THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No:18107/16

DEMOCRATIC ALLIANCE **APPLICANT**

and

GEORGE HLAUDI MOTSOENENG	**1st RESPONDENT**
THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD ("SABC")	**2nd RESPONDENT**
THE BOARD OF DIRECTORS OF THE SABC	**3rd RESPONDENT**
THE ACTING GROUP CHIEF EXECUTIVE OFFICER OF THE SABC	**4th RESPONDENT**
THE PUBLIC PROTECTOR	**5th RESPONDENT**
MBULAHENI MAGUVHE	**6th RESPONDENT**
LEAH THABISILE KHUMALO	**7th RESPONDENT**
JAMES AGUMA	**8th RESPONDENT**
AUDREY RAPHELA	**9th RESPONDENT**
NOMVUYO MEMORY MHLAKAZA	**10th RESPONDENT**
NDIVHONISWANI TSHIDZUMBA	**11th RESPONDENT**
VUSI MAVUSO	**12th RESPONDENT**
KRISH NAIDOO	**13th RESPONDENT**
BESSIE TUGWANA	**14th RESPONDENT**
THE CHAIRPERSON OF THE PORTFOLIO	**15th RESPONDENT**

COMMITTEE FOR COMMUNICATIONS OF THE NATIONAL ASSEMBLY	
THE SPEAKER OF THE NATIONAL ASSEMBLY	**16th RESPONDENT**
THE MINISTER OF COMMUNICATIONS	**17th RESPONDENT**
AZWIHANGWISI FAITH MUTHAMBI	**18th RESPONDENT**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**19th RESPONDENT**
AFRICAN NATIONAL CONGRESS	**20th RESPONDENT**
THANDEKA GQUBULE	**21st RESPONDENT**
FOETA KRIGE	**22nd RESPONDENT**
SUNA VENTER	**23rd RESPONDENT**
BUSISIWE NTULI	**24th RESPONDENT**
KRIVANI PILLAY	**25th RESPONDENT**
JACQUES STEENKAMP	**26th RESPONDENT**
LUKHANYO CALATA	**27th RESPONDENT**
VUYO MVOKO	**28th RESPONDENT**
SOS SUPPORT PUBLIC BROADCASTING COALITION	**29th RESPONDENT**
MEDIA MONITORING AFRICA	**30th RESPONDENT**
HELEN SUZMAN FOUNDATION	**31st RESPONDENT**
FREEDOM OF EXPRESSION INSTITUTE	**32nd RESPONDENT**
SOUTH AFRICAN NATIONAL EDITORS FORUM	**33rd RESPONDENT**
RIGHT2KNOW CAMPAIGN	**34th RESPONDENT**
BROADCASTING, ELECTRONIC, MEDIA & ALLIED WORKERS UNION	**35th RESPONDENT**

Coram: LE GRANGE & ROGERS JJ

Heard: 2 FEBRUARY 2017

Delivered: 7 FEBRUARY 2017

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

LE GRANGE & ROGERS JJ

Introduction

[1] On 12 December 2016 we handed down judgment in this case and in the related case 3104/16 (the CA application and DC application respectively). We shall use the same abbreviations as before.

[2] The SABC has applied for leave to appeal against paras (c), (d), (g) and (i) of our order in the CA application. Aguma has applied for leave to appeal against para (i), in terms whereof he was ordered to pay the costs of the CA application jointly and severally with Motsoeneng.

[3] The DA, which opposes the applications for leave, has delivered an application in terms of s 18(3) of the Superior Courts Act 10 of 2013 for a direction that our orders in the CA application shall be operative and be executed pending the outcome of any appeal. Motsoeneng and the Public Protector have not sought leave to appeal. None of the parties seek leave to appeal against our orders in the DC application.

The DA's rule 7 challenge

[4] In response to the SABC's application for leave to appeal, the DA issued a notice in terms of rule 7 disputing the authority of Ncube Incorporated Attorneys ('NIA'), the attorneys who signed the application purportedly on behalf of the SABC.

[5] NIA responded by providing an affidavit by the SABC's company secretary who attached a resolution of the executive committee which authorised the legal department to oppose the DA's application to a final determination and which authorised Aguma to sign all necessary documents in that regard. Although the affidavit did not attach the document setting out the executive committee's delegated authority, Mr du Toit SC, who appeared with Mr Premhid on behalf of the SABC, said that he had the delegation document in court and that it clearly covered

the defending of legal proceedings against the SABC. Mr Katz SC, who appeared with Mr Bishop for the DA, did not challenge this.

