

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA  
BRAAMFONTEIN**

**CASE NO: 45/23**

In the matter between:

**MEDIA MONITORING AFRICA TRUST**

**APPLICANT**

and

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

**1<sup>ST</sup> RESPONDENT**

**SPEAKER OF THE NATIONAL ASSEMBLY**

**2<sup>ND</sup> RESPONDENT**

**MINISTER OF COMMUNICATIONS AND  
DIGITAL TECHNOLOGIES**

**3<sup>RD</sup> RESPONDENT**

**SOUTH AFRICAN BROADCASTING  
CORPORATION SOC LIMITED**

**4<sup>TH</sup> RESPONDENT**

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**MEDIA MONITORING AFRICA TRUST**

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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

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**FIRST RESPONDENT'S HEADS OF ARGUMENT**

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## INTRODUCTION

- 1 The Court has requested written submissions on three issues:
  - 1.1 whether the Court's exclusive jurisdiction is engaged;
  - 1.2 whether the President can decline to give effect to the National Assembly recommendation if he considers its recommendation to be tainted by illegality; and
  - 1.3 if so, whether there is an illegality in the present case justifying the President's failure to make the appointments.
  
- 2 We address these issues in turn below. In brief, our submissions are as follows:
  - 2.1 The Court's exclusive jurisdiction is not engaged.
  - 2.2 The President has a constitutional duty to take appropriate action if he has reason to believe that the National Assembly's decision may be tainted by illegality.
  - 2.3 This Court has not been called upon to determine the legality of the National Assembly's decision. Both MMA and the President agree, however, that it is apparently unlawful. Its import is, in the very least, unclear. The President has acted lawfully in communicating these concerns to the National Assembly.
  
- 3 At the outset, we point out that the President fully acknowledges the critical constitutional importance of an independent and effective national broadcaster

and that the delay in appointing a Board for the SABC is wholly unsatisfactory.<sup>1</sup> However, the effect of the relief that the Applicant seeks would be to force the President to appoint a Board in circumstances where he genuinely believes that the National Assembly resolution is unlawful.

## THE COURT DOES NOT HAVE EXCLUSIVE JURISDICTION

4 MMA claims that the President has conceded that the Court has exclusive jurisdiction over this case.<sup>2</sup> This is incorrect.

4.1 In the President's answering affidavit, he accepts that only this Court would have jurisdiction to grant the order in the terms sought by the applicant ("**MMA**") at prayer 4 of the notice of motion,<sup>3</sup> that is a declaration that the President has "*failed to fulfil this obligation in terms of section 84(2)(e) of the Constitution*".<sup>4</sup>

4.2 The President does not accept, however, that it is competent for this Court to exercise exclusive jurisdiction over the application on the facts of this case.<sup>5</sup>

5 In any event, a debate about a concession is besides the point. It is ultimately for this Court to determine whether jurisdiction is satisfied. A party to litigation cannot

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<sup>1</sup> AA p348 para 11.

<sup>2</sup> RA p 397 para 7.1.

<sup>3</sup> AA p 362 para 50 and p 370 para 88.

<sup>4</sup> Notice of Motion p 2 prayer 4.

<sup>5</sup> AA p 362 para 50 and 88.

(whether by concession or otherwise) confer jurisdiction on a court which it does not possess.<sup>6</sup> MMA appears to accept this as a matter of law.<sup>7</sup>

6 Section 167(4)(e) of the Constitution provides:

*“Only the Constitutional Court may-*

*...*

*(e) decide that Parliament or the President has failed to fulfil a constitutional obligation”.*

7 In *EFF1*, the Constitutional Court held unanimously as follows:<sup>8</sup>

7.1 Section 167(4)(e) must be narrowly interpreted.<sup>9</sup>

7.2 Determining whether the Court’s exclusive jurisdiction is engaged in terms of section 167(4)(e) is not a superficial function of a party merely alleging that a constitutional obligation has been breached.<sup>10</sup>

7.3 There is a two-step test:

*“First, it must be established that a constitutional obligation that rests on the President ... is the one that allegedly has not been fulfilled. Second, that obligation must be closely examined to determine whether it is of the kind envisaged by s 167(4)(e).”<sup>11</sup>*

<sup>6</sup> Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC 2006 6 SA 91 (C).

