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TO: DEPUTY CHIEF JUSTICE DIKGANG MOSENEKE
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SUBMISSION BY MEDIA MONITORING AFRICA:

**JUSTICE MOSENEKE INQUIRY ON FREE AND FAIR LOCAL GOVERNMENT ELECTIONS
DURING COVID-19**

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INTRODUCTION

1. This submission is made by Media Monitoring Africa (MMA) to the Justice Moseneke Inquiry on Free and Fair Local Government Elections during COVID-19 (Moseneke Inquiry). We welcome the opportunity to provide this submission to the Moseneke Inquiry, and commend the Independent Electoral Commission (IEC) on taking this step in an effort to ensure that the upcoming Local Government Elections will be free, fair and credible in the context of the COVID-19 pandemic.
2. This submission focuses specifically on the media's preparedness to cover the Local Government Elections in line with the constitutional mandate under section 16(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution), as well as our recommendations for measures that the IEC and other relevant stakeholders can implement and/or support to enable the media to perform this function effectively during this time. The important role played by the media – particularly in the context of elections – cannot be gainsaid. It is through such reporting that the public is able to make informed political decisions and hold political actors to account. Given that there may be limited election observation missions due to travel restrictions, the media will play a heightened role during the upcoming Local Government Elections in ensuring vigilance and scrutiny over the electoral processes.
3. We note at the outset that we are confident that the majority of media organisations in South Africa are in a position to meet the task ahead of them. However, to facilitate this role and ensure the safety of the relevant journalists, we make several recommendations for measures to be considered going forward. Accordingly, this submission is structured as follows:
 - 3.1. **First**, an overview of MMA.
 - 3.2. **Second**, certain key regional and international guidance that the Moseneke Inquiry may consider.
 - 3.3. **Third**, our submission regarding the ability of the media to access key events during the election period.
 - 3.4. **Fourth**, our submission regarding internet access and the zero-rating of election-related content.
 - 3.5. **Fifth**, our submission regarding disinformation during the election period.
 - 3.6. **Fifth**, our submission regarding the safety of journalists.

4. These are dealt with in turn below.

OVERVIEW OF MEDIA MONITORING AFRICA

5. MMA is a not-for-profit organisation that has been monitoring the media since 1993. MMA's objectives are to promote the development of a free, fair, ethical, and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom.
6. MMA has over 28 years' experience in media monitoring and direct engagement with media, civil society organisations, state institutions and citizens. MMA is the only independent organisation that analyses and engages with media according to this framework. In all of our projects, we seek to demonstrate leadership, creativity and progressive approaches to meet the changing needs of the media environment.
7. Of relevance to the present submission, we draw attention to the fact that, in 2019, MMA launched the Real411, which is a publicly accessible online reporting platform for members of the public to report incidences of harassment, hate speech, incitement and disinformation. In doing so, MMA has partnered with various organisations, including the IEC, the South African Human Rights Commission, the South African National Editors' Forum and the Press Council of South Africa, as well as various social media platforms. The Real411 seeks to provide an independent, transparent and accountable complaints mechanism to address online harms, specifically disinformation, hate speech, incitement to violence and harassment.
8. For more information about MMA, please visit: www.mediamonitoringafrica.org.

REGIONAL AND INTERNATIONAL GUIDANCE ON ELECTIONS DURING COVID-19

African Commission on Human and Peoples' Rights

9. Of relevance to the Moseneke Inquiry, we draw attention to a statement published by the African Commission on Human and Peoples' Rights (African Commission) on elections in Africa during the COVID-19 pandemic. The statement affirms that "the right to regular, free, fair and credible elections is the most sacred democratic norm that serves as a primary means for the exercise of the sovereign right of a people to self-government under article 20 of the African Charter and the right of individuals to participation in public affairs under article 13 of the African Charter." The statement goes on to note that the conduct of elections within constitutionally established parameters and applicable human rights standards, including those provided for in the African Charter on Democracy, Elections and Governance, is a

pre-requisite for the maintenance of a democratic, accountable and responsive system of government.