[6] Although Mr Katz persisted in the rule 7 challenge, he was hard pressed to argue that the executive committee's resolution was an insufficient authority for Aguma to act on behalf of the SABC in applying for leave to appeal. It is true, as Mr Katz pointed out, that the resolution did not specifically authorise the appointment of NIA. In terms of the resolution, Aguma would have had authority to appoint NIA to represent the SABC. NIA represented the SABC in the main case and its authority was not challenged. It is fanciful to suppose that Aguma has not instructed NIA to represent the SABC.

[7] It appears that Mr Katz's main complaint is that the SABC has provided no information as to how the decision to apply for leave to appeal was made. He submitted that Aguma's thinking would be relevant in assessing an appropriate costs order. However, NIA was not obliged, in response to the rule 7 challenge, to justify its client's decision to apply for leave to appeal; NIA merely had to establish that it was duly authorised to bring the application on behalf of the SABC.

The SABC's application for leave

[8] In summary, the SABC's grounds for leave to appeal are that another court might reasonably find (i) that there was no 'decision' to appoint Motsoeneng as the GECA; (ii) that if there was a 'decision', it was not a decision in the exercise of public power and was thus not susceptible to review; (iii) that we erred in having regard to the wording of Motsoeneng's 2011 service contract as GECA; (iv) that we erred in finding that Aguma's appointment of Motsoeneng as GECA violated his constitutional obligation to assist and protect the Public Protector.

[9] Although Mr du Toit persisted with all the grounds of appeal, the only one he developed in argument was that the 'decision' (if one was taken) was not made in the exercise of public power.

[10] We have considered the grounds of appeal and the oral and written submissions made on behalf of the SABC at the hearing of the application for leave to appeal. The various issues were fully addressed in our judgment of 12 December 2016. We do not think there is any reasonable prospect of another court reaching different conclusions on the issues raised in the application for leave to appeal.

[11] In regard to the question whether the decision to appoint Motsoeneng as GECA involved the exercise of public power, our analysis in the main judgment drew support from the judgements of the Constitutional Court in *Chirwa* and *Khumalo.* Mr du Toit's submissions did not explain why these judgements did not strongly support the conclusion we reached.

[12] In para 5 of their written submissions, the SABC's counsel referred to the judgment of Langa CJ in *Chirwa*. However on this point Langa CJ was in the minority. The majority view is reflected in para 158 of our main judgment.

[13] Mr du Toit submitted that *Khumalo*, which we dealt with in para 161 of our main judgment, was distinguishable for two reasons, namely (i) that it concerned the employment of persons already in the employ of the State; (ii) that the ultimate decision was based on the MEC's delay in bringing the application. We do not understand the first reason. As in *Khumalo*, the SABC approached Motsoeneng's appointment as GECA on the basis that he was already (and was still) in the SABC's employ. We approached the matter on the same basis (despite the possible implications of the expiry of Motsoeneng's 2011 employment contract). The second reason is misconceived. It is true that the MEC's case failed because of delay; but the question of delay was only relevant because the Constitutional Court found that it was dealing with the review of an exercise of public power, thus engaging the delay rule.

[14] Mr du Toit questioned the way we distinguished *Calibre Clinical* in para 163 of the main judgment. He submitted that, like Motsoeneng's appointment in the present case, the procurement of services and goods in that case was an internal organisational matter rather than a decision which was 'governmental in nature'. The submission cannot succeed. The procurement of services and goods by public

bodies undoubtedly constitutes administrative action. Such decisions are among the most litigated review cases. The applicant failed in *Calibre Clinical* not because the character of the decision was purely internal but because the body which made the decision was not a public body. In the present case, by contrast, it is common cause that the SABC is a public body which exists in the public interest.

[15] Mr du Toit persisted with his argument based on PAJA and *Gijima*. We dealt with that matter fully in paras 164-166. We remain firmly of the view that the SABC's argument is misconceived. Mr du Toit submitted that PAJA's significance was not only procedural (ie in respect of time limits) – PAJA also had substantive significance because in order to constitute 'administrative action' a decision had to have 'direct, external legal effect'. That is true but irrelevant. Mr du Toit submitted that the SABC's appointment of Motsoeneng as GECA did not have direct, external legal effect. We need not decide whether or not that is so. It would only be necessary to do so if the DA were relying on a ground of review which was available to it under PAJA but not on the constitutional principle of legality. The DA has squarely relied on the principle of legality. The only question is whether the decision involved the exercise of public power. If the decision in fact amounted to 'administrative action' for purposes of PAJA, the DA's case would be stronger, not weaker, because the grounds of review under PAJA are more generous and because the DA complied with all procedural time limits.

