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

**CASE NO:** 17/29163

**Delete whichever is not applicable**
**(1) Reportable Yes**
**(2) Of interest to other Judges Yes**
**(3) Revised: Yes**

**Date: 18/01/ 2019**

**Signature.....**

In the matter between:

**SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED** Applicant

and

**SOUTH AFRICAN BROADCASTING CORPORATION PENSION FUND** First Respondent

**GEORGE HLAUDI MOTSOENENG** Second Respondent

**MINISTER OF FINANCE** Third Respondent

**THE FINANCIAL SECTOR CONDUCT AUTHORITY** Fourth Respondent

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J U D G M E N T

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MAIER-FRAWLEY AJ:

***Introduction***

1. The applicant is the South African Broadcasting Corporation ('SABC'), the former employer of the second respondent, Mr George Hlaudi Motsoeneng ('Motsoeneng'). By virtue of his employment with the SABC, Motsoeneng became a member of the first respondent, the South African Broadcasting Corporation Pension Fund ('the Fund').

2. Motsoeneng's employment with the SABC was terminated on 12 June 2017.[1] As a result thereof, Motsoeneng became entitled to payment of a withdrawal benefit from the Fund in accordance with the Rules of the Fund.[2]

3. In a letter of 20 July 2017,[3] the SABC informed the Fund that it was investigating allegations of misconduct against Motsoeneng and that it was 'in the process of preparing to institute proceedings against Motsoeneng to obtain judgment against him for the recovery of damages caused to the SABC by reason of his dishonest conduct.' The SABC, *inter alia,* requested the Fund to withhold payment of the whole of any benefit payable to Motsoeneng until such time as the judgment it anticipated securing, was obtained.

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[1] It is not in dispute that Motsoeneng was dismissed pursuant to a disciplinary inquiry that was held by the SABC. The papers do not reveal the nature of the charges that were proffered against him or the reasons for his dismissal.

[2] The lump sum benefit is equal to his fund credit, as noted in *Sentinel Retirement Fund and Another v Masoanganye* (1003/2017) [2018] ZASCA 126 (27 September 2018) at para 2.

[3] Annexure 'KK2' at pp 243 – 245 of the papers.
The misconduct referred to in the letter related to various findings in that regard, as articulated by the Public Protector in her report entitled "When Governance and Ethics Fail"–'*A report on an investigation into allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)'* (report number 23 of 2013/2014). The institution of civil proceedings referred to in the letter was said to be pursued in compliance with the remedial action ordered by the Public Protector in her report. In a subsequent letter dated 28 July 2018, the SABC notified the Fund that it also intended to recover monies unlawfully paid out by it to Motsoeneng in the sum of approximately R11,000 000.00 (eleven million rand), being obliged, as an organ of State in terms of the Public Finance Management Act 1 of 1999, to recover monies unlawfully paid out by it. The letter, annexure 'KK4' appears at pp 248 – 249 of the papers.

4. Motsoeneng, in the meanwhile, sought to withdraw his pension benefit from the Fund.

5. The Fund, at the behest of the SABC, appears to have agreed to withhold payment of the pension benefit due to Motsoeneng, pending the outcome of an urgent application to interdict payment of Motsoeneng's pension benefit by the Fund. [4] In keeping with this agreement, the Fund has not released payment thereof to Motsoeneng.

6. On 4 August 2017, the SABC launched the contemplated urgent application, which eventually culminated in the present hearing. The matter appears not to have been prosecuted to finality in the urgent court, presumably because of the Fund's agreement to await the final outcome of these proceedings, which agreement had the effect of preserving the *status quo*, pending a determination by the court.

7. On 5 February 2018, the SABC and the Special Investigating Unit ('SIU') instituted an action for damages against Motsoeneng in respect of the two claims forming the subject matter of the present proceedings.[5]

8. The application was issued in two parts. As matters presently stand, in Part A, the SABC primarily seeks interim interdictory relief to restrain the Fund from paying out Motsoeneng's pension benefits, together with ancillary relief[6] and

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[4] This is alluded to in letters addressed by the Fund as well as its attorneys (at pp 250-252 of the papers). In both letters, the Fund called upon the SABC to file its application to interdict the Fund from paying out the benefit on or before 4 August 2017. In par 11.2 at p 315 of its answering affidavit, the Fund asserts it was merely granting the SABC an indulgence, as it was under an obligation in terms of its rules and the Act to make payment to Motsoeneng of his pension benefit.

[5] See Notices bundle at pp 32-57. The action was launched in the Gauteng Local division under case no. 18/04253 by the Special Investigating Unit ('SIU') as first plaintiff, and the SABC as second plaintiff, with reference to a claim in the amount of R19,235 453.20 and a claim in the amount of R11,508 549.12 (in aggregate in totalling the sum of R21,743 972.32) in respect of damages allegedly sustained by the SABC as a result of the unlawful conduct of Motsoeneng.

[6] The ancillary relief sought includes, amongst others, an interdict to restrain the Fund and Motsoeneng from 'dissipating or concealing' assets in the sum of R21, 743,972.32. The anti-

costs. The relief is primarily aimed at preserving the benefits that are due and payable to Motsoeneng in the custody of the Fund, pending the outcome of the action for damages.[7] The relief is premised on the provisions of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 ('the Act') as read with Rule 15.2 of the Fund's Rules. In Part B, the SABC seeks, amongst other relief, to review and set aside as irregular and unlawful, a decision of its Governance and Nominations Committee ('GNC') to award Motsoeneng an amount equivalent to 2.5% of R1,19 billion.

9. The third and fourth respondents are respectively the Minister of Finance and the Financial Sector Conduct Authority (also referred to in the papers as the Registrar of Pension Funds), who were joined as parties to the proceedings by orders of court granted respectively on 22 September 2017 and 2 November 2017, [8] on account of their interest in the matter as authorities responsible for the administration of the Act. The applicant had initially sought a conditional declaration of constitutional invalidity in respect of section 37D of the Act on the basis that it was inconsistent with the Constitution of the Republic of South Africa.[9] The third and fourth respondents thereafter filed answering affidavits for purposes of opposing such relief. In paragraph 8.2 of its replying affidavit,[10] the SABC gave notice of its election to abandon its constitutional challenge of section 37D and tendered the costs occasioned thereby. To the extent that the third and fourth respondents opposed the application on the

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dissipation interdict is seemingly aimed at preventing Motsoeneng from utilising the proceeds of the withdrawal benefit in the event that same is paid out to him, however, such relief was not pursued at the hearing of the application.

[7] The relief is really designed to have the SABC's interests in the benefits payable by the Fund to Motsoeneng preserved until a judgment is obtained against Motsoeneng.

[8] In terms of each of the court orders, the third and fourth respondents were joined as parties in the main application 'where the applicant *inter alia* challenges the constitutionality of s 37D(1)(b)(ii) of the Pension Funds Act, no. 24 of 1956.' In terms of paragraph 2 of each order, the applicant was granted leave to supplement its affidavits and notices of motion filed in the main application in order to reflect such joinder.

[9] In support of its conditional constitutional challenge, the SABC sought to rely on a wider interpretation of the provisions of s 37D(1)(b) of Act than that which has hitherto been applied by the courts.

[10] Par 8.2 at p 409 of the papers.

basis of the SABC's conditional constitutional challenge and interpretation of s 37D(1)(b) of the Act, the SABC's withdrawal thereof had the effect of disposing of any lis between itself and such respondents. In the result, the third and fourth respondents did not participate further in the proceedings.

10. For convenience and where appropriate, the Fund and Motsoeneng will jointly be referred to as 'the respondents' henceforth in the judgment.

11. Both respondents opposed the application. The Fund filed several affidavits in the matter, which are mentioned below, whilst Motsoeneng chose not to file any. Instead, he only filed a notice in terms of Rule 6(5)(d)(iii) in which he set out various questions of law which he intended to raise at the hearing of the application.

12. The Fund opposes the application *inter alia,* on the basis that the SABC failed to bring its case within the ambit of s 37D(1)(b)(ii) of the Act as read with Rule 15.2 of the Rules of the Fund in its notice of motion and founding affidavit, thereby disentitling the SABC to an order requiring the Fund to withhold payment of the accrued pension benefit due to Motsoeneng. It also opposes the costs order sought against it.[11]

13. The applicable grounds on which Motsoeneng's legal challenge is brought, are as follows:

13.1. "The SABC has not met the legal requirements for an order restraining either of the respondents from dissipating or concealing assets in the sum stated;

13.2. The SABC has failed to establish a legal entitlement to an order restraining the Fund from paying him benefits in the sum stated;

[11] The Fund also opposed the conditional constitutional challenge brought by the SABC, which has since been withdrawn by the latter.

13.3. The SABC has failed to bring its claim within the ambit of s 37D(1)(b)(ii) of the Act;

13.4. The SABC has failed to bring its claim within the ambit of Rule 15.2 of the Fund's rules." [12]

14. The hearing of the matter encompassed only an adjudication of the relief sought in Part A of the application and written and oral argument by the parties was advanced only in relation thereto. As such, Part A will, for convenience, be referred to as 'the application' in the judgment.

15. Before considering the merits of the application, it is necessary to deal, at the outset, with a number of preliminary issues that were raised during the proceedings. These pertain to various procedural and other complaints raised by the respondents, including an application by the Fund to strike out the entirety of the replying affidavit (or one or more paragraphs thereof) and an application for condonation by the SABC for the late filing of its replying affidavit.

***Preliminary issues***

*Procedural complaints*

16. In addition to its opposition on the merits, the Fund complains about various procedural irregularities that were said to have been committed by the SABC during the conduct of the proceedings, namely:

16.1. The service and filing of a supplementary founding affidavit, dated 7 September 2017, without the leave of the court first having been obtained;

[12] Certain additional grounds relied on by Motsoeneng are no longer relevant as they pertain to the SABC's case concerning its conditional constitutional challenge, which is no longer in issue in the matter.

16.2. The service and filing of amended notices of motion during the course of the proceedings (on 8 September 2017 and 19 January 2018) without utilising the provisions of the Rules of Court for purposes of effecting the amendments;

16.3. The inclusion of new matter in the replying affidavit in an attempt to make out a new case in reply;

16.4. The late filing of its replying affidavit; and

16.5. The inclusion of hearsay evidence in its affidavits.

17. Motsoeneng largely echoes these complaints in his written argument by asserting, *inter alia*, that the '*SABC arrogated* [unto] *itself the purported right to amend and supplement its case at will, without even the pretence of seeking condonation for such conduct, or to justify it*'[13] and that '*the SABC's papers have changed and grown over time...*', and, in relation to the SABC's first amended notice of motion (annexed as 'SKK1' to its first supplementary affidavit)[14] that '*the SABC filed the new papers unilaterally, without any pretext at complying with the Uniform Rules of the Honourable Court.*'[15] In relation to the delivery of the first supplementary founding affidavit (dated 7 September 2017), the complaint is that the SABC '*neither obtained consent nor condonation*' therefore.[16] A further complaint relates to the inclusion of new matter in the replying affidavit by virtue of which the SABC is said to be

[13] Para 4 at p 2 of Motsoeneng's heads of argument.
[14] The SABC's first supplementary founding affidavit dated 7 September 2017 appears at pp 261-272 of the papers. Annexure 'SKK1' thereto, being the SABC's first amended notice of motion, dated 8 September 2017, appears at pp 281-286 of the papers.
[15] Para 35 at p 16 of Motsoeneng's heads of argument.
[16] Para 28 at p 12 of Motsoeneng's heads of argument.

arguing a different case to that which it '*expressly stated in its founding affidavit, it does not rely on*'.[17]

18. The complaint as to a new case of action in reply, is based on what is contained in paragraph 3.1 of the replying affidavit. There, the SABC alleges that:

> "3.1 The Applicant brings this application in circumstances where:
>
> 3.1.1 the sum of R21,743 972.32 that it seeks to recover as set out in its amended notice of motion dated 19 January 2018, constitutes losses it suffered owing to the unlawful conduct of the Second Respondent;
>
> 3.1.2 a civil action for the recovery of the aforesaid sum has already been instituted by the Special Investigating Unit ('SIU') and the Applicant against the Second Respondent with the High Court, Gauteng Local Division, Johannesburg, under case number 18/04253."