10. However, as noted in the statement, the African Commission is also mindful of the inevitable tension that arises between upholding the legally established public health measures and the right to elections. In the light of this, the African Commission makes a series of recommendations regarding pre-elections, during the elections and post-elections, as well as in circumstances of postponed elections. These include the following:
 - 10.1. The state should update the electoral calendar based on inclusive consultations and transparent processes with a view to ensure that more time than usual is allocated for the electoral process for enabling the conduct of electoral preparations, such as voter registrations, in full compliance with physical distancing protocols and, where possible, allowing electronic registration.
 - 10.2. Electoral gatherings and campaigns should preferably be held in open spaces, and strictly comply with the public health measures in place, including social distancing, sanitisation and hand washing, and the mandatory wearing of masks.
 - 10.3. The state should ensure that the public health measures in place are enforced without discrimination, and are not abused to frustrate opposition candidates and the free exercise of voting by the electorate.
 - 10.4. The state should see that all relevant measures are put in place to ensure that voters, officials, observers and all other persons involved in the election process maintain physical distancing and hygiene protocols. This could include staggered voting times extended beyond the normal number of voting days and setting up more polling stations than usual, in order to limit the number of people that would congregate in one area. (We would add that this should include measures to encourage the ventilation of voting stations and related places.)
 - 10.5. The state should further ensure that polling stations are thoroughly sanitised before, during and after the elections, that the wearing of masks at all times is mandatory, and that sanitisers are available to voters before and after voting, and also to those counting the votes.
 - 10.6. The state should be cognisant of the higher vulnerability of older persons and persons with co-morbidities to contracting and suffering serious health consequences from COVID-19, and take extra precautions to ensure that

such persons are able to vote in a manner which does not subject them to unnecessary risk, including advance voting.

- 10.7. The state should consider adopting alternative forms of voting, so that voters do not have to physically visit polling stations, including online or postal voting, where this is a viable option.
 - 10.8. The state should ensure that all precautions are put in place to ensure that COVID-19 related measures are not abused to prevent anyone from exercising the right to vote.
 - 10.9. Where disputes arise about the outcome of the elections, the state should ensure that these are dealt with within the established procedures and do not lead to violence or conflict.
 - 10.10. The state should take all measures to prevent, investigate and prosecute human rights violations which occur during the election period, and provide adequate redress to victims.
11. Of particular relevance to the present submission, the African Commission recommends that, while the current ban on travel makes it impossible for independent observers to observe elections, measures should be put in place to mediate this challenge, including by allowing more local election observers and possible innovations around virtual election observation using available ICT technology. We strongly endorse this recommendation, as such innovations would also facilitate greater media access to election processes without putting journalists in danger of contracting COVID-19. Accordingly, we would urge the Mosenke Inquiry to recommend that key election processes, such as the counting of votes, is made available via a live-stream online, so that election observers and media representatives can continue to perform their duties and functions without being required to be physically present.

Independent mandate-holders on the right to freedom of expression

12. In the Joint Declaration on Freedom of Expression and Elections in the Digital Age, the independent mandate-holders on the right to freedom of expression from the United Nations, the Organisation for Security and Co-operation in Europe and the Organisation of American States highlighted the essential role that freedom of expression and information, free, independent and diverse media, and a free and accessible internet play in ensuring free and fair elections, in particular by informing the public about parties, candidates and their platforms. The independent mandate-holders made *inter alia* the following recommendations:

Submission by Media Monitoring Africa

- 12.1. States should promote effective access to the internet and other digital technologies for all parts of population, including by closing digital gaps based on gender, race, ethnicity, disability, socio-economic status and other bases, and putting in place clear requirements and policies to ensure respect for the principle of net neutrality.
 - 12.2. State actors should ensure that the media enjoys robust access to sources of official information and to candidates for public office, and does not face undue barriers to their ability to disseminate such information and ideas, including during the public health pandemic of COVID-19.
 - 12.3. States should make a concerted effort to promote digital media and information literacy, including in relation to elections.
 - 12.4. Directing targeted political advertising, based on personal data, at individuals through the media should not be allowed, especially during election periods, unless those individuals have consented to the use of their personal data for this purpose.
 - 12.5. States should consider supporting positive measures to address online disinformation, such as the promotion of independent fact-checking mechanisms and public education campaigns, while avoiding adopting rules criminalising disinformation.
 - 12.6. States should adopt appropriately clear and proportionate laws that prohibit the dissemination of statements which are specifically designed to obstruct individuals' right to vote, such as by intentionally spreading incorrect information about where or when to vote.
 - 12.7. Parties, politicians and candidates should refrain from limiting the ability of media and journalists to access any public communications they make related to elections.
13. We would urge the Moseneke Inquiry to endorse this Joint Declaration, particularly the recommendations set out above, in the interests of ensuring that the upcoming Local Government Elections are free, fair and credible. In particular, and as dealt with in more detail below, we draw attention to the partnership between MMA and the IEC regarding the Real411 platform established to help combat and mitigate digital harms.