[16] Mr du Toit argued that our decision would open the floodgates for reviews by outsiders challenging staff appointments in public bodies. However, once a decision is found to involve the exercise of public power, it is susceptible to legality review. The Constitution does not permit a court to hold otherwise. We are in any event not much impressed by the floodgates argument. In practical reality, political parties, public-interest groups and other outsiders pick their fights carefully. It will not often be the case that a staff appointment can be impeached as irrational or on one of the other grounds permitted by a legality review. And unless the appointment were to a post of some significance, a fight about it is unlikely to be thought worth the candle. Every day public bodies are making procurement decisions which could theoretically be the subject of review proceedings. Relatively few are contested. The judgements of the courts pursuant to those reviews have no doubt enhanced the quality and

transparency of procurement decisions. The same would be true of the occasional review of significant staff appointments.

[17] We thus conclude that the SABC's application for leave to appeal must be refused.

Aguma's application for leave to appeal

[18] Aguma appeals against the personal costs order against him. The SABC has also applied for leave to appeal against this order though its legal interest in the order is not apparent.

[19] As our main judgment shows, we were fully aware that a personal costs order was a departure from the usual result. We fully explained our reasons for finding that Aguma should personally be responsible for the costs.

[20] An appellate court will only interfere with a trial court's decision on costs if the trial court acted on a wrong principle or arbitrarily or capriciously. Mr du Toit did not seek to persuade us that the principles which we applied were not the correct legal principles. He also refrained from suggesting that we made the costs order arbitrarily or capriciously. Given the limited grounds for appellate interference, we do not think there are reasonable prospects of success on appeal.

[21] Aguma's application for leave to appeal must thus also be refused.

Costs of applications for leave to appeal

[22] We do not intend to order Aguma personally to pay the costs occasioned by the SABC's application for leave to appeal. He must, however, pay the costs occasioned by his own application for leave to appeal.

The section 18 application

[23] Because the SABC has taken the attitude that the time has not yet expired for it to file affidavits in opposition to the s 18 application, we have not yet heard that application. At the hearing of the applications for leave to appeal we nevertheless invited Mr Katz to explain why the s 18 application was still necessary in the light of undertakings given by Motsoeneng, namely that he will not return to work until the occurrence of one or other of the events identified in para (c) of our order (namely the setting aside of the Public Protector's remedial action or his exoneration in the new disciplinary inquiry).

[24] Mr Katz, as we understood him, accepted that the only order which the DA required to be implemented pending any appeal is para (c). We hope that the parties will be able to reach an agreement in this respect so that it will be unnecessary for us to hear the s 18 application. We would obviously be willing to make an order by agreement, if an order is required. (Of course, unless the SABC intends to petition the Supreme Court of appeal for leave to appeal, there will be no need to pursue the s 18 application since there will be no further appeal process suspending our previous order.)

[25] If the parties cannot reach agreement and if the DA requires the s 18 application to be determined, the parties are at liberty to approach us for directions. Again, though, we would encourage them to reach agreement regarding the filing of further affidavits. Prima facie the SABC's reliance on the time limits contained in rule 6 is erroneous. Section 18(3) applications are interlocutory and usually attended by some urgency.

The new disciplinary inquiry

[26] In our DC judgment we foreshadowed the possibility of a supplementary order appointing the chairperson and initiator of the new disciplinary inquiry. By letter dated 27 January 2017 we were informed by NIA that the parties (excluding the DA) have now agreed on the new initiator. Although the person previously

agreed upon as the new chairperson was unavailable to take up the appointment, we were given the name of another person as the new chairperson.

[27] In the light of publicly available information regarding the work of the ad hoc parliamentary committee, we are inclined at this stage to leave it to the new interim board, which will hopefully be appointed shortly, to determine the new chairperson and initiator. If the new interim board is not established within three months of today's date, the parties may approach us again.

Orders

[28] As agreed by counsel at the hearing of the applications for leave to appeal, this judgment will be handed down electronically by transmitting same to counsel as a pdf.

[29] We make the following orders:

(a) The application by the second respondent (the SABC) for leave to appeal is dismissed with costs including those attendant on the employment of two counsel.

(b) The application by the eighth respondent (Mr Aguma) for leave to appeal is dismissed with costs including those attendant on the employment of two counsel.

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LE GRANGE J

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ROGERS J

APPEARANCES

For Applicant (the DA)	Mr Katz SC and Mr M Bishop Instructed by Minde Schapiro & Smith Inc Tyger Valley Office Park Building No 2 Cnr Willie van Schoor & Old Oak Roads Bellville
For Second and Eighth Respondents (the SABC and Mr Aguma)	Mr S du Toit SC and Mr K Premhid Instructed by: Ncube Inc Attorneys c/o Nongogo Nuku Inc 7th Floor, Spoornet Building 1 Adderley Street Cape Town