

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

CASE NO. CCT 45/23

In the matter between:

MEDIA MONITORING AFRICA TRUST

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Second Respondent

**MINISTER OF COMMUNICATIONS AND
DIGITAL TECHNOLOGIES**

Third Respondent

**SOUTH AFRICAN BROADCASTING
CORPORATION SOC LIMITED**

Fourth Respondent

FILING SHEET

KINDLY TAKE NOTICE THAT the Applicant presents the Replying Affidavit for service and filing.

DATED at JOHANNESBURG on 15 MARCH 2023.



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Ref:PSIMM-202302

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT

AND TO: THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
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Ref: 0630/23/Z53

AND TO: THE SPEAKER OF THE NATIONAL ASSEMBLY
Second Respondent
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AND TO: THE MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES
Third Respondent
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AND TO: SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD
Fourth Respondent
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APPLICANT'S REPLYING AFFIDAVIT

I, the undersigned,

WILLIAM ROBERT BIRD

state under oath:

1. I am an adult male and the Director of the Media Monitoring Africa Trust ("**MMA**"), an inter vivos trust with registration number T1411/93 and with registered offices at Suite No. 2, Art Centre, 22 6th Street, Parkhurst, Johannesburg.

WB KK

2. I deposed to the founding affidavit in this application, and I am duly authorised to depose to this replying affidavit on behalf of MMA.
3. The facts to which I depose are within my personal knowledge, except where it is apparent from the context that they are not, and are to the best of my belief true and correct. Where I make submissions of law, I do so on the advice of the Applicant's legal representatives.
4. I have read the answering affidavit of the First Respondent ("**the President**"), who opposes the relief sought by MMA, and I respond to it in this replying affidavit. No other respondent is opposing the application, and the Fourth Respondent has filed a notice to abide by the Court's decision.
5. I will first respond thematically to the main points in the President's affidavit, and then traverse it ad seriatim.

THEMATIC RESPONSE

6. The President has helpfully narrowed the issues in this matter, for which MMA is grateful.
7. The President concedes the following:
 - 7.1. This Court has exclusive jurisdiction over this application (paras 50 and 88).
 - 7.2. The South African Broadcasting Corporation SOC Ltd ("**SABC**") "is a critical institution in our constitutional democracy"; "it is vital that its independence be preserved"; its Board "is indispensable in this

regard”; and “it is wholly unsatisfactory that the SABC has been without a Board since 15 October 2022” (paras 9-11). Also, “there is a pressing urgency to appoint the SABC Board” (para 51; see also paras 93 and 97).

7.3. It was “critical” for the President to proceed “with due haste” (para 11).

7.4. The Broadcasting Act, 1999 (“**the Act**”) affords the President no discretion to refuse to appoint any or all of the twelve persons chosen by the National Assembly (paras 8.1, 38.1, 55, 72.2, 75, 79 and 85).

8. The President, however, contends as follows:

8.1. He was obliged by the Constitution and his oath of office to refer the matter back to the National Assembly to address certain legality concerns he had (paras 8.2, 8.4, 34, 38.3, 39, 48, 53, 55, 56, 57, 58, 66 and 73.2).

8.2. The appointment process has been delayed for reasons beyond his control (paras 11, 57 and 83).

8.3. He and the National Assembly must be afforded time to resolve the matter (paras 42, 52 and 73.4). The implication of this contention is that MMA’s application is not ripe.

9. MMA respectfully disagrees with these contentions, for the following reasons:

9.1. The President has no power to refer the appointments back to the National Assembly, for any reason.

- 9.2. Even if the President had such a power (which is denied), he had no need to refer the matter back in the present case, as the National Assembly's advice was lawfully executable.
- 9.3. In any event (and even if the President had the power and the need to refer the matter back to the National Assembly, which is denied), he failed to act diligently and without delay.
- 9.4. Finally, the application is ripe for consideration.
10. I will expand on each point in turn.

