THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 570/04

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION Appellant

and

FRED PETER COOP & OTHERS Respondent

Coram: *Navsa, Mthiyane, Brand, Van Heerden JJA et Cachalia AJA*

Date of hearing: **15 & 16 November 2005**

Date of delivery: **30 November 2005**

Summary: Retiree status of former SABC employees in relation to medical scheme and concessionary television licences – medical scheme subsidy and concessionary television licences unilaterally withdrawn by the SABC – SABC relying on absence of authority in respect of the grant of retiree status – former employees relying on ostensible authority – requirements met.

JUDGMENT

NAVSA JA:

[1] This is an appeal by the South African Broadcasting Corporation (the SABC), the national public broadcaster which broadcasts television and radio programmes in terms of the provisions of the Broadcasting Act 4 of 1999 (the Act), against a judgment of Blieden J in the Johannesburg High Court, leave to appeal having been granted by him. The court below ordered the SABC to reinstate and continue to pay a 60% subsidy of the monthly medical scheme contributions of the 93 respondents (hereafter referred to as the plaintiffs), who were formerly employed by it, and to reimburse and pay such amounts as were due subsequent to its unilateral withdrawal of the subsidy in 2001. He also ordered the SABC to reinstate concessionary television licences to such plaintiffs as had received them prior to their being unilaterally withdrawn in 1999. The court below took a dim view of the SABC's conduct in withdrawing the subsidies and the concessionary licences and of the manner in which the SABC's case was conducted and consequently ordered it to pay costs on an attorney-client scale. It is against these orders that the present appeal is directed.

[2] The proceedings in the court below commenced by way of an application which was later referred to oral evidence. The trial lasted eight weeks. The plaintiffs called 24 witnesses and the SABC four. The record of proceedings in the court below comprises 51 volumes extending to 5088 pages. The purpose of the trial was to determine whether the SABC's unilateral withdrawal of the subsidy and the concessionary licences was lawful.

[3] The main issue in this appeal is as follows: whether the plaintiffs did indeed depart from the SABC as retirees. This requires an enquiry into the related question of whether the basis on which they departed was authorised by the SABC. In light of a concession made on behalf of the SABC, to which I will refer in due course (see para 81 below), it is not necessary to address a question entertained and answered in the court below; namely, whether the subsidy and the concessionary licences are, in so far as retirees are concerned, conditions of service or gratuities that may unilaterally be withdrawn by the SABC.

[4] In order to understand the present dispute and to address these questions, it is necessary to set out the background in some

detail, starting with the manner in which the SABC is structured in terms of the Act.

[5] The SABC operates subject to overall control by a board that consists of twelve non-executive members, plus the Group Chief Executive Officer, the Chief Operations Officer and the Chief Financial Officer or their equivalents, who are the executive members of the Board.[1] The affairs of the corporation are administered by an executive committee (Exco) consisting of the three executive members of the Board and no more than eleven other persons. Exco is accountable to the Board and must perform such functions as may be determined by the Board.[2] The SABC may engage such officers and employees as is necessary for the attainment of its objects and determines their duties, remuneration and their other conditions of service. It is empowered to establish or support associations or institutions for the promotion of the interests of its officers and employees and their dependants. It may establish or support aid funds for the rendering of assistance to its officers and employees or their dependants. It also has the

[1] Section 12 of the Act.
[2] Section 14.

power to provide pecuniary benefits for such persons upon retirement or termination of service under other circumstances.[3]

[6] The differences between the relevant provisions of the Act and the provisions of the Broadcasting Act 73 of 1976 under which the SABC previously operated are for present purposes irrelevant.

[7] With effect from 1 January 1993 the SABC pension fund amended its rules to provide that an employee who was over the age of 45 and who resigned, was retrenched, or was dismissed (save for fraud or dishonesty) was entitled to withdraw the full actuarial value of his or her pension (hereafter referred to as the full pension value).[4] Prior to this such person was entitled to receive only his or her own contributions plus interest.

