

SOUTH AFRICA / JUDGMENT

McLaren and Others v Acting Chief Executive
Officer of the National Construction
Incubator and Others (123420/24) [2024]
ZAGPPHC 1380 (27 December 2024)

[2024] ZAGPPHC 1380

COURT

North Gauteng High Court, Pretoria

BEFORE

Wentzel AJ

CASE / FILE NUMBER

123420/24

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 123420/24

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

DATE:

27/12/2024

SIGNATURE

In

the matter between:

CLAYTON
MARK McLAREN
First Applicant
TLOU
ISHMAEL MANAMELA
Second Applicant
LUNGANI
DLUDLA
Third Applicant
THEMBA
NKOSI
Fourth Applicant
NOMPUMELELO
NYAOSE
Fifth Applicant
FEZILE
ZONDI
Sixth Applicant
SAMKELO
MAHLABA
Seventh Applicant
CEDRICK
TAPAMO
Eighth Applicant
REFILOE
MOKGOSHI
Ninth Applicant
LERATO
MOALUSI
Tenth Applicant
MPHO
SENATLE
Eleventh Applicant
PHILILE
DLAMINI
Twelfth Applicant
DUMISENI
MBAMBO
Thirteenth Applicant
MPHO
MOKOENENE
Fourteenth Applicant
NHLAKANIPHO
MBONAMBI
Fifteenth Applicant
MDUDUZO
DUBAZANE
Sixteenth Applicant
SLINDILE
NTULI
Seventeenth Applicant

SBAHLE
NTSHANGASE
Eighteenth Applicant
And
THE
ACTING CHIEF EXECUTIVE OFFICER OF
THE
NATIONAL CONSTRUCTION
INCUBATOR
THE
CHAIRPERSON OF THE NATIONAL
CONSTRUCTION
INCUBATOR
Joint First Respondents
THE
ACTING CHIEF EXECUTIVE OFFICER
SMALL
ENTERPRISE DEVELOPMENT
AGENCY
(SEDA)
Second Respondent
MINISTER
OF SMALL BUSINESS
DEVELOPMENT
Third Respondent

JUDGMENT

WENTZEL AJ

Introduction

- [1] The applicants are employees of the National Construction Incubator (“NCI”) which has not paid their salaries since January 2024. They seek, by way of urgency:
- a. an order against the Acting Chief Executive Officer and the Chairperson of the NCI (cited as joint first respondents), and the Acting Chief Executive Officer of the Small Development Enterprise Agency (“SEDA”), the second respondent, for payment of their outstanding salaries from 31 January 2024 to date.
 - b. an order directing the Minister of Small Business Development (the third respondent) “in his official capacity as the leader and co-ordinator of the promotion and development of entrepreneurship of Small, Micro and Medium Enterprises (SMMEs) and Co-operatives, and to ensure an enabling legislative and policy environment to support their growth and sustainability, to intervene and ensure that SEDA releases funds due, owing and payable to the First Respondent and thereby enable the payment of outstanding salaries due to the employee applicants.”

[2] The applicants also seek a declarator that “the conduct of the First and/or Second Respondents, to the extent that they have failed to pay the salaries of the applicants from January 2024 up until the date of the application:

(a) To be contrary to the common law contract of master and servant.

Alternatively

(b) Not to be sustainable by the practicalities of continued livelihood and dependence by the applicants on their salaries for their

day-to-day livelihood sustenance.”

[3] Although the salaries have not been paid since January 2024, no steps were taken to recover the salaries until 28 October 2024, when the current application was launched by way of urgency and set down for hearing on 5 November 2024. The explanation proffered was that up until this point, the applicants were ever hopeful that the NCI would receive funding from SEDA and that they would be paid their salaries; the applicants state that they have now reached a point where they are no longer able to put food on the

table for themselves and their families and thus can no longer wait to be paid their salaries.

[4] It goes without saying that the declaratory relief sought is novel and there cannot be a clearer case of self-created urgency. Be that as it may, in the interests of justice, I decided to hear the application.

[5] The application was served on SEDA via email from the applicants’ attorneys. There is thus no way of knowing whether the application came to SEDA’s attention, and this is why it did not oppose the application. There is no proof of service of the application on the NCI. However, the applicants’ attorney uploaded a letter from the Chief Executive Officer of the NCI stating that, although it did not oppose the application, it requested that the legal steps be directed at SEDA “as the main cause of this crisis”.

[6] Although the matter was not opposed, of primary concern to me was that the applicants accepted that their employment contract was with the NCI, but wished me to order that both the NCI and SEDA, with whom they had no contractual relationship, to pay their salaries. The applicants also wished me to order the Minister of the Department of Small Business Development (“DSBD”) (“the Minister”) to intervene to ensure that SEDA released the funds allegedly due and owing to the NCI so that the NCI could pay their salaries. Even assuming that outstanding funds are due and payable by SEDA to the NCI, which is not at all clear, this would be a remedy available to the NCI and not the applicants, who have no entitlement to insist that SEDA fund the NCI.

[7] Notwithstanding my sympathy for the plight of the applicants and being mindful that our courts have increasingly become courts of justice and equity, I will, in the course of this judgment, set out the numerous difficulties I have with the relief sought against SEDA and the Minister and explain why I feel compelled to limit the relief sought to that against the

NCI. Were I to grant the relief sought against SEDA, this would create a very dangerous precedent and seriously encroach upon the doctrine of the separation of powers enshrined in the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

The basis for the relief sought by the applicants

- [8] The first applicant was the deponent to the founding affidavit, which he deposed to on behalf of all the applicants. For convenience, I will refer to the deponent collectively as “the applicants”. The applicants state that they “have legally been employed by, and are on the pay-roll of the NCI.” In support of this fact, they annexed their respective “Letters of Appointment” marked “IE-L/App 2” to “IE-L/App 18”. These were not formal Letters of Appointment but rather schedules setting out the name of each respective employee, the nature of his or her employment and their current employment status. In this respect, the applicants state that:

“The letters of appointment are a true reflection of the appointment date as well as the position held by each employee. I am compelled to place on record that where necessary, an appointed employee may, based on progression, be elevated to a different position in the course of his/her employment — such particularity need not necessarily decry the initially appointed position.”

- [9] In several instances the employees were reflected as having been retrenched or having resigned.

- [10] The applicants explain the basis for the relief sought against the NCI and SEDA in the following terms:

“On the basis of the common law, the Applicants are employees and in their hierarchical order, the respondents are the employers.”

- [11] Further the applicants allege:

“7.2. While as loyal employees, we strove hard to serve the NCI, the latter has had its administration going hay-wire, to the point of neglecting the primary condition of one being employed namely to receive their hard- earned wages in return for their labour — somewhere in the pages of the Holy Book it is written: “A labourer deserves his wages”...

7.3.2. The employees work hours have been translated into flexi-work-hours. As a condition which has no impact on the salaries of the employees.

7.3.2.1. Irrespective of the flexi hours, in our numbers as the eighteen applicant employees, the NCI Trust has retained us as employees and our work output has not been affected in that we have maintained our production quotas as before, throughout and always for the agreed salary...

7.4.1. As employees of the NCI Trust, we earn our livelihood from the salary we receive.”

- [12] The purpose of the application is said to be:

“...for the employees of the NCI, [to] seek relief against the continued unfolding of the unbearable development of hoping against hope

concerning our salaries hence - the employees of the NCI resolved to approach the Honourable Court for appropriate relief.”

[13] It is argued that SEDA is vicariously liable to the employees for non-payment of their salaries. The basis of the claim against SEDA is set out in paragraph 4.4.2 of the founding affidavit as follows:

“In terms of the Memorandum of Agreement entered into by and between the SMALL ENTERPRISE DEVELOPMENT AGENCY hereinafter referred to as SEDA, the 2nd Respondent and NATIONAL CONSTRUCTION BUSINESS INCUBATOR hereinafter referred to as NCI Trust, the first respondent, entered into a Memorandum of Agreement (the MOU) on 1 April 2022.”

[14] The Memorandum of Agreement (which I will refer to as the “MOE” and not as the Memorandum of Understanding (“MOU”) as done so by the applicants) was valid from 1 April 2022 to 31 March

2024. It will be demonstrated that the MOE constituted a legally binding agreement between SEDA and the NCI that regulated the terms upon which NCI was funded and was much more than a simple memorandum of understanding.

[15] The applicants explain that:

- a. “The First Respondent i.e. the NCI Trust who is the employer, is a public benefit organisation mandated to develop and mentor emerging construction companies within Southern Africa. Its focal points are BBBEE initiatives designed to empower emerging construction companies to compete with older and more established companies in the open market.”
- b. “SEDA is legally obligated to support the NCI Trust and it is the founder of the trust and the greatest supporter of the Trust is the main beneficiary of the NCI Trust and not the only beneficiary. SEDA forms part of the government's Department of Small Business Development initiatives.”

