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Striving for open and trusted information

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Dear Ms Kgatshe

MMA: WRITTEN SUBMISSIONS ON THE DRAFT AMENDMENT TO THE MUNICIPAL ELECTIONS REGULATIONS.

1. INTRODUCTION

- 1.1 On 31 October 2025 in Notice 6785 published in Government Gazette No. 53608, written representations were invited on the Draft Amendment to the Municipal Party Elections Broadcasts and Political Advertisements Regulations, 2011 (the Draft Amendment Elections Regs). The closing date for submissions was extended to 23 January in Notice 6948, published in Government Gazette No 53856 dated 15 December 2025 (the Extension Notice).
- 1.2 Media Monitoring Africa (MMA), founded in 1993 is currently rebranding to Moxii Africa, is a public interest organisation that strives for open and trusted information by focusing on instilling information integrity, promoting online safety and opening access to information. We achieve these aims through, holding those with power accountable using the following strategies; lobbying and advocacy, strategic litigation, research and analysis, civic technology development and training and facilitation.
- 1.3 MMA thanks ICASA for the opportunity to comment on the Draft Amendment Regs and requests an opportunity to participate at the public hearings to be held hereon. Unfortunately, MMA's legal team is not available on 11 or 12 February 2026 (the draft deadlines provided for in the Extension Notice) and so we respectfully request that the hearings be rescheduled to later in February 2026 given the importance of the issues at stake.

- 1.4 MMA is well known to ICASA as we have on many occasions engaged with it over the decades and have brought complaints to ICASA's standing Complaints and Compliance Committee (CCC) in the public interest.
- 1.5 In May 2024, the CCC¹ ruled that MMA did not have standing in a complaint it brought during the national and provincial elections as the relevant regulations envisage only a political party being able to make such a complaint.
- 1.6 On 7 December 2024 MMA sent correspondence to the Chairperson of ICASA setting out its concerns about and requesting a meeting with ICASA to engage it on the manifest unlawfulness of such a limitation on the public's right to complain about broadcasting licensees which violate the provisions of relevant and applicable statutes and/or regulations during election periods. The meeting eventually took place only on 18 August 2025.
- 1.7 At the meeting, ICASA representatives stated that MMA had "made good points that will be considered prior to issuing the new draft amendments".
- 1.8 Unfortunately, it appears that the arguments put forward by MMA have been largely ignored by ICASA as the Draft Amendment Regs do not cure the unlawful elements of the existing Municipal Regs as clearly presented to ICASA by MMA both in its letter of 7 December 2024 and in its oral representations at the meeting of 18 August 2025.

2. THE MUNICIPAL ELECTIONS REGULATIONS

- 2.1 The regulations that are at issue at this time are the Municipal Elections Regulations which are prescribed in Notice 203, Government Gazette No. 34086 dated 8 March 2011, as amended (the Municipal Elections Regs). It is these regulations that the Draft Amendment Regulations seek to amend.
- 2.2 The particular provisions of the Municipal Regulations that MMA take issue with as follows:
 - 2.2.1 regulation 6(7) of the Municipal Elections Regs, which, according to the CCC² (giving a ruling on the provision in the corresponding National and Provincial Elections Broadcasting Regulations³ which are similarly worded), are to be interpreted as excluding any complainant, other than a registered political party or independent

¹ Case No. 475/2024.

² Case No. 475/2024.

³ Notice 101, Government Gazette No. 37350 dated 17 February 2014, as amended.

candidate, from lodging a complaint regarding the non-broadcast of a PA; (our emphasis); read with

- 2.2.2 regulation 4(8) of the Municipal Elections which is the same as regulation 6(7) but dealing with PEBs as opposed to PAs; read with
- 2.2.3 regulation 7(1) of the Municipal Elections Regs which the Draft Amendment Regs proposes (at section 7.1 of the Draft Amendment Regs) should be amended to read: “In the event of any person being aggrieved by any PA or PEB, that person may lodge a complaint with the Authority within five (5) working days after such broadcast has occurred”; and
- 2.2.4 regulation 6(10) of the Municipal Elections Regs which, according to the CCC⁴, (giving a ruling on the provision in the corresponding Elections Broadcasting Regulations⁵ which are similarly worded) is to be interpreted as giving a broadcasting service licensee the discretion to reject a PA if in its view the content thereof violates regulation 6(10) of the Municipal Elections Regs (emphasis added) and the same would apply, as a matter of principle, to regulation 4(12) of the Municipal Elections Regs regarding PEBs.

