

**IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)**

CASE NO: 13815/2008

In the matter between:

MPOFU, DALI

Applicant

and

**SOUTH AFRICAN BROADCASTING
CORPORATION LTD**

First Respondent

**CHAIRPERSON: BOARD OF THE
SOUTH AFRICAN BROADCASTING
CORPORATION LTD**

Second Respondent

MAMPONE NO

Third Respondent

J U D G M E N T

TSOKA, J:

[1] The applicant, Dali Mpofu (Mpofu), seeks on urgent basis, the following

declaratory orders:

- 1.1 Declaring the meeting of the Board of the South African Broadcasting Corporation Limited held on 6 May 2008 unlawful;
- 1.2 Declaring any decision, inclusive of the decision taken to suspend him by the Board meeting of the South African Broadcasting Corporation Limited on 6 May 2008, invalid and of no force and effect;
- 1.3 Declaring the resolution of the Board meeting of the South African Broadcasting Corporation Limited taken on 6 May 2008 invalid and of no force and effect.

[2] In the alternative to the order sought in prayers 1.1, 1.2 and 1.3 above, Mpofu seeks an order setting aside the resolution of the Board of the South African Broadcasting Corporation Limited taken at the Board meeting on 6 May 2008. Further alternatively, he seeks an interim order setting aside the resolution of the Board pending the finalisation of the review proceedings he intends to institute against the respondents, reviewing and setting aside the decision and resolution of the Board.

[3] He further seeks an order setting aside the appointment of the third

respondent, Gab Mampone (Mampone) as an Acting Group Chief Executive Officer.

[4] Mpofu seeks an order for costs on attorney and own client scale.

[5] The first respondent, South African Broadcasting Corporation Limited (SABC) and the second respondent, the Chairperson of the Board of SABC, oppose the application. They accordingly filed an answering affidavit. Mampone is not opposing the application.

[6] There are three issues to be resolved in this matter. The first is the question of urgency. The second question is whether the decision to suspend Mpofu and the resolution taken on 6 May 2008 were taken by a properly constituted Board of SABC. If the answer to the second question is in the affirmative, the third question is "*Was Mpofu entitled to a hearing prior to his suspension on 6 May 2008.*" If, however, the answer to the second question is in the negative, the third question falls away.

[7] I proceed to deal with the above formulated issues.

Urgency

[8] When Mpofu was suspended at 01h40 on 7 May 2008 he was given the Memorandum dated 4 April 2008, a resolution taken at a Board meeting of

6 May 2008 and a letter of suspension. The letter of suspension advises him that he will be on suspension on full payment but that during the suspension he will not continue to act in his usual or normal capacity as the Group Chief Executive Officer (GCEO). He was requested to respond to the letter as well as to the Memorandum. His response was required to be not later than 16h30 on Thursday 15 May 2008. He was further requested to refrain from entering the premises of SABC, as well as refraining from communication, whether directly or indirectly with any employee of SABC.

[9] In the founding affidavit, paragraphs 104-106, Mpofu states as follows:

"104. In fact, the unjustified refusal of the respondents to grant me access to the SABC employees, even for the sole purpose of conducting my defence, has severely hampered the intended speedy finalisation of this affidavit and has increased the costs of bringing this application to me. I have been unable to secure certain documents which I would have preferred to refer to, but which are in the possession of the SABC. A punitive cost order will be sought on this and various other grounds.

105. This condition also renders it impossible for me to comply with the deadline of 15 May 2008 to respond to the numerous allegations in the memorandum, some of which deal with matters in specific departments of the SABC, eg. the Finance Department.

106. Due this restriction, it has also been impossible to obtain the necessary confirmatory affidavits in this application, particularly from the executive directors.

107. Until this issue is resolved, or the respondents alter this condition, this matter may never be able to move forward."

[10] The background of the Memorandum given to Mpofu on 7 May 2008 is necessary to appreciate the resolution of the question of urgency.

[11] It is common cause that the Memorandum prepared by the Chairperson of the Board of SABC, Ms Khanyisiwe Mkonza (Ms Mkonza) was not given to Mpofu prior to 7 May 2008. It is also common cause that the Memorandum was leaked to the media. Pursuant to the leaking of the Memorandum, The Sunday Times newspaper of 13 April 2008 ran a story concerning the Memorandum. The Sunday Times headlines read: “*New board guns for SABC boss*”.