[16] The applicants point out that the NCI Trust was set up at the instance of SETA in order to achieve the vision and objectives of SEDA. It is said that “[t]he Trustees’ duty is to manage the NCI Trust and provide oversight in accordance with the trust deed to ensure that the donor funding is used to attain the objectives and purpose of the trust as set out in the trust deed”. It is pointed out that “on average R10 million per year has been provided to the NCI Trust for the past three years”.

[17] Under the heading: “Non-payment of R10 million for the financial year 2023 to 2024” the applicant’s state:

“4.4.4.5. SEDA (2 Respondent) failed, refused neglected and/or omitted to release funds in the amount of R10 million to the 1st Respondent. This failure, refusal, neglect and/or omission crystalized the financial woes of the 1st Respondent for whom the 2nd

Respondent as the founder of the trust. SEDA is a creature of the Department of Small Business Development.

4.4.4.5.1. Accordingly, the SEDA is withholding funds due to its own creature namely the 1st Respondent and has throttled the 1st Respondent.

4.4.4.5.2. The ripple effect, in fact, and in particular, the SEDA has repudiated the MOU during its currency.

4.4.4.5.2.1. As the founder of the NCI Trust, and irrespective of the repudiation of the MOU, SEDA is nevertheless vicariously liable to the employee for the non-payment of salaries.”

[18] It is further argued that that:

4.4.4.1 “In terms of the MOU, the previously released and allocated funds the salaries of the employees ought to have been budgeted for, for the period of the allocation namely 2023/24”. (sic)

[19] Under the heading: “Financial short-fall for the 2022-2023”, it is alleged:

“4.4.4.4. There is a short-fall in the amount of R2.847 500.00 million Rand which [is] due, owing and payable by SEDA to the 1st Respondent. The Honourable Court is referred to Annexure “SEDA-1” and “SEDA-2”.

4.4.4.4.1. Based on the afore-stated short-fall, the financial woes of the 1st Respondent arose as planning and budgeting could not be fully implemented.”

[20] Annexure “SEDA- 1” is an incomplete letter addressed by SEDA to Lindani Dhlomo (“Dhlomo”) dated 14 February 2024. In this letter, SEDA makes reference to the third quarterly report submitted to it by the NCI as a prerequisite to its funding by SEDA. SEDA, however, pointed out that:

“Thank you for the submission of the quarter three report. As stipulated on the MoA, the Centre is expected to adhere to the reporting due date. Below is a summary of the Centres performance during the third quarter, as per MOA the centre is expected to perform at 80% and above to receive full tranche. Please be advised that it is important for the Centre to meet the set quarterly targets because underperformance negatively impacts the tranche payment. Furthermore, all shortfall balances will be forfeited should the Centre not be able to adhere to the required performance. The Centre year to date performance is indicated below.”

[21] The schedule referred to reflects that that the approved funding amount was R8 500 000 for the 2022/2023 financial year. It will be explained later in this judgment with reference to the clauses in the MOA that this amount was to be paid in four tranches and was dependent upon the NCI meeting its performance targets in each quarter. Where these targets are not met, the amount of the funding provided is reduced. The schedule reflects that provided the

performance targets were met, the third quarter payment would have been 50% of the total approved amount and was thus would have been an amount of R4 250 000. However, the targets were not met, and the shortfall was R2 847 500.00, with the shortfall payment stated to be R1 594 600.00. The balance due is thus stated to be R1 252 900.00.

[22] Thus, Annexure “SEDA-1” does not support the allegation that there was a balance outstanding in the amount of R2 847 500; what it reflects is that the amount of R1 252 900 was due. It is not apparent whether this payment was made by SEDA or not. Annexure “SEDA-2” is an undated letter from Sipho Ngcai, the Executive Manager of SEDA, to the NCI stating that he had noted the variance between the stated performance targets and that which had been achieved and requested that “the centre to mitigate the risk and ensure performance during the next quarter of reporting....We trust that we can depend on your co-operation and continued efforts for performance improvement.”

[23] The applicants maintain that SEDA, as the founder of the trust, is “indictable,” both to the employees and the NCI and explain that:

- a. “SEDA is cited in its obligatory capacity to support the First Respondent i.e. the NCI Trust;” and
- b. “The Minister of Small Business Development is cited in his official capacity as the leader and co-ordinator of the promotion and development of entrepreneurship of Small, Micro and Medium Enterprises (SMMEs) and Co-operatives, ensure an enabling legislative and policy environment to support their growth and sustainability.”
- c. “Furthermore, the Minister of Small Business Development is cited to obtain an order and directive against the Minister to the effect that she immediately intervenes by taking such steps as are necessary, reasonable and expedient to ensure that SEDA releases funds due, owing and payable to the First Respondent and thereby enable the payment of the overdue and outstanding salaries payable to the employee applicants.”

[24] In further support of its case against SEDA, the applicants explain that:

“7.2.1 The NCI Trust receives funding from the eThekweni Municipality, the City of Ekurhuleni, Nelson Mandela Bay, the City of Tshwane and overseas donors.”

and

“7.4.4.2.1 The funding donated by the eThekweni Municipality, the City of Ekurhuleni, Nelson Mandela Bay, the City of Tshwane and overseas donors is administered by either or both the First and Second Respondent for the benefit of the NCI Trust.”

7.4.4.2.2 The fundamental issue in the administration of the donated funds. I submit, has as its primary concern, the payment of the salaries of the employees.”

7.4.2.2.3 From the fact of the stoppage in the salary payment, a proper case can be made out that the First and/or the Second Respondent have not performed a proper financial administration of the trust funds.”

[25] It is argued that:

“As the founder of the NCI Trust, and irrespective of the repudiation of the MOU, SEDA is nevertheless vicariously liable to the employee for the non-payment of salaries.” (FA para 4.4.4.5.2.1)

[26] In conclusion, the applicants set out SEDA’s alleged obligation to pay their salaries as follows:

“10.2. The 2" Respondent being legally obligated:

- (a) To support the 1 Respondent [NCI Trust];
- (b) As the founder of the trust;
- (c) The SEDA being the greatest supporter of the Trust;
- (d)
- (i) On average, over the past three years, the SEDA is on average, said to have provided R10 million per year to the NCI Trust.-
- (ii) The SEDA has wrongfully and unlawfully failed, neglected or omitted to maintain its legal and moral obligation to the 1" Respondent its foundational legal obligation to fund the NCI Trust to the extent that the NCI Trust has not paid the employees’ salaries for ten months continuously.

Alternatively—

- (e)
- (i) The NCI Trust as the 1" Respondent is indictable for failing to administer the SEDA's finances provided to the Trust,
- (ii) The cumulative effect of the conduct of the 1st and the 2nd Respondents has contributed to the non-payment of the salaries of the employees over a continuous period of ten (10) years [months].”

[27] The applicants maintain that the non-payment of their salaries constitutes both a breach of their contract of employment and constitutes an unfair labour practice.

[28] It is alleged that the respondents’ legal obligation to pay salaries extends beyond the termination of the MOE. For this proposition reliance is placed on clause 2.8 of the MOE who reads:

“The termination of this agreement shall not affect those provisions which expressly provide that they will continue after such termination or expiry or those provisions which of necessity must continue to have effect after such termination or expiry, even where those clauses do not expressly provide thereof”.

- [29] The applicants argue that the payment of salaries is a necessity in terms of clause 2.8 of the MOA. No clauses in the MOA deal with the payment of salaries and I cannot see how the payment of salaries can be said to be the sort of “necessity” contemplated in clause 2.8. Nevertheless, the applicants wish me to have regard to the fact that “salaries and wages are protected and that international instruments which South Africa has ratified observe the protection as well for which the Protection of Wages Convention 1949 (NO: 95) clause 2” and that in terms of Article 12 095- Protection of Wages Convention, 1949 (No. 95): “Wages shall be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family”.
- [30] I do not dispute the entitlement of the applicants to receive their salaries for the work performed by them this year with the consent of the NCI despite the termination of the MOA on 31 March 2024. However, this right lies against the NCI. Although the applicants were paid their salaries up until December 2023, the NCI has failed to make payment the applicants’ salaries since January 2024 to the date of the application. The outstanding salaries amount to R2 974 995.21.

