production Advisory

BROADCASTING ACT NO. 4 OF 1999

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- **Section 14**
- This section gives powers to the Group Chief Executive Officer, the Chief Operating Officer and Chief Financial Officer to administer the daily affairs of the Corporation.
- Compliant with inter alia sections 52, 54 and 55 of Public Finance Management Act by the SABC is not negotiable, National Assembly is here to oversee the compliance to the above sections.

- **Section 15(1) provides:-**
 - “(1) The appointing body –
 - may remove a member from office on account of misconduct or inability to perform his or her duties efficiently after due inquiry and upon recommendation by the Board; or
 - must remove a member from office after a finding to that effect by a committee of the National Assembly and the adoption by the National Assembly of a resolution calling for that member's removal from office in terms of section 15A.”

BROADCASTING ACT NO. 4 OF 1999

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- **Section 15A provides:-**
- “(1)(a) The National Assembly may, after due inquiry and by the adoption of a resolution, recommend the removal of a member from office on account of any or all of the following:
- misconduct;
- inability to perform the duties of his or her office efficiently;
- absence from three consecutive meetings of the Board without the permission of the Board, except on good cause shown; and
- failure to disclose an interest in terms of section 17 or voting or attendances at, or participation in, proceedings of the Board while having an interest contemplated in section 17.

- The Companies Act No. 71 of 2008 “Act” is an overarching Act in respect of incorporation of companies, powers and duties of shareholders and directors, management of all the affairs of the companies, regulations of all the affairs of companies in the Republic, it applies to state own companies like the SABC as well.
- Section 8 of the Companies Act deals with different categories of companies, and includes amongst other things, the categories of profit companies, a state-owned companies (s8(2)(a)) is defined as including, an enterprise that is registered in terms of this Act as a company and listed as a public entity in terms of Schedule 2 or 3 of the Public Finance Management Act No. 1 of 1999.
- The SABC is listed as a public entity in terms of Schedule 2 of the Public Finance Management Act, 1 of 1999. SABC’s MoI was registered on the 14 May 2014 (in terms of the Companies Act No. 71 of 2008).

COMPANIES ACT NO. 71 OF 2008

WHAT IS THE STATE OWN COMPANY

- A State-Owned Company (SOC) is a profit company that is listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act, or is owned by a municipality.
- A SOC is therefore a national government business enterprise. It is a juristic person under the ownership and control of the national executive that has been assigned financial and operational authority to carry on a business activity.
- The principal business of a government business enterprise or SOC is that it provides goods or services in accordance with ordinary business principles and is fully or substantially financed from sources other than the National Revenue Fund or by way of tax, levy or any other statutory money.

- Section 9 of the Companies Act deals with the 'modified application' of the Act in respect of State-Owned Companies. Subsection (1) provides:
 - "Subject to section 5(4) and (5), any provision of this Act that applies to a public company applies to a State-Owned Company, except to the extent that the Minister has granted an exemption in terms of subsection (3)."
- Section 9(2) provides:
 - "The member of the Cabinet responsible for:
 - State-Owned Companies may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all State-Owned Companies, any class of state-owned companies, or to one or more particular State-Owned Companies or;
- Company or;

WHAT IS THE STATE OWN COMPANY

WHAT IS THE STATE OWN COMPANY

- Section 9(3) provides:
- "The Minister, by notice in the Gazette after receiving the advice of the Commission, may grant an exemption contemplated in subsection (2):
- only to the extent that the relevant alternative regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and (Companies Act)
- subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act." (Companies Act)



- SABC has not been exempted under section 9(3) from any of the provisions of the Companies Act except the ones cited in section 8A of the Broadcasting Act.
- Section 9(3) provides:

WHAT IS THE STATE OWN COMPANY

WHAT IS THE MEMORANDUM OF INCORPORATION

- The MoI is a shareholder's document (in simple term is the constitution of the company) it is defined in section 1 as the document, as amended from time to time, that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and other matters as contemplated in section 15 of the Act. The MoI therefore determines the rights, powers and duties of all stakeholders, as well as the nature of the company that is, whether it is a public or private company or another type of company.

- Section 8A(1) of the Broadcasting Act states that, old Corporation is, with effect from a date determined by the Minister by notice in the Gazette, which may be a date prior to the commencement of this Companies Act, to be known as the South African Broadcasting Act, deemed to be a public company incorporated in terms of the Companies Act with the name of South African Broadcasting Corporation Limited.
- Section 8A(2) of the Broadcasting Act states that, the Corporation must have a share capital as contemplated in section 19 of the Companies Act with the State as its sole shareholder with effect from the date of conversion.

WHAT IS THE MEMORANDUM OF INCORPORATION

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- **Section 8A(3) of the Broadcasting Act states that, the Minister (Minister of Communications) must determine the memorandum and article of association of the Corporation and must submit these to the Register at least a week prior to the date of the notice contemplated in subsection (1).**
- Section 8A(4) of the Broadcasting Act states that, the Registrar must, on the date of the notice contemplated in subsection (1), register the memorandum and the article of association of the Corporation in terms of section 63(1) of the Companies Act and issue a certificate of incorporation and a certificate to commence business to the Corporation, but no fees are payable in respect of such registration or issue.