[12] On 23 April 2008 Ms Mkonza, the Chairperson of the SABC Board, wrote a letter to Mpofu. The contents of the letter are important. The letter, which is Annexure “DM10” to the papers, reads as follows:

“PRIVATE & CONFIDENTIAL”

23 April 2008

*Advocate Dali Mpofu
Group Chief Executive Officer
Room 2848
28th Floor
Radio Park*

Dear Adv. Mpofu

Re : Concerns in relation to matters affecting the SABC

I refer to the above matter which was discussed in a duly constituted meeting of the Non-Executive Directors of the South African

Broadcasting Corporation (SABC), on Wednesday, 9 April 2008 and where it was resolved that:

- (i) The matters contained in a memorandum prepared by me and addressed to all Non-Executive Directors of the SABC Board be considered more fully by a three-person sub-Committee consisting of myself, Ms Christine Qunta – the Deputy Chairperson of the Board and Ms Fadila Lagadien – the Chairperson of the Human Resources Committee of the Board, and that*
- (ii) This sub-committee of the Board be authorised to obtain independent advice in relation to the concerns raised in my memorandum and the way forward.*

I confirm that I had (in the presence of the Deputy Chairperson and Ms Lagadien) conveyed to you on Monday 14 April 2008, the fact that the meeting indeed took place on the 9 April, as you and other Directors had been notified, and that the resolutions aforementioned were adopted. I confirm that you had also acknowledged that you were aware of the allegations as publicised in the media, specifically in the Sunday Times.

I also confirm that, according to your memorandum of 16 April addressed to me, you indicated that the Group Executive had met to discuss the Chairperson's memorandum.

This serves to inform you that the Non-Executive Directors of the Board of the SABC will be meeting on Wednesday 23 April 2008 to consider a report to be submitted by the sub-committee. The Board will consider what action, if any, will be taken after due and careful deliberations. Since the allegations concern you directly, I am of the view that it would not be appropriate or desirable for you to be present during the said meeting but that you will be informed of the outcome of its deliberations after the meeting by me personally or by a person appointed to do so by the Board.

Yours sincerely

KANYISIWE MKONZA

CHAIRPERSON, SABC BOARD OF DIRECTORS"

[13] From the contents of the letter, the Memorandum was still to be

considered fully by a three persons subcommittee of members of the Non-Executive Directors. The subcommittee was authorised to obtain independent advice regarding the concerns raised in the Memorandum.

[14] On 30 April 2008 the Board of SABC met the Communication Portfolio Committee (Portfolio Committee) in Cape Town. At this meeting, again, Ms Mkonza reiterating the contents of the letter of 23 April 2008 written to Mpofu, informed the Chairperson of the Portfolio Committee that:

“At this point in time the process is not complete, and we do have to complete the process without putting anyone’s position or dignity at stake. We really want to do that with that confidentiality and dignity taken into consideration. I really do want to appeal to you, Chairperson, to handle the matter that way.”

[15] Responding to questions asked by the Chairperson of the Portfolio Committee regarding the composition of the three persons subcommittee, Ms Mkonza responded:

“It does not exist any more, because that committee was just given the task of compiling information. That’s all. The matter is back in the hands of the full board and it is the full board that reports on this matter.”

[16] It is not surprising that the Memorandum was still to be refined as the deputy Chairperson, who was at the meeting of the Portfolio Committee, remarked as follows:

“There has been no intention on the part of any board member to deprive the GCEO or the management of an opportunity to respond to that. The question is when. And I really should correct that, because there are factual inaccuracies, many factual inaccuracies towards the GCEO, and I really would prefer not to go into that, Chair, because we will be here the whole day.”

[17] In the answering affidavit, regarding the meeting with the Portfolio Committee, Ms Mkonza, in paragraph 60 of the answering affidavit, states that:

“60. At this stage there was no intention to suspend the applicant. The three persons committee had not completed the revision of the memorandum.”

[18] Having regard to the complaints of Mpofu regarding his restrictions to enter the premises of SABC, and not to communicate with any employee of the SACBC, which restrictions would hinder him to prepare a response before 15 May 2008 to the unrevised Memorandum of 4 April 2008, with full factual inaccuracies regarding him, it is not surprising that on 12 May 2008, on urgent basis, he approached the court for relief.