19. The Fund contends that the SABC '*changed course in attempting to base its cause of action on the fact that a summons had been issued (and hence by extension trying to bring its case within the ambit of section 37D or rule 15.2)*'. The fund complains that the SABC has impermissibly sought to rely on a new cause of action in reply - one which arose only after the launch of the application, which the court should not permit. Reliance was placed on the cases such as *Molusi and others v Voges No and Others* [2015] 3 All SA 131 (SCA) at para [20][18] and *Aeroquip SA v Gross and others* [2009] 3 All SA 264 (GNP) at para [6][19] for the general rule which prohibits an applicant from

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[17] Paras 15-18 at pp 6 - 7 of Motsoeneng's heads of argument.

[18] In *Molusi,* the following was said: '*In application proceedings, the affidavits do not only constitute evidence, but they also fulfil the purpose of pleadings…they must set out the cause of action in clear and unequivocal terms to enable the respondent to know what case to meet. This is why the applicant is never permitted to change colours which he/she has pinned to the mast and plead a new cause of action in a relying affidavit.*'

[19] In *Aeroquip,* the following was said: '*The general rule is that the applicant must make out its case in its founding affidavit and is not entitled to introduce new matter in its replying affidavit. Where the applicant introduces new matter in its replying affidavit the court may either ignore or strike out the*

making out its case in its replying affidavit. On this basis, the Fund applies for the striking out of the whole of the replying affidavit, *alternatively*, paragraphs 5.2 and/or 3.1.2 and/or 7 thereof.

20. The Fund's prejudice is said to lie in the fact that it 'could not exercise its discretion on the basis of new facts that were raised' in the replying affidavit.'[20]

21. Motsoeneng contends that he has been prejudiced by being '*called upon to address matters stated in the amended notice of motion* (being the first amended notice of motion dated 8 September 2017) *where as a matter of law the notice of motion stands unamended and the supplementary affidavit sought to be relied upon by the SABC has not been admitted by the Honourable Court and is accordingly pro non scripto. Exacerbating the prejudice...is the fact that the very amended notice of motion sought to be relied upon by the SABC records that the SABC will seek to be granted leave to supplement its application in terms of Part B. Accordingly Motsoeneng is to be confronted with a third founding affidavit in this application.*'[21]

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*new matter which should have been in the founding affidavit...the court has an overriding discretion to allow an applicant to introduce new matter in its replying affidavit where its omission from the founding affidavit is properly explained.'*

[20] Para 57 at p 30 of the Fund's heads of argument. See too, para 13.5 at p 397 of the papers where the Fund submits that in exercising a discretion whether or not to withhold payment of the benefit to a member pending the finalisation of a civil action, one of the factors taken into consideration is the strength of the employer's claim, which must be balanced against the interest of the member. The Fund submits that '*Where the employer gives conflicting versions (as is the case here), it is well neigh impossible for the first respondent to exercise its discretion in favour of the employer at all, where the employer (applicant) initially was itself not of the view that the conduct constituted fraud, theft, dishonesty or misconduct within the meaning of section 37D.*' The argument appears to me to be misguided in that it fails to properly appreciate the purpose for which and context in which the allegations supporting the SABC's conditional constitutional challenge were made. This is dealt with in paras 50 & 51 of the judgment.

[21] Paras 40 - 41 at p 18 of the heads of argument filed on behalf of Motsoeneng.

22. The aforesaid complaints must be considered in the light of all the undisputed facts and attendant circumstances in the matter. On the undisputed allegations contained in the founding papers: (i) the GNC acted outside the scope of its authority (and the governing policies under which SABC functionaries are required to operate) in approving the award of a success fee to Motsoeneng. The GNC was thus said to be exercising powers which it was not authorised or empowered to exercise[22] and its decision to award a success fee was therefore unlawful and invalid, justifying interference on review and (ii) Motsoeneng unlawfully accepted and retained payment of an unauthorised and unwarranted success fee in the amount of R11, 508 549.12, which the SABC submits, constitutes misconduct within the ambit of s 37D(1)(b)(ii) of the Act as read with Rule 15.2 of the Fund's Rules and (iii) Motsoeneng was found by the Public Protector to have committed various acts of misconduct involving *inter alia*, his abuse of power and improper conduct in the appointments and salary increments of certain staff members of the SABC and his role in the purging of senior staff members (which resulted in numerous labour disputes and settlement awards against the SABC) in circumstances involving dishonesty on his part, and in respect of which the Public Protector directed the SABC to take remedial action, which included the recovery of financial losses sustained by it as a result thereof. The SABC has computed some of its losses in this regard, which, for present purposes, amounts to R10, 235 452.20. The SABC likewise submits that such conduct constitutes misconduct within the ambit of s 37D(1)(b)(ii) of the Act as read with Rule 15.2 of the Fund's Rules. The factual allegations which underpin the SABC's claims remain largely if not wholly undisputed on the papers. Motsoeneng elected not to engage with the substantive allegations made by the SABC in its papers. Nor did he put up any version to the contrary.

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[22] As a matter of law, not only must a public functionary exercise powers/take administrative action which he/she is expressly authorised to take but he/she must also only take such action within the limits provided for in that source of authority. See: *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 (1) SA 374 (CC); *Pharmaceutical Manufacturers Association of South Africa and another In Re Ex Parte President of the Rebublic of South Africa and others 2000 (3) BCLR 241 (CC)*

23. Against this background of *prima facie* unlawfulness and illegality, on the assumption that the other requirements for interdictory relief are met, the primary question which will require determination, is whether the SABC has established a *prima facie* case that Motsoeneng may be liable to it in the light of the allegations against him, such as to entitle it to interim interdictory relief for purposes of protecting its right of recovery by preserving its interests in Motsoeneng's pension benefit, pending an action to ascertain whether or not it is owed money.

24. The facts and allegations on which the SABC lays claim to the relief sought in the application is contained in five affidavits filed by it over the course of several months. It is both useful and convenient to set out a brief chronology of how the pleadings evolved in relation to the SABC's case.

25. On 4 August 2017, the SABC launched the application (incorporating part A and B) by way of urgency. In its founding affidavit, it relied on a claim in respect of an unauthorised and irregular payment in an amount of R11, 508 549.12, which it discovered had been made by it to Motsoeneng in respect of the award of a 'success fee'. The deponent to the founding affidavit had only been appointed on 27 March 2017, when an interim board was appointed by the president of the Republic of South Africa. The SABC's audit department had only discovered the irregularity on 24 July 2017. The SABC also set out facts supporting a claim against Motsoeneng, based on allegations that were corroborated by the findings of the Public Protector concerning acts of misconduct[23] that had been committed by him during the tenure of his

[23] In paras 34 -35 of the founding affidavit (at pp 18-25 of the papers), some of the acts of misconduct found by the Public Protector to have been committed by Motsoeneng are set out. These included irregular appointments and salary progressions of staff; the irregular termination of the employment of several senior employees of the SABC; irregular suspensions of staff, Motsoeneng's irregular involvement and abuse of power therein and Motsoeneng's maladministration.

employment at the SABC (prior to his appointment as Chief Operating Officer ('COO') on 9 July 2014), and which resulted in huge financial losses being sustained by the SABC.

26. On 8 September 2017, the SABC delivered a supplementary affidavit[24] to its founding affidavit together with an amended notice of motion, which was annexed thereto. In this affidavit, the SABC provided a computation of its claim against Motsoeneng in the amount of R10, 235 452.20 and expanded on the allegations made in the founding affidavit, as per the findings of the Public Protector.

27. The SABC gave notice therein that the '*facts introduced through this supplementary affidavit and the concomitant relief sought, as reflected in the amended notice of motion annexed hereto marked "SKK1",*[25] *constitute the main claim. The relief sought in the original notice of motion and founding affidavit constitute an alternative claim.*'[26] The reason given for the SABC's failure to include further relevant facts emanating from the public protector's report in the founding affidavit, is the following: As a result of circumstances beyond its control, the SABC had to terminate the services of its erstwhile attorneys. Its attorneys of record were instructed 11 hours prior to the deadline that had been set by the Fund for service on it of the application by email. At the time, the Public Protector's report had not been made available to counsel and same could only be properly considered after the founding affidavit was field. The relevance of facts included in the supplementary affidavit was thus only established in the course of considering the Public Protector's report.[27] The SABC averred that 'none of the respondents stand to be prejudiced in that

[24] The supplementary affidavit, dated 7 September 2017, appears at pp 261-272 of the papers.
[25] Annexure 'SKK1' containing the SABC's first amended notice of motion, dated 8 September 2017, appears at pp 273-278 of the papers.
[26] Para 6 at p 263 of the papers.
[27] Paras 4 & 5 at p 262 of the papers.

they have not filed their answering affidavits and can be provided with more time to deal with the allegations contained herein'.[28]

28. On 12 October 2017, the Fund delivered its answering affidavit to the founding affidavit. On the same day, it delivered a separate supplementary answering affidavit to the SABC's supplementary founding affidavit in which it *inter alia,* raised a complaint in regard to the delivery of the 'amended' notice of motion.

29. As regards the joinder of the third and fourth respondents as parties to the proceedings, on 22 September 2017, the SABC issued an application to join the Minister of Finance to the application pursuant to which an order of court was granted on 7 November 2017. On 2 November 2017, the SABC issued an application to join the Registrar of Pension Funds to the application pursuant to which an order of court was granted on 8 January 2018. In terms of both court orders, the SABC was given leave to supplement its papers to reflect the said joinder.

30. On 22 January 2018, the SABC delivered a second supplementary founding affidavit (dated 18 January 2018) to reflect the aforesaid joinder. In addition, the SABC introduced an amended notice of motion in the proceedings. In paragraph 10 thereof,[29] the deponent to the affidavit states as follows: '*I attach hereto as annexure "KK3" an amended notice of motion reflecting the correct total sum of R21, 743, 972.32 comprising of the R11, 508 549.12 contained in the original notice of motion and R10, 235 453.20 contained in*

[28] Para 7 at p 263 of the papers.
[29] P 322.8 of the papers. Annexure 'KK3' containing the SABC's second amended notice of motion, appears at pp 322.17 - 322.22 of the papers.

*the amended notice of motion which was attached in the supplementary affidavit of 11 September 2017*[30]*.'*

31. On 2 February 2018, the third respondent delivered an answering affidavit. On 14 February 2018, the fourth respondent delivered an answering affidavit.

32. On 5 April 2018, the SABC delivered its replying affidavit wherein it *inter alia,* sought condonation for the late filing thereof and withdrew its conditional constitutional challenge.

33. On 26 April 2018, the Fund delivered a Notice of Application to Strike Out the SABC's replying affidavit together with a supplementary affidavit in response to the replying affidavit.

34. On 18 July 2018, the SABC delivered an affidavit in response to the Fund's Notice to Strike Out.

35. It is true that the SABC filed amended notices of motion without observance of the Rules of Court and that it filed its supplementary affidavit of 7 September 2017 without leave of the court first having been obtained therefore. It is equally true that the way in which the SABC has sought to advance its case and the manner in which the pleadings have evolved, is less than perfect.

[30] The date of 11 September 2017 appears to be a mistake as the supplementary affidavit referred to in this paragraph was dated 7 September 2017 and was delivered on 8 September 2017. See pp 260 and 272 of the papers.