ACCESS TO KEY EVENTS DURING THE ELECTION PERIOD

14. We are concerned that the media's ability to access key events during the election period may be inhibited under the excuse of COVID-19 protocols. This would not be acceptable, and would be contrary to the Electoral Code of Conduct, which provides in section 8(b) that every registered party and candidate may not prevent access by members of the media to public political meetings, marches, demonstrations and rallies. We submit that this applies equally whether these are taking place in-person or online. To the extent that political meetings are taking place virtually, we submit that the media must be notified timeously of such meetings, and provided with the relevant links and login details to be able to access the meetings.
15. It is also imperative that members of the media have access to other election-related processes, such as voting stations on election day, the counting of votes and the results operation centres that are set up by the IEC, as they would in the ordinary course.
16. We would therefore urge the Moseneke Inquiry to direct that the media must be given access to the abovementioned election processes, whether in-person or online, to ensure that the media is able to perform its tasks and scrutinise the election processes appropriately and effectively. As mentioned above, to the extent that technological innovations can be harnessed so that this mandate can be fulfilled without members of the media needing to be physically present, these should be encouraged and adopted in the interests of public health and safety. Lastly, in this regard, we recommend that journalists must be provided with permits that allow them to travel freely regardless of the curfew of at the time, and that they continue to be recognised as essential workers under the COVID-19 regulations.

INTERNET ACCESS AND ZERO-RATING OF ELECTION-RELATED CONTENT

17. Principle 37 of the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa, as adopted by the African Commission, provides as follows:

“(1) States shall facilitate the rights to freedom of expression and access to information online and the means necessary to exercise these rights.

(2) States shall recognise that universal, equitable, affordable and meaningful access to the internet is necessary for the realisation of freedom of expression, access to information and the exercise of other human rights.

(3) States shall, in cooperation with all relevant stakeholders, adopt laws, policies and other measures to provide universal, equitable, affordable and meaningful access to the internet without discrimination, including by:

(a) developing independent and transparent regulatory mechanisms for effective oversight;

(b) improving information and communication technology and internet infrastructure for universal coverage;

(c) establishing mechanisms for regulating market competition to support lower pricing and encourage diversity;

(d) promoting local access initiatives such as community networks for enabling the increased connection of marginalised, unserved or underserved communities; and

(e) facilitating digital literacy skills for inclusive and autonomous use.

(4) In providing access to the internet, States shall take specific measures to ensure that marginalised groups have effective exercise of their rights online.

(5) States shall adopt laws, policies and other measures to promote affordable access to the internet for children that equips them with digital literacy skills for online education and safety, protects them from online harm and safeguards their privacy and identity.”

18. Moreover, in April 2020, the African Commission’s Special Rapporteur on the Right to Freedom of Expression and Access to Information in Africa issued a press statement on the importance of access to the internet in responding to the pandemic. In the statement, the Special Rapporteur noted that the internet is crucial for journalists to verify information and keep the public updated on the measures that governments are taking to contain the spread of COVID-19. The Special Rapporteur went on to call on states to take all measures to guarantee, respect and protect the right to freedom of expression and access to information through ensuring access to the internet and social media services, especially during the COVID-19 pandemic.
19. In the context of the upcoming Local Government Elections, we submit that it is imperative that all members of the public have access to election-related content that is made available online. However, given the high data costs in the country, this is currently not a practical reality for many persons in South Africa. We therefore submit that the only way to ensure equitable access to information on key issues of democratic importance is for access to election-related content to be zero-rated. This would include, at a minimum, zero-rating the IEC website (if it has not been done already) and partner websites, such as the Real411 platform and the political

advertising repository, as well as to zero-rate news websites that are covering the elections in the public interest.

20. At a practical level, we submit that this would work in a similar manner as was done with the zero-rating of websites that contained information regarding COVID-19, such as through an application process to the IEC. We would therefore urge the Moseneke Inquiry to recommend that the IEC engages with internet service providers to facilitate zero-rating arrangements, and that the IEC establishes a process whereby relevant organisations can apply to have their election-related content zero-rated. We submit that this would be an important and progressive step in ensuring that all members of the public have relevant, credible and up-to-date information regarding the developments in the elections, without discriminating against those who cannot afford to access online news platforms.

DISINFORMATION DURING THE ELECTION PERIOD

21. We are deeply concerned by the likelihood of disinformation being spread during the election period, including by political figures and other prominent persons who may seek to use COVID-19 as a guise to dissuade persons from voting. In this regard, it is important to note that section 89(2) of the Electoral Act 73 of 1998 prohibits any person from publishing false information with the intention of disrupting or preventing an election, creating hostility or fear in order to influence the conduct or outcome of an election, or influencing the conduct or outcome of an election. Furthermore, section 4(1)(b) of the Electoral Code of Conduct provides that every registered party and candidate must publicly condemn any action that may undermine the free and fair conduct of elections.
22. To this end, and building on the work done during the General Elections in 2019, MMA has been partnering with the IEC on the [Real411](#) platform, which will enable members of the public to report concerns of disinformation during the election period. Additionally, MMA and the IEC will be launching a political advertising repository to enable the public to distinguish between real and altered political advertisements, and MMA and the IEC have also been engaging with various social media platforms to address this issue.
23. However, despite these measures, disinformation regarding COVID-19 remains rife, which we submit is likely to increase during the election period. For instance, Mr Julius Malema was recently quoted as saying: "There is no regulation that is going to stop us. From today we don't listen to what Ramaphosa says about Corona, we don't comply with nonsense he says about Corona until he gives us vaccines. And vaccinates our people because he has got no intentions of vaccinating our people". Statements like these have the propensity to cause real harm by encouraging the

public not to follow the COVID-19 regulations, and creating the impression that there is no intention of vaccinating the public.

