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MEMORANDUM
[Confidential]

TO: **Mr E Kholwane, MP**
Chairperson of the Portfolio Committee on Communication

COPY: **Acting Secretary to Parliament**
[Mr MB Coetzee]

FROM: **Constitutional and Legal Services Office**
[Dr BE Loots and Adv CR van der Merwe – Parliamentary Legal Advisers]

DATE: **17 September 2012**

REF: **58c /2012**

SUBJECT: **PORTFOLIO COMMITTEE CONSIDERATION OF ACTIONS TAKEN BY THE SABC BOARD IN RESPECT OF AN INTERNAL ENQUIRY**



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TO: Mr E Kholwane, MP
Chairperson of the Portfolio Committee on Communication

COPY: Acting Secretary to Parliament
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FROM: Constitutional and Legal Services Office
[Dr BE Loots and Adv CR van der Merwe – Parliamentary Legal Advisers]

DATE: 17 September 2012

REF: 58c/2012

SUBJECT: PORTFOLIO COMMITTEE CONSIDERATION OF ACTIONS TAKEN
BY THE SABC BOARD IN RESPECT OF AN INTERNAL ENQUIRY

INTRODUCTION

1. Our Office was requested to advise the Portfolio Committee on Communication ('the Committee') on the internal enquiry conducted by the South African Broadcasting Corporation Board ('the Board') into the conduct of one of its members (Advocate Mahlali) – specifically related to the role and mandate of the Committee in this context.

BACKGROUND

2. The Committee has been advised of an internal enquiry conducted at the behest of the Board. The report of the firm of attorneys who conducted the enquiry classified it as an "informal enquiry". This could affect the weight given to the findings. The report also does not contain confirmed evidentiary material (i.e. documents that are signed and / or attested to).

3. The Committee previously requested this Office to advise on the role of the Committee in the finalisation of the Board's enquiry. These opinions¹ are attached for ease of reference as Annexures A, B and C.²
4. The Office of the Leader of Government Business telephonically indicated to the Chairperson of the Committee that the Presidency regarded the ministerial communication on the enquiry and subsequent recommendations as "for information purposes" only, due to the apparent informal nature of the enquiry. The options available to the Committee³ depend on the status of the Board's process. It is thus advisable that written confirmation of their position be obtained from the Office of the Presidency.
5. During a recent unrelated presentation by the Board, the Committee was advised of further concerns that resulted in a Board recommendation that a motion of no confidence be taken against the relevant Board member.
 - 5.1. Upon reflection of the draft minutes⁴ provided to us by the Committee Secretary, the vote of no confidence is challengeable, as the request of Adv Mahlati for the matter to be voted on was summarily refused.

LEGAL QUESTION

6. In terms of the brief received, the following legal questions must be considered:
 - 6.1. What is the extent of the Committee's legislative / oversight mandate under the circumstances?
 - 6.2. What steps would be required in order to exercise the above mandate?

LEGAL ANALYSIS

7. Section 15(1)(b), read with section 15A, of the Broadcasting Act, 1999 (Act No. 4 of 1999) ('the Act') provides that the National Assembly may recommend removal of a member of the Board or the dissolution of the Board to the appointing authority whereupon the appointing authority must remove the member or dissolve the Board. The appointing authority, as per Annexures A – C, is the President.
8. Section 15A further requires a "due enquiry" and the adoption of a resolution in order for such a recommendation to be made. The Act is not prescriptive as to the manner in which the "due enquiry" must be conducted.

¹ These opinions are referenced 58/2012, 58a/2012 and 58b/2012.

² The facts set out in these annexures are not repeated in this opinion.

³ See paragraph 8 onwards.

⁴ "SABC - Minutes of a meeting of the Board of Directors held in the 28th floor boardroom, Radio Park, Henley Road, Auckland Park, Johannesburg at 12:00 on 11 June 2012".