36. On the other hand, I am guided by the approach of Schreiner JA in *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F, where he emphasised that:

> " No doubt parties and their Legal advisers should not be encouraged to become slack in their 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."

(own emphasis)

37. Courts have always been inclined to adopt a pragmatic approach in dealing with formalistic and technical objections. In *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19, at para 41, Mogoeng CJ commented that '*The Constitution and our law are all about real justice, not mere formalities,'* emphasising that form should never trump any approach that would advance the interests of justice. In *Eke v Parsons* [2015] ZACC 30 at para [39], Madlanga J cautioned that:

> "Without doubt, rules governing the court processes cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to the point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said'[i]t is trite that the rules exist for the courts, and not the courts for the rules'."

38. Earlier, in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 (SCA) at para 32,* Brand JA too had stated:

> "I am not entirely sure what is meant by the description of the application as 'totally irregular'. If it is intended to convey that the application amounted to a deviation from the uniform rules of court, the answer is, in my view, that, as has often been said, the rules are there for the court and not the court for the rules. The court *a quo* obviously had a discretion to allow the affidavit. In exercising this discretion, the overriding factor that ought to have been considered was the question of prejudice. The perceived prejudice that the respondent would suffer if the application were to be upheld, is not explained. Apart from being deprived of the opportunity to raise technical objections, I can see no prejudice that the

respondent would have suffered at all. At the time of the substantive application, the respondent had already responded – in its rejoining affidavit – to the matter sought to be included in the founding affidavit. The procedure which the appellant proposed would have cured the technical defects of which respondent complained. The respondent could not both complain that certain matter was objectionable and at the same time resist steps to remove the basis for its complaint. The appellant's only alternative would have been to withdraw its application, pay the wasted costs and bring it again supplemented by the new matter. This would merely result in pointless waste of time and costs.

39. Mr Bester SC, who appeared on behalf of Motsoeneng, argued that the amended notice of motion dated 19 January 2018, upon which the SABC finally relies, as too the SABC's supplementary affidavit dated 7 September 2017, should be ignored as *pro non scripto*.[31] In that event, as I understand the argument, unless and until the further affidavit is permitted by the court, it would be unnecessary (if not improper) for a respondent to reply thereto. In my view, the argument is flawed, for it assumes that the court will exercise its discretion against admitting the affidavit, whether or not a formal application is made therefore. Aside from the fact that such an argument assumes that the court will exercise its discretion in favour of the objecting party, will the approach which is advocated, namely, to ignore the documents because they were filed without strict observance of the rules of court, hamper a decision of the case on its real merits? I think so. And, will such an approach advance the interests of justice? I think not. Motsoeneng's perceived prejudice (referred to in paragraph 21 above) appears to me to be contrived, bearing in mind that Motsoeneng elected not to file any affidavits in the matter.

[31] The argument is that a party is not entitled in terms of rule 6(5)(e) of the Uniform Rules of Court to file further affidavits without first obtaining the leave of the court to do so. Therefore, so the argument developed, the documents are not properly before court until the applicant applies for leave to file them and provides reasons for why it is necessary to do so. Mr Bester SC however points out that the court may in its discretion permit the filing thereof. The Fund relied on a similar complaint in advancing an argument in relation to costs. The argument is unduly formalistic and technical. Courts do not encourage formalism in the application of the rules. As pointed out in the earlier quoted authorities, the rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the Courts. See further: *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ) (19 November 2010) at paras 16-19, where Wepener J conveniently summarised various additional authorities in eschewing a formalistic approach.

40. In circumstances where - (i) the Fund filed a supplementary answering affidavit in response to the SABC's supplementary affidavit dated 7/9/2017 (in which the SABC's first amended notice of motion was introduced); (ii) joinder of the third and fourth respondents occurred on the basis of the facts set out in both the founding and supplementary founding affidavits, including the first amended notice of motion dated 8 September 2017; (iii) the third and fourth respondents filed an answering affidavit in response to such founding affidavits and amended notice of motion; (iv) the supplementary founding affidavit of 7 September 2017 was filed prior to any answering affidavit/s having been delivered in the matter; (v) the second supplementary founding affidavit dated 18 January 2018 (in which the second amended notice of motion dated 19 January 2018, was introduced), was filed pursuant to the joinder of the third and fourth respondents in the matter and the answering affidavits of the third and fourth respondents were delivered in response thereto, including all other affidavits that had been filed by the SABC at that stage; (vi) Motsoeneng, who had an equal opportunity to seek to avail himself of the right to respond to any new matter raised in the second supplementary affidavit, chose not to do so; (vii) factual allegations pertaining to the findings of the Public Protector and the contents of the final audit report were not disputed by the respondents; and (viii) none of opposing parties in the litigation either disputed the factual allegations underpinning the SABC's claims against Motsoeneng, as set out in the supplementary founding affidavits, or raised any objection thereto on grounds that the evidence was irrelevant - it would, in my view, plainly be in the interests of justice to have regard to the documents complained of.

41. I agree with what was stated by Francis J in *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 at para 15, namely, that: 'A common sense approach should be used when dealing with such matters. The true test is whether all the facts pertaining to the matter have been placed before the court.' In

the present matter, all the papers are before me and the matter is ready to be dealt with on its merits. It is in the interests of justice that the affidavit including the amended notice of motion be taken into account and that this matter be finalised and that unnecessary additional costs be avoided. The approach advocated by Mr Bester SC (mentioned in fn 31 above) would 'result in the making of unnecessary procedurally related applications which are not truly required in order for justice to be done or for the speedy resolution of litigation but which appear to be designed merely to inflate costs to the advantage of the practitioner's pocket'. (per the cautionary remarks of Leach J (as he then was) in *Szedlacsek v Szedlacsek and Others* 2000 (4) SA 147 (E) at 149C-H).

42. Mr Bester SC submits that it was not incumbent upon the second respondent to file an affidavit in response to a '*pro non scripto* affidavit', without the court first sanctioning its admission. The argument is not sustainable. A litigant who elects to sit back and deliberately refrains from engaging with substantive allegations made in an affidavit on the supposition that they will not, in the exercise the court's discretion, be entertained by the court, takes the risk that his objection to the admission of the affidavit will not be upheld. As the second respondent did not seek to avail himself of an opportunity to deal with the additional matter, he cannot later complain that it should be ignored. See: *Lagoon Beach Hotel (Pty) ltd v Lehane NO and Others* 2016 (3) SA 143 SCA at para 16.

43. It is not in dispute that the SABC is a public broadcaster that is funded through the public purse. The huge public interest considerations in the matter are self-evident.[32]

[32] It is self-evidently in the public interest that public funds be not utilised for an unlawful and unauthorised purpose. It is not in dispute that the present proceedings are but one of the steps that are being taken by the SABC in its bid to recover alleged fruitless and wasteful expenditure and all

44. As I see it, I have an overriding discretion to overlook the procedural irregularities complained of. I can see no real prejudice that Motsoeneng or the Fund would suffer if the case were to be determined on the basis of the SABC's notice of motion dated 19 January 2018, including its supplementary founding affidavit of 7 September 2017 and all other affidavits filed in the matter. In any event, the Fund filed a further affidavit to deal with the SABC's supplementary affidavit of 7 September 2017, which took care of its perceived prejudice in relation thereto. A determination of the case on its real merits, having regard to all relevant facts put before the court, will advance not only the interests of the litigants but also the public interest and the interests of justice. The documents are therefore allowed, and the respondents' objections thereto are dismissed.

*Has the SABC made out a new case in reply?*

45. In its written heads of argument, the Fund submits that in motion proceedings, '*one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit.*'[33] Reliance was placed on cases such as *Molusi and others v Voges NO and Others* [2015] 3 ALL SA 131 (SCA) at p 138, para 20;[34] and *Aeroquip SA v Gross and others* [2009] 3 ALL SA 264 (GNP) at p 267, para 6[35] in this regard.

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monies allegedly irregularly expended through unlawful and improper actions from the appropriate persons, which in this case, happens to be Motsoeneng.

[33] Para 54 at p 28 of the Fund's heads of argument.

[34] In *Molusi* at para 20, the following was said: '*It is settled law that the purpose of pleadings is to define the issues for the parties and the court. In application proceedings, the affidavits do not only constitute evidence, but they also fulfil the purpose of pleadings. In other words, they must set out the cause of action in clear and unequivocal terms to enable the respondent to know what case to meet. This is the reason why an applicant is never permitted to change colours which he/she has pinned to the mast and plead a new cause of action in a replying affidavit.*'

[35] In *Aeroquip* at para 6, the following was said: '*The general rule is that the applicant must make out its case in its founding affidavit and is not entitled to introduce new matter in its replying affidavit. Where the applicant introduces new matter in its replying affidavit, the court may either ignore or strike out the new matter which should have been in the founding affidavit. As pointed out in the latter*

46. In the present case, the Fund acceded to the SABC's request to withhold payment of Motsoeneng's pension benefit on the basis that it (SABC) was in the process of instituting proceedings against him due to his alleged dishonest misconduct.[36] The misconduct upon which the SABC relied in correspondence preceding the institution of the present application,[37] was said to relate to: (i) those acts of misconduct which the Public Protector had found (pursuant to an investigation conducted by her) had been committed by Motsoeneng and in respect of which she had directed the Board to take remedial action;[38] and (ii) the unlawful payment to and receipt by Motsoeneng of a success fee in the amount of approximately R11 million, to which he was not legally entitled. In the papers filed in support of the application, the misconduct in relation to these claims was explained and expounded upon by the SABC.

47. The factual allegations in the founding papers[39] *prima facie* demonstrate that Motsoeneng had accepted and retained payment of an unlawful, unauthorised

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*case the court has an overriding discretion to allow an applicant to introduce new matter in its replying affidavit where its omission from the founding affidavit is properly explained.*

[36] See: Annexure 'KK3' at p 246 of the papers.

[37] See: Annexures 'KK2' at pp 243 – 245 and 'KK4' at pp 248 – 249 of the papers.

[38] The Public Protector directed the Board of the SABC to ensure that:

(i) all monies are recovered which were irregularly expended through unlawful and improper actions from the appropriate persons;

(ii) appropriate disciplinary action was taken against Mr Motsoeneng for his ***dishonesty*** relating to the misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increments of certain staff and for his role in the purging of senior staff members resulting in numerous labour disputes and settlement awards against the SABC;

(iii) any fruitless and wasteful expenditure that had been incurred as a result of irregular salary increments to Mr Motsoeneng is recovered from him.

The aforesaid remedial action is referred to in annexure 'KK2' at p 244 of the papers.

[39] The founding papers comprise the founding affidavit and annexures thereto.

and unwarranted success fee in the amount of R11,508 549.12,[40] this, in circumstances where: (i) an investigation conducted by the SABC's audit department revealed that the requisite Board approval had not been sought or obtained in relation to such payment, [41] (which fact would support an inference that it had deliberately not been disclosed by any members of the SABC's Governance and Nominations Committee ('GNC') to the Board);[42] (ii) payment of the amount of R11, 508 549.12 had been made in full by way of lump sum payments on 12 and 13 September 2016[43] in circumstances where, to the knowledge of the GNC,[44] the SABC's financial circumstances did not allow for a lump sum payment thereof and where the GNC had in fact resolved that payment would be made by way of instalments over a period of three years;[45] (iii) transcripts of the GNC deliberations that preceded the taking of the decision to award Motsoeneng a success fee, evidenced that GNC members were aware that the payment to Motsoeneng was irregular;[46]

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[40] This is by virtue of the following factual allegations appearing in the founding affidavit, namely that: (i) the GNC approved payment of the success fee in circumstances where it did not have the authority to do so in terms of the SABC"s Delegation of Authority Framework ('DAF'), read with the Terms of Reference pertaining to the SABC's GNC and HR committee; and (ii) there was no obligation created either in Motsoeneng's service agreement or in the SABC's governing policy documents to pay out such a success fee to him, which carried the consequence of rendering the decision to award the success fee and the subsequent payment made to Motsoeneng '*unlawful and void ab initio and therefore in contravention of the regulatory prescripts as such, but not limited to, the Constitution and the PFMA.*' – see further in this regard: founding affidavit: para 10.4 at p 14; para 26 at pp15-16; para 28 at pp 16-17; para 32 at p 18; para 33 at p 18; and para 74 at p 34 of the papers.

