

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NUMBER: 2017/29163**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO

  
**J.L. KHAN**

**15 DECEMBER 2021**

In the matter between:

**SOUTH AFRICAN BROADCASTING CORPORATION  
SOC LIMITED**

First Applicant

**SPECIAL INVESTIGATING UNIT**

Second Applicant

and

**SOUTH AFRICAN BROADCASTING CORPORATION  
PENSION FUND**

First Respondent

**GEORGE HLAUDI MOTSOENENG**

Second Respondent

***Delivered:*** *This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email, and by uploading same onto CaseLines. The date and time for hand-down is deemed to be have been on 15 December 2021.*

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**JUDGMENT**

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**KHAN AJ:**

## **Introduction**

- [1] Part A of this application, instituted on the 4 August 2017, was heard by Justice Maier-Frawley AJ, (as she then was), when Judgement was handed down on the 18 January 2019. The historical background to this matter and the facts giving rise to this application is a matter of record.
- [2] In Part B of this application, launched on the 12 April 2019, the First Applicant ("the SABC") and the Second Applicant ("the SIU") seek the following orders in terms of its Amended Notice of Motion, dated 27 May 2021:-
- 2.1 Condoning the First and Second Applicant's failure to bring this review application within a reasonable time, alternatively extending the 180 day period in section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), in terms of s 9(1)(b) thereof.
- 2.2 Reviewing and setting aside the decision by the First Applicant on 19 August 2016, through its Governance and Nominations Committee, ("GNC") to award the Second Respondent a success fee and paying him R11,508,549.12, alternatively declaring the said decision invalid and setting it aside.
- 2.3 Ordering the Second Respondent to repay to the SABC an amount of R11,508,549.12 paid to him as a success fee with interest, at the rate of 15,5% per annum calculated from 13 September 2016 to date of payment within 7 (seven) days from the date of the order.
- 2.4 Ordering the First Respondent to pay to the SABC an amount of R11,508,549.12 from the pension proceeds that have accumulated to the

Second Respondent, in favour of the SABC, alternatively pay the full pension proceeds of the Second Respondent, in the event that they do not equal R11,508,549.12, in the event that the Second Respondent fails to pay within 7 (seven) days.

- [3] In its Notice of Motion, dated the 12 April 2019, the SABC sought condonation in terms of PAJA, alternatively under the principle of legality, an order declaring the decision of the SABC, through its Governance and Nominations Committee, to award the Second Respondent ("Motsoeneng") a success fee of 2.5% of R1.19 billion, irregular and unlawful and setting it aside. It further sought an order directing the First Respondent ("The Pension Fund") to make payment of the sum of R21 743 972.32 of the pension proceeds that have accumulated to Motsoeneng, in favour of the First Applicant.
- [4] On the 29 June 2020, the SIU was granted an order to intervene in these proceedings. This was after the President, on the 1 September 2017 referred allegations of impropriety in connection with the affairs of the SABC to the SIU in terms of Proclamation No R29 of 2017, published in Government Gazette no 41086 of 1 September 2017.
- [5] The SABC and the SIU amended its Notice of Motion on the 24 July 2020, still seeking condonation, reviewing and setting aside the decision of the SABC to award Motsoeneng a success fee, ordering Motsoeneng to repay the amount of R11, 508, 549.12 together with interest and to pay an amount of R10, 235, 453.20 to the SABC, due to his wasteful and irregular expenditure. Further that the Pension Fund pay the SABC an amount of R21,743,972.32 alternatively R11, 508,549.12, alternatively the full pension proceeds from the pension proceeds of Motsoeneng, in favour of the SABC.
- [6] Motsoeneng objected to this amendment on the basis that it is prejudicial to the finalisation of the litigation brought against him by the SABC, that the relief sought

is the subject of a pending action before the Civil Court, under case number 18/04253 ("the Action"), by the SABC and the SIU, is an abuse of the judicial process, is unfair and frustrates the finalization of claims against him as he is now forced to respond to the vast factual basis on which the SIU's amended orders are grounded. The Court should accordingly refuse the amendment of the Notice of Motion by the SIU.

- [7] The Court notes that the 24 July 2020, Notice of Motion sought to apportion the amount of R 21, 743, 972.32 into two claims, in respect of the success fee, in the amount of R11, 508, 549,12 and the amount of R10, 235, 453,20, in respect of wasteful and irregular expenditure. This is significantly the only change to the Notice of Motion, in terms of the historical progression of this matter, the amendment should, accordingly not have come as a surprise to Motsoeneng. Motsoeneng elected not to file any affidavits in Claim A, relying instead on a Notice in terms of Rule 6(5)(d)(iii), his complaint that he is now forced to respond to the vast factual basis on which the SIU's amended orders are grounded with significant financial prejudice to him can find no basis, he would have had to file a response in any event, which is what he did on the 22 September 2020.
- [8] Whilst, this complaint may have been objectionable when the matter was first instituted in September 2017, given the time that has elapsed, the Notice of Motion and the affidavits filed herein and in terms of Claim A, the prejudice expressed by Motsoeneng appears more contrived than real.
- [9] The SIU, relying on Rule 53(4) argue that as an Applicant in a review application it is entitled as a matter of law to amend, add to or vary its Notice of Motion upon the filing of the record without the consent of Motsoeneng or leave of the court and that the prayers sought in the amended Notice of Motion are necessitated by law, and that no real prejudice is in any event demonstrated by Motsoeneng. The SIU finds support for its contention in the matter of **HELEN SUZMAN FOUNDATION VS JUDICIAL SERVICE COMMISSION 2018 (4) SA 1 (CC)**:

[13] *"The purpose of Rule 53 is to "facilitate and regulate applications for review". The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review."*

- [10] Subsequent to the 24 July 2020, amendment, the SABC and SIU, recorded in its heads of argument, dated 20 November 2020 and in argument, that the Applicants' do not intend proceeding with the R10 235 453,20 wasteful and irregular expenditure claim and will only proceed with the claim for payment of the success fee in the amount of R11,508,549.12. The wasteful and irregular expenditure claim will be stayed pending the Action. The amended Notice of Motion, bringing the Applicants' claim in line with this decision, was filed on the 27 May 2021.
- [11] The Court is further informed that any prayer requiring the Pension Fund to pay over Motsoeneng's pension proceeds to the Applicants' will necessitate a variation of the interim interdict already granted in favour of the Applicants' under Part A which the Applicants' will seek at the hearing of the application.
- [12] Motsoeneng objects to the stay of the R10,235,453.20 wasteful and irregular expenditure claim on the grounds that the Applicants' cannot simply abandon the claim by disguising it as a stay, he claims that there is no legal or factual basis on which the Applicants' have a right to stay any of the orders sought in the Application in circumstances where he has had to oppose at huge legal cost. That

the claim of R10, 235 453.230 must be dismissed with costs, alternatively the Applicants' must pay the cost thereof.

[13] The stay of the wasteful and irregular claim is necessitated by Motsoeneng's review of the Public Protectors report, in October 2019, it makes practical sense not to pursue the wasteful and irregular expenditure claim until such time as a decision is reached therein. *"For, it is well settled in our law that until a decision is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. OUDEKRAAL ESTATES (PTY) LTD V CITY OF CAPE TOWN & OTHERS [2004] ZASCA 48; 2004 (6) SA 222 (SCA) at para 26.*

[14] The Applicant's amendment of the 27 May 2021, seemingly abandons the R10, 235, 453.20 wasteful and irregular expenditure claim as nothing is said of this claim. No objection to the amendment was raised at the hearing of the matter or subsequent thereto.

[15] It is apparent, when one has regard to the amendments to the Notice of Motion, that the way the SABC and the SIU have sought to advance its case is less than ideal. The amendments, however do appear to be a reaction to the response of Motsoeneng in firstly filing an answering affidavit, after omitting to do so initially and the review of the Public Protectors report. Whether this should form the basis to dismiss the Applicants' claim is clear from the following decisions, in ***KHUNOU & OTHERS V FIHRER & SON 1982 (3) SA (WLD)*** the Court stated,

*"The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a*

*refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner.”*

- [16] In **TRANS-AFRICAN INSURANCE CO LTD V MALULEKA 1956 (2) SA 273 (A)** at 278F, the court held:

*“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand, technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”*

- [17] Motsoeneng has not demonstrated his prejudice to the 24 July 2020 amendment and the stay of the wasteful and irregular claim is necessitated by the review of the Public Protector's report. I do not believe that the interest of justice is served by upholding technical defences, especially in the absence of real prejudice to Motsoeneng. This matter has a long history and a delay will simply result in additional costs, which is not in the interest of the parties. The amendment to the 24 July 2020, Notice of Motion are in event moot, in light of the 27 May 2021 amendment.

- [18] The basic rules regarding costs were summarised by the Constitutional Court in **FERREIRA V LEVIN NO AND OTHERS, 1996 (2) SA 621 CC at 624B-C** where the court held:

*“The Supreme Court has over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the*

award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.”

- [19] The Applicants amendment of the 27 May 2021, comes at a very late stage and after Affidavits and Heads of argument in respect of the wasteful and irregular expenditure claim had already been filed, whilst the court accepts that this may have been a knee jerk reaction to the review of the Public Protectors report, such review was instituted in October 2019, the Applicant filed its heads in November 2020, it had ample opportunity to determine the impact thereof on the relief sought in this application, but waited until the hearing of the matter to amend the relief claimed, no explanation has been offered as to why this was not done previously. In respect of the costs of the abandonment of the wasteful and irregular expenditure claim, the Applicants’ must be liable for same.

### **Application for Condonation**

- [20] The Applicants’ request this Court to condone its failure to bring this review application within a reasonable time, alternatively extending the 180 day period in section 7(1) of PAJA in terms of s 9(1) (b) thereof. The Affidavits of the SABC and the SIU confirm that the Application for Condonation is in addition premised on the principle of illegality, this however appears not to have made it into the amended Notices of Motion.



[21] The Applicants' submit that when the SABC launched its application during 2017, it launched it under PAJA and pleaded the legality review in the alternative. In the heads of argument filed by the SABC on the 29<sup>th</sup> of August 2019, the SABC made it clear that following the Constitutional Court's decision in **STATE INFORMATION TECHNOLOGY AGENCY SOC V GIJIMA HOLDINGS (PTY) LTD 2018 (2) SA 23 CC**, it was proceeding under the legality review.

[22] The SIU contends that as the Second Applicant and as it has entered the shoes of the SABC, it also approaches this court under the legality review and does not need to bring a condonation application under PAJA. The decisions of **SIU V KIM DIAMONDS (PTY) LTD 2004 (2) SA 173 (SPECIAL TRIBUNAL) 182D-L**; **SA PERSONAL INJURY LAWYERS V HEATH AND OTHERS 2001(1) SA 883 (CC)**, support this contention:

[39] *"I have already referred to the functions that the head of the SIU has to perform. They include not only the undertaking of intrusive investigations, but litigating on behalf of the state to recover losses that it has suffered as a result of corrupt or other unlawful practices".*

[23] Motsoeneng does not appear to oppose the application for condonation and in fact agrees that same cannot be brought under PAJA but must be brought in terms of the principle of legality. He however indicates that the contention that the GNC's decision is susceptible to review on the principle of legality is without merit.