9. If the Committee chooses to exercise its authority as per sections 15(1)(b) and 15A, it can do so in two ways:
- 9.1. The Committee **may conduct the enquiry itself**. In this regard it would be advisable for the Committee to (in chronological order) —
- 9.1.1. report to the National Assembly on the proposed route;⁵
 - 9.1.2. obtain an “advice on evidence” to guide the Committee;⁶
 - 9.1.3. notify Advocate Mahlati in writing of the proposed enquiry and invite her to attend;⁷
 - 9.1.4. call witnesses to attest to the case against Advocate Mahlati;
 - 9.1.5. provide Advocate Mahlati with an opportunity to state her case, and to propose further witnesses to the Committee;
 - 9.1.6. consider the evidence provided and reach a conclusion; and
 - 9.1.7. report on the process, evidence considered and decision of the Committee to the National Assembly for its approval.
- 9.2. The Committee **may call on the Auditor-General to assist** with the required due enquiry.
- 9.2.1. The Public Audit Act, 2004 (Act No 25 of 2004) provides in sections 5(1)(b) and (d) that the Auditor-General may provide advice and support to a legislature or its committees, including a special audit.
 - 9.2.2. It must be noted that such advice and support relates to services “outside the scope of the Auditor-General’s normal audit and reporting functions”. The correct terminology for such an audit is a “special integrated audit”.⁸
 - 9.2.3. The assistance of the Auditor-General is provided at a fee. Any request for advice or support must thus be accompanied with the necessary authorisation to incur expenditure.

⁵ Section 15 and 15A indicates that these steps may be undertaken by the National Assembly. Although the Committee is an extension of the House, such an enquiry would not form part of its normal functions and thus it would be advisable to obtain the concurrence of the House first.

⁶ This is a document usually prepared by a legal expert in a trial, which considers the facts that need to be proved to confirm or rebuff the allegations and then determines the evidence that would be required to prove those facts. Such a document would assist the Committee in ascertaining which witnesses to call, and what documentary or other real evidence to request.

⁷ Should Advocate Mahlati choose not to be present this will not hinder the Committee in proceeding with the enquiry.

⁸ Consultation with Mr. Lourens Van Vuuren of the Auditor General’s Office in Pretoria.

9.2.4. As the Committee is an extension of the House, it would be advisable that any referral to the Auditor-General is done with approval of the National Assembly, as well as approval of the costs payable.

10. Once the Committee has decided to conduct the enquiry itself, or refer the enquiry to the Auditor-General, section 15A(2)(a) of the Act allows that the appointing body "**may** suspend a member from office at any time after the start of the proceedings of the National Assembly for the removal of that member".

10.1. It is common practice that, where there is a reasonable and justifiable fear that the individual being investigated may hamper such a process from running its course, that the individual being investigated be suspended with full benefits for the duration of the investigation;⁹

10.2. It is recommended that – should the Committee be of the opinion that Advocate Mahlali should be suspended pending the enquiry - the Committee report to the National Assembly regarding the enquiry includes a recommendation to that effect.

LEGAL ADVICE

11. It is recommended that the Committee –

11.1. obtain written confirmation from the Presidency that it regarded the previous recommendation of the Board as not for consideration in terms of section 15(1)(a) of the Act.

11.2. resolve —


11.2.1. whether to conduct an enquiry, given the concerns before it;

11.2.2. whether to conduct the enquiry itself, or to refer it to the Auditor-General for a "special integrated audit"; and

11.2.3. whether to request the National Assembly to recommend to the appointing authority (in terms of section 15A(2) of the Act) to preventatively suspend Advocate Mahlali pending the enquiry.

12. It is further recommended that the Committee then follow the necessary House procedures in order to have its resolutions adopted at every appropriate step.


Dr BE Loots
Parliamentary Legal Adviser


Adv CR van der Merwe
Parliamentary Legal Adviser

⁹ Such a suspension is regarded as preventative rather than punitive in nature.