[41] See paras 6.11 and 9.11 of the audit report at pp 62 and 67 of the papers. This fact in conjunction with those facts mentioned in fn 42 below are capable of supporting an inference that the payment of the success fee had deliberately not been disclosed by any members of the SABC's GNC to the Board.

[42] This should be read within the context of what is averred in para 20 of the founding affidavit (at p 12 of the papers) namely, that it was only on 24 July 2017 that the SABC's audit department discovered that Motsoeneng had unlawfully received a success fee; See too: para 79 at p 35 where it is averred that Mr Aguma (former Group Chief Executive officer) and Ms Audrey Raphela (acting CFO) had retrieved all supporting documents in relation to the payment effected to Motsoeneng, claiming that it was to be kept by them for audit trail purposes. See further: paras 9.18 & 9.19 of the audit report (at p 69) where it is stated that documentation confirming that Motsoeneng had negotiated funding for the SABC did not exist. It is noteworthy that Motsoeneng was an executive member of the SABC's GNC. Names of the GNC members appear in para 9.7 at p 66 of the papers.

[43] See: para 29 at p 17 of the founding affidavit.

[44] See: para 9.10 of the audit report at p 67 of the papers.

[45] See para 9.21 of the audit report at p 69 and para (2) at p 98 of the papers.

[46] See paras 6.11 of the audit report at p 62 of the papers.

(iv) the terms of reference of the GNC included, amongst others, to '[*p*]*revent any Human Capital practices that will result in unauthorised, irregular, fruitless and wasteful expenditure...*';[47] (v) a paper audit trail in relation to the payment had been deliberately concealed, in conflict with established norms and values that demand open transparency in the exercise of public power; (vi) neither Motsoeneng's service agreement nor the SABC's governing policy documents made provision for payment to him of a success fee;[48] (vii) the duties of Executive Directors (of which Motsoeneng was one) included, amongst others, the giving of advice on governance related matters;[49] and (viii) the SABC had expressly relied on the provisions of section 57 of the Public Finance Management Act 1 of 1999 ("PFMA'),[50] the Public Protector's report,[51] and the final audit report[52] (relating to the outcome of the audit investigation conducted by the SABC's internal audit department) in support of its case.

48. The allegation by the Fund in its answering affidavit, namely, that the SABC '*does not allege that Motsoeneng did anything wrong in relation to the success fee paid to him*'[53] was sought to be refuted by the SABC in paragraph 5.2 of its replying affidavit. For the sake of brevity, I do not intend to quote the contents of paragraph 5.2 verbatim in the judgment.[54] Suffice it to say that there it is explained, in reference to specific averments that were made by the

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[47] See para 5.17 of the audit report at p 60 of the papers.
[48] See para 33 at p 18 of the founding affidavit.
[49] Para 9.47 of the audit report at p 76 of the papers.
[50] In terms of section 57 of the PFMA, officials of the SABC are obliged to ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official.
[51] Public Protector's Report No 23 of 2013/2014, "When Governance and Ethics Fail" (17 February 2014). The full title of the Report, filed by the Public Protector in terms of s 182(1)*(b)* of the Constitution and s 8(1) of the Public Protector Act, reads: '*A report on an investigation into allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)* (report number 23 of 2013/2014)
[52] Annexure 'KK1' to the founding affidavit, at pp 48-119 of the papers.
[53] Par 16 at p 264 of the answering affidavit.
[54] Paragraph 5.2 is contained at pp 364–369 of the papers.

SABC in paragraphs 20, 33 and 74 of the founding affidavit[55] (as supported by the undisputed facts set out in the audit report, annexure 'KK1" thereto), that Motsoeneng's wrongdoing in relation to the success fee payment was actuated by his taking 'receipt of unlawful monies (exacerbated by his failure to disclose same until the Applicant [SABC] received findings from its audit investigation'. That there was no legal basis for the payment (on account of the fact that it was not regulated by any of the empowering provisions and/or Motsoeneng's Service Agreement as set out in the founding affidavit) and that it was therefore not due, owing or payable to him, was common cause on the papers. That Motsoeneng received and retained payment of monies to which he enjoyed no legal entitlement, was likewise common cause on the papers. These allegations were not new. They appeared in the founding papers, as is evident from the contents of paragraph 47 above. [56]

49. The SABC further spelt out in paragraph 5.2.5 of the replying affidavit (at p 367-368) why it submits that Motsoeneng's acceptance of the unlawful success fee payment fell within the ambit of 'the dishonesty and misconduct envisaged by section 37D(1)(b)' of the Act. The submissions made therein were premised on the provisions of section 57 of the PFMA, which the SABC had expressly stated it relied on in paragraphs 5 and 32 of the founding affidavit,[57] and the undisputed fact that there was no legal basis for the payment. Relying on the common cause fact that Motsoeneng took receipt of monies to which he was not legally entitled (exacerbated by his failure to disclose same until the SABC received findings from its audit investigation),

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[55] There, the SABC alleged that its audit department had discovered that Motsoeneng had 'unlawfully received' the success fee payment (para 20); the success fee was not a performance benefit in terms of Motsoeneng's Service Agreement; (para 33); and Motsoeneng was not legally entitled to receive payment of the success fee (para 74).

[56] Paragraph 47 of the judgment should be read in conjunction with the footnotes referred to therein.

[57] See: paras 5 (at pp 7-8) and 32 (at p 18) of the founding affidavit. In terms of s 57 of the PFMA, Motsoeneng was obliged, in his capacity as Chief Operating officer ('COO') to: (i) ensure that the system of financial management and internal controls established for the SABC were carried out; and (ii) take effective and appropriate steps to prevent any irregular expenditure and fruitless and wasteful expenditure within his area of responsibility.

the SABC articulated its legal argument based on submissions that were grounded thereon. Further submissions as were made in sub-paragraphs 5.2.5.3 and 5.2.5.4 of the replying affidavit[58] comprise legal conclusions, which, in my view, were likewise pegged on the case relied on by the SABC in its founding papers, which the Fund did not and indeed could not dispute.[59]

50. The Fund complains in its answering affidavit that *'[i]n paragraphs 71–73 of the founding affidavit, the SABC makes it clear that the alleged fraud, theft and misconduct it relies on as a basis for the foreshadowed review application in Part B of the notice of Motion was not perpetrated by Motsoeneng but by its former Chief Executive Officer (Aguma) and the G&C committee',* being essentially the same complaint as that voiced by Motsoeneng (mentioned in paragraph 17 above).

51. In *riposte,* Mr Motau SC, who appeared on behalf of the SABC, submitted that the respondents have misunderstood the basis on which the allegations in paragraphs 71-73 of the founding affidavit were made.[60] The respondents also

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[58] There it was stated that:

" 5.2.5.3 *In violation of s76(2)(a) of the Companies Act of 2008…he* [Motsoeneng] *used his position as a director to gain an advantage for himself or knowingly caused harm to the Applicant in breach of his duty of good faith.*

*5.2.5.4 The Second Respondent acted in contravention of his fiduciary duties to the Applicant to act in the best interests of the Applicant, which is unlawful and which ultimately resulted in the intentional loss of public money.*

*5.2.7 While the Applicant accepts that the unlawful decision to award the success fee to the Second Respondent was made by the GNC and the then Chief financial Officer, which is the basis on which the Applicant seeks to review and set aside such decision, it is submitted that the Applicant relies on the dishonesty and misconduct perpetuated by the Second Respondent, as a member of the First Respondent…"*

[59] It is noteworthy that the Fund expressly stated in para 39 of its answering affidavit (at p 302) that '*It is not the purpose of this affidavit to comment on any issues relating to Motsoeneng. Most of the factual allegations do not fall within the knowledge of the Fund.*'

[60] There, the SABC submits that '*even where the intended beneficiary of the pension benefits may or was ex facie the documents not the person who perpetrated a fraud, theft or misconduct against the employer, as is the case, the said intended beneficiary should not be allowed to receive the said pension benefit by reason of [the] existence of contravention of the rule of law and/or contravention of the empowering provision. The applicant's proposed interpretation of section 37D of the Pension*

overlook the fact that such allegations were made in support of a *conditional*[61] constitutional challenge which the SABC pursued at that juncture. The allegations should be viewed within the context in which they were made i.e., an argument proffered in support of a conditional constitutional challenge brought in circumstances where the SABC submitted in paragraphs 75 and 76 that '*the Legislature could not have envisioned that the particular grounds upon which the first respondent can withhold payment are* ***only*** *those acts where the beneficiary is the* ***only*** *guilty party. It must have envisaged that it also includes instances where the misconduct or contravention of the law cannot or appear not to be attributed to the second respondent.*' Mr Motau SC further submitted that the allegations in paragraphs 71-73 of the founding affidavit were made on the assumption of a finding that Motsoeneng did not do anything wrong in receiving and not disclosing the success fee, for it is only then that the interpretation relied on by the SABC would arise. I am inclined to agree, particularly when regard is had to the context in which the allegations were made.[62] And, as was eloquently put by Harms JA: '*context, it*

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*Fund Act does permit the withholding of [an] accumulated pension benefit where the intended beneficiary (such as the second respondent) of the success fee is not tainted by allegations of misconduct or is not guilty of misconduct, but received an undue and unlawful benefit. It is submitted that the misconduct was committed or perpetrated by Mr Aguma and the G&N Committee, as they were not authorised to take the decision to award such success fee as it fell outside the bounds of their scope. The act of awarding such success fee was therefore unlawful.*'

Although Mr Bester SC, arguing on behalf of Motsoeneng, relies on the words 'as is the case' underlined above to support an argument that the SABC expressly only relied on misconduct committed by the GNC (and not Motsoeneng), I do not think that the italicised words necessarily convey such a meaning, having regard to the context in which they were spoken. They could reasonably also convey the expression 'as the case may be', that is, to distinguish between acts of fraud, theft or other forms of misconduct.

[61] In para 69 at p 33 of the papers, the SABC specifically states that the 'unconstitutionality of section 37D is only being brought on a conditional basis, i.e. *only* if the court finds that the other bases upon which the application has been brought, are not sufficient to find in favour of the applicant', i.e., on the basis that Motsoeneng's conduct (in receiving payment of a success fee to which he was knowingly not legally entitled), is found not to constitute 'misconduct' within the meaning of s 37D(1)(b) of the Act.

[62] Absent the constitutional challenge of s 37D(1)(b), the applicant relied on Motsoeneng's misconduct in order to invoke the application of s 37D(1)(b) of the Act in the matter. Although the SABC did not spell out in the founding affidavit why it contends that the unlawful receipt by Motsoeneng of monies to which he was knowingly not entitled amounted to dishonesty within the ambit of s 37D(1)(b), but only did so in reply, it cannot be said that the SABC thereby sought to build a case *ex post facto*. In

*has been said hyperbolically, is everything in law*'. [63] As already illustrated above, the SABC's case has always been that Motsoeneng committed acts of misconduct within the meaning of section 37D(1)(b)(ii) of the Act. I agree with Mr Motau SC that the SABC merely sought to clarify in reply why this was so. A need for clarification arose by virtue of the Fund's perceived misreading of the case relied on in the founding affidavit in the absence of the conditional constitutional challenge.

