

Reply by the Department of Transport to questions of clarity sought by the Members of the Portfolio Committee on Transport pursuant to the extended deliberations from 31 August 2018 PCOT meeting.

**Ad: Clause 7: Composition of the Board (SABC Ruling)**

**SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Corporation and Others v South African Broadcasting Corporation SOC Ltd and Others (81056/14)[2017] ZAGPJHC 289**

This is a High Court decision handed down by Matojane J on 17 October 2017 in the Gauteng Local Division involving the SOS Coalition, Media Monitoring Africa and Freedom of Expression wherein the High Court dismissed the Minister of Communication's application for leave to appeal Justice KE Matojane's ruling regarding the powers of the SABC board.

**Summary is as follows**

The case involves two applications which were head together focusing on two key aspects of the Minister's powers in respect of the SABC board. The two applications are instituted in the background of systematic and repeated failures in the governance and management of the SABC. This has presented itself in the continuous turn-over of Directors of the Board with resultant financial mismanagement. The critical systemic causes of governance failures and mismanagement were found to have been caused by Ministerial interference in the governance and operations of the SABC.

The improper Ministerial interference in the affairs of the SABC was demonstrated in the report of the ad hoc Committee on the **SABC Board Inquiry into the fitness of the SABC Board**[1] which found that the previous Minister of Communications, Ms Muthambi unlawfully interfered in the affairs of the Board.

The ad hoc committee report was preceded by the Public Protector's report on allegations of maladministration, systemic corporate governance deficiencies, abuse of power and irregular appointment of Mr Motsoeneng by the SABC, "**When Governance and Ethics Fail**" (17 February 2014) [2]. The Public Protector's report demonstrates the history of Ministerial interference in the affairs of the SABC. She found that the previous Minister of Communications Ms Pule unlawfully interfered with the recruitment and appointment of a Chief Financial officer of the SABC in 2012.

**The issues for determination**

Both applications concern the constitutionality and lawfulness of the powers that the Minister of Communications ("the Minister") exercises in respect of the Directors of the SABC Board.

**First case:**

SABC 1 Concerns the lawfulness of the powers vested in the Minister under SABC's Memorandum of Incorporation (MOI) and SABC Charter in respect of the appointment, discipline and suspension of the three Executive Directors of the SABC, being the GCEO, COO and CFO. The central issue in dispute is whether the powers vested in the Minister undermine the independence of the SABC, which the applicants and amicus contend is required by the right to freedom of expression (including the freedom of the media) under S16 of the Constitution. An ancillary issue is whether the Minister's

powers contravene S13(11) of the Broadcasting Act, which provides that the SABC Board must "control the affairs" of the SABC.

The SABC's Memorandum of Incorporation (Moi) and the SABC Board Charter confer extensive powers on the Minister in respect of all three executive directors. This includes giving the Minister a veto power in respect of their appointment; the power to approve the terms and conditions of their appointment; the powers to determine the term of office, re-appointment and acting appointments; and the power to approve any disciplinary proceedings and suspension from office of the Executive Directors.

The court held that these provisions of the Moi and Board Charter are in breach of the Broadcasting Act, particularly section 13(11) which provides that the SABC Board, not the Minister, must control 'the affairs' of the SABC.

The second case

SABC 2 concerns the power of the Minister to remove all of the directors of the SABC, including the non-executive directors. The Minister contends that she has a right to remove the directors from office. She contends that this power flows from section 71 of the Companies Act, which she followed. The Minister has exercised these powers by dismissing three non-executive directors of the SABC Board.

The court held that the removal of the directors is regulated by sections 15 and 15A of the Broadcasting Act, not the Companies. In instances where there was conflict between the Companies Act and the Broadcasting Act, the latter would prevail. Those sections require that the removal of the directors to be effected by a decision of the National Assembly, when such removal is warranted.

By permitting the removal of a board member unilaterally at the instance of the Minister as sole shareholder and removal by simple majority vote of the Board, section 71 undermines their independence. The threat of removal without any oversight, on any ground, and without due enquiry, would render Board members not likely to express views not aligned with that of the government or the majority Board members.

The Broadcasting Act is not listed under section 5(4)(b)(i) of the Companies Act, accordingly, none of the provisions of the Broadcasting Act, is made applicable in the event of inconsistency with the Companies Act. This violates section 7(2) and 16 of the Constitution and the relevant provisions of the Companies Act are invalid to this extent.