[24] I refer to the Judgement pertaining to the SABC's application for condonation in Part A, where the Honourable Justice Maier Fraley AJ concluded that:

[70] *"the issues raised by the matter are of considerable importance not only to the parties but also to members of the public at large, Mr Motau SC submits in his heads of argument that, "at the heart of this matter lies the attempt to recover public funds unlawfully and*

*irregularly paid to Motsoeneng in the face of clear knowledge of the unlawfulness thereof, on his part. They can thus be no contesting that the grant of condonation would be in the public interest, I agree. That the case evokes the public interest in the light of the fight against corruption in our country permits of no doubt. Furthermore, the Respondents to not stand to suffer any prejudice if the SABC is granted condonation.”*

[25] The Honourable Court found that the SABC had offered a reasonable explanation for the delay, and upon consideration of all the relevant factors it would be in the interest of justice that condonation be granted.

[26] The Court in **STATE INFORMATION TECHNOLOGY AGENCY SOC V GIJIMA HOLDINGS (PTY) LTD 2018 (2) SA 23 CC**, confirmed that:

[37] *...The point of the matter is that no choice is available to an organ of state wanting to have its own decision reviewed, PAJA is simply not available to it. That is the conclusion we have been led to by an interpretation of, primarily, section 33 of the Constitution and, secondarily, PAJA itself...*

[38] *The conclusion that PAJA does not apply does not mean that an organ of state cannot apply for the review of its own decision, it simply means that it cannot do so under PAJA...*

[41] *...Indeed, we have previously held that the principle of legality would be a means by which an organ of state may seek the review of its own decision.*

[27] Relying on section 237 of the Constitution, Skweyiya J, held in **KHUMALO V MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION: KWAZULU NATAL (2013) ZACC 49; 2014 (5) SA 579; (CC); 2014 (3) BCLR (CC):**

[46] *“Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality. This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.*

[28] **IN MERAUFONG CITY LOCAL MUNICIPALITY V ANGLOGOLD ASHANTI LIMITED;(2016) ZACC 35 ;2017(2) SA 211 (CC); 2017 (2) BCLR 182 (CC)**  
Cameron J said:

[73] *“The rule against delay in instituting reviews exists for good reason, to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision making body itself.”*

[29] The vehicle of choice thus available to an Organ of State wanting to have its own decision reviewed, is the principle of legality, I cannot fault the Applicants' submissions in this regard.

[30] In **GROOTBOOM V NATIONAL PROSECUTING AUTHORITY AND ANOTHER 2014 (2) SA 68 CC**, the Constitutional Court confirmed that the court seized of the

matter has a discretion whether to grant condonation and reaffirmed that the standard for considering such an application is the interest of justice.

[31] The SIU's reasons for its delay are set out in the supporting affidavit of the 24 July 2020, *to wit*:

31.1 The President appointed the SIU on the 1 September 2017 under proclamation R29 of 2017 to investigate serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interest of the public at the SABC.

31.2 The SIU commenced its investigation shortly after the proclamation. The investigation was time-consuming and extensive and necessitated that the SIU interview a number of present and former employees of the SABC, Board members and analysis of extensive documentation. All the information then had to be collated and a draft investigation affidavit was compiled which was only completed and deposed to on the 8<sup>th</sup> of August 2019.

31.3 The SIU then instructed its Attorneys to bring an application for the SIU to intervene in this application in order to introduce the evidence uncovered by the SIU. On the 29<sup>th</sup> of June 2020 the SIU obtained an order for the SIU to intervene in terms of which the SIU had to file its affidavit within 15 days, which it did.

[32] It is not known when the Application to intervene was initially filed, the delay would at worst for the SIU, be approximately 10 months, from date of the release of the audit report to the date of the Court granting the SIU leave to intervene. Having regard to the SIU's explanation, I do not find that there has been undue delay in bringing this review application under the principle of legality and none that would

prevent me from exercising my discretion in favour of the Applicants'. The interest of justice would best be served by allowing this application, and the questions raised therein, to reach its conclusion and to stop the drain on the public purse.

### **Defence of *Alibi Lis Pendens***

- [33] Motsoeneng raises a claim of *alibi lis pendens* on the basis that the second part of the action, instituted by the Applicants' against him in February 2018 under case number 18/04253 ("the Action"), is the same as the claim raised against him in these proceedings. This application should accordingly be stayed pending the final outcome of the action, as the pending litigation is between the same parties, involves the determination of the same question and is in respect of the same subject matter. The court should not proceed to hear this matter because of the nature of the claim, the nature and content of the evidence relied on and his impeded ability to properly answer the claim in application procedure.
- [34] The relief sought in the action in the first claim is for payment of R10 235 453.20, being the loss suffered by the SABC by virtue of Motsoeneng's misconduct. The relief sought in the second claim is for payment of R11 508 549.12, being part of the success fee that the GNC awarded Motsoeneng. The Applicant's response in this regard is that it is not convenient to stay the Action which is at its pleading stage and unlikely to proceed to trial for some time and that it is more convenient for this review to run its course. As an administrative decision, the SABC's decision stands and has binding effect unless and until it is set aside in review proceedings. The second claim in the action relies on this Court reviewing and setting aside the SABC's decision to award Motsoeneng a success fee. The action does not "*involve the determination of a question that is necessary for the determination of [this review] and substantially determinative of the outcome of [this review]*".

[35] The exact opposite is true, this review involves the determination of a question (the lawfulness of the success fee) that is necessary for the determination of the action. If anything should be stayed, it should be the action pending this review. That it is first necessary to resolve the issues in this review before the action can proceed, there is no prejudice to Motsoeneng if the review is proceeded with first before the final determination of the action.

[36] The Applicant relies on the decision of **CAESARSTONE SDOT-YAM LTD V THE WORLD OF MARBLE AND GRANITE 2000 CC AND OTHERS (741/12) [2013] ZASCA 129; 2013 (6) SA 499 (SCA); [2013] 4 ALL SA 509 (SCA) (26 SEPTEMBER 2013)** at paras 2-4 and 21, where Wallis JA held:

[2] *As its name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years.*

[3] *The plea bears an affinity to the plea of res judicata, which is directed at achieving the same policy goals. Their close relationship is evident from the following passage from Voet 44.2.7:*

*'Exception of lis pendens also requires same persons, thing and cause. -The exception that a suit is already pending is quite akin to the exception of res judicata, inasmuch as, when a suit is pending before another judge, this exception*

*is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of res judicata in terms of what has already been said. Thus, the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending.'*

- [4] *That passage was adopted and approved by De Villiers CJ in Wolff NO v Solomon and the requirements it spelled out for reliance on the plea have been reiterated on several occasions. For example, in rejecting a contention that proceedings before the Advertising Standards Authority and those before the Registrar of Patents warranted the invocation of the principle, Nugent AJA in Nestlé (South Africa) (Pty) Ltd v Mars Inc. said:*

*'there is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions*

*[...]*

- [21] *On this basis the requirement of the same cause of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that latter case...*

- [37] Having regard to the above, I do not agree that the Action and Part B involve the determination of the same question and find that the plea of *alibi lis pendens* cannot be sustained.

### **Hearsay Complaint**

- [38] Motsoeneng argues that the report attached to the founding papers as “KK1” (the final report on the success fee sanctioned by the Interim Board) is hearsay as Ms. Kwenyama has no personal knowledge in respect of any of the events referred to, or any of the documents relied upon, none of the individuals referred to in the report have deposed to Affidavit, and no basis has been laid or sought for the admission of this evidence. Various technical and procedural objections to the audit report are raised culminating in Motsoenengs final submission that he was never interviewed by the investigators neither were the members and attendees of the GNC.
- [39] Apart from identifying what he believes to be deficiencies in the report and indicating that he never had the opportunity to give his version, (which has now been cured by the filing of his Answering affidavit) Motsoeneng does not state how the admission of the report will prejudice him.
- [40] The Applicant denies that it relies solely on annexure “KK1”, the report of the Public Protector or that the report is hearsay and that the absence of confirmatory affidavits from people implicated in the report makes it so and argues that it is in the interests of justice under the Law of Evidence Amendment Act 45 of 1988 to admit the report.
- [41] Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 records,



*“Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-*

*[...]*

*(c) the court, having regard to-*  
*(i) the nature of the proceedings;*  
*(ii) the nature of the evidence;*  
*(iii) the purpose for which the evidence is tendered;*  
*(iv) the probative value of the evidence;*  
*(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*  
*(vi) any prejudice to a party which the admission of such evidence might entail; and*  
*(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.”*

[42] The report is noted to contain statements from 3 employees of the SABC, emails and minutes of the GNC. The minutes of the GNC, dated the 19 August 2016 and 2 September 2016 is not disputed by Motsoeneng. Amongst the documents attached is proof of the two payments to Motsoeneng, which he has also attached to his Affidavit and which is not disputed by him. The report further references the Human Resources Committee and the GNC's terms of reference, the Employee Recognition programme and the Performance Management Programme, all of which would be familiar to Motsoeneng. The authors of the report specify that the report does not express a legal opinion, but merely states the facts as it came to their attention. I do not that the report prejudices Motsoeneng, more especially that he relies on some of the documents relied on for the report as well. The interest of justice demands that the issues are properly ventilated and that all relevant facts and documents are before the court to enable it to reach a just and equitable decision.

[43] The Judgement in Part A, by Justice Maier Frawley, at para 73-76 dealing with the Public Protectors report and the allegations of hearsay by the Fund found that the evidence is relevant and its admission cannot prejudice the Pension Fund and

falls to be admitted in terms of the Law of Evidence Amendment Act 45 of 1988. I can find no reason to depart from this approach.

### **The GNC Decision**

- [44] During a meeting of the GNC, which commenced at 10h15 on the 19 August 2016, the SABC's Former Acting Group Chief Executive Officer, Mr James Aguma ("Aguma") made an oral representation to the GNC that the SABC Encore and 24 Hours News Channel had been funded from funds raised by Motsoeneng and if the SABC recognised that it had to raise money outside of the two main revenue streams, then it ought to consider rewarding people for raising funds. He indicated that Motsoeneng had raised R1.19 billion which was outside of his job description. Motsoeneng had not been recognised for such performance and cautioned that, if the Corporation did not incorporate the principle of paying a success fee to the COO and employees who went beyond the call of duty to raise funds for the Corporation, channels like SABC Encore and the 24 Hours News would close down.
- [45] He confirmed that if Motsoeneng was not with the SABC, the alternative would be to borrow R1.19 billion with an average interest rate of not less than 9.5% because of the SABC's negative return on investment on activities included in its public mandate. The bank would either inflate the interest rate or reject the application to borrow the funds. In terms of the research that had been conducted on Banks, the results had shown that a success fee for raising capital of R10 million and below would be between 4% and 5% whilst the fee for raising billions would be 0.5% to 3%.
- [46] Aguma indicated that the succession fee principle would apply to the entire Corporation except for those areas where commission was already earned and would cover the revenue generated by employees who went beyond the call of duty.

[47] The GNC resolved to amend the current Commission Policy and made the following decision with particular reference to Motsoeneng:-

47.1 In lieu of the capital funding of R1,9 billion raised by Mr H G Motsoeneng, in favour of the SABC and the fact that R100 million had not yet been received by the SABC, approval be and is hereby given to pay him a success fee of 2.5% of R1.19 billion less R100 million in instalments over a period of three years, (resolution 2).

47.2 The Acting Chief Financial Officer, Ms M A Raphela, must provide the GNC with the Corporation's financial accounts in order to establish if the Corporation could afford the payments stated in resolution (2) above;

47.3 Resolution 2 above must be a standing agenda item for the GNC to enable members to monitor the payment and to ensure that the financials of the Corporation will not negatively affected by such payments.