The correspondence from the CEO of the NCI

- [31] The applicants’ attorneys uploaded a letter from the acting CEO of the NCI, Sandile Matiwane (“Matiwane”) sent to the applicants’ attorneys dated 6 November 2024. In his letter, Matiwane explains that the NCI is a non-profit organisation funded by various organs of government. He states that all programs that are administered by the NCI are for the benefit of the trust and its objectives.
- [32] Matiwane points out that ever since its establishment 2006, the NCI has been funded by SEDA. However, he says that since March 2023, the NCI has been requesting payment of the outstanding balance in the amount of R2 847 500 for the 2022/2023 financial year which has not been received. Despite this, SEDA continued to request operations reports for the first and second quarters of the 2023/2024 financial year, which were provided. He states that despite numerous requests, SEDA has failed to respond to the NCI which has made it impossible for the NCI to continue its normal operations and make payment of the amounts owing by it. Matiwane thus suggests that the legal route taken by the applicants against the NCI should rather be directed at SEDA. He maintains that
- as soon as SEDA releases the outstanding tranches, the applicants will be paid.
- [33] It is apparent from the correspondence annexed to the papers between the NCI and SEDA that there is a dispute regarding the outstanding payment and SEDA’s obligation to fund the NCI for the 2023/2024 financial year and the current 2024/2025 financial year. The NCI, however, has taken no legal steps against SEDA to recover the amounts allegedly outstanding from SEDA.
- [34] Be that as it may, in response to Matiwane’s letter dated 6 November 2024, the applicants’ attorneys addressed a letter to the NCI in which it was stated:

“1. The Contract of employment is between the NCI and the employee- applicants. The employees’- applicants’ legitimate expectation for the payment of salaries is wholly and entirely vested in the NCI.

2. The indictment for the non-payment of salaries is upon the NCI and whosoever has partnered with the NCI for the payment of the salaries as well as enabling the NCI to perform the duties it was

established for.

3. To the extent that the NCI acknowledges its legal obligations to pay the employee-applicants’ salaries means that an order

sought against the NCI will be appropriate in the prevailing circumstances.

4. It is on the basis of the afore-going, that my instructions from the applicants is that the application remains against the NCI, the 2" and the 3" Respondents for the full and outstanding salaries amount, the one paying the other to be absolved.” (emphasis added)

[35] The applicants’ attorney thus held the NCI accountable for the outstanding salaries, albeit jointly and severally with SEDA.

[36] This letter was later supported by what was called a “Courtesy Affidavit” deposed to by Matiwane. In it he confirms that SEDA currently owes the NCI R2, 847, 500.00 for the 2022/2023 financial year. He confirms that the NCI has continued to render services in the interests of both the NCI and SEDA in the implementation of the incubation programmes.

[37] Matiwane further states that the NCI has complied with its obligations to receive funding for the 2022/2023 financial years and has submitted quarterly reports to SEDA. Matiwane further points out that, despite there being an admitted impasse between the NCI and SEDA with regard to finding, the applicants have continued to perform their Key Performance Indicators (“KPI’s”)

as indicated by SEDA and to render services “diligently, effectively and efficiently.”

[38] With regards to the 2023/2024 financial year, Matiwane claims that all services rendered by the NCI on behalf of SEDA have been fulfilled but SEDA has failed to release the amount of R10 million to the NCI to enable it to meet its financial obligations to the employees “and Trust etc”.

[39] During the course of argument, I afforded the applicants’ counsel several opportunities to convince me that the applicants had a case against SEDA for payment of the outstanding salaries. This caused the applicants to file a courtesy affidavit from Matiwane and two supplementary affidavits.

The Courtesy Affidavit

[40] In Matiwane’s courtesy affidavit he reiterates that the NCI is not opposing the application but wishes to place the following information before the Court:

“5.1. The NCI Trust was founded by SEDA who is responsible for funding the NCI Trust as a benefactor. I am aware of the contents of the Letters of Authority issued by the Master of the High Court to grant authority to SEDA.

5.1.1 SEDA is the middle-man between the NCI Trust and government.

5.1.[2] In terms of the preamble to the Memorandum of Understanding (MOU) signed by and between SEDA and the NCI Trust, SEDA is there to provide incubation support funding for the NCI Trust to implement the business plan which funds are from the Department of Small Business Development [DSBD) approved by parliament.

[41] Matiwane then deals with what he calls “the dilemmas” facing the NCI which he explains:

“6.1. In terms of the MOU, SEDA was and has throughout remained obligated to provide funding for the financial periods 2022-2033 and 2023-2024.

6.1.1. SEDA failed to honour its moral and contractual obligation regarding the financial periods in question and has thus placed a wedge in the administration of the NCI Trust incubation programme services inter alia, the payment of staff salaries.

6.1.2. The fore-going has and continues to impact negatively as a responsibility and duty which rests in the hands of SEDA and which impedes the administration responsibility of the NCI Trust regarding the incubation programme.

[42] Despite the express clause in the MOA that the funding agreement terminated on 31 March 2024 and that there should be no expectation of renewal dealt with below, Matiwane argued that the funding arrangement remained in place as no instruction had been given to the NCI that the incubation program had ceased. He submitted:

“6.2.2. No instruction for the discontinuance of the incubation programme:

Given that the incubation programme is pivotal to the government as well as being in the national interest, neither SEDA nor the Department of Small Business Development has given instructions for the incubation programme to be discontinued.

6.2.3. The Board of Trustees of the NCI Trust still requires the loyal services of the staff members who cannot be faltered for having initiated the present court proceedings against the three respondents as they did.

7. The total documented outstanding funding which is in the hands of SEDA amounts to R12,847,500.00.

7.1. The amount due to the applicants in salaries is R2,974,995.21.

7.1.1. I humbly request the Honourable Court to grant the claim of the applicants namely, the payment of outstanding salaries in the amount of R2,974,995.21 together with interest as claimed. The remaining balance on the R12,847,500.00 is a matter for the NCI Trust to claim for itself against SEDA.”

[43] With no further funding agreement in place, NCI continued to run its incubation programme at risk. It similarly allowed its employees to continue to render services in the hope that funding would be provided in circumstances where SEDA had no legal obligation to continue to fund the NCI and both its continued funding and the outstanding amounts due for the 2022/2023 and 2023/2024 financial years were in dispute as will appear hereinafter.

The first supplementary affidavit

[44] In the supplementary affidavit it is alleged that according to “reliable information” received from the CEO of NCI, the NCI “is still struggling with the collection of outstanding invoices from various funders. As soon as outstanding funds are received, all staff will be notified, and salary payments will be made accordingly.”

[45] It is also stated that the amount of R2.8 million is outstanding for the 2023/2024 financial year. In terms of the MOA, SEDA’s obligation to fund the NCI only extended until the end of March 2024. However, when one has regard to the emails relied upon and annexed as “EM-1” and “EM-2” it is suspected that the applicants intended to refer to the amount of R2 847 500.00 stated to be outstanding for the 2022/2023 financial year.

[46] “EM-1” is an email to Sipho Ncgai (“Ncgai”) of SEDA from the NCI in which the unknown author (perhaps Matiwane) makes reference to a meeting that took place on 6 February 2024. It is stated therein that:

“Furthermore, it was mentioned that there was a timeline attached to the disbursement of the last tranche for the 22/23 financially. We trust that Seda will consult with the Chief Financial Officer (CFO) regarding this matter to ensure timely disbursement of the funds that will greatly assist NCI in achieving our objectives for the 2023/ 24 F.Y [financial year].

It is important to note that the outstanding tranche payment for the 2022/23 financial year is still pending, as NCI [illegible] the approval letter for the 2023/24 financial year. Despite the governance matters, we have been able to diligently report on Q1 and Q2 for the current financial year.

We sincerely hope and trust that once all outstanding requirements are met, Seda will consider funding NCI for the 2023/24 financial year.

I have also included our current acting CEO and CFO, Mr Sandile Matiwane (Accounting Officer) as he spearheads NCI’s recovery from the governance issues that have plagued NCI over the past 7 to 8 months in this past year.

Mr Ngcai, we approach this matter with humility and a genuine desire to strengthen our partnership with SEDA. We are committed to addressing any remaining concerns and fulfilling all necessary obligations.” (emphasis added)

[47] Annexure “EM-2” is addressed to “Rhulane” with reference to the R2.8 million owed for the first and second quarters, referred to as “Q1” and “Q2”. There it is stated that SEDA was still withholding approximately R2.8 million that was due to the NCI at the end of the 2022/2023 financial year.

[48] It would thus appear that the reference to the 2023/2024 financial year was an error and the applicants intended to refer to the 2022/2024 financial year. This notwithstanding, it will appear below that SEDA withheld the amount of R2 847 500.00

as on submission of its third quarterly report, NCI had failed to meet the minimum required 80% of its targets for the 2022/2023

financial year in the second quarter and had failed to remedy them in the third quarter and thus had forfeited this amount.

[49] This notwithstanding, in their first supplementary affidavit the applicants have impressed upon me to “focus not only on the outstanding R2.8 million but also on the cumulative effect thereof which is R12.8 million respectively for the financial year 2022-2023 and 2023-2024.” This is on the basis that SEDA is allegedly obliged to fund the NCI to the tune of R10 million per year. As I understand it, it is alleged that for the 2022/2023 financial year, R2.8 million is outstanding, and for the 2023/2024 financial year, no payment whatsoever has been paid and thus, R10 million is outstanding. This, however, is not readily apparent from the papers and it may be that it is contended that SEDA was obliged to fund the NCI for the 2024/2025 financial year to the tune of R10 million and thus at present, approximately R2.8 million is outstanding for the 2022/2023 financial year and R10 million is outstanding for the 2024/2025 financial years.