<sup>7</sup> MMA Heads para 9.

<sup>8</sup> Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC).

<sup>9</sup> Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC) para 17.

<sup>10</sup> Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC) para 16.

<sup>11</sup> Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC) para 16.

7.4 The constitutional obligation concerned must be one expressly and exclusively conferred on the President alone and not one which he shares, for example, collectively with cabinet.<sup>12</sup>

7.5 The Court explained that:

*“President-specific obligations like some of those set out in s 84 of the Constitution or obligations imposed on the President through the exercise of powers expressly conferred by the Constitution on those who then exercise them against the President, on their own or coupled with those in s 83, respectively, are master keys to this court's exclusive jurisdiction in terms of s 167(4)(e).”<sup>13</sup> (Emphasis added.)*

8 As we demonstrate to follow, MMA has failed to fulfil either leg of the *EFF1* test.

#### **No constitutional obligation is engaged**

9 First, properly construed, the application does not allege the President's failure to fulfil a constitutional obligation.

10 Section 84(2)(e) of the Constitution provides, in relevant part:

*“Powers and functions of President*

(1) *The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.*

(2) *The President is responsible for-*

...

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<sup>12</sup> Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC) para 27.

<sup>13</sup> Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC) para 39.

(e) *making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive*". (Emphasis added).

- 11 MMA claims that section 84(2)(e) of the Constitution elevates statutory appointment obligations to constitutional obligations.<sup>14</sup> It provides no authority or argument to support the proposition. It is wrong.
- 12 Section 84(2)(e) does not impose a constitutional obligation on the President to make any appointments at all. It merely empowers him to do so where legislation or other provisions of the Constitution "require" him to make such appointments.
- 13 Theoretically, a failure to appoint the SABC Board could infringe the obligation to appoint under section 13 of the Broadcasting Act 4 of 1999 but it is only a failure to exercise a power under section 84(2)(e) of the Constitution. It can never be a failure to fulfil a constitutional obligation because section 84(2)(e) of the Constitution does not impose any appointment duty at all. The relief sought under prayer 4 of the notice of motion would therefore be incompetent in its current form.
- 14 As held in *EFF1*, exclusive jurisdiction is not afforded to a litigant merely because the pleadings say so.<sup>15</sup> Simply because MMA seek a declarator that the President has breached a constitutional obligation does not of its own accord establish exclusive jurisdiction.
- 15 It is therefore legally unsustainable for MMA to rely on section 84(2)(e) of the Constitution in an effort to establish exclusive jurisdiction when the foundation of

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<sup>14</sup> MMA Heads para 13.

<sup>15</sup> *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 16.



the application which the Court is called to determine relates to the nature and scope of the President's duties under section 13 of the Broadcasting Act.

16 *Von Abo* and *EFF1* merely cite section 84 of the Constitution generally as examples of Presidential functions, some of which "may" invoke the Court's exclusive jurisdiction.<sup>16</sup> The judgments are not authority for the proposition that any invocation of section 84 confers exclusive jurisdiction on the Constitutional Court.

17 The application therefore does not engage the Court's exclusive jurisdiction because it does not require that the Court find that the President infringed a constitutional obligation. This accords with the restrictive interpretive approach to section 167(4)(e) as established in *Von Abo*<sup>17</sup> and affirmed in *EFF1*.<sup>18</sup>

**The appointing power is not of a nature contemplated in section 167(4)(e)**

18 Second, the President's appointing power is not of a nature contemplated by section 167(4)(e) of the Constitution, as purposively interpreted.

