

SOUTH AFRICA / JUDGMENT

Mvoko v South African Broadcasting Corporation Soc Ltd (1066/2016) [2017] ZASCA 139; 2018 (2) SA 291 (SCA) (29 September 2017) [2017] ZASCA 139

COURT

Supreme Court of Appeal

BEFORE

Navsa, Mathopo, Mokgohloa, Tsoka, Fourie

CASE / FILE NUMBER

1066/2016

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 1066/2016

In the matter between:

VUYO MVOKO

APPELLANT

and

THE SOUTH AFRICAN BROADCASTING CORPORATION SOC

LTD RESPONDENT

Neutral Citation: Mvoko v SABC (1066/2016)

[2017] ZASCA 139(29 September 2017).

Coram: Navsa ADP, Mathopo JA, Mokgohloa, Tsoka and Fourie AJJA

Heard: 11 September 2017

Delivered: 29 September 2017

Summary:

Application for leave to appeal in terms of 17(2)(d) of the Superior Courts Act 10 of 2013 granted – in relation to merits of the appeal – claim for specific performance of a written agreement between independent contractor and the South African Broadcasting Corporation (SABC) – SABC ordered to comply with written agreement – SABC has to conduct itself within constitutional parameters and within its statutory mandate – Broadcasting Act 4 of 1999.

ORDER

On appeal from: The Gauteng Local Division, Johannesburg (Van Oosten J sitting as court of first instance).

The following order is made:

1. The application for leave to appeal is granted and the respondent is ordered to pay the applicant's costs.
2. The appeal is upheld with costs including the costs of two counsel.
3. The order of the court below is set aside and substituted as follows:
 - 'a. The respondent is directed to comply with the written agreement dated 4 April 2016, and to schedule the applicant, as in the past, to perform his services as set out in annexure A to the agreement and to remunerate him accordingly in relation to the remaining term of the agreement.
 - b. The respondent is ordered to pay the applicant's costs including the costs consequent upon the employment of two counsel.'

NAVSA ADP (Mathopo JA, Mokgohloa, Tsoka and Fourie AJJA concurring):

- [1] The appellant, Mr Vuyo Mvoko, a journalist, applied to this court in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the SC Act), for leave to appeal against an order of the Gauteng Local Division, Johannesburg,

which dismissed with costs an application by him for specific performance of a written agreement concluded with the respondent, the South African Broadcasting Corporation SOC Limited (the SABC) - the state-owned national radio and television broadcaster established in terms of the Broadcasting Act 4 of 1999 (the Act).

- [2] The application for leave to appeal followed on a refusal by the court below to grant such leave. This court referred the application

for leave to appeal for oral argument in terms of s 17(2)(d) of the SC Act and directed the parties to be ready, if called upon to do so, to argue the merits of the appeal. We heard the application and directed that the merits be argued as well. The history of the matter is set out in the paragraphs that follow.

- [3] The agreement underlying Mr Mvoko's application in the court below made provision for him to render professional television

journalism services to the SABC. His functions when scheduled, before a decision by the SABC to suspend his services, included covering breaking news items and conducting specialist interviews with, amongst others, Presidents and other heads of states. He also packaged news stories which included researching, analysing and commentating on news items and conducting interviews. Mr Mvoko was also responsible for anchoring, analysing and commentating during live broadcasts. In addition he was responsible for covering news in other countries. The agreement in question is dated 4 April 2016 and the period for which it endures is 1 April 2016 to 31 March 2018. I shall in due course deal with specific provisions of the agreement.

- [4] From 2002 to 2006 Mr Mvoko was employed by the SABC as its Group Political Editor. From 2011 until his application brought in the court below, he was an independent contractor with the SABC in terms of written agreements including the one which is at the centre of this appeal.

- [5] At this stage it is necessary to set out the events leading up to the suspension of Mr Mvoko's services by the SABC. According to him the events which are set out hereafter were a manifestation of manipulation by executives at the SABC to serve narrow personal and political agendas and they demonstrate how, in breach of its statutory and constitutional mandate, the SABC was stifling independent journalistic thought and silencing critical voices. It was submitted before us that the actions complained of were the very antithesis of a journalistic culture which enabled a free flow of information independently conveyed to the public. Mr Mvoko's case in the court below, as will be more clearly demonstrated below, was that his services were unlawfully terminated because he was

seeking to hold the SABC to its constitutional and statutory mandates. Put differently, his case was that he stood up to interference in editorial decisions which impinged on journalistic independence.

