IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION (1) OF THE SPECIAL INVESTIGATIONS UNIT AND SPECIAL TRIBUNALS ACT 74 OF 1996

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: GP01/2021

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED First Applicant

SPECIAL INVESTIGATING UNIT Second Applicant

and

FORMER CHIEF OPERATIONS OFFICER:
GEORGE HLAUDI MOTSOENENG First Respondent

FORMER ACTING CHIEF FINANCIAL OFFICER:
AUDREY RAPHELA Second Respondent

FORMER GROUP EXECUTIVE: SPORT:
SULLY MOTSWENI Third Respondent

FORMER GROUP EXECUTIVE: RADIO:
LESLIE NTLOKO Fourth Respondent

FORMER GROUP EXECUTIVE: TELEVISION:

NOMSA PHILISO	Fifth Respondent
FORMER GROUP EXECUTIVE: NEWS AND CURRENT AFFAIRS: SIMON TEBELE	Sixth Respondent
FORMER GROUP EXECUTIVE: CORPORATE AFFAIRS: BESSIE TUGWANA	Seventh Respondent
FORMER GROUP EXECUTIVE: COMMERCIAL ENTERPRISES: TSHIFIWA MULAUDZI	Eight Respondent
FORMER GENERAL MANAGER: OPERATIONS: NOMPUMELELO PHASHA	Ninth Respondent
FORMER ACTING GROUP CHIEF EXECUTIVE OFFICER: JAMES AGUMA	Tenth Respondent

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JUDGMENT

Summary: Administrative review –- whether an organ of State had a policy authorising its functionaries to make a decision and a budget to implement the decision - whether such a decision is reviewable in terms of the principle of legality – whether the debt in respect of which the applicants seek to hold the respondents personally liable to the first applicant has become prescribed terms of s 11(d) read with s 12(3) of the Prescription Act 68 of 1969.

MODIBA J:

INTRODUCTION

[1] The applicants seek to review and set aside two decisions the South African Broadcasting Corporation (SABC) made on 24 July and on 5 September 2021 to award R50,000 to each person identified as a music legend. They also seek an order declaring that the sum of R2,425,000 the SABC paid to 53 music legends pursuant to the impugned decisions unlawful and setting them aside. They also seek as just and equitable relief an order that the first to tenth respondents repay R2,425,000 to the SABC jointly and severally, the one paying the other to be absolved.

[2] Several respondents are opposing the application. They have raised several points *in limine*. They also oppose the review application on the merits. Tugwana abides the Tribunal decision regarding the review relief. She only opposes the just and equitable relief sought by the applicants.

[3] For convenience, I simply refer to the opposing respondents as the 'respondents'. Where I need to make individual reference to a respondent or to distinguish between respondents, I use their names. Similarly, I collectively refer to the applicants as such. I individually refer to them by their names.

[4] On 10 March 2022, the applicants filed a supplementary founding affidavit placing a record of the impugned decisions (the record) before the Tribunal and supplementing the case set out in their founding affidavit. They seek condonation for the late filing of this affidavit. No respondents would suffer prejudice as a result of the admission of this affidavit because those respondents who had already filed their answering were afforded an opportunity to file supplementary answering affidavits. Some of them did.

[5] Mulaudzi and Phasha seek condonation for the late filing of their answering affidavit. Their condonation request is not opposed. The request is granted. Mulaudzi and Phasha have also instituted a counter application to set aside the report on the

forensic investigation the Special Investigating Unit (SIU) conducted into the impugned decisions (the SIU report). I determine the counter application at a pertinent juncture in this judgment.

[6] Motsoeneng seeks condonation for the late filing of his heads of argument. The applicants do not oppose the request. Condonation for the late filing of Motsoeneng's heads of argument is granted.

[7] After the Tribunal heard oral argument in this matter, on 17 March 2022, Motsoeneng filed a supplementary answering affidavit, purportedly in response to my question regarding the source of funds for the music legends project. The applicants oppose the admission of this affidavit. They have also dealt with the merits of the issues raised in it. I did not invite Motsoeneng to file a further affidavit on the source of funds. This issue is one of two grounds of opposition he relies on. He has dealt with it extensively in his answering affidavit. The information he addressed in the supplementary answering affidavit has always been at his disposal. He provides no reason why he did not detail it in his answering affidavit. The supplementary answering affidavit does not take his defence further. It only increased the prolixity of the papers.

[8] I only admit the affidavit because no party stands to be prejudiced its admission. However, to express my displeasure at Motsoeneng burdening the Tribunal with further papers, it is appropriate that he pays to the costs the SIU incurred as a result of the filing of this affidavit.

[9] The applicants seek to strike out identified paragraphs in Mulaudzi and Phasha's answering affidavit. I consider this request at a pertinent point in this judgment.

[10] This judgment is structured as follows. After this introduction, I describe the parties. Thereafter I outline the background. Then, I consider the applicants' request to strike out. Thereafter, I deal concisely with the applicant's basis for the review and the respondents' response. Then I deal with respondents' points *in limine* and the merits of the review. In conclusion, I summarise the key findings made in the judgment. Then, I deal with the question of costs of the review application followed by Mulaudzi

and Pasha's counter application. Thereafter, I provide an explanation for the delay in handing down this judgment. Lastly, I set out the order.

THE PARTIES

[11] The first applicant, the SABC is a state owned company established in terms of the Broadcasting Act.[1]

[12] The second applicant, the SIU is also an organ of state. It is established in terms of s2(1)(a) of the Special Investigating Unit and Special Tribunals Act[2] (the SIU Act). Since the SIU investigated the impugned decisions, it derives *locus standi* from s 4(1)(c) read with s 5(5) of the SIU Act to institute proceedings before the Tribunal or a court of law for any relief to which the SABC is entitled.

[13] The first to tenth respondents are former executive employees of the SABC. At all relevant times when the applicants' cause of action arose, Motsoeneng was employed as the Chief Operating Officer, Raphela as the Chief Financial Officer and Aguma as the Group Chief Executive Officer. In these capacities, Motsoeneng, Raphela and Aguma were also members of the SABC Executive Committee (EXCO). The first to ninth respondents also served as members of the SABC's Operations Committee (OPCOM).

BACKGROUND

[14] The background facts are largely common cause.

[15] The idea that led to the impugned decisions being made was conceived by Motsoeneng. EXCO made the July decision. OPCOM ratified this decision on 5 September 2016 and implemented it. The decision is recorded in a written resolution OPCOM passed on 29 September 2016. It was signed by the SABS's former Deputy Company Secretary, Lindiwe Bayi. The OPCOM resolution approved the impugned

[1] Act 4 of 1999.
[2] Act 74 of 1996.

payments and required that the list of music legends be reviewed to ensure completeness and confirmation of beneficiary details to avoid duplicate payments. It also states that music legends who have been omitted from the list would be managed on a case by case basis if they subsequently approach the SABC.

[16] On 30 September 2016, a business case for the impugned payments was compiled by Motsoeneng as the then Chief Operating Officer, supported by Raphela as the then Chief Financial Officer and approved by Aguma as the then Group Chief Executive Officer. The business case sets out a motivation for the impugned payments. The impugned payments would incentive the music legends for supporting the SABC by compensating music legends who did not receive needle royalties prior to 1996. They would be paid a once off amount of R50,000 each.

[17] Ultimately, only 53 music legends were paid in the sum total the applicants seek to recover in these proceedings.