19 In *EFF1*, the Court explained with respect to the second leg of the exclusive jurisdiction test that:

*"obligations that are readily ascertainable and are unlikely to give rise to disputes' do not require a court to deal with 'a sensitive aspect of the separation of powers and may thus be heard by the High Court.'"*<sup>19</sup>

<sup>16</sup> *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) para 37 and *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 39.

<sup>17</sup> *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) paras 35-36.

<sup>18</sup> *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 17.

<sup>19</sup> *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 18, in reference to *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 25.

- 20 If the relevant constitutional obligation is one in which “*crucial political questions are likely to arise*”, this will “*entail an intrusion into sensitive areas of the separation of powers*” and “*the demands for [the Constitutional Court] to exercise its exclusive jurisdiction will have been met*”.<sup>20</sup> Such a purposive interpretation, the Court explained, was important to ensuring comity between the judicial, executive and legislative branches of government by reserving politically consequential issues for the highest court.<sup>21</sup>
- 21 The President’s appointing powers with respect to the SABC Board are the opposite of the kind of power contemplated in *EFF1* that should be preserved for this Court’s exclusive domain.
- 21.1 On MMA’s own version – with which the President agrees – the President’s function under section 13 of the Broadcasting Act is merely a formal one.<sup>22</sup> The scope of his powers are readily ascertainable from the Statute.
- 21.2 The President is not involved in the shortlisting, interviewing, vetting and selection processes for SABC Board candidates, which is the sole domain of the National Assembly. As MMA says, this accords with the National Assembly’s composition being a representative, multiparty and participatory body.<sup>23</sup>

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<sup>20</sup> *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 18, in reference to *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) paras 24 – 26.

<sup>21</sup> *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 19.

<sup>22</sup> FA p 26 para 79; AA para 79; MMA Heads para 12.

<sup>23</sup> FA p 12 para 24; AA p 368 paras 78 to 80.

21.3 The President has no discretion on who to appoint.<sup>24</sup> He can only act on the National Assembly's advice.

21.4 The President's function is therefore neither politically sensitive nor politically consequential. The adjudication of the President's functions does not intrude into those most sensitive aspects of the separation of powers, which ought to be preserved for this Court's exclusive jurisdiction.

22 The application therefore also fails to meet the second leg of the *EFF1* test.

23 The application should therefore be dismissed on the basis that it neither engages the Court's exclusive jurisdiction, nor establishes exceptional circumstances to be heard in this Court as a court of first instance.

## THE PRESIDENT'S DUTIES WHEN CONFRONTED WITH APPARENT ILLEGALITY

24 The second issue which the Court has asked the parties to address is whether the President can decline to give effect to the National Assembly's recommendation if he considers it to be tainted by illegality.

25 As this Court held in *Hugo*:

*"Ultimately the President, as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands."*<sup>25</sup> (Emphasis added.)

<sup>24</sup> FA p 27 para 85; AA p 368 para 79.

<sup>25</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 65

26 The President has multiple legal obligations in the context of this case, and he is obliged to fulfil them all.

26.1 First, the President has a statutory duty to appoint 12 persons to the SABC Board on the advice of the National Assembly.<sup>26</sup> He has no discretion to choose who to appoint. He can only appoint the 12 persons who the National Assembly advises him to appoint. He must give effect to the will of Parliament, assuming that its will is clearly ascertainable.

26.2 Second, the President has a constitutional duty to uphold the rule of law.

26.3 As stated in **Merafong**, it is his duty to “*rectify unlawfulness*” should he become aware of it.<sup>27</sup> As held in **Khumalo**, this means that he has “*an obligation to act to correct ... unlawfulness, within the boundaries of the law and the interests of justice.*”<sup>28</sup>

26.4 To the extent that the President is aware of a potential illegality in the National Assembly’s advice, he may not simply ignore it and proceed to make the appointments despite it. This duty flows from the principle of legality and the rule of law in section 1 of the Constitution and the President’s oath of office.<sup>29</sup>

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<sup>26</sup> Broadcasting Act section 13(1).