- [6] The first example provided by Mr Mvoko as an indication of SABC managerial political interference with editorial decisions occurred

during March 2016, shortly after a television interview he had conducted with the former Public Protector, Ms Thuli Madonsela,

concerning racism in South Africa, was aired. The interview was part of a programme called 'On the Record'. It was the SABC's custom to re-run the programme by way of a broadcast the next day at 05h00. This did not occur. The cancellation of the re-run was without any consultation or communication with Mr Mvoko, who was the programme's executive producer.

- [7] Subsequently, Mr Mvoko was summoned to a meeting with two SABC executives to whom he was accountable, namely Mr Nyana Molete and Ms Nothando Maseko. The former informed him that management was intent on cancelling 'On the Record' and was not willing to discuss the matter any further. On a later date Mr Mvoko was told by Ms Maseko that the

then group executive for television news, Mr Jimi Matthews, was not pleased with the fact that Ms Madonsela had been interviewed. Mr Mvoko notified viewers by way of his twitter account that the program had been cancelled for reasons he was at that moment not willing to disclose. His tweet apologised for the abrupt manner in which the program was ended. Mr Molete was displeased with this notification and informed Mr Mvoko that he was liable to be subjected to disciplinary action. However, Mr Mvoko was told that if he signed a letter accepting that his tweet was inconsistent with the provisions of the written agreement with the SABC, and if he acknowledged that the letter served as a warning that a recurrence would lead to stringent action against him, no further action would be taken against him. According to Mr Mvoko he reluctantly signed the letter because, at that time, the agreement presently in issue was in the process of being negotiated and he did not want to jeopardise the upcoming potential extension of his contract.

- [8] The second example of political interference in editorial decisions cited by Mr Mvoko involved his television coverage of local government elections during 2016. Mr Mvoko described how, in his coverage of the launching of the manifesto of the Democratic Alliance (DA), the official opposition in the National Parliament he had mentioned that the DA believed the African National Congress (ANC), the ruling party, was at its most vulnerable in certain metropolitan municipalities. Soon thereafter the then acting political editor at the SABC, Ms Sophie Mokoena approached him stating that Mr Motsoeneng, the Chief Operating Officer at the time, objected to the fact that he had mentioned the ANC in relation to a DA rally. Mr Mvoko was informed that ‘Mr Motsoeneng was watching and scrutinising “each and every word”’ that he was uttering and that he should be careful on air.
- [9] The third instance of political interference occurred during January 2016 when Mr Mvoko interviewed the President of the Republic of South Africa and questioned him about the dismissal of the former Minister of Finance, Mr Nhlanhla Nene. He did this because, so he asserts, it was a burning public issue. The President replied to the questions and the interview ended. Soon thereafter, Ms Maseko told Mr Mvoko that she was under pressure not to air the interview, or to excise the part that related to the dismissal of Mr Nene. Mr Mvoko responded by stating that other television stations had conducted similar interviews without censorship.
- [10] The fourth example provided by Mr Mvoko involved another interview by him of the President, after the latter’s address on the State of the Nation. The interview included questions concerning the Minister of Police in relation to Mr Robert McBride and Mr Anwar Dramat, as well as questions concerning limitations on land ownership by foreigners and whether that would have the effect of driving away potential investors. Mr Mvoko was told later by Ms Maseko that those parts of the interview relating to the land question and the Minister of Police had to be excised. Those portions were subsequently not broadcast.