The President has no power to refer the matter back to the National Assembly

11. Section 79 of the Constitution gives the President a special constitutional power, when presented with a Bill for his assent, to refer it back to the National Assembly for reconsideration if he has reservations about its constitutionality. If, after the process of reconsideration, the President still has reservations, he may not veto the Bill but may refer it to the Constitutional Court. If the Court finds that the Bill is not unconstitutional, then the President must assent to it.
12. This is the one and only instance in which the President is empowered to oversee or second-guess the will of Parliament – the will of the people. And this power is carefully circumscribed. Most significantly for present purposes, this power only exists because the Constitution expressly and exceptionally created it. There is no inherent prerogative residing in the Presidency to exercise oversight over the work of Parliament.

13. Neither the Constitution nor the Act empower the President to determine whether the National Assembly's selection process was unlawful. It follows that they also do not empower him, after he has adjudged that it was unlawful, to remit or refer the matter back to the National Assembly to remedy the defect.
14. Only a court, exercising its powers of judicial review, may do these things. If the President, or the National Assembly itself, or both, believe that the selection was unlawful for some reason, their only recourse is to approach a court to have it set aside. The President, in particular, cannot resort to constitutional self-help, and, having judged for himself that Parliament's work is unlawful, order Parliament to remedy the defects to his satisfaction.
15. Yet that is precisely what the President has purported to do in the present case.
16. In his answering affidavit (at para 8.1 for example), the President is adamant that he has "at no stage assumed or exercised a discretion to refuse to appoint any or all of the twelve persons whom the National Assembly advised me to appoint". But is that not exactly what he has done, and is still doing? He is saying to the National Assembly that he is not willing to appoint the twelve they have chosen, until they correct what he says they have done wrong.
17. The President says he is "obliged" to do this "in order to satisfy [himself] that [he] could make the appointments lawfully", and that this is necessary for him to fulfil his "oath of office and constitutional obligations" (para 8.2). But the President is extraordinarily vague about this. He has not pointed to a specific provision in the Constitution, or anywhere else, that empowers or "obliges" him to second-guess Parliament's work, let alone order them to re-do it to his "satisfaction". Outside

of section 79 of the Constitution (in respect of assenting to Bills), there is no such provision and no such power.

18. If it were necessary to have the National Assembly's work remitted for correction (which it is not, for the reasons set out in the next section), the President would have to approach the only branch of government with the power to achieve this: the judiciary. This would not violate the principles of co-operative governance, as the President claims, because the first resort would be for him to invite the National Assembly to approach the courts jointly with him for a self-review (as all organs of state are obliged to do promptly once alerted to having done something unlawful). Only if the National Assembly declined or unduly delayed, would the President be compelled to litigate *against* the National Assembly (and compelled by the Constitution itself).

19. Finally, it is necessary to point out that the President's claim, that he "at no stage assumed" any discretion to reject Parliament's advice, is contradicted by his own evidence:

19.1. The President says that, on 21 December 2022, he "requested the CVs of candidates from the National Assembly" (para 20). What relevance could the CVs have for the President, if he had no discretion to reject a candidate? This shows that he believed, at that stage, that he had such a discretion.

19.2. On 3 February 2023, the President wrote to the Speaker, not only about the three additional names but also about (a) whether they were security vetted, and (b) whether the National Assembly had considered the objections they had received about several

candidates. The latter two issues could never have been relevant for the President unless he believed he had a discretion to reject one or more of Parliament's choices.

20. In the final analysis, despite his insistence to the contrary, the President has been consistently purporting to exercise a power to review Parliament's process, which he sources in unidentified "constitutional obligations".
21. For the reasons set out above, the President does not have any such power. His constitutional and statutory function is to give effect to the will of Parliament.

The President had no need to refer the matter back to the National Assembly

22. The will of Parliament was clear.
23. The Speaker of the National Assembly wrote to the President on 20 December 2022, stating that "the Assembly in terms of the provisions of the Broadcasting Act No 4 of 1999, recommended the following twelve candidates to fill vacancies on the [SABC] Board: ..." (emphasis added)
24. It was clear what the National Assembly wished. They wished for the President to appoint those twelve.
25. It is true that the Assembly "further recommended the following three additional names to serve as a reserve pool to cater for any eventuality given the period it has taken to complete the process". And it is true that this was not permitted by the Act and was thus unlawful.
26. But it does not matter, on the facts of this case, because no "eventuality" arose. The President's anxiety about the legality of the "reserve pool" is academic, as

none of the selected twelve has died, disappeared or withdrawn. The President should not have held up the appointment of the SABC Board to resolve an issue that is wholly academic.