[19] In the circumstances of this matter, I rule that the matter is urgent in terms of Rule 6(12). The parties argued both urgency and the merits of the application.

The Board meeting of 6 May 2008

[20] SABC is a creature of statute. It is governed and regulated by the Broadcasting Act 4 of 1999 (the Act), the Broadcasting Charter (the Charter), the Protocol of Corporate Governance in the Public Service (the Protocol), the Public Finance Management Act 1 of 1999 (the PFMA Act), its Articles of Association (the Articles) and the Companies Act 61 of 1973 (the Companies Act). SABC is not only a State Owned Enterprise (SOE) but it is also an organ of State.

[21] It is crucially important to have regard to these instruments to determine what constitutes the Board of directors of SABC.

[22] Section 1 of the Act defines the Board as the Board of South African Broadcasting Corporation Limited. Section 12 of the Act provides that the Board shall consist of:

22.1 twelve non-executive members

22.2 the GCEO

22.3 the COO and the CFO or their equivalents who will be executive members of the Board. In terms of section 12 the twelve non-executive directors of the Board are appointed by the President

on the advice of the National Assembly. Nine members of the Board, which must include either the Chairperson or her deputy at any meeting of the Board, constitute a quorum. In total 15 directors constitute the Board of SABC.

[23] Clause 4.1 of the Charter provides that the Board of Directors is appointed in terms of section 13 of the Act and is constituted as set out in Article 11 of the Articles. It is chaired by a non-executive Chairperson and a deputy Chairperson appointed by the President. In terms of clause 13.1 a quorum necessary for the transaction of business shall be nine (9) members of the Board.

[24] Article 11.1.1 of the Articles provides that:

“The corporation will have a Board which shall consist of 15 (fifteen) Directors, of whom 12 (twelve) shall be non-executive Directors appointed by the President and 3 (three) shall be Executive Directors, namely, the Group Chief Executive Officer, the Chief Financial Officer and the Chief Operating Officer or their equivalents.”

[25] In terms of the Protocol, the Board constitute a fundamental base of corporate governance and should be headed and be controlled by an effective and efficient Board consisting of non-executive and executive directors, majority of whom must be non-executive directors, to ensure independence

and objectivity in decision making.

[26] From the clear and unambiguous language of the Act, the Charter, the Articles and the Protocol, the Board of SABC is constituted by 15 directors, 12 of whom are non-executive directors while the remaining 3 are executive directors. At any meeting of the Board, as long as either the Chairperson or her deputy is present, 9 directors constitute a quorum. The Board is viewed as a collective. What is further apparent from these instruments is that there is no doubt that there can be no other Board meeting referred to as a Board meeting of SABC which consists of only the non-executive directors. Although such meeting is envisaged in terms of 13.14 of the Charter, such meeting is not a meeting of the Board of SABC, but a meeting between the non-executive directors of the Board and the company Secretary.

[27] It is this collective Board of SABC as outlined above, that its directors are entitled to receive a notice of invitation to any meeting of the Board. As long as each and every director of the 15 directors is invited to a Board meeting, and provided either the Chairperson or her deputy is present and provided further that the directors present are not less than 9 in number, even if only non executive directors turn up at such a meeting, a properly Board meeting is constituted. Such Board is empowered and entitled to transact any business on behalf of SABC.

[28] In the present matter the GCEO, the COO and the CFO were not invited to the meeting of 6 May 2008. This is common cause. In fact the GCEO, the COO and the CFO were in an executive directors meeting when the meeting of 6 May 2008 was held. Although Mpofu was invited and addressed the meeting on the issue of the suspension of Dr S Zikalala (Dr Zikalala), he was not party to the said meeting. It appears that a deliberate decision was taken to exclude the executive directors. In these circumstances, it is disingenuous to refer to the meeting of 6 May 2008 as the meeting of the Board of SABC. That meeting falls foul of the provisions of the Act, the Charter, the Articles, Protocol and the Companies Act.

[29] Clause 10.3 of the Charter provides that:

“The Board shall allow every director to play a full and constructive role in its affairs. Directors shall accordingly participate fully, frankly and constructively in Board discussions and other activities and shall endeavour to bring the benefit of their particular knowledge, skills and abilities to Board discussions.”

[30] The exclusion of Mpofu and the two executive directors robbed them of the right to participate fully, openly, frankly and constructively in the meeting of 6 May 2008. SABC is, as a result of the exclusion, poorer for it.