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52. Having regard to the relevant facts and circumstances outlined above, I am not persuaded that the SABC has impermissibly attempted to make out a new case or to 'change course' in reply. Even if I am wrong in this regard, and in so far as it may be said that additional relevant evidentiary matter is included in the replying affidavit,[64] as pointed out in cases such as *Swifambo supra,* (at para 11) and *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at para 15 and *Anglo Operations supra*, (at para 32) and *Lagoon Beach Hotel supra* (at para 16), the general rule, namely, that a party must make out its case in the founding affidavit and cannot do so in reply, is not an absolute rule, and must be applied with a fair measure of practical common sense, without a court being overly technical in such matters. The Fund filed a further affidavit to deal with 'new' matter raised in the replying affidavit. This took care of any prejudice it may have sustained. Motsoeneng did not seek to

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paragraph 5.2 of the reply, the SABC seeks to draw inferences from the common cause facts outlined in the founding affidavit, in clarification of its case in the founding affidavit. Such an approach appears to have been sanctioned by the constitutional Court in *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC) at para 30. It cannot therefore either be said that the SABC proffered conflicting interpretations as to whether Motsoeneng's conduct constituted misconduct as contemplated in s 37D(1)(b) of the Act.

[63] Taken from *Take and Save Trading CC and Others v Standard bank of SA Ltd* 2004 (4) SA 1 (SCA), para 3.

[64] Comprising the SABC's reliance on the institution of a civil action for damages against Motsoeneng (in meeting one of the requirements of rule 15.2 of the Fund's rules) and in regard to its argument (on the undisputed facts and law) concerning Motsoeneng's dishonesty in relation to his receipt of an unlawful payment. In developing the argument, the SABC spells out its conclusion that Motsoeneng accepted and retained an unlawful payment to which he was knowingly not legally entitled and which ultimately resulted in the intentional loss of public money and caused harm to the SABC.

avail himself of the opportunity to deal with any additional matter set out in reply and I therefore see no cogent reason why it should be ignored. In any event, as previously mentioned, Motsoeneng's perceived prejudice appears more illusory than real in the light of the fact that he chose not to engage with any of the substantive allegations made by the SABC against him in the application.[65]

53. I also bear in mind that this application commenced as one of urgency and that courts are more inclined to allow the supplementation of papers in circumstances where papers are prepared in great haste and under the pressure of time constraints, as occurred in the present matter. I have a discretion in the matter as well as a duty to regulate the proceedings as an administrator of justice. Within the overall context of the matter, I would be failing in that duty if I were to allow the respondents to take advantage of founding papers that were less than perfect. See *Take and Save Trading CC and Others v Standard bank of SA Ltd* 2004 (4) SA 1 (SCA) at para 3.[66]

*Sriking out application*

54. The Fund seeks to have the entire replying affidavit struck out, alternatively paragraphs, 5.2 and/or 3.1.2 and/or 7 thereof.

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[65] As pointed out by Cameron JA in *Boxer Superstores Mthatha and another v Mbenya* 2007 (5) SA 450 (SCA) at para 4, where a party objects to the viability of an application but fails to file an answering affidavit, the allegations in the founding affidavit are to be taken as established facts. Within the present context, and stated differently, where substantive allegations are made by an applicant and a respondent chooses a procedural path i.e., to object by way of notice, electing not to engage in the substantive factual allegations, the allegations in the founding affidavit are taken as established facts.

[66] There Harms JA said, amongst others: 'Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources.' (own emphasis)

55. In paragraph 3.1.2 of the replying affidavit, the SABC indicates that it has issued summons for the recovery of its loss against Motsoeneng. In paragraph 5.2, *inter alia*, pertinent allegations of dishonesty are made in relation to the misconduct relied on in the founding affidavit. I have already dealt with the salient content of paragraph 5.2 earlier in the judgment. In paragraph 7, the SABC gives notice of its abandonment of its conditional constitutional challenge by reason of its belief that it has established full compliance with the provisions of section 37D(1)(b) of the Act, read with the rules of the Fund.

56. For a striking out application to succeed, two requirements must be satisfied. The first is that the matter sought to be expunged, must be considered scandalous, vexatious or irrelevant. (This has simply not been demonstrated by the Fund. In my view, the matter complained of is neither scandalous nor vexatious, and it is eminently relevant.) The second is that of prejudice.

57. Save for incurring costs in relation to its opposition to the conditional constitutional challenge brought by the SABC, which the SABC has since tendered to pay,[67] the Fund's perceived prejudice (mentioned in paragaraph 20 above) appears to me contrived for three reasons. The first is that the Fund has in fact filed a further substantive affidavit to the replying affidavit, thereby averting any prejudice to it. The second is that the Fund has repeatedly emphasised in its papers that it has no interest in the dispute between the SABC and Motsoeneng, with the deponent to the answering affidavit stating that 'most of the factual allegations do not fall within the knowledge of the Fund' or her own personal knowledge.[68] The third is that the Fund was aware that the applicant was intent on instituting a civil action for damages at the time the application was launched, and from a reading of its affidavits, it also knew that such an action had not yet been instituted at

[67] See para 8.2 at p 409 of the papers.
[68] See: p 252; para 6 at p 290; para 39 at p 302; para 9 at pp 314-315;

that stage. The Fund must therefore have expected that the contemplated action would only be instituted subsequently, whilst these proceedings were underway.[69] Its complaint that it has been prejudiced in exercising its discretion is not therefore understood, in the light of the fact that all the relevant circumstances were known to it at the time the application was launched.

58. I am therefore not persuaded that the Fund would be prejudiced if the matter is not struck out.

59. I should mention another point relied on by Mr. Van der berg SC, who appeared on behalf of the Fund. He persisted in the argument that the misconduct relied on against Motsoeneng was raised for the first time in reply - in contradiction to the case relied on by the SABC in the founding affidavit. In consequence, so it was contended, the SABC had impermissibly tried to make out a case of misconduct against Motsoeneng (within the meaning of s 37D(1)(b) of the Act) in reply. He therefore submitted that the SABC's allegations in reply should on this basis, either be ignored or struck out.

60. There is in my view, no merit in any of this. As was stated in *Lagoon Beach supra* (at para 16), 'not only must a court exercise practical, common sense in regard to striking out applications but there is today a tendency to permit greater flexibility than my previously have been the case to admit further evidence in reply.' Consequently, as stated in *Nkengana,* 'if the new matter in the replying affidavit is in answer to a defence raised by the respondent and is not such that it should have been included in the founding

[69] Yet the Fund agreed to withhold payment of the pension benefit, notwithstanding its protestations that it was not empowered by its rules or s37D of the Act to do so and notwithstanding that it knew, at the time, that a civil action had not yet been instituted by the SABC against Motsoeneng. According to the SABC, 'owing to reasons related to the collation of evidence between the SIU and the applicant, the subsequent joinder of the third and fourth respondents and the resultant exchange of processes between parties pursuant thereto, the legal proceedings could only be instituted in the beginning of 2018'. See para 9.9.4 at p 414 of the papers.

affidavit in order to set out a cause of action, the court will refuse an application to strike out.'[70] As indicated earlier, SABC's case was always based on an acts of misconduct committed by Motsoeneng for purposes of its reliance on the provisions of s 37D(1)(b) of the Act. In the answering affidavit, the Fund contended that the SABC had alleged no wrongdoing on the part of Motsoeneng in its founding papers. It was in order to rebut this that the SABC explained, in reply, why it contends that Motsoeneng's unlawful receipt of the success fee and his non-disclosure thereof actuated wrongdoing on his part. This was merely a gloss on what had been set out in the founding affidavit read together with the contents of the final audit report relied on therein. The SABC was not seeking to make out a fresh cause of action in reply, and there is therefore no reason to strike out the explanation given in reply or to ignore it.

61. For all the reasons given, the Fund's striking-out application falls to be dismissed with costs.

*Condonation*

62. The SABC seeks condonation for the late filing of its replying affidavit. The reply was filed approximately 6 months after the filing of the Fund's answering affidavits and approximately 6 weeks after the fourth respondent delivered its answering affidavit in the matter.

63. The reasons for the delay are set out in paragraph 8 (at pp 378-281 of the papers). In brief, the SABC states that after the filing of the last of the answering affidavits in the matter, it had to consult with its legal

[70] *Nkengana & another v Schnetler & another* [2011] 1 ALL SA 272 (SCA) at para 10.

representatives and the SIU[71] in regard to the matters raised therein, especially relating to the constitutional challenge. When considering the extent of the financial losses suffered by the SABC due to Motsoeneng's alleged unlawful conduct, and due to the multifaceted legal processes employed by the applicant in seeking to reclaim its money from Motsoeneng, the SABC decided to escalate the matter to the SIU. It then had to consult and liaise with the SIU frequently in the present matter as well as in, amongst others, the civil proceedings launched against Motsoeneng. As the SIU was mandated to pursue the civil proceedings on behalf of the Applicant and, as the issues attendant in this application and those dealt with the civil action are similar if not the same, it became necessary for all parties involved in the processes to consult with each other in order to prevent incongruencies in the articulation of the two cases.

64. According to the SABC, the working arrangement proved challenging, due to the unavailability of the relevant persons at crucial times, which necessitated the rescheduling of consultations and which in turn inevitably resulted in delays. Consultations between the SABC, its legal representatives and the SIU occurred on various occasions. [72] The SABC only obtained all the relevant information and consents it required to finalise the affidavit by 28 March 2018. The SABC alleges that it could not file its reply earlier, as it had required confirmation form the SIU 'especially on the constitutional challenge,' more so, 'as the case involves more than just the interests of the Applicant'.

[71] It is not in dispute on the papers that the SIU was established by the President of the Republic of South Africa in terms of Proclamation No. 118 of 31 July 2001 and it was subsequently mandated to investigate certain allegations relating to the affairs of the SABC and to institute civil proceedings emanating therefrom, under Proclamation No. R.29 of 2017 published in the Government Gazette No. 41086 of 1 September 2017.

[72] It was apparently decided during these consultations that the SABC would not need to rely on the conditional constitutional challenge argument and prayer 5.3 of its notice of motion of 19 January 2018.

65. The respondents submitted that the explanation tendered was insufficient to meet the required threshold for relief, particularly as it did not cover the full period of the delay. Reliance in this regard was placed on cases such as *Aurecon South Africa (PTY) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) at p 208, para 17; *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at p 83, para 50; and *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at p 477, paras 22 and 23 and *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at p 297, para 6, where, *inter alia,* the requirements for the grant of condonation were considered.

66. In *Grootboom supra,* Bosielo AJ noted that the court seized of the matter has a discretion whether to grant condonation[73] and reaffirmed that the standard for considering such an application is the interests of justice.[74] If it is in the interests of justice that condonation be granted, it will be granted. If it is not, condonation will not be granted. [75]

67. In terms of the cases cited, for purposes of determining whether it is in the interests of justice to condone any delay, relevant factors include: the nature of the relief sought, the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of the delay;[76] the importance of the issue to be raised and the prospects of success. The explanation offered must also be reasonable.[77]

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[73] Grootboom *supra*, para 20.
[74] *Grootboom* supra, para 22.
[75] *Grootboom supra,* para 50.
[76] *Van Wyk supra.*
[77] *Price Waterhouse Coopers Inc. and Others v Van Vollenhoven NO and Another* [2010] 2 ALL SA 256 (SCA) at p 259, para 7.

68. As further pointed out by Zondo J in *Grootboom supra*,[78] 'the interests of justice must be determined with reference to all the relevant factors.[79] However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.'

69. The period is to be assessed at 6 weeks, bearing in mind the joinder of the third and fourth respondents in the application and the date on which the last of the answering affidavits were filed in the matter. A period of 6 weeks was held not to be unreasonable in *Grootboom supra*.