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Annexure A

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MEMORANDUM
[Confidential]

TO : Mr ES Kholwane, MP
Chairperson: PC on Communications

COPY : Secretary to Parliament

FROM : Constitutional and Legal Services Office
[Adv CR van der Merwe & Dr BE Loots – Parliamentary Legal Adviser]

DATE : 7 March 2012

SUBJECT : Role of the PC on Communications in the removal of a member from the SABC Board

REFERENCE NO. : 58/2012

MESSAGE : Attached please find Memorandum



MEMORANDUM

CONFIDENTIAL

TO: Mr ES Kholwane, MP
Chairperson: Portfolio Committee on Communications

COPY: Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Adv CR van der Merwe & Dr BE Loots – Parliamentary Legal Advisers]

DATE: 7 March 2012

REF: 58/2012

SUBJECT: Role of the PC on Communications in the removal of a member from the SABC Board

INTRODUCTION

1. Our office was requested to provide a legal opinion on the role of the Portfolio Committee on Communication, following the SABC Board's recommendation to the Minister of Communication that one of their members be removed.

LEGAL OPINION

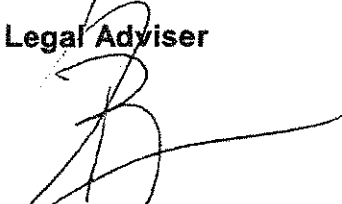
2. In terms of section 15 of the Broadcasting Act, No 4 of 1999 (the Act), only "[t]he appointing body may remove a member from the office on account of misconduct or inability to perform his or her duties efficiently after due inquiry and upon recommendation by the Board."
3. The Act defines the "appointing body" as "the body charged with the appointment of members of the Board in terms of section 13 ..."
4. Section 13 in turns identifies the President as the appointing body. The SABC Board can therefore recommend (via the Minister) to the President (as the appointing authority for the removal of a member from office.
5. The PC on Communications therefore does not have any legislative authorised role to play in the process of the removal of a member of the board by the appointing body.

6. At most the Committee can exercise its normal oversight mandate and call upon the Minister to brief it on the reasons informing the recommendation and the progress being made in the matter.



Adv C van der Merwe

Legal Adviser



Dr BE Loots

Legal Adviser



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Annexure B

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MEMORANDUM
[Confidential]

TO: Mr E Kholwane, MP
Chairperson of the Portfolio Committee on Communications

COPY: Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Dr BE Loots & Adv CR vd Merwe – Parliamentary Legal Advisers]

DATE: 30 April 2012

REF: 58a/2012

SUBJECT: Role of the PC on Communications in the removal of a member from the SABC Board



MEMORANDUM

[Confidential]

TO: Mr E Kholwane, MP
Chairperson of the PC on Communications

COPY: Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Dr BE Loots & Adv CR vd Merwe – Parliamentary Legal Advisers]

DATE: 30 April 2012

REF: 58a/2012

SUBJECT: Role of the PC on Communications in the removal of a member from the SABC Board

INTRODUCTION

1. Our Office was requested to provide a follow-up opinion on our comments regarding the SABC Board's recommendation to the Minister of Communication ('the Minister') that one of their members be removed. For ease of reference we attach the previous opinion, dated 7 March 2012, as Annexure A.¹
2. Following the concerns expressed by the Minister regarding the fairness of the process followed by the SABC Board ('the Board'),² this opinion will expand on the role of the Board and the legislative mandate of the Portfolio Committee on Communications ('the Committee'), as far as it concerns the steps that can be taken to initiate the removal of a Board member.

¹ Our previous opinion was limited to the process initiated by the Board and therefore we only considered section 15(1)(a), read with section 13, of the Broadcasting Act 4 of 1999.

² These concerns are outlined in a letter from the Minister, dated 17 April 2012 (attached for ease of reference as Annexure B), and an opinion provided by Adv M Mphaga SC on request of the Minister (attached for ease of reference as Annexure C).