The SABC situation as outlined above is unlikely to occur as the composition and appointment of the Board is provided for in the legislation.

#### **King IV**

The King Code is non-legislative and is based on principles and practices. Although the code is not enforced through legislation, due to evolutions in South African law many of the principles are now embodied as law in the Companies Act of South Africa of 2008. The philosophy of the code consists of the three key elements of leadership, sustainability and good corporate citizenship. It views good governance as essentially being effective and ethical leadership.

The King IV code focuses on the concept of stakeholder inclusivity and highlights that organisations are not merely responsible for the economic bottom line but critically need to consider the societal and environmental impacts and outcomes of their operations.

The King IV Code has been structured as a framework that can be applied more easily across both listed and unlisted companies, profit and non-profits as well as private and public entities.

King IV has the following elements: practices, principles and governance outcomes. The practices are recommended at an optimum level of corporate governance and should be adapted by each organisation to achieve the principle. The governance outcome is the positive effect or benefits of good corporate governance for the organisation and includes ethical culture, performance and value creation, adequate and effective control and trust, good reputation and legitimacy.

The 75 King III principles have been consolidated into 17 principles in the draft King IV, each linked to very distinct outcomes. King IV requires an *'Apply AND Explain' approach*, as opposed to King III which is *'Apply OR Explain'*. This means that application of the principles is assumed, and that an explanation is disclosed on the practices that have been implemented and the progress made towards governance outcomes.

As alluded to above, the King IV is a set of voluntary principles and good practices of corporate governance. If King IV conflicts with any legislation, the legislation will prevail. However, for entities with a primary listing on the JSE Limited Securities Exchange certain aspects of King IV are binding by virtue of the listings requirements imposing obligations on issuers to comply therewith.

The fact that King IV is not legally binding in itself does not mean that there are no legal consequences arising from non-compliance. A court will consider King IV when evaluating what is regarded as practice in a particular situation, especially where governance duties are involved. Failure to meet corporate governance practice, and by implication the principles set out in King IV, may invoke liability of the board in certain circumstances.

King IV in Part 5.3 "Governing Structures and Delegation", Principle 7, provides in recommended practice 9 that:

*"As a minimum, the chief executive officer (CEO) and at least one other executive should be appointed to the governing body to ensure that it has more than one point of direct interaction with management. The executive other than the CEO appointed to the governing body may be the chief financial officer (CFO) or another designated executive as is appropriate for the organisation"*

King IV does not exclude the voting powers of the above contemplated executive members in any recommended practice.

The Sector Supplement King IV and SOEs confirms the relevance of Principle 7 for SOEs.

Reverting to the RABS Bill, in our response last week Friday, the Department stated that "The addition of CEO and CFO as Board members is aligned with the King IV to ensure direct interaction between management and the Board.

#### **PFMA – Accounting Authority**

Subsections 49(1) and (2) of the PFMA provides for accounting authorities, as follows:

*"49. Accounting authorities.—(1) Every public entity must have an authority which must be accountable for the purposes of this Act.*

*(2) If the public entity—*

*(a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or*  
*(b) does not have a controlling body, the chief executive officer or the other 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."*

The above section merely serves to assign the duties of an accounting authority between two types of organisations, e.g. the RAF has a board, consequently the board is the accounting authority per subsection 49(2)(a), as opposed to SASSA which does not have a board but only a CEO, which CEO is the accounting authority in terms of subsection 49(2)(b).

Importantly, the above section does not preclude the appointment of a CEO as member of a board.

### **PFMA - Conflicts**

As part of the Department's response to comments that were made on clause 16(2)(b), the PCOT will recall that the Department proposed a reference in the (proposed) Bill to the applicable section of the PFMA.

### **Money still owed after passing of Bill into law what happens?**

The response to this question can be linked to the question raised around retrospective application of the Bill. The PCOT will recall that as part of the Department's reply it was stated that the proposed Bill will not apply retrospectively and that only claims that arose after 24h00 of the evening prior to the day on which the new Act comes into force will be administered under the new Act. All claims that arose prior to this will be administered under the current RAF Act.

### **Comment was made on development of a clause dealing with tariffs "being a catch all clause"**

Section 60 of the RAF Act, SLA to respond,

### **Income benefits**

Example was made that "my child gets involved in an accident, he or she will not be reimbursed, aware that medical costs will be taken care of. As part of the comments from public hearings the claimant needs cash.