70. As appears from the papers, 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. There 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 do not stand to suffer any prejudice if the SABC is granted condonation. The issue of prejudice has already been canvassed above. Whilst it is correct that the explanation offered does not

[78] *Grootboom supra*, para 51.
[79] *Brummer v Gorfil Brothers Investments (Pty) Ltd and others* 2000 (2) SA 837 (CC).

traverse the entire period of the delay, this factor alone is not definitive of the matter but must be balanced against all other relevant factors.

71. In my view, the SABC has offered a reasonable explanation for the delay. To expect different persons from different institutions (or even different internal departments within an institution) to magically align their diaries at the drop of a hat, would be to expect the possible from the impossible. As will also become evident from what is stated below, it cannot be concluded that the SABC does not enjoy reasonable prospects of success in the pending action.

72. Upon a consideration of all the relevant factors, it would be in the interests of justice that condonation be granted.

*Hearsay complaint*

73. The SABC relies on evidence contained in the report of the Public Protector, a highly reputable investigative office, to corroborate allegations of misconduct against Motsoeneng in these proceedings. In its answering affidavit to the SABC's supplementary affidavit of 7 September 2017, the Fund alleges that the Public Protector's report constitutes inadmissible hearsay evidence and is not binding on this court. The Fund does not however state that it has been or will be prejudiced by the admission of the alleged hearsay evidence.

74. In *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others* (81056/14) [2017] ZAGPJHC 289 (17 October 2017) at paras 21 to 23, Matojane J pointed out that in *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) (4

August 2004), the Constitutional Court sanctioned the use of reports by reputable international organisations as being materially relevant considerations in deciding human rights cases. He went on to state as follows:

"The above approach extends to the reports of the Public Protector, the Auditor-General, the SIU as well as the PWC report. These reports raise serious concerns which are relevant and in respect of which judicial notice is taken. In *Economic Freedom Fighters v The President of the Republic of SA and Others* 2016 (3) SA 580 (CC) (31 March 2016), the Constitutional Court held that 'our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.'...."

75. The SABC requests that the evidence be admitted in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 for all the reasons set out at pp 372-377 of the papers. The evidence is relevant and its admission cannot prejudice the Fund, as it has repeatedly declared in its papers that it has no interest in the dispute between the SABC and Motsoeneng. It also cannot prejudice Motsoeneng, as he has elected not to engage with or dispute the allegations of dishonesty, unlawfulness and knowledge attributed to him in these proceedings, based on evidence uncovered by the Public Protector's investigation of his conduct.

76. The evidence therefore falls to be admitted in terms of the Law of Evidence Amendment Act 45 of 1988.

***Requirements for interim interdictory relief***

77. The requirements for the grant of an interim interdict are well known.[80] The onus of proving an entitlement to interim interdictory relief rests on the

[80] See: Setlego v Setlego 1914 AD 221 at 227; *City of Tswane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19 at paras 141-143 (per the minority judgment of Froneman and Cameron JJ).

SABC. As succinctly put in *Annex Distribution (Pty) Limited and Others v Bank of Baroda* 2018 (1) SA 562 (GP) at para 9:

> "...a party that seeks interdictory relief on an interim basis must show that it has at the very least a *prima facie* right, that such right will be unlawfully infringed, that the balance of convenience is in its favour and that irreparable harm will result if an interim order is not granted in the meantime which would protect that right. ... most applications for an interim interdict are decided on the basis of the balance of convenience, which must favour the grant of an interdict. This is an exercise that must involve weighing the harm to be endured by an applicant if interim relief is not granted as against the harm that a respondent will bear if the interdict is granted. A Court must assess all relevant factors carefully in order to decide where the balance of convenience rests..."

78. It was pointed out in *Charlton and Others v Tongaat-Hulett Pension Fund* (9438/05) [2006] ZAKZHC 14 (1 February 2006), that whilst section 37D(1)(b)(ii) of the Act does not provide for withholding of benefits which are due and payable to a member of the Fund, nothing in the Act or Rules prevents the employer from interdicting payment of the benefit to the member. The law relating to interdicts will be applicable in such circumstances.

*Prima facie right and feared interference with that right*

79. Section 37A(1)[81] of the Act contains provisions of general application prohibiting the reduction, transfer or execution of pension benefits whilst Section 37D provides an exception to that general application.

[81] Section 37A provides, in relevant part, as follows:
'**Pension benefit is not reducible, transferable or executable**
(1) Save to the extent permitted by this Act...no benefit provided for in the rules of the registered fund...or right to such benefit...shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred... or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law...'

80. The SABC relies on s 37D(1)(b)(ii)(bb) of the Act. Section 37D(1)(b) provides as follows:

" (1)A registered may-

(a)...

(b) deduct any amount due by a member to his employer on the date...on which he ceases to be a member of the fund, in respect of-

(i)...

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in sub-paragraph (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-

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has been obtained against the member in any 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."

81. In *Moodley v Scottburgh / Umzinto North Local Transitional Council and Another,*[82] the court interpreted the word 'misconduct' as envisioned in s 37D(1)(b)(ii) of the Act and concluded that the general word 'misconduct' referred to therein must be interpreted to mean dishonest conduct or at least, conduct involving an element of dishonesty, which would thus exclude negligence. Accordingly, in terms of *Moodley,* only intentional conduct that contains an element of dishonesty will qualify as one of the grounds upon which a fund may deduct an amount from the employee's benefit.

82. It should be pointed out at the outset that the SABC does not seek any reduction of or deduction from the member's (Motsoeneng) benefits in Part A of the application. It merely seeks an order that payment of such benefits be

[82] 2000 (4) SA 524 (D).

withheld (an order interdicting payment) pending resolution of its claim against Motsoeneng.

83. The parties' appear to concur that the purpose of section 37D(1)(b) of the Act is to protect an employer's right to pursue recovery of misappropriated monies.[83]

84. S 37D(1)(b) does not specifically provide for the withholding of a benefit. However, in *Highveld Steel & Vanadium Corporation v Oosthuizen* 2009 (4) SA 1 (SCA) at para 19, it was held that in order to give effect to the purpose of the section, which is to protect an employer's right to recovery of money misappropriated from it, the wording must be interpreted to include the power to withhold payment of a member's benefits pending the determination or acknowledgment of such member's liability.

85. S 37D(1)(b)(ii) must also be read in conjunction with the rules of the Fund. [84] It is trite that a pension fund, its members and the participating employer are governed by the rules of the pension fund.[85] The reference to 'member' in s 37D(1)(b) includes a former member who has not received all the benefits that may be due to him or her from the fund. Expressed differently, a member remains such until he or she has received all the benefits and that person's membership is terminated according to the rules of the fund. See: *Absa Bank Ltd v Burmeister and Others* [2005] 3 ALL SA 409 (SCA).

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[83] As held in several cases, *inter alia, Twigg v Orion Money Purchase Pension Fund and another* (2001) 12 BPLR 2970 (PFA) and *Highveld Steel v Vanadium Corporation* 2009 (4) SA 1 (SCA) at para 16.

[84] *Shelton and Others v Tongaat-Hulett pension Fund and Others* [2000] 2 BPLR 94 (D) at p 97I–98A.

[85] Section 13 of the Act reads;

" 13 **Binding force of rules**

Subject to the provisions of the Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming."

See also: *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA).

86. Rule 15.2 of the fund's rules confers a discretion upon the trustees of the Fund, based on a *prima facie* case having reasonable prospects of success being made out against the member concerned. The rule applies in circumstances where legal proceedings have been instituted against the member concerned. Rule 15.2 reads, in relevant part, as follows:

"Notwithstanding any other provisions of these Rules, the Trustees may, where an Employer has instituted legal proceedings in a court of law...against the Member concerned for compensation in respect of damage caused to the Employer as contemplated in Section 37D of the Act, withhold payment of the benefit until such time as the matter has been finally determined by a competent court of law or has been settled or formally withdrawn, provided that:

(a) the amount withheld shall not exceed the amount that may be deducted in terms of Section 37D(1)(b)(ii) of the Act;

(b) the Trustees in their reasonable discretion are satisfied that the Employer has made out a *prima facie* case against the Member concerned and there is reason to believe that the Employer has a reasonable chance of success in the proceedings that have been instituted;

(c) the Trustees are satisfied that the Employer is not at any stage of the proceedings responsible for any undue delay in the prosecution of the proceedings;

(d) once the proceedings have been determined, settled or withdrawn, any benefit to which the Member is entitled is paid forthwith; and

(e) ..."

87. The withholding of pension benefits is thus allowed in terms of the Act (as interpreted in *Highveld Steel)* and the rules of the fund *in casu.*[86] The Fund

[86] The withholding of pension benefits by a Fund has been said to 'simply avoid the necessity for an interim interdict to be obtained by the employer. It is purely a temporary measure that preserves the *status quo* and does not involve ... a deduction... The benefits continue to be held by the fund until the rights of the employer against the member have been determined.' – per Balton J in *Charlton supra.* The Fund is required to balance the interests of the employee against those of the member and to that end, is empowered to exercise a discretion in favour of withholding payment of the benefit due to the member until a judgment is obtained against the member by an employer, See: *Highveld*

submits that in terms of s 37D and rule 15.2, the amount which the SABC wants the Fund to withhold may not exceed the amount of Motsoeneng's benefit. In other words, only the amount of the member's benefit can be withheld. This appears to me to be correct and in any event, no argument to the contrary was advanced by the SABC at the hearing of the matter.

88. The allegations made in the SABC's affidavits appear to *prima facie* point to the fact that Motsoeneng unlawfully received payment of a success fee in the amount of R11, 508 549.12 in circumstances where (a) he allegedly knew or ought to have known (in his role as Chief Operating Officer and in any event, as executive member of the GNC)[87] of the irregularity by which the payment of such amount to him was tainted and to which he was therefore not legally entitled, but which he nonetheless accepted and retained, exacerbated by his failure to disclose same (until uncovered by an audit investigation) and (b) in contravention of his undisputed duties in terms of s 57 of the PFMA to ensure that the system of financial management and internal controls established for the SABC are carried out and to take effective and appropriate steps to prevent any irregular or fruitless and wasteful expenditure within his area of responsibility. His dishonesty is said to lie in knowingly and intentionally accepting a payment that was on the face of it irregular and invalid, without disclosing same (which served to unjustly enrich him) and then appropriating it to himself, thereby acting in his own self-interest and in breach of his fiduciary duty of good faith owed to the SABC under s 76(2)(a) of the Companies Act.

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*Steel supra.* In terms of rule 15.2, the Fund in the present matter is specifically empowered to withhold payment if certain jurisdictional requirements are met, i.e., legal action has been instituted by the employer against the member concerned and the Trustees are satisfied that the employer has a meritorious claim which it has not delayed in prosecuting.

[87] In his capacity as executive member of the GNC, he was required to furnish advice on governance issues at the SABC, which would ordinarily have required him to have knowledge of its governing policies (or lack of existence thereof).

89. The evidence put up by the SABC is sufficient to *prima facie* point to Motsoeneng's intentional misappropriation of public funds[88] - the SABC's allegations support the inference that Motsoeneng knowingly acted in his own self-interest in appropriating to himself, for his own use, public funds entrusted to his care as public functionary, to which he was not legally entitled, which caused the SABC to suffer loss. Bearing in mind that the SABC is a major public entity in terms of Schedule 2 of the PFMA and that it is funded through the public purse, it is enjoined to recover the losses it suffered from Motsoeneng as a result of his unlawful conduct. It is also constitutionally enjoined to do so. And it is in the interests of the public and for the SABC to do so.