<sup>27</sup> Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC) para 61.

<sup>28</sup> Khumalo v MEC for Education 2014 (5) SA 579 para 35.

<sup>29</sup> Schedule 2 to the Constitution section 1: In terms of his oath of office, the President is sworn to “*obey, observe, uphold and maintain the Constitution and all other law in the Republic*” and to discharge his duties to the best of his knowledge and ability and being true to the dictates of his conscience.

26.5 Third, the President has a constitutional duty to respect the powers and functions of the other arms of government, including to respect the authority of the Courts and the National Assembly respectively.

26.6 On one hand, the President cannot simply ignore the National Assembly's resolution on the basis that he considers it to be invalid.<sup>30</sup> He cannot resort to self-help in this regard, because in law a *prima facie* unlawful decision stands until it is "*challenged by the right actor in the right proceedings*", the courts being the arbiter of legality.<sup>31</sup>

26.7 On the other hand, the President must exercise his powers and perform his functions in a manner that does not encroach on those of the National Assembly.<sup>32</sup> The President is constitutionally obligated to cooperate with the National Assembly in mutual trust and good faith, which obligation includes the duties, amongst others, to:

26.7.1 assist and support the National Assembly;<sup>33</sup>

26.7.2 inform the National Assembly of and consult with the National Assembly on matters of common interest;<sup>34</sup>

26.7.3 coordinate his actions with the National Assembly;<sup>35</sup> and to

26.7.4 avoid legal proceedings against the National Assembly.<sup>36</sup>

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<sup>30</sup> Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC) para 41.

<sup>31</sup> Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC) para 43.

<sup>32</sup> Section 41(1)(g) of the Constitution.

<sup>33</sup> Section 41(1)(h)(ii) of the Constitution.

<sup>34</sup> Section 41(1)(h)(iii) of the Constitution.

<sup>35</sup> Section 41(1)(h)(iv) of the Constitution.

<sup>36</sup> Section 41(1)(h)(vi) of the Constitution.

26.8 Therefore, if the President is faced with an unclear or potentially unlawful National Assembly resolution, he must act, and he must do so within the boundaries of the law and interests of justice as *Khumalo* described. He was accordingly obligated to:

26.8.1 communicate his concerns to the National Assembly in a manner that properly respected its substantive powers under section 13 of the Broadcasting Act;

26.8.2 afford the National Assembly the opportunity to consider the issue and clarify its decision if need be; and

26.8.3 to avoid rushing to Court to set aside the decision as a first point of recourse.

26.9 This is precisely what the President did.

## **WHETHER AN ILLEGALITY EXISTS**

27 MMA's application calls on this Court to determine whether the President has failed to fulfil his obligations under section 13(1) of the Broadcasting Act. The legality or otherwise of the National Assembly's decision is not strictly before this Court. Certainly, MMA's application does not call upon the National Assembly to defend its decision.

28 It is apparent, however, that the National Assembly's decision has presented the President with a difficult situation in that the advice it purports to give the President on who to appoint may be unlawful and certainly is unclear. The

question which MMA's application demands that the Court determine is whether the President's response to that resolution is unconstitutional?

29 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.*"

30 MMA and the President largely agree on how the provision should be interpreted.

30.1 Textually, there is nothing in the Broadcasting Act which expressly confers on the President any discretion on whom to appoint. To the contrary, the words "*must be appointed ... on the advice of the National Assembly*" convey that the President lacks any discretionary power on who or how many non-executive members he may appoint.

30.2 On a purposive interpretation, the President's powers in the appointment process ought to be curtailed because the Broadcasting Act seeks to protect the SABC's independence and impartiality from executive interference.<sup>37</sup>

30.3 Lower courts have affirmed this interpretation.<sup>38</sup>

30.4 Several comparative decisions from other jurisdictions have endorsed restrictive interpretations of similar phrases in relation to executive appointment powers.

