IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

APPEAL CASE NO: A5021/08
CASE NO: 13815/08

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION LTD First Appellant
(First Respondent in court *a quo*)

THE CHAIRPERSON: THE BOARD OF THE SOUTH AFRICAN BROADCASTING CORPORATION Second Appellant
(Second Respondent in court *a quo*)

and

DALI MPOFU Respondent
(Applicant in the court *a quo*)

J U D G M E N T

Coram: Victor J

[1] The first appellant is the South African Broadcasting Corporation (SABC). On 6 May 2008 its Board of Directors (the second appellant) held an urgent meeting where a decision was taken to suspend the respondent who was employed as its Group Chief Executive Officer. The respondent is both a

director of the Board of SABC and an employee. The relief sought by the respondent was not based on his contract of employment.

[2] Pursuant to an urgent application, Tsoka J set aside the meeting of 6 May 2008 of the SABC Board, the resolution taken at the meeting to suspend the respondent and granted costs on the attorney and own client scale. This is an appeal from that decision.

[3] Since the decision of the court a quo was based on company law provisions and not the Promotion of Administrative Justice Act No 3 of 2000, this appeal turns on what is termed the company law complaint. The appellants contend that the impugned meeting was incorrectly set aside based on both the law and the facts. The appellants submit that they had acted in accordance with the relevant statutory provisions as well as the Articles of Association.

[4] The nub of the further submissions are that the respondent was invited to attend the meeting, that he had no entitlement to participate since he was the subject matter of the meeting and therefore had a conflict of interests; he acquiesced in the proceedings as did the other two executive directors, Mr Nicholson and Ms Mampane. In addition it was only the non executive directors who could suspend him. The appellants contend that his suspension as Group CEO does not affect his membership of the Board.

[5] The appellants submit that the respondent in his capacity *qua* director/General Chief Executive Officer cannot litigate against the SABC as the Articles of Association do not empower him to do so. He is not a member of the SABC and his remedy lies in the realm of his employment contract.

RELEVANT BACKGROUND FACTS

[6] On 1 August 2005 the respondent was appointed to his position as Group Chief Executive Officer. The Board of the SABC consists of 15 members[1]. The respondent and two others are the executive members and the 12 other members of the Board are non executive. During the course of 2008 the relationship between the respondent and the chairperson of the Board Ms Khanyisiwe Mkonza become strained.

[7] During the early part of 2008 an induction meeting of the Board was held. An expert in corporate governance and author of the King Code, Mr Mervyn King SC gave a presentation to the Board on its oversight role and there was particular emphasis on the delineation of the role between management and the Board. During this induction meeting the respondent requested that a meeting be held to clarify the separate roles of management and the Board. The respondent understood that as General CEO he was responsible for the day to day operational matters of the SABC and not the Board.

[1] Article 11

[8] On 4 April 2008 the first meeting took place between the respondent and the Board. It was cordial but immediately thereafter the chairperson prepared a memorandum expressing her concern about affecting her "***ability to provide leadership to the Organization***".

[9] On 7 April 2008 the chairperson gave the respondent notice of a meeting to be held on 9 April 2008 of the non-executive board where the respondent, Ms Mampane and Mr Nicholson were ordered to be "*on stand by*". The meeting was not held at the premises of SABC but at the Hyatt Hotel in Rosebank. The respondent and the other two members attended the meeting but waited outside throughout and were not called in. A few days thereafter a Board memorandum was leaked to the Sunday Times newspaper: "***NEW BOARD GUNS FOR SABC BOSS***" meaning the respondent. He requested a copy of the memorandum to no avail. This step commenced the tormenting but extremely damaging approach by the Chairperson to let the respondent know the various meetings concerned him but his participation was controlled and curtailed by her. This conduct must be weighed against the principle that the Board in its entirety is the principal focal point of good corporate governance[2] and that the fiduciary duty the directors owed to each other is paramount.

[10] The executive committee requested a meeting with the Board to discuss the breach of confidentiality of the leaked memorandum to the press and this was rejected alternatively not acted upon by the chairperson.

[2] The King Report page 12 of 235

[11] On 23 April 2008 the chairperson sent a letter inviting the respondent to a meeting of the non-executive Board which was to take place on the same day. The letter stated that it would not be appropriate or desirable for him to be present. He did not attend.

[12] On 24 April 2008 he was invited to attend another non-executive directors' meeting. He presented himself and was told to wait outside whilst the meeting commenced. He was duly called in. The question of the memorandum was raised. Members of the Board especially Mr Peter Mavundla and Ms Allison Gillwald were surprised that he had not seen it. Mr Andile Mbeki a director and member of the Board announced that a decision had been taken to investigate the respondent around the issues contained in the memorandum.

[13] He was asked for his comment and told them he was aggrieved by the manner in which the matter was being handled as the issues raised pertained to his alleged poor performance and not to misconduct. He reminded them about the procedures in the SABC disciplinary code when it came to performance related issues and questioned the decision why an independent person with no exposure to SABC functions was to investigate him. The next day the chairperson telephoned to advise him that the meeting had reversed its decision on the investigation. Instead she would give him a copy of the memorandum but she was revising it.