27. The Speaker was thus right to tell the President, in her letter of 6 February 2023, that “the President should ignore the three names in the reserve pool. According to the legal advice received, the irregular inclusion of the names in the reserve pool does not affect the legal status of the twelve names recommended to the President for appointment to the SABC Board. The three names in the reserve pool are clearly distinguishable from the other twelve names and can be severed without any impact on the latter.”
28. If the President had been asked to choose twelve appointees from a list of fifteen (or more), this would indeed have been unlawful and placed him in an intolerable position, and he would have to approach a court to have the Assembly resolution set aside.
29. But that is not the case here. The President was presented with a list of twelve people whom the Assembly had resolved to appoint. His function was to appoint them, without more. That part of the resolution was wholly lawful, and we do not understand the President to be suggesting otherwise.
30. The “reserve pool” appendage to the resolution was indeed unlawful. We agree on that. But that has no impact on the lawfulness of Parliament’s selection of the twelve, nor on the lawfulness of the President appointing the twelve. A challenge to the President’s appointment of the twelve would not succeed on the basis that the Assembly had also, unlawfully, added a “reserve pool”. And if the President were to approach a court to have the Assembly’s resolution set aside, the court

would, we submit, easily sever the “reserve pool” appendage from the rest, and likely find that the challenge to the appendage was academic and unripe, given that no “eventuality” had arisen to bring the “reserve pool” into consideration.

31. Even if the President had the power to refer the resolution back to the Assembly (which he clearly does not), he would have no need to do so in the present case, as no “eventuality” prevented him from simply appointing the chosen twelve.
32. The President must give effect to the will of Parliament.

The President has failed to act diligently and without delay

33. The President says that the continued delay in the appointment of the SABC has been beyond his control. MMA respectfully disagrees.
34. While we acknowledge that the Speaker only sent the President the list of names on 20 December 2022 – some two months after the end of the last Board’s term – and that this was unacceptable, the President has now more than doubled the period for which the SABC has had no Board. At the time of signing this affidavit, the SABC has had no Board for five months.
35. Thus, while we agree that the National Assembly bears significant blame for a portion of the delay, we maintain that the President has failed to act diligently and without delay as commanded by section 237 of the Constitution. This is true even if he had (a) the power and (b) the need to refer the matter back to Parliament, as he claims (which we deny).
36. Let us trace the chronology.

- 36.1. When the Speaker sent the President the list of names, on 20 December 2022, the SABC had been without a Board for 66 days. The President thus knew he had to act urgently, and he acknowledges this (para 11).
- 36.2. The following day, 21 December 2022, the President requested the CVs of the candidates. This step was prompt, yes, but totally uncalled for, as the President had no business perusing the CVs of candidates if he had no say in whom to appoint (as he now accepts).
- 36.3. The President received these CVs on 10 January 2023. On his version, he only then sought legal advice on the legality of the “reserve pool” (para 22). This delay of 21 days – between receiving the list and seeking legal advice – is completely unexplained. We note that this includes the festive period, however, and some latitude should be afforded.
- 36.4. The President does not disclose when he received the legal advice he had requested on the “reserve pool” (among other issues). One assumes that he must have requested the advice on an urgent basis, and thus that it was received within no more than a week after 10 January 2023. But we simply do not know. We have not been told.
- 36.5. In any event, it was only on 3 February 2023 that the President wrote to the Speaker to “bring concerns about the legality of the process” to the National Assembly’s attention “for its consideration and, if it deems it appropriate, its action”. This was 25 days after he received the CVs. The President could and should have acted much quicker than this.