[8] Another regime applied to retirees. The rules dealing with persons who qualified for retirement remained the same, namely, that upon retirement an employee would receive a monthly pension[5] and was entitled to apply to the trustees to be paid a maximum of one-third of the actuarial value of his or her pension. Unlike the category of persons referred to in the preceding paragraph, the pension fund rules did not permit retirees to

[3] Section 26.
[4] Rule 6.4(1)(iv) of the SABC pension fund rules.
[5] Rule 6.1 of the SABC pension fund rules.

withdraw their full pension values. The rules of the SABC medical scheme, on the other hand, entitled retirees to remain on the scheme as continuation members.[6] Persons who resigned, were retrenched or were dismissed were, however, not so entitled in terms of the rules.

[9] From 1 April 1990 the SABC paid a subsidy of 60% of the medical scheme contributions of all employees and retirees.[7] In addition, employees and retirees also received a concessionary television licence upon request. The benefit of such a licence was that a holder paid an annual rate substantially lower than that paid by the general public.

[10] The series of events that culminated in the present dispute started in July 1993 with Mr J P Ludick (Ludick), one of the plaintiffs, who was due to retire on 1 November 1993, his 60th

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[6] Rule 6.2.2.1 provides:
'A member shall … retain his membership of the Scheme in the event of his retiring from the service of his employer or whose service is terminated by his employer on account of age, ill-health or other disability; provided that such a member had been, at the date of retirement or termination of his employment a member of the Scheme for a period of not less than 5 years…'

[7] The SABC's present medical scheme was constituted on 1 July 1972. It appears that, from that time until 1974, the SABC paid a 50% subsidy for both employees and pensioners (retirees). In 1974 the Board decided that, with effect from 1 January 1975, a 100% contribution would be paid in respect of pensioners who received a pension of less than R50-00 per month, other pensioners to receive a 75% contribution. This was followed by a decision in 1977 to the effect that, from 1 September, the SABC would pay a 100% contribution for all pensioners. In 1979 the contribution paid in respect of employees was increased to 62.5%. It is not clear when the contribution paid in respect of employees was subsequently reduced to 60%, but this appears to have taken place sometime before 1 April 1990, when the decision to reduce the contribution in respect of 'new' pensioners from 100% to 60% took effect.

birthday being 19 October 1993.[8] At that stage he had been employed by the SABC for a period of 34 years and was the regional head of the then Northern Transvaal broadcast division of the SABC. Although a senior manager, he was not a member of Exco.

[11] As stated above, the amendment to the pension fund rules enabling retrenchees, persons who had been dismissed and those who had resigned to withdraw their full pension values took effect on 1 January 1993. On 3 August 1993 Ludick entered into discussions with the SABC's Group Head of Human Resources (HR), Mr Dan Esterhuyse (Esterhuyse). In a telefacsimile (fax) sent to Esterhuyse on the same day, Ludick, referring to the discussions, requested particulars of the 'usual pension benefits' due to him on retirement, as well as of 'die enkelbedrag wat geld op 30 September 1993 soos deur u verduidelik'. He also requested the latest copy of the pension fund rules.

[12] On 4 August 1993 Mr Cor Nauta (Nauta), the pension fund advisor in Esterhuyse's office, responded in writing, supplying

[8] In terms of the personnel regulations, members of top and senior management retire at the age of 60 and other employees at the age of 63, although the latter may retire at any time between the ages of 60 and 63 provided they give prior written notification. Employees who have more than ten years of pensionable service may, with prior permission from the SABC, retire at any time after reaching the age of 50. According to the pension fund rules 'normal retirement date' means 'the first day of the month next following the attainment of the Normal Retirement Age'.

details of Ludick's monthly pension entitlement with maximum permissible commutation (one-third) and informed Ludick that the actuary had been requested to calculate the full value of his pension (it is common cause that this was in excess of R1 million). Nauta also recorded that the latest pension fund rules had been despatched to Ludick.