[14] On 29 April 2008 the respondent attended a scheduled parliamentary Portfolio Committee briefing in Cape Town on Communications for the purpose of advising on budget and strategy. The meeting was aborted since none of the non-executive members were present. The meeting was rescheduled for the next day. At the meeting the next day there was a show down. The Parliamentary Committee insisted to know whether the memorandum was the view of all the Board members. After being pressed on this Ms Mkonza informed the Portfolio Committee that she was the author of the memorandum. The Committee invited the Board members to speak openly. The Committee expressed dissatisfaction with the contents of the memorandum and that it had been leaked to the press as also the refusal of Ms Mkonza to meet with the respondent to try and resolve the impasse. A member of the Portfolio Committee noted that the respondent was at the mercy of the media for three weeks with the oblique criticism that the chairperson had failed to produce a final memorandum.

[15] It also became apparent that the respondent's repeated requests to the chairperson for a meeting to clarify the respective roles of management i.e. the executive directors and the Board had not been brought to the attention of all the members of the Board. Some members were unaware that respondent had been making requests for this role clarification workshop. At the Portfolio Committee meeting Ms Mkonza promised to give the respondent a copy of the updated or revised memorandum. No mention was made of his suspension yet within days of that meeting he was suspended.

[16] From the Saturday, a few days prior to the fateful Board meeting of Tuesday 6 May 2009, the respondent had been trying to reach the chairperson to meet with her about certain urgent matters. She advised she did not take calls over the weekend. When he managed to reach her on the Sunday she promised to come back to him. On Tuesday 6 May 2008 the respondent after what he considered proper legal process decided to suspend a senior employee Dr Zikalala who admitted to leaking confidential material to third parties. The respondent suspended Dr Zikalala in accordance with the SABC Disciplinary Code. He wished to address the staff about the suspension at 16h00 that day and then the Press. Prior to making this decision public, the respondent tried to convey his decision to the Chairperson and requested a meeting with her. He attempted to contact her through the company secretary and left voice messages on her cell phone. He eventually sent her a letter urging her to make time to meet him about a senior employee who leaked information to third parties. By the said Tuesday they had still not met. By 16h00 he had still not made contact with the Chairperson. At 16h00 he made the announcement as planned.

[17] The Chairperson contacted him at 17h00 and said her cell phone battery had been flat. She advised that she did not recognize the suspension of Dr Zikalala. She advised that there would be a meeting with him on 7 May 2008 about the matter.

[18] Rather precipitously and during the evening of 6 May 2008 at about 19h59 and whilst the respondent was meeting with the executive members he

was informed that there would be a non-executive Board meeting to commence at 20h00 and that the executive members were required “to remain on standby.” When he together with Ms Mampane and Mr Nicholson were finally called in, there were four Board members present and some of the other Board members were on teleconference. The status of Ms Mampane and Mr Nicholson as directors was not questioned at all for the purposes of this meeting. The respondent was called upon to explain the suspension of Dr Zikalala. He explained inter alia that such suspension was within his powers as Group CEO. Since Dr Zikalala had admitted to leaking the confidential material to third parties the respondent was of the view that he had acted within the powers as Group CEO of the SABC and the delegation authority framework to suspend him. In terms of the disciplinary code duly adopted by the Board, discipline was a management function. Dr Zikalala was on precautionary suspension.

[19] She then requested them to leave the meeting. At 01h40 he received a telephone call from the Chairperson advising that he had been suspended. When he asked the reason she said it was serious. He later read the resolution passed. The respondent contends that the reference in the resolution to suspend him referred to his “divisive and disruptive conduct”. He felt this was included as an afterthought so as to conceal the real reasons for suspending him viz Dr Zikalala.

RELEVANT STATUTORY FRAMEWORK.

[20] In order to determine the validity of the decisions taken at the meeting of 6 May 2008 it is necessary to consider the statutory framework.

[21] The SABC was established pursuant to the Broadcasting No 4 of 1999 ("*the Broadcasting Act*") having been converted from the former SABC to a company now deemed to be a public company incorporated in terms of the Companies Act 61 of 1973, (the Companies Act). Since the date of the conversion the state is the sole shareholder and thus its only member. The memorandum and the Articles of Association of the SABC were registered in terms the Companies Act. Section 8A of the Broadcasting Act excludes section 65 of the Companies Act in particular Section 65(2) which provides that the Memorandum and Articles of Association are binding on the company.

[22] Notwithstanding the SABC did register the Memorandum and its own Articles of Association. It was registered as a company having a share capital not adopting Schedule 1. Words and expressions in the Articles had to bear the meaning as assigned in certain Statutes referred to in the Articles *inter alia* the Broadcasting Act, the Companies Act, the Public Finance Management Act No. 1 of 1999, Telecommunications Act No 103 of 1996, Treasury Regulations for Departments 2002 and other statutes.