[11] Mr Mvoko was also aggrieved when the SABC adopted a policy in terms of which footage of violent protests would not be shown on television, a decision which resulted in the resignation of Mr Matthews. The SABC thereafter consented to an order of the Gauteng

Division, Pretoria, in terms of which it undertook not to enforce the policy, pending ‘a full ventilation of the matter at a later stage’. Mr Mvoko took the view that the adoption of the policy was a dramatic and heightened escalation of political interference in editorial policy. I pause to record that the Independent Communications Authority of South Africa later declared the policy unlawful.[1]

[12] As a result of the events set out in the preceding paragraphs, Mr Mvoko decided it was time to take up the cudgels as a journalist,

both in the interest of the SABC and the public, and to offer his reflections in the media. On 6 July 2016 he published an article in The Star, a newspaper with its principal circulation in Johannesburg. It is that article which set off the events culminating in the litigation leading to the present appeal. For that reason it is necessary to have regard to its contents in some detail. The article was entitled ‘My hell at the SABC’ and it bore the subtitle ‘In power mongers’ grip’. The first paragraph reads as follows:

‘The SABC has never been a paragon of a great anything. It has been a work-in-progress, with degrees of success as generations of

well-meaning South Africans tackled the extraordinarily and complex task of undoing decades of apartheid misuse of this national asset.’

It is necessary to record that the title of the article was provided by The Star itself.

[13] The article also referred to Mr Mvoko’s experience at the SABC concerning the cancellation of ‘On the Record’, as noted above. He was critical of the SABC’s Mr Motsoeneng and said the following concerning the organisation:

‘What cannot and should not be pawned, though, is the SABC. It’s too important an institution for its integrity to be impugned, and for the intelligence of everyone associated with it or the public that’s supposed to be benefiting from it to be undermined.’

[14] Mr Mvoko criticised the policy referred to above, namely, that violent images would not be broadcast by the SABC. However, the part of the article that evoked the most outrage on the part of the SABC, as was evident from the submissions before us on its behalf, was the following:

‘We are saying there’s no point in doing the right thing by promoting women to leadership positions – only to reduce them to policing duties, or walking around with their cellphones glued to their ears as they take arbitrary instructions on who to put on air.’

This was construed by the SABC as a direct and vicious attack on Ms Maseko.

[15] Mr Mvoko was adamant that in writing the article he had the following objectives: to offer his reflections on what was happening at the SABC in relation to the erosion of editorial independence; to convey his own first-hand experience of that erosion; to dispel myths about the goings-on at the SABC; and to remind the public that there was still time to save the integrity of the SABC.

[16] On 7 July 2016, the day following the publication of the article, Ms Maseko informed Mr Mvoko telephonically that he was required to collect a letter addressed to him. Mr Molete handed him the letter and said: 'Don't crucify me. I just have to give you this letter'. It is necessary to quote the relevant part of the letter:

'It has come to management's attention that you have allegedly been involved in acts of non-compliance/contravention of your contract which conduct constitutes a material breach of the agreement, relating to the following issues:

- You have brought the name of the SABC into disrepute and also damaging the image of the SABC with the comments/statements in the newspaper article of The Star Newspaper dated 06 July 2016.

Management views your conduct in a very serious light and contemplates terminating the agreement. However, you are requested to submit written representations as to why the agreement should not be terminated and should you wish to do so, same have to be submitted to writer hereof on or before close of business on Monday 11 July 2016 (16:00). Furthermore, Management has resolved not to schedule you to render your services as the Independent Contract until this matter is resolved.'

[17] Following on that letter Mr Mvoko's legal representatives wrote to the SABC demanding that he 'be scheduled' in terms of his written agreement with the SABC. The SABC did not comply and Mr Mvoko then turned to the court below for relief. The SABC, in resisting Mr Mvoko's application contended, principally, that it was misconceived in that the agreement on which he relied stipulated that it was the SABC's prerogative to engage Mr Mvoko's services 'as and when required'. The SABC contended that the agreement itself recognised that Mr Mvoko had no right to insist on being scheduled. Thus, so it was submitted, Mr Mvoko could not compel specific performance. Before us the SABC persisted in that stance. As to the suspension of his services, the SABC took the view that it was lawfully done since the agreement provided that in performing his services he was prohibited from engaging in any conduct, behaviour, utterances and the like that, in the reasonable opinion of the SABC, had the effect of bringing the name of the organisation into disrepute or impacting negatively on his relationship with colleagues and the SABC. The publication of the article in The Star, in the view of the SABC, was a breach of that contractual provision entitling the SABC to suspend his services.