ANALYSIS OF LEGISLATIVE CONSIDERATIONS

Appointing Authority

3. We agree with the opinion of Adv M Mphaga, in so far as he indicated that the Minister is not the appointing authority.³ However, we recognise the logic of the Board in communicating their recommendation to the Minister.
4. It is our opinion that the President is the appointing authority in terms of the Broadcasting Act, 4 of 1999 ('the Act').⁴ In this context, the President acts as the head of the executive. Ministers are appointed to head various government departments as representatives of the President in that capacity.⁵
5. Although section 15(2) of the Broadcasting Act, No 4 of 1999 ('the Act') requires the Board to communicate a recommendation regarding the removal of a member based on misconduct to the appointing authority, it is logical that the Board would do so via the Minister, as she acts as the representative of the President in that department.⁶

Extent of the Power in Section 15

6. We are not in agreement with Adv M Mphaga that the Minister has the authority to call on the Committee in terms of section 15(1)(b) to supplement the process initiated by the Board. There is no obligation on the Committee to initiate its section 15(1)(b) process, in reaction to that instituted by the Board in terms of section 15(1)(a).
7. It is our understanding that the section 15(1)(b) option would be activated by the Committee when it, in exercising its oversight mandate, identifies certain issues relating to the conduct of a Board member that justifies an enquiry and possible removal. This is not the case in the current set of circumstances. The concerns relating to the process followed by the Board preceding its recommendation for removal was brought to the attention of the Committee by the Minister.⁷

³ See par 4.9 of Annexure C.

⁴ See Annexure A. In the context of the Act, the Committee is the recommending authority. We disagree with the finding of Adv Mphaga in paragraph 4.8 of his opinion (Annexure C) that the appointing authority consists of the National Assembly and the President jointly.

⁵ See Currie & De Waal *The New Constitutional & Administrative Law: Volume One* (2001)245 – 256.

⁶ This does not constitute or require a delegation of authority by the President to the Minister, as the President remains the appointing authority in terms of the Act.

⁷ We are not privy to the communications on which the complaint against the Board member is based (as referred to in Annexure C). This opinion is therefore only limited to the information contained in the attached Annexures A – D.

8. Furthermore, the section 15(1) subsections are alternatives and not supplementary.⁸ Section 15(1) of the Act addresses two scenarios whereby the removal of a member can be recommended to the appointing authority, namely

"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.⁹*

9. Section 15 makes provision for a member of the Board to be removed by the appointing authority upon the recommendation of either the Board (section 15(1)(a)) or resolution of the National Assembly (section 15(1)(b)). The activation of section 15(1)(a) by the Board therefore places no obligation on the Committee to exercise its section 15(1)(b) powers.¹⁰

10. Section 15 of the Act must be interpreted with due regard to the principle of the separation of powers that underlies the Constitution of the Republic of South Africa, 1996.¹¹ When the Board makes a recommendation to the appointing authority it is acting within the executive sphere and performing executive functions. If section 15(1)(b) was to be read as allowing the Committee to interfere in a section 15(1)(a) process it would amount to the Committee interfering in the communication/reporting line between the Board and the appointing authority (via the Minister). Such a step would undermine the constitutionally protected separation of powers.

11. Furthermore, as the Minister falls within the executive authority, she does not have the mandate to instruct the Committee (a component of the legislature) to exercise

⁸ The 2009 amendment to the Act (attached for ease of reference as Annexure D) clearly highlights that the word "or" (indicating alternatives) was inserted by the legislation in its amendment of section 15(1).

⁹ Emphasis/underlining added. In our opinion the phrasing in section 15 is yet another indication that the National Assembly cannot be regarded as the appointing authority along with the President, as it is legislatively authorised to make a recommendation to the appointing authority. The recommendation authority of the National Assembly in section 15A further highlights this distinction as any other interpretation would undermine the doctrine of separation of powers.

¹⁰ We are however in agreement with the opinion of Adv M Mphaga (Annexure C at paras 4.26 – 4.27), that if the Committee chooses to act in terms of its section 15(1)(b) powers, the steps followed in terms of section 15A must be exercised with due regard to the rules of justice underlying due process.

