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LEGAL OPINION
[Confidential]

TO : Ms D Tsotetsi, MP
Acting Chairperson: Portfolio Committee on
Communications

COPY : Secretary to Parliament
Acting Deputy Secretary: Core Business

DATE : 15 March 2016

FROM : Constitutional and Legal Services Office
Ms P Ngema: Parliamentary Legal Adviser

REFERENCE : 20 / 2016

SUBJECT : APPLICABILITY OF SUB-JUDICE RULE TO
BROADCASTING AMENDMENT BILL [B 39-15]

Please find the attached legal opinion for your attention.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke.

.....
P Ngema (Ms)
Parliamentary Legal Adviser



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SUBJECT : **APPLICABILITY OF SUB-JUDICE RULE TO BROADCASTING AMENDMENT BILL [B 39-2015]**

Introduction

1. Our Office was requested by the Acting Chairperson of the Portfolio Committee on Communications (the Committee) to advise on the applicability of the NA *sub-judice* rule in respect of the Broadcasting Amendment Bill [B39 – 2015] (the Bill).
2. Thus the legal question is whether National Assembly Rule (NA Rule) 67, the sub-judice rule, is applicable and if so, what is the extent, in the processing of the Bill that has been referred to the Committee.

Background

3. The object of the Bill amongst others, is to amend sections 13 and 15 including 15A, of the Broadcasting Act, 1999 (Act No.4 of 1999) which pertain to membership and removal of members of the South African Broadcasting Corporation Limited (SABC) Board. The three proposed amendments further seek to remove any involvement of the National Assembly (NA) in this appointment process.
4. Before the Gauteng Division High Court there are two pending cases which may be presumed to have a bearing on the introduced Broadcasting Amendment Bill. The first



case is that of *Mashangu Ronny Lubisi v SABC, SABC Board, Minister of Communications and others; Case Number 78709/15* (Lubisi). The second one is *SOS Support Broadcasting Coalition and Others v SABC, Minister of Communications, SABC Board and Others; Case Number 76343/15* (SOS Support Broadcasting Coalition).

5. In summary, the Lubisi case seeks a review and setting aside of the decision of the SABC Board to remove Mr Lubisi as a non-executive member. It is alleged that the decision to remove Mr Lubisi was taken contrary to the provisions of the Broadcasting Act and therefore he asks the Court to declare such decision and his removal as unlawful.
6. The second case is by SOS Support Broadcasting Coalition, a Non-Governmental Organisation (NGO) which requests the Court to declare that members of the SABC Board may not be removed in terms of the Companies Act, 2008 (Act No. 71 of 2008) without application and compliance with the relevant provisions of the Broadcasting Act.
7. The Minister of Communications (Minister) is cited as a respondent in both the above-mentioned cases. The Minister has introduced the Bill to Parliament as a proposed section 75 Bill. The Speaker has referred the Bill to the Committee. The Joint Tagging Mechanism (JTM) has classified or tagged the Bill as a section 75 Bill.
8. On 8 March 2016, the Committee received a briefing on the Bill from the Department of Communications in line with NA Rule 247(6) read with NA Rule 249.
9. Section 13(1) of the Broadcasting Act provides that the twelve non-executive members of the SABC Board must be appointed by the President on the advice of the National Assembly. It is trite in our jurisprudence that "on the advice" means that the National Assembly must make a recommendation for approval by the President in respect of the twelve non-executive members eligible for appointment.
10. The current section 13 of the Broadcasting Act, opted for the appointment process where both the legislature (NA) and executive are involved in the process of recruiting leading to the appointment of suitable candidates. The proposed amendment in clause 3 of the Bill seeks to alter that option and make the executive alone (Minister and President) the role players in the appointment process of the SABC Board members.



11. Same is also applicable as a consequential amendment to the substitution of the NA for the Minister, who should be advising the President on who to appoint and the envisaged panel on who to remove. This amendment is proposed in clauses 5 and 6 of the Bill, respectively.
12. The question of application of the sub-judice rule arises out of the above-mentioned context.

Legal framework

13. National Assembly Rule 67 provides that no member shall “refer” to “any matter” on which a judicial decision is pending. This amounts to a prohibition against any member from making reference to any matter before courts. This rule is intended to promote the respect of the judiciary and adhere to the applicable principles of law.
14. At paragraph 26 of the *Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13¹*(Endumeni Municipality), the court directed that to give an appropriate construction to a legal instrument and to resolve possible interpretation challenges, ‘the apparent purpose of the provision and the context in which the provision occurs are important guides to the correct interpretation’. Eloquenty the court further said:

...An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation ...
15. Section 13(2) of the Broadcasting Act enjoins the appointment process to be done in a manner that ensures public participation during the nomination process, transparency and openness and that a short-list of candidates for appointment is published.
16. Parliament has legislative authority and a constitutional mandate to pass legislation in terms of sections 43 and 44 of the Constitution whilst at all times guarding against

¹ Read together with paragraphs 18 and 19. The Constitutional Court has confirmed that the purposive context based interpretation is the one to be preferred and must be applied as opposed to that of deriving the intention of the legislature/drafter in *Urmilla Mansingh v General Council of the Bar and Others 2014(1) BCLR 85 (CC)* at paragraphs 16 and 27.



any form of contempt against or disrespect to the autonomy and powers of the other structures and branches of government.

17. According to the Collins English dictionary "refer to" means to make mention or to direct the attention of (someone) for information or facts. "Any matter" is unfortunately very broad and encompassing of everything.

18. In *Midi Television (Pty) Ltd T/A e-TV Director of Public Prosecutions (Western Cape) 2007 (5) SA 540 (SCA)*², the Court held as follows:

... a publication will be unlawful, and thus susceptible to being prohibited, **only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough.** ...

19. The above judgment clarified the landscape and application of the sub-judice common law principle within the context of the Constitution. Hence the sub-judice test is as follows: For the rule to find application, there must be "**demonstrable and substantial prejudice to the administration of justice coupled with the real risk that such prejudice will actually occur.**" The Court further said that a mere speculation or conjecture that prejudice will occur is not sufficient to enable the application of the sub-judice rule.

(Underline and bold is my emphasis.)

Application of law to the facts

20. In this instance, the Committee requires legal advice whether the *sub-judice* rule prohibits them from processing the Broadcasting Amendment Bill in light of the two pending cases before the Gauteng High Court.

21. It is crucial that in this scenario, the clarified position of the sub-judice principle, as alluded to in *Midi Television*, read with the actual facts of the cases before the Court and the content of the Bill, be scrutinised and given thorough and appropriate interpretation within the constitutional mandate of Parliament as outlined in the Constitution.

² At para 19.



Legal advice

22. In light of the applicable law, it is my considered view that there is neither demonstrable prejudice which either of the parties in the pending cases will suffer nor will the processing of this Bill have adverse implications or influence the Court on the matters before it.

23. Therefore, I am of the view that the Bill's consideration does not in itself fall foul of NA Rule 67. However, it must be borne in mind that the Chairperson will have an unenviable task to ensure that members of the Committee stay clear of the issues before the Court and do not bring them into the domain and scope of the deliberations on the Bill.

Ms Phumelele Ngema
Parliamentary Legal Adviser

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