[18] The SABC asserted that the scheduling of television programmes featuring Mr Mvoko was within the control of Ms Maseko, who was the head of News Output, and that Mr Mvoko is not the one who ultimately decides on whether a program is to be aired. It was adamant that

an independent contractor such as Mr Mvoko could not dictate whether to feature television programmes. Moreover, it warned that if Mr Mvoko were to be granted relief, the court 'would in fact be prescribing to the respondent what programmes should be featured on television, and who should present them'. This warning to the court was dramatically presented as follows:

'This Court would be dragged into the news room of the respondent.'

It was not for the court, so the SABC stated, to prescribe which means it should employ in performing its functions.

[19] Furthermore, particularly in relation to Ms Maseko and Mr Molete, the SABC submitted that the article destroyed the element of trust and good faith that was necessary between them and Mr Mvoko. The depiction of Ms Maseko as a 'useless puppet' was regarded as most offensive and it was contended that it would affect the relationship of trust between her and Mr Mvoko. In dealing with the alleged attack on Ms Maseko, counsel on behalf of Mr Mvoko submitted that the article should be understood to reflect that he was concerned about black women being appointed to executive positions merely as tokens subject to political control.

[20] It is especially disconcerting that the SABC deliberately chose not to respond to Mr Mvoko's detailed description of political interference in relation to editorial comment and journalistic integrity. The following is what it restricted itself to:

'These allegations, on the applicant's case, are irrelevant to this application. I therefore do not deal with them, and point out that that does not mean that the contentions made are admitted. The contrary should be accepted. This urgent court is not the appropriate forum, nor is it the appropriate time to engage in a debate as to the respondent's editorial policies.'

This is an aspect to which I shall return in due course.

[21] The court below, in a brief judgment, considered the following clause of the agreement to be pertinent:

'Should either party terminate this agreement and the other dispute the terminating party's right to do so or in instances where the SABC conducts an investigation into irregularities allegedly conducted by the independent contract, of the SABC shall have the right, pending determination of the dispute or the outcome of the investigation, not to schedule the independent

contractor to render any services and may engage/use another service provider to continue with the services.' (Clause 13.2.)

The court considered that provision of the agreement alongside the very last sentence of the letter by the SABC, referred to in para 16 above, which informed Mr Mvoko that management had resolved not to schedule him 'until the matter is resolved'. In the court's view Mr Mvoko's suspension was temporary and not permanent.

[22] As to Mr Mvoko's constitutional challenge, which included his reliance on his right to freedom of expression, the court below said the following:

'The applicant's Constitutional challenge flounders at the procedural level. The suspension of the applicant's services,

as I have been at pains to observe, was temporary and not permanent. The SABC's letter, on which sole reliance is placed by the applicant, clearly indicates, and, in specific terms, provides for an investigation into the appropriateness of the STAR article. It would therefore be premature for this court to express any firm views let alone decide on the Constitutionality of the views expressed in the STAR article in the face of a final decision yet to be taken by the SABC whether or not to terminate the agreement at the conclusion of its investigation. The same principles applicable to the requirement that internal remedies ought to be exhausted prior to an approach to court, in my view, on a parity of reasoning, with equal force apply here.'

The court went on to say:

'Nothing of substance was advanced on behalf of the applicant that would entitle this court to interfere with the SABC's investigation

prior to finally determining the fate of the agreement, as set out in its letter.'

[23] Consequently, Mr Mvoko's application was dismissed with costs including the costs of two counsel, the taxation or payment of which was suspended, pending finalisation of the SABC's 'determination of the dispute'. I proceed to consider

whether the approach of the court below was correct.

[24] In my view, one should start with a consideration of the relevant provisions of the written agreement. The following all appear in the definition section of the agreement:

(a) Clause 1.1.5 defines 'independent contractor' as:

'[T]he Party whose name and details are reflected on page 1 and in the annexure attached to this agreement and shall mean a natural and/or juristic person who is contracted by the SABC to render specific services or to perform a particular task/specific programme etc in return for an agreed contract fee . . . '

(b) Clause 1.1.10 reads:

“Programme” shall mean, where applicable, the specific radio or television programme in terms of which the Independent Contractor will be engaged to render services.'