Where a child is injured the needs that arise relate to financing of the medical treatment, rehabilitation, and caregiving cost of the child. In as far as the aforementioned needs are provided for by the medical benefit provided for in the Bill there is no further need for cash. As regards the child's parents, in appropriate circumstances a parent or another family member could receive compensation for acting as a caregiver to the child, which in that sense may see compensation paid to a parent.

### **Prescription of RAF claims**

**Is there recourse available if this were to happen, if claim prescribes in the hands of the RAF/lawyers?**

**Against a lawyer**, a claim can be lodged with the law society where the attorney is based. A separate claim can be lodged with the Attorney's Indemnity Insurance Fund who may compensate the claimant. The law society will take appropriate measures against the lawyer which may include

amongst others, striking the lawyer off the roll of practising attorneys thus barring him/her from practicing law for a specified period or lifetime depending on the merits of each case.

**Against RAF**, a process is followed to approve the waiver of the prescription, based on a Board approved policy, where the RAF is determined to have acted in breach of its duty of care, the prescription is waived and disciplinary action is taken where indicated.

### **Mediation by an external mediator**

The proposed Bill makes provision for the appeal process and the subsequent right of review. If mediation, arbitration, then litigation and appeals/review are allowed, the time and costs will be significantly increased.

The audio recording of Dr Edeling's submission as part of the APRAV contingent was reviewed – the document received from the secretariat was not relevant. In the submission emphasis is placed on the needs-based, as opposed to rights-based, approach followed in mediation. In a scheme where benefits are defined in terms of set rules a needs-based approach will serve little purpose where the right to a benefit does not exist per the scheme rules. Mediation is more appropriate within a commercial context where the parties have the discretion to compromise.

A review of other legislative dispute resolution mechanisms, within the broader social security landscape, confirms a preference for bespoke solutions, as follows:

### **COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT NO. 130 OF 1993**

- No mediation
- No arbitration
- Section 91 –

*91. Objections and appeal against decisions of Director-General.—(1) Any person affected by a decision of the Director-General or a trade union or employers' organization of which that person was a member at the relevant time may, within 180 days after such decision, lodge an objection against that decision with the commissioner in the prescribed manner.*

*(2) (a) An objection lodged in terms of this section shall be considered and decided by the presiding officer assisted by two assessors designated by him, of whom one shall be an assessor representing employees and one an assessor representing employers.*

*(b) If the presiding officer considers it expedient, he may, notwithstanding paragraph (a), call in the assistance of a medical assessor.*

*(c) The provisions of sections 6, 7, 45 and 46 shall apply mutatis mutandis in respect of the consideration of an objection.*

*(3) (a) After considering an objection the presiding officer shall, provided that at least one of the assessors, excluding any medical assessor, agrees with him, confirm the decision in respect of which the objection was lodged or give such other decision as he may deem equitable... "*

### **SOCIAL ASSISTANCE ACT NO. 13 OF 2004**

- No mediation
- No arbitration
- Section 18 –

18. *Reconsideration of decision by Agency and appeal.*—(1) If an applicant or a beneficiary disagrees with a decision made by the Agency in respect of a matter regulated by this Act, that person or a person acting on his or her behalf may, within 90 days of his or her gaining knowledge of that decision, lodge a written application to the Agency requesting the Agency to reconsider its decision in the prescribed manner.

(1A) If an applicant or a beneficiary disagrees with a reconsidered decision made by the Agency in respect of a matter contemplated in subsection (1), that person or a person acting on his or her behalf may, within 90 days of his or her gaining knowledge of that decision, lodge a written appeal with the Minister against that decision, setting out the reasons why the Minister should vary or set aside that decision.

(2) The Minister may—

(a) upon receipt of the applicant's or a beneficiary's written appeal and the Agency's reasons for the decision, confirm, vary or set aside that decision; or

(b) appoint an independent tribunal to consider an appeal contemplated in subsection (1A) in the prescribed manner and that tribunal may, after consideration of the matter, confirm, vary or set aside that decision.

(3) If the Minister has appointed an independent tribunal in terms of subsection (2) (b) all appeals contemplated in subsection (1A) must be considered by that tribunal.

(4) Notwithstanding subsection (1A), the independent tribunal may in the prescribed manner condone any late application by an applicant or a beneficiary."