[18] By December 2016, members of the Board of the SABC who were in office when the impugned decisions were made had signed. In March 2017, an interim Board was appointed. It immediately became seized with several investigations into maladministration at the SABC. It also investigated the impugned decisions.

[19] On 1 September 2017, the President referred to the SIU for investigation allegations of impropriety into the affairs of the SABC under proclamation No R29 of 2017 published in Government Gazette No. 41086 (the Proclamation). The proclamation was amended by Proclamation R.18 of 2018.[3] The impugned decisions are form part of several areas of investigation the SIU investigated as authorised by these proclamations.

[20] The SIU finalized its report in July 2020. It instituted this application in January 2021.

[3] Proclamation R.18 of 2018 published on 6 July 2018 in Government Gazette No. 41754.

THE APPLICANTS' REQUEST TO STRIKE OUT

[21] The applicants seek to strike out paragraphs 17 to 20 and 27 to 50 from Mulaudzi and Phasha's answering affidavit because they contain irrelevant and vexatious allegations. In these paragraphs, Mulaudzi and Phasha make various allegations of misconduct against named applicants' attorneys. The relevant attorneys are not party to this application. They act on the instructions of the applicants. The Legal Practice Council is the appropriate body to investigate the allegations levelled against the applicants' attorneys. For these reasons, for the purpose of the present application, these paragraphs are irrelevant and vexatious and stand to be struck out with punitive costs.

[22] The applicants also seek a striking out of paragraph 91 of Mulaudzi and Phasha's answering affidavit because the allegations made in this paragraph are vexatious and spurious. In this paragraph, Mulaudzi and Phasha accuse the SIU investigator, Ms Dreyer (Dreyer) of racism for wanting to invalidate the classification as music legends of the artists who are subject to this application.

[23] The applicants are impugning the July and September decisions to implement the music legends project (MLP) and to recover payments made under this project using SABC funds. Dreyer is not a party to these proceedings. The relief the applicants seek has not been shown to personally benefit Dreyer in anyway. Therefore, it is spurious and vexatious to allege that she seeks to invalidate the classification of the relevant artists as music legends. Mulaudzi and Phasha's allegations against Dreyer fall to be struck out.

GROUNDS OF REVIEW

[24] The applicants allege that the SABC did not have a policy on which the impugned decisions were based. By making the impugned decisions, the respondents collectively acted in flagrant disregard of the SABCs internal policies, recklessly and grossly negligent in the performance of their duties and abused their power as SABC executives. As a result, the SABC incurred wasteful and fruitless expenditure. Hence, the applicants seek to recover this money jointly and severally from the respondents.

[25] The applicants further allege that the payments made to the music legends were not approved by the Board of the SABC which approves the SABC's annual budget or in the SABC's operational plans and to whom expenditure of that nature (not based on policy and not budgeted for) is deferred. The SABC did not benefit from the MLP. Other than the fact that an expectation had been raised that the payment would be made to music legends when an announcement was made on the SABC breakfast show, there was no sound business proposition for the project. The financial implications of the impugned decisions had not been considered. Consequently, the loss to the SABC occasioned by the impugned decisions cannot be justified.

[26] There was also no agreed criteria for the identification of the music legends.

[27] For these reasons, the applicants contend that the impugned decisions were unlawful, irrational and arbitrary.

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[28] The respondents have raised a number of points *in limine* which I detail below. As already mentioned, save for Tugwana, the respondents also oppose the application on the merits.

[29] Several respondents contend that the MLP was consistent with the policies of the SABC prevailing at the time. Further, Motsoeneng raised funds for the MLP from MultiChoice as authorised by the Broadcasting Act. Therefore, the payments were not a loss to the SABC.

[30] Tebele contends that when the impugned decisions were made, the OPCOM terms of reference had not been approved.

[31] In the event that the event that the impugned decisions are set aside, the respondents set out various reasons why they should not be held personally liable for any loss to the SABC occasioned by the impugned decisions.

POINTS *IN LIMINE*

Whether the despondent to the applicants' affidavits has personal knowledge of the facts on which she relies

[32] Several respondents contend that the deponent to the applicants' affidavits, Dreyer, lacks personal knowledge of the facts on which she relies, particularly those relating to the SABC, the SABC's policies and/ or the SABC delegations flow chat.

[33] This point *in limine* is frivolous and lacks merit. Dreyer interviewed SABC employees and Board members who have personal knowledge of the facts. She obtained sworn statements from them. She draws the allegations she makes in her affidavits from their depositions. It is clear from Dreyer's affidavits that she familiarised herself with relevant SABC's policies. She also attests to this fact. As to whether the Tribunal agrees with the conclusions she seeks to draw from the relevant policies is for the Tribunal to decide.

[34] Therefore, this point *in limine* falls to be dismissed.

Locus Standi

[35] Under the heading 'APPLICANT LACKS LOCUS STANDI', Mulaudzi and Phasha complains that Dreyer lacks *locus standi* because "she also commissioned the affidavits used in the investigation and thus a conflict of interest." (sic) Therefore, she should not have commissioned her own and the affidavits of those she interviewed during the investigation. They urge the Tribunal to disregard the relevant affidavits.

[36] The complaint that Dreyer lacks *locus standi* is misplaced. She is not an applicant in this application and therefor does not require legal standing to bring the application. She played two roles in this application. She investigated the impugned decisions on behalf of the SIU. During the investigation, she interviewed witnesses and obtained sworn statements from some of the witnesses, which she commissioned. She also deposed to the applicants' affidavits.

[37] The complaint that Dreyer should not have commissioned the affidavits of those she interviewed lacks merit. Regulation 7(1) of the Regulations Governing the

Administration of Oaths or Affirmations[4] provides that a commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest. Regulation 7(2) provides that "Sub regulation (1) shall not apply to an affidavit or declaration mentioned in the Schedule". The Schedule, at paragraph 2, provides that the following declarations are exempt from the provisions of Regulation 7(1): "a declaration taken by a commissioner of oaths who is not an attorney and whose only interest therein arises out of his employment and in the course of his duty." Dreyer falls within this category – she is not an attorney. Her only interest in the matter arises out of her employment and in the course of her duty as a forensic investigator for the SIU. As such, she is permitted to commission the affidavit of the informants she interviewed during the SIU investigation.

[38] It is incorrect that Dreyer commissioned the affidavits in which she is a deponent.

[39] Therefore, this point *in limine* falls to be dismissed.

Whether the application is inappropriate

[40] Motsoeneng contends that the application is inappropriate for various reasons, addressed below.

[41] He contends that the application is still born because he was not acting in his personal capacity but on behalf of the SABC. Raphela raised a similar issue. This is an issue that goes to the merits of the application and will be considered as part of the merits.

[42] Motsoeneng also contends that the matter does not fall within the mandate of the SIU. Further, he complains that the SIU may not bring a self-review in respect of a decision made by the SABC. Raphela raises the same issue. These contentions lack merit. The SIU has the power within the framework of its terms of reference as set out in Proclamation R.29 read with Proclamation R.18 of 2018, s 2(1)(a)(i), 2(2), 4(1)(c) and 5(5) of the SIU Act, to investigate whether the SABC suffered any monetary loss

[4] Published under GN R1258 in Government Gazette 3619 of 21 July 1972.

a result of the impugned decisions and if so, to institute civil proceedings for any relief to which the SABC is entitled.

