



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF
THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1999**

(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

And in the Intervention application by:

SOUTH AFRICAN MUSIC LEGENTS FORUM Intervener

AND

SOUTH AFRICAN BROADCASTING CORPORATION

SOC LIMITED First Applicant

SPECIAL INVESTIGATING UNIT Second Applicant

Summary

Application to intervene – locus standi - the intervener ought to establish its locus standi to bring the application in its founding affidavit. The intervener is a Non-Profit Company (NPC) registered in terms of the Companies Act¹. The intervener's founding affidavit describes the intervener as an organization whose intention, purpose and goal is to advocate and promote various interests of South African Music Legends (SAML). Its business activities as described are not confirmed in its CIPC registration certificate, attached to the founding affidavit. The certificate states that its business activities are not restricted.

An NPC is required to set out in its Memorandum of Incorporation (MOI), at least one object of the company. The object of a NPC ascribes to it the power to act. The object of a NPC must either be of a public benefit or relate to one or more cultural social activities, or communal group or interest. The Directors a NPC are also required to employ all the company assets and income to advance the company object(s) as

¹ 71 of 2008

stated in its MOI.² They may not act beyond its object as stated in its MOI or employ the company's resources towards any activity unless the activity advances its objects.

The intervener's MOI, setting out its objects, is not attached to the founding affidavit. The averment in the intervener's founding affidavit is insufficient to establish the intervener's capacity to advocate for the interests of SAMLs. So is the inscription in the intervener's CIPC registration certificate that its business activities are not restricted. This omission is fatal to the intervener's locus standi to intervene in these proceedings.

Order - Application dismissed with costs.

JUDGMENT

Mode of delivery: *this judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading on Caselines. The date and time of delivery is deemed to be 10am on Monday 15 November 2021.*

MODIBA J:

- [1] On 27 July and 5 September 2016, the South African Broadcasting Corporation (the SABC) took a decision to pay R50,000 in respect of needle royalties to each of 50 music legends referred to in the applicants' founding papers. The SABC and the Special Investigation Unit (SIU) as joint applicants, seek to review and set aside these two decisions. They also seek to recover from the respondents the total sum paid to the music legends, in the amount of R2,425,000. The respondents are opposing the application.

² Items 1 and 2 of Schedule I of the Companies Act 71 of 2008. See also Cassim FHI and Others, *The Law of Business Structures*, Juta. Paragraphs 5.8.1

- [2] On the eve of the hearing of the review application, the intervener, the South African Music Legends Forum (SAMLFF) filed an application to intervene in the review application. The applicants are opposing the intervention application. By the Tribunal's directive, the intervention application is determined on the basis of the papers filed by the parties.
- [3] The Intervener allege a material and substantial interest in the review application. In addition, the intervener has elaborately set out the basis on which it seeks to oppose the review application.
- [4] The applicants dispute that the intervener has a material and substantial interest in the review application. They also contend that the intervener lacks *locus standi* to bring the application to intervene, has not brought the application in good faith and that the issues it raises have no bearing on the review application.
- [5] In determining whether the intervener makes out a case to intervene, I am guided by the following legal principles as eloquently set out by the applicants:

5.1 any person entitled to join as plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or defendant;³

5.2 a party is entitled to intervene where it has a direct and substantial interest in the right that is the subject matter of the application, which could be prejudiced by the judgment of the court. The interest must be such that the intervener's joinder is either necessary or convenient. The possibility that a

³ 7 Erasmus Superior Courts Practice, Rule 12: 2018, DI-137.

legal interest exists is sufficient. It is not necessary for the court to determine that it exists.

5.3 it is not necessary for the intervener to satisfy the court that it will succeed in its case or defence. It is sufficient for the intervener to rely on allegations which it intends proving in the main application. When assessing the intervener's standing, the Tribunal must assume that the intervener's allegations are true and correct; and

5.4 the application to intervene is made seriously and is not frivolous.

[6] For the reasons that follow, the intervener fails to meet all the above legal requirements.

Locus Standi

[7] It is trite that the intervener, as applicant in the intervention application, ought to have established its *locus standi* to bring the application in its founding affidavit. For the reasons that follow, despite the Tribunal affording the intervener an indulgence to address its *locus standi* in a supplementary affidavit, having failed to do so in its founding affidavit, the intervener has still failed to do so.

[8] The intervener is a Non-Profit Company (NPC) registered in terms of the Companies Act⁴. The intervener's founding affidavit deposed to by William Mthethwa, one of the intervener's Directors, describes the intervener as an organization whose intention, purpose and goal is to advocate and promote various

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interests of South African Music Legends (SAML). Its business activities as described by Mr Mthethwa are not confirmed in its CIPC registration certificate, attached to the founding affidavit. The certificate states that its business activities are not restricted.