[13] On the same day Ludick sent a fax to Esterhuyse, pointing out that he considered many parts of the pension fund rules to be vague and asking, inter alia, to be referred to the specific clause in the pension fund rules requiring him to *resign* in order to withdraw his full pension value. In addition Ludick asked for confirmation that he would be permitted to continue his membership of the SABC's medical and group life assurance schemes after the termination of his services. Ludick testified that Esterhuyse had informed him that his resignation was 'a technical mechanism' required in order to withdraw his full pension value, but that he would still be regarded by the SABC as a retiree and thus would remain entitled to post-retirement benefits, including subsidised membership of the SABC medical scheme.

[14] On 27 August 1993 Ludick wrote to the then Group Chief Executive of the SABC, Mr W J J Harmse (Harmse), stating that

the new pension fund rules provided the option of withdrawing his full pension value, but that, according to Esterhuyse's interpretation of the rules, he had to resign in order to do so. He stated that, if this interpretation was correct, he would terminate his services with the SABC on 30 September 1993 and transfer his pension monies to another fund of his choice. Ludick informed Harmse that, according to Esterhuyse, if he departed from the SABC in this manner, he could probably ('waarskynlik') retain his membership of the medical and group life assurance schemes and requested Harmse to confirm that he would indeed be able to remain a member of the two schemes. He requested Harmse to regard this letter as 'my bedanking as lid van die SAUK pensioenfonds', effective from 1 October 1993.

[15] Harmse acknowledged receipt of the letter, confirming acceptance of Ludick's resignation. He stated (unconditionally) that Ludick would retain his membership of the medical scheme 'as pensioenarislid' and that he had the choice of continuing as a member of the group life assurance scheme.

[16] It would seem that Nauta arranged all the formalities for Ludick's departure from the SABC on this basis, facilitating the transfer of his full pension value to another fund. Nauta also

confirmed (in writing) Ludick's continued membership of both the medical scheme (with his contribution to the premium being only 40% of the total) and of the group life assurance scheme. Upon his departure from the SABC Ludick received a gratuity of R2 500-00, usually afforded only to retirees.

[17] Ludick was the first person to depart from the SABC on the basis described above. It is clear that his dealings were principally with Esterhuyse and Harmse. The former died in an aeroplane accident in October 1993.

[18] Subsequent to Ludick's departure, in the period from January to November 1994, a number of managers employed by the SABC terminated their services on the same basis as he had done. They all used the mechanism of *resigning* in order to withdraw their full pension values and, in their correspondence with their immediate seniors, senior management and the pension fund advisor's office, stated their intention to *retire*. Like Ludick, they continued to receive a concessionary television licence, were permitted to continue their membership of the medical scheme and received the 60% subsidy in respect thereof from the SABC until the withdrawal of the subsidy and concessionary licences in 1999 and 2001, respectively.

[19] The same mechanism was during that period utilised by some managers and employees of Sentech Limited (Sentech), a public company the shares of which are wholly owned by the Government. Initially Sentech was contained within the SABC corporate structure as its signal distribution division. In 1992, assuming its own corporate identity as described above, it nevertheless continued in a symbiotic relationship with the SABC, rendering technical services. In that year a number of SABC employees transferred to this new corporate entity, but retained their employment and related benefits. It is common cause that, by and large, Sentech's terms of employment were the same as those of the SABC and that their employees and retirees were accommodated within the SABC pension fund and medical scheme.

[20] In the court below Sentech was the second defendant. Sentech did not oppose the relief sought and adopted the same attitude in respect of this appeal. The third defendant, the SABC medical scheme which is a body corporate registered and functioning as such in terms of the Medical Schemes Act 131 of 1998, took the same stance.

[21] Not only did the plaintiffs who fell in the category presently under discussion openly state their intention to retire but, more importantly, top management and their immediate seniors considered them to be retirees. Ludick, for example, interacted with Esterhuyse and with Harmse and it is clear from the relevant correspondence that Ludick was regarded by them as a retiree.