[43] Lastly, Motsoeneng has raised contradictory complaints regarding the applicants' reliance on the Promotion of Just Administrative Act[5] (PAJA). In his answering affidavit, Motsoeneng complains that the applicants have not cited the PAJA grounds of review relied on. Yet, in his heads of argument, he contends that this being a self-review, on the authority in *Gijima*[6], the applicants may not bring the application in terms of PAJA.

[44] This issue is stale. Despite praying for a review in terms of PAJA, alternatively the principle of legality in their notice of motion, in paragraphs 37 and 38 of their founding affidavit, with reference to *Gijima* and *Buffalo City*[7], the applicants make it clear that since this is a self-review, they may not rely on PAJA. Therefore, it is common cause that the applicants solely rely on the legality principle.

Irregular amendment of the application

[45] Raphela incorrectly contends that when the applicants filed their supplementary founding affidavit clarifying that whereas they had brought the review in terms of PAJA, alternatively under the principle of legality, on the authority in *Gijima*, they are now bringing it under the principle of legality, effectively, they amended their application, but failed to follow the appropriate procedure to amend their notice of motion.

[46] The applicants sought no amendment. They were simply clarifying that they are now only proceeding in terms of the legality principle being the only avenue available to them in a self-review application.

[47] This point *in limine* falls to be dismissed.

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[5] Act 3 of 2000.

[6] *State information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC)

[7] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) paragraph 111 (*Asla Construction*) and the authorities cited there. Also see *Gijima* fn 8 at paragraph 38.

Irregular filing of the record

[48] On 25 March 2021, Raphela filed a notice in terms of Uniform Rule 30/30A raising various complaints. The issues she raised in the notice have become academic. She has not pursued the relief she is entitled to in terms of Uniform Rule 30/30A. The parties have fully pleaded and filed heads of argument. The application is adjudicated on the basis of all the papers filed as well as the parties' oral submissions.

[49] This point *in limine* falls to be dismissed.

Misjoinder of the music legends

[50] Various respondents complains about the misjoinder of the 53 music legends who were paid by the SABC pursuant to the impugned decisions. The misjoinder of the Music Legends was determined separately and disposed of in a judgment delivered in 15 November 2021.

Whether the applicants brought the application within a reasonable time

[51] Motsoeneng, Motsweni, Raphela and Tugwana complain that the applicants have delayed unreasonably in bringing the application. For this reason alone, the application ought to be dismissed.

[52] The applicants are asking the Tribunal to overlook the delay.

[53] The unreasonable delay rule applies to reviews brought under the principle of legality. An applicant is required to institute a review within a reasonable time. In *Buffalo City*, the Constitutional Court ruled that whether an applicant delayed to bring a review application is determined following a two stage process.

[54] Firstly, the court determines whether the delay is unreasonable or undue. This is a factual enquiry in which all the relevant circumstances are considered and the court makes a value judgment. The Court will consider the explanation for the delay. The explanation should cover the full period of the delay. In the absence of any or a full explanation, the delay will invariably be unreasonable.

[55] Secondly, if the delay is unreasonable, the Court must determine whether it should exercise its discretion to overlook the delay. The Court's discretion must be exercised based on objective facts. The Court will consider relevant factors such as the potential prejudice to affected parties, the consequences of setting aside the impugned decision, the nature of the impugned decision and the conduct of the party bringing the review.

[56] Motsoeneng contends that the delay is unreasonable because the applicants have not fully explained it. The dates on which the Board engaged on the issues in this application have not been given. Timeframes for the preparation of the forensic reports commissioned by the Board are not given. It is not stated when the internal investigations were completed. Motsoeneng also complains that the delay is prejudicial. It is five years since the MLP was implemented and three years since the investigation commenced in July 2017. Yet, he fails to explain the prejudice he has suffered as a result of the delay.

[57] Motsoeneng further contends that no evidence showing that the SIU appeared before the Parliamentary Standing Committee on Public Account is given. The SIU fails to state why appearing before that committee delayed the application. The suggestion that the SIU investigated is complex matters is vague. It is its problem that it could not obtain evidence. The conclusion that the SIU competed its investigation in July 2020 is not supported by any activities and times during which the activities were undertaken.

[58] The omissions Motsoeneng complains of indicate the SABC's failure to take appropriate action. The Tribunal may not simply uphold this point *in limine* because the SABC failed to take appropriate action. It has the discretion to overlook the delay. The SIU's statutory mandate is to step into the shoes of an organ of state under these circumstances. It may not be non-suited simply because the organ of state with *locus standi* failed to institute legal proceedings. To hold so would frustrate the objectives of the SIU Act.

[59] The SIU was only authorised to investigate the impugned decisions on 1 September 2017 when Proclamation R.29 was issued. According the Dreyer, as the

investigation into the affairs of the SABC was vast, it was split into two. The second phase, in which the MLP fell, only commenced in May 2018. She started gathering evidence and interviewing key informants. She battled to locate key informants due to the long time lapse since the impugned decisions were made. She obtained information from the last informant, Mulaudzi on 10 April 2020. She then proceeded to evaluate the evidence and compiled the SIU report. She finalised the report on 6 July 2020. Only then did the SIU establish the facts on which it relies on in this application. The SIU proceeded to instruct its attorneys to consider the papers for the purpose of seeking the relief prayed for in the notice of motion. The applicants instituted the application on 21 January 2021.

[60] The SIU has given the full explanation for the delay in bringing the application. The voluminous nature of Dreyer's report attest to the large extent of her investigation into the impugned decision. The report is long, justifying the long period Dreyer took to gather evidence and interview witnesses. To expect the applicants to detail every step Dreyer took during the investigation and its duration would unduly add to the prolixity of the papers in the application. It would not serve any other valuable purpose.

[61] The SIU is authorised to bring this application in its own right and in its name. Dismiss the application due to the SABC's failure to institute the review with the necessary promptitude is not in the interest of justice, more so that as I reason below, until reviewed and set aside, the impugned decisions remain valid and enforceable in favour of the music legends who are yet to be paid.

[62] There are no objective facts on which to find that the applicants acted in bad faith by delaying to bring the application. On the other hand, the alleged conduct of the applicants implicates the constitution. S172(1)(a) of the Constitution requires that when a court decides a constitutional matter within its power, it must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Only 53 of the 180 Music Legends on the list of the music legends have been paid. If the lawfulness of the impugned decisions is not enquired into, the SABC may be obliged to honour payments to the remaining music legends on the list. The alleged unlawfulness would be perpetuated, resulting in further loss to the SABC. Therefore, notwithstanding the unreasonableness of the delay, the lawfulness of the

impugned decisions ought to be looked into to recover money lost to the SABC as a result thereof and to prevent further loss to the SABC,

[63] The adverse effect of the delay has not been demonstrated. The delay is not so inordinate that key evidence has been lost. The six months' period the SIU attorney took to bring the application was not unreasonable given the large volume of Dreyer's report. This point *in limine* falls to be dismissed.

Prescription

[64] The parties agree that the applicants' monetary claim constitutes a debt as envisaged in Chapter 3 of the Prescription Act.[8] In terms of s 11 (d), the prescription period for a debt is three years. Before a debt can be deemed to be due and prescription could start running, s 12(3) requires the creditor to have knowledge of the facts from which the debt arose.

[65] Failure to appreciate the consequences that flow from such knowledge does not interrupt prescription.[9] S 12(3) does not require the creditor to have any knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that might be drawn from the facts from which the debt arose.[10] Knowledge that the debtor's conduct is wrongful and actionable is knowledge of a legal conclusion, not one of a fact.[11] S 12(3) does not require a declaration of invalidity to be made in terms of s 172(1)(a) of the Constitution before prescription starts running.