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<sup>37</sup> See section 192 of the Constitution as read with section 2 of the Broadcasting Act.

<sup>38</sup> *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation Soc Limited* 2017 JDR 1686 (GJ) paras 76 – 77.

30.4.1 This is the case of the majority of the Botswana Court of Appeal, which restrictively interpreted the President's judicial appointment powers which had to be made "*acting in accordance with the advice of the Judicial Service Commission*" ("**JSC**").<sup>39</sup>

30.4.2 In *Misick and Others v the Queen* (2015) 1 WLR 1215 (PC), Lord Hughes held that the use of a similar phrase in the Constitution of the Turks and Caicos Islands meant that the appointments were made in effect by the JSC.

30.4.3 In *Kong v Attorney General* [2011] SGCA 9, the Singapore Court of Appeal held that the words "*on the advice of Cabinet*" in the Singapore Constitution did not entitle the President to act against the advice of Cabinet.

30.4.4 In *Makenete v Lekhanya and Others* [1990] LSHC 1, the Lesotho Chief Justice held that the King's authority to act "*in accordance with the advice of the Military Council*" permitted the King no discretion to act contrary to the Council's advice.

30.4.5 In *Supreme Court Advocates-on-Record Association and Another v Union of India* [2015] INSC 776, the Supreme Court of India held that a requirement for the President to "*act in accordance with the advice*" of the Council of Ministers meant that

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<sup>39</sup> The Law Society of Botswana and Another v the President of Botswana and Others (Unreported) Court of Appeal Civil Appeal No CACGB-031-16 (19 April 2017) [2017] BWCA 2. See the decisions of Lesetedi JA and Brand JA, Lord Hamilton JA and Lord Abernathy JA. We note in particular, Lesetedi JA and Brand JA considered that, notwithstanding the President's limited discretion, if he had concerns about the JSC's recommendations, he should draw them to the JSC's attention to give it an opportunity to reconsider its recommendation without directing the JSC to act in any particular way.



the President was bound to exercise his functions in consonance with the advice given to him.

31 Therefore, to the extent that the National Assembly's resolution purports to confer on the President any discretion in respect of who he appoints to the SABC Board, the resolution is unlawful.

32 On its face, the National Assembly's resolution purports to confer discretion on the President to appoint 12 Board members from amongst 15 candidates. As indicated in the minutes, the resolution states that the question put to the Assembly and agreed to was:

*"Dr R Home, Adv T Thipanyane, Mr K Ramukumba, Prof F Kruger, Ms N Batyi, Ms P Magopeni, Ms A Makhwanya, Ms M Moonsamy, Ms R Motaung, Mr D Maimela, Mr D Mohuba, Mr M Tsedu, Mr Z Matthews (additional name), Ms P Kadi (additional name) and Mr Q Green (additional name) accordingly recommended for appointment to the South African Broadcasting Corporation Board."*<sup>40</sup>

33 The National Assembly's advice on who the President should appoint is therefore not clear from the minutes of the resolution. The responses from the Speaker and the Portfolio Committee on Communications and Digital Technologies ("**Portfolio Committee**") to the President's queries served only to muddy the waters.

33.1 The Speaker said that the resolution's inclusion of a "reserve pool" of candidates (that is, the three "additional names") was "irregular" and had

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<sup>40</sup> Annexure "AA1" p 376.