[22] Fred Coop (Coop), who is the first plaintiff and an important character in the present dispute, succeeded Esterhuyse (albeit in an acting capacity) as the SABC's Group Head of HR after the latter's unfortunate death. At the time that Ludick was preparing for his departure from the SABC and whilst Esterhuyse was still alive, Coop was the second most senior person in the HR department. His first appearance in written correspondence in the present saga was on 10 September 1993 when he wrote to the Group Head of Financial Services at the SABC, seeking payment of the gratuity of R2 500-00 due to Ludick upon his retirement.

[23] Scrutiny of written correspondence involving persons who left the SABC and Sentech on the same basis as Ludick reveals that, in doing so, they interacted with a range of senior and top managers and that they were located in different divisions and geographical areas. Some of them dealt with the HR managers in

the geographical regions in which they were employed. Some communicated directly with the CEO of the SABC, with Coop, or with Sentech's CEO or HR manager.

[24] In December 1994 a process was started which culminated in the involvement of another distinct group of plaintiffs in the present litigation. During that month, a management report in which Coop played a major part was presented by the SABC's HR department for approval by Exco. The report proposed a staff reduction exercise, with employees being invited to apply for voluntary retrenchment. The apparent motivation was cost effectiveness, but an underlying concomitant reason was a major transformation exercise to enable formerly disadvantaged South Africans to take up leadership positions within the SABC and to provide an incentive for the departure of those of the 'old order' who wished to leave or who were unacceptable as part of the new face of the SABC.

[25] The report proposed offering those who applied for voluntary retrenchment the SABC's standard severance package (with a slight modification with which we need not be concerned). It is of some importance that the report, in dealing with a timetable for action to achieve what is set out in the preceding paragraph and in

relation to proposed acts by management, used the phrase ‘retirement/voluntary retrenchment’ three times as shown here.

[26] The Board approved the plan on 1 February 1995. The SABC produced a special edition of its internal publication, Intekom (No 24), dated 3 February 1995, to publicise the retrenchment exercise. It spelt out the details of the retrenchment package on offer, stating that it was primarily directed at ‘staff in management and non-programme related disciplines’, but that all employees could apply. Approval of packages would be subject to management discretion. The offer was open for acceptance until 31 March 1995. Applications had to be submitted to the relevant line managers who had to consult with the appropriate divisional head before final decisions were made. Employees were warned not to approach the pensions office before their applications were approved.

[27] This retrenchment process should be viewed in the context of significant changes that were taking place at the SABC. A new Board had been appointed in June 1993, primarily to ensure that the SABC’s media coverage leading up to and including South Africa’s first democratic elections in 1994 would be fair. In line with the transformation process, Mr Zwelakhe Sisulu (Sisulu) had

joined the SABC on 1 February 1994 as special assistant to Harmse. It was accepted by all that he was being groomed to succeed Harmse, which he did at the end of 1994. Sisulu had been charged to lead the transformation process and was assisted in this by Professor Govan Reddy, who had been appointed head of SABC radio in January 1994.

[28] As part of a communication drive in relation to the retrenchment programme mentioned in Intekom No 24, Sisulu addressed SABC staffers countrywide by way of an internal live television broadcast to all SABC centres. He was joined in this transmission by Dr Matsepe-Casaburri, the new chairperson of the SABC Board. The retrenchment exercise as described in Intekom No 24 was thus communicated to all SABC staff.

[29] It is common cause that, shortly after the transmission, Sisulu and Coop (in his role as head of the HR department) addressed SABC staff in a hall at SABC headquarters in Auckland Park. Coop testified that in his presentation, in Sisulu's presence, he described not only the details concerning the retrenchment package but also the benefits that were available to those employees who were accepted for voluntary retrenchment and who also qualified for early retirement. These benefits were the

same as those received by Ludick. Sisulu could not recall the details of what was discussed but was unwilling to state positively that Coop had *not* done this. I will return to this and other aspects of Coop's testimony when I deal with the criticisms levelled against Coop by the SABC.

[30] Because Sentech employed mostly technically skilled staff whose services were sorely required, the invitation to apply for voluntary retrenchment was not extended to its employees.