[66] As contended by Tugwana, the applicants' contention that the Board members who were in office when the impugned decisions were taken and implemented had no knowledge of the unlawfulness of the impugned decisions because they started resigning in October 2016 and had all resigned by December 2016, leaving the respondents and members of EXCO in control of the affairs of the SABC, does not sustain its defence to this point *in limine.*

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[8] Act 68 of 1969

[9] *Yellow Star Properties 1020 (Pty) Ltd v MEC Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) paragraph [37].

[10] *Mtokonya V Minister of Police* 2018 (5) SA 22 (CC) paragraph [32] and [36].

[11] *Mtokonya* fn38 at paragraph [44] – [45].

[67] A new interim Board was appointed in March 2017. It ordered a forensic investigation into the impugned decision. It was furnished with a report on the investigation in August 2017. The SABC acquired knowledge of the unlawfulness of the impugned decisions and consequently of the payments to the music legends in August 2017 when it was furnished with the forensic investigation report. The forensic report states that the decision to make the payments to the music legends was irregular and breached the PFMA and OPCOM had to be held accountable.

[68] The content of the forensic report was discussed at the meeting of the SABC Group Exco on 14 September 2017. In light thereof, the SABC EXCO resolved that no further payments be made to the music legends. Accordingly, the SABC was aware of both the identity of the debtor and the facts from which the debt arose at the very latest by 14 September 2017. From 3 August and at the latest on 14 September 2017, the prescription period started running in respect of the debt arising from the payments made to the music legends. Consequently, the debt became prescribed on 13 September 2020. The SIU only launched this application in January 2021, over three years after this date.

[69] The SIU's contention - that it does not base the application on the findings from the SABC investigation but on the findings from its own investigation which were made in 6 July 2020 when Dreyer finalised her report, only then did it have the minimum facts required to bring this application – is unsustainable.

[70] On the authority in *Kim Diamonds*[12], the SIU as a representative applicant in terms of s 4(1)(c) read with s 5(5) of the SIU Act is only entitled to the relief to which the SABC is entitled. Similarly, the defences a respondent has against the SABC may be raised against the SIU. To demonstrate the sound basis of this principle, it would be absurd in these proceedings to declare the debt to have prescribed against the SABC but not to have prescribed against the SIU given that the SIU is only entitled to the relief that the SABC is entitled to. The claim having prescribed as against the SABC, the SABC is not entitled to any relief. Therefore, the SIU is also not entitled to any relief in respect of the claim arising from the impugned decisions.

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[71] Therefore this point *in limine* stands to be upheld.

THE MERITS

[72] Notwithstanding the finding that the applicants claim to recover the impugned payments from the first to tenth respondents has become prescribed, as already stated, the alleged unlawfulness of the impugned decisions remains live.

[73] I deal with the merits of the review under the following subheadings:
73.1 The constitutional, legislative and regulatory framework relied on by the parties
73.2 Lack of policy authorizing the impugned decisions
73.3 OPCOM and EXCO's lack of authority to make the impugned decisions
73.4 Lack of criteria for the determination of Music Legends
73.5 Lack of a budget for the MLP.

The constitutional, legislative and regulatory framework

[74] The parties rely on the constitutional, legislative and regulatory framework set out below.

The Constitution

[75] In terms of s 2 of the Constitution of the Republic of South Africa, 1996 (the Constitution), the Constitution is the supreme law of the Republic. Any law or conduct that is inconsistent with it is invalid. The obligations it imposes must be fulfilled.

[76] S 195 makes provision for basic values and principles that govern public institutions such as the SABC. They include of a high standard of professional ethics, efficient, economic and effective use of resources and accountable public administration. S 195 expressly requires the promotion and maintenance of these constitutional values.

[77] The SABC is an organ of state as contemplated in s 239 of the Constitution

The Public Finance Management Act

[78] The SABC is also a public entity listed in Schedule 2 of the Public Finance Management Act[13] (PFMA). In terms of s 46, the provisions of the PFMA apply to all public entities listed in Schedule 2 or 3. In terms of s 49, every public entity must have an authority which must be accountable for the purposes of the PFMA. If a public entity has a Board or other controlling body, that Board or controlling body is the accounting authority for that entity. If it does not have a controlling body, the chief executive officer or the person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority.

[79] In terms of s 51(1) an accounting authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure which does not comply with the operational policies of the public entity. In terms of s 56 (1), the accounting authority for a public entity may in writing delegate any of the powers entrusted or delegated to the accounting authority in terms of this Act to an official in that public entity; or instruct an official in that public entity to perform any of the duties assigned to the accounting authority in terms of the PFMA.

[80] In terms of s 57 (1), an official in a public entity must:

80.1 ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;

80.2 ensure the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;

80.3 take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

80.4 comply with the provisions of the PFMA Act to the extent applicable to that official, including any delegations and instructions in terms of s 56;

80.5 ensure the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility.

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[13] Act 1 of 1999.

The Broadcasting Act

[81] S 2 provides for the objects of the Act. These include the establishment and development of a Broadcasting policy in the Republic. In the public interest to amongst others safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa. S 6 makes provisions for the Charter of the SABC. The SABC Charter provides for the broad National Policy Framework formulated by Parliament, with which the SABC must comply. S 8 provides for the objectivities of the SABC in very broad and general terms, while s 8A provides for the conversion of the Corporation that was established in terms of Act 73, 1976. It is the provision in terms of which the SABC is deemed to be a public company incorporated in terms of the Companies Act.

[82] S 10 provides for the regulation of the public service provided by the SABC, which includes the enrichment of the cultural heritage of South Africa by providing support for traditional and contemporary artistic expression. S 12 provides for the composition of the Board. It consists of twelve non-executive members. In terms of S 10(1)(f), the Group Chief Executive Officer, the Chief Operating Officer and the Chief Financial Officer or their equivalents are the executive members of the Board. In terms of s 14, the affairs of the SABC are administered by an executive committee (EXCO) consisting of the Group Chief Executive Officer, Chief Operating Officer and Chief Executive Officer and no more than 11 other members.

[83] The EXCO is accountable to the Board. The EXCO must perform such functions as may be determined by the Board. In terms of s 26, the SABC may engage such officers and other employee's as it may deem necessary for the attainment of its objects, and may determine their duties and salaries, wages, allowances or other remuneration and general conditions of service.

The SABC Board Charter

[84] On 26 April 2016, the SABC Board, as it was constituted at the time, approved the SABC Board Charter and its implementation. The purpose of the Board Charter as set out in Clause 3 includes setting out the vision, mission, roles and responsibilities of the Board; ensuring that all Board members are aware of their collective and

individual duties and responsibilities; ensuring that Board members are aware of various pieces of legislation; regulations; and policies affecting their conduct; ensuring that the principles of corporate governance are applied in their dealings in respect of, and on behalf of SABC; and generally regulating the parameters within which the Board would operate.

[85] In terms of Clause 8, individual directors and the Board as a whole, both executive and non-executive carry full fiduciary responsibility towards the SABC in terms of the Companies Act, the Broadcasting Act and the PFMA. Clause 11, sets out the roles and responsibilities of the executive directors of the SABC, being the Group Chief Executive Officer, the Chief Operating Officer and the Chief Financial Officer.