*“no legal basis” but that “the President should ignore the three names in the reserve pool”.*<sup>41</sup>

33.2 MMA conveniently ignores the submissions subsequently provided by the Chairperson of the Portfolio Committee. Therein, the Chairperson says that the *“reserve pool”* of candidates were named *“in case of any eventuality”*, which he broadly describes as taking into account if a candidate’s security status may have changed, if they may no longer be available *“for various reasons”*, *“and any other matter that may be raised which could be raised by stakeholders post the Committee process”*.<sup>42</sup>

33.3 Critically, the Chairperson said that the Speaker’s letter has the effect of *“altering the resolution adopted by the National Assembly”*, thus indicating that it was both the intention and effect of the resolution to nominate all 15 candidates for appointment at the President’s discretion.

33.4 On the Chairperson’s version, the National Assembly resolution was plainly intended to confer on the President discretionary powers on who to appoint. This included a power for the President to determine whether there existed *“any eventuality”* or any subsequent reason which *“could”* be raised by a stakeholder to appoint a candidate from amongst the *“additional names”*.

34 Both on its face, and in particular as interpreted by the Chairperson of the Portfolio Committee, the National Assembly resolution would appear to conflict

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<sup>41</sup> Annexure “AA4” p 380.

<sup>42</sup> Annexure “AA6” p 383.

with section 13 of the Broadcasting Act. MMA also considers that the resolution is unlawful.<sup>43</sup>

35 Further to the legality concern, the resolution – and the National Assembly’s intention therein – is unclear. The President cannot act on the National Assembly’s advice if there is no clarity on what it is advising.

36 As appears from MMA’s heads of argument, and from the letter from the Speaker dated 5 April 2023<sup>44</sup>, one of the candidates has subsequently withdrawn his candidacy for appointment.<sup>45</sup> The difficulty contemplated by the President has come to fruition. If he appoints 12 candidates from amongst the 15 nominated by the National Assembly, he will be exercising a discretion that the Broadcasting Act does not afford him.

## THE PRESIDENT’S CONDUCT

37 The President has acted lawfully in the face of an unclear and possibly unlawful resolution.

38 The President did not “*reject*” or “*veto*” the advice of the National Assembly as MMA alleges.<sup>46</sup> This allegation underlies an implication of bad faith which is wholly unsustainable on the facts. It is also directly contradicted by the President’s explicit statement that he does not consider he has the power to reject the National Assembly’s advice and he has no intention of doing so.<sup>47</sup>

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<sup>43</sup> FA p 27 para 77; RA p 402 para 25.

<sup>44</sup> First Respondent’s Supplementary Affidavit, para 11

<sup>45</sup> MMA Heads para 50.

<sup>46</sup> MMA Heads paras 22 – 26.

<sup>47</sup> AA p 359 para 38.1, p 363 para 55, p 368 paras 75 and 79.

39 The President is also not arrogating a power to “*review*” the National Assembly’s advice as MMA claims.<sup>48</sup> He therefore cannot be said to be resorting to self-help.

40 The President’s letters make the nature of his conduct clear.

40.1 In his letter of 3 February 2023 to the Speaker, the President says he was “*grappling with a few concerns*” and considers it his duty to bring these concerns “*about the legality of the process*” to the National Assembly’s attention “*for its consideration and, if it deems it appropriate, its action*”.<sup>49</sup> He emphasises that it is for the National Assembly to decide “*who becomes a member of the SABC Board*”.<sup>50</sup>

40.2 In his letter of 9 February 2023, the President asks only that in light of the contradictory communications he received from the Speaker and Chairperson of the Portfolio Committee respectively, that he urgently “*be given a clear, legally accurate record of what precisely the National Assembly has determined*”.<sup>51</sup>

41 Importantly, the President simply sought clarity from the National Assembly in the face of conflicting instructions from the Speaker and the Chair of the Committee about the content and import of the National Assembly resolution.

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<sup>48</sup> MMA Heads para 22.

<sup>49</sup> Annexure “AA3” p 378 paras 2 – 4.

<sup>50</sup> Annexure “AA3” p 378 para 5.

<sup>51</sup> Annexure “AA7” p 389 para 5.