[50] This itself is not supported as the approved funding for the 2022/2023 financial year was R8.5 million.

The second supplementary affidavit

The second supplementary affidavit was deposed to in response to a query from me whether or not SEDA was aware that the applicants had continued to render services to the NCI despite their failure to provide further funding to the NCI. In this affidavit, the applicants point out that the mentors, who are the employees of the NCI, report monthly to SEDA through a program system known as GrowthWheel. It is alleged that SEDA verifies the data provided to it and then releases the annual R10 million funding due to the NCI on a yearly basis. As proof of this, the applicants annex marked “SEDA-2”. The quoted passage from this annexure is from “SEDA -1”, being a letter from SEDA to Dhlomo dated 14 February 2023 already dealt with by me. It provides only proof of the submission of quarterly reports and sets out the NCI’s performance for the third quarter of the 2022-2023 financial year.

[51] What is of interest to me is the submission made that:

“(b) Based inter alia, on Annexure "SEDA-2", it is clear that SEDA is liable to pay the balance due in the amount of R2, 847,500.00 in outstanding salaries and added to his figure in interest which escalated the amount to R2, 953, 797, 95.”

- [52] What is clear is that the alleged outstanding balance of R2 847 500.00 owing for the 2022/2023 financial year has increased to R2 953 797.95 when interest is taken into account. This almost the same amount as the amount alleged to be outstanding for the unpaid salaries for the 2024 financial year, namely R2 974 995.21.
- [53] In the second supplementary affidavit further reference is made to the fact that the NCI advertises for positions on SEDA's website. I do not believe that this takes the matter any further.
- [54] The fact that the NCI is an independent incubator funded by SEDA also does not advance the argument made by the applicant. Paragraphs 5.19 and 5.20 of the MOA relied upon serve only to confirm that SEDA requires that it be informed of the appointment and resignation of the directors of the NCI and that it requires that the NCI appoint staff to fulfil its obligations from previously disadvantaged groups. This also does not create a legal obligation on SEDA to pay the salaries of the persons so appointed.
- [55] The applicants also rely on a letter dated 2 August 2023 from the acting CEO of SEDA to Dhlomo. This is a copy of the notice sent to the NCI by SEDA that it intended to apply to court for the removal of the trustees of the NCI as it was SEDA's views that they were all in violation of their respective financial responsibilities. The background to this letter is dealt with later in this judgment.
- [56] What the applicants rely on is the rationale set out in the letter for SEDA's locus standi to bring the threatened application which was stated to be as follows:
- “This correspondence constitutes a notice from SEDA which is directed to all appointed Trustees of National Construction Incubator, herein referred to as NCI Trust, that Seda as:*
- i) Co-founders and Trustees of the NCI Trust,
 - ii) One of the Funders of the NCI Trust,
 - iii) Beneficiary of NCI Trust programs, and iv) Control 1988.”
- [57] This serves to confirm that SEDA is one of the funders of the NCI regards itself as a beneficiary of the NCI Programs. On this basis, the applicants contend that “[t]he output of the Trust workforce therefore, is the trajectory of the locomotion of the incubator programmes without which, the aims and objective of SEDA as the founders and funders of the Trust will not be realised.”
- [58] The applicants impress upon me to “pierce the corporal veil of SEDA-NCI TRUST and see the Trust workforce as SEDA's tools of trade. Without the tools of trade, the mandate of SEDA namely the incubator programmes will not be realised.”

[59] I, however, do not believe that this necessarily means that SEDA has a legal obligation to pay the salaries of the persons employed by the NCI. Afterall, it is clear from the terms of the MOA dealt with below that the payment of salaries of persons employed by the NCI is to be made by the NCI from the funds allocated to it by SEDA and not by SEDA itself.

[60] Finally, in their second supplementary affidavit the applicants have referred me to the email from Leeto Matshidiso, the legal advisor to SEDA dated 26 October 2023 to the first applicant and inter alia Mr. Ngcai of SEDA in which he states:

“We will continue to give you our support in the best and worst of times and trust that NCI will strive to fulfil its mandate. We thank the CEO and all staff members for the display of loyalty and commitment to the NCI and share hope that all will be well in the days to come.

Continue and maintain that spirit of resilience and magnanimity.”

[61] It is suspected that the background to this is the application brought by certain of the trustees to remove Ms. Chilwa as a trustee and SEDA’s application to intervene to ensure the removal of all trustees and the appointment of an administrator to manage the affairs of the NCI dealt with below. Again, I do not see how this advances the applicants’ case in the present application.

The Terms of the Memorandum of Agreement between SEDA and the NCI

[62] The MOA is explicit in its terms with regard to its funding obligations and its governance requirements, which are a prerequisite to the funding and are designed to ensure transparency, accountability and the proper use of government resources as well as taxpayer and/or donor money.

[63] The preamble to the MOA is instructive and reads:

“1.1 WHEREAS it has become necessary for Seda to provide incubation support funding for NCI incubator to implement the NCI business plan and/Or implementation plan and which funds have been allocated to Seda by DSBD and where DPD and Sedas funds have been approved by parliament;

1.2 And, whereas, MCI is registered as a legal entity

1.3 And, whereas, the parties have agreed to the NCI business plan and all implementation plan (an extra)

1.4 And, whereas, the parties agree that there shall be no expectation of future renewal of this agreement and that any decision to renew shall rest exclusively with Seda

1.5 And, whereas, amount allocated by Seda in respect of this agreement and so indicated in Sedas approval letters for:

1.5.1 Year 1 (one) 2022/23 financial year, as will be approved by the adjudication committee;

1.5.2 Year 2 (two) 2023/2024 financial year the allocated funds Will be subject to the approval of the respective year's implementation plans and the availability of funds from DSBD and other sources; and where in 3.32 is applicable.

1.6 And, whereas with the implementation of the NCIS business plan, NCI will be responsible for the administration of the funds available for the NCI incubation program/special project for the effective, efficient and economical utilisation of the funds to achieve the objectives of the NCI.

1.7 And, whereas, NCIS has been established as part of a strategy for the development and promotion of entrepreneurial culture in the community and surrounding catchment.

1.8 And, whereas, the overall objective of the business plan and/or implementation plan is to enhance the competitive capability of the South African small enterprise to compete in the global market and ensure high investment returns, SMME creation, job creation and economic growth with primary focus on the Parliament and placement of previously disadvantaged individuals;

1.9 And, whereas the directors of the NCI Shall endeavor to ensure attainment of the objectives, set out in the NCI business plan;

1.10 And, whereas, NCI and it takes to administer the funds available to NCI and to manage the NCI business plan;

1.11 And whereas, this agreement will, notwithstanding the signature date, be enforced for a period of 2 (two) Financial years commencing from one April 2022 until 31 March 2024 respective of clause 3.32, in which period it is expected that NCI will become sustainable and after the state period all financial assistance from Seda will terminate; and

1.12 And, whereas, MCI shall be aligned to see the guidelines as stipulated in the sinter's policy manual provided by seed and amendments there too."

[64] The following definitions set out in clause 2 are relevant;

- a. "Approval Letter" shall mean a formal letter approving finance for the incubator for a particular financial year. The approval letter must read in conjunction with the KPI Target Letter which shall be concluded and form part of this Agreement, as well as this MoA and together they constitute the full agreement between Seda and the NCI."
- b. "Directors" shall mean appointed or elected members of the board of directors of the NCI who have the responsibility for determining and implementing the company's policy and will include directors appointed by Seda as the incubator funder.
- c. "DSBD" shall mean the department of small business development."
- d. "SMME" shall mean small medium Micro Enterprises."

[65] In terms of clause 2.8 it is provided that:

“The termination of this agreement shall not affect those provisions which expressly provide that they will continue after such termination or expiry or provisions which of the necessity must continue to have effect after such termination or expiry, even where those clauses do not expressly provide therefore.”

[66] The applicant’s counsel argued that the obligation to pay wages extended beyond the termination date of the agreement. However, as I have said, I cannot see how the payment of wages by the NCI can be said to transcend the continuation of the agreement within the meaning of clause 2.8.

[67] Clauses 3.1 and 3.2 expressly limit the period for which funding will be provided and the terms of such funding and reads:

“3.1 Subject to the approval of funds by Seda, the availability of funds from DSBD and other sources and further subject to clauses 4.8 and 4.9 herein, Seda agrees to provide funding to NCI for a period of 1(One) Financial year, 2022/2023, which funding shall be provided subject to the terms and conditions set out in this agreement and approved by Seda.

“3.2 Funding allocation for year 2(Two) of the program will be subject to the approval of the respective years implementation plans and the availability of funds from DSPD and other sources, and terms as outlined in clause 3.3 hereto.”