#### **UNEMPLOYMENT INSURANCE ACT NO. 63 OF 2001**

- No mediation
- No arbitration
- Section 37 –

37. *Disputes relating to payment or non-payment of benefits.*—(1) A person who is entitled to benefits in terms of this Act may appeal to a regional appeals committee if that person is aggrieved by a decision of—

(a) the Commissioner to suspend such person's right to benefits; or

(b) a claims officer relating to the payment or non-payment of benefits.

(2) A person who is dissatisfied with the decision of a regional appeals committee may refer the matter to the National Appeals Committee for a decision.

(3) A decision by the National Appeals Committee is final, subject to judicial review.

(4) For the purposes of an appeal in terms of this section—

(a) the decisions of a regional appeals committee and those of the National Appeals Committee are determined by majority vote; and

(b) a regional appeals committee or the National Appeals Committee, as the case may be, may, after considering an appeal, confirm or vary the decision in question, or rescind it and substitute the decision of the relevant regional appeals committee or the National Appeals Committee, as the case may be.

#### **Development of Regulations**

**Comment was made that Regulations be developed simultaneously, the Committee to have sight of the regulations and comment on them**

The regulations fall within the purview of the Minister and the latter publishes them for comments, for now, the regulations are awaiting the finalisation of the proposed RABS Bill as they are expected to deal with the who, the what, the when and the how. Development of the Regulations prior to

finalisation of the proposed Bill might amount to pre-empting the outcome of the Parliament legislative authority.

An important further consideration is the requirement to act within the rule of law.

In *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC), at 19 and onwards:

"Section 2 of the Constitution lays the foundation for the control of public power. It provides: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." Consistent with this, section 44(4) of the Constitution provides that in the exercise of its legislative authority Parliament "must act in accordance with, and within the limits of, the Constitution." The same applies to members of the Cabinet who are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. They too are required to act in accordance with the Constitution. The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law. The question whether the President acted *intra vires* or *ultra vires* in bringing the Act into force when he did, is accordingly a constitutional matter. The finding that he acted *ultra vires* is a finding that he acted in a manner that was inconsistent with the Constitution"

In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC), at 58 onwards:

"It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality. There is of course no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to "administrative action" the principle of legality is enshrined in section 24(a). In relation to legislation and to executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution."

The import of the above is that the regulation making powers derived from the Bill cannot be exercised by the Minister until, the earliest, when the Bill is accented to by the President, in accordance with

Section 14 of the Interpretation Act No. 33 of 1957, which provides as follows:

*"14. Exercise of conferred powers between passing and commencement of a law.— Where a law confers a power—*  
*(a) to make any appointment; or*  
*(b) to make, grant or issue any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws; or*  
*(c) to give notices; or*  
*(d) to prescribe forms; or*  
*(e) to do any other act or thing for the purpose of the law,*  
*that power may, unless the contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof: Provided that any instrument, order, warrant, scheme, letters patent, rules,*

*regulations or by-laws made, granted or issued under such power shall not, unless the contrary intention appears in the law or the contrary is necessary for bringing the law into operation, come into operation until the law comes into operation."*

#### **Issue of upward/downward adjustment**

The proposed Bill proposes the definition of **"average annual national income"** *means the amount based on the average annual after-tax income earned in the Republic, for the whole of the employed and unemployed population between the ages of 18 and 59, inclusive, calculated in accordance with the methodology prescribed by the Minister in consultation with the Minister of Finance*

The methodology will be prescribed in the regulations but then reliable sources such the National Household Survey of the Statistics South Africa numbers and the South African Reserve Bank indices will be considered in the development of the prescribed methodology

#### **Third Party Claims**

What is the position with regards to the third party claim? Should a claim against the third party be allowed?

In this regard the approved policy provides as follows: *"The recent amendments were challenged for being unconstitutional, but by the end of 2009, the Constitutional Court had dismissed most of the attacks and held that the removal of the common law right is constitutionally valid. The removal of the balance of the common law right will continue under the RABS."* Therefore, allowing the third party claim would be a deviation from the policy.

Furthermore, the Constitutional Court expressed the following sentiments in regard the third party claim: *"The colossal risk to which the new cap exposes all drivers (from which the Fund would previously have protected them by paying full compensation), as against the relatively small inattentiveness or oversight that could give rise to the risk, lends further support to the abolition of the common law action. What is more, the retention of the common law claim does not sit well with a social security compensation system that aims to provide equitable compensation (as distinct from the right to sue for compensation) for all people regardless of their financial ability."* Therefore, allowing the third party claim would be opposite social security principles as expressed by the CC.