- 42 At the time of compiling these heads, the Portfolio Committee is seized with the President's request. The Portfolio Committee intends to report to the National Assembly for further action.<sup>52</sup>
- 43 On MMA's approach the President must either:
- 43.1 make the appointments where the advice he received on who to appoint is unclear and possibly unlawful; or
  - 43.2 without communicating these concerns to the National Assembly, rush to Court to set the resolution aside on review, only prolonging the process to finalise the Board appointments.
- 44 Were this Court to uphold MMA's case, it would stymie the proper administration of government, obstruct comity and undermine cooperation between the executive and legislative branches of government as required by the Constitution. Moreover, it would require the President to exercise a discretion he does not have in law.
- 45 A finding for MMA would effectively be to declare that it is unlawful for the President to communicate legality concerns to Parliament where they exercise mutually dependent statutory functions. This can never be the case.

## **CONCLUSION**

- 46 The President has been placed in an invidious position. A potentially unlawful National Assembly resolution has been presented to him in circumstances where his exercise of his appointing powers under the Broadcasting Act are time

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<sup>52</sup> Speaker's explanatory affidavit p 431 paras 18 – 19. First Respondent's Supplementary Affidavit

sensitive. While he is acutely aware of the urgent need to appoint the SABC Board,<sup>53</sup> he is also aware of the dire consequences to the SABC were he to do so on an unlawful basis.<sup>54</sup> The President took legal advice, considered his position, and has acted as best he believed he should in order to uphold his constitutional duties. His conduct has been lawful. The application should therefore be dismissed on the merits.

47 The Court's exclusive jurisdiction is in any event not engaged. MMA have provided no satisfactory reason why it ought to be entitled to priority over other litigants to approach the Court directly. The application should therefore be dismissed. The President does not seek a costs order in light of the *Biowatch* principle.<sup>55</sup>

**NASREEN RAJAB-BUDLENDER SC**

**ANNABEL RAW**

Chambers, Sandton

6 April 2023

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<sup>53</sup> AA para 42.

<sup>54</sup> AA para 98.

<sup>55</sup> *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) para 56.

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA  
BRAAMFONTEIN**

Case No: 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

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**FIRST RESPONDENT'S TABLE OF AUTHORITIES**

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	<b>AUTHORITY</b>	<b>CITATION IN HEADS</b>
	<b>DOMESTIC CASE LAW</b>	
1.	Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC)	P 19 fn 55

2.	Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC 2006 6 SA 91 (C).	P 3 fn 5
3.	Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC)	P 7 fn 18 – 19
4.	Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC)	P 4 fn 7 – 12; p 5 fn 14 – 15; p 7 fn 17 - 20
5.	Khumalo v MEC for Education 2014 (5) SA 579	P 10 fn 27
6.	Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC)	P 10 fn 26, 29 – 30; p 18 fn 51
7.	President of the Republic of South Africa and Others v South African Dental Association and Another 2015 (4) BCLR 388 (CC)	P 18 fn 50
8.	President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)	P 9 fn 24
9.	S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation Soc Limited 2017 JDR 1686 (GJ)	P 12 fn 37
10.	Von Abo v President of the Republic of South Africa 2009 (5) SA 345 (CC)	P 5 fn 15; p 7 fn 16
	<b>FOREIGN CASE LAW</b>	
11.	The Law Society of Botswana and Another v the President of Botswana and Others (Unreported) Court of Appeal Civil Appeal No CACGB-031-16 (19 April 2017) [2017] BWCA 2	P 13 fn 38
12.	Kong v Attorney General [2011] SGCA 9	P 13 para 27.4.3
13.	Makenete v Lekhanya and Others [1990] LSHC 1	P 13 para 27.4.4



14.	Misick and Others v the Queen (2015) 1 WLR 1215 (PC)	P 13 para 27.4.2
15.	Supreme Court Advocates-on-Record Association and Another v Union of India [2015] INSC 776	P 14 para 27.4.5