[68] Importantly clause 3.3 provide that:

“3.3 The parties agree that there shall be no expectation of future renewal of this agreement and that any decision to renew shall rest exclusively with Seda.”

[69] SEDA’s duties are circumscribed in clause 4, the material provisions being as follows:

“4.1 Seda will ensure that NCI conduct transparent recruitment, selection, verification, hiring and appointment of board members with other funding members and/or shareholders, through preliminary involvement and/or retrospective audits;

4.2 Seda will inform NCI annually of the amounts approved by Seda and subject to availability of funds thus budgeted and approved for the implementation of the NCI Business Plan;

4.3 This allocation is also subject to funds approved by Parliament for Seda. The funds earmarked for the 2022/23 financial year, will be transferred by Seda to NCI on a biannual cash flow basis after this Agreement has been signed and further subject to the provisions of clause 4.2.

4.4 Subject to the provisions of clause 4.6 Seda shall transfer funds to NCI according to the estimated cash flow projections and not exceeding the budget that was approved by Seda for the specific financial year;

4.5 Seda will not be held responsible for any deficit/shortfall in the funding of the approved business plan.

4.6 Payment by Seda is further subject to:

4.6.1 Approval of Business Plan and/or Implementation Plan;

4.6.2 Timeous receipt of complete and accurate quarterly Reports and/or special projects reports;

4.6.3 Electronic transfer into the bank account of NCI in accordance with Seda's financial policies and procedures."

[70] Clauses 4.9 and 4.10 deal with the payment of the approved funds in tranches, with the first tranche of 50% being payable upon, inter alia, approval of the Business Plan/ Implementation Plan. The second tranche of 50% is payable "on receipt of the second quarter report indicating that at least 80% achievement of targets as per Annexure "C" (KPI Target Letter), signed Annual Financial Statements, Annual Report and Q2 Feedback Letter with a minimum of 80% achievement or compliant remedial report."

[71] Clauses 4.10 and 4.11 deals with what happens if 80% of the targets set are not achieved and provides:

"4.10 In the event where NCI performs below 80% on quarterly targets, the centre will receive a fraction of the following quarter's tranche payment equivalent to percentage performance achieved. The shortfall amount will be transferred to NCI upon the Centre providing means of verification confirming that it has made up for the under performance by end of Q3.

4.11 In the event of the consistent underperformance that is below 80%, the centre will forfeit the shortfall amount at the end of quarter three. The forfeited amount will be allocated to other performing centres through a special adjudication sitting."

[72] As indicated above, it is apparent that on submission of the third quarterly report for the 2022/2023 financial year, it was apparent that the NCI had not achieved 80% of its targets. Accordingly, it forfeited the shortfall amount of approximately R2.8 million. This amount is thus not outstanding as claimed by the applicants.

[73] Clauses 5.13 to 5.14 set out fully SEDA's governance and auditing requirements which are a *sine qua non* for NCI's continued funding.

[74] Clause 5.15 stipulates that:

"NCI shall satisfy Seda annually, that the conditions of clause 5.13, relating to the previous year's assistance has been complied

with by the NCI, that the financial aid is still meritorious and that the objectives as stipulated in this Agreement were attained. Should NCI not comply within 5 (five) months of the end of the financial year, further payments to NCI may be stopped. In this regard, specific attention must be given to section 38 (1)(j) of the PFMA and Treasury Regulation 8.4.

[75] Clause 6, moreover, expressly limits the period of the agreement and reads:

"This agreement shall be valid for a period of 2 (two) financial years, from 01 April 2022 and shall endure until 31 March 2024 unless

terminated earlier as per terms contained in clause 5.15 and clause 10.”

[76] The MOA thus terminated by the effluxion of time on 31 March 2024 and SEDA’s obligation to further fund the NCI terminated on this date.

[77] Clause 22.3 stipulates that upon termination of the agreement, the balance of the unused allocated funds, if any, shall be repaid and documentation and record will be returned.

[78] Clause 5.10 specifies that the appointment of staff and procurement of consulting services, materials and other goods and services required to implement NCI’s Business Plan must be done in accordance with SEDA’s procurement and supply chain management policy. It states:

“In the event of the appointment of staff and procurement of consulting services, materials, other goods and services required in the implementation of the NCI Business Plan, NCI shall ensure procurement of goods and services is in accordance with Seda’s Centre Policy Manual, Seda’s Supply Chain Management Policy and according to a system which is fair, equitable, transparent,

competitive and cost-effective.”

[79] Clause 5.20 stipulates:

“NCI shall be entitled to appoint such staff as it deems necessary to fulfil its obligations in terms of the Agreement and undertakes to identify, attract and appoint persons from the previously disadvantaged groups, who are natural citizens of South Africa; however if after all efforts have been exhausted and NCI wishes to appoint a person outside of the previously disadvantage groups or a person who is not a natural citizen of South Africa, the motivation to do so (detailing the various attempts; and outcomes thereof; made by NCI in this regard) must be submitted to Seda for approval.”

[80] Clause 5.11, however, makes it plain that:

“All agreements with third parties shall be entered into in the name of NCI.”

[81] This would include the contracts of employment entered into with the applicants.

[82] Clause 5.22 understandably requires the NCI to credit SEDA, as an organ of government, for its incubation work, as it is the founder and funder of the NCI which provides incubation services to new small businesses and entrepreneurs as part of government’s overall policy to promote small businesses. It states:

“NCI undertakes to change its branding within a period of 3 (three) months from the effective date to include the Seda logo and statement of support in all its marketing materials and stationery, all changes and or inclusion will be subject to written consent or approval by Seda.”

[83] However, clause 5.23 stresses that:

“Without detracting from the above NCI shall in all its contractual obligations clearly state that it is not an agent or partner of Seda, that no joint venture between it and Seda exists and that it is unable to bind Seda’s creditors or assume any financial

liability on behalf of Seda.”

[84] It was clearly contemplated that the incubators, including the NCI, would utilise the funding provided to assume responsibility for payment of all of its expenses, including the payment of salaries and wages.

[85] Clause 14 contains the usual non-variation clause and provides that:

“No agreement supporting to vary, add to, delete or cancel this agreement or any rights in terms of this agreement shall be effective unless reduced to writing as an addendum and signed by the parties or the authorised signatories.”

[86] Clause 18 makes it clear that the written agreement constitutes the entire agreement and reads

“This agreement constitutes the entire agreement between the parties regarding the matters dealt with in this agreement and no representations, terms, conditions, warranties or material evidence (express or implied) not content herein shall be binding to the parties. Any amendments to the Agreement shall be reduced to writing as an addendum and be signed by the parties or their duly authorised signatories.”

[87] Clause 22. 4 states that “the agreement may be executed in counterparts, each of which will be an original and which together constitute the same agreement.”

[88] It is thus readily apparent from the express terms of MOA that it terminated by the effluxion of time on 31 March 2024. It was made plain that the NCI should have no expectation of the continuation of any further funding after this point or expect the term of the MOA to be extended. Whether the trustees of the NCI represented to the applicants that SEDA was obliged to provide further funding, or that funding it was obliged to provide was outstanding, may raise other issues, but the fact remains that SEDA has no legal obligation to provide funding beyond 31 March

2024. SEDA disavowed any liability to pay any amount beyond the agreed amount of the funding for the particular financial year.

[89] The MOA was explicit in its terms that SEDA was not obligated to pay employees or consultants engaged by the NCI in order to carry out its mandate; any contracts of employment which the applicants may have had were with the NCI and not with SEDA and the NCI was expressly precluded from contracting in the name of SEDA or on its behalf.

[90] Although I queried whether SEDA was aware that whilst the funding dispute between it and the NCI persisted, the applicants continued to render services to the NCI for SEDA’s benefit, it was not the applicants’ case that SEDA represented to the applicants that they would be

paid or created a legitimate expectation that they would be paid, upon which they relied in continuing to provide their services to the NCI with the knowledge of SEDA, to their detriment, grounding a claim for damages against SEDA. I, however, make no finding as to whether or not a claim for damages based upon misrepresentation or estoppel against SEDA would be sound as there are insufficient facts before me to support this. I am also not in a position from the papers before me to determine whether or not approximately R2.8 million in funding is outstanding in respect of the 2022/2023 financial year or whether the amount SEDA agreed to provide for the 2023/2024 financial was indeed provided. I have also expressed my reservations as to whether or not the alleged amount of R2.8 million was indeed outstanding as the evidence before me indicates that the NCI failed to meet 80% of its targets; I have my doubts that the funding promised for the 2023/2024 financial year was not provided as the NCI was able to pay all salaries up until December 2023. This could only be established during trial proceedings after the hearing of oral evidence and certainly cannot be decided on the papers before me.