3. THE PROVISIONS OF THE ICASA ACT RELEVANT TO WHOM MAY COMPLAIN TO THE CCC

- 3.1 In our view regulation 7(1) of Municipal Elections Regs as it is currently worded and as per the interpretation of its sister provision in the National and Provincial Elections Regs by the CCC is *ultra vires* the provisions of the Independent Communications Authority of South Africa Act, 2000 (the Icasa Act):
 - 3.1.1 section 17B(a)(ii) and (iii) of the ICASA Act provide that the CCC “must investigate, and hear if appropriate, and make a finding on... all complaints received by it; and allegations of non-compliance with this Act or the underlying statutes received by it”; (our emphasis); and
 - 3.1.2 17C(1)(a)(iii) of this ICASA Act which entitles “a person who has reason to believe that a licensee or another person is guilty of any non-compliance with the underlying statutes may lodge a complaint with the authority within 60 days are becoming aware of the alleged non-compliance”.

⁴ Case No. 475/2024.

⁵ Notice 101, Government Gazette No. 37350 dated 17 February 2014, as amended.

- 3.2 The limitation that only a political party or independent candidate may refer the refusal by a licensee to broadcast a PA (or PEB) is *ultra vires* the express wording of the legislation that entitles any person who believes that a licensee is guilty of non-compliance to complain to ICASA, including to its standing committee, the CCC.
- 3.3 As is clear from the wording of proposed regulation 7.1 of the Draft Amendment Regulations, the unlawfulness and unconstitutionality of existing regulation 7(1) of the Municipal Regulations is not intended to be cured by proposed regulation 7.1 of the Draft Amendment Regulations.

4. THE PROVISIONS OF THE ECA ACT RELEVANT TO WHETHER OR NOT A BROADCAST LICENSEE HAS THE DISCRETION TO REJECT A POLITICAL ADVERTISEMENT OR PARTY/POLITICAL ELECTION BROADCAST BASED SOLELY ON THE CONTENT THEREOF

- 4.1 The interpretation of the Municipal Broadcast Regulations that a broadcaster can, *mero motu*, make a determination that in its view a PEB or PA violates regulation 4(12) or 6(10) of the Municipal Elections Regs cannot accord with the provisions of section 58 of the Electronic Communications Act, 2005 (the ECA) because it would violate the “broadcast one, broadcast all” principle that is clearly articulated in section 58(1) of the ECA which provides “*A broadcasting service licensee is not required to broadcast a political advertisement but if he or she elects to do so, he or she might afford all other political parties, should they so request a like opportunity.*”
- 4.2 The Municipal Elections Regs do give licensed broadcasters who have exercised their discretion to accept PEBs and/or PAs the right to refuse to carry a particular PEB and/or PA but only on very limited grounds, as is set out in regulation 4(5) and/or 6(3), respectively, of the Municipal Elections Regs, namely, if the political advertisement does not conform to the *technical standard and quality* listed in Schedule 2 to Annexure A of the regulations.
- 4.3 While it is true that regulations 4(12) and 6(10), respectively, of the Municipal Elections Regs places an obligation upon the political party or independent candidate concerned (our emphasis) to ensure that any of its political advertisements does not:
 - (a) contravene the provisions of the Electoral Code, the Electoral Act, the Constitution, the Act and the Broadcasting Act; or
 - (b) contain any material that is calculated, or that in the ordinary course is likely, to provoke or incite any unlawful, illegal or criminal act, or that may be perceived as condoning or lending support to such an act,

MMA submits that it is not for the broadcaster (our emphasis) to act as judge, jury and executioner (as it were) in regard to the content (as opposed to technical and quality standards) of a political party or independent candidate's political advertising and in so doing to engage, effectively, in the prior restraining of certain political speech during an election period. The opportunities to censor political expression are just too great as we saw in the DA flag burning advertisement case before the CCC.

