



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 178/08

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION LTD APPELLANT

v

FRED PETER COOP & OTHERS RESPONDENT

Neutral citation: *SA Broadcasting Corporation v Coop* (178/2008) [2009]
 ZASCA 30 (30 March 2009).

Coram: Nugent, Jafta, Mlambo, Maya JJA et Hurt AJA
Heard: 2 March 2009
Delivered: 30 March 2009

Summary: Court order – meaning and effect – SABC seeking to phase out
 and withdraw benefits it had been ordered to maintain – not
 shown by SABC that legal basis of order no longer in existence.

ORDER

On appeal from: High Court, Witwatersrand (Mogagabe AJ sitting as court of first instance).

The following order is made:

‘The appeal is dismissed with costs including the costs of two counsel.’

JUDGMENT

MLAMBO JA (Nugent, Jafta, Maya JJA, Hurt AJA concurring)

[1] This is an appeal by the South African Broadcasting Corporation (SABC), against the judgment of the Johannesburg High Court (Mogagabe AJ) granting the respondents an interdict and other ancillary relief against it. The appeal is with the leave of the court a quo.

[2] The matter has a somewhat chequered past spanning some 8 years of litigation between the parties and I sketch such to facilitate an appreciation of the issues of contestation. The respondents were part of a group of employees who left the employ of the SABC between 1993 and 2000 and were paid the full actuarial value of their pensions. They, however, remained members of the SABC medical scheme and the SABC continued paying a 60 per cent subsidy of their monthly medical scheme contributions, amongst

other so-called retirement benefits (the subsidies).¹ The SABC also paid the same subsidies to other employees who had left its employ and who had remained members of the medical scheme but who had not been paid the full actuarial value of their pensions. These latter employees came to be known as 'bona fide pensioners' and are regarded by the SABC as retirees in terms of its pension fund rules.

[3] In 2001 the SABC gave notice to the respondents of its intention to withdraw their subsidies. The SABC justified its stance on the basis that the respondents were not retirees and that the subsidies paid on their behalf had not been authorised. The SABC relied on the fact that upon termination of their employment the respondents lost any claims they may have had in terms of its pension fund rules, having been paid the full actuarial value of their pensions. Having unsuccessfully disputed the SABC's stance the respondents instituted motion proceedings in the Johannesburg High Court seeking an order, amongst others, for the reinstatement of their subsidies, which the SABC had withdrawn in keeping with its notice to the respondents.

[4] In view of some irresolvable disputes of fact on the papers, the matter was referred to trial for the hearing of evidence. Bliden J heard the matter and rejected the SABC's claims. He found that the SABC had ratified the decisions by its officials to extend the subsidies to the respondents, and granted the respondents the relief they sought. That judgment has since been reported: *Coop & others v South African Broadcasting Corporation & others*

¹ The other subsidy related to television licenses.

[2004] 25 ILJ 1933 W. Blieden J essentially ordered the SABC to reinstate the subsidies.

[5] Having been granted leave by Blieden J the SABC appealed his orders to this court. In that appeal this court upheld Blieden J's orders, albeit for different reasons. This court disapproved Blieden J's finding that the SABC had ratified the decision of its officials in extending the subsidies to the respondents. It reasoned that the respondents had established that the SABC was estopped from denying the authority of its officials who had purported to represent it in agreeing that the respondents could be treated as retirees and therefore entitled to the subsidies. It further found it unnecessary to decide whether the respondents were contractually entitled to the subsidies as contended by them or whether these were gratuitous as asserted by the SABC. The decision of this court has also since been reported: *South African Broadcasting Corporation v Coop & others* 2006 (2) SA 217 (SCA).

[6] Nearly a year after the handing down of the judgment and order of this court, the SABC sent out a standard letter to the respondents stating, amongst other things, that after intensive consultation with the so-called bona fide pensioners (retirees) it had decided to commence phasing out the subsidies paid to these retirees over a five year period. The SABC stated that it continued to hold the view that it was entitled to vary, withdraw or phase out the subsidies on reasonable notice. In that letter the SABC gave the respondents notice that it had decided to commence phasing out their subsidies at the rate of 20 per cent per annum with effect from 1 February

2007. On receipt of that letter the respondents disputed the SABC's stance and threatened litigation to enforce their rights to the subsidies unless the SABC undertook not to phase them out. After eliciting no response the respondents again launched motion proceedings in the Johannesburg High Court *inter alia* seeking an order interdicting and restraining the SABC from withdrawing or in any way reducing or phasing out the subsidies.

[7] In that matter the respondents' stance was simply that the conduct of the SABC in phasing out or reducing their subsidies was in conflict with and in contempt of the judgment and order of Blieden J. On the other hand the SABC asserted that it was entitled to phase out the subsidies by virtue of the fact that it had commenced phasing out same in respect of the bona fide pensioners. The SABC's interpretation of the reasoning underlying Blieden J's order was that the respondents had to be treated in the same manner as the bona fide pensioners. On that basis its counsel submitted that because it had decided to phase out the subsidies of those pensioners, it was entitled to phase out the subsidies of the respondents as well.

[8] Having heard argument Mogagabe AJ found in favour of the respondents and ordered the SABC to comply with the order issued by Blieden J. He also granted an order interdicting and restraining the SABC from phasing out the subsidies. In arriving at that conclusion Mogagabe AJ reasoned that the SABC was misguided in interpreting Blieden J's order to mean that it was entitled to disregard that order so long as it was treating the respondents in the same manner as the bona fide pensioners. In this regard

Mogagabe AJ reasoned that Blieden J's order could not be interpreted to mean that the SABC was entitled to phase out and withdraw the subsidies of bona fide pensioners.

[9] On appeal before us counsel for the SABC submitted that Mogagabe AJ had erred in holding against it. He submitted that Blieden J's order did not mean that the SABC was bound to comply therewith in perpetuity. He submitted that the SABC's decision to phase out the subsidies in conformity with its decision to do so in relation to bona fide pensioners was a new act that occurred after the order had been granted and relieved the SABC of its obligation to henceforth comply with the order.

[10] I do not think a litigant who is bound by a continuing mandamus is able to escape those obligations merely by alleging that he or she has chosen to end them. It cannot be disputed that the order was made because it was found that the respondents had a legal right to continue to receive the subsidy. While it is correct that the order was not made in perpetuity it remains effective until the rights upon which it was founded come to an end. Where those rights emanate from a contract then no doubt they end when the contract lawfully terminates. But the SABC has laid no basis for finding that the rights have been lawfully terminated in this case. A mere assertion that it has terminated those rights, without establishing that the termination was lawful, does not seem to me to be sufficient to relieve it of the continuing obligations imposed by the order.

[11] We were asked by counsel for the respondents to rule that the finding by Blieden J in the course of his judgment that the respondent's contracts entitled them to the subsidies is res judicata between the parties. I do not think we are called upon to stray beyond what is properly required for our decision in this appeal.

[12] The appeal is dismissed with costs including the costs of two counsel.

D MLAMBO
JUDGE OF APPEAL

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