- [91] It is also pointed out that many of the applicants have been retrenched or have resigned as aforementioned; those who have been working have admittedly been working flexi-hours and it would seem, on risk, in the hope that the NCI would receive funding and they would ultimately be paid. It is most unfortunate that the NCI permitted and/or encouraged the applicants to continue to render their services after the termination of the MOA on 31 March 2024 or created an expectation that further funding would be forthcoming. Any outstanding funding to which the NCI may be contractually entitled needs to be claimed by the NCI from SEDA and cannot be claimed by the employees. It is in my view imperative that the NCI seeks to enforce its rights against SEDA to the alleged outstanding funding so that it will be in a position to pay the outstanding salaries owed by it to the applicants.
- [92] In their first supplementary affidavit the applicants allege that SEDA is the main “founder and supporter” of the NCI and is to blame for the non-payment of staff salaries. This is not what the CEO says-he indicates that there are outstanding invoices from “various funders”. Moreover, it is clear from the terms of the MOA between SEDA and the NCI that SEDA would provide funding for a further two years, after which it was envisaged that NCI would be self-sufficient and would no longer require funding from government.
- [93] Both in the courtesy affidavit and in the course of argument, reliance was placed on the recent matter of *Dhlomo N.O. and Others v Chalwa N.O. and Another* (8721/23P) [2023] ZAKZPHC 134 (10 November 2023) in support of the applicants’ argument that SEDA is legally obliged to fund the NCI and thus should be held to be jointly and severally liable with the NCI to pay the applicants’ salaries. It is stressed that the applicants have not sought an Order that SEDA provide the outstanding funding to the NCI or continue to fund the NCI beyond 31 March 2024 so that it may make payment of their salaries to them.

- [94] In Dhlomo, the applicants were former trustees of the NCI who instituted an urgent application in their personal capacities to secure the removal of the first respondent, Ms. P Chalwa N.O. (“Chalwa”), who was the CEO of the NCI. Dhlomo and others sought Chalwa’s immediate removal as a trustee of the NCI on the basis of a preliminary investigation which implicated her in maladministration, misappropriation of funds and irregular transactions constituting serious misconduct.
- [95] SEDA sought to be joined as an intervening party and contended that Dhlomo and others ought properly to be removed as trustees and an administrator should be appointed to administer the trust. Davis AJ, sitting in the Pietermaritzburg High Court, set out the background to the matter and the basis for SEDA’s application to intervene at paragraph [8] ff of his judgment:
- “[8] In order to understand the relationship between the parties and why SEDA applied to intervene it is necessary to contextualise the relationship between them. The applicants and the respondent were appointed by the Master as trustees of the National Construction*
- Incubator Trust (NCI Trust), which is duly registered and incorporated in terms of the Trust Property Control Act 57 of 1988 (the Act), with registration number IT183/2008. SEDA was the founder of the NCI Trust and the main beneficiary.
- [9] The NCI Trust is a public benefit organization mandated to develop and mentor emerging construction companies within Southern Africa. Its focal point are BBBEE initiatives designed to empower emerging construction companies to compete with older and more established companies in the open market. It seeks to assist those companies that historically did not have equal access and opportunity within the industry to compete with other long established construction entities. One of the goals is to allow these emerging companies to compete on an equal footing with those corporations that were the beneficiaries of historical inequality.
- [10] The NCI Trust provides technical and business administration assistance, which includes training and upskilling initiatives. Being a public benefit organisation the objects of the trust accord with the constitutional imperatives of economic transformation.
- [11] The NCI Trust has numerous sources whereby it generates capital. There is donor funding and the NCI Trust also receives funding from its partners, which include the metropolitan municipalities and other local government authorities. Funding is received from inter alia, the eThekweni Municipality, the City of Ekurhuleni, Nelson Mandela Bay, the City of Tshwane and overseas donor funding. The majority of its funding is sourced from public funds.” (Footnotes omitted from these paragraphs and all the further paragraphs quoted by me).
- [96] In their founding affidavit, the applicants have prefaced their claim for judgment against SEDA on the statements made by Davis AJ at paragraphs 12 and 13 where the learned judge stated that:

“[12] SEDA is legally obligated to support the NCI Trust, it is the founder of the trust and is ‘possibly the greatest supporter of the Trust.’ SEDA is also the main beneficiary of the NCI Trust but is not the only beneficiary. SEDA forms part of the government’s Department of Small Business Development initiative.

[13] Over the past three years SEDA has on average provided R10 million rand per year to the NCI Trust. The trust was set up at the instance of SEDA in order to achieve the vision and objectives of SEDA. The trustee’s fiduciary duty is to manage the NCI Trust and provide oversight in accordance with the trust deed and to ensure that the donor funding is used to attain the objects and purposes of the trust as set out in the trust deed.

[97] The applicants maintain that these statements establish that SEDA is legally obligated to continue to provide funding to the NCI beyond 31 March 2024. This, however, entirely ignores the express terms of the MOA between SEDA and the Trust which were not dealt with by by Davis AJ in his judgment. It may well be that he had the MOA was not before him as it was not relevant to the dispute at hand, namely the alleged maladministration of the NCI by Chalwa and whether or not an administrator should be appointed; it may also be that the MOA was before Davis AJ and formed the basis for his finding that SEDA was legally obligated to fund the NCI as in this certainly was the case for the 2023/2024 financial year under consideration. This, of course is mere

speculation. But what I do not accept is that the statements made by Davis AJ place a legal obligation on SEDA to provide the funding

irrespective of the terms of the MOA ad infinitum.

[98] In dealing with SEDA’s application to intervene, Davis JA explained:

“[40] The founding affidavit of Mr Nkhosikona Mbatha was used in support of their [SADA’s] application to intervene. The affidavit confirms that SEDA is an agency of the Department of Small Business which provides non-financial support to small medium and micro enterprises (SMME’s) and cooperatives throughout the Republic of South Africa. SEDA’s main objectives coincide with the NCI Trust, it founded the trust and is fully funded by the Department of Small Business Development.

[41] In order for SEDA to fulfil its functions the NCI Trust was established in

2018. SEDA is the co-founder, main funder and the beneficiary of the NCI Trust. SEDA maintains that it should have been joined to this application as it has a direct and substantial interest in the application. The affidavit is, surprisingly silent, on why it did not seek to intervene in the other recent applications brought in this division as it was fully aware of the issues between the trustees from the outset.

[42] The founding affidavit of SEDA does not deal with the averments that pertain to the cause of the impasse between the applicants and the respondent, it does not illuminate any issues as to the conduct of the applicants and respondent. Instead, the affidavit focuses on the results of the conduct complained of in the papers. There is no attempt to interrogate the

averments of either the applicant or respondent, to ascertain if there are real disputes of fact as to the cause of the issues that now confront the trust. SEDA instead maintains that the result of the conflict between the applicants and respondent is characterized by serious infighting that warrants the appointing of an administrator to administer the NCI Trust and simultaneously to investigate the cause of the conflict.”

- [99] Of importance to the current application are the further comments made by Davis AJ in which he further explained that:

“[43] SEDA justifies seeking the relief they do on the basis that donor money is currently being withheld because of issues at the NCI Trust, this resulted in employees and service providers not being paid and this opens the NCI Trust to legal challenges which directly impact upon SEDA and its ability to perform in terms of its mandate.”

- [100] At the hearing, counsel for the applicant trustees informed Davis AJ that the applicants had no objection to SEDA being admitted to the proceedings and stated that they merely opposed the substantive relief sought by SEDA. SEDA also limited its relief to the appointment of an administrator and did not persist in their relief seeking the removal of the applicants as trustees.

- [101] Davis AJ went on to state:

“[50] Mere friction or enmity between the trustees and beneficiaries will not in itself be adequate reason for the removal of the trustees. Nor would mere conflict amongst trustees be a sufficient reason. Ultimately the question is whether the removal will, as required by s 20(1) of the Act, be ‘in the interest of the trust and its beneficiaries’.

- [51] The applicants acknowledge the importance of their relationship with SEDA, the existence of the NCI Trust is founded on the aims and objectives of SEDA and their appointments as trustees is to support and provide leadership and oversight in the attainment of these objectives.
- [52] However, their appointment as trustees demands that they maintain their independence and uphold their fiduciary positions and integrity and this demands that they act in the best interests of the NCI Trust, which is a public benefit organization. This has to be done without fear or favour, noting that the NCI Trust and SEDA have a joint responsibility to the public, this court, and their funders to be transparent about this matter.
- [53] On a scrutiny of the papers there is no evidence on the common cause facts of the applicants acting directly to undermine the NCI Trust, the evidence discloses that the applicants merely seek to exercise their fiduciary duty towards the beneficiaries of the NCI Trust in accordance with the trust deed and objects of the trust.