(c) Clause 1.1.13 sets out the meaning of 'services' as:

'[T]he specific services to be rendered or to perform a particular task/specific programme etc that the Independent Contractor is

engaged to provide to the SABC under and in terms of this Agreement as depicted in the annexure(s) to this Agreement’.

[25] Annexure A of the agreement reads as follows:

‘ANNEXURE A

STATEMENT OF WORK

a) Services to be rendered:

- o Initiate and Cover News stories

- o Planning, Producing, as well as on air presentation for TV news for specialist occasions such as National Days, eg June 16, Sona and Elections

- o Packages for bulletins on some of the Major breaking stories

- o Drive the Editorial directions of such broadcast under guidance of Head of TV News

- o Submit forward planning diaries for above programmes or broadcasts

- o Use of official SABC Vehicles for coverage of news stories

- o Be available to travel for out of town and international broadcasts

- o S&T @ R319 per night will be paid by the SABC and Bed and Breakfast only (Travel and accommodation daily per diem for services rendered)

b) Contract fee to be paid

- o R5780.00

- o Per Shift

c) Performance Standards to be adhered to:

- o Form part of the Newsroom think tank by contributing to the divisions overall editorial strategic direction

- o Avail yourself for live

analysis

d) Division and cost centre:

- o TV NEWS

- o 1479

e) Start date and End date of the Agreement:

- o 01/04/2016

o 31/03/2018

f) Division specific requirements:

o

g) Possible misconduct as a basis to terminate the independent contractor's agreement:

o Bringing the SABC into disrepute;

o Negligence in the execution of your duties;

o Dishonesty;

o Conflict of Interest;

o Disruption of Relations;

o Assault;

o Reporting late for duty;

o Not reporting for duty;

o Committing a common/statutory law offence having an impact on the contract and services rendered/to be rendered'

[26] Clause 2.5 provides:

'The annexures to this Agreement form an integral part hereof and words and expressions defined in this Agreement shall bear, unless the context otherwise requires the same meanings in such annexures which do not themselves contain their own definitions.'

[27] Under the heading 'Introduction', clause 3.1 records the following:

'The SABC wishes to engage the Independent Contractor to provide the Services on the basis and due to the representation made by the Independent Contractor that the Independent Contractor has the necessary ability, experience, resources and the capacity to provide the Services.'

[28] Clause 5 sets out the obligations of the independent contractor. Clauses 5.1, 5.2 and 5.3 read as follows:

'5.1 The Independent Contractor shall provide the Services strictly in accordance with the Terms and Conditions contained in this Agreement and reflected in the Annexure.

5.2 The Services shall be performed in consultation, co-ordination and under the direction of the Principal Client or his/her duly appointed nominee. It is understood that there will be no supervision and control by the Principal Client during the course of delivery of the Services by the Independent Contractor.

5.3 The Principal Client will provide a brief of the obligations to be performed, manage the outcomes and provide adequate feedback on the outcome thereon.'

[29] Clause 5.4.3 prohibits the independent contractor from ‘conduct, behaviour, utterances and the like that, in the reasonable opinion of the SABC, has the effect of bringing the name of the SABC into disrepute or impacting negatively on the relationship with colleagues and the Principal Client’. Significantly, in the agreement in question, under a heading that states ‘for office use only’ the following appears:

‘Service to be Rendered: PLANNING & CONTRIBUTING EDITOR

Programme: NEWS

Nature of Contribution: PLANNING & CONTRIBUTING EDITOR

Method of Payment: MONTHLY IN ARREARS

Contract Period: 01/04/2016-31/03/2018’

[30] Clause 13.2 of the agreement provides:

‘Should either Party terminate this Agreement and the other dispute the terminating Party’s right to do so or in instances where the SABC conducts an Investigation into irregularities allegedly conducted by the independent contractor, the SABC shall have the right, pending determination of the dispute or the outcomes

of the Investigation, not to schedule the Independent Contractor to render any Services and may engage/use another service provider to continue with the Services.’ (My emphasis.)

[31] The clause on which particular reliance was placed by the SABC, is clause 3.4 which reads as follows:

‘The Independent Contractor will be engaged on an “as and when required” basis.’

