



**Attn: His Excellency, President MC Ramaphosa**  
**President of the Republic of South Africa**  
Union Buildings  
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Pretoria

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Your reference

Our reference

Date

D Milo /N Padayachee /Z Ranisi  
3030652

2 April 2019

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Dear Honourable President

## **IN RE: THE SOUTH AFRICAN BROADCASTING CORPORATION (SOC) LIMITED (“the SABC”)**

1. As you are aware, we act on behalf of:
  - 1.1 Media Monitoring Africa, a non-profit organisation which promotes ethical and fair journalism that supports democracy and human rights; seeks to protect the constitutional right to freedom of expression, and advocates for the free flow of information to the public on matters of public interest; and
  - 1.2 S.O.S Support Public Broadcasting Coalition, a non-profit, voluntary association which supports the strengthening of public and community broadcasting in the public interest, primarily by monitoring and assisting with the resolution of problems facing the SABC, (referred to collectively as (“**our clients**”).
2. As set out in our previous letters, our clients are deeply concerned about the delays in appointing candidates to fill the 8 vacancies on the SABC’s Board as it is inquorate and cannot function until their appointment by the President.
3. Our clients were encouraged that the list of recommended candidates was approved by

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**Senior Partner:** JC Els **Managing Partner:** SJ Hutton **Partners:** BW Abraham RB Africa M Adderley NG Alp RL Appelbaum DC Bayman KL Beillings AE Bennett AP Blair DHL Booyen AR Bowley MS Burger RI Carrim T Cassim SJ Chong A Christie KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland JH Davies PM Daya L de Bruyn PU Dela JHB de Lange M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver W Drue HJ du Preez CP du Toit SK Edmundson KH Eiser AE Esterhuizen MJR Evans AA Felekis G Fitzmaurice JB Forman C Gabriel CP Gaul KL Gawith OH Geldenhuys MM Gibson H Goolam CI Gouws PD Grealy JM Harvey MH Hathorn JS Henning KR Hillis S Hockey CM Hofeld PM Holloway AV Ismail ME Jarvis CA Jennings CM Jonker S Jooste LA Kahn ACR Katzke M Kennedy A Keyser MD Kota JC Kraamwinkel M Kyle J Lamb E Louw L Marais S McCafferty MC McIntosh SJ McKenzie CS Meyer AJ Mills D Milo NP Mngomezulu M Moloi LE Mostert VM Movshovich RA Nelson G Niven ZN Ntshona M Nxumalo AN Nyatsumba L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane BA Phillips MA Phillips D Ramjettan GI Rapson Z Rawoot K Rew SA Ritchie NJA Robb DC Rudman WJ Rysbergen G Sader M Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh J Smit RS Smith MP Spalding PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor TK Thekiso PZ Vanda PP van der Merwe SE van der Meulen CS Vanmali JE Veeran B Versfeld MG Versfeld TA Versfeld DM Visagie EME Warmington J Watson AWR Westwood RH Wilson M Yudaken **Chief Operating Officer:** SA Boyd

the National Assembly on **Tuesday, 19 March 2019** and that the list of candidates by now will have been sent to the Office of the President for the recommended members to be appointed.

4. Our clients are concerned that it has been 2 weeks since the National Assembly approved the candidates, but you have not yet appointed them.

5. Our clients again emphasise that:

5.1 a functioning Board is critical to ensuring the SABC's independence;

5.2 The Constitutional Court has held that the public broadcaster facilitates the public's rights to freedom of information and the media, as well as their right to vote;

5.3 The SABC's role in these rights is particularly significant given the upcoming national elections in May 2019. The most critical period for a constitutional democracy to have a properly functioning and independent public broadcaster is in the build-up to, and coverage of, national elections.

6. Our clients point out that:

6.1 Section 13 of the Broadcasting Act provides that “[t]he twelve non-executive members of the Board must be appointed by the President on the advice of the National Assembly.”

6.2 The phrase “*on the advice of*” must be contrasted with the text used in relation to numerous other appointments and decisions, where the President is required to make an appointment or decision “*after consultation with*” a given entity.

6.3 Where the President is required to act “*on the advice of*” an entity, the President has no discretion. Once the twelve people have been selected by the National Assembly and the names are sent to the President, the President is obliged to appoint those persons.

7. This has been made clear by respected academics and courts. For instance:

7.1 In *Cape Bar Council v Judicial Service Commission and Others* [2011] ZAWCHC 388; 2012 (4) BCLR 406 (WCC) at para 21 the court held:

*“The JSC serves a unique and crucial function in the South African judicial system, whether one accepts the construction that it has sole responsibility for deciding who should be appointed as judges to the various High Courts, or whether one inclines to the view that the President retains some limited form of discretion as the respondents contended. The latter construction is however difficult to reconcile with the imperative terms of s 174(6) of the Constitution.”*

- 7.2 Christina Murray and Richard Stacey in Constitutional Law of South Africa note that: “The term ‘on the advice of’ means ‘on the instruction of’ and leaves no discretion.”<sup>1</sup>
- 7.3 Iain Currie and Johan de Waal, discussing the process of judicial appointment state:
- “Others judges of the superior courts are appointed by the President on the advice of the [Judicial Services] Commission which means that the President is bound to accept the decision of the Commission and appoint as judges the persons that it recommends, effectively removing executive control over the appointment of superior court judges.”<sup>2</sup>*
8. Section 13(3) of the Broadcasting Act provides that the President “*must designate one of the members referred to in subsection (2) as the chairperson and another member as the deputy chairperson, both of whom must be non-executive members of the Board.*” Our clients respectfully submit that as the Board presently has a chairperson Mr Bongumusa Makhatini who has been functioning very well (particularly under extremely challenging circumstances) the President should exercise his power in terms of section 13(3) simply to re-designate Mr Bongumusa Makhatini as the chairperson.
9. Accordingly:
- 9.1 Our clients request that your office confirms that the President has indeed received the list of candidates from the National Assembly as well as clarifying why there has been a delay in the appointment. Please respond by **Friday, 5 April 2019**; and
- 9.2 Our clients urge the President to appoint the recommended candidates by **Wednesday, 10 April 2019**, failing which our clients will consider the legal avenues open to them.
10. All our clients’ rights are reserved.

Yours faithfully

**WEBBER WENTZEL**

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Partner

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*Letter sent electronically without signature.*

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<sup>1</sup> Woolman et al *Constitutional Law of South Africa* 18-5 fn 3. See also H Corder “Judicial Authority in a Changing South Africa (2004) 24 *Legal Studies* 253 at 263; and C Murray “Who Chooses Constitutional Court Judges” (1999) 116 *SALJ* 865 at 865.

<sup>2</sup> I Currie and J de Waal *New Constitutional and Administrative Law* at 304.