- 36.6. The Speaker responded on the next working day, Monday 6 February 2023, having obtained urgent legal advice over the weekend it seems. The advice was that the President should ignore the unlawful “reserve pool” and simply appoint the clearly selected twelve. The Speaker thus did not believe that there was any need for further “action” on the part of the National Assembly.
- 36.7. The President again sought legal advice, though he does not disclose when he requested it or when he received it. One has to assume, again, that it was procured on an extremely urgent basis and received within a week of the Speaker’s letter.
- 36.8. In any event, the President did nothing about the matter until 4 March 2023, when he received a submission from the Chair of the Portfolio Committee on Communications and Digital Technologies (“**the Portfolio Committee**”). This was 27 days – close to a month – since the Speaker’s letter. This is despite the fact that MMA had written to the President urgently on both 15 and 22 February 2023 (the latter setting out the timetable for this application).
- 36.9. In an effort to stave off this application, the President’s office wrote to MMA on 23 February 2023, cryptically saying that the President’s effort “to ensure the legality of the process” has “taken longer than initially thought”, but that “the appointment will be made without further delay once the concerns have been clarified”. But, at that stage, the Speaker had already responded fully to the “concerns” over two weeks earlier. On the President’s own version, by that date, he had

not sought legal advice on her response and also had no reason to know or expect that a submission would be forthcoming from the Chair of the Portfolio Committee. This only happened on 2 March 2023. So, there is no explanation of what the President was doing about the SABC matter for the rest of the month after 6 February 2023.

36.10. The President received the Portfolio Committee Chair's "submission" on 4 March 2023 and "immediately sought legal advice" on it (para 30).

36.11. On 9 March 2023 (the day before deposing to his answering affidavit under directions from this Court), the President wrote to the Speaker again, saying that he was not willing to ignore the "reserve pool" as she had advised, and "ask[ing] that the matter be referred back to the Portfolio Committee for its urgent consideration and that [he] be given a clear, legally accurate record of what precisely the National Assembly has determined with respect to the persons they resolved to advise me to consider for appointment to the SABC Board." (I pause to mention that the use of the phrase "consider for appointment", rather than "appoint", contradicts the President's concession that he has no say over whom to appoint.)

37. All of this shows that, despite the President's claim that the delays have all been beyond his control, there were **76 days** when the ball was in the President's court and no action was being taken (other than awaiting and considering legal advice). This was well within the President's control. This kind of paralysis is, with respect,

the opposite of performing constitutional obligations diligently and without delay, as section 237 commands.

38. MMA therefore maintains that the President has failed to perform his obligations diligently and without delay, and persists in seeking a declaratory order to that effect. A standard must be set, for this President and his successors, so that a repeat of this SABC Board crisis is not repeated, whether for the SABC or any other public institution.

The application is ripe

39. The President now argues that the National Assembly should be given time to resolve his concerns to his satisfaction, and thus “the intervention of this Court is, with respect, not necessary at this stage”. The President also criticises MMA for rushing off to Court prematurely.

40. MMA does not accept these contentions.

41. First, the President’s decision to refer the matter back to the Assembly is unlawful and unconstitutional, for the reasons set out above. This Court cannot be asked to await and abide the outcome of a process that is wholly illegal.

42. Second, the Assembly, through the Speaker, has already declined the referral.

- 42.1. The President had brought his concerns to the attention of the Assembly “for its consideration and, if it deems it appropriate, its action”. The Speaker advised the President that he should ignore the “reserve pool”, as the Assembly’s choice of twelve was clear. In effect,

the Speaker advised the President that no further “action” from the Assembly was “appropriate” (to use the language of his letter).

42.2. The President was unsatisfied with the Speaker’s advice and has ordered the Assembly to give him a new “legally valid resolution”, without which he “cannot make the appointments” (para 53 of his affidavit).

42.3. What is more, the President made this ‘referral’ for reconsideration only one day before deposing to his affidavit in these proceedings (9 March 2023). At the time this application was launched (24 February 2023), the (unlawful) referral had not been made. It is not acceptable for the President to subvert the application by attempting to pull the rug of ripeness out from under it. It was and remains properly before this Court and ripe for relief.

43. Third, the President offers no insight into how the National Assembly will go about producing a “legally valid resolution”, nor how long it will take to do so. He asks this Court and the South African people to wait indefinitely, while the SABC slides into chaos and insolvency.

44. Fourth, the argument that ‘the Assembly is currently dealing with it’ is legally bad. It was rightly rejected in *Mazibuko v Sisulu and Another*¹, which concerned the unconstitutionality of Parliament’s rules concerning motions of no confidence in the President. If the rules were unconstitutional, they had to be declared so. The Court had no discretion to refuse this relief on the basis that Parliament was busy

¹ [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (at paras 67-70).

amending the rules. Similarly, if the President's conduct in respect of the SABC Board is unconstitutional, it must be declared so and remedied.

