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URGENT

Date: 28 March 2024

Your ref:

Our ref: PLMM-202406

TO: DR MASHILO BOLOKA

CEO of the Film and Publication Board

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Dear Dr Boloka,

NOTICE IN TERMS OF SECTION 18H AND SECTION 27A OF THE FILMS AND PUBLICATIONS ACT, 1996 (ACT NO. 65 OF 1996), AS AMENDED | LETTER OF DEMAND

1. We act for the Media Monitoring Africa Trust (“MMA”), the South African National Editors Forum (“SANEF”), the Campaign for Free Expression (“CFE”), the Press Council of South Africa, and the SOS Support Public Broadcasting Coalition (“SOS”), collectively, “our clients”. We refer to the Notice published by the Film and Publication Board (“FPB”) titled *Notice in terms of Section 18H and Section 27A of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended* (No. 4526) dated 22 March 2024 (“the Notice”).
2. We record as follows:
 - 2.1. The Notice was published on 22 March 2024 and pertains to disinformation and misinformation through Internet platforms, including social media, during elections.¹

¹ At para 2. The Notice was published on the South African Government website (accessible here: <https://www.gov.za/documents/notices/films-and-publications-act-notice-amendment-comments-invited-22-mar-2024>).

Director: MJ Power B.A., LL.B., LL.M. (Wits) | **Senior Associates:** T Davis B.A. (RU), LL.B. (UCT), S Khumalo LL.B. (Wits), T Lloyd LL.B. (Wits), LL.M. (Edin.), T Power B.A., LL.B., LL.M. (Wits) | **Candidate Legal Practitioners:** C Chitengu B.A., LL.B. (UJ), C Dehosse B.A., LL.B. (Stell.), LL.M. (UCT) | **Technologist:** K Nwana | **Office Manager:** J Rashid. Power & Associates Incorporated is a law firm registered with the Legal Practice Council of South Africa (F18433) and a personal liability company registered in the Republic of South Africa (2018/071686/21).

* **Cape Town Office:** Unit 403, 5 St Georges Mall, Cape Town, South Africa, 8001. ** **Name Change:** Please note that on 10 May 2023 our name changed from Power Singh Inc. to Power & Associates.

- 2.2. In an effort to seek clarity on the status of the Notice we issued correspondence to the FPB on 26 March 2024.
- 2.3. On 27 March 2024, Mr William Bird of MMA and Ms Tina Power from Power and Associates attended a meeting with Andrew Sebapu and Makhosazana Lindhorst from the FPB to discuss the correspondence. During the meeting, Mr Sebapu and Ms Lindhorst confirmed that the Notice is operational and in effect.
3. Our clients have identified a myriad of concerns and challenges with the Notice, as set out hereunder, and submit that the Notice does not pass constitutional muster and should be urgently withdrawn.
4. As primary concerns, it appears that the contents of the Notice falls outside the scope, mandate, and powers of the FPB and are accordingly *ultra vires*. Further, the Notice seeks to introduce new definitions and prohibited conduct which have significant ramifications for freedom of expression, and it appears the new prohibited content is being introduced by way of Notice, rather than proper legislative channels, subject to public participation. These and other concerns are detailed below.

Schedule 1

5. Our clients accept that the chief executive officer of the FPB may publish certain notices in the *Gazette*, for example, in terms of sections 16(5) and 18(4) of the Films and Publications Act, 1996 (“FPA”). However, our clients note with concern, that neither section 18H nor section 27A of the FPA – in terms of which the Notice is published – prescribes that the chief executive officer may publish notices in the *Gazette*.
6. The Notice introduces two new definitions for “disinformation” and “misinformation”. Neither of these terms or definitions appear in the FPA or its Regulations, or anywhere in South Africa’s current legal framework. The definitions are manifestly vague and appear to be introduced as new forms of prohibited content. Introducing such vague and overbroad concepts, which appear to be shoehorned into the existing definition of hate speech which attach significant liability for non-compliance, manifestly limits the right to freedom of expression, and unjustifiably so.
7. The Notice, at paragraph 2.2, provides that “it is important that regulatory measures are put in place to ensure that the democratic will of the people is not undermined by acts of misinformation or disinformation.” Our clients submit that regulating mis- or disinformation during elections falls outside the scope of the FPA and does not align with the objects of the FPA. Furthermore, the FPB is not mandated, through any law, to regulate acts of mis- or disinformation. Moreover, it is widely accepted that there are serious dangers of vague and overly broad laws and regulations pertaining to disinformation and the chilling effect this can have on the right to freedom of expression. Our clients recall cautions from the United Nations Special Rapporteur on the promotion and protection of the right to