¹¹ As the supreme law, all legislation must be interpreted in line with the Constitution.

its section 15(1)(b) oversight informed powers, a power that must also be interpreted with due regard to the constitutionally endorsed separation of powers.

12. It must further be noted that the Committee is an extension of the National Assembly. It obtains its legislative authority to make recommendations to the House from the relevant House, whether by means of legislation, rules or referral. As section 15(1)(b) clearly requires a resolution recommending removal by the National Assembly (following a finding to that effect by the Committee), it is not for the Minister to usurp the functions of the house by referring the matter to the Committee for consideration.¹²

LEGAL OPINION

13. As the Board, in exercising its executive functions, has already in terms of section 15(1)(a) recommended that the member be removed, it is for the appointing authority, not the Minister or the Committee, to decide whether he or she will follow the recommendation of the Board.

14. If the Minister chooses to follow the advise of Adv M Mphaga, namely that both the National Assembly and the President jointly acts as the appointing authority responsible for the removal of Board members, then the Minister must communicate the Board's recommendation (along with procedural concerns she has highlighted) to the President and the Speaker of the National Assembly.¹³

15. We nevertheless hold that in our opinion it is only the President that should exercise the final decision whether effect must be given to the recommendation of the Board, as the National Assembly in our view merely acts as the recommending authority in the context of section 15(1)(b).

16. We further hold that the Committee has no role to play in the section 15(1)(a) initiated procedure, that now requires the appointing authority (in our opinion the President) to respond to the recommendation.

¹² The only manner in which the Committee can initiate a resolution of the house is by reporting on a matter referred to it, or a matter incidental to its mandate. As the current issue was referred to the Committee by the Minister it does not fall within either of these categories.

¹³ We nevertheless hold that in our opinion it is only the President that should exercise the final decision whether effect must be given to the recommendation of the Board. If however the National Assembly sees fit to agree with the opinion of the Minister that it has an appointing/removal role to play along with the Minister, then the proper procedure would be for the Speaker of the National Assembly to table the communication by the Minister and refer the issue to the Committee for consideration and report.

17. We caution that the Committee should not interfere in the process, as the concerns with the disciplinary enquiry did not come to the attention of the Committee as an incidental to the exercise of its oversight mandate, and it was also not referred to it by the National Assembly for consideration and report. There is in our view no legal basis for the Committee's involvement in the process initiated by the Board.

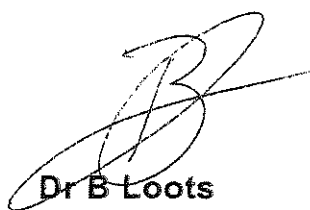
18. The process at current falls squarely within the executive sphere. Interference by the Committee at this stage (when the appointing authority has to respond to the Board's resolution (with due regard to the Minister's procedural concerns) in terms of section 15(1)(a)) would undermine the separation of powers endorsed by the Constitution and might constitute interference with the enquiry instituted by the Board.

CONCLUSION

19. The power of the National Assembly in terms of section 15(1)(b) of the Act is an alternative to the power of the Board set out in section 15(1)(b) and is not a required 'follow-up step'.


20. In our opinion the President and not the National Assembly is the 'appointing authority' that must give due consideration to the recommendation of the Board upon communication thereof by the Minister.

21. Exercising the power set out in section 15(1)(b) in these circumstances might be negatively perceived in respect of the separation of powers doctrine and interference with the functioning of the Board.