- [54] The applicants' response to SEDA applying to the court appoint on an interim basis an administrator is flawed in law as it would usurp the function of the Master, it would be from the outset a nullity, void ab initio and ultra-vires the provisions of section 16(2) of the Act. 25 The power to appoint an administrator is the statutory preserve of the Master and no one else".
- [102] Relying on supporting decisions of the Supreme Court of Appeal, Davis JA found that:
- "[60] These decisions of the SCA are binding precedent and are dispositive of the substantive relief sought by SEDA. The application to have an interim administrator appointed must fail, this court has no jurisdiction in these circumstances to make such an order."*
- [103] In dealing with the finder's fee Chalwa sought to pay herself, Davis AJ repeated his view that SEDA was legally obligated to fund the NCI:
- "[102] It is the examination of the salary increase of 25% and the 10% finder's fee that underscore the unfitness of the respondent to be a trustee. I deal firstly with the finder's fee through which the respondent received a finder's fee payment of R125 000 from a donation to the NCI Trust by SEDA. The majority of the funds sourced by the NCI Trust are donations from municipalities and government entities, this renders the finder's fee hugely problematic. When looked at it in the light of the fact that SEDA as the founder of the NCI Trust, is legally obligated to fund the trust, it is the NCI Trust's primary donor and beneficiary. The decision to pay to the CEO a finder's fee in such circumstances is incomprehensible, especially in light of a trustee's duty to the trust."*
- [103] SEDA over a period of 3 years has donated R10 million per annum to the NCI Trust. It is legally obligated to do so as the trust is one of the main vehicles used to achieve the goals of SEDA. Without its contributions the NCI Trust would face serious challenges, indeed it probably could not operate. Simply stated the respondent in terms of this scheme would be enriched in the amount of approximately R1 million rand per annum. This enrichment through this scheme would be as a result of her doing absolutely nothing and in direct contravention of the stipulation in the trust deed that all funding be used for incubation. [emphasis added].
- ...
- [105] What is completely unacceptable is the following:
- (a) Where an employee takes a finder's fee, from the legally obligated primary donor, who donates money from the public fiscus to the Incubator and that donation is in aid of the work of the Incubator, i.e. to assist SMMEs to gain a footing in the construction industry, this behaviour defies comprehension.
 - (b) There is no sourcing of, or the need to find, an income stream, SEDA has to donate money.

- (c) The taking of the finder's fee, in light of the above, is exacerbated when the employee is in fact a trustee, who is charged with ensuring that donated funds are used to achieve the aims and objectives of the NCI Trust.
- (d) The deed requires that all funding is to be used for incubation, it cannot be used to pay a finder's fee or commission.
- (e) There is no resolution by the trustees of the NCI Trust authorising the paying of a finder's fee, noting that the trust could not have, in the proper exercise of their fiduciary duty, authorised this fee.
- (f) This is a gross abuse of the respondent's position within the trust and placed herself in direct conflict with the purpose of the trust.

[106] The respondent's conduct on this aspect falls well short of complying with her duty to the NCI Trust as a trustee. The respondent's actions are the opposite to promoting the objects of the 'Incubator Trust,' which include the promoting and upliftment of emerging construction companies and thereby creating sustainable businesses. All she did was deplete the funds available to the trust that should be used for the purposes of incubation. It is another illustration of the respondent acting outside of her duties towards the NCI Trust and failing to protect the income of the trust. It is a clear example of maladministration.

[107] Paragraph 4.2.4 of the trust deed specifically states; that 'the funds donated and all capital contributions had to be used for purposes of Incubation'. The respondent was thus prevented by the trust deed from using these contributions other than for incubation.

[108] The duty of a trustee in respect of the trust with regard to the finances of the trust was set out earlier per Koen J in Tugh NO. 64 The respondent was required to act with 'great care' when dealing with the NCI Trust money, the standard quoted was that of the *bonus et diligens paterfamilias*. Her behaviour is in stark contrast with this requirement.

[104] Davis AJ's comments about SEDA's conduct are instructive. He found:

[119] SEDA's unwillingness to deal with the facts of what occurred within the trust that fundamentally undermined the aims of SEDA is disappointing, especially when the information was readily available to them. They instead chose not to engage with the factual issues. If they had done so the conclusion they had to come to would have been that the reality is, on the undisputed facts in this application, it is in the NCI Trust's interest, SEDA's interest and all the beneficiaries' interest, that the respondent be removed."

[105] Reading between the lines, it may be that SEDA sought to intervene in order to protect Chilwa and its reluctance to provide further funding to the NCI may be because it is at odds with the trustees who Davis J refused to remove from their positions. The correspondence placed before me indicates that SEDA had stated it would not provide further funding pending the outcome of Davis AJ's judgment. Davis AJ delivered his judgment on 10

November 2023 which appears to coincide with SEDA's decision not to provide further funding. I thus have my suspicions that the current impasse between SEDA and the current trustees of the NCI has as its origins the dispute between the current trustees and Chalwa.

[106] In the email from the first respondent to Ishmail Manamela dated 12 February 2024, he makes reference to the outstanding documentation, including NCI's Annual Financial Statements and its Expenditure Report and Bank Statements required by SEDA "concerning SIDA's governance requirements as a prerequisite for its further funding". It is plain from this correspondence that there were also issues raised by SEDA regarding NCI's failure to rotate its Board. What is plain, however, is that as at 12 February 2024, McLaren claimed that SEDA had not met the last tranche of its funding obligations to the NCI for the 2022/2023 financial year but this notwithstanding, the NCI had reported to SEDA for the first and second quarters of the 2023/2024 financial year.

[107] In the email McLaren reassured Ngcai of SEDA that it would comply with its funding requirements. He stated: "Rest assured, we are diligently working on providing these documents for your review." McLaren also assured Ngcai that:

"We approach this matter with humility and a genuine desire to strengthen our partnership with SEDA. We are committed to addressing any remaining concerns and fulfilling all necessary obligations."

[108] On 21 May 2024, a Microsoft Teams meeting was held between McLaren and the NCI trustees regarding funding for the current financial year and to discuss SEDA's concerns, as well as the last tranche payment for the 2022/2023 financial year in the amount of R2.8 million. However, only the first page of the minutes of this meeting were attached to the supplementary affidavit and it is not clear what was discussed and agreed at this meeting.

[109] On 19 September 2024, McLaren addressed the outstanding amount of R2.8m allegedly owed by SEDA for the first and second quarters of the 2022/2023 financial year. In this email, McLaren made reference to the ruling handed down by Davis AJ in the Dlonldo matter and the agreement apparently reached with SEDA that funding for the 2023/2024 financial year would be provided once Davis AJ had ruled on the matter. It was pointed out that, notwithstanding Davis AJ J had handed down his judgment on 10 November 2023, still no funding had been forthcoming.

[110] I am not in a position on the papers before me to resolve the funding dispute between the NCI and SEDA for the 2022/2023 and 2023/2024 financial years. However, there was no guarantee of funding for the 2024/2025 financial year, and it was irresponsible for the trustees to require and/or allow the employees to continue to tender their services without securing funding from SEDA for their continued services after March 2024. This is said while I am alive to the fact that SEDA may be being obstructive in not authorising the requested funding in view of the events that played out before Davis AJ

[111] I have considered the further arguments advanced by the applicant's counsel and the contents of the courtesy affidavit as well as the contents of the first and second supplementary founding affidavit. I have also considered the supplementary heads of argument filed relating to these further affidavits:

- a. The issues and case law regarding the piercing of the corporate veil raised in the first supplementary affidavit and supplementary heads of argument pertain the liability of directors of a company in their personal capacity in certain circumstances do not find relevance in the present matter.
- b. The argument raised in the first supplementary affidavit that SEDA, as the founding father of the NCI, was vicariously for its "child's" financial obligations, even if unauthorised (provided they are sufficiently connected with the acts which were authorised to be regarded as modes of doing them) also fall to be rejected.
- c. Although it is accepted that the employees of the NCI have acted in fulfilling the mandate of SEDA, this mandate is not open-ended, and the NCI is obliged to comply with a number of mandatory reporting requirements to ensure transparency. It is expressly stated in the MOA that SEDA shall not be liable for the obligations incurred by the NCI in its own name. It is common cause that the NCI is the employer of the applicants and therefore, that it is the party responsible for the payment of their salaries.
- d. It was argued that SEDA, as an organ of state promoting the mandate of the DSBD, is not immune from liability or conduct which impacts negatively on the NCI. For this proposition, reference was made to *Minister of Safety and Security v Van Daivenboden* 2002 (6) SA 31 (SCA). This matter is not relevant to the case at hand and instead, deals with the duty of care in delict owed by the SAPS to deprive persons not fit to bear firearms of their firearms. The case was one involving negligent omission and in no way supports an all-encompassing legal obligation on the part of SEDA to fund and continue to fund the NCI ad infinitum.
- e. Reference was also made to the matter of *Chaiechele v Minister of Safety and Security and Another* (Centre for Applied Legal Studies intervening)

[2001] ZACC 22; 2001 (4) SA 938 (CC) where the Constitutional Court held that there is a Constitutional obligation on the courts to develop the common law to promote the spirit, purport and objects of the Bill of Rights. The Court (per Ackermann and Goldstone JJ) held that, although the major engine for law reform should be the legislature, courts are under a general duty to develop the common law when it deviates from

the spirit, purport and objects of the Bill of Rights.