[48] On the 12<sup>th</sup> and 13 September 2016, 2 payments amounting to R11,508,549.12 was made to Motsoeneng, calculated on the amount of R460,341,964.80 (being funds received as at the 12 September 2016), this is not in dispute. Although I pause to mention that Motsoeneng admits this in the affidavit deposed to on the 18 June 2019 but in his affidavit of the 22 September 2020, indicates that he was paid the amount of R6,790,043.98 and that the SABC paid the difference to SARS as tax on the R11,508, 549.12 which was due to him. He denies that if the SABC is entitled to the repayment of the success fee, that it would be an amount of R11 508 549.12 as set out in the Notice of Motion.

- [49] It is common cause that the SABC Board did not approve the payment of the success fee or approve a policy to award a success fee. The Applicants' argue that the Board had to approve such payment whilst Motsoeneng indicates that this was a governance issue that fell within the mandate of the GNC, accordingly Board approval was neither required nor necessary. In argument, on behalf of Motsoeneng, the court was told that the Applicants' do not contend that the GNC was wrong in approving the success fee, only that the Board had not approved same. It is necessary to interrogate the Powers of the GNC.
- [50] The introductory paragraphs of the SABC's Delegation of Authority Framework 2016-2017("DAF"), records that the Board has created a series of Board Committees in terms of the Board Charter, to assist it in the execution of its role. These Committees may be permanent or may be constituted on an *ad hoc* basis to deal with specific issues. The Board Committees derive their authority from the Board. As a general principle, all matters which fall within the ambit of authority of the Board in respect of which *the Board has not delegated authority* (my emphasis) must first be considered by the relevant Board Committee to make a recommendation to the Board on the appropriate resolution.
- [51] The DAF and the Board Charter illustrates that the Board Committees are generally constituted with powers of recommendation only, however subject to certain statutory limitations, the Board may, in its discretion, delegate decision-making authority in any area to one or more of the Board Committees. Each Board Committee is constituted in accordance with the terms of reference, which set out the rules of operation of the Committee, its role and responsibilities and its relationship to the Board. The current Committees of the Board and an overview of the roles are set out in the table in section 3 of this DAF.
- [52] The Board Charter reiterates that its Committees must have due regard to the fact that they do not have independent decision-making powers. They make recommendations to the Board *except in situations* (my emphasis) where the

Board authorises the Committee to take decisions and implement them. Thus in undertaking its duties, each Committee must have due regard to its role as an advisory body to the Board, unless specifically mandated by the Board to make decisions. A formal report back either orally or in writing shall be provided by the Chairperson of each Committee to all Board meetings following the Committee meetings to keep the Board informed and to enable the Board to monitor the Committees effectiveness.

[53] The Board Committees cannot make any decisions and Exco Committees have delegated decision making authority but this authority only derives its power from the Board and not the other way round. The Board Committees thus do not make decisions and then impose their decisions on the Board. The Board delegates the authority for the decision to be made and then the Committees comply based on the delegated authority of the Board.

[54] The DAF records under the heading, Residual Authority of the Board, that the delegation of authority to any person or Committee shall not divest the Board of that Authority. Notwithstanding any delegation, the Board shall always retain residual authority and any authority delegated by the Board in terms of this DAF, may be revoked at will, by resolution at the sole discretion of the Board. The delegation of Authority does not divest the Board of the responsibility concerning the due exercise of the delegated power or the performance of the assigned duty. The Board may “confirm, ratify, vary or revoke any decision taken by any official as a result of a delegation in terms hereof, subject .....The duty to monitor is an important part of the delegation of authority and distinguishes delegation from an abdication of responsibility.....”

[55] The DAF is replete with various clauses making it apparent that only the Board has the power to make decisions unless this authority has been delegated. Where any business activity is not dealt with, in the scope of this DAF or is an exceptional/unusual circumstance, the general principle of voluntary upward

referral to the individual or Committee at the next higher level of authority *prior* to decision-making applies. The limits of authority in this DAF have been developed within the context of the SABC's risk management framework and are intended to take care of most day-to-day situations. In exceptional circumstances where the level of authority attributable to an employee or Committee in this DAF is not sufficient to accommodate the usual business activities of that employee or Committee, a request for a specific extraordinary delegation of authority may be made to EXCO or Board, accompanied by a full motivation as to the purpose, duration and value of the additional authority required.

- [56] Under section B, Strategic and Structural matters, Compliance and Governance of the DAF, B15 is to be noted, under approval of any new policies and any major or significant amendments thereto, only the Board can approve, although the EXCO/ Board Committee may recommend. Under Section G - Remuneration Performance Management And Change Of Service Directors, it is apparent that all decisions pertaining to performance needs to be approved by the Board and that whilst the GNC may recommend they cannot approve the decision without the Board.
- [57] The Approval tables of the DAF at Section 10, set out the approval levels delegated to various employees and forums, 10.5 indicates what the activity is. Column 1 of the Approval Tables at section 11, sets out the area of decision, column 2 sets out the delegated authority activity, columns 3, 4 and 5 sets out who may recommend and approve a decision and who must be notified of that decision. Section 10 makes provision for two matters relating to the chief operating officer and chief financial officer.
- [58] On issues of appraisal of the performance of the CEO and the CFO it is only the GNC which is competent to make recommendations to the Board and the Board would in turn inform the shareholder. On issues relating to the approval of performance bonuses payable in terms of the performance management scheme,

it is the executive Committee who recommends to the Board acting on the submission by the HR Committee. The Human Resources and Remuneration Committee is to determine and review remuneration and bonus's payable in terms of the performance contracts.

- [59] In terms of the GNC's Terms of reference 2016 to 2017, it is recorded that the GNC is a Committee of the SABC Board of Directors. The Committee is appointed by the Board to assist it by giving detailed attention to areas of the Boards duties and responsibilities by way of a more comprehensive evaluation of specific issues in relation to policies and procedures, determine all the essential components of remuneration for the executive directors of the group and to make recommendations to the Board.
- [60] The Committee must operate in terms of a written Terms of Reference ("ToR") which must deal adequately with its membership, authority and responsibilities. The ToR must be confirmed by the Board and be reviewed at least annually to ensure its relevance and to obtain Board approval of any proposed changes.
- [61] The Committee will regularly review the size, structure and composition of the Committees of the Board, with due regard to the legal requirements, skills and expertise required for effective performance of each Committee. Ensure that appropriate succession planning is in place for both Executive and Non-Executive Directors of the Board. Evaluate succession-planning arrangements for Executive Directors of the Board to ensure that these are orderly and calculated to maintain an appropriate balance of diversity, skills, knowledge and experience.
- [62] Annually review the key data indicators of listed successors for direct reports of the Group Chief Executive officer to determine their status on the succession plan and readiness to assume a role as the need arises. Such data should include the performance evaluation outcomes and outputs of management conversations.

- [63] Supervise the administration of the Corporations policies relating to actual or potential conflicts of interest affecting Members of the Board. Be responsible for preparing a description of the role and capabilities required for particular appointments to the Board and for identifying and nominating candidates for the approval of the Board for recommendation to the Minister and the President.
- [64] Make recommendations to the Board for the continuation (or not) in service of any director as an Executive or Non-Executive director. Review and where appropriate, make recommendations to the Board about proposed appointment to the Boards and Committees of Subsidiary Businesses including the exercise of shareholder rights to remove a Director, the nomination of Group Representatives to sit on the Board of subsidiaries and;
- [65] Ensure that, on appointment to the Board, Non-Executive Directors receive a formal letter of appointment stating what is expected of them. The Committee shall, on behalf of the Board approved conditions of employment and all benefits applicable to the group chief executive officer, chief financial officer, chief operating officer and the terms and conditions of the severance of employment of such individuals.
- [66] The scope of authority of the GNC pertaining to remuneration is as follows, in consultation with the Board and subject to the approval of the Minister, determines the remuneration for the executive director, on appointment, having regard to the remuneration policy, makes recommendations in respect of the fees and/or remuneration of the non-executive directors to the Board from time to time, which directors fees and all remuneration shall be subject to the approval of the Minister.
- [67] The Committee will assist the Board and it's oversight of, the remuneration policy and its specific application to the executive directors, the adoption of annual and longer-term incentive plans, the annual evaluation of the performance of the GCEO, COO and CFO, the determination of levels of reward to the executive



directors and the communication to the minister on the remuneration policy and the Committees work on behalf of the Board.

- [68] The GNC will, develop, evaluate and review the corporate governance structures, policies, practices and procedures of the Corporation and ensure that such structures, policies, practices and procedures as the Committee deems to be in keeping with the tenets of good corporate governance are implemented.
- [69] Review and evaluate regularly the balance of skills, knowledge and experience and performance and effectiveness of the Board and its Committees, make recommendations to the Board with regard to any adjustments that it considers appropriate and approve the section in the annual report dealing with the performance of the Board.
- [70] Receive periodic reports on membership and review annual reports on the effectiveness of the Boards of subsidiaries within the Group, establish and ensure implementation of an induction program for new appointees to the Board. Approve a performance and evaluation and measurement framework to monitor the effectiveness of the Board, Board Committees, individual directors, the GCEO, CFO and CEO. Review and where appropriate make recommendations to the Board about actual or potential conflicts of interest. Facilitate the formulation and monitoring of the Corporation's transformation agenda.
- [71] In respect of its Governance role in terms of the 2016-2017, Terms of Reference at section 4.6, is to Review and, where appropriate, make recommendations to the Board about actual or potential conflicts of interest affecting any Member of the Board, carry out an annual review of declarations of conflicts of interest by the Board, and approve a report to the Shareholder on how the Corporation's Policy on Conflicts of Interest has been applied during the year, to prevent any Human Capital practices that will result in unauthorised, irregular, fruitless and wasteful

expenditure and losses from criminal conduct and expenditure not complying with legislation.

- [72] Having regard to the aforesaid, it is apparent that the role of the GNC was predominantly to determine the essential components of remuneration for the Executive Directors and succession planning.
- [73] The Applicant argues that in terms of the Policy Management Framework ("PMF"), only the SABC Board could adopt a new policy for the SABC. The GNC did not have the authority to award a success fee, only the Human Resources Committees and Remuneration Committees had the authority to recommend a performance bonus, which the Board may approve. The GNC's decision to award Motsoeneng a success fee was therefore unauthorised, unlawful and beyond the prescripts of its mandate.
- [74] The question that this court must determine, according to Motsoeneng is whether the SABC should be allowed to have the *agreement (my emphasis)* reached between itself and Motsoeneng to pay him a success fee reviewed and set aside on the grounds that the SABC did not have a policy to pay a success fee or that the GNC did not have the powers to award him a success fee.
- [75] It is it necessary to consider the factual matrix under which this agreement was reached. According to Motsoeneng, the SABC was seeking to make significant financial and technological investments to improve its broadcasting competitiveness and financial profitability. The financial sustainability and business development of the SABC became a matter of some concern both from its technological requirements and reach and competitiveness. The emergence of private broadcasters in the market imposed significant pressures on the public broadcaster to remain relevant and competitive. The SABC was keen to hear from any member of the public both in the public and private sector on how to improve its financial sustainability and market relevance. Members in the SABC, as any

member of the public, were entitled and encouraged to develop business proposals that would promote the financial and market viability of the SABC.