Dr B Loots

Parliamentary Legal Adviser



Adv C van der Merwe

Parliamentary Legal Adviser



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Annexure C

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MEMORANDUM
[Confidential]

TO: Mr E Kholwane, MP
Chairperson of the Portfolio Committee on Communications

COPY: Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Dr BE Loots & Adv CR vd Merwe – Parliamentary Legal Advisers]

DATE: 28 August 2012

REF: 58b/2012

SUBJECT: MANDATE OF THE PC ON COMMUNICATIONS IN RESPECT OF
THE SABC BOARD



MEMORANDUM

[Confidential]

TO: Mr E Kholwane, MP
Chairperson of the PC on Communications

COPY: Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Dr BE Loots & Adv CR vd Merwe – Parliamentary Legal Advisers]

DATE: 28 August 2012

REF: 58b/2012

SUBJECT: MANDATE OF THE PC ON COMMUNICATIONS IN RESPECT OF
THE SABC BOARD

INTRODUCTION

1. This opinion provides further advice to the Portfolio Committee on Communications ('the Committee') regarding its mandate in relation to the SABC Board, as a follow-up to a previous opinion (Ref 58a/2012, of which a copy is attached for ease of reference).

BACKGROUND

2. The current process to remove a SABC Board member has commenced in terms of section 15(1)(a) of the Broadcasting Act, No 4 of 1999 ('the Act') and therefore the Act does not provide a process whereby the Committee can intervene in this investigation.
3. In terms of the brief received, the Committee is however still concerned about the SABC Board's ability to continue the investigation process. The Committee

has accordingly requested advice on the scope of its mandate as far as the SABC Board is concerned. This Office was not informed of the reason for the Committee's noted concern and accordingly the opinion is of a general nature as far as the mandate is concerned.

LEGAL ANALYSIS

4. National Assembly Rule 201(b) in paragraphs (i) and (iv) require of portfolio committees to maintain oversight of the exercise of national executive authority (within each committee's portfolio), including the implementation of legislation, as well as over any other body or institution in respect of which it is assigned oversight responsibility. Paragraph (c) of National Assembly Rule 201 further authorises portfolio committees to monitor, investigate, enquire into and make recommendations regarding these entities.
5. Section 15(1)(b) (read with section 15A) of the Act provides that the National Assembly may recommend removal of a member of the SABC Board or the dissolution of the SABC Board to the appointing authority,¹ whereupon the appointing authority must remove the member or dissolve the Board.
6. Section 15A further requires a "due enquiry" and the adoption of a resolution by the National Assembly for such a recommendation to be made. Related to this step, section 15A provides that upon dissolution of the Board an interim Board must be appointed.

APPLICATION OF THE LAW

7. To our knowledge, the process to remove a member of the SABC Board has not yet been finalised. In our previous opinion (Ref 58a/2012) we recommended that as the appointing authority, the President must give due consideration to the recommendation of the SABC Board upon communication thereof by the Minister. We therefore advise that the Committee first request information regarding the President's decision before the Committee can address the SABC Board on its actions in this regard.

¹ In our opinion 58a/2012 a case is made that the President is the appointing authority.

8. As stated in paragraph 2 above, the Act does not make allowance for the Committee to become involved in the current process to remove a member of the SABC Board. A "due inquiry" could however be used to ascertain the basis of the Committee's concerns, whereupon the Committee could decide whether to apply section 15A in relation to one member, to the SABC Board as a whole, if at all.
9. The requirement in section 15A of a "due inquiry" necessitates that the Committee provides the SABC Board with full details of its concerns. As part of such process, the Committee should grant the SABC Board an opportunity to address the Committee on issues that it fears affects the ability of the SABC Board to function properly.
10. As the SABC reports to the Minister (in terms of section 28 of the Act), any request to the SABC to address the Committee should be directed to the Minister.

RECOMMENDATION

11. It is recommended that the Committee requests the Minister to:
 - 11.1.1. Report to the Committee on the progress in referring the SABC Board recommendation to the President as is required by the Act; and
 - 11.1.2. Request the SABC Board (via the Minister) to report to the Committee on its actions related to this investigation, as well as such other matters that gave rise to the Committee's concern regarding the SABC Boards abilities.
12. Upon receipt of these reports, the Committee may then consider whether a recommendation in terms of section 15A of the Act should be made to the National Assembly.



Dr B Loots

Parliamentary Legal Adviser



Adv C van der Merwe

Parliamentary Legal Adviser