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IN RE:**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

MEMORANDUM

1. Consultant is Advocate Z Adhikarie, a Senior Parliamentary Legal Advisor.
2. Consultant has referred me to sub-sections 6(1)(f) and (g) of the Independent Communications Authority of South Africa Act 13 of 2000, as amended by Act 3 of 2006 (*"the Act"*), which identify certain conditions upon which a person may not be appointed as a councillor to the Council of the Independent Communications Authority of South Africa (*"ICASA"*).
3. The subsections provide as follows:

"6. Disqualification

- (1) A person may not be appointed as a councillor if he or she-**
- (f) or his or her family member has a direct or indirect financial interest in the electronic communications, postal or broadcasting industry;**

(g) or his or her business partner or associate holds an office in or with, or is employed by, any person or body, whether corporate or unincorporated, which has an interest contemplated in paragraph (f);"

4. I am instructed that a particular councillor ("*the Councillor*"):
 - (a) had a financial interest in the electronic communications or broadcasting industry at the time of his appointment;
 - (b) had undertaken to divest himself of this interest (during an interview and prior to his appointment);
 - (c) failed to do so;
 - (d) presently purports to be in the process of divesting (albeit during his incumbency).

5. In the above circumstances:
 - 5.1 I am asked to advise whether the appointment of the Councillor was valid.

 - 5.2 If not, I am asked to identify:
 - (a) the effect of the Councillor's participation in meetings of the Council;
 - (b) the appropriate remedy.

Introduction

6. Regulation of broadcasting and electronic communication by an independent and competent communications authority is necessary for the proper functioning of a constitutional democracy.
7. Section 5 of the Act therefore provides for the appointment of councillors by the Minister of Communications after a public participation process, and a mechanism - contemplated by Section 55(2) of the Constitution - whereby the National Assembly maintains oversight of the national executive authority in a direct manner.

Validity of appointment

8. Section 6(2) of the Act unequivocally provides that a person who is subject to a disqualification (by virtue, *inter alia*, of subsections 6(1)(f) and 6(1)(g)), during the nomination process, "*may only be appointed if at the time of such appointment he or she is no longer subject to disqualification.*"
9. The language of this subsection is clear, unequivocal and pertinent. It must be given effect to.
10. The context allows no alternative because:
 - 10.1 Section 6 is headed "**Disqualification**;" and
 - 10.2 Section 6 (1) commences with the imperative words "*A person may not be appointed a councillor if he or she-*"
11. The appointment of the Councillor was *ultra vires* and of no force or effect.

12. In purporting to appoint the Councillor the Minister was constrained by the principle that the Executive has no power beyond that conferred by the Act.

(See: Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) para [58] at p 400 D – F; and

Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) para [20] at 687 H – 688 A).

13. In the circumstances the Councillor was not authorized by law to take the required oath - in terms of Section 5(4)(b) - to the effect that he or she would uphold and protect the Constitution and the laws of the Republic.

The validity of proceedings in circumstances where a councillor attends, participates in or votes at a hearing of the Council in relation to any matter before the Council in which he or she has a conflict of interest is dealt with in Sections 12 and 13 of the Act

14. Section 13 provides that, subject to Section 12 and provided a decision was taken by a majority of the Councillors at the time, who were entitled to sit and constituted a quorum, a decision of the Council would not be invalid merely by reason of –

- “(a) any irregularity in the appointment of a Councillor;*
- (b) a vacancy in the Council; or*
- (c) the fact that any person not entitled to sit as a Councillor sat as such at the time when the decision was taken.”*

15. By virtue of the importance of the decisions taken by the Council, the provisions of Section 13 are vital to maintain order in the field of broadcasting and electronic communications, in circumstances such as the present.

16. Section 12(1) prohibits a councillor from voting at, attending, or in any other manner participating in any meeting, if he or she has a conflict of interest in relation to an application relating to a licence of the species described in subsections 6(1) (f) and (g), or in relation to any matter before the Council in which he or she has an interest which may preclude him or her from performing his or her functions as a councillor in a fair, unbiased and proper manner.
17. Section 12(2) places a duty on the Council to enforce the lastmentioned provision and to record any disclosure of interest, where there is reason to believe that a councillor has such interest. Section 12(3) further provides that proceedings shall be null and void if a councillor fails to disclose any interest or remains present at the meeting or participates in the proceedings where such reason exists.
18. Contravention of subsection 12(1) or 12(2) is a punishable offence. Such conduct would place an unqualified prohibition on that person's appointment as a councillor (see. section 6(1)(j)(ii)); and removal from office via section 8(1)(e)).
19. However, there is nothing in my instruction to suggest that a breach of sections 12(1) and 12(2) has in fact occurred.
20. Consultant should therefore investigate the facts and be guided by the principles above.

Appropriate Remedy

21. Section 8 of the Act provides for removal of a councillor from office, *inter alia*, on account of his or her becoming disqualified as contemplated in Section 6(1). (Self evidently this includes the disqualifications in subsection 6(1)(f) and 6(1)(g)).
22. In my view section 8 provides the appropriate remedy in the present situation because, upon a proper interpretation of the lastmentioned sections, appointment of and continued tenure by the disqualified councillor constitute an *a fortiori* situation for removal.
23. The appointment exists until it is addressed by resignation or removal. The Minister should therefore refer the invalid appointment to the National Assembly with a view to the removal of the Councillor in terms of Section 8(1)(f).
24. Section 5(3) provides that persons appointed to the Council must be committed to accountability on the part of those entrusted with the governance of a public service. This provision is imperative. It is doubtful whether anyone could be regarded as accountable and trustworthy when they continue to hold an office for which they have been expressly disqualified by an Act of Parliament. Reference may therefore be made to Section 8(1)(a) of the Act; that is, for removal on account of misconduct.
25. It is doubtful, in my view, whether a court would entertain a review of the invalid appointment of the Councillor while the alternative remedies above exist and before they have been exhausted.

26. Should Consultant require any further amplification or clarity I remain available at all times at the contact numbers above.

MICHAEL DONEN SC

Chambers
17th May 2010