4.4 That the drafters of the regulations clearly intended that the broadcaster:

- 4.4.1 would have no discretion in regard to the content of PEBS or PAs advertisements; and therefore
- 4.4.2 would bear no responsibility for the content of a PEB or PA, as is clear from the provisions of regulation:
 - 4.4.2.1 4(13) of the Municipal Elections Regs, which expressly provides that "*A political party or an independent candidate that submits a PEB for broadcast to a BSL is deemed to have indemnified the BSL against incurred damages, losses and third-party claims arising from the broadcast thereof*"; and
 - 4.4.2.2 6(11) of the Municipal Elections Regs, which expressly provide that "*A political party or an independent candidate that submits a PA for broadcast to a BSL is deemed to have indemnified the BSL against incurred damages, losses and third-party claims arising from the broadcast thereof.*" Note that the Draft Amendment Regs propose that this is to become regulation 6(9) of the Municipal Elections Regs as per the provisions of regulation 6.2 of the Draft Amendment Regulations.

4.5 MMA submits that such a regulatory indemnification would have no utility if indeed the broadcaster could or should exercise editorial control over the content of a PEB or PA, as opposed to control over only technical standards and quality thereof which it is required to do in terms of regulations 4(5) and 6(3), respectively of the Municipal Elections Regs.

5. UNCONSTITUTIONALITY OF THE EXISTING PROVISIONS

- 5.1 MMA submits that the interpretation given by the CCC and as approved by the ICASA Council would violate a number of fundamental constitutional rights and are clearly unlawful.
- 5.2 First, they allow a broadcaster to censor political expression during an election period, thereby denying the public the right to hear and/or see the views of political parties and or independent candidates during an election. This is a manifest violation of:

- 5.2.1 the right to receive or impart information and ideas, protected in section 16(1)(b) of the Constitution;
- 5.2.2 the right to campaign for a political party or cause, protected in section 19(1)(c) of the Constitution; and
- 5.2.3 the right to free and fair elections, protected in section 19(2) of the Constitution.

5.3 Second, they allow the CCC to refuse to hear a complaint about the failure of a broadcaster to flight a PEB or PA in accordance with the requirements of the ECA, by a member of the public. This is a violation of the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or another independent and impartial tribunal or forum, which is protected under section 34 of the Constitution.

5.4 There are no justifiable grounds for denying or even limiting such rights during an election period and so the limitations or restrictions contained in the Municipal Elections Regs fail to meet the standards therefor set out in section 36, the Limitations Clause, of the Constitution.

6. PROPOSED AMENDMENTS TO THE MUNICIPAL ELECTIONS REGS TO CURE THE CURRENT ILLEGALITY THEREOF

- 6.1 MMA has already engaged twice previously ICASA on the necessity of amending the Municipal Elections Regs to cure the above defects in light of the CCC ruling.
- 6.2 MMA is of the view that some simple wording changes to three of the Municipal Elections Regs would cure their unlawful aspects, namely:
 - 6.2.1 Draft Regulation 5.1 in the Draft Amendment Regs proposes to amend regulation 4(5) of the Municipal Elections Regulations. However, MMA suggests that regulation 4(5) be further amended to make it clear that the extent of a broadcaster's discretion regarding a PEB is whether or not it conforms to the technical standards and quality set out in Schedule 2 to Annexure A and so, we submit that it requires to be further amended to read as follows:

“(5) A BSL that is obliged, or intends to broadcast PEB(s) must ensure that the PEB conforms to the technical standards and quality as listed in Schedule 2 of Annexure A of these Regulations, non-conformity therewith being the only basis on which a BSL may reject a PEB”.
 - 6.2.2 While regulation 6(3) of the Municipal Election Regs is proposed to be amended by regulation 6.1 of the Draft Amendment Regulations, MMA submits that:

6.2.2.1 The number at the start of the proposed amended sub-section is incorrect. It ought to be “(3)” and not (1). Otherwise the numbering of the sub-regulations of regulation 6 will be:

(1)...