45. Finally, it is extremely unfair for the President to criticise MMA for approaching this Court. It is important to point out that the President kept MMA and the South African public in the dark about the referral process he had (unlawfully) embarked on. His correspondence with the Speaker was concealed until the President filed his answering affidavit, despite MMA's pleas for transparency.

45.1. When MMA first wrote to the President on 27 January 2023, we requested that the President either make the Board appointments by 3 February 2023, or provide written reasons for failing to do so.

45.2. On 3 February 2023, the President wrote to the Speaker with his concerns about the "reserve pool", the security vetting, and the objections to certain candidates. On the same day, his office wrote back to MMA, saying in the vaguest of terms that he had received legal advice on "matters of concern to him" and would take steps to act on it within the next week. The President could and should have been transparent about what his "concerns" were, and what he was doing about resolving them. He could have achieved this easily, by publishing his letter to the Speaker.

45.3. On 6 February 2023, MMA replied to the President, saying it "looks forward to being advised of the actions to be taken by the President". On the same day, the Speaker wrote back to the President, responding comprehensively to his concerns. The President could and should have published this letter from the Speaker, so that the

public would at least know what was causing the delay. Instead, the President left MMA's letter unanswered, and elected to keep his concerns, and the Speaker's response to them, a secret.

45.4. When MMA wrote to the President again on 15 February 2023, begging for his written reasons for the delay, by 17 February 2023, failing which MMA would approach the Court. If the President wanted to avoid litigation, that was his opportunity to be transparent about the cause of the delay and what he was doing about it. Instead, this letter, too, went unanswered.

45.5. Even after MMA wrote to the President on 22 February 2023, indicating that litigation had become unavoidable and setting out the procedural timetable, the President still did not take the public into his confidence. Instead, in his office's response on 23 February 2023, he was again vague and evasive, citing "concerns about the National Assembly process", and saying that his efforts to "ensure the legality of the process before appointment" had "taken longer than initially thought". On the basis of this cryptic riddle, he tried to convince MMA that it was "unnecessary to litigate at this stage". This was wholly misguided. The President missed a third opportunity to be forthright with the public about the reasons for the delay, at a time when they sorely needed reassurance.

45.6. The first time the public learned of the content of the President's concerns, and what he had been doing about them, was when he filed his answering affidavit under directions issued by this Court.

- 45.7. The President, like all organs of state, is constitutionally obliged to be open, transparent, responsive and accountable (sections 1(d) and 195(1)). There is simply no good reason for the President to have been so secretive about his engagements with the National Assembly, and he has not provided any.
46. In any event, even after the long delayed disclosure of the President's concerns and his correspondence with Parliament, MMA remains convinced that litigation was and remains necessary and ripe. The President's endeavours to resolve his concerns are unconstitutional. He has failed to fulfil his constitutional obligation to appoint the twelve Board members clearly selected by the National Assembly, diligently and without delay, and he must be ordered to do so without any further delay.

TRAVERSAL AD SERIATIM

Ad para 1

47. This is admitted.

Ad paras 2 and 3

48. To the extent inconsistent with this replying affidavit and the founding affidavit, it is denied that all the facts and legal submissions in the President's affidavit are correct. MMA in no way suggests that the President is being dishonest; only that he is factually and legally mistaken in some respects.

Ad para 4

49. This is noted.

Ad paras 5 to 7

50. This is admitted.

Ad paras 8.1 to 8.2

51. These averments and submissions are disputed, for the reasons set out above.

Ad para 8.3

52. This is admitted.

Ad paras 8.4

53. For the reasons set out above, it is denied that the President “could not make the appointments on the basis of what appears to be an unlawful decision by the National Assembly”.

Ad para 8.5

54. This is denied, for the reasons set out above.

Ad paras 9 to 10

55. These averments are admitted.

Ad para 11

56. It is denied that the President “could not” make the appointments, or that making the appointments would come “at the expense of [his] adherence to the rule of law”. It is also denied that “[t]he delay in the appointment process has been for reasons beyond [his] control.”