[86] In terms of Clause 17, although EXCO is not a Committee of the Board as such, it is constituted as, set out in s 14 of the Broadcasting Act and is accountable, in terms of the Memorandum of Incorporation, to the Board of Directors. EXCO and OPCOM function in the terms of reference for these bodies. Save for the executive authority delegated to EXCO, the EXCO terms of reference are similar to those of the Board Committees. EXCO may exercise the level of authority delegated to it by the Board in the Delegation of Authority Framework. The Board has the duty to monitor the exercise of such authority by EXCO.

[87] The terms of reference for each committee set out the purpose of each committee, its scope, roles, duties, main responsibilities as well as the composition of each committee.

The Delegation of Authority of the Framework

[88] The Delegation of Authority of the Framework (DAF), is another important instrument in the regulatory framework governing the operations of the SABC. It sets out parameters within which decision-making at all levels of the SABC is to be undertaken in order to promote effective and efficient governance within the SABC. The general principles of delegation of authority, contemplated in this document are captured in Clause 5. It sets out the principles of governance in terms of which, DAF was formulated and which inform the delegation of authority by the Board. The

authority delegated in terms of DAF shall be exercised only in connection with the management functions and within the scope of responsibility of each employee and/or committee subject to the laws, policies, practices and governance parameters of the SABC.

[89] Although the DAF seeks to create structured decision-making at all levels of the SABC, it is an essential part of the risk management framework of the corporation. Generally, individuals or forums empowered to exercise any decision-making authority in terms of the DAF must demonstrate, prior to exercising such authority, that they have fully considered the risks inherent in their proposed decision, that they have taken all reasonable steps to ensure that such risks are appropriately mitigated and that they are acting in the best interests of and for the sole benefit of the Corporation.

[90] The applicants specifically rely on the DAF provisions set out below.

> "53. INDIVIDUAL ACCOUNTABILITY AND RESPONSIBILITIES FOR RISK MANAGEMENT
>
> 5.3.1 The delegated authority vested in delegatees in terms of this DAF is vested in each delegatee as an individual such that each delegatee shall be personally and individually responsible for the due exercise of such authority and shall be accountable for the consequences flowing therefrom.
>
> 5.3.2 Where decisions are made by a Committee (e.g. EXCO or its Committee), each member of that Committee, present at the meeting at which the decision was taken and who has not dissented, shall be accountable and liable jointly, separately and in his or her official or personal capacity for the consequences flowing therefrom.
>
> 5.3.3 The principles of consultation and voluntary upward referral may be utilized to verify the impact, including the inherent risks, of a particular decision, notwithstanding that the authority level delegated to the employee in terms of this DAF is sufficient to enable the employee to make such decision.
>
> 5.4. FINANCIAL AND FUNCTIONAL LIMITATIONS IN RESPECT OF DELEGATED AUTHORITY
>
> 5.4.1 Any delegation of authority with regard to financial authority, shall, be exercised only within the approved financial limits of authority of the delegatee and within the delgatee's own area of functional responsibility. For example, an

> authority conferred on an employee at scale code 115 to conclude the acquisition of a contract for a TV series shall be restricted to employee's having the functional responsibility to acquire content and shall not be interpreted as a general authority to all employee's at that level.
> 5.4.2…
> 5.4.3 Any decisions regarding matters beyond the delegated financial limits approved in this DAF shall be referred to the next higher level of authority within the Corporation. In the event of any doubt as to whether a position has sufficient authority in respect of a particular transaction, as a general principle, the delegate must use the established principle of voluntary upward referral (see 5.6.3) and refer the matter to the next higher level of decision-making authority in the Corporation. …
> 5.4.4 Budgeting for all projects must be done based on the total of both the internal and external cost element."

The Companies Act

[91] The SIU also relies on several provisions of the Companies Act to hold the respondents liable for the loss to the SABC arising from the impugned decisions. It appears that the SIU's reliance on the Companies Act, raised only in its replying affidavit was prompted by Raphela's defence based on s 79 of the Companies Act. Since this relief has been declared to have prescribed, delving into the relevant provisions would serve no purpose. I only refer to the relevant provisions where necessary when I determine the relevant grounds of review.

Lack of policy authorizing the impugned decisions

[92] The applicants contend that the SABC did not have a policy authorizing the impugned decisions. The decisions are also not authorised in terms of DAF or the OPCOM terms of reference. Therefore, the impugned decisions are unlawful.

[93] In response to these allegations, in paragraph 3 of his answering affidavit, Motsoeneng contends that the MLP served to reward music legends for their support during the liberation struggle by promoting the cultural identity of South Africa and national unity through music and art. He complains that the applicants failed to identify

the SABC policies that were violated when he raised private funding for the project. He further submits that the plight of most music legends has disturbed him. They are desolate. Some die without money and have to be buried as paupers. As a result, he has personally contributed the burial costs of some of the music legends.

[94] He also submits that he has received personal recognition for the MLP. The benefit to the SABC is that it 'was able to shake the world' and trigger a debate on the role of national broadcasters. As a thought leader on local content at the SABC, he was invited to address broadcasters and policy developers in places like India where content providers from all over the world gathered to discuss key features of local content.

[95] Motsoeneng's version on whether there existed a policy within the SABC authorising the MLP is contradictory. On the one hand he denies that such a policy does not exist. On the other hand, he submits that such a policy was not necessary as it is consistent with the constitutional, statutory and policy objectives of the SABC. He has specifically cited s 2 and 10 of the Broadcasting Act. The high water mark of his defence is that he raised funds for the MLP from private sources. I consider the latter defence under a different sub-topic.

[96] Effectively, Motsoeneng has failed to answer the applicants' case regarding the absence of a policy authorising the MLP. His reliance on the Broadcasting Act does not assist him. He submits that he influenced a policy on local content. By implication, despite the existence of the provisions in the Broadcasting Act on which he now relies, until he influenced the policy on local content, such a policy did not exist.

[97] He does not take the Tribunal into his confidence regarding how he influenced the policy. It does not appear that he relies on a written policy because he has attached none to his opposing papers. It is also not his version that he recommended the approval of the policy to OPCOM and EXCO and that they approved it and recommended its approval to the Board which also approved it.

[98] He vaguely references the SABC Board Charter. However, it is not his case that the Board approved the local content policy which he developed or that the Board

approved the MLP. His version is that he 'reported' the MLP to the Board and the Board endorsed it. As I find below, there was no such endorsement by the board.

[99] Motsoeneng has attached what in paragraph 12 of his answering affidavit he refers to as 'a report prepared for this project.' This document is annexure SIU4 to the applicants' founding affidavit. The document is entitled BUSINESS CASE: SA MUSIC LEGENDS. It is from Motsoeneng. It is addressed to Aguma. Raphela is copied on the document. The purpose of the document is to seek approval to pay the music legends who appear on a list attached to the document. It only references the 5 September decision. Nowhere in this document is reference made to the local content policy or any other SABC policy that authorise the impugned decisions. The minutes of the OPCOM meeting held on 5 September 2016 also make no reference to such a policy.

[100] From the version Motsoeneng set out in his answering affidavit. He singularly conceptualised the MLP. The minutes of the meetings at which the impugned decisions were taken support this version. He presented the MLP to OPCOM for approval.

[101] The OPCOM minutes record that 'Motsoeneng stated that the SABC intended 'to pay identified Local Veteran musicians by the end of the week… Members were presented with the names of all musicians that had been selected for the once of payment…'

[102] The other respondents have not presented a version on which the Tribunal may rely, that when the impugned decisions were made, the SABC had a policy supporting the MLP.