- [76] As a senior employee of the SABC he decided to experiment with a business proposal to introduce new channels which would be fully funded by the private sector. It was clear that raising funds in the private sector required not only innovative and competitive business proposals but also business connections that were willing to see investing in the public sector as a viable and profitable venture. He came up with the business proposal for the establishment of pilot projects which could be incorporated into the licensing regime of the SABC at no financial risk to it but entirely funded and financed by a private investor. When he did so it was in his personal capacity, during private engagements and always outside his employment time and resources.
- [77] The sourcing of additional income streams was not part of his job function. He pro-actively negotiated and re-negotiated a number of contracts which led to the income listed under item 4.4 in the minute of the GNC Committee of 19 August 2016. Without this income the SABC would have had to find alternative funding. Government was not in a position to assist and the only avenue was to borrow the funds from the open market which would have been very expensive, raising fees and interest on the borrowings would have substantially contributed to the SABC's financial burden.
- [78] That he met with Mr Patel, ("Patel") an executive at Multi-Choice who saw the business opportunity for Multi-Choice in his proposal to invest in the establishment of a 24 Hour News channel and a new Entertainment channel. That he formalised the agreement with Patel to create an investment opportunity for Multi-Choice in the SABC and went to the SABC Board and reported on his business proposals and the private discussions with Patel. The SABC Board was happy with the business proposal and endorsed it and he was asked to conclude the agreement with Multi-Choice.

- [79] Multi-Choice submitted an agreement which he looked at and which agreement was vetted by the SABC legal division who were happy that the agreement was not inconsistent with the legislative mandate of the SABC. The agreement was presented to the SABC Board and after careful consideration, the Finance Committee directed that he sign the agreement on behalf of the SABC.
- [80] The conclusion of the deal with Multi-Choice raised new governance issues not adequately covered in the DAF. The development of new governance policies to deal with new governance challenges was within the jurisdiction of the GNC. The SABC 24-Hour News channel and SABC Encore were pilot projects of the SABC sitting on the Multi-Choice bouquet, they were accordingly not covered by the Broadcasting Act and therefore operated outside the framework of that legislation. As pilot projects of the SABC, there is currently no legislative scheme for their existence and therefore their existence presented unique governance and compliance issues that fell within the mandate of the GNC. The involvement of private investment in the public broadcaster raised fresh governance and compliance issues requiring the attention of the GNC. The issue of his role presented new governance and compliance issues for the public broadcaster that had no precedence.
- [81] The GNC had the power to award him a success fee for raising money in the private sector. The paying of a success fee is a governance issue together with the question of how to recognise the new channels as part of the SABC regime and therefore required the attention of the GNC. The SABC did not have a policy on the payment of success fees, the agreement with Multichoice therefore raised a new governance issue which fell within the GNC.
- [82] Clause 3 of the DAF gives the GNC the responsibility to approve business plans and matters above R100,000,000 to R200,000,000. The power of approval is not subject to approval by the SABC Board as this has been delegated to the GNC.

Therefore the GNC was authorised in relation to the conclusion of an agreement with a private investor, to decide on the rewards policy fit for the nature of the achievement. It was authorised to decide to make a financial decision involving the awarding of a success fee within the threshold of its financial authority. The decision to award a success fee fell within the mandate of the GNC in terms of clause 3 of the DAF. That it is inconsistent with the meaning of the provisions in the DAF to require it to exercise its mandate subject to approval by the Board. Clause 3 cannot and should not be read to impose that obligation on the GNC. Therefore, the awarding of the success fee was done in accordance with the powers vested on the GNC to approve business plans and matters above R100,000,000 to R200,000,000.

[83] It follows that the GNC was authorised to deal with the issue of success fee as a governance and compliance issue within its mandate. When it decided to pay the success fee, it did so after identifying the issue as one of governance and compliance within its mandate to formulate, adopt and implement. It was on this basis that the GNC correctly proposed, debated and adopted the Commission and Success fee. Once that decision was taken by the GNC it had to be reflected in the policies of the SABC and prior to the SABC Board amending the Commission and Success fee policy accordingly, it was dissolved and replaced by an interim Board. The formulation, adoption and implementation of the success fee policy by the GNC was therefore in keeping with the tenants of good corporate governance.

[84] Motsoeneng further submits that paying a success fee would be normal in the private sector but since the SABC was confronting this issue for the first time, it presented new governance and ethical issues for the GNC to consider. Submitting a viable and profitable business proposal to an entity like the SABC is not something reserved only for employees of the SABC. Any member of the public could submit a business proposal to the SABC and if that proposal was accepted it would be right for the Board to consider how to pay such people.

- [85] Juxtaposed to these submissions, the Applicants' aver that the GNC had the authority to approve conditions of employment and benefits for the Chief Operating Officer. The success fee did not arise as a condition of employment, nor was it an employment benefit. Motsoeneng had an employment contract with the SABC. He was entitled to remuneration under that contract. The SABC had policies for limited discretionary bonuses. Neither, Motsoeneng's employment contract nor the SABC's remuneration policies allowed success fees. Motsoeneng admits that *"the SABC's policies did not recognise specifically the necessity of success fee"* and that the GNC had to amend the SABC's commission policy to allow for a success fee, specifically for Motsoeneng. Thus no contract and no policy authorised Motsoeneng's success fee. For this reason alone, the GNC acted beyond its authority.
- [86] Motsoeneng's success fee went far beyond the kind of performance bonuses that the SABC's policies permitted. The SABC had an Employee Recognition Award Programme to reward *"high-level performance that assists the SABC in pursuing its strategic goals and objectives"*. The highest monetary award under that Programme is R10 000. It also had a Performance Management Policy that provided for annual bonuses based on a percentage of an employee's salary.
- [87] The success fee could not have been a performance benefit within the employment contract that had accumulated to Motsoeneng. The approval of which was a contravention of the provisions of the DAF. The HR Committee together with the Executive Committee were the appropriate Committees to determine and recommend a performance bonus.
- [88] The GNC's scope was limited to the approval of conditions of employment and all benefits applicable to the Group Chief Executive Officer, Chief Financial Officer and the Chief Operating Officer and the terms of conditions of the severance of employment of such individual.

- [89] Aguma misled the GNC at the meeting of the 19 August 2016, in that funding that was purportedly raised by Motsoeneng was R459 million and not R1,19 billion. Prior to this meeting the agenda did not include the deliberations or the item of an award of a success fee to the Motsoeneng. No supporting documents were given to the GNC, the entry was only included belatedly at the meeting that was held on the 19<sup>th</sup> of August 2016.
- [90] The GNC did not ascertain whether it could afford the success fee before awarding it to Motsoeneng, despite indicating that this must be done, a decision was taken regardless of whether the Corporation could afford it. The payments in addition were not made over a period of 3 years as the GNC resolved they would be and whilst ensuring that the Corporation was not negatively affected by such payments.
- [91] In its Supporting Affidavit, the SIU refers to various affidavits obtained and considered in the Investigation Affidavit. The Affidavit of Mr Vusumuzi Goodman Moses Mavuso, ("Mavuso") a non-executive director at the SABC from 25 September 2013 to 13 October 2016, is referred to. Mr Mavuso confirmed that the Board of the SABC as the accounting authority retained its ultimate responsibility and control. The Board's Sub-Committees had no independent decision-making powers unless specifically delegated in accordance with the DAF. Any drafting or amending of a policy in the SABC had to be done in line with the PMF. In terms of the PMF, the motivation for the drafting or amending of the relevant policy as well as the proposal of a new draft policy is submitted to the relevant Board Sub-Committee for consideration which then submits its recommendations to the Board for approval, no Board Sub-Committee could approve a new policy or approve the amendments to an existing policy. If there are no policy making provision for a specific matter (or payment), then that matter must be submitted to the Board for approval. He then states the following:

*"No payment can be approved and processed if there is no policy which makes provision for such a payment, unless the Board approved such a payment (or matter). As there was no approved policy for payment of a success fee to the executives of the SABC, a proposal to pay Motsoeneng's success fee ought to have been served before the Board as an item for express approval. This did not occur."*

- [92] Motsoeneng's service agreement at clause 9, records the duties of the executive. Clause 12.2 makes provision for performance of bonuses. Clause 12.2.1 provides that annual performance bonuses are not guaranteed and may be granted at the sole and absolute discretion of the Board which will take into account, without limitation, the performance of the SABC and that of the COO measured against the key performance indicators and all areas set out in the performance agreement. No performance agreement was concluded between the SABC and Motsoeneng. Other than this bonus, the agreement does not make any other provision for other rewards such as a success fee.
- [93] Zakir Yunus, employed by the SABC as Group Specialist, Remuneration and Benefits in the Human Resources Division (HR) confirmed that HR is the division responsible for remuneration, benefits, rewards, bonuses, incentives and/or commission in terms of section 6.1 of the DAF. If there is a conflict between the DAF and any other policy the DAF will override the policy to the extent of the conflict and will be deemed to prevail.
- [94] Arashad Thomas- employed at the SABC as General Manager-Treasury, confirms that at the time the success fee was paid, the SABC was already facing financial difficulties because the forecasted expenditure and future commitments were more than the cash available, the cashflow projections showed that the SABC cash reserves would turn negative in October 2016. The SABC had a liquidity requirement of R650 million per month, meaning it needed a minimum cash balance of R650,000,000 to be able to cover expenses and still remain liquid.



When the success fee was approved and paid, the SABC only had just over R488 million as a cash balance.

- [95] Maria Christina Campher, SABC Chief Financial Controller, indicates that she initially insisted on receiving approval of the Board before making payment on the 12<sup>th</sup> and 13<sup>th</sup> of September 2016 but was overruled and instructed to pay by Aguma and Raphela. She states that on the 12<sup>th</sup> of September 2016 she was first approached by Elijah Makoko (the payroll manager at the time) at around 15h30, which was long after the cut off time for the submission of payments to Treasury, she has no idea why the payments had to be made with such urgency.
- [96] Motsoeneng's personal assistant, Thobekile Herriet Khumalo ("Khumalo"), states that after 16h30, on the 12<sup>th</sup> of September 2016 Aguma came to Motsoeneng's office, Aguma requested to use her laptop because Motsoeneng wanted to write a letter. Aguma proceeded to draft the letter himself which was subsequently handed to Motsoeneng to sign the letter. After it was signed by Motsoeneng, Khumalo scanned it for record purposes. The evidence of Khumalo shows that Motsoeneng was to an extent intimately involved with Aguma in the payment process.
- [97] The urgency and timing of this payment could not have been a coincidence, the answer may lie in paragraph 45 of the judgement of the High Court in **SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD AND OTHERS V DEMOCRATIC ALLIANCE AND OTHERS (393/2015) [2015] ZASCA 156; [2015] 4 ALL SA 719 (SCA); 2016 (2) SA 522 (SCA)**, handed down on the 14 December 2016, in terms whereof Motsoeneng's petition to the Supreme Court of Appeal was refused, with the result that it was finally determined that his appointment as the COO on 8 July 2014 was set aside. The sequence of events strongly suggest that Motsoeneng and Aguma may have had wind of the fact that the decision on his petition was to be delivered by the SCA on 14 September

2016, hence the extraordinary manner in which the payment was processed and paid on 12 September 2016.