[32] It should be borne in mind that it had been the practice, both in terms of the present agreement and the one preceding it, for Mr Mvoko to be scheduled to perform tasks in terms of annexure A. The scheduling appears to have been regular, subject of course to necessary and lawful changes to programmes that fell within management’s prerogative. The part of the agreement under the heading ‘for office use only’ contemplates services to be regularly provided by Mr Mvoko as a planning and contributing editor. The annexure, which the agreement specifically recognises as an integral part thereof, clearly contemplates that Mr Mvoko would ‘form part of the Newsroom think tank by contributing to the divisions overall editorial strategic direction’. This is hardly a description that supports the SABC’s interpretation in relation to the ‘as and when required’ clause. Clause 13.2, referred to in para 30 above, which gives the SABC the right ‘not to schedule’ the independent contractor, pending a dispute in relation to the right to terminate the agreement, is in line with that construction. One might rightly ask why one would need to terminate rather than just not schedule an independent contractor’s services. It is the equivalent of ‘do not call us, we will call you’, or, perhaps more accurately, ‘do not call us and we will not call you’. All of this explains the practice in relation to the use by the SABC of Mr Mvoko’s services, both in

relation to the preceding and present agreement. The 'as and when required' clause has to be read in the restricted manner referred to in the second sentence of this paragraph. The principle of reading the clause within the overall context and contemplating its purpose and business efficacy when applied to the clause presently under consideration renders that result.[2]

- [33] In light of the conclusion in the preceding paragraph there is no basis for the warning sounded by the SABC to courts to avoid imposing themselves within the SABC boardroom. If anything, for reasons that are set out hereunder, the SABC should be careful not to be a law unto itself. It has to operate within its statutory mandate and, like the rest of us, it has to conduct itself within constitutional parameters.
- [34] The SABC's reliance on clause 13.2 of the agreement read in conjunction with clause 5.4.3 for its right to suspend Mr Mvoko is misplaced. Clause 13.2 requires an investigation into irregularities on the part of the independent contractor pending the conclusion of which the SABC is entitled to suspend. The difficulty regarding that part of the SABC's case is that its conduct, described in detail by Mr Mvoko and which is unrefuted, is what brought it into disrepute. It behaved in a manner reminiscent of an era which we all would much rather forget. It smacks of high-handedness and of a lack of consideration of the SABC's role as a national broadcaster.
- [35] In this respect, regard should firstly be had to the basic values and principles governing public administration set out in s 195 of the Constitution which provides, amongst others, that services must be provided impartially, fairly, equitably and without bias, and that public administration must be accountable.[3] In terms of s 195(2) these principles apply to administration in every sphere of government, organs of state and public enterprises.

The South African Broadcasting System is dealt with in the Act. The following appears at the commencement of Chapter II of the Act:

'This Chapter is of central significance to the Act, as it lays the basis that the South African broadcasting system is owned and controlled by South Africans. The National Government, acting through the Minister, is responsible for the achievement of this purpose and the constitutional mandate of broadcasting policy development. Being empowered to act on behalf of the nation, the Minister has the ultimate responsibility to fulfil certain obligations relating to use, protection and access to broadcasting resources.'

Even more significantly, fundamental principles and interpretations are dealt with at the commencement of the Act where the following

appears:

'This Chapter sets out the fundamental principles and objects of this Act. Freedom of expression and the journalistic, creative and programming independence of the broadcasters and independence of regulation are identified as guaranteed by the Constitution. These principles recognise that the South African broadcasting system comprises public, commercial and

community elements which make use of the radio frequencies that are public property and provides, through its programming, a public service necessary for the maintenance of South African identity, universal access, equality, unity and diversity.’

[36] Section 3(5) of the Act provides, inter alia, that the programming provided by the South African Broadcasting System must:

‘(a) be varied and comprehensive, providing a balance of information, education and entertainment meeting the broadcasting needs of the entire South African population in terms of age, race, gender, religion, interests and backgrounds;

(b) be varied and offer a range of South African content and analysis from a South African perspective;

....

(d) provide a reasonable, balanced opportunity for the public to receive a variety of points of view on matters of public concern;

(e) provide a significant place for programmes produced by the independent production sector.’