Approval by OPCOM, EXCO and the Board

[103] The minutes of the impugned decisions reflect that the MLP was approved by OPCOM. OPCOM lacked the authority to approve the MLP. Item 2.3 of the OPCOM terms of reference prescribe in peremptory terms that:

> "*The Committee must review and recommend to EXCO a three-year Business Plan containing details of operational plans, marketing and financial plans and*

policies prepared in compliance with the objectives of the Corporation and in compliance with the general objectives of the Broadcasting Act. The business plan must cover the service obligations of the corporation together with the pre-determined objectives in this regard."

[104] EXCO never approved a three-year business plan and/ or policy authorising the MLP.

[105] Tebele contends that the OPCOM terms of reference on which the applicants rely was not approved by the Board as required by the SABC Policy Management Framework. Therefore, when it met in September 2016, OPCOM was not properly constituted. The application should be dismissed for this ground alone.

[106] This ground of opposition lacks merit. It rather bolsters the applicants' case. It does not refute it. If OPCOM made a decision under circumstances were it was not properly constituted, then its decision is invalid. Consequently, it is vulnerable to be reviewed and set aside. But, Tebele acknowledges his membership of OPCOM. As contended by the applicants, he attended OPCOM meetings, including the September meeting. At all material times, he generally accepted the validity of the OPCOM terms of reference. At no point did he raise this issue with OPCOM or the SABC and challenge the validity of other decisions taken by OPCOM.

[107] Tebele also contends that he was not present when the decision on the MLP was taken. He also did not vote for the resolution in relation to the MLP. The minutes of the September meeting were only signed on 8 August 2017, essentially to give legitimacy to a decision that was taken unlawfully. But, Tebele fails to deal at all with the July meeting which he attended. The applicants' case is that the MLP was discussed and approved by EXCO at that meeting. At no point did Tebele as a member of OPCOM express his disapproval of the MLP to EXCO when he attended the July meeting. This renders his version that he did not give approval as an OPCOM member at the September meeting unreliable. It is improbable that he would fail to express his disapproval of the MLP at the EXCO meeting but later disapprove of it at the OPCOM meeting.

[108] According to Moodliar who attended and recorded the September meeting, Tebele was in attendance when the MLP was discussed and approved. Raphela was also present even though her name was not recorded. None of the OPCOM members in attendance, including Tebele and Raphela, objected to the MLP.

[109] Raphela denies that she attended the meeting. Even if I accepted her version that she did not attend the meeting where the impugned decision(s) were taken, she is unable to escape a finding that she acquiesced the OPCOM resolution approving the MLP by signing the business case subsequently compiled by Motsoeneng. If the OPCOM resolution did not carry her approval, she probably would not have signed the business case. The high water mark of her version is that she supported the business case because Motsoeneng had represented that he raised 50% of the funds from external donors. As I find below, Motsoeneng had not raised such finds.

[110] Raphela contradicts herself by alleging that she was not yet an employee of the SABC when the impugned decisions were taken. Yet, at paragraph 61 of her answering affidavit, she states that she became an employee of the SABC on 1 February 2016. She became acting Chief Financial Officer on 26 June 2016. This was before the two impugned decisions were taken. The fact that she believed that the project was initiated prior to her joining the SABC does not absolve her from ensuring compliance with the applicable SABC policies and ensuring that indeed donor funds had been raised as alleged by Motsoeneng and paid to the SABC.

[111] In terms of Item 4.2 of the OPCOM, all transactions recommended to EXCO for approval ought to be to in line with the corporate goals. They must fulfil the Broadcasting Act objectives to maximise revenue and increase shareholder value. They must comply with the values of the public broadcasting service. Further, they must be budgeted for. Item 4.2.7 prescribes that when taking decisions that would bind the members of the OPCOM, the SABC should consider the impact of all transactions presented to it on the financial viability of the corporation, including, but not limited to, whether the transaction has been provided for in the budget.

[112] OPCOM did not recommend MLP and its funding to EXCO. EXCO simply noted these items when Motsoeneng presented them to EXCO at the July meeting.

[113] In terms of item 8 of the OPCOM terms of reference, OPCOM is urged to have due regard to the fact that it does not have independent decision-making powers. It makes recommendation to EXCO except where EXCO has authorized the Committee to make a decision and implement it.

[114] Item 4.2 of the OPCOM TOR provides that:

> "*4.2.5 Specific functions of the Committee shall include to:*
> *Ensure that all transactions recommended to EXCO for approval are in line with the corporate goals, that they fulfil the Broadcasting Act objectives to maximise revenue and increase shareholder value, that the comply with the values of the public broadcasting service and had been budgeted for.",*

[115] Item 4.2.7 prescribes that when taking decisions that are binding on the SABC members of the OPCOM should:

> "*Consider the impact of call transactions prevented to it on the financial viability of the corporation, including, but not limited to, whether the transaction has been provided for in the budget*."; and

[116] There is no evidence in the papers filed of record that the provisions of OPCOM TOR refer to above were complied with.

[117] The resolution passed by OPCOM is not a directive that duly authorise the MPL. Such a directive may only be issued by the company secretary when authorised by the Board. It is not the respondents' case that the OPCOM resolution meets these requirements.

[118] Ultimately, Motsoeneng and Raphela resort to DAF while Mulaudzi, Phasha and Aguma solely rely on DAF. The fact that the amount to be spent to pay 180 music legends fell within the SABC's executives delegated authority in terms of DAF is of no moment. Even if the cost of the MLP fell within the authority delegated to the SABC executives, according to Krish, DAF regulates the delegation of authority which is derived from the approved policies of the SABC. No power derives from DAF itself.

The fact that in terms of DAF, the SABC had delegated authority to approve transactions for a stated threshold, the SABC executives may not simply approve any transaction. The transaction ought to be authorised by a prevailing SABC policy and approved as part of the SABC annual plan and budget. Failing which, it had to be referred to the Board. As I find below, no such referral was made.

[119] Clause DAF E-13 on which Mulaudzi, Phasha and Aguma rely, specifically applies to operational expenditure. It is not the respondents' case that the impugned payments were made in respect of operational expenditure. Thus, even for this reason, the payments were made contrary to DAF and thus not authorised.

Lack of criteria for the determination of Music Legends

[120] The applicants contend that music legends who would receive payment were arbitrarily identified as there is no objective criteria to determine who is a music legend. Therefore, the impugned decisions were arbitrary and unreasonable as no reasonable executive would have made a decision on this basis.

[121] Motsoeneng and several other respondents contend that the criteria were clear. Musicians whose music SABC radio stations played, who did not receive needle royalties prior to 1996 would be rewarded through the MLP.

[122] The minutes of the meetings at which the impugned decisions were made do not reflect that objective criteria were developed, approved and used to identify the music legends. In fact, it appears that a list of identified music legends had been prepared prior to the impugned meetings being held. OPCOM only raised questions regarding how music legends who are not on the list would be dealt with if they presented later.

[123] Mulaudzi, Phasha and Aguma's contention that the music artists who were listed as music legends are music legends by reference to the awards they have received further demonstrates the arbitrary nature of the decision. It is not their case that receipt of an award is the criteria used to identify music legends and that all the

music artists on the list have received music awards. They have only listed a few music artists who have received awards.