[31] Hundreds of SABC employees responded. Divisional heads were approached for approval. Coop and Nauta featured prominently in the interaction with divisional heads and employees. Coop testified that he and senior managers within the HR department and those located elsewhere in the SABC acted on the basis of the precedent that had been set by Ludick (and those who followed him) and permitted those who now applied for voluntary retrenchment and who qualified for early retirement to withdraw their full pension values *and* take the retrenchment package *and* retain their subsidised membership of the medical scheme *and* if they so wished, continue to participate in the group life assurance scheme. Most of the plaintiffs fall into this category.

[32] Although Sentech personnel were not entitled to apply for the 1995 retrenchment package, a few plaintiffs who were Sentech employees and who qualified for early retirement utilised the 'Ludick resignation/early retirement option' in 1995 and obtained all the benefits which Ludick had received on his departure from the SABC. None received retrenchment packages. Prior to their departure they directed their queries to the HR manager at Sentech, Mr Hendrik Calitz (Calitz), and/or the managing director, Mr Niel Smuts. Calitz interacted with Coop and Nauta concerning some of these applications for early retirement. Nauta regularly gave advice to Sentech and SABC employees on how their 'early retirement/resignation' letters should be worded.

[33] It should be noted that after the amendment of the pension fund rules an amendment to revenue legislation was contemplated in terms of which monies withdrawn from pension funds would be subjected to a substantially increased tax rate.[9] This generated public interest and discussion and served as an additional motivation for those who approached the SABC and Sentech to retire in terms of the Ludick option and later in terms of the 1995 retrenchment option.

[9] The increased tax rate apparently came into effect during August/September 1995.

[34] In 1997 a second SABC retrenchment exercise was put into operation. It followed on a report by consultants employed by the SABC. The details of this exercise are sketchy but, since it did not impact on the plaintiffs, it need detain us no further.

[35] I turn to deal with some individuals who fall outside the categories already dealt with.

[36] Mr Gert Claassen (Claassen) is the only plaintiff who had less than 10 years service with the SABC. Many of the plaintiffs have service records spanning two or three decades. Claassen, however, had only been employed by the SABC for approximately six years and was 56 years old when he left the SABC in 1997. At that time he was second-in-command of the operational arm of the SABC. He was employed on a fixed-term contract and was not a member of the SABC pension fund or of its provident fund. It is common cause that he qualified for early retirement in terms of the then applicable personnel regulations and, in December 1996, he wrote to Sisulu (then the CEO) requesting early retirement and continued membership of the medical scheme. Ms Langa-Royds, who had succeeded Coop as Group HR head, confirmed in writing that his contract would terminate on 31 May 1997 and that he would retain his membership of the medical scheme ‘against the

current rate of contribution and subject to future adjustments'. He, like the other plaintiffs, received the 60% medical scheme subsidy and the concessionary television licence until they were unilaterally withdrawn. By contrast with the other plaintiffs discussed so far, in a subsequent letter from Mr Anton Heunis (then Group Manager of HR) confirming Claassen's continued membership of the medical scheme, it was specifically recorded that 'the subsidy rate was subject to revision'. This reservation on exit from the SABC was recorded in respect of only one other plaintiff, Mr Jan Hendrik Otto.

[37] Harmse's rise in the SABC was meteoric. Starting with the SABC as an administrative assistant in 1963, he became the CEO in 1988. He was appointed by the Board and his terms of appointment were determined after negotiations with the then chairperson of the board. He was appointed on a five-year contract but, at the end of 1993, his contract was extended for one year after an accord had been reached with Dr Matsepe-Casaburri.

[38] Harmse verbally negotiated the terms of his departure with Mr Hickling, the deputy-chairperson of the Board at that time. On his departure he did not receive a package but was permitted to withdraw his full pension value and continue his membership of the

medical scheme. He too received the 60% contribution until it was withdrawn.