- Section 8A(5) of the Broadcasting Act states that, with effect from the date of conversion the Companies Act applies to the Corporation as if it had been incorporated in terms of the Companies Act on that date, save to the extent stipulated in this Act.
- Section 8A(6) Sections 32, 44, 54(2), 60, 63(2), 64, 65, 66, 172, 190 and 344(b) and (d) of the Companies Act No. 71 of 2008 do not apply to the Corporation".
- Section 8A(6) of the Broadcasting Act intended that section 71(3)(a)(b) and section 71(4)(a)(b) of Companies Act No. 71 of 2008 should apply in respect to the directors of the SABC Board.

WHAT IS THE MEMORANDUM OF INCORPORATION

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- Section 8A(7) of the Broadcasting Act states that , all references in this Act to the conversion of the old Corporation must be construed as references to the conversion of the old Corporation into a public company having a share capital and having been incorporated in terms of the Companies Act as stipulated in subsection(2).
- Section 8A(8) of the Broadcasting Act states that, neither the repeal of the Broadcasting Act, 1976 (Act No. 73 of 1976) nor the conversion of the old Corporation affects-
- The continued corporate existence of the old Corporation with separate legal personality as from the date of its first establishment;
- Any of the rights, assets, liability or obligations acquired or incurred by the old Corporation or on behalf of the Corporation at any time before its conversion.



- The validity of any act lawfully performed by or on behalf of the old corporation prior to the date of conversion.
- The terms and conditions of services and accrued benefits of its employees; or

WHAT IS THE MEMORANDUM OF INCORPORATION

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- The MoI may contain inter alia the following provisions:
- altering the effect of any alterable provision in the Companies Act No. 71 of 2008;
- containing special conditions applicable to the company;
- containing requirements for the amendment of any special conditions applicable to the company in addition to any of the requirements set out in the Act, and or



- A company's MoI can deal with any number of different issues amongst other things the following:
- the objects and powers of the company;
- the authorised shared and types of shares;
- any restrictions or limitations on the powers of the company;
- what happens to the assets of the company is dissolved;
- the composition of the board of directors;
- the election and removal of directors;
- alternate directors;
- the frequency of board meetings;
- the committees of the board;
- the personal liability of directors;

WHAT IS THE MEMORANDUM OF INCORPORATION

WHAT IS THE MEMORANDUM OF INCORPORATION

- the indemnification of directors;
- powers of directors and powers of shareholder;
- types of shareholders' resolution;
- rights of shareholders, including voting rights;
- the disposal by shareholder of their shares;
- shareholders meetings and the procedures involved;
- specific audit requirements; and
- the amendment of the MoI.



- The MoI is an important document that enables significant flexibility as to the relationship between a company and its stakeholder. It can accommodate simple company structure or very detailed and complex provisions.

WHAT IS THE MEMORANDUM OF INCORPORATION

COMPANIES ACT NO. 71 OF 2008

- Section 8A(6) of the Broadcasting Act excludes the operation of sections 32, 44, 54(2), 60, 63(2), 64, 65, 66, 172, 190 and 344(b) and (d) of the Companies Act No. 71 of 2008 on the SABC.
- The non excluded sections of the Companies Act No. 71 of 2008 are applicable to the SABC including section 71(3)(a) and (b) of the Companies Act, this section empowers the Board of the SABC to remove a member of the SABC Board.



- What section 71(3)(a) and (b) of the Companies Act does is to provide for another method or procedure and grounds of removing a director of the SABC Board. This method or procedure does not involve the "appointing body" and the National Assembly. In simple terms, section 71(3)(a) and (b) of the Companies Act, the SABC Board may on its own without any notice or involvement of the appointing body and the National Assembly, remove one of its members on the grounds and in terms of the procedure provided for therein.

COMPANIES ACT NO. 71 OF 2008

COMPANIES ACT NO. 71 OF 2008

- The provisions of section 71(3)(a) and (b) of the Companies Act clearly provide for a procedure which is different from what contemplated in section 15(1) of the Broadcasting Act which empowers the “*appointing body*” to perform the act of removal.
- Furthermore, section 71(3)(a) and (b) does not make provision for the National Assembly to play any role in the removal of directors of the SABC in terms of that subsection. It also does not in any way dilute or remove the powers of the National Assembly to recommend the removal of a member of the SABC Board in terms of section 15(1)(b) on the grounds provided for in section 15(A).
- The provisions of the Companies Act and the Broadcasting Act in this scenario are capable of concurrent application, therefore there are three procedures upon which a director of the SABC board can be removed, namely:-



- may be removed by the President after a due inquiry and upon recommendation by the SABC Board (section 15(1)(a) of the Broadcasting Act);
- may be removed by the President after a due inquiry and upon recommendation by the SABC Board (section 15(1)(a) of the Broadcasting Act);
- must be removed by the President after a finding of misconduct by a committee of the National Assembly and the adoption by the national Assembly of a resolution calling for that member's removal from office (section 15(1)(b) of the Broadcasting Act; and
- may be removed by resolution of the Board where a director inter alia is guilty of dereliction of duties, and the Board has determined, that he or she has neglected, or been derelict in the performance of the functions of a director (section 71(3)(b) of the Companies Act).