[23] The Articles[3] provide that general meetings of Directors are to be called whenever the Board thinks it fit. Notices [4]provide that the notice of the general meeting shall comply with the provisions of the Statutes, which of course

[3] Article 8.1.2 (b)
[4] Article 8.2.1

includes the Companies Act. The Articles [5]provide that notice of a general meeting shall be given on not less than 14 clear days and notice must be given to such persons who are in accordance with the provisions of the Articles entitled to receive notice of all meetings. The notice shall specify the venue, date and time of the meeting and if it is special business the nature of such business. Special business is not defined. The Articles[6] provide that the Board may regulate its meetings as it thinks fit provided that the Board shall meet regularly. A quorum must consist of nine members.

[24] Executive directors conclude contracts of employment for 5 years. The Articles[7] deal with the duties of the Board. The Board controls the affairs of the Corporation in accordance with the Statutes. The directors have to exercise the utmost good faith, honesty and integrity in all their dealings with or on behalf of the SABC and always act in its best interests. Article 12.2.9 ensures that matters of confidential nature should be treated as such and not be divulged to anyone without the authority of the SABC. Provision is made [8] that each director must be in a position to make informed decisions.

[25] The powers of the Board are defined[9]. The management of the business and control of the Corporation is vested in the directors. The directors must ensure that any decision taken is not inconsistent with the Statutes or the Articles and complies with the statutes or any resolution passed by a general meeting. The Articles define the proceedings of the Board. The

[5] Article 8.2.2
[6] Article 16.1.1
[7] Article 12
[8] Article 12.2.11
[9] Article 14

chairperson may and the secretary at the request of a director shall at any time convene a meeting. The Articles [10] define the notice required for such a meeting. The Board shall determine the number of days notice to be given for the Board meetings and the form and the medium for giving that notice.

[26] The Articles [11]provides for directors' written resolutions. Article 18.1 provides that "*Subject to the statutes, a duly minuted resolution in writing signed by all the directors shall be as valid and effectual as a resolution passed at a meeting of the Board duly called and constituted.*" Article 18.3 provides that the written resolution shall be deemed to have been passed on the day it was signed by the last director unless a statement to the contrary is made in the written resolution. Article 18.4 provides that a written resolution which is not signed by all the directors shall be inoperative until confirmed by a meeting of the Board.

[27] It is the appellants' approach that the resolution is reflected as an extract of the minute book and therefore the minute does not have to be signed by all the directors to be valid. The respondent relies in his founding affidavit upon the fact that the resolution was not signed by all the directors as is required in terms of the Articles. Upon a proper analysis of this submission it is clear that the actual resolution was not signed by all directors.

[28] A further feature of importance is whether the Board in making the decision to suspend the respondent was mindful of and indeed applied proper

[10] Article 16.4
[11] Article 18

corporate governance principles in coming to their decision. The central issue of corporate governance is the accountability of senior management and the Board of a company because of the extensive powers vested in them. [12]

[29] The King Report on Corporate Governance for South Africa 2002 deals with public sector enterprises. The first appellant is a public company and is a public sector enterprise as defined in terms of the Public Finance Management Act No 1 of 1999. Companies and their Boards are required to measure up to the principles set out in the Code. King recommends that public enterprise should try and apply the appropriate principles set out in the Code. The Code sets out principles and does not determine detailed conduct. The conduct of public enterprises must be measured against the relevant principles of the Code and must adhere to best practices. The Code regulates directors and their conduct not only with a view to complying with the minimum statutory standard but also to seek to adhere to the best available practice that may be relevant to the company in its particular circumstances.

[30] The Board and its directors are ultimately accountable and responsible for the performance and affairs of the company. King noted that given the synergy which takes place between individuals of different skills, experience and background, the unitary board structure with executive and non-executive directors interacting remains appropriate for a South African company. In terms of the King Code, Board meetings should include mechanisms that are efficient and timely. Board members should be briefed prior to meetings and

[12] Gower and Davies Principles of Modern Company Law 7th edition London Sweet & Maxwell 2003

Board members should take the responsibility of being objectively satisfied that they have been furnished with all the relevant information and facts before making a decision. Although non-executive directors may meet separately the attendance of executive directors at Board meetings is of value. The diversity of views is important. The Board has a collective responsibility to provide effective corporate governance and should exercise leadership, enterprise, integrity and judgment in directing the company.[13]

[31] In this case the absence of meaningful notice, the exclusion of not only the respondent from a substantial portion of the Board meeting juxtaposed to the manner in which two executive members of the Board were intentionally excluded, then included and thereafter excluded from a debate among Board members is an issue of crucial concern. The importance of the deliberation by all members of the Board could not have escaped the chairperson. The issues which had surrounded the memorandum had smouldered throughout April 2008 had certainly after the parliamentary Portfolio Committee meeting become an inflammable issue. The potential suspension of the respondent was an issue which required the attention of the entire Board as defined in the Broadcasting Act and the Articles. In addition the Board had to be in a position to make informed decisions as required by the Articles.[14] The events surrounding the convening of the meeting and the execution thereof correctly led the court a quo to the inescapable conclusion that it had to be set aside.