Lack of a budget for the MLP

[124] Again, Motsoeneng has not specifically answered to the applicants' case that the SABC did not have a budget for the MLP. He avoids the allegation by alleging that he raids funds from MultiChoice for the project.

[125] He contends that he was authorised by ss 10(2) and 24 of the Broadcasting Act to raise funds from private sources. These provisions provides as follows:

> *"10(2) The public service provided by the Corporation may draw revenues from advertising and sponsorships, grants and donations, as well as licence fees levied in respect of the licensing of persons in relation to television sets, and may receive grants from the State."*

> *"Accounts*
> *24(1) The Corporation must keep proper account of all moneys received or expended by it and of all its assets, liabilities and financial transactions.*

> *(2) The Corporation must as soon as practicable after the end of each financial year, prepare statements of accounts and a balance sheet showing in appropriate detail the revenues and expenditure of the Corporation during that financial year, and its assets and liabilities as at the end of each financial year.*
>
> *(3) The Corporation must in its accounts referred to in subs (2) reflect separately the accounts of the public and commercial services.*
>
> *(4) The Board must ensure that the Corporation complies with the Public Finance Management Act in relation to accounting procedures by public entities."*

[126] Motsoeneng further contends that it is not the applicants' case that he breached any of these provisions when he raised funds from a private source for the MLP. The Tribunal is unable to rely on this version for several reasons.

[127] Motsoeneng purportedly raised R5 million from MultiChoice for the MLP. Yet, it would cost the SABC R9 million to pay R50,000 to all 180 Music Legends who were identified. There was an acknowledgment that there could be music legends who have not been identified. They would be dealt with on a case by case basis. Back up artists would also receive a financial reward at a later stage. Therefore, more than R9 million would be required to fund the MLP. Motsoeneng is silent on how the funding shortfall would be addressed.

[128] Notably, the minutes of the EXCO meeting note that Motsoeneng reported to EXCO that 50% of the funds for the MLP would be sourced from external sources. This is also Raphela's version. EXCO and Raphela do not seem to have been concerned about where the balance of the funds required would come from. Yet, EXCO simply noted the project while Raphela expressly supported the MLP business case.

[129] Receipt of the MultiChoice funds does not reflect on the SABC's financial statements for the relevant period. This is confirmed by the SABC's Sokhela, Mudau, Malema and Van Dyk in affidavits filed as Annexure MD1, MD2, MD3 and MD 46 of the record. When Dreyer enquired with MultiChoice, MultiChoice confirmed that no negotiations took place been the SABC and MultiChoice regarding funding for the MLP and MultiChoice made no payments to the SABC for this project.

[130] The impugned payments were authorised and approved based on the business case Motsoeneng prepared which Raphela supported and Aguma approved. It made no reference to external funds. The payments were disbursed from cost centre 1721

as the MLP was not planned or budgeted for. The funds in cost centre 1721 had been raised from other SABC cost centres.

[131] Funds for the MLP did not form part of the SABC's approved annual budget. Yet, evidence show that SABC funds were used for the project.

[132] That cost centre 1721 was created before Raphela joined the SABC does not avail her a valid defence. The issue is the inappropriate use of cost centre 1721 funds to make payment in respect of MLP. Cost centre 1721 was not merely used to host and disburse private funds raised by Motsoeneng. SABC funds held in cost centre 1721 were inappropriately used to pay music legends. Raphela's version, is that cost centre 1721 funds could only be used for emergency and only for the purpose of generating revenue. Yet, she did not question the decision to pay music legends and to use cost centre 1721 notwithstanding that no funds had been received from MultiChoice as presented by Motsoeneng. She has attached financial statements for cost centre 1721 for the 2015/6 financial year to her answering affidavit. It is not her case that the funds from MultiChoice are reflected on the financial statements.

[133] According to Sokhela, it was the first time the SABC made a gratuitous payment to external individuals. As a result, it had no approved policy for processing such unique payments. The payments were processed through the prize winner process even though music legends were not prize winners.

[134] In his supplementary affidavit, Motsoeneng contends that minutes of the Board meeting (paragraph 4.4 at page 5) held on 19 August 2016 reflects funds he raised for the music legends project and that Mr Aguma reported these endeavours to the Board. The minutes reflect that Motsoeneng raised R5 million for the music legends project. This issue arose in a discussion regarding payment to Motsoeneng of a success fee for all the funds he raised for the SABC. The minutes reflects that he raised R100 million in total.

[135] He contends that the minutes also confirm Ms Raphela's statement that Multichoice, also referred to as MNET has agreed to donate R20 million to the SABC. What Motsoeneng fails to deal with is what is recorded in the second last paragraph of page 6 of the minutes, that there is R400 million in the SABC account and that the R100 million Motsoeneng raised has not been received.

[136] As evidence that the SABC did receive the MultiChoice donation, Motsoeneng references the answers Ms Raphela gave when she was interviewed by Dreyer as reflected page 47 of the record of the impugned decisions filed by the applicants. According to Ms Raphela, MultiChoice donated R20 million to the SABC for the MLP. The funds were kept in the CFO's cost centre 1721. This amount included the R5 million to be used for the MLP. The balance was to be used for elections.

[137] But, the SABC financial records do not reflect that this amount was ever received by the SABC. Both Ms Raphela and Motsoeneng have not placed any evidence before the Tribunal that the SABC did receive the MultiChoice donation either in the amount of R5 million or R15 million.

FINDINGS

[138] The respondents, in the capacities in which they were employed by the SABC, were either, members of the SABC EXCO as defined in the Broadcasting Act, read with the Board Charter, and members of OPCOM. They attended and participated in the meetings at which the impugned decisions were taken.

[139] There is no policy within the SABC authorising the impugned decisions. Neither was the MPL authorised in terms of the SABC's annual and operational plan for the relevant financial year(s). The Board did not issue a resolution authorising the MPL. The identification of music legends who would benefit from the MPL was arbitrary as there was no approved criteria. Yet, SABC funds reserved for emergencies were used to fund the MLP. The SABC derived no benefit from the MLP. Thus, funds used to pay MLPs represent a loss to it The MPL had not been budgeted for. Contrary to

representations by Motsoeneng, the SABC did not receive any funds from MultiChoice for the MLP.

[140] The laudable and noble MLP objectives do not justify breach of the rule of law. No public servant may conceptualise and implement a project unless authorised by prevailing statutory and regulatory policy provisions, have the necessary approvals including funding for the project.

[141] Therefore, when they took the impugned decisions, the respondents failed to observe a high standard of professional ethics, efficient, economic and effective use of resources and accountable public administration as required in terms of s 195 of the Constitution. As the then SABC's accounting officer, Aguma failed to take effective and appropriate steps to prevent irregular expenditure and losses resulting from expenditure which does not comply with the operational policies of the SABC as required in terms of s 51 of the PFMA. The other respondents failed as required in terms of s 57(1) of the PFMA to ensure the effective, efficient, economical and transparent use of financial and other resources within their area of responsibility. The respondents have also breached the provisions of the internal policies of the SABC cited earlier.

[142] For these reasons, the impugned decisions were taken in breach of the principle of legality. They are declared unlawful in terms of s 172 (1) (a) of the Constitution.

[143] However, it is not just and equitable to set aside the impugned decisions in respect of the 53 musicians that have been paid in terms of s172(1)(b) of the Constitution. The payments were made more than five years ago. The loss the SABC incurred pursuant to the payments has been found to have prescribed.