freedom of opinion and expression, among others, that countering disinformation should not be used as a pretext to restrict the enjoyment and realisation of human rights or to justify censorship, including through vague and overly broad laws criminalising disinformation.

8. The Notice references section 31(3)(a) of the FPA, which pertains to the publishing of “guidelines” of what is harmful or disturbing in terms of schedules 3 and 8 (which have been repealed). The Notice, at paragraph 2.4, states that pursuant to section 31(3)(a) the FPB has identified mis- or disinformation and fake news (which is not defined in the Notice) as harmful or disturbing, due to its potential to propagate for war, incite violence, or advocate hate speech. The Notice goes on to state that such material is therefore prohibited in terms of the Act. There are several challenges with this:
 - 8.1. First, this appears to conflate the Notice with the publication of guidelines, which creates ambiguity.
 - 8.2. Second, the publication of guidelines is subject to a publication participation process, which to our knowledge, the Notice has not undergone.
 - 8.3. Third, section 31(3)(a) does not give the chief executive officer, or the FPB, the power to introduce new definitions or prohibit new forms of content.
 - 8.4. Finally, our clients note that the term “prescribe”, as used on the title page of the Notice is a term defined in the FPA and to mean “prescribed by regulation”. It is our clients’ understanding that in terms of section 31 read with 31A of the FPA only the Minister has the power to prescribe regulations. While the FPB is empowered in certain circumstances to publish guidelines, our clients are of the view that the Notice is not a regulation, and, in any event, the FPA does not authorise the FPB to introduce new prohibited content as the Notice appears to have done.

Schedule 2

9. Schedule 2 of the Notice simply restates, verbatim, sections 18H, 24G and 6B(1)(d) of the FPA. In line with the concerns above regarding the basis of the Notice and the backdoor inclusion of new prohibited content, our clients are gravely concerned that this schedule suggests that the FPB is of the view that it has the power to adjudicate cases relating to mis- and disinformation during elections and make findings of offences that attach significant liability.

Schedule 3

10. Our clients are concerned that this schedule unlawfully extends the scope of section 27A(2) of the FPA and that the FPB is not authorised to demand this of internet service providers

(ISPs). Further, as stated above, there are concerns regarding the inclusion of mis- and disinformation within the scope of prohibited content, which again, and for ISPs attaches significant liability for non-compliance.

11. Further, it is unclear to our clients where the FPB derives the authority to require “Platforms” to report, within 30 days, to the FPB on the “reasonable” steps taken to prevent mis- and disinformation during elections, nor to determine what is “reasonable”.

Demand for urgent withdrawal

12. As a result of all of the above, we are instructed to demand as we hereby do, that the FPB **urgently**, and by **17h00, Thursday, 4 April 2024, at the latest**—

- 12.1. withdraw the Notice in its entirety; and

- 12.2. publish the withdrawal in the *Gazette* and on the FPB website and relevant government websites.

13. Should the FPB fail to do so, we are instructed to initiate urgent legal proceedings against the FPB.

14. We await your urgent response and confirm that our clients’ rights are reserved.

Yours faithfully,



POWER & ASSOCIATES

Per: Tina Power | *Senior Associate*

E-mail: tina.power@powerlaw.africa

COPIED TO: THE FILM AND PUBLICATION BOARD

C/o Makhosazana Lindhorst (Executive: Regulatory Development and Enforcement) and Andrew Sebapu (Legal Officer: Regulatory Compliance and Enforcement)

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COPIED TO: THE MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES

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ENDS.