- f. Whilst I agree wholeheartedly with this proposition, it does not mean that the courts are obliged to intervene in employer-employee relationship to ensure that all employees who have rendered services are paid irrespective of the terms of their contract of employment. SEDA is not the employees' employer; the NCI is. It is the entity that needs to seek to recover its outstanding debts from SEDA to ensure that it is able to meet its obligations to its employees.
- g. I also agree that the Balo Pele Principle relied upon by the applicants is a laudable principle of government; however it does not entitle me to create a contractual obligation where none exists between SEDA and the applicants.
- [112] The fact of the matter is the current MOA between SEDA and the NCI terminated on 31 March 2024 and it was stressed that the NCI should not expect SEDA's funding to continue beyond that period for which it had agreed to provide the funding. SEDA's funding is also not to be seen in a vacuum; it is expressly premised upon the availability of funds, the incubators continued need for funding and the NCI establishing that it is deserving and worthy of further funding. Most importantly, SEDA's further funding of incubators is subject to the approval of Parliament and Treasury. The court is not in a position to override these provisions in the generalised "interests of justice" and to do so would constitute the principle of the separation of powers enshrined in the Constitution.
- [113] The NCI and other incubators are not entitled to funding ad infinitum; the expressed purpose of the funding is to enable the incubator to "get off the ground", as it were, and then to become self-sufficient and self-funding. The employees plainly expect that SEDA will inject R10 million into the NCI on a yearly basis and that payment their salaries would thus always be guaranteed. Sadly, I believe this to be a misunderstanding of the legal position and rights and obligations between SEDA and the NCI.
- [114] I have taken cognisance of Davis AJ's comments that SEDA was legally obliged to provide funding to the NCI. This must be seen in the context of the MOA which expressly regulated SEDA's funding obligations for the 2022/2023 and the 2023/2024 financial years which were relevant to the dispute before him. Should Davis AJ not have been aware of the terms of the MOA, his comments cannot be read to mean that SEDA has a Constitutional mandate and obligation to fund all government incubators in all sectors of the economy regardless of government's financial constraints, and the incubator worthiness of such funding. Such a legal obligation could also not override the express requirement that any funding be authorised by Parliament.
- [115] It matters not whether clause 2.2 3 of the MOA refers to the termination of the agreement or it is regarded to have terminated on the "effluxion of time" as argued by the applicants' counsel; either way it terminated or ceased to exist by the effluxion of time on 31 March 2024 in the absence of any further funding agreement.

- [116] In his further supplementary heads of argument, the applicants' counsel relied on section 39(2) of the Constitution and argued that legislation needs to be interpreted to promote the spirit, purport and objects of the Bill of Rights and does not deny any other rights and freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights.
- [117] It was further argued that the concept of "public policy" underpins all contracts including those affecting the interests of third parties. It was submitted that the MOA between SEDA and the NCI "had constitutional overtones" in that it served "constitutional policy objectives". Thus, it was argued that a term in a contract that is inimical to the values enshrined in the Constitution is contrary to public policy and is therefore unenforceable.
- [118] In support of counsel's argument, I was referred to the Constitutional Court judgment of *Barkhuizen v Napier* 2007(5) SA 323 CC. This involved the validity of a time limitation clause in a contract of insurance. The Supreme Court of Appeal had cautioned that the fact that a term in a contract is unfair or may operate harshly does not, by itself, lead to the conclusion that it offends the values of the Constitution. What the Constitution requires of the courts, the

Supreme Court of Appeal held, is that they "employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives." The Supreme Court of Appeal further explained that this entails "that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements."

- [119] The CC, on the other hand, held:

" 23. The section 34 argument raises the fundamental question of the appropriateness, or otherwise, of testing a contractual provision directly against a provision in the Bill of Rights. This raises the question of horizontality, that is, the direct application of the Bill of Rights to private persons as contemplated in section 8(2) and (3) of the Constitution. This Court has yet to consider this issue..."

27 What then is the proper approach of constitutional challenges to contractual terms where both parties are private parties? Different considerations may apply to certain contracts where the state is a party. This does not arise in this case.

28. Ordinarily, constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the

advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, “is a cornerstone” of that democracy; “it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom.”¹

29. What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.
30. In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms.

[120] It was found that section 34 of the Constitution which guarantees the right to access to court not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy.

[121] It was explained:

“35 Under our legal order, all law derives its force from the Constitution and is thus subject to constitutional control. Any law that is inconsistent with the Constitution is invalid. No law is immune from constitutional control. The common law of contract is no exception. And courts have a constitutional obligation to develop common law, including the principles of the law of contract, so as to bring it in line with values that underlie our Constitution. When developing the common law of contract, courts are required to do so in a manner that “promotes the spirit, purport and objects of the Bill of Rights.” Section 39(2) of the Constitution says so. All this is, by now, axiomatic. Courts are equally empowered to develop the rules of the common law to limit a right in the Bill of Rights “provided that the limitation is in accordance with section 36(1).”

36. The proper approach to this matter is, therefore, to determine whether clause 5.2.5 is inimical to the values that underlie our constitutional democracy, as given expression to in section 34 and thus contrary to public policy.”

[122] Although the concept of incubation is a laudable government policy, there is no Constitutional right to each sector of the economy to demand that they be funded by government programmes; nor are the applicants entitled to demand that government do so in order to enable the NCI to make payment of their salaries. There is similarly no constitutional right to employment, but rather a right to economic assistance from

government for the poorest of the poor and the unemployed; no government, no matter how rich, can guarantee all of its citizen's employment, particularly where government coffers are dependent upon the amount it is able to recover through taxes.

- [123] Much as I would have liked to come to the assistance of the applicants in ordering SEDA to provide funding, I can legally do no more than order the NCI to pay the applicant's outstanding salaries from the end of January 2024 to the date of the application on the basis that it continued to require the employees to render services beyond 31 March 2024 on the basis of its assurances that the funding from SEDA would be forthcoming and they would be paid their salaries.
- [124] However, I take cognizance of the fact that neither SEDA nor the Minister have sought to oppose the application or to place any relevant facts before this court regarding SEDA's obligations to fund the NCI or why it was that it permitted the NCI to continue to operate and employ the applicants when it had not agreed to provide further funding. However, I must consider the possibility that the application did not come to the knowledge of SEDA as it was not served via Sheriff and only sent via email by the applicants' attorneys.
- [125] On the papers before me it is alleged that there is an outstanding balance of approximately R2.8 million owing by SEDA for the 2022/2023 financial year which, if paid would allow the NCI to pay the outstanding salaries. The applicants further allege that the amount of R10 million is owing for the 2023/2024 financial year was also not paid by SEDA; one wonders then how it managed to cover the applicants' salaries for the period up to and including December 2023. There is also correspondence before me from which it is clear that there is a dispute between the NCI and SEDA as to its compliance with its obligations entitling it to funding for the 2023/2024 financial year.
- [126] It is readily apparent that in filing its so-called "Courtesy Affidavit", the NCI has joined issue with the case the applicants have proffered against SEDA. I am, however, not able on the papers before me to determine whether SEDA in fact owes the NCI an amount of R2.8 million for the 2022/2023 or a further R10 million for the R2023/2024 or the R2024/2025 financial years.
- [127] The MOA has terminated through the effluxion of time, and it is common cause it has not been renewed; nor has a further funding agreement been put in place. It is thus not possible for me to grant relief as contemplated in the amended draft order. This Court cannot compel the Minister to intervene and ensure that SEDA funds the NCI; this would constitute a serious overreach of the separation of powers between the courts and the executive. Funding is moreover the domain of Treasury and must be approved by Parliament.
- [128] I thus make an Order in the following terms:

- a. The first respondent is ordered to make payment to the applicants the total amount of R2 953 797.95, to be paid to each applicant in accordance with the schedules attached to the notice of motion within 10 days of this Order.
- b. The aforementioned payment is to be made into the trust account of the applicants' attorney to be disbursed to the applicants within 10 days of receipt after deducting the agreed contingency fee and/or reasonable fees and disbursements.
- c. Directing the applicants' attorneys to provide the Sheriff with the banking details of their trust account as well as proof of the account by the bank at which the trust account is held.
- d. Directing the first respondent to pay the costs of this application.

JUDGE OF THE HIGH COURT OF PRETORIA

Appearances :

Counsel for the Applicant:

Mr M D Molusi

Instructed by:

MD Molusi Attorneys

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Prepared on 14 October 2026 · Esheria