Ad para 12

57. The President’s intention is noted. As explained above, his intended course of action is unconstitutional. He has already been provided with clear advice on the twelve chosen appointees, as far back as 20 December 2022.

Ad para 13

58. As explained above, the President’s genuine concerns are of no legal relevance, as the Constitution and the Act do not give him the power to refer the matter back to the National Assembly. His remedy was to approach a court for judicial review, not to resort to unconstitutional self-help. However, as we have explained above, there would not be any need for such a review.

Ad paras 14 to 30

59. These events are admitted, although MMA does not admit the correctness of the President’s correspondence with Parliament, nor that of the submission from the Chairperson of the Portfolio Committee.

Ad para 31

60. MMA disagrees, as explained above.

Ad para 32

61. This is admitted, save to state that the discretionary power entailed by the listing of three reserve candidates would only come into play upon some “eventuality”, and no “eventuality” arose on the facts. So the issue is academic.

Ad para 33

62. It is denied that this is the correct interpretation of the submission from the Chair of the Portfolio Committee. This will be addressed in argument.

Ad para 34

63. For the reasons set out above, it is denied that the President could not appoint the clearly chosen twelve. And, if he could not (which is denied), his remedy was to seek judicial review, not resort to unconstitutional self-help.

Ad paras 35 to 37

64. These averments are admitted, but MMA does not agree with the contents of the President’s letter to the Speaker.

Ad para 38.1

65. As indicated above, the President clearly did not “fully appreciate” this when he asked Parliament for the CVs of the selected candidates on 21 December 2022, nor when he raised his concern about the vetting process and whether objections to certain candidates had been properly considered. Moreover, as a matter of fact, the President has indeed rejected the advice of the National Assembly, on the incorrect basis that its advice was “unlawful”.

Ad para 38.2 to 38.3

66. As explained above, the President's genuine concerns are of no legal relevance, as the Constitution and the Act do not give him the power to refer the matter back to the National Assembly. His remedy was to approach a court for judicial review, not to resort to unconstitutional self-help. However, as we have explained above, there would not be any need for such a review.

Ad para 38.4

67. As explained above, the President had no power or right to raise those concerns with the National Assembly.

Ad para 38.5

68. It is denied that any current "confusion" on the part of the National Assembly has any bearing on the President's obligation to appoint the clearly selected twelve.

Ad para 39

69. As explained above, the President had no power or right to refer the matter back to the National Assembly.

Ad paras 40 and 41

70. These averments are denied. The President could have invited the National Assembly to approach this Court jointly – this would not violate the principles of co-operative governance. In any event, as explained above, there was not even any need for him to do this, as he could and should have simply appointed the chosen twelve.

Ad para 42

71. These averments are denied, for the reasons set out above.

Ad para 43

72. For the reasons set out above, it is denied that this litigation could be avoided, in light of the President's legally wrong refusal to make the appointments, and his inexplicable lack of transparency about his reasons for doing so.

Ad para 44

73. It is denied that the President should be afforded any more time. The matter is ripe on the existing record.

Ad paras 45 to 46

74. These averments are noted.

Ad paras 47 to 48

75. MMA disagrees, for the reasons given above.

Ad paras 49 to 51

76. The admissions are noted.

77. The denials are disputed, for the reasons given above. While the President concedes that this Court has exclusive jurisdiction, he denies that it is necessary for the Court to exercise the jurisdiction, but does not provide reasons why the Court should not exercise its discretion.

78. MMA further submits that the matter remains extremely urgent. The SABC has been without a Board for over 150 days. The debilitating effects of this have been disclosed by the Group CEO of the SABC, Madoda Mxakwe, during a public hearing between SABC and Parliament's Standing Committee on Public Accounts (SCOPA) on 1 March 2023 (subsequent to the launching of this application).² Mr Mxakwe recorded inter alia the following:

“From a governance point of view, as I had said earlier on, we do crack the whip in terms of poor performance on revenue generation, whether you're looking at the poor performance on audience ratings or from a revenue point of view. Based on that we have developed mitigating plans which we had shared at various levels even with the previous board. Those plans unfortunately cannot be implemented precisely because of the quantum and the threshold involved. As EXCO go we have approved those plans but they do need approval of the board, so essentially all of the plans that have been put in place cannot be implemented precisely because we are where we are as an organization. And it does render the whole institution dysfunctional because if you do not implement the plans that are aimed at closing the gap, whether you're talking about revenue point of view. There is, for example another point here I would need to make, we generate about R70 million in TV licenses and when those contracts come to an end they need to be renewed and we can't renew them precisely because of the threshold involved. That further deepens our issues when it comes to revenue generation so to your point honourable member, the issue that we do not have a board is crippling the SABC.”