24. In the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, the independent mandate-holders on the right to freedom of expression highlighted *inter alia* the following:
- 24.1. State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false or which demonstrate a reckless disregard for verifiable information.
 - 24.2. State actors should, in accordance with their domestic and international legal obligations and their public duties, take care to ensure that they disseminate reliable and trustworthy information, including about matters of public interest, such as the economy, public health, security and the environment.
 - 24.3. States have a positive obligation to promote a free, independent and diverse communications environment, including media diversity, which is a key means of addressing disinformation and propaganda.
25. Accordingly, we would urge the Moseneke Inquiry to recommend that all political parties and independent candidate commit to not spread disinformation during the election period, and to commit to supporting the measures being implemented by MMA and the IEC in an effort to combat disinformation. Access to credible information will be imperative during the upcoming election period in order to reassure voters that it is safe to participate in the elections, and compliance with the relevant COVID-19 regulations and protocols must be strictly adhered to in the interests of the safety of all persons in the country.

SAFETY OF JOURNALISTS

26. Section 8(c) of the Electoral Code provides that every registered party and candidate must take all reasonable measures to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters. In *Brown v Economic Freedom Fighters and Others*,¹ the High Court of South Africa held that by failing to instruct their supporters to comply with the Electoral Code, the Economic Freedom Fighters were themselves in violation thereof. Further in this regard, the court held that the Economic Freedom Fighters were “fully aware of their actions and specifically the

¹ Case No. 14686/2019, 6 June 2019; see, also, Global Freedom of Expression, Columbia University, “Brown v Economic Freedom Fighters”, undated, accessible [here](#).

consequences of their inaction, the impact thereof on their supporters and the conduct and consequences which followed”, and further that even if the Economic Freedom Fighters “did not deliberately intend them, they at least stood reckless to the results which, although they may not have foreseen them initially, were reasonably foreseeable once they had been brought to their attention on more than one occasion from different sources.”

27. The safety of journalists is a crucial pillar in fulfilling the right to media freedom in South Africa. However, various instances of threats, harassment, trolling, doxing and other harms have made it nearly impossible for some journalists to operate effectively, and have placed media organisations in the invidious position of having to put their journalists at risk when covering election-related matters. This is exacerbated by the COVID-19 pandemic, which poses a threat to the physical health and safety of journalists covering the elections.
28. In the light of these concerns, we would urge the Moseneke Inquiry to recommend that:
 - 28.1. All registered parties and candidates must make a firm commitment to respecting and protecting the media and press freedom during the election period.
 - 28.2. Any threats or attacks against journalists must be condemned in the strongest terms, immediately and without vacillation, and must be dealt with by the relevant party or candidate.
 - 28.3. Any threats or attacks against journalists must be investigated by the IEC, the South African Police Service or other relevant body, and swift remedies must be provided for the harm caused.
 - 28.4. All COVID-19 regulations and protocols must be strictly adhered to by the IEC, registered parties and candidates, and voters and supporters must be encouraged to do the same, so that those journalists covering the elections are not placed at undue risk and are considered “essential workers”.
29. We submit that these measures will go some way in reassuring members of the media that their safety and well-being is a matter of concern and priority for the IEC, and in recognition of the indispensable role that the media plays in the democratic processes.

CONCLUSION

30. We reiterate our appreciation for the opportunity to provide this submission. In our view, the upcoming Local Government Elections may be one of the most challenging elections that this country has faced, presenting unique and nuanced challenges that will need to be navigated. As mentioned above, it is more important than ever that the media is able to act effectively and vigilantly, and exercise careful scrutiny over the election processes. As the Constitutional Court has previously held:²

“In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16.”

31. We submit that the measures proposed above will assist in ensuring that the media is able to perform the necessary functions with “vigour, courage, integrity and responsibility” during the upcoming Local Government Elections. We remain willing and available to provide any further information to the Moseneke Inquiry that may be of assistance in the finalisation of this process, including by participating in any oral hearings to provide further detail on the measures proposed above.

**MEDIA MONITORING AFRICA
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² *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 42.