[13] King Report
[14] Article 12.2.11

THE VALIDITY OF THE MEETING OF 6 MAY 2008 AT WHICH THE RESOLUTION WAS TAKEN IN THE ABSENCE OF THE RESPONDENT AND THE TWO OTHER EXECUTIVE DIRECTORS

The absence of the respondent, Ms Mampane and Mr Nicholson at the moment critique when the decision to suspend him was taken.

[32] The appellants contend that the court a quo erred in fact by finding that the decision was taken in the absence of the respondent at the meeting. They contend that he was at the meeting and he did participate. The respondent's limited participation at the meeting is common cause. He was called in and only allowed to deal with the matter of Dr Zikalala. Such participation was neither meaningful nor in accordance with the best practice as described in the King Report particularly when regard is had to the fact that the SABC is a public enterprise. The limitation on the participation of the other two executive members is also not in accordance with best practice. The court a quo was correct in finding that a Board meeting must consist of all Board members. The suggested justification by the appellants for their exclusion was based on the fact that they report to the respondent and presumably are his subordinates. This approach is inconsistent with the Articles which gives the executive directors full status. There is no suggestion in the appellants' papers that the conflict of interests issue was debated that evening, and if it was, it would have had to be dealt with in accordance with section 17 (2) of the Broadcasting Act. It was not.

> *"If at any stage during the course of any proceedings before the Board it appears that any Board member has or may have an interest which may cause such conflict of interest to arise ……leave the meeting so as to enable the remaining Board members to discuss the matter and determine whether such Board member is preclude from participating in such meeting ……and such disclosure and decision taken by the remaining Board members regarding such determination, must be recorded in the minutes of the meeting in question."*

In any event it does not appear that the type of conflict of interest in question here falls into this category. The chairperson appears to have unilaterally and without proper deliberation with all the members of the Board made a decision to exclude the respondent based on a perceived conflict of interest. The entire deliberation on this aspect should have been debated by the directors and minuted.

Locus Standi of the respondent

[33] The appellants complain that even if the SABC breached its Articles this does not confer any right on the respondent as a director to launch the litigation. He should have proceeded by way of interdict proceedings against the other directors. [15] The respondent did not initiate proceedings on behalf of SABC in order to vindicate its rights. Obviously if he had done there would have to be compliance with the Companies Act.[16] The suggestion that the respondent remained a Board member is inconsistent with the entire manner in which the chairperson proceeded against the respondent thereafter. I am of the view that the respondent cannot be restricted to relief solely in terms of his employment contract. The issues here are far wider than his employment contract. The respondent has a real and substantial interest in the decision

[15] Pulbrook vs Richmond Consolidated Mining Co (1978) 9Chat 612-613
[16] Section 266 of the Companies Act

taken and should not be limited in approaching the courts. See also Van Tonder v Pienaar and Others [17]

> *"It was also submitted that, since the applicant had only been suspended, not dismissed, and was still being paid his salary, he had no cause of action. Even if he had been dismissed, so it was argued, he would only have been entitled to damages and not a declaratory order. These submissions overlook the fact that the applicant brings his application as a director not as an employee of the company."*

[34] In determining the question of locus standi Davis J in McCarthy and others v Constantia Property Owners Association and others [18] referred to the very wide and flexible interpretation placed on locus standi. In Jacobs en 'n Ander v Waks en Andere[19], Botha JA held that it was not necessary that a litigant should have a financial or legal interest in a business in order to establish locus standi. Any person who was a director and in full control of a company which was trading and anyone who was the manager of a business had a real interest that the business should survive and that its profitability should not be harmed. Botha JA held at 534A:

'Dit is nie 'n tegniese begrip met vas omlynde grense nie."

[35] The Waks case involved an issue of locus standi within the context of public law. Botha JA in Waks' case held that the Carletonville City Council was in a position of trust in relation to ratepayers' funds and that for this reason the ratepayers had locus standi to review what was claimed to be an unlawful

[17] 1982 (2) SA 336 (SE)
[18] 1999 (4) SA 847 (C)
[19] 1992 (1) SA 521 (A)

expenditure of such funds by the Council. In Gross and Others v Pentz[20], Harms JA in dealing with the locus standi of a contingent beneficiary to institute an action against a trustee for maladministration held:

> *'The question of locus standi is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as litigating party. . . . The sufficiency of interest is "altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldene reëls kan neergelê word vir die beantwoording van die vraag nie . . . ". . . . The general rule is "that it is for the party instituting proceedings to allege and prove. . . that he has locus standi, the onus of establishing that issue rests upon the applicant".' In Steel and Engineering Industries Federation and Others v National Union of Metal Workers of South Africa (1) 1993 (4) SA 190 (T) at A 194J-195A Myburgh J said, with reference to the dictum regarding locus standi in Patz v Greene & Co 1907 TS 427 at 433:*
> *'I have doubts whether such a formalistic approach is acceptable in today's circumstances.'*
> *Adhering to a less formalistic approach, he followed a dictum in Attorney-General of the Gambia v N'Jie [1961] 2 All ER 504 (PC) at 511 that locus standi concerns a party not being 'a mere busybody who is interfering with things which do not concern him'.*