- [98] Motsoeneng argues that submitting a viable and profitable business proposal to an entity such as the SABC is not something reserved only for employees of the SABC, any member of the public could submit a business proposal to the SABC and if that proposal was accepted it would be *right for the Board* (my emphasis) to consider how to pay such people. This statement summarises what should have occurred in terms of the DAF. The Board had to consider this and not the GNC whose functions were largely employee remuneration and succession planning.
- [99] It is evident from the SABC's legislative framework that the GNC had no authority to create a policy on the success fee or to authorise payment of a success fee. The GNC as a Committee with delegated authority was under a duty to bring the issue of a success fee to the attention of the Board, not make a decision on its own and continue to carry out that decision after it became aware that the Board had specifically rejected such a proposal on the 19 August 2016 at a Board meeting attended by members of the GNC, including Motsoeneng.
- [100] Motsoeneng's defence to the Applicants' claim is effectively thus, even though he was an employee of the SABC, the funds were raised in his private capacity, that he formulated this idea because the SABC was in financial difficulty and unable to raise funds through the legislative processes allocated for that purpose.
- [101] That he had nothing to do with the decision to award the success fee, this was a decision that the GNC came to of its own accord and that he accepted this decision. The SABC benefitted from his idea and continues to do so. In argument the court was told that the Applicants' are shifting the blame onto Motsoeneng for their own dishonest actions. The Applicants' further do not allege that the GNC

was wrong in taking the decision to pay the success fee, only that the GNC did not seek the approval of the Board.

[102] That there was an agreement and the SABC is now estopped from raising the lack of authority as a defence and that the Applicants' are not entitled to Motsoeneng's pension fund as this deprives him of his constitutional right to property. I consider these submissions:-

102.1.1 In raising the funds Motsoeneng alleges that he acted in his private capacity and that he went to private functions. The promotion of private investment in the SABC projects was not part and parcel of his normal SABC duties. It is common cause that on or about 9 July 2014, the SABC and Motsoeneng entered into a fixed term service agreement in terms of which Motsoeneng was employed as the Chief Operating Officer (COO) for a five year period. As the COO, Motsoeneng should have been intimately involved in and aware of the SABC's legislative framework and its policies.

102.1.2 The Applicant's allege a violation of section 76(2)(a) of the Companies Act, 71 of 2008, Motsoeneng used his position as COO to gain an advantage for himself and knowingly cause harm to the SABC in that at the time of accepting the success fee, his continued employment with the SABC was in jeopardy, following findings of misconduct on his part and irregularity of his appointment by the public protector in the report dated 17 February 2014 and the various judgements that followed. The acceptance of the payment of the success fee was in contravention of his fiduciary duties to the SABC which constitutes unlawful conduct as it resulted in the intentional and/or negligent loss of public money. He was further aware that section 12.2.1 of his service agreement stipulated that, *"annual performance bonus are not guaranteed and may be granted at the sole discretion and absolute discretion of the Board*

*which will take into account, without limitation, the performance of the SABC and that of the COO measured against the key performance indicators and/or areas set out in the Performance Agreement”.*

102.1.3 Motsoeneng’s position as the COO gave him the knowledge of the inner workings of the SABC and its financial limitations, which allowed him to come up with his business proposal. Even though he argues that he acted in his private capacity, as a result of which, he did not fall without the reward structures of the SABC, i.e. the Employee Recognition Programme and the Management Policy, this contention cannot be sustained, if regard is had, to his conduct.

[103] When Motsoeneng came up with his business model, he took this to the SABC Board, which was accepted. When Motsoeneng entered into the agreement with Patel to commit to long term investment in the SABC projects, he went to the SABC Board to obtain their approval. The agreement with Multi-Choice was then vetted by the SABC legal division, the financial injection would allow the SABC to move from analogue to digital which was part of his duties. The agreement was then presented to the Board and Motsoeneng was given the authority to sign the agreement by the Board, which he subsequently did.

[104] There is nothing in the papers before this court to suggest that Motsoeneng made it clear to the SABC that he was not acting in the position as COO but in his private capacity. Nor is there any confirmation that the SABC was advised that as a private individual he expected to be rewarded for his efforts.

[105] At every stage of the process Motsoeneng sought approval from the Board, yet when it came to approval of a success fee, the Board was completely excluded, and somehow Motsoeneng did not take issue with this. Suddenly, what had been an issue for the Board all along and which necessitated the Board’s consent, was now a governance issue, specifically within the domain of the GNC.

- [106] Motsoeneng argues that the conclusion of the deal with Multi-Choice raised new governance issues not adequately covered in the DAF. There is no requirement for the GNC to develop, evaluate and approve policies and to submit whatever is done to the Board. Motsoeneng appears to be attempting to place a square peg in a round hole. If this is so, why would Motsoeneng approach the Board for approval, why not simply go straight to the GNC. None of the governance issues that the Respondent alleges are issues that the GNC had to deal with, was put before the GNC, they were all placed before the Board, by Moetsoeneng, for approval and he was given the approval by the Board, the argument in this regard cannot be sustained.
- [107] The GNC has no authority except that set out in the table on page 6 of the DAF, which predominantly relate to determining all the essential components of remuneration for the executive directors of the group and succession planning. The awarding of a success fee does not fall within its mandate.
- [108] It seems unlikely that a business proposal that started off with the approval of the Board would find its way to the GNC without being delegated as such. This Court has not been provided with any such delegation. Motsoeneng submits that there was no legislative scheme for the pilot projects and therefore their existence presented unique governance and compliance issues. If this were so, it is more likely that these issues would have been dealt with by the Board or delegated to the appropriate committee by the Board.
- [109] There is no information before this court to indicate why this matter would find itself to the GNC, or why this would be a governance issue that the GNC had to deal with. We know that a contract was concluded with Multi-Choice which would have governed the relationship between the SABC and Multi-Choice. It is confirmed that this agreement was vetted by the legal department. We are not told

specifically what issues would need to be dealt with by the GNC, except for the bald statement that this is a governance issue.

[110] The submission that the GNC would need to look at the future conduct of these pilot projects is itself problematic considering the time that elapsed from date of conclusion of the contract. We know that the contract with Multi-Choice was concluded on or about 3 July 2013 and would have endured for a period of 5 years. By 2018 it would have been up for renewal, we are told it was renewed. The GNC meeting was held on the 19 August 2016, 3 years later, any governance issues that needed to be dealt with by the GNC, would in all probability have manifested itself in the 3 years since the conclusion of the agreement and the GNC would have had various meetings to resolve or table such issues, yet no information in this regard is provided. No minutes of the GNC meetings are provided attesting to the fact that this was a governance issue that fell within the mandate of the GNC or that the GNC exercised such mandate in any manner.

[111] The court finds support for this contention from the minutes of the SABC board meeting held on the 29<sup>th</sup> of January 2015 which is an annexure ('HM8') to Motsoeneng's, Answering Affidavit of the 7<sup>th</sup> of September 2020, specifically paragraph 3.6 thereof, in which the following was recorded:

*Mr J R Aguma reported that the analysis of the cost and location map methodology for the 24 hour News Channel was in progress. However, the challenge was the allocation of costs between the time spent on the 24 Hours News Channel and the General News Channels. It was pointed out that feedback in respect of the impact of the new platform to be created in terms of the Multi-Choice contract would be dealt with by the joint PBS/PCS committees. Mr G H Motsoeneng reported that regulations were in the process of being developed and that the DoC was responsible for this process. He stated that the SABC would provide its input prior to the regulations being issued for public comment.*

- [112] At paragraph 5.6, the involvement of the PBS/PCS committee is again referenced. Nowhere is the GNC referenced as the Committee that would deal with the Multi-Choice issue and it is apparent that the SABC Board was seized with the Multi-Choice contract and would delegate authority on specific issues pertaining thereto.
- [113] The way the success fee was introduced and explained by Aguma at the GNC meeting of the 19 August 2016 and the response of the members is further telling, it was not tabled as a matter which the GNC had dealt with previously and were fully aware of but as a new item that needed explanation and justification.
- [114] It is common cause that the SABC did not have a policy pertaining to a success fee, as such this was a new policy and would have been subject to the general principle of voluntary upward referral to the individual or Committee at the next higher level of authority *prior* to decision. Paragraph 2 of the PMF details the procedure to be followed in initiating a new policy or a change to an existing policy. The requester of a change in an existing policy or the initiator of a new policy must *inter alia* motivate why the existing situation is unsatisfactory and what the unsatisfactory state is on the SABC. They must then indicate what the required state is and the positive effect this will have on the SABC. Clause 2.5 of the PMF deals with the approval process of the policy. It states in no uncertain terms in paragraph 2.5.1 that all policies are approved by the SABC Board.
- [115] Motsoeneng as the former COO of the SABC ought to have been aware of this, he was intimately aware of the operations of the SABC, to the extent that he could appreciate a lacuna in its legislative functioning pertaining to finance. He tells us that he looked carefully at the agreement with Multi-Choice, that the agreement was vetted by the SABC legal division which was also happy that the agreement was not inconsistent with the legislative mandate. His position as the COO would demand that he be aware of the SABC policies.

- [116] Even if the Court were to accept that Motsoeneng was unaware that the GNC was going to consider giving him a success fee, he would have had to be aware of the fact that the SABC did not have a success fee policy and that its implementation would need to be approved by the Board.
- [117] Motsoeneng attended two meetings on the 19 August 2016, the first was the GNC meeting and the second was the Board Meeting. In respect of the GNC meeting he indicates that his private efforts and role in the conclusion of the agreement with Multi-Choice came up for discussion in a formal meeting of the GNC, he was present to answer any questions and report on the Multi-Choice deal. After completing his report he received extensive compliments from the members of the GNC as he had with the SABC Board, however when the issue involving his special role in the conclusion of the Multi-Choice deal was raised, he left the meeting.
- [118] He did not initiate the discussions on any payment of a success fee but he was aware from the comments of some of the Board members that his role would be considered for the purpose of deciding whether he should be paid a success fee or offered some reward. He was not a member of the GNC, did not participate in the deliberations and could only be present on the specific invitation of the GNC.
- [119] We know from the transcript of the GNC meeting, that Motsoeneng was excused after the issue of the success fee was raised but before the success fee was discussed. He would thus have known, as he left the GNC meeting that the members were going to be discussing the awarding of a success fee to him.
- [120] The court is told that Motsoeneng's purpose at the GNC meeting on the 19 August 2016, was to answer questions on the Multi-Choice deal. Neither the Transcript nor the minutes confirm that the Multi-Choice deal was discussed before the



success fee was raised. It is evident that Motsoeneng is not being honest when he makes this submission.

- [121] Motsoeneng submits that the GNC awarded him a success fee for the fact that he, in his private capacity had solely negotiated and raised money for the SABC from the private sector to invest in the establishment of two television channels, namely SABC 24 Hour News channel 404 and the SABC entertainment channel. He received a letter from the Group Executive HR, the late Mr Moholo Lephaka, dated 22 August 2016 in which he was informed that the GNC had approved the payment of a success fee to him, *"in lieu of the revenue amounting to R1,19 billion that has been raised by yourself in favour of the SABC*. He also received the minutes of the GNC meeting in which the decision to adopt a success fee policy was made.
- [122] After reading the decision he met with Aguma in the company of Mr Lephaka about the decision, he then met with his then attorney, *Mr Zola Majavu after which he advised Aguma what he believed would be a justifiable payment of a success fee*. In a letter dated 12 September 2016, he specifically isolated the funds raised by him in pursuance of his contractual duties as an SABC employee, he informed the SABC that he did not expect to be rewarded by way of a success fee for what he considered activities within the course and scope of his employment, for example saving the SABC money for AFCON games which amounted to R 32 million and further raising R 60 million for AFCON. He agreed to be paid a success fee for his business proposal which involved the establishment of the two pilot programs, namely, SABC 24-Hour News Channel and the SABC Encore Channel at R746 million paid entirely by the private investor. Thus, even though the GNC decided to make payment of the success fee without Motsoeneng's intervention, Motsoeneng instructed the GNC on which funds the success fee of 2.5% had to be based and this was done long after the Committee members were advised that he had raised R1.19 billion and which was confirmed on the date the first payment was made.