90. As regards the claim based on Motsoeneng's conduct, which is principally based on the findings of the Public Protector,[89] the following must be borne in mind: in finding Motsoeneng guilty of misconduct, the Public protector made serious adverse findings of dishonesty against him, which, amongst others, encompassed findings of abuse of power, waste of public money, purging of

[88] It is ostensibly for this reason that the SABC relies in its written argument on cases such as *Nissan SA (Pty) Ltd v Marnitz NO & others (Stand 186 Aeroport (Pty) Ltd intervening )* [2006] 4 ALL SA 120 (SCA) at para 24; and *S v Graham* 1975 (3) SA 569 (A) at 573E-H. *Nissan SA* held that payment is a bilateral juristic act, requiring the meeting of two minds. Where A hands over money to B mistakenly believing that the money is due to B, then B, if he is aware to the mistake, is not entitled to appropriate the money. If he does appropriate the money in such circumstances, such appropriation would constitute theft. *Graham* held that if A mistakenly thinking that an amount is due to B gives B a cheque in payment of that amount and B, knowing that the amount is not due, deposits the cheque, B commits theft of money although he has not appropriated the money in the corporeal sense. It is B's claim to be entitled to be credited with the amount of the cheque that in those circumstances constitutes theft. In the present matter, the facts set out in the SABC's affidavits point *prima facie* to the conclusion that Motsoeneng accepted the unlawful success fee payment, in circumstances where he knew or ought to have known of the unlawfulness thereof.

[89] The Public Protector's key findings are summarised in *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) at para 6. There it is pointed out, *inter alia*, that the Public Protector 'concluded that there were 'pathological corporate deficiencies at the SABC' and that Motsoeneng had been allowed by 'successive (b)oards to operate above the law'. It was further noted in para 47 of the judgment, the Public Protector is 'plainly better suited to determine issues of maladministration within the SABC than the SABC itself. That, after all, is why the office of the Public Protector exists. The Public Protector is independent and impartial...'. The court noted, at para 48, that the Public Protector's findings were made following a full investigation where those affected (including Motsoeneng) were afforded a proper hearing.

senior staff and the disregard for principles of good corporate governance and maladministration.

91. In *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) ['SABC v DA'] at para 52 and 53, the following was said:

> " The Public Protector cannot realise the constitutional purpose of her office if the other organs of state may second-guess her findings and ignore her recommendations...Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored...Any affected person aggrieved by a finding, decision or action taken by the Public protector might, in appropriate circumstances, challenge that by way of a review application. Absent a review application, however, such person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector..." (own emphasis)

92. Mr Bester SC, arguing on behalf of Motsoeneng, submits that the SABC's case against Motsoeneng as grounded on the Public Protector's report of 2014, is flawed in that it assumes that the Public Protector in fact found Motsoeneng to be the root cause of these matters and further that such findings are binding on Motsoeneng. In this regard, he relies on the case of *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC) and Others; Democratic Alliance v Motsoeneng and Others* (3104/2016; 18107/16) [2017] 1 All SA 530 (WCC) at paras 104 – 106.[90]

[90] There, the following was said:

" [104] It thus seems to me that the primary significance of the Public Protector's factual findings is to explain and justify the remedial action taken. The nature of the investigation and the factual findings play an important part in interpreting the remedial action and assessing its legal effect. If the remedial action is directed at a specific institution, and if the remedial action is on a proper interpretation of the report binding, the institution must comply with the remedial action and respect the factual findings unless and until they are set aside on review.

[105] In the present case strong adverse factual findings were made against Motsoeneng. The remedial action was, however, directed not at him but at the Minister and the board. I am satisfied, having regard to her factual findings, that the remedial action was binding on the board. The SABC could not fail to take disciplinary action on the grounds specified by the Public Protector unless her

93. Whilst it is correct that it is open to Motsoeneng to challenge the findings of the Public Protector, he has chosen not to do so in these proceedings. And, as pointed out in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 at para 73, 'When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.' As pointed out by the SABC in its papers,[91] the findings of the Public Protector have, to date hereof, not been challenged or set aside on review.

94. The Fund contends in its answering affidavit that the acts of misconduct relied on in the Public Protector's report of February 2014' must have taken place before February 2014,' and that therefore 'there is a strong *prima facie* inference that any cause of action which the applicant may have against the second respondent has prescribed. The applicant has not furnished any evidence to show that it may be able to successfully resist a special plea based on prescription.'[92] The Fund appears to mention the issue of prescription in relation to its duty, in terms of rule 15.2, to consider whether the employer has made out a *prima facie* meritorious case against the member.[93]

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factual findings regarding Motsoeneng and the resultant remedial action were set aside by a court. So far, I think, everyone in the present case concurs.

[106] The nature of the disciplinary action constituting the remedial action is a different matter. The disciplinary action was to be directed at Motsoeneng. He is not a person bound by the remedial action. The report did not require him to ensure that anything was done. If he is not bound by the remedial action, why should he be bound by the Public Protector's factual findings?"

[91] Para 6.1.5 at p 374 of the papers. The SABC is bound to abide by the remedial action imposed by the Public Protector to recover monies that have caused it to incur irregular, fruitless and wasteful expenditure. See paras 6.1.9 to 6.1.12 at pp 376-377 of the papers. It is not in dispute on the papers that Motsoeneng had a duty to take effective and appropriate steps to prevent any irregular expenditure and fruitless and wasteful expenditure within his area of responsibility.

[92] Paras 15.3 & 15.4 at pp 218 - 319 of the papers.

[93] Para 28 at p.18 of the Fund's heads of argument.

95. Mr. Motau SC submitted in oral argument that the issue of prescription is not one which can be relied on by the Fund in these proceedings – it is for Motsoeneng to raise by way of special plea in the pending action. I am inclined to agree, firstly, because it was not for the SABC to 'show that it may be able to successfully resist a special plea based on prescription' in these proceedings, particularly, in the absence of any such challenge properly brought by Motsoeneng; secondly, because the SABC is legally obliged to comply with the remedial action directed by the Public Protector in her report,[94] which, as is undisputed on the papers, the SABC is doing by means of these and other proceedings; thirdly, because it would not be appropriate for this court to pre-empt the findings of a trial court in the pending action on the mere assumption that a special plea will be raised and if so, that it will be upheld; and fourthly, in any event, all the relevant the facts and evidence upon which such a plea would have to be determined, have not been canvassed in these proceedings.

96. As aptly put by Mogoeng CJ in *City of Tswane supra,*[95] (at para 50), '[f]ortunately, the right is only required to be *prima facie*, though open to some doubt. It need not be clear' for an applicant to establish an entitlement to interim interdictory relief.

97. On a reading of all the affidavits in the matter and in view of the glaring absence of any serious challenge to the SABC's allegations of intentional and dishonest misconduct against Motsoeneng, the SABC has in my view established *a prima facie* case that Motsoeneng may be liable to it for repayment of the success fee. It also enjoys a *prima facie* right to recover the losses it has incurred in respect of its other claim and which appear to be

[94] See: *SABC v DA* (referred to in para 88 of the judgment), recently affirmed by the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 (31 March 2016)
[95] *City of Tswane* is referred to in fn 80 above.

directly attributable to the unlawful conduct of Motsoeneng.[96] It has accordingly established a *prima facie* right of recovery within the meaning of s 37D(1)(b) of the Act for purposes of entitling it to interim interdictory relief.

98. One further argument proffered by the Fund bears mentioning. The Fund submits that the replying affidavit still fails to disclose a cause of action in that it is evident from the particulars of claim filed in the pending action, that only the SIU (and not the SABC) seeks judgment against the defendant (Motsoeneng). In *riposte*, Mr Motau SC submits that the Fund's argument is highly formalistic and does not pose immediate prejudice to the Fund because the action will be adjudicated on its merits in due course. What is sought to be recovered in the pending action is for the public purse. The SIU is given authority to recover losses sustained by the SABC as a result of *inter alia,* maladministration and unlawful conduct on the part of Motsoeneng and the action has been instituted for and on behalf of the SABC, who is the second plaintiff in the action. In any event, an amendment can be brought to the particulars of claim in due course, if necessary. I am inclined to agree. The point is not definitive of the matter, at least not on a *prima facie* basis, and does not serve to upend the conclusions at which I arrived at in paragraph 97 above.

99. As regards an anticipated interference with the right of recovery, the SABC fears that the protection of its interests in the pension benefits payable to Motsoeneng afforded to it by s 37D(1)(b)(ii) of the Act, is being threatened by the Fund's unwillingness to withhold the pension benefits,[97] and the real

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[96] See: paras 29 & 30 at p 268 of the papers. The SABC in any event points out that in making the finding that Motsoeneng is guilty of misconduct, the Public Protector's determination of same was predicated on all the empowering provisions set out in the SABC's supplementary affidavit of 9 September 2017, including the Constitution, the PFMA and the Companies Act.

[97] The Fund indicated in its answering affidavit that it is 'unable' to exercise its discretion in favour of the SABC. During oral argument presented to court on behalf of the Fund, counsel informed the court

likelihood that Motsoeneng will not be able to preserve the pension amount once it is paid out, so that the SABC faces the prospect of being left with a hollow judgment in due course.[98] That is sufficient for purposes of meeting the second requirement for interim interdictory relief. It is also axiomatic that the SABC thus has no other adequate or alternative remedy at its disposal with which to protect its interests.

*Irreparable harm*

100. The SABC discovered that Motsoeneng is the registered owner of four immovable properties, all of which are still bonded to the relevant financial institutions. It invited him to provide unencumbered security to be preserved in trust, which he refused to provide.[99] The SABC therefore holds a reasonable apprehension that Motsoeneng will not be able to satisfy a claim in excess of R10 Million in due course.[100] In its written argument, the SABC submits that there is a high likelihood that he will not preserve the money so paid in order to prioritise the SABC's claim. In the circumstances, it may be impossible to enforce an award made in its favour by the time judgment is obtained against him. In the absence of gainsaying evidence by Motsoeneng, the submissions hold sway.

101. The Fund refused to disclose the amount of the pension benefits held by it in its papers on grounds of confidentiality. In acknowledging that the pension proceeds may not be adequate to meet its claim(s), the SABC submitted that

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that the answering affidavits should be read to indicate that the Fund has elected not to withhold the pension benefits, unless ordered to do so.

[98] This is based on the fact that Motsoeneng appears to have insufficient disposable assets with which to satisfy a judgment in due course and his refusal to provide unencumbered security to the SABC after being invited to do so. See paras 50-53 & paras 58-59 at pp 30-31 of the papers. It is rather telling that Motsoeneng has not disputed or refuted these averments.

[99] The SABC submits that Motsoeneng's refusal is telling in the circumstances.

[100] It was pointed out in Motsoeneng's heads of argument that he is unemployed at present.

'they will contribute in ameliorating' its prejudice.[101] During the course of his oral argument however, Mr. Van der Berg SC indicated that the pension proceeds were 'less than R10 million.'

102. The SABC submits that the harm that has been suffered as a result of the Motsoeneng's misconduct, it ultimately harm to the public and the fiscus. If an interim interdict is not granted, and even if the SABC is successful in the pending action, it will likely be left with a hollow judgment. In that event, the harm to the SABC and the public at large would be irreparable. I am inclined to agree. The submission appears to be supported on the undisputed facts alleged by the SABC. Moreover, in the circumstances of the matter, the efficacy of the remedy afforded by section 37D(1)(b) of the Act, having regard to its fundamental purpose, will be rendered meaningless in the absence of an interdict.

*Balance of convenience*

103. The Court must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is. If there is greater prejudice to the respondent, an interim interdict will be refused.[102]

104. According to the SABC, should it be unsuccessful in recovering its losses from Motsoeneng in the pending action, the latter would then access his pension proceeds from the Fund. Conversely, should the interdict not be granted, the Fund will pay the pension proceeds to Motsoeneng

[101] Para 53 at p 30 of the papers.
[102] See: *Crossfield & son Ltd v Crystallizers Ltd* 1925 WLD 316 at 223; *Minnaar v Oberholzer Liquor Licencing Board & Another* 1955(1) SA 681 (T) at 684 A-B; *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957(2) SA 382(D) at 384H- 385A.