[36] In would be impermissible to non-suit the respondent on the basis of his lack of *locus standi* when he seeks to vindicate his rights. In addition to what is stated above the respondent has cited the SABC as a company but has also cited the Board represented by the chairperson in her representative capacity. Reference is made to the Board as comprising 15 members. However inelegant the citation may be, all 15 members are before the court duly represented by its chairperson. There is no reason why the respondent should not be entitled to seek relief against them.

[20] 1996 (4) SA 617 (A) at 632C-E

Sufficiency of Notice

[37] It was common cause that on 6 May 2008 the respondent and the other two executive directors were notified of the meeting on 1 minutes notice. The respondent and the two executive directors were called into the meeting for a short period. The respondent addressed the meeting where after he and the two executives were asked to leave. Therefore the respondent was not present inside the meeting of 6 May 2008 when the decision was taken. The submission that the respondent was part of the meeting (albeit a portion thereof) is to overlook the ambit and purport of what a properly constituted Board meeting should be. In my view the Board was not properly assembled.

[38] In Majola Investments (Pty) Ltd v Uitsigt Properties (Pty) Ltd [21] Broome J, came to the following conclusion at 241:

> *'I therefore accept the principles that notice of a directors' meeting must be given to every director who is within reach and that the question whether a director is within reach depends upon the circumstances, including the nature of the business to be transacted. If the business to be transacted were contentious the degree of inaccessibility would have to be very great. If, on the other hand, the business were not contentious but required immediate attention, the degree of inaccessibility would be very much less, particularly where the absent director knew and approved of the formal business to be transacted.'*

[39] These principles were followed in Burstein v Yale[22], a case in which two out of three directors had purportedly authorised a cession by the company

[21] 1961 (4) SA 705 (T)
[22] 1958 (1) SA 768 (W)

without prior consultation with the third director who was readily accessible. Fair and reasonable notice to attend a directors' meeting depends on the circumstances and on the structure, practice and affairs of the company. *In casu* only four of the 12 non executive directors were present. The others were on teleconference. This is not a satisfactory situation where a matter of the suspension of the General CEO was being deliberated. The haste was unnecessary as there was already a meeting scheduled for 7 April 2008 when the chairperson's non acceptance of the suspension of Dr Zikalala was to be discussed.

[40] The Articles of Association deal with meetings and do allow for the Board to define the conduct of its own meeting. Upon a proper interpretation of the Articles the Board must mean the Board and not the deliberate exclusion of a portion of the Board to determine how meetings must be conducted, again a corporate governance issue. Although teleconference is permissible in terms of the Articles, the question to be determined is whether in these circumstances it was necessary to conduct the meeting in this way and in addition whether the decision had to be made in the early hours of the morning when a meeting had already been scheduled for 7 May 2008.

[41] The respondent and his two executive directors were given one minutes notice of the meeting and thereafter kept out of the meeting except for a short period. These issues go to the crux of whether the meeting was properly convened. Furthermore it is not in accordance with proper corporate governance to keep directors out of a Board meeting then allow them in for a

selected period and when the vote is taken to remove them from the meeting. The question is whether this procedure was permissible. The above circumstances in my view do not make it possible to hold that there was a properly convened meeting of the first appellant's directors and that the business transacted was valid.

The proper conduct of the meeting

[42] Seligson JA in Transcash Swd (Pty) Ltd v Smith [23] referred to a number of cases involving the proper conduct of Board meetings. In De Villiers and another NNO v Boe Bank Ltd [24]Navsa JA stated

> *"Of course, principles of good governance of companies dictate that resolutions should be properly taken at general meetings or meetings of directors after due and proper deliberation. This does not mean, however, that in instances where this course is not strictly followed the directors cannot otherwise bind a company".*

In other words the particular circumstances are of importance when assessing the validity or otherwise of the resolution. The suspension of a high profile General CEO in a public sector enterprise which is particularly directed to observe principles of good corporate governance and best practice must ensure that it adheres to the principles referred to above. There could not have "due and proper" deliberation" in the absence of the three Board members.

[23] 1994 (2) SA 295 (C)
[24] 2004 (3) SA 1 SCA

[43] See African Organic Fertilizer and Associated Industries Ltd v Premier Fertilizers Ltd[25]. In Transcash supra reference was made to the case Burstein v Yale [26]

where Kuper J held at 771B-C:

> *"'The general rule is that directors of a company can only act validly when assembled at a board meeting unless the Articles otherwise provide".*

at 771G:

> *"'The plaintiff has not established that the cession was in fact authorised by the directors of the company because he has failed to prove that a proper meeting was held or that notice was given to all the directors of the company who were within reach of the cession and that they approved of the cession."*

[44] In Silver Garbus and Co (Pty) Ltd v Teichert[27], formalities can be dispensed with provided that a board meeting of all the directors agree to what is done. This is not such a case. At least three directors have not agreed to the resolution taken at the meeting.

