

REPUBLIC OF SOUTH AFRICA



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

Case No: 2020/10124

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED YES/NO
..... SIGNATURE	..... DATE

In the matter between :

In the interlocutory application between:

**NDIVHONISWANI AARON TSHIDZUMBA  
MBULAHENI OBERT MAGUVHE  
MALESHANE AUDREY RAPHELA**

**First Applicant  
Second Applicant  
Third Applicant**

and

**SPECIAL INVESTIGATION UNIT  
JAMES AGUMA  
LEAH THABISELA KHUMALO  
THERESA VICTORIA GELDENHUYS  
THE SOUTH AFRICAN BROADCASTING  
CORPORATION (SOC) LIMITED**

**First Respondent  
Second Respondent  
Third Respondent  
Fourth Respondent  
Fifth Respondent**

*In Re* the main action between

**SPECIAL INVESTIGATING UNIT**

**Plaintiff**

and

**MBULAHENI OBERT MAGUVHE  
NDIVHONISWANI AARON TSHIDZUMBA  
JAMES AGUMA**

**First Defendant  
Second Defendant  
Third Defendant**

**MALESHANE AUDREY RAPHELA  
LEAH TSHABISILE KHUMALO  
THERESA VICTORIA GELDENHUYS  
SOUTH AFRICAN BROADCASTING CORPORATION**

**Fourth Defendant  
Fifth Defendant  
Sixth Defendant  
Seventh Defendant**

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**JUDGMENT APPLICATION LEAVE TO APPEAL**

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**STRYDOM J**

- [1] This is an application for leave to appeal against my judgment and order handed down on 23 August 2022 in this matter.
- [2] Section 17 of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the judge who presided over the matter is of the opinion that the appeal would have a reasonable prospect of success or, pursuant to section 17(1)(a)(ii), there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
- [3] The applicants in this application are three erstwhile directors who served on the board of the SABC and on the Governance and Nominations Committee (GNC) when a payment referred to as “success fee” in an amount of R11,508,549.12 was paid to Mr Hlaudi Motsoeneng, who at the time served as the Chief Executive Officer of the SABC.
- [4] On 19 August 2016 the payment to Mr Motsoeneng was approved and payment was made during September 2016.
- [5] The applicants filed a 43 page application for leave to appeal in which every finding of this court was challenged and criticised in rather strong terms. The

matter was in fact re-argued in the notice of appeal which was more in the form of a heads of argument with references to case law.

- [6] It is difficult to provide a summary of points raised but in essence it was stated that this court erred in finding that the explanation provided for the delay in bringing the application to lift the bar was lacking. Further that the court was wrong in its finding that the defences raised by the applicants lacked merit and was outweighed by the lack of explanation for the long delay to uplift the bar preventing the applicants to plead. It was further stated that because of the other proceedings pending concerning this payment made to Mr Motsoeneng the court should have lifted the bar and allowed the filing of pleas, *inter alia*, on the basis that no prejudice was shown which the plaintiff in the action, the Special Investigating Unit, would suffer if the pleas were allowed. A *res judicata* point was also raised.
- [7] This court's judgment was premised on the extraordinary long and unexplained delay in launching the condonation application which meant that the veracity of the defences played a lesser role in coming to the conclusion of this court not to condone the lateness of the applicants' application.
- [8] Nevertheless, if the defences raised had a reasonable prospect of success the court would have granted condonation regardless the long delay.
- [9] The applicants argued before this court that the defence of prescription has a strong prospect of success on appeal. The court was referred to the recent judgment of Modiba J in the Special Tribunal in Case No. GP01/2021, a judgment delivered on 18 October 2022. This was a matter in which the SABC as first applicant and the Special Investigating Unit as the second applicant

applied for certain relief against Mr Motsoeneng and other executives of the SABC who approved payment to so-called music legends.

[10] In paragraph 70 of this judgment, Modiba J found as follows:

“On the authority in *Kim Diamonds*, the SIU as a representative applicant in terms of s 4(1)(c) read with s 5(5) of the SIU Act is only entitled to the relief to which the SABC is entitled. Similarly, the defences a respondent has against the SABC may be raised against the SIU. To demonstrate the sound basis of this principle, it would be absurd in these proceedings to declare the debt to have prescribed against the SABC but not to have prescribed against the SIU given that the SIU is only entitled to the relief that the SABC is entitled to. The claim having prescribed as against the SABC, the SABC is not entitled to any relief. Therefore, the SIU is also not entitled to any relief in respect of the claim arising from the impugned decisions.”

[11] The implication of this finding is that the SIU can only pursue claims which the SABC could have pursued. The SIU merely step into the proverbial shoes of the SABC, albeit that it sues in its own name.

[12] In my judgment I found the opposite, i.e. that the SIU could sue in their own name and that a separate cause of action became available to the SIU pursuant to terms of sections 4(1)(c) and 5(5) of the SIU Act. The SIU sued the applicants in its own name without joining the SABC as a plaintiff.