105. The SABC states that it has no assurance that Motsoeneng will be able to pay back the success fee if ordered to do so in the pending review, nor would he be able to satisfy either of the SABC's claims in the pending action if judgment is obtained against him. On the papers, no such assurance has in fact been given by Motsoeneng.

106. On the other hand, no prejudice whatsoever has been alleged by Motsoeneng in these proceedings. He has not put up any evidence to the effect that he urgently requires access to his pension benefits and if so, why immediate payment is required. Albeit that Motsoeneg will be delayed in his bid to obtain payment of his pension benefits if an interim interdict is granted, he will however be able to obtain payment thereof in the event that the SABC is unsuccessful in the pending action. On the other hand, if an interim interdict is not granted and the SABC succeeds in obtaining judgment in the pending action, it will likely be left with a hollow judgment with ensuing harm to the SABC, members of the public and the fiscus itself. In my view, the prejudice that the SABC stands to suffer if an interdict is not granted far outweighs any inconvenience that Motsoeneng may suffer if it is granted.

107. The Fund appears to deny that the balance of convenience favours the grant of an interdict based on its view that the SABC has failed to demonstrate that it is entitled to any payment from Motoeneng or that the conduct committed by him amounted to misconduct within the meaning contemplated in s 37D(1)(b) of the Act. The Fund's submissions do not take the matter further, in the light of my earlier finding that the SABC has indeed established a *prima facie* right.

108. It remains only to be said that for all the reasons given, SABC has established its entitlement to an interdict restraining the Fund from paying out the whole

of the pension benefit standing to the credit of Motsoeneng. Having regard to the disclosure made at the hearing of the matter, namely, that the Fund holds an amount of 'less than R10 million', and having regard to the provisions of rule 15(2)(a) read with section 37D of the Act, the amount to be withheld cannot exceed the amount standing to Motsoeneng's fund credit.

*Remaining issue*

109. At the hearing of the matter, the SABC indicated that it would not require the relief sought in prayer 5.1 of its notice of motion of 19 January 2018 relating to anti-dissipatory relief.

110. It follows from what is stated in paragraph 14 above, that Part B of the application, which is yet to be determined, will have to be postponed. Mindful of the duty of the court to control the proceedings, *inter alia,* for purposes of restraining the use of public resources, as mentioned earlier in the judgment, it will be in the interests of justice to do so.

***Costs***

111. The basic rules regarding costs were summarised by the Constitutional Court in *Ferreira v Levin NO and Others,*[103] where the following was said:

> "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."

[103] 1996 (2) SA 621 (CC) at 624B–C, para [3].

112. Mr. Motau SC submits that costs in the interim stage of *pendent lite* proceedings are usually ordered to be costs in the cause of the proceedings where a final determination is made on the issues.[104] He submits therefore that the costs of this interim application, vis-a-vis Motsoeneng, should be ordered to be costs in the cause of the pending civil action, and vis-s-vis the Fund, having regard to its obdurate approach in the matter, that the Fund should be ordered to pay the costs incurred by the SABC in the application. Leaving the SABC's conditional constitutional challenge aside, he further submits that the Fund did not only oppose the application because of the costs order sought against it in the matter – it entered the frey on the merits, notwithstanding its repeated declaration that it has no knowledge of or interest in the dispute between the SABC and Motsoeneng.

113. Mr. Van der Berg SC submits that the application should be dismissed with costs, alternatively, and in the event that the court is inclined to determine the matter on a reading of all the affidavits filed and arguments proffered in relation thereto, that the SABC should bear the Fund's costs up to the date of the replying affidavit.

114. Mr. Bester SC seeks the dismissal of the application with costs, including the costs attendant upon the employment of two counsel.

115. The SABC has achieved substantial success in the matter, absent its abandonment of its reliance on the conditional constitutional challenge and anti-dissipatory relief. Ordinarily, in applying the general rule in regard to costs, a successful litigant is awarded costs to recompense it for the expense to

[104] See: *Airodex Express (Pty) Ltd v Rauch International Pipelines (Transvaal) (Pty) Ltd* 1984 (3) SA 861 (WLD)

which it was put in initiating the proceedings. However, all the relevant circumstances must be considered.

116. In my view, the manner in which the SABC advanced its case was certainly less than ideal, however, juxtaposed against the approach of the respondents in resorting to a multitude of technical points in opposition to the matter, this, in circumstances where the factual allegations underpinning the SABC's claims against Motsoeneng stand predominantly undisputed and unrefuted on the papers, it cannot be said that the SABC was exclusively to blame for how the pleadings evolved.

117. In this regard, Mr Motau SC submits that the SABC sought to deal with the situation by addressing each of the Fund's complaints, so as to ensure that the asserted non-compliances did not stand in the way of it prosecuting the matter expeditiously, which is in the interest of the SABC and of the public for it to do, and which conduct on the part of the SABC is inconsistent with that of a party who wishes to delay the prosecution of an unmeritorious recovery claim. Thus for example, when the Fund agreed that the SABC should bring an application for an interdict by a certain date, it did so. Then the Fund complained that it had not instituted a civil action, and when it did so, the Fund complained that the action was instituted too late. Mr Van der berg SC submits, on the other hand, that the Fund found itself in an invidious position in that it has a duty to see that the provisions of the Act and the rules are complied with. For purposes of exercising its discretion in terms of rule 15.2, the Fund was duty bound to consider the strength of the SABC's claim against Motsoeneng. Mr Bester SC submitted that Motsoeneng was entitled to oppose the application on the grounds set out in the notice in terms of rule 6(5)(d)(iii) of the Uniform Rules of court, and given the manner in which the SABC sought to advance its case in these proceedings, the SABC should be ordered to pay his costs, even if he is unsuccessful in these proceedings.

118. In my view, the approach taken by the Fund and Motsoeneng in the matter is regrettable. As regards Motsoeneng, the facts underpinning the SABC's claims of misconduct against him are or ought to be known to him, yet he chose not to put up any version as would reveal his innocence or otherwise. He chose rather to shield himself from scrutiny by resorting to technical objections.

119. Accepting that the Fund was under a duty to ensure that the Act and its rules were complied with[105] and that it was concerned about the lack of jurisdictional facts required to trigger the exercise by it of its discretion under rule 15.2 in the SABC's papers, what however appears striking from the Fund's line of attack, is its wavering stance in relation to the exercise by it of a discretion in the matter. In its answering affidavit, it submits that it was not empowered to withhold payment of the pension benefits (in circumstances where the SABC had not yet instituted action - as contemplated in rule 15.2 - in respect of misconduct as envisaged in s 37D(1)(b) of the Act), yet it agreed to withhold payment pending the decision of the court in these proceedings, all the while knowing that such action had not yet been instituted, only to complain, when the contemplated action was duly instituted, that it was instituted late, and taking the point that that the SABC had thereby sought to make out a new case in reply; in the meanwhile contending that it was prejudiced in that it was prevented from exercising a discretion in the matter, yet indicating at the hearing of the matter that it should be taken to have exercised a discretion not to withhold payment of the benefits whilst simultaneously contending in its heads of argument that the SABC had not made out a case for interfering with the exercise by it of its discretion in these proceedings.

[105] In terms of s 37D(f) of the Act.

120. All being said and done however, the fact remains that Fund could not properly have exercised its discretion in terms of rule 15(2) of its rules until it was satisfied that the jurisdictional requirements contained therein had been met. [106] This occurred by the time that it was notified in the replying affidavit of the institution of the civil action against Motsoeneng. However, much of the Fund's opposition up to the point of the replying affidavit was directed at disputing: (i) the merit worthiness of the SABC's claim against Motsoeneng (based on the findings of the Public Protector) and (ii) in respect of the success fee, that the SABC had established a case within the purview of section 37D(1)(b)(ii) of the Act (based on a mistaken view that no misconduct had been alleged against Motsoeneng) and far less attention was given to the fact that an action had not yet been instituted against Motsoeneng. The Fund persistence in its opposition on the merits after the filing of the replying affidavit was based on a mistaken view that the SABC had sought to make out a new case in the replying affidavit (based on its apparent misreading of the founding papers concerning allegations of unlawful conduct allegedly committed by Motsoeneng and the SABC's reliance thereon for establishing a case of misconduct within the purview of s 37D(1)(b)(ii) of the Act as well as a formalistic argument in relation to the action duly instituted. Considering that the Fund did not succeed on any of these aspects and in view of its approach in pursuing technical and formalistic arguments despite an absence of prejudice to it, coupled with its vacillating stance in relation to the exercise of its discretion, I am not inclined to order the SABC to pay the costs it incurred in opposing the relief up to the filing of the replying affidavit.

121. In line with its tender in paragraph 8.2 at p 409 of the papers, the SABC is to pay the costs of the Fund associated with the abandonment of its

[106] In *Highveld Steel supra,* at para 20, the SCA stressed the need to strike a balance between the interests of the employer and those of the member and cautioned as follows: '*Considering the potential prejudice to an employee who may urgently need to access his pension benefits and who is in due course found innocent, it is necessary that pension funds exercise their discretion with care and in the process balance the competing interests with due regard to the strength of the employer's claim. They may also impose conditions on employees to do justice to the case.*

constitutional challenge. In view of its last minute abandonment of the relief sought in terms of paragraph 1 of the notice of motion dated 19 January 2018 (anti-dissipatory relief) the SABC should also bear the costs incurred by the respondents in respect thereof.

122. I accordingly make the following order:

ORDER:

1. The first respondent (the South African Broadcasting Corporation Pension Fund) is restrained from paying out the whole of the pension benefit held by the first respondent and standing to the fund credit of the second respondent (George Hlaudi Motsoeneng), pending the final determination of the action instituted against the second respondent under case no.18/04253 in the Gauteng Local division ('the pending action').
2. The Applicant is to pay the first and second respondents' costs associated with the applicant's withdrawal of its conditional constitutional challenge and its abandonment of the relief sought in terms of paragraph 1 of the amended notice of motion dated 19 January 2018.

4. The striking-out application brought by the first respondent is dismissed with costs.

5. As regards the second respondent, the Applicant's costs in respect of Part A of the application are to be costs in the cause of the pending action.

6. As regards the first respondent, and save for the orders set out in paragraphs 3 and 4 above, the first respondent is to pay the Applicant's costs in respect of Part A of the application.

7. Part B of the application is postponed *sine dies*.

**MAIER-FRAWLEY AJ**

Date of hearing: 6 December 2018

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122. I accordingly make the following order:

ORDER:

1. The first respondent (the South African Broadcasting Corporation Pension Fund) is restrained from paying out the whole of the pension benefit held by the first respondent and standing to the fund credit of the second respondent (George Hlaudi Motsoeneng), pending the final determination of the action instituted against the second respondent under case no.18/04253 in the Gauteng Local division ('the pending action').
2. The Applicant is to pay the first and second respondents' costs associated with the applicant's withdrawal of its conditional constitutional challenge and its abandonment of the relief sought in terms of paragraph 1 of the amended notice of motion dated 19 January 2018.
4. The striking-out application brought by the first respondent is dismissed with costs.
5. As regards the second respondent, the Applicant's costs in respect of Part A of the application are to be costs in the cause of the pending action.
6. As regards the first respondent, and save for the orders set out in paragraphs 3 and 4 above, the first respondent is to pay the Applicant's costs in respect of Part A of the application.
7. Part B of the application is postponed *sine dies*.

Frawley

**MAIER-FRAWLEY AJ**

Date of hearing: 6 December 2018