[45] None of the directors were given sufficient opportunity to consider the matter. See De Villiers JP in the case of Robinson v Imroth and Others [28]the principle is apposite:

> *'For the acts of a majority to bind a minority it is essential that the minority should at least have been given an opportunity of stating their views and to this again that the minority should have been given time to*

[25] 1948 (3) SA 233 (N)
[26] 1958 (1) SA 768 (W)
[27] 1954 (2) SA 98 (N) at 102
[28] 1917 WLD 159 at 171 at 171

consider the matter and furnished with or had access to whatever information may be necessary to form an opinion.'

[46] This principle was again advanced by Colman J in Novick and Another v Comair Holdings Ltd and Others 1979 (2) SA 116 (W) at 128D at 128D stated:

' I was referred to the authorities which hold that the company is entitled to the benefit of the collective wisdom of all the directors present at a meeting, and not merely to that of a majority. The minority, it is said, is entitled to all relevant information, and to an opportunity of stating its views, even though it may ultimately have to submit to a majority decision. The legal basis for this defence was the well-known doctrine that directors of a company are under a duty to use their voting powers for the benefit and in the interests of that company and not of any other person.

[47] In Transcash SWD (Pty) Ltd v Smith supra Seligson AJ this principle was again adopted:

"But the principles cited illustrate the need for directors to have notice of board meetings so that, if they so wish, they can attend and attempt to influence the outcome. It is not enough to suggest, as Mr Rosenthal did, that one must take a robust view that, if the result would be the same were a further regular meeting to be held, the Court should condone the irregularity. This approach may be permissible in certain circumstances where there is a purely technical irregularity or where objection was not raised timeously.

[48] In regard to the will of the majority Seligson in Transcash *supra* was of the view

"In any event I am by no means convinced that where, as in the instant case, there is a dispute between the majority and minority shareholders directors of a private company, the majority can, on the strength of its view that the minority has been guilty of unlawful conduct, exclude the minority from board meetings or from voting thereat on the simple basis that the minority is precluded from voting because of a conflict of interest. Such a principle would be fraught with difficulty and provide a temptation to the majority to manufacture conflict of interest situations.

> *Even if there is alleged misconduct of a serious nature against him, in my judgment, a director, particularly one who is also a shareholder, is entitled to exercise his rights as a director until he has been validly removed as such. "*

This principle is particularly appropriate in this case where a public enterprise is involved and best practice must be adhered to. The respondent's rights remain intact throughout until he is removed as a director as provided for in the Articles.

[49] In the result the court a quo correctly held that the respondent was fully entitled to participate fully throughout the entire meeting of 6 May 2008. The chairperson's decision to exclude the respondent and the two executive members when the decision was taken to suspend him precipitated a fatal flaw in the process as found by the court a quo. The reliance on a conflict of interest as a reason to exclude the respondent from the meeting resulted in preventing him from discharging his duties as a director. The same applies to the other two executive directors who could not possibly have had a conflict of interest.

Acquiescence

[50] Insofar as the appellants rely on the acquiescence of the respondent and the two directors upon leaving the meeting this onus has not been discharged by the appellants. Acquiescence is akin to waiver The dictum of Innes, C.J. about waiver is apposite as set out in Laws v Rutherford [29] and as

[29] 1924 AD 261 at p. 263

applied in Hepner v Roodepoort-Maraisburg Town Council [30] is of application namely:

> *"The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."*

This the appellants have not done. The immediate reaction of the respondent was to launch an urgent application. It cannot be held that he or the other executive directors acquiesced. Notwithstanding the respondent's qualification as an advocate and the skills of the Ms Mampane and Mr Nicholson their leaving the meeting upon the chairperson's instruction does not alleviate the appellants' obligation to demonstrate that they decided to abandon their rights.

Costs

[51] In regard to the appeal against costs I find that the conduct of the chairperson when assessed against the relevant background facts and the principles of corporate governance is not to be encouraged. The chairperson had a fiduciary duty to act objectively. She clearly got caught up in an emotional response to the suspension of Dr Zikalala. A meeting had been called for 7 May 2008 and yet she reacted by bringing forward that meeting which went on into the early hours of the morning. In addition the procedure of calling fellow directors to meetings, telling them to be on standby and then not allowing them into the meeting and have them wait outside the meeting all indicates a degree of imperiousness which is not to be condoned in corporate governance. In particular the meeting at the Hyatt Hotel meant that the three

[30] 1962 (4) SA 772 (AD) at p. 778D - G

executive directors had a futile wait. If the meeting had been at the premises of the SABC they could have carried on with their other work.

[52] In the result the appeal is dismissed with costs including the cost of two counsel.