79. The matter could hardly be more urgent.

Ad paras 52 to 58

80. MMA disagrees, for the reasons set out above.

² See recording of SCOPA hearing with SABC, accessible at <https://www.youtube.com/watch?v=j5KE6u3c-Wc>.

MB KK

Ad paras 59 to 60

81. The admissions are noted.

Ad para 61

82. MMA disagrees, as explained above.

Ad paras 62 to 68

83. The admissions are noted. It is denied that the President has any “statutory powers” to “ensure the legality of the Board’s appointment”.

Ad para 69

84. These averments are denied, for the reasons given above.

Ad para 70

85. The letter is admitted, but the contents are disputed to the extent set out above.

Ad para 71.1

86. MMA disagrees, for the reasons given above.

Ad para 71.2

87. This is denied. The President was not only “in a position” but was constitutionally obliged to be open and transparent about the steps he was taking. There was no need or justification for him to be secretive or coy about his engagements with the National Assembly. On the contrary, the national crisis and outcry about the

five-month absence of the SABC Board demanded that he make full disclosure, not to MMA but to the public at large.

Ad para 71.3

88. This is noted.

Ad paras 7.1 to 7.3

89. These averments are denied, for the reasons set out above.

Ad paras 73.1 to 73.4

90. The letter is admitted, but its contents are disputed to the extent set out above.

Ad paras 74 to 77

91. MMA disagrees, for the reasons given above.

Ad para 78 to 80

92. The admissions are noted.

93. For the reasons given above, it is disputed that the President has “at no stage laboured under the apprehension that [he has] such a discretion”. His conduct says the opposite.

Ad para 81

94. The admission is noted. The remainder is disputed, for the reasons given above.

VK
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Ad para 82

95. MMA disagrees, as above.

Ad para 83

96. The admission is noted. The remainder is disputed, for the reasons given above.

Ad para 84

97. This will be debated in argument.

Ad paras 85 to 86

98. These averments are disputed, for the reasons given above.

Ad para 87

99. MMA persists that the President has failed to fulfil his constitutional obligations, but withdraws the allegation of contempt.

Ad para 88

100. The admission is noted. The remainder is disputed.

Ad paras 89 to 92

101. These averments are disputed, for the reasons given in the founding affidavit and above.

Ad para 93

102. The admission is noted. It is denied that the President has the power to act in the way that he has done and continues to do.

Ad para 94

103. This is noted.

Ad para 95

104. MMA persists in seeking the relief in the notice of application.

Ad para 96

105. This is noted.

Ad paras 97 to 98

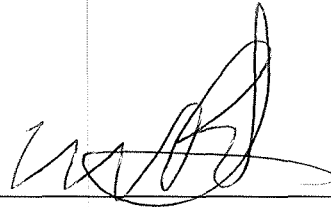
106. The admissions are noted. It is denied that the President's course of action was or is an appropriate or lawful way to ensure that the SABC Board appointments are made lawfully.

Ad para 99

107. MMA persists in seeking the relief in the notice of application.

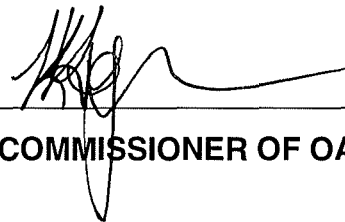
CONCLUSION

108. For the reasons set out in this affidavit, MMA is unpersuaded by the President's submissions, and persists in praying for the relief in the notice of application.



WILLIAM ROBERT BIRD

I hereby certify that the deponent stated that he knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at Rosebank on this the **15th** day of **MARCH 2023**. The Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.



COMMISSIONER OF OATHS

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