[13] Section 4(1)(c) provides that the SIU can institute and conduct civil proceedings in a Special Tribunal or any court of law for any relief relevant to any investigation and section 5(5) determines that notwithstanding anything to the contrary in any law and for the performance of any of its functions under the

SIU Act the SIU may institute and conduct civil proceedings in its own name or on behalf of a state institution in a special tribunal or any court of law.

[14] Consequently, an option is provided to the SIU either to institute civil proceedings in its own name or in the name of a state institution. In this matter the SIU instituted proceedings in its own name.

[15] The interpretation of these sections becomes important as that will determine when a prescriptive period will start to run. In my view, if the SIU instituted proceedings in its own name the prescriptive period can only start to run when the SIU became aware of the facts from which the debt arose.

[16] In my respectful view, the *ratio* contained in paragraph 70 of the judgment of Modiba J is wrong and I stand by my views. Consequently, there are now conflicting judgments on the issue whether the SIU is bound by the prescriptive periods which would have been applicable if the SABC instituted an action. For purposes of leave to appeal there may be some compelling reason why the appeal should be heard, more particularly as there are conflicting judgments on this point.

[17] The court considered whether leave to appeal should be granted on this ground alone but it was argued on behalf of the SIU that even on the interpretation of Modiba J the claim made by the SIU in this matter has not prescribed.

[18] In paragraph 59.2 of the applicants' notice of application for leave to appeal, it is contended that the claim prescribed on 19 August 2019, alternatively, on 12 and 13 September 2019, this being three years after the date when the decision was made to approve the payment of the success fee on 19 August

2016, alternatively, the date when the payments were made to Mr Motsoeneng on 12 and 13 September 2016.

[19] It was argued on behalf of the SIU that insofar as these dates may be relevant dates, in the context of reasoning adopted by Modiba J, the claim has not prescribed because section 13(1)(e) of the Prescription Act expressly provides when the creditor is a juristic person and the debtor is a member of the governing body of such juristic person, as is the case in this matter, the completion of prescription is delayed by a period of one year from the date the debtor is no longer a member of the governing body. It is common cause that the applicants were all members of the SABC's governing body.

[20] It was shown by the SIU that if the date of resignation of the three applicants are considered, and the extra year is added in terms of section 13(1)(e), then the claims have not prescribed. It was not in dispute that the summons in this matter was issued on 26 March 2020, a date, on this calculation, well before the claim prescribed.

[21] To counter this argument, it was argued on behalf of the applicants that section 77 of the Companies Act 71 of 2008, remains applicable which in subsection (7) determines that proceedings to recover any loss, damage or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that gave rise to the liability. Section 77 deals, *inter alia*, with a claim by a company against directors who breach their fiduciary duties owed to the company.

[22] In my view this argument does not assist the applicants for two reasons:

22.1 The claim of the SIU is not made pursuant to the terms of the Companies Act. As was found in the judgment of this court, the SIU's case against the applicants was instituted, *inter alia*, pursuant to a breach of fiduciary duties in terms of sections 50 and 57 of the Public Finance Management Act read with the ss4(1), 2(2) and 5(5) of the Special Investigating Units and Special Tribunals Act 74 of 1996. Sections 50 and 57 placed fiduciary duties on the applicants in their capacity as office bearers of the SABC to act with fidelity, honesty, integrity and the best interests of the SABC in managing its affairs. Section 4(1)(c) provides that the SIU can institute and conduct civil proceedings in any court of law for any relief, *inter alia*, relevant to any investigation in its own name. The SIU is a creditor in its own right and the debt vis-à-vis the SIU could only become due when the SIU became aware of the existence of the debt.

22.2 Even if section 77 of the Companies Act was applicable this does not assist the applicants. Section 5 of the Companies Act which deals with inconsistencies between any provision of the Companies Act and a provision of any other legislation determines that if such inconsistency presents itself the Public Finance Management Act 1 of 1999 prevails in the case of such inconsistency.

[23] The PFMA does not provide for a three year prescriptive period as section 77 does, which would mean that the Prescription Act would be the applicable act to determine prescription pursuant to a claim made in terms of the PFMA.

[24] Accordingly, it is this court's view that there is no reasonable prospect that another court would find that a claim made by the SIU against the applicants prescribed.

[25] On behalf of the applicants was also raised a *res judicata* point. This was raised in a context that an order for repayment of the R11m was already made by another court. This point raised is also without merit as the first requirement for *res judicata* would be that the order was made against the same parties which in this instance it was not.

[26] In my view all other points made, including the point relating to rule 35(14) is without merit and needs no further consideration.

[27] The court exercised a discretion as far as the condonation application was concerned and a court of appeal will not lightly interfere with a lower court's exercise of this discretion.

[28] In my view, the applicants have failed to show that there is a reasonable prospect that another court would come to a different decision as the one I have come to.

[29] Accordingly, the application for leave to appeal is dismissed, with costs.

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**RÉAN STRYDOM  
JUDGE OF THE HIGH COURT  
GAUTENG LOCAL DIVISION  
JOHANNESBURG**



Date of hearing: 31 October 2022

Date of judgment: 08 November 2022

Appearances:

On behalf of the Applicants: Adv. P. Cirone

On behalf of the 1<sup>st</sup> Respondent: Adv. G. Mamabolo