(2)...

(1)...

(4)...

Which is clearly an error.

6.2.2.2 Secondly, the proposed amended regulation 6(3) in the Draft Amendment Regs ought to make it clear that the extent of a broadcaster’s discretion regarding a PA is whether or not the PA conforms to the technical standards (note that there are a number of these, not just a single standard and so the word “standard” is required to be pluralised) and quality set out in Schedule 2 to Annexure A and so, we submit that regulation 6(3) of the Municipal Regulations is required to be further amended to read as follows:

“(3) A BSL that intends to transmit a PA must ensure that the advertisement conforms to the technical standards and quality as listed in Schedule 2 of Annexure A of these Regulations, non-conformity therewith being the only basis on which a BSL may reject a PA”.

6.2.3 MMA suggests that regulation 7(1) of the Municipal Elections Regs be amended as follows:

“(1) Any person aggrieved by a PA or PEB or by the refusal of a broadcaster to broadcast a PA or PEB may lodge a complaint with the Authority within forty-eight (48) hours of such a broadcast or refusal, as the case may be.”

7. CONCLUSION

7.1 MMA has suggested wording changes to three provisions in the Municipal Elections Regs which, if promulgated, would cure the existing unlawfulness thereof, and support the objects of both the ECA and the Constitution in contributing to free and fair elections.

- 7.2 MMA is deeply disappointed that despite repeatedly bringing the unlawfulness of the Municipal Elections Regs to the attention of ICASA, the Draft Amendment Regs do not propose to cure the illegalities as the Draft Amendment Regs are silent on these matters. The changes aren't merely differences of opinion, but deal with legality and constitutionality of the draft regulations and thus for these issues not to be addressed or even for any reasoning to be provided or highlighted is a grave limitation of the draft regulations
- 7.3 As ICASA is aware, the upcoming municipal elections are likely to be hotly contested and so the public interest in ensuring that the Municipal Elections Regs (as interpreted *inter alia* by the CCC) conform to the requirements of the ECA is acutely engaged.
- 7.4 MMA has little option but to be explicit that we will consider urgent review proceedings in the High Court should ICASA fail to ensure that the Draft Amendment Regulations cure the unlawfulness of:
 - 7.4.1 allowing broadcasters to refuse to broadcast PEBs or PAs on grounds other than their non-compliance with the technical standards and quality set out in Schedule 2 to Annexure A to the Municipal Elections Regs; and/or
 - 7.4.2 not allowing a member of the general public to complain about the non-broadcast of a PEB or PA on grounds other than their non-compliance with the technical standards and quality set out in Schedule 2 of Annexure A to the Municipal Elections Regs.
- 7.5 The precedent set by the CCC and as approved by ICASA is that no member of the public has the right to complain when a broadcaster engages in content censorship of political parties and independent candidates in an election. That is an egregious violation of a number of constitutional rights as has been set out above.
- 7.6 Given the importance of these issues for the upcoming municipal elections, MMA has forwarded these submissions, along with our previous correspondence on these matters, to the Independent Electoral Commission with the request that they also engage with yourselves to ensure that ICASA's Municipal Elections Regs and the proposed Draft Amendment Regs do not result in censorship of PEBs and PAs by broadcasters and do not deny the public its right to complain about non-compliance with elections-related provisions of the ECA or relevant regulations.

7.7 MMA's rights are reserved, including its right to apply for costs.

Yours Sincerely

A handwritten signature in black ink, appearing to read "William Bird".

William Bird

DIRECTOR

cc The Independent Electoral Commission