_____

VICTOR J
JUDGE OF THE HIGH COURT

JAJBHAY, J:

[53] I have read the judgment of Victor J. I agree with the order which she proposes. I consider the following reasons important in support of that order.

[54] The background facts material to the decision of this matter are set out in the judgment of Victor J and need not be repeated here. The essence of the approach adopted by Tsoka J is set out in the following parts of his judgment:

> "*[28] In the present matter the GCEO, the COO and the CFO were not invited to the meeting of 6 May 2008. This is common cause. In fact the GCEO, the COO and the CFO were in an executive directors meeting when the meeting of 6 May 2008 was held. Although Mpofu was invited and addressed the meeting on the issue of the suspension of Dr S Zikalala (Dr Zikalala), he was not party to the said meeting. It appears that a deliberate decision was taken to exclude the executive directors. In these circumstances, it is disingenuous to refer to the meeting of 6 May 2008 as the meeting of the Board of SABC. The meeting falls foul of the provisions of the Act, the Charter, the Articles, Protocol and the Companies Act.*"

The learned Judge in the court *a quo* then went on to set out the following:

> "*[36] Ms Mkonza is a businesswoman. She is the chairperson of the Board of SABC. She is a non-executive director who must act independently and objectively. The Board she chairs is accountable to the National Assembly through the Communication Portfolio Committee. In exercising her duties it is expected of her to show fidelity, honesty, integrity and act in the best interest of the SABC. In fact this is what Article 6.11 of the Charter demands of her.*"

[55] The Constitution of the Republic of South Africa (Act No. 108 of 1996) recognises the importance of good governance: Section 195 deals with basic values and principles governing public administration. In terms of this section there must be a high standard of professional ethics. In fact this standard must be promoted and maintained. These principles apply to organs of state and public enterprises: Section 195 (2). This is not surprising, given our history and the advent of our new democratic era. Our Constitution compels government in all of its forms, both through government departments and organs of state (including state-owned enterprises) to adhere to principles of good governance. State-owned enterprises such as the SABC are included in the definition of "*organ of state*". It is for this reason that the provisions of the Constitution as well as the legislation enacted in terms thereof are applicable to state-owned enterprises: *Goodman Brothers (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W). Our Constitution has enshrined certain rights that also have a direct bearing on the corporate governance of state-owned enterprises.

[56] The Public Finance Management Act No. 1 of 1999 as amended was promulgated to give effect to Chapter 13 of the Constitution. According to the then Minister of Finance, "*The aim of this Act is to modernise the system of*

financial management in the public sector. It represents a fundamental break from the past regime of opaqueness, hierarchical systems of management, poor information and weak accountability. The Act will lay the basis for a more effective corporate governance framework for the public sector: Minister of Finance, Trevor Manuel, in the foreword to the Public Finance Management Act."

[57] According to Khoza and Adam in *The Power of Governance*, (2005), Pan MacMillan and Business in Africa: Johannesburg:

> "*The Constitution imposes a number of general obligations on all organs of state to promote cooperative government. In particular, organs of state involved in intergovernmental disputes are required to make every effort to settle the dispute and exhaust all other remedies before approaching the courts. This does not prevent organs of state seeking relief from the courts and is therefore a workable model.*"

[58] The facts in this matter indicate that the leadership qualities of Ms Mkonza as well as the other non executive directors were wanting. It is clear from Ms Mkonza's own words that when the meeting of the evening of 6 May 2008 was convened, the non-executive directors were "*outraged at what they perceived and understood as yet a further example of the applicant's unaccountable conduct and his conduct in disregard of and contempt for the Board*". She goes on and further complains that "*the applicant was called in to the meeting and asked to explain his unwarranted and highly irregular conduct. In his explanation the applicant indicated that he sought legal advice prior to the suspension of Zikalala*". In the same affidavit, she then sets out that:

> "*The Board debated the consequences* (sic) *the applicant's actions in light of the current climate that existed within the first respondent, took the view that it was yet a further example of the applicant's unaccountable conduct and behaviour and that took the view that the first respondent could not be required to continue to tolerate the applicant's disruptive presence during the investigation. It was clear that by 6 May 2008 the applicant had become a disruptive presence within the first respondent. It was feared that if he continued in his post he would interfere with and disrupt the investigation into the allegations raised in the memorandum.*"

[59] Here, Mr Maleka SC correctly argued that the appellant's decision to suspend Dr Zikalala was the real and true reason, for triggering the decision by the non-executive members of the Board to suspend the respondent on 6 May 2008, with immediate effect. Adv Maleka SC further stated:

> "*They wasted no time in communicating that decision to the respondent, for they found it proper to notify him, of the suspension on the morning of 7 May 2008, at 01:40.*"

[60] In state-owned enterprises, like other organisations, good corporate governance is ultimately about effective leadership. An organisation depends on its board to provide it with direction, and the directors need to understand what that leadership role entails. Khoza and Adam in *The Power of Governance* correctly set out that the concept of leadership in state-owned enterprises is not always understood. The learned authors set out at page 49:

> "*In the case of state-owned enterprises, this problem may be magnified: here one needs to consider the respective roles not only of the Board and management, but also the role of government as a shareholder. It is critical that there is an understanding by government, in its capacity as shareholder, of its leadership role in directing and guiding the state-owned enterprise. The concept of a shareholder performance*

> *agreement can assist in clarifying the respective roles of the Board and shareholder …*"
>
> "… *The solution begins with a proper understanding of what leadership means to the Board and to the shareholder.*"

[61] The Board of Directors in state-owned enterprises are not only enjoined to consider their responsibilities in terms of the King Report 2002. They must also consider their responsibilities in our constitutional democracy in terms of the African leadership philosophy and values. In the present millennium, and in our African continent, we must be determined to emerge from the past of subjugation and exploitation, as was expressed by Khoza (2001):

> "*Africa has struggled under a multitude of crushing burdens that many have come to regard as a matter of course, as afflictions rather than as effects.*"

There are "*… those without a historical perspective of the degradation of the continent as a result of slavery and colonialism …*" and there are "*… those who appreciate the deep seated impact of the historical imports of slavery, colonialism, imperialism and more lately of globalisation and the venality of Africa's leadership, those who do not accept this as ordained, inevitable or even characteristic of the continent … they believe that Africa's destiny will not be a consequence of pre-destination, but the consequence of human will and application hence the concept of Renaissance, a rebirth, a return to greatness, or simply the coming of a new age … the catalytic element that is crucial and central to that transformation is leadership*".

[62] History has bestowed on our generation in our country the gift of a rare opportunity to manage our freedom as a nation and to nurture it towards its maturity. This obliges all of us as citizens of this country to speak, and to act in very special ways. Section 1 of the Constitution informs us that:

> "*The Republic of South Africa is one, sovereign, democratic state founded on the following values:*
>
> *(a) human dignity; the achievement of equality and the advancement of human rights and freedoms.*"

This means that there are in existence dominant values as well as an ethos that binds us as communities to ensure social cohesion. In South Africa we have a value system based on the culture of ubuntu.

[63] This in effect is the capacity to express compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. Ubuntu speaks to our inter-connectedness, our common humanity and the responsibility to each that flows from our connection. Ubuntu is a culture which places some emphasis on the commonality and on the interdependence of the members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community, that such a person may be part of. In South Africa ubuntu must become a notion with particular resonance in the building of our constitutional democracy. All directors serving on state-owned enterprises must take cognisance of these factors in the determination of their duties as directors. Ubuntu manifests itself through various human acts and behaviour patterns in

different social situations. This was clearly lacking when the determination to suspend the respondent was made. The actions of the chairperson as well as her other Board members were made in haste whilst they were "*upset*". To my mind, Tsoka J was correct when he concluded that "*the conduct of Mkonza falls short of a director who should act independently, without fear or favour, openly with integrity and honesty*".

[64] Integrity is a key principle underpinning good corporate governance. Put clearly, good corporate governance is based on a clear code of ethical behaviour and personal integrity exercised by the board, where communications are shared openly. There are no opportunities in this environment for cloaks and daggers. Such important decisions are not made in haste or in anger. There must be ethical behaviour in the exercise of dealings with fellow board members. These dealings must be dealt with in such a manner so as to ensure due process and sensitivity.

[65] The objective of developing African leadership philosophy and values is consistent with the constitutional values of ubuntu-botho. In the case of *Dikoko v Mokhatla 2006 (6) SA 235,* Sachs J said: *"Ubuntu-botho is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past: (See the Epilogue to the interim Constitution, extensively discussed in Azanian Peoples Organisation*

(AZAPO) and Others v President of the Republic of South Africa and Others 1996 (4) SA 671 (CC) (1996 (8) BCLR 1015) at para [48]). In present-day terms it has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution. As this court said in Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) (2004 (12) BCLR 1268):

"The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

[66] Ubuntu-botho is deeply rooted in our society. These values should assist in informing corporate decisions made by directors in state owned enterprises. Proper and constructive dialogue would enable better outcomes in the decision making process. Heated and impetuous decision making is the stuff of irrational outcomes. This must be avoided. This form of governance is underpinned by the philosophy of ubuntu-botho. The time is right to incorporate the views of umuntu ngumuntu ngabantu in the King code of good governance.

[67] It is for the above reasons that I agree with the order set out by Victor J.

_____

M JAJBHAY
JUDGE OF THE HIGH COURT

I concur:

Horn J
JUDGE OF THE HIGH COURT

I concur:

Jajbhay J,
JUDGE OF THE HIGH COURT

Date of Argument: 11 May 2009

Date of Judgment: 11 June 2009

Counsel for Appellants: PJ Pretorius SC together with A Cockrell
Attorneys for the Appellants: Bowman Gillfillan
Counsel for Respondent: I V Maleka SC together with TJB Bokaba SC
Attorneys for the Respondent: Werksmans Attorneys