- [123] At the second meeting Motsoeneng attended on the 19 August 2016, the SABC Board meeting, a proposal was made by Professor Tshidzumba to reward SABC employees for doing their jobs such as negotiating contracts. Mavuso objected to this, contending that the SABC performance management systems were sufficient to reward staff. This objection was upheld by the Board, the proposal by Tshidzumba was not approved. The minutes of the meeting show that Moetsoeneng and the members of the GNC who had earlier on the same day taken a resolution approving the Commission Policy of the SABC to include a success fee to Executive directors and specifically to pay Motsoeneng a success fee, were present at that meeting but did not disclose this resolution or their intention to pay Motsoeneng a success fee to the Board.
- [124] The members of the GNC and Motsoeneng had a fiduciary duty in terms of sections 50, 51 and 55 of the PFMA, to ensure that, *"they prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct and expenditure not complying with the operational policies of the SABC."* The silence of the members of the GNC and Motsoeneng speak of collusion, if the GNC was the Committee to deal with the success fee, then all other Committees including the Board would be aware of this and the GNC would have been asked to weigh in on the question of rewarding employees.
- [125] There would further, be every reason to inform the Board that the GNC had just approved a policy rewarding employees with a success fee when this issue was raised. Even after the rejection of Tshidzumba's proposal in this meeting, the GNC members failed to halt the payment of the success fee to Motsoeneng. At this point, certain members of the GNC were aware that it had exceeded its mandate and would not obtain Board approval for payment of the success fee, yet they proceeded regardless.
- [126] Motsoeneng himself was part of this Board meeting and was aware that the GNC had earlier discussed payment of the success fee to him but did not disclose this

to the Board, when he had a fiduciary duty as its COO to do so, worst still he then proceeded to advise Aguma on what amounts his success fee should be based. I do not agree that only the Chairperson of the GNC could raise this issue with the Board. Motsoeneng was not an administrative clerk at the SABC, he was its COO.

[127] It is submitted by the Applicants' that Motsoeneng's dishonesty is apparent from the following acts, firstly, his acceptance of the payment of the success fee knowing that only the Board of the SABC had the authority to approve a new policy to pay rewards such as success fees to the Executives at the SABC and that the Board had not approved such a policy. Secondly, he was aware that not only was there no approved policy on success fees but that members of the Board had in fact expressly rejected the payment of such rewards to the Executives when it was proposed in a meeting he attended. Third, he failed to disclose to the Board that the GNC had discussed and/or approved the payment of the success fee to him. Fourth, even after becoming aware of the Board member's express rejection of the payment of such rewards he nevertheless proceeded to accept such a payment. Fifth, he was intimately involved and in cahoots, with the previous Group Chief Executive Officer, Aguma in ensuring that the success fee is paid to him urgently despite being aware that it was not approved by the Board. Motsoeneng's response to this is that he was never a member of the GNC, he was the COO of the SABC.

[128] It is apparent to this Court, that Motsoeneng's motive and design all along was to be rewarded for his business innovation, from his private meetings, in his private capacity and during private engagements, with persons in the private sector, to his understanding that the SABC was keen to hear from any member of the public both in the public and private sector on how to improve its financial sustainability and market relevance. Motsoeneng saw an opportunity and capitalised on such opportunity in his position as COO of the SABC and in this, he wanted to be rewarded. Fortuitously, it appears that the GNC came to the same conclusion, I

am not convinced that this is the case, the conduct of the GNC speaks of collusion.

- [129] The members of the GNC were not acting in the interests of the SABC, were not attempting to prevent any human and human capital practices that would result in irregular or fruitless and wasteful expenditure. For reasons unbeknownst to this Court, the members of the GNC did not act in terms of their fiduciary duties. Prescripts and procedures were not complied with and due diligence ignored.
- [130] In terms of the minutes of the GNC meeting, the Acting Chief Financial Officer, Raphela must provide the GNC with the Corporations financial accounts in order to establish if the Corporation could afford the payments. This was not done.
- [131] Resolution 2 was to be a standing agenda item for the GNC to enable members to monitor the payment and to ensure that the financials of the Corporation will not negatively affected by such payments, this was not done. We know from the affidavit of Arashad Thomas that at the time the success fee was paid, the SABC was already facing financial difficulties and only had just over R488 million as a cash balance.
- [132] The rush to make payment of the success fee at the insistence of Aguma and Raphela on the 12 and 13 September 2016, ignoring Ms Campers request for Board approval and the request for payment well after the cut off time for the submission of payments to Treasury, is not explained, but neatly coincides with the setting aside of Motsoeneng's appointment as COO on 14 September 2016, by the SCA. So too does the sudden need to award a success fee to Motsoeneng 3 years after the Mutli-Choice contract was concluded.
- [133] On the 12 September 2016, Khumalo after 16h30 witnessed Aguma writing an email addressed to himself, on Motsoeneng's laptop and then giving it to Motsoeneng to sign, on the basis that same was written by Motsoeneng. We

know that Motsoeneng initially claimed responsibility for writing this email. We further know that the first payment was made on the 12 September 2016 and that this affidavit was drafted after payment had been made by Campher.

[134] Aguma and Raphela once payment was affected to the Motsoeneng, retrieved all supporting documents claiming that it be kept by them for audit trail purposes with the result that the SABC Board only became aware on the 24 July 2017, when the forensics investigation was completed and a final report given, that the decision taken by the GNC Committee to award Motsoeneng, the success fee was not authorized by the empowering provisions and was thus irregular.

[135] In terms of the Clause 7 of the GNC's Terms of reference, under the heading Meeting procedures, *"a notice of each meeting including the agenda, confirming the date, time and venue shall be forwarded to each member of the Committee at least two weeks prior to the date of the meeting. Relevant supporting papers for the agenda items to be discussed shall be forwarded to each member of the Committee."* The Success Fee was not placed as an item on the agenda two weeks before the meeting, this was raised as a new item at the meeting, the GNC thus adopted the success fee policy in an unprocedural manner.

[136] Motsoeneng's response is that the meeting was Quorate, the chairperson of the GNC, who was also the chairperson of the Board reported to SABC, the GNC's recommendations on the success fee and the decision to award Motsoeneng a success fee of 2.5% of R1.19 billion did not require Board approval and then makes the startling revelation that the procedures of the GNC are to be applied in a flexible manner. In the past, members of the GNC would for the first time during the meeting introduce a new matter and request for the matter to be part of the agenda. When that has happened, the GNC would then elevate the issue and decide whether or not to add it in the agenda. The GNC is the master of its procedure and a two week notice is guidance and therefore discretionary rather than mandatory. The fact that an item is added on the agenda of the GNC on the

date of the meeting does not invalidate the decisions of the meeting. Motsoeneng is emphatic that he was not a member of the GNC, yet he is intimately aware of the GNC's flagrant disregard for proper procedure.

[137] The decision to award a success fee was not a prerequisite or compulsory to securing the contract with Multi-Choice, yet the impression that is created is that a success fee had to be paid. The allegation that the payment of the success fee was a governance issue, requiring the GNC's intervention is not convincing, the GNC did not have to consider the business proposal, it had already been approved and considered by the Board, the awarding of a success fee was not part and parcel of the business proposal. As indicated above there is no indication that the Board was informed by Motsoeneng, when the proposal was presented to the Board, that he expected to be compensated for this, over and above his salary.

[138] Motsoeneng argues that the allegation that he is dishonest because he ought to know that the GNC should not have awarded him a success fee is perverse because the SABC in essence wants to shift the blame to him for its actions in the handling of the success fee issue. If the decision was unlawful it was not because he accepted the payment of a success fee for work he knew he had successfully done for the betterment of the SABC. It was unlawful because the GNC failed to appreciate the scope of its authority to formulate and adopt a success fee policy. The SABC now wishes to benefit with reference to his pension, for its unlawful actions in relation to the payment of the success fee, he cannot be forced to forfeit his pension to pay for a decision of the SABC in which he had nothing to do. This argument however loses sight of the fact that he received proceeds that he was not entitled to and is now disputing that same must be repaid.

[139] Motsoeneng, argues that the allegations that he acted dishonestly when he accepted the decision of the GNC to award him a success fee is without any merit. The decision to award him a success was lawfully taken by the SABC, however

in the event that he is wrong, at worst the SABC wants to benefit from its own wrongdoing and he is entitled to rely on the principle of estoppel to protect himself from the prejudicial conduct of the SABC in the event that it is found that the decision to award him a success fee was unlawful.

- [140] Motsoeneng argues that the SABC received significant financial investment as a consequence of his personal business innovations in raising the funding for the business proposals involving the pilot projects. The SABC represented to him that it had the legal authority to accept the business proposal for raising funds and to determine how to reward him. It further represented to him that it was lawfully authorised to pay him a success fee to the value of 2.5% of the amount raised for the business innovation. After considering the offer of the SABC to reward him with a success fee, he accepted it on the basis of the representations made to him regarding the SABC's authority to award him the success fee. That he would not have accepted the payment of the success fee if the SABC had informed him that it did not have the authority to accept his business proposal to raise funds for the establishment of private broadcasting channels operating outside the statutory framework but with the permissible innovations in the SABC.
- [141] Based on the SABC's representations he accepted the offer to pay a success fee for his business innovations in raising private sector funding for the SABC pilot projects. Further and to the extent that the authority of the Board was required to pay him a success fee, it ratified the decision of the GNC when it's signed off the annual financial statements of the SABC reflecting the business innovation involving the assessment of one R1.9 billion and the payment of the success fee.
- [142] Motsoeneng was not dealing with the SABC when these representations were made, even though the GNC is a committee of the SABC, when it made the decision to approve and pay the success fee it did so without the authority of the Board and in so doing it acted on its own and not on behalf of the SABC. Motsoeneng indicates that he would not have accepted the payment of the

success fee if the SABC had informed him that it did not have the authority to accept his business proposal. His conduct however makes it apparent that when he got approval for his business model, he approached the Board who were not informed that he was acting in his private capacity and not as an employee of the SABC and that he wanted to be compensated for his efforts over and above his salary. The success fee was raised by the GNC and not the Board, he knew from the Board meeting of the 19 August 2016 that the Board would not approve compensation for reward over and above what its policies made provision for and cannot now pretend that the SABC represented to him that he would be paid, it did not. The cabal that was the GNC did so, not the SABC Board.

[143] The Applicants' response in this regard is that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance on the principle of Estoppel, Motsoeneng's argument on estoppel is misplaced. The Applicants' rely on the decision of, **PROVINCIAL GOVERNMENT OF THE EASTERN CAPE AND OTHERS V CONTRACTPROPS 25 (PTY) LTD (414/99) [2001] ZASCA 68; [2001] All SA 273 (SCA) (25 May 2001)** and **TRUST BANK VAN AFRIKA BPK V EKSTEEN 1964 (3) SA 402 (AD) AT 411H-412B** and **ITHALA DEVELOPMENT FINANCE CORPORATION LTD V MOHAMED HUSSEN WARSAME (13452/2013) [2014] ZAKZPHC 38 (10 JUNE 2014)** where the Court held that the doctrine of estoppel cannot be used to make what is illegal, legal and cannot replace statutory requirements for the validity of contracts.