[37] The SABC is especially catered for in Chapter IV of the Act. Importantly, s 6(4) which provides a charter for the SABC, reads as follows:

‘The Corporation must encourage the development of South African expression by providing, in South African official languages, a wide range of programming that –

(a) reflects South African attitudes, opinions, ideas, values and artistic creativity;

(b) displays South African talent in education and entertainment programmes;

(c) offers a plurality of views and a variety of news, information and analysis from a South African point of view;

(d) advances the national and public interest.’

Furthermore, s 6(8) provides:

‘The Corporation must develop a Code of Practice that ensures that the services and the personnel comply with –

(a) the constitutional principle of equality;

(b) the equitable treatment of all segments of the south African population;

(c) the constitutional requirement of equitable treatment of all official languages;

(d) the rights of all South Africans to receive and impart information and ideas;

(e) the mandate to provide for a wide range of audience interests, beliefs and perspectives; and

- (f) a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest.’

[38] Section 10(1)(d) of the Act dictates that the public service provided by the SABC must, inter alia, ‘provide significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartially, balance and independence from government, commercial and other interests’.

[39] In *South African Broadcasting Corporation Soc Ltd & others v Democratic Alliance & others* 2016 (2) SA 522 (SCA) (SABC v DA), this court said the following in para 49 about the SABC:

‘It is important to emphasise that this case is about a public broadcaster that millions of South Africans rely on for news and information about their country and the world at large, and for as long as it remains dysfunctional, it will be unable to fulfil its statutory mandate. The public interest should thus be its overarching theme and objective. Sadly, that has not always been the case. Its Board has had to be dissolved more than once and its financial position was once so parlous that a loan of R1 billion, which was guaranteed by the National Treasury, had to be raised to rescue it.’

That case involved the legality of the appointment of Mr Motsoeneng who features in the present case as well.

[40] The highest standards of journalism and of integrity in public administration can rightly be expected of the SABC. The political

interference complained of by Mr Mvoko is, as already pointed out, uncontested. It is inexcusable and rather than rendering Mr Mvoko liable to disciplinary action it calls for an enquiry into the conduct of the SABC in its role as public broadcaster. The article in *The Star* was in the form of a whistle blower exposing the ills at a national institution owned by all of us as citizens. The criticism allegedly

directed at Ms Maseko as a person who was being politically manipulated by others and who responded to political instruction was

based on Mr Mvoko’s experiences at the SABC. His assertions in regard to management at the SABC being politically controlled were not challenged. This court, in *SABC v DA* described the SABC in much the same way as was done in the introductory paragraph of the article in *The Star*.

[41] The long title of the Protected Disclosures Act 26 of 2000 (the PDA) reads as follows:

‘To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith.’

Of course the PDA applies to employees and not independent contractors. However, one might rightfully ask why an independent contractor whose professional independence is threatened by irregular and unlawful conduct at a public broadcaster and who has his own and the public's interest at heart is precluded from exposing irregular and unlawful conduct.

[42] A further problem for the SABC, insofar as the right to suspend is concerned, is that a jurisdictional fact for its exercise is that an investigation has to be conducted. The letter by the SABC suspending Mr Mvoko's services, far from contemplating an investigation, states a conclusion already reached by management in relation to the alleged misconduct and then attempts to qualify it by requesting written representations which is not of assistance to it in relation to the asserted right to suspend. No indication is given of the form of the investigation and how the question of the misconduct would ultimately be adjudicated.

[43] For all the aforesaid reasons it is clear that the court below erred in its approach to the application by Mr Mvoko and that the appeal is liable to succeed. The appropriate order is one that should not be beyond what is contemplated by the agreement in question.

[44]

1. The application for leave to appeal is granted and the respondent is ordered to pay the applicant's costs.

M S Navsa

Acting Deputy President

Appearances:

Counsel for Appellant: L Sisilana (with him T Ngcukaitobi)

Instructed by:

Bowman Gilfillan Inc, Johannesburg

McIntyre & Van Der Post, Bloemfontein

Counsel for Respondent: S Du Toit SC (with him S K Hassim SC and S Kangangarara)

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Phatshoane Henney Attorneys, Bloemfontein

[1] Established in terms of the provisions of the Independent Communications Authority of South Africa Act 13 of 2000.

[2] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 26.

[3] Section 195(1)(d) and (f) of the Constitution.

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