- [9] An NPC is required to set out in its Memorandum of Incorporation (MOI), at least one object of the company. The object of a NPC ascribes to it the power to act. The object of a NPC must either be of a public benefit or relate to one or more cultural social activities, or communal group or interest. The Director of a NPC are also required to employ all the company assets and income to advance the company object(s) as stated in its MOI.⁵ It follows that the Directors of a NPC Company may not act beyond its object as stated in its MOI or employ the company's resources towards any activity unless the activity advances its objects.
- [10] The intervener's MOI, setting out its objects, is not attached to the founding affidavit. Mr Mthethwa deposition, contained in the intervener's founding affidavit, is insufficient to establish the intervener's capacity to advocate for the interests of SAMLs. So is the inscription in the intervener's CIPC registration certificate that its business activities are not restricted This omission is fatal to the intervener's *locus standi* to intervene in these proceedings.
- [11] Additional difficulties confront the intervener in respect of its purported *locus standi*.
- [12] Mr Mthethwa also deposed to the intervener's supplementary affidavits. To the founding affidavit, a Board Resolution signed by Mr Mthethwa and his fellow

⁵ Items 1 and 2 of Schedule I of the Companies Act 71 of 2008. See also Cassim FHI and Others, *The Law of Business Structures*, Juta. Paragraphs 5.8.1

Directors Sydney Mogopodi and Yvonne Bene-Maduna, authorizing Mr Mthethwa to bring the intervention application is attached. Proof that Mr Mthethwa, Mr Mogopodi and Ms Bene-Maduna are the interveners' Directors is not attached to the interveners founding papers.

- [13] The intervener has attached confirmatory affidavits by Mr Mogopodi, Ms Bene-Maduna and one Alec Khaodi who confirm that the intervener represents their interests as SAML and that they beneficiaries of the impugned funds.
- [14] In addition, a list of 17 SAMLs whose confirmatory affidavits could not be obtained because they are impecunious is attached to the interveners founding papers. On the authority in *Eskom v Soweto City Council*⁶, this explanation regrettably does not ascribe *locus standi* on the intervener to represent these SAML.
- [15] The intervener also purports to represents SAMLs who stood to benefit from the impugned decision but did not receive their payments due to the review application. It intends claiming their payments on their behalf in the event that it succeeds in the opposing their review application. This cohort of SAMLs is not identified in the interveners founding papers. Similarly, the intervener has not obtained their consent to bring the application to intervene on their behalf.
- [16] At best, the intervener only succeeds in establishing consent to intervene only on behalf of Messrs Mthethwa, Mogopodi, Khaodi and Ms Bene-Maduna. However, as already found, its failure to establish that it is authorised to do so in terms of its MOI, presents a fatal difficulty.

⁶ 1992 (2) SA 703 (W) 705 D-H

[17] As I find below, the intervener has also failed to meet the additional legal requirements dealt with below.

Material and substantial interest

[18] The SAMLf relies on the following factors to establish that it has a material and substantial interest:

18.1 should the review application succeed, it is 'morally and physically bound to refund the SABC as it will be unfair, unjust and against common good that the money that was paid to SAMLs be a burden of the Respondents' (*sic*);

18.2 the review application 'will go against the intervener's mandate to claim halted payments as a result of the SIU investigation, due to the other music legends who are yet to be paid'.

[19] The alleged SAMLs' moral obligation to refund the SABC does not satisfy the test for material and substantial interest as set out above. The applicants are not asserting any right enforceable against the SAMLs. The order the applicants seek against the respondents is not prejudicial to the SAML or to the intervener. Neither is it incapable of enforcement without them.

[20] For the reason set out in paragraphs 10 to 16 above, the intervener has not established its mandate and *locus standi* to claim any payments that were due to be paid to any of the SAMLs it contends were yet to be paid.

The absence of good faith

[21] The intervener has not made good an undertaking made in its supplementary affidavit to file confirmatory affidavits of the additional SAMLs it purports to represent at the hearing of the application. Given that the application is determined on the papers filed, at best, it should have filed the confirmatory affidavits in tandem with its heads of argument. Its failure to do so represents lack of good faith on its part.

[22] Another indicator of the absence of good faith is that Mr Mthethwa, the deponent to the intervener's affidavits has not provided his physical address. The same applies to the SAMLs who filed confirmatory affidavits. The prejudice the applicants stand to suffer in the event of a cost order in their favour is palpable.

Irrelevant considerations

[23] If allowed to intervene, the intervener seeks to raise various defences that the respondents have raised. These include, the allegation that the gratuitous payments were made out of funds Motsoeneng raised from Multichoice, that the impugned decision was consistent with the Broadcasting Act and the SABC policy and that the payments were within the respondents' delegated authority. It is clear

from the founding papers that Mthethwa has no personal knowledge of these averments, despite his deposition in paragraph 1.1 of the founding affidavit that he has personal knowledge of the facts deposed to therein. He has not advanced any reason whether there is any basis to, nonetheless, admit this evidence in terms of section 3(4) of the Law of Evidence Amendment Act.⁷

[24] While the Tribunal is sympathetic to the plight of SAMLs as described in the interveners affidavits, it is irrelevant to the question whether the respondents were authorised to make the impugned decision and payments.

[25] In the premises, the following order is made:

ORDER

1. The application to intervene is dismissed with costs.



JUDGE L. T. MODIBA
MEMBER OF THE SPECIAL TRIBUNAL

⁷ Act 45 of 1988

APPEARENCES

Counsel for the Applicants:	Mr. MB Tshabangu
Attorney for the Applicants:	Claude Chiyaka, MB Tshabangu Incorporated
Counsel for the Respondents:	Mr. J Motepe SC, assisted by Ms MV Magagane
Attorney for the Respondents:	Mr. S Dhlomo, Werksman Attorneys
Date of hearing:	Not applicable. Application determined on written Submissions. Last date for filing heads of argument: 31 August 2021
Date of Judgment:	15 November 2021