[144] It is not just and equitable for the validity of the impugned decisions in respect of the music legends who are yet to be paid to remain undisturbed. They fall to be reviewed and set aside in terms of s 172(1)(b) to prevent further loss to the SABC.

[145] Regrettably, even if there is a basis to hold the respondents personally liable for the loss the SABC suffered as a result for the impugned decisions, the relevant debt has become prescribed in terms of s 11(d) read with s12(3) of the Prescription Act. Therefore, it would serve no purpose to determine whether the respondents ought to be held personally liable for the loss the SABC incurred as a result of the payments made to music legends.

COSTS OF THE REVIEW APPLICATION

[146] It is trite that costs normally follow the cause. A court has a discretion to depart from this trite principle where such departure is justified by relevant factors. The Tribunal exercises it discretion to depart from this general principle for the reasons that follow.

[147] The applicants understated the fact that the SABC had knowledge of the debtor and of the facts giving raise to its claim in August 2017 when the interim Board received the report on the forensic investigation it commissioned in respect of the impugned decisions. The applicants did so by not mentioning in their founding papers the date on which the SABC interim Board received the report, leaving the date buried in the approximately 2000-page report the applicants filed in respect of the impugned decision. The reason for this is obvious. From that date, the prescription period started running against the SABC.

[148] This information was unearthed by Tugwana whose case on prescription was found to be unassailable. The applicants anticipated such a defence by inappropriately seeking to ride on the date on which the SIU competed its investigation as the date on

which the prescription period started running. As an institution litigating in the public interest, there is a higher duty on the applicants to act professionally, honestly and with due diligence when fulfilling their statutory mandate. By acting as aforesaid, they have failed in their duty bring to the Tribunal's attention even facts that do not advance their case.

[149] Tugwana took no issue with the merits of the review. She only defended herself from being found personally liable on the basis of a claim that has prescribed.

[150] Failure by the applicants to play open cards with the Tribunal regarding the date on which the requirements in s 11 (d) read with 12(3) of the Prescription Act were met calls for the Tribunal's censure against the applicants by way of a punitive cost order in favour of Tugwana.

[151] The spurious defence mounted by the rest of the respondents on the merits warrants that they are treated differently for the purpose of costs. They escape personal liability because their prescription point was upheld. However, they opposed the merits. Yet, they have not demonstrated a substantial interest in doing so. They are no longer employees of the SABC. They had acted in flagrant disregard of their constitutional and statutory duties and in breach of the relevant SABC policies when they made the impugned decisions. Since the application stands to succeed on the merits, it is just and equitable that these respondents pay their own costs of the application.

MULAUDZI AND PHASHA'S COUNTER APPLICATION

[152] Mulaudzi and Phasha have counter-applied to set aside the SIU report on the forensic investigation into the impugned decisions which has been filed in this application as an annexure to the record of the impugned decisions on the basis that the report is unconstitutional, irregular and unlawful. They also seek an order that the

applicants' attorney Ms Khosi Mabaso (Ms Mabaso) pay the costs of the counter application de bonis popriis.

[153] The basis grounds for this relief is unclear. Mulaudzi and Phasha contend that they were not aware of the report until it was filed in this application. Their input was not solicited. They have made various allegations of misconduct against the applicants' named attorneys. As I have ruled above, these allegations stand to be struck out.

[154] Mulaudzi and Phasha also contend that the report is based on the lies Moodlier fed to the SIU. The payments to music legends were authorised.

[155] To the extent that the basis for the counter application rely on issues that go to the merits of the review application, they have been dealt with under the merits of the review application.

[156] Mulaudzi and Phasha have not made out a case for the relief sought in the counter application. It stands to be dismissed with costs.

THE DELAY IN HANDING DOWN THIS JUDGMENT

[157] In terms of the guidelines issued by the Chief Justice, judgment ought to be delivered within three months of being reserved. The Tribunal subscribes to this standard notwithstanding that currently it does not fall within the authority of the Chief Justice in terms of s 165 of the Constitution.[14] This standard was not met in this instance for various reasons. The papers in this matter are voluminous. They comprise of approximately 4,700 folios. I had to consider the versions and legal arguments

[14] Constitution of the Republic of South Africa, 1996.

advanced on behalf of 8 different parties. Writing such a judgment is rarely feasible during the Tribunal term given the Tribunal's busy schedule. The fact that I heard the application shortly after hearing other factually and legally complex applications, which were relatively more urgent, being the only Tribunal judge who was available to preside over matters in the Tribunal since October 2021, only added to the pressure. I therefore could not accommodate writing the judgment during the June 2022 long recess. Any inconvenience to the parties occasioned by the delay is regrettable.

ORDER

1. Condonation for the late filing of the eighth and ninth respondents' (Mulaudzi and Phasha's) answering affidavit, the tenth respondent's (Aguma's) supplementary answering affidavit and the first respondent's (Motsoeneng) heads of argument is granted.
2. The first respondent (Motsoeneng) shall pay the costs of first applicant (the Special Investigating Unit) occasioned by the filing of his supplementary answering on the attorney and client scale.
3. Paragraphs 17 to 20, 27 to 50 and 91 of Mulaudzi and Phasha's answering affidavits are struck out with costs on the attorney and client scale.
4. The application succeeds.
5. It is declared that:
   5.1 the delay by the first and second applicant in bringing this review application is not unreasonable;
   5.2 the decisions taken by the respondents 24 July 2016 and on 5 September 2016 (the impugned decisions) to reward the musicians identified as music legends with an amount of R50 000.00 are declared irregular and unlawful. each *alternatively* declaring the said decision invalid and setting it aside.
   5.3 the debt in respect of which the applicants seek an order that the respondents pay an amount of R2 425 000.00 (two million four hundred and twenty-five thousand rand) to the SABC has become prescribed.
6. The parties, with the exception of the seventh respondent (Tugwana), shall carry their cost of the application.

7. The applicants shall pay Tugwana's costs of the application on the attorney and client scale.
8. Mulaudzi and Phasha's counter application is dismissed with costs.
9. The above costs orders are inclusive of the costs of two counsel where so employed.

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JUDGE L. T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARENCES

For the Applicants:	Adv. Jabu Motepe SC, assisted by Adv. J Mnisi Attorney for the Applicants: Ms Kgosi Mabaso, Werksman Attorneys
For the 1st Respondent:	Adv T Masuku SC, assisted by Adv. N Nyathi Attorney for the 1st Respondent: Ms S Mnokwe, Bokwa Incorporated. Counsel for the 2nd Respondent: Adv.G Mamabolo Attorney for the 2nd Respondent: A Nduna, Motlatsi Seleka Attorneys
For the 6thRespondent:	Adv. X Hilita Attorney for the Respondents: Mr. P Tati, Tati Attorneys

For the 7th Respondent:	Adv.S Budlender SC, assisted by Adv. K Mvubu Attorney for the 7th Respondent: Mr W Moeketsane, Moeti Kanyane Incorporated
For 8th and 9th respondents:	Adv. M Kufa, assisted by Adv. M Davids Attorney for 8th and 9th respondents: Mr ME Machaba, Machaba Attorneys
For 10th respondent:	Mr. LD Mantsha Attorney for 10th respondent: Mr L Mantsha, Lungisani Mantsha Incorporated

Date of hearing: 14 March 2022
Date of Judgment: 18 October 2022

Mode of delivery: *this judgment was handed down electronically by circulation to the parties' legal representatives by email, uploading on Caselines and release to SAFLII. The date and time of delivery is deemed to be 10am.*