[144] Motsoeneng refers to the decision of **MAKATE V VODACOM (PTY) LTD [2016] ZACC13;2016 (6) BCLR 709 (CC); 2016 (4) 121 CC** and equates it to the situation between himself, the SABC and the GNC. The Honourable Justice Jafta is quoted and the essential elements of Estoppel, as set out by Justice Jafta is quoted as being illustrative of Motsoeneng's position and defence herein. The court is unable to agree with the submissions herein. In the first instance Motsoeneng is not a private individual entering into a contract. In his capacity as COO, he presented a business proposal to the SABC, this was in the course and



scope of his employment with the SABC. There was no agreement that Motsoeneng would be paid a success fee when the business proposal was presented to the Board. The GNC decided to award Motsoeneng a success fee, 3 years after conclusion of the Multi-Choice agreement. The success fee was not authorised by the Board and the DAF makes it clear that the GNC has no authority to authorise the payment of the success fee. The authority of the GNC to authorise a success fee has been set out above and will not be repeated here.

[145] Apart from denying the contents of the affidavits of Mavuso, Zakir Yunus, Arashad Thomas and Maria Christina Campher. Motsoeneng does not offer an alternative version and in fact admits that Aguma used his laptop to draft the letter that purportedly came from him, as indicated by Ms Khumalo. In light of the admission the Court is unable to infer that Motsoeneng had nothing to do with the GNC's decision to pay the success fee.

[146] Initially the court was informed that Motsoeneng addressed the letter of the 12 September 2016 to Aguma pointing out that certain of the items in respect of which the success fee had been approved, ought not to have been included. However once the affidavit of Khumalo materialised when the SIU was joined, Motsoeneng then confirms that Aguma drafted this affidavit.

[147] In argument, Counsel for the Second Respondent referred the court to a paragraph under section 4.6 of the GNC's 2016–2017 ToR, which allegedly supported the contention that the approval of the success fee was within the GNC's mandate:-

*"The following functions shall be the common recurring activities of the Committee in carrying out its responsibilities. These functions should serve as a guide, with the understanding that the Committee may carry out additional functions and adopt additional policies and procedures as may be appropriate in light of changing business, legislative, regulatory, legal or other conditions. The Committees*

*responsibilities should remain flexible, to best react to changing conditions and to be in the best position to assure the board and stakeholders of the Corporation that the Corporations governance principles, policies, standards and practices optimally assist the Board and the Corporations management to effectively and efficiently promote the interests of the corporation by appropriately balancing the interest of its shareholders:*

*The Boards knowledge and proficiency to be effective in its role;*

*The Board independence from management and other stakeholders and it's accountability to the Shareholder;*

*The Board's empowerment to make decisions and act independently of management and other Corporation stakeholders.....*

*.....*

*.....*

*New or special committees of the Board that may be necessary to properly address ethical, legal and or other matters that may arise”.*

[148] Having regard to the paragraph in its totality, it is apparent that the paragraph that starts with the words, “*The following functions* refers to what is stated after the words,..... *balancing the interest of its stakeholders*” and is not a paragraph on its own. It refers at all times to the Board and confirms that the Committees responsibilities should be in the best position to assure the Board and Stakeholders of the Corporation that the Corporations governance principles, policy standards and practices optimally assist the Board.....”.This paragraph does not in any manner suggest that the GNC may ignore the Board and usurp its authority. The Court accordingly cannot agree that this paragraph, taken out of context bestows the GNC, with the authority to authorise a success fee in the absence of Board approval.

[149] Motsoeneng argues that the SABC ratified the decision of the GNC to pay the success fee when it signed off the financial statements of the SABC. The SABC contends that this argument is defeated by a rhetorical question. How does the

Board approve payment of a success fee to him when it has never approved any policy on success fees? Worse still, how can it be said that the Board ratified the payment of a success fee when the idea of paying such rewards was expressly rejected in a Board meeting of 19 August 2016, at which Motsoeneng was present. The court can find no flaw in this reasoning.

- [150] The SABC is an organ of state, the SABC's decision to award a success fee to Motsoeneng is reviewable under the principle of legality. In **FEDSURE LIFE ASSURANCE LTD V GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL** [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC), the Court held:

58] *"It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". It also said that— "a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful".*

- [151] Having regard to the aforesaid, it is evident that the GNC did not have the authority to authorise a policy pertaining to the success fee or to make payment of a success fee to Motsoeneng without the approval of the Board. In paying Motsoeneng, the GNC acted ultra vires and unlawfully. The decision of the GNC to award Motsoeneng the success fee of R11,508, 549.12 is accordingly set aside.

- [152] The Court must now consider what is a proper remedy. In this regard, I am guided by the decision in, **ALLPAY CONSOLIDATED INVESTMENT HOLDINGS (PTY) LTD AND OTHERS V CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN**

**SOCIAL SECURITY AGENCY AND OTHERS (NO 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) (17 April 2014);** at para 56, Froneman J, on the proper approach to remedy:

[30] *Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.*

[31] *In the merits judgment this Court stated:*

*“Once a finding of invalidity... is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory procurement framework is concluded not on the state entity’s behalf, but on the public’s behalf. The interests of those most closely associated with the benefits of that contract must be given due weight...”*

[32] *This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. The emphasis on correction and reversal of invalid administrative action is clearly grounded in section 172(1)(b) of the Constitution, where it is stated that an order of suspension of a declaration of invalidity may be made “to allow the competent authority to correct the defect.” Remedial correction is also a logical consequence flowing from invalid and rescinded contracts and enrichment law generally.*

[153] **In PASSENGER RAIL AGENCY OF SOUTH AFRICA V SWIFAMBO RAIL AGENCY (PTY) LTD (2015/42219) [2017] ZAGPJHC 177; [2017] 3 ALL SA 971 (GJ); 2017 (6) SA 223 (GJ) (3 JULY 2017),** Francis J, held:

- [83] *"Section 8 of PAJA empowers this court with a generous discretion in granting any order that is just and equitable. In doing so, a court should bear in mind that the primary focus of judicial review is the correction and reversal of unlawful administrative action.*
- [84] *Before doing so, if I take into account all the irregularities and the various steps that were taken by some employees of PRASA to hide those irregularities, this let Swifambo to gain a dishonest advantage which in this case was financial over other bidders and is tantamount to fraud. Fraud is defined as an act or course of deception, an intentional concealment, omission or perversion of truth to gain and unlawful or unfair advantage. The irregularities raised in this case have unearthed manifestation of corruption, collusion or fraud in this tender process. There is simply no explanation why Swifambo was preferred to other bidders.*
- [85] *In Tswelopele Non-Profit Organisation and Others vs City of Tshwane Metropolitan Municipality 2007 (6) SA 511 (SCA) at paragraph 17 it was explained as follows: "This places intense focus on the question of remedy, for though the Constitution speaks through its norms and principles, it acts through the relief granted under it. And if the Constitution is to be more than merely rhetoric, cases such as this demand and effective remedy, since (in the oft-cited words of Ackerman J in Fose v Minister of Safety and Security) 'without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced'.*
- [86] *The Constitutional Court made the same point in the remedial decision in the AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) 2014 (4) SA 179 (CC) at paragraphs 29. In doing so the Court relied on its decision*

*in Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 CC at paragraph 29 where it was held that:*

*"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated, It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration, compelled by constitutional precepts and at a broader level, to entrench the rule of law. "*

[87] *The question of what is just and equitable is a question that will always be informed by the circumstances of each case. In Millennium Waste Management (Pty) v Chairperson of the Tender Board: Limpopo Province and Others 2008(2) SA 481 (SCA) the court held at paragraph as follows, "To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interest the administrative ...official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable ".*

[88] *Similarly in review applications the court must take into account various factors. The court must look at the public interest, the nature of the irregularities that took place, any explanation for that, whether*

*the person concerned is an innocent tenderer, what message the court will be sending out when it grants a certain remedy etc. If the respondent is an innocent tenderer it follows that this will be an important factor that the court should take into account in deciding a just and equitable remedy. A review court can either set aside the decision ab initio or set aside with prospective effect.*

- [154] The Applicants' submit that correcting the SABC's unlawful decision requires Motsoeneng to repay the value of the success fee to the SABC and that nothing in the Pension Fund Act stands in the way of this order. Motsoeneng was never entitled to the success fee in the first place. The relief sought is simply to reverse the undue payment. Whilst the Pension Funds Act does generally ring fence pension funds, it protects only legitimate contributions. The success fee was never legitimate.
- [155] Motsoeneng was in a position of trust, as the COO of the SABC, he had a fiduciary duty to protect the interests of the SABC. Instead he chose to protect and further his own self-interests, even when it was evident that the decision of the GNC would not be approved by the Board, he did not reveal that the GNC had authorised a payment to him and then received the payment. He colluded with Aguma, allowing Aguma to write emails in his name for reasons the court cannot assume. He indicates that he was in the meeting of the GNC of the 19 August 2016 to advise the Committee of the Multi-Choice contract, but this he did not do, all of this must be viewed within the prism of the litigation that was pending against him at the time and which ultimately resulted in him being ousted from the position of COO.
- [156] It is pertinent to refer to the decision of **SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD AND OTHERS V DEMOCRATIC ALLIANCE AND OTHERS (393/2015) [2015] ZASCA 156; [2015] 4 ALL SA 719 (SCA); 2016 (2) SA 522 (SCA)**, (8 October 2015), in this regard, Justices Navsa and Ponnann, when referring to the report of the Public Protector:

[6] "the Public Protector released a report relating to her investigation entitled 'When Governance and Ethics Fail'. *The Public Protector concluded that there were 'pathological corporate governance deficiencies at the SABC' and that Mr Motsoeneng had been allowed 'by successive [b]oards to operate above the law'.*"

[44] *Our Constitution sets high standards for the exercise of public power by State institutions and officials. However, those standards are not always lived up to, and it would be naïve to assume that organs of State and public officials, found by the Public Protector to have been guilty of corruption and malfeasance in public office, will meekly accept her findings and implement her remedial measures. That is not how guilty bureaucrats in society generally respond. The objective of policing State officials to guard against corruption and malfeasance in public office forms part of the constitutional imperative to combat corruption. The Constitutional Court in *Glenister v President of the Republic of South Africa & others* [2011] ZACC 6; 2011 (3) SA 347 (CC) noted (paras 176 and 177):*

*'Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy.'*



[49] *It is important to emphasise that this case is about a public broadcaster that millions of South Africans rely on for news and information about their country and the world at large and for as long as it remains dysfunctional, it will be unable to fulfil its statutory mandate. The public interest should thus be its overarching theme and objective. Sadly, that has not always been the case. Its Board has had to be dissolved more than once and its financial position was once so parlous that a loan of R1 billion, which was guaranteed by the National Treasury, had to be raised to rescue it. Here as well, the public interest appears not to have weighed with the Board of the SABC. The Public Protector observes in her report: The allegations of misconduct against Motsoeneng are serious. He is the COO of the SABC. He is an executive member of the Board. He has virtually unlimited authority over his subordinates and access to all the documentation in relation to the charges of misconduct that will be preferred against him."*

[157] Motsoeneng, pretends not to understand the policies of the SABC and paints himself as an innocent party swayed by the winds of circumstance, this is not so. Motsoeneng was a senior executive at the SABC, in terms of his service agreement he was contracted to use his utmost endeavours to protect and promote the business and interests of the SABC and to preserve its reputation and goodwill. His service agreement made no mention of the payment of a success fee, it only referred to a performance contract, which was not concluded. He knew this, and so opted for the route of a private individual, this is not supported by his actions at the time and the Board was not advised when the business proposal was submitted, that he expected to be compensated over and above his salary.