[31] Blackman Jooste Everingham in Volume 2: *Commentary on the Companies Act* at pp 8-339 to 8-340 regarding Meeting of directors, say the following:

“Unless the company’s articles otherwise provide, and save in the case of a private company with only one director or where all the directors consent to what is done, directors can act only by means of a properly passed resolution at a properly convened meeting of the board of directors from which no director has been excluded and at which a quorum is present. Failure so to act renders their decision invalid ...”

[32] It is common cause that in the present matter not all the directors consented to the meeting of 6 May 2008. It is further common cause that Mpofu and the other two Executive Directors were deliberately excluded from the meeting of 6 May 2008. The Articles do not provide for this. The decision and resolution taken on 6 May 2008 are invalid.

[33] In the result I find that the meeting of 6 May 2008, at which a decision was taken and a resolution was passed to suspend Mpofu, is unlawful. Consequently the decision taken and the resolution passed at that meeting is invalid and of no force and effect.

[34] It is unnecessary to resolve the third question as the second question has been answered in the negative.

Costs

[35] The parties agree that any order for costs shall include costs of two counsel as both parties engaged the services of two counsel. What is in

dispute is the scale of such costs. The applicant seeks and argues for punitive costs against the respondents. The respondents argue that there is nothing in the papers that warrant for a punitive costs order.

[36] Ms Mkonza is a businesswoman. She is the chairperson of the Board of SABC. She is a non-executive director who must act independently and objectively. The Board she chairs is accountable to the National Assembly through the Communication Portfolio Committee. In exercising her duties it is expected of her to show fidelity, honesty, integrity and act in the best interest of SABC. In fact this is what Article 6.11 of the Charter demands of her.

[37] On 28 and 29 January 2008 the new Board of SABC was inducted to ensure that the Board appreciates its duties and oversight role. A presentation on corporate governance by Mervin King, an expert on corporate governance, was made. On 4 April 2008 Ms Mkonza met with GCEO. Despite having had a cordial meeting with GCEO, on the same day, she wrote the Memorandum addressed to all Board members raising few concerns which she did not raise with GCEO. On 9 April 2008 she purportedly called a Board meeting excluding the executive directors. On 30 April 2008 she assured the Portfolio Committee that the leaking to the press of the Memorandum of 4 April 2008 will be investigated and that the Memorandum would be refined whereafter it would be given to Mpofu to respond within 7 days. Two days later, contrary to the undertaking given to the Portfolio

Committee, she gave Mpofu, for the first time, the unrefined and the same Memorandum that the deputy Chairperson remarked to the Portfolio Committee that it contains inaccuracies regarding Mpofu, and demanded Mpofu to respond thereto by 16h30 on 15 May 2008. Although Mpofu was not notified of the meeting of 6 May 2008, he was requested to be on standby until 01h40 when he was given a letter of suspension. The Memorandum is purportedly addressed to all members of the Board. This is misleading. Ms Mkonza knew that the Executive Directors were not furnished with it. The Executive Directors obtained a copy from the website of The Sunday Times.

[38] Mampone is not defending the application. Dr Zikalala is not a party to the application. Dr Zikalala has not filed a supplementary affidavit. Despite that the issues raised in the Memorandum of 4 April 2008 do not deal with the suspension of Dr Zikalala, as then he was not yet suspended, her answering affidavit argues the case for both Mampone and Dr Zikalala.

[39] The conduct of Mkonza falls short of a director who should act independently, without fear or favour, openly, with integrity and honesty. This conduct deserves a punitive costs order. The Board of directors act as a collective. In this capacity, the Board is as culpable as its Chairperson.

[40] The following order is made:

- 40.1 The meeting of the Board of South African Broadcasting Corporation Limited held on 6 May 2008 is declared unlawful;
- 40.2 Any decision taken including the decision to suspend the applicant at the Board meeting on 6 May 2008 is declared invalid and of no force and effect;
- 40.3 The resolution of the Board of South African Broadcasting Corporation Limited taken at the meeting of 6 May 2008 is declared invalid and of no force and effect;
- 40.4 The first and second respondents are ordered, jointly and severally, to pay the applicant's costs, which costs shall include costs of two counsel, on attorney and own client scale.

M TSOKA
JUDGE OF THE HIGH COURT