COMPANIES ACT NO. 71 OF 2008

PUBLIC FINANCE MANAGEMENT ACT

NO. 1 OF 1999

- The Public Finance Management Act is an overarching legislation which regulates the management and spending of the public finance by Government Departments, entities, agencies and other relevant structures, all entities under the Department of Communications are therefore bound by the relevant provisions of the “PFMA”.
- The National Assembly as the overseer of the Executives has a constitutional duty to hold Executives to account on how entities under their authority are spending and managing public funds. This Act is a “cornerstone” of our work.





- The Constitution is the supreme law in our Country, it mandated that rule of law be observed, of which its foundation is the principle of legality. Principle of legality requires that the Department and its entities should only exercise powers which are conferred to them by law.

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT NO. 108 OF 1996

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ACT 13 OF 2000

- The main objective of ICASA Act “Act” was to establish the Independent Authority to: (inter alia)
- regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution;
- regulate electronic communications in the public interest;
- achieve the objects contemplated in the underlying statutes.



- The provisions of the Act which are of major importance to the work of the National Assembly are sections 1A, 1B, 5, 6A, 8(2), 9(2)(b), 15(1), 15A and 16.
- Section 5 deals with the composition of the council of the ICASA.
- Section (1A) requires the National Assembly to submit a list of candidates to the Minister.
- Sections (1B) deals with Minister's recommendation to the National Assembly.

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ACT OF 2000

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- Section 6A deals with the establishment of performance management system to monitor and evaluate the performance of the chairperson, councillors and the Council, individually and collectively.
- Section 8(2) deals with the removals of councillors.
- Section 9(2)(b) provides authority to National Assembly to direct that a councillor can hold office for a longer period which may not exceed one subsequent term of four years.



- Section 15(1) deals with the money appropriated by Parliament.
- Section 15(A) deals with the money determined in any manner as may be agreed between the Minister and the Minister of Finance and approved by Cabinet.
- Section 16 require the National Assembly to supply the Minister with such information and particulars as him or her may in writing require in connection with the activities of the Authority.

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ACT OF 2000

BRAND SA TRUST DEED

- Brand SA is regulated by the Trust Deed.
- The Trust Deed regulates the affairs of Brand SA .
- Brand SA is subjected to Public Finance Management Act.



- The objectives of the MDDA amongst other things are the following:-
 - To promote development and diversity in the South African Media throughout the country, and for these purposes to encourage ownership and control of, and access to, media by historically disadvantaged communities, diminished indigenous, language and culture groups.
 - Section 4 of the Act deals with the appointment of members of the board, members of the board are appointed by the President on the recommendation of the National Assembly after public participation in the nomination processes.
 - Section 5 of the Act deals with the removal of the MDDA board members.

MEDIA DEVELOPMENT AND DIVERSITY AGENCY ACT NO. 14 OF 2002

FILM AND PUBLICATION BOARD ACT

NO. 65 OF 1996

- The objectives of this Act is to provide for the classification of certain films and publications, to provide for the establishment of the board, appeal tribunal and penalty committee.
- Section 3 deals with the establishment of the board, council, appeal tribunal, and penalty committee.
- Sections 4 and 4A deal with the constitution of the council by the Minister and the powers of such council.
- The composition of the appeal tribunal and penalty committee are set out in sections 5 and 6 respectively.



- The removal of the members of council, appeal tribunal and penalty committee are set out in section 9 of the Act.
- The removal of the members of council, appeal tribunal and penalty committee are set out in section 9 of the Act.
- The board, council, appeal tribunal and penalty committee present their annual reports to the Minister for tabling in the National Assembly.

FILM AND PUBLICATION BOARD ACT 65 OF 1996

ELECTRONIC COMMUNICATIONS ACT

NO. 36 OF 2005

- This is an overarching Act in respect of Electronic Communications and related matters, it is meant amongst other things to promote convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors, to make new provisions for the regulation of Electronic Communications Services, Electronic Communications Network Services and Broadcasting Services.
- Section 3 deals with Ministerial policies and policy direction.
- The ECA has dealt extensively with the competencies of the Regulator (ICASA). ICASA derives most of its powers from the ECA.



- It is your responsibility to hold the Executive to account on the work of all the entities listed above. The Ministry will ensure that all the entities comply with the legislation as has been always the case so far.

CONCLUSION

THANK YOU

Acting DG
1 regard user
members of board of SABC
↳ CEO
↳ Deputy of
↳ CFO
company secretary