[158] The court cannot draw the conclusion that Motsoeneng was acting in his private capacity in securing the pilot projects, this seemingly is an afterthought when things went wrong for him and the payment of the success fee was discovered. As the COO, Motsoeneng's key accountabilities included being responsible for platform management and content generation activities of the SABC and Market Intelligence Research. He was contracted to direct corporate strategy and operational growth of the corporation in order to improve profitability and quality of the service offering in the designated areas of responsibility. He also had to develop local, continental and global partnerships with relevant industry players. The success achieved with Multi-choice is what he was employed to achieve and for which he earned his salary of R3, 683, 600,00 per annum.

[159] Motsoeneng admits that none of the SABC's policies allowed for a success fee, despite this he accepted payment of the sum of R11,508, 549.12. Motsoeneng was not an innocent bystander in all of this, he set out to obtain a benefit that he was not entitled to, knowing full well that his employment contract did not allow for bonuses. The only reasonable inference to be drawn is that he received payment of the success fee in circumstances that he knew, or ought to have known, that he was not entitled to it, this was unlawful.

[160] In terms of Section 37D(1)(b)(ii)(bb) of the Pension Fund Act,

*"A registered fund may deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of ii) compensation (including any legal costs) recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which(bb) judgment has been obtained against the member in any court, including a magistrate's court, from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned".*

[161] Motsoeneng has elected to review the Public Protectors report, her findings however are still binding until the report is set aside, so too is her conclusion that, *Mr Motsoeneng had been allowed 'by successive [b]oards to operate above the law'.* In **SOUTH AFRICAN BROADCASTING CORPORATION, (*ibid* para 49)** the court found that the allegations of dishonesty against Motsoeneng are serious.

[162] In **MOODLEY V SCOTTBURG / UMZINTO NORTH LOCAL TRANSITIONAL COUNCIL AND ANOTHER, 2000 (4) SA 524 (D)**, the court held that the word "misconduct" as envisaged in section 37D(1 )(b)(ii) should be interpreted as meaning conduct which has an element of dishonesty. In **DENEL SOC LIMITED T/A DENEL AVIATION & ANOTHER V KLAAS MADIMETSA MAFALO & ANOTHER, [2016] ZAGPPHC 284**, MAJIKI J accepted the finding of dishonesty on the part of the Respondent and put paid to the Respondent's submission that no judgement had been entered against him and the Applicant was not entitled to its order.

[19] *As regards the order sought for payment by the pension fund, it was submitted that the first respondent has not admitted liability and the applicants have no judgment against him. Section 37 D b(ii) bb of Pensions Funds Act 24 of 1956 provides:" a registered fund may deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund in respect of compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb) in respect of any damage caused to the employer by reason of any theft; dishonesty, fraud or misconduct by the member in respect of which Judgment has been obtained against the member in any court; including a Magistrates Court "*

[20] *In my view, the circumstances on which the money due to be paid to the second applicant by the first respondent are included in the above section. The first respondent was found guilty of gross dishonesty, amongst others, in the second applicant's disciplinary hearing. I find no reason to quarrel with that conclusion for reasons already alluded to,*

*about his conduct after receipt of the money, elsewhere in this Judgment. The feet of clay in the submission on behalf of the applicant is to imagine that the order in terms of this section must be distant in time from when Judgment is obtained. In my view, a proper case has been made for the deduction and payment to be made. Judgment for payment of the amount has been granted. The applicants are therefore entitled to an order for realisation of the judgment.*

[163] The Applicant argues that the only just and equitable remedy is for the Pension Fund to repay Motsoeneng's ill-gotten gains which would align with recent jurisprudence that wrongs must be made right. Motsoeneng alleges that the section does not apply as he has not accepted liability in writing, has not been found guilty by a court of law to have caused damage to the SABC by reason of misconduct, dishonesty, theft or fraud. Having regard to the ***DENEL SOC LIMITED T/A DENEL AVIATION & ANOTHER V KLAAS MADIMETSA MAFALO & ANOTHER***, [2016] ZAGPPHC 284 decision above, this argument cannot assist him. It's further argued that Motsoeneng did not cause any damage to the SABC by receiving the payment of part of the agreed success fee by reason of dishonesty. At best, he benefited the SABC through the monies that he raise from the private sector. Based on the decision in ***SOUTH AFRICAN BROADCASTING CORPORATION*** (*ibid*) Motsoeneng cannot make this submission. There is no doubt that the SABC was prejudiced by the payment to Motsoeneng at a time when it was already in financial difficulty.

[164] The Applicant refers to the decision of ***ESKOM V MCKINSEY 22877/2018***) [2019] ZAGPPHC 185 (18 JUNE 2019) in terms of which, the Court disagreed that Trillian should profit from its wrongdoing holding that, at para 66-69:

[66] *"That a party such as Trillian should not benefit from unlawful conduct is more than clear. In the present matter, where there was neither factual nor legal basis for Trillian to be paid such substantial*

*amount of public moneys. It is indeed just and equitable that such moneys be returned to Eskom. To prove that indeed crime, no matter what euphemism is used in describing such unlawful conduct, does not pay. That indeed the cancer of corruption can be eradicated and those who benefit from ill-gotten gains, will be deprived of such gains. In the ultimate end, this would encourage good and ethical behavior in public procurement matters and thus entrench the rule of law.*

[67] *In the present matter, where the probabilities are apparent that senior officials of Eskom could leave no stone unturned to benefit Trillian,.....justice and equity demand nothing less than that the moneys paid to Trillian, unjustifiably, be returned to Eskom.*

[69] *The only and effective remedy, that is just and equitable, in the circumstances of this matter, is that the substantial resources paid to Trillian, in the absence of either factual or legal basis, must be returned to Eskom for the utilization of such resources to all the inhabitants of this Country. This will not only be just and equitable, but will be to strengthen the rule of law, the very foundation of any constitutional state such as ours.”*

[165] In various decisions, **CORRUPTION WATCH V CEO, SOUTH AFRICAN SOCIAL SERVICES (21904/2015) [2018] ZAGPPHC 7 (23 MARCH 2018); MINING QUALIFICATIONS AUTHORITY V IFU TRAINING INSTITUTE (2016/44912) [2018] ZAGPJHC 455 (26 JUNE 2018); CITY OF TSHWANE METROPOLITAN MUNICIPALITY V ALTECH RADIO HOLDINGS (58305/2017) [2019] ZAGPPHC 455 (16 JULY 2019). SWIFAMBO RAIL LEASING V PRASA (1030/2917) [2018] ZASCA 167 (30 NOVEMBER 2018) (“PRASA (SCA)”)**, in addition to **ESKOM V MCKINSEY**, our Courts have ruled that monies paid unjustly should be returned.

[166] I can find no reason why Motsoeneng should not be ordered to repay the money paid to him by the SABC. This Court must send out a strong message that unlawful conduct does not pay and that public officials will not benefit from their own malfeasance at the expense of the public purse.

[167] In addition, I find that Motsoeneng's conduct was dishonest and that the requirements of section 37D(1)(b)(ii)(bb) have been met.

#### **Variation of the Interim Interdict**

[168] The final issue that the Court needs to deal with is the variation of the interim order granted in Part A by the Honourable Justice Maier-Frawley AJ dated 18 January 2019, in favour of the Applicants, in terms of which the Court ordered that the First Respondent is restrained from paying out the whole of the pension benefits held by the First Respondent and standing to the fund credit of Mr George Hlaudi Motsoeneng, pending the final determination of the action instituted against Mr George Hlaudi Motsoeneng, under case number 18/04253 in the Gauteng local division.

[169] The court is guided by the matter of **ZONDI V MEMBER OF THE EXECUTIVE COUNCIL FOR TRADITIONAL AND LOCAL GOVERNMENT AFFAIRS AND OTHERS (CCT73/03) [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC)** (29 November 2005) Ngcobo J at paras 27-30, held at para 29:

*"Simple interlocutory orders stand on a different footing. These are open to reconsideration, variation or rescission on good cause shown. Courts have exercised the power to vary simple interlocutory orders when the facts on which the orders were based have changed or where the orders were based on an incorrect interpretation of a statute which only became apparent later. The*

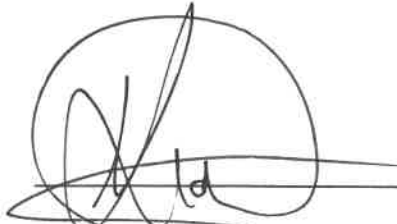
*rationale for holding interlocutory orders to be subject to variation seems to be their very nature. They do not dispose of any issue or any portion of the issue in the main action.”*

- [170] The relief sought in the action in the first claim is for payment of R10 235 453.20, in respect of the wasteful and irregular expenditure. The relief sought in the second claim is for payment of R11 508 549.12, being part of the success fee that the GNC awarded Motsoeneng. The First claim is dependent on the review of the Public Protectors report and the Applicants have sought to stay the application pending such review.
- [171] At the time when Judgement was handed down under Part A, Motsoeneng had not filed an Answering Affidavit and had not filed an application for the review of the Public Protectors report, he has subsequently done both.
- [172] The Second claim in the Action, relies on this Court reviewing and setting aside the SABC's decision to award Motsoeneng a success fee. As an administrative decision, the SABC's decision stands and has binding effect unless and until it is set aside in review proceedings. Out of necessity, the Action in the second claim cannot proceed until the decision is set aside.
- [173] The Order of the Court, that the First Respondent is restrained from paying out the whole of the pension benefits held by the First Respondent and standing to the fund credit of Mr George Hlaudi Motsoeneng, pending the final determination of the action instituted against Mr George Hlaudi Motsoeneng, under case number 18/04253 in the Gauteng Local Division, cannot be given effect to as the final determination of the action is dependent on the review by this Court and if the status quo is maintained, this matter cannot reach finality, I am accordingly of the view that good cause exists for the variation of the order.

## **Order**

[1] In the circumstances, I make an order in the following terms:

1. The decision by the SABC on 19 August 2016, through its Governance and Nominations Committee, to award Motsoeneng a success fee and paying him R11,508,549.12, is declared invalid and set aside.
2. Motsoeneng is ordered to repay to the SABC, the amount of R11,508,549.12 paid to him as a success fee with interest at the rate of 15,5% per annum calculated from 13 September 2016 to date of payment, within 7 (seven) days from the date of service of this order.
3. The Pension Fund is to pay to the SABC an amount of R11,508,549.12 from the pension proceeds that have accumulated to the benefit of Mr H R Motsoeneng, in favour of the SABC, alternatively to pay the full pension proceeds of Mr H R Motsoeneng, in the event that they do not equal R11,508,549.12, in the event that the Second Respondent fails to pay within 7 (seven) days from date of service of this order.
4. Ordering the Second Respondent to pay the costs of this application, which costs will include the reserved costs in respect of Part A and the costs of 2 Counsel where employed.
5. Ordering the First and Second Applicants to pay the Respondents costs in respect of the costs of the abandonment of the wasteful and irregular expenditure claim.

  
**J.L. KHAN**  
*Acting Judge of the High Court  
Gauteng Local Division, Johannesburg*



Heard:	26 May 2021
Judgment:	15 December 2021
Applicant's Counsel:	J.A. Motepe SC (with T.E. Netshiozwi)
Instructed by:	Werksmans Attorneys
Respondent's Counsel:	T. Masuku SC (with M.K. Mathipa)
Instructed by:	Bokwa Law Incorporated