

**SABC v SABC Pension Fund & George Hlaudi Motsoeneng and others, Case no. 17/29163,  
(Judgment delivered on 18/1/2018)**

Motion proceedings - pragmatic approach in dealing with formalistic and technical objections – court’s overriding discretion - determination of complaints concerning procedural irregularities committed in the course of opposed motion proceedings to be considered in the light of all the undisputed facts and attendant circumstances in the matter with reference to questions of prejudice and the interests of the litigants, including the interests of justice.

Procedural irregularities in question concerned:- the alleged inclusion of new matter in reply; whether additional matter resulted in a new case being made out in reply; the service and filing of further affidavits without first obtaining the leave of the court to do so; the service and filing of amended notices of motion without utilisation of the provisions of the Rules of Court in effecting the amendments; the inclusion of hearsay evidence in affidavits; and the late filing of affidavits without condonation first being sought and granted therefore.

**Held:** 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;

**Held:** Where legal conclusions articulated by applicant in reply (based on inferences properly drawn from common cause facts in founding and answering papers) are tendered in clarification of case made out in founding papers, such an approach not objectionable;

**Re merits:**

**Relief sought:** Interim interdict for withholding payment of pension benefit by Pension Fund to member (Motsoeneng), pending outcome of action for recovery of damages sustained by employer (SABC) as a result of intentional dishonest conduct on the part of the member (ex-employee of employer) within the context of s 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.

**Issues for determination:-**

- whether the unlawful receipt and retention by employee/member of monies to which the employee/member was knowingly not entitled, amounted to dishonest misconduct within the ambit of s 37D(1)(b) of the Act; and
- whether the SABC 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.

**Held:-**

- In relation to the SABC's claim for recovery of an unlawful and irregular success fee paid to Motsoeneng *qua* employee during his period of employment at SABC, evidence *prima facie* established dishonesty and intentional misconduct on the part of Mptsoeneng *qua* member of the Pension Fund - employee/member's dishonesty was said to lie in knowingly and intentionally accepting a payment that was on the face of it irregular and invalid, without disclosing same (which *de facto* 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 employer (SABC) under s 76(2)(a) of the Companies Act, 2008 and in contravention of his duties and obligations in terms of s 57 of the Public Finance Management Act 1 of 1999 ('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;
- In relation to the SABC's claim based on Motsoeneng's dishonest and unlawful conduct (as principally based on and corroborated by the findings of the Public Protector), evidence likewise *prima facie* established intentional dishonest misconduct on the part of Motsoeneng within the meaning of s 37D(1)(b) of the Act;

**Held further:-** allegations made by the SABC support the inference that member 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;

**Held further:-** SABC accordingly established a *prima facie* right to interdict payment of pension benefit to Motsoeneng where other requirements for interdictory relief all met.