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LEGAL OPINION

[Confidential]

TO : Mrs JC Moloi-Moropa, MP
: Chairperson: PC on Communications

COPY : Secretary to Parliament

DATE : 24 March 2015

SUBJECT : Legal Opinion on Powers to Remove Board
Members of the SABC

LEGAL ADVISER : Mr. N Mjnxane

Ref No. : 31 / 15



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1. Our office was requested to advise on the powers and procedure for the removal of a Board Member of the South African Broadcasting Corporation ("SABC"). It should be noted that this advice is not based on any particular dismissal/removal of a Board Member of the SABC; rather it sets out, in broad general terms, the procedure in terms of which a Board Member of the said institution may legally be removed.
2. In terms of the principle of legality organs of the state may only exercise the powers and perform functions authorized by the law. The aforementioned principle was discussed extensively by our courts in the two significant decisions that are discussed below.
3. In *Speaker of the National Assembly v De Lille and Others* 1999 (4) SA 863 (SCA) Mohammed CJ, as he then was, in examining the legal authority of the National Assembly to suspend its member said:

[14] This enquiry must crucially rest on the Constitution of the Republic of South Africa...It is supreme, not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2

of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorized by the Constitution is entitled to the protection of the courts. No Parliament, no official, and no institution is immune from judicial scrutiny in such circumstances.

4. In *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) the Court said:

[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.

5. In terms of section 13 of the Broadcasting Act the twelve (12) non-executive members of the SABC Board are appointed by the President on the advice of the National Assembly.
6. Section 15 of the Broadcasting Act provides for the removal of non-executive member(s) of the SABC Board from office and states that:

(1) The appointing body –

(a) 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

(b) 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.

7. Notably, the above mentioned sections providing for removal of a Board Member, are the only stated powers and procedure in terms of which a Board Member of the SABC may be removed.
8. Section 15(1) of the Broadcasting Act refers to the "appointing body". The Broadcasting Act defines an "appointing body" to mean the body charged with the appointment of members of the Board in terms of section 13 of the Broadcasting

Act. In terms of section 13 of the Broadcasting Act, the President appoints non-executive members of the Board. In terms of section 13(3) the Chairperson and the Deputy Chairperson of the SABC Board are non-executive members of the Board.

9. Section 15 provides two separate processes for the removal of a member of the SABC Board from office. The one process is in terms of section 15(1) (a) of the Broadcasting Act (hereinafter referred to as a "section 15(1) (a) removal process"). In terms of the section 15(1) (a) removal process, the President may remove a member of the SABC Board from office on account of misconduct or inability to perform his or her duties efficiently after a due inquiry and recommendation by the SABC Board. In terms of the section 15(1) (a) process the President has discretionary powers of removing an SABC Board member from office.
10. In terms of the aforementioned section, the SABC board has no legal competency to arbitrarily remove a Member of the Board; rather the Board may conduct an inquiry and recommend to the President ("appointing authority"), the removal of a Board Member. The inquiry envisaged in this section is a legal inquiry based on the rule of law, which would include the right to hear the Board Member in question's version of events, affording him/her all rights inherent to a person who has allegations leveled against him/her (legal representation) amongst others.
11. The other process of removing a member from office is outlined in section 15(1) (b) of the Broadcasting Act (hereinafter referred to as a "section 15(1) (b) removal process"). In terms of the section 15(1) (b) removal process, the President must remove a member of the SABC Board from office after a finding to that effect by a committee of the National Assembly (the "Assembly") and the adoption by the Assembly of a resolution calling for that member's removal from office in terms of section 15A of the Broadcasting Act. In terms of the section 15(1) (b) process the President is obliged to remove a Board member on the finding and recommendation of the Assembly.
12. Section 15A(1) of the Broadcasting Act provides that:
 - (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:
 - (i) misconduct;
 - (ii) inability to perform the duties of his or her office efficiently;
 - (iii) absence from three consecutive meetings of the Board, except on good cause shown;
 - (iv) failure to disclose an interest in terms of section 17 or voting or attendance at, or participation in, proceedings of the Board while having an interest contemplated in section 17; and
 - (v) his or her becoming disqualified as contemplated in section 16.

13. The Portfolio Committee on Communications has the legal competence to conduct an inquiry into an SABC Board member's fitness to hold office. The Committee's legal competence is founded in section 15(1) (b) read together with section 15A(1) of the Broadcasting Act. The decision to hold a section 15A inquiry is the responsibility of the entire Committee.
14. In terms of the Act, the SABC Board does not in itself, have the legal competency to conduct an inquiry into an SABC Board Member's fitness to hold office, find such a Board Member guilty and remove him/her from office.
15. The only legally valid removal of a SABC Board Member is by the President as appointing authority in terms of section 15(1)(a) process as outlined above or by the President on recommendation of a Committee of the National Assembly as set out in section 15(1)(b) read with section 15A(1) of the Broadcasting Act.
16. Section 71 of the Companies Act provides for the removal of directors. It states that a director may be removed by an ordinary resolution at a shareholders meeting. The director concerned must be given notice of the meeting and be afforded reasonable opportunity to make a presentation on the matter before a vote is taken by the shareholders. It is important to note that both the Broadcasting Act and the Companies Act envisage a fair inquiry, always affording the affected director/s an opportunity to present her/his side of the story, with all relevant rights afforded before such a director can be removed.
17. In addition, it is imperative to note that, the Broadcasting Act is specifically applicable to the appointing and removal of SABC Board Members. The Companies Act 71 of 2008 on the other hand, whilst it is applicable to the Board, where it is conflict and cannot be reconciled with the Broadcasting Act, the latter act would find precedence over the Companies Act.
18. The common law and legislative interpretation principle of *lex specialis derogat legi generali*, is a generally accepted technique of interpretation and conflict resolution in both national and international law. In a nutshell, this principle suggests that whenever two or more pieces of legislation deal with the same subject matter, priority should be given to the legislation that is more specific to the subject matter.
19. The application of the special law does not normally extinguish the relevant general law. The general law will remain valid and applicable and will, in accordance with the principle of harmonization, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.
20. The rationale of the principle that special law (Broadcasting Act) has priority over general law (Companies Act) as it relates to the SABC Board is justified by the fact that such special law, is often more concrete, often takes better account of the particular features of the context in which it is to be applied than any

applicable general law. Its application may also often create a more equitable result.

21. It is our view that in this instance the Broadcasting Act is applicable to the removal of a Board Member and that any conflicting provision of the Companies Act would be preceded by the relevant provisions of the Broadcasting Act.
22. Lastly, any removal of a SABC Board Member that is not effected in line with the provisions of the Broadcasting Act as stated above is invalid and therefore unlawful.



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Mr. N Mjekane

Parliamentary Legal Adviser