[39] Mr Willie Lindstrom (Lindstrom) was employed by the SABC from 1967 until 2000 when he terminated his services. At that stage he was five years from his normal retirement date. He had undergone a number of joint replacements and required extensive surgical and medical attention. Continued membership of the subsidised medical scheme was therefore particularly important to him. In October 1999, he wrote to Mr Snuki Zikalala, the executive editor of the news division, who was part of the new face of the SABC, requesting a retrenchment package and continued membership of the medical scheme. Correspondence ensued with a number of the SABC's new regime officers. The matter was taken up with Reverend Mbatha, who succeeded Sisulu. Lindstrom arranged a meeting with Ms Cecilia Khuzwayo (Khuzwayo), who had succeeded Ms Langa-Royds as Group HR Head. This meeting was also attended by Mr Delarey Nell, another plaintiff. In discussions with Khuzwayo, it became clear that the SABC was not prepared to offer them any kind of retrenchment package and that they could choose either redeployment or early retirement with continued membership of the medical scheme. They chose the

latter and this was recorded in writing by the SABC. After discussions with Mr Jaco van Staden who was ‘standing in’ for Ms Lynne Gildenhuys (Nauta’s successor as pension fund advisor), they were both permitted to withdraw their full pension values and to remain members of the medical scheme as retirees.

[40] Coop departed from the SABC on 30 August 1995 after he had negotiated the terms of his departure directly with Sisulu. He was entitled to early retirement as he had been in the service of the SABC for almost 30 years. It is true that, in the correspondence between himself and Sisulu, no mention was made of early retirement or of continued membership of the medical scheme. However, his evidence that he intended to leave the SABC as a retiree and that he made this clear to Sisulu was not seriously challenged. As far as he was concerned he received what he had requested, namely, his full pension value, continued subsidised membership of the medical scheme, the retirement gratuity of R2 500-00 and all the other benefits usually afforded to retirees.

[41] This discussion of individual cases is meant to be illustrative and not exhaustive.

[42] I record that the SABC made provision for the 60% subsidy in its annual budgets presented to the board and, in doing so, drew no distinction between retirees and employees. Since at least 1994 its audited financial statements, as approved by the Board and signed by the respective CEO's, reflected the payment of a post-retirement subsidy as a long term *liability* calculated as a projection in respect of both present and past employees. Thus, for example, in accounts for the year ending 30 September 1996, the SABC made provision in an amount of R189.4 million for the 'present value, as actuarially valued…of post-retirement contributions payable by the Corporation to the Medical Aid Scheme in respect of current and past employees'. It is clear from the evidence that this included provision for direct-paying members of the medical scheme. Direct paying members were retirees who did not receive a monthly pension from the SABC (this included retirees who had subscribed to a provident fund or who had made their own private pension fund arrangements). Direct payment was necessary because, for this category of persons, deductions could not be effected from a monthly pension paid by the SABC. The provision made thus included the projected subsidy for the plaintiffs. For the financial years ending 31 March 1998 (covering a period of 18 months), 31 March 1999, 31 March 2000 and 31 March 2001, such

provision was made in amounts of R217 million, R210 million, R238.4 million and R238.9 million, respectively. It is important to note that, apart from external audit, the SABC was subject to stringent internal audit as well.

[43] It is clear from documentary evidence that, when the Board made the decision to withdraw the subsidy, it did so under the impression that the reservation set out in the letters presented to Claassen and Otto had been included in letters to all the persons in the plaintiffs' position upon their departure from the SABC. It is also abundantly clear from the documentary motivation presented to the Board on which it based its decision to withdraw the subsidy that the primary consideration was financial savings. So much so that it was contemplated that the savings that might be effected by the withdrawal of the medical scheme subsidy for persons in the position of the plaintiffs could turn the SABC from a loss-making position into a profitable organisation.

[44] Coop and other top and senior managers amongst the plaintiffs, who testified, stated that they had assumed that authority for the Ludick precedent derived from an Exco decision. It appears to be accepted by all that there was in fact no *Board* decision permitting persons to leave on that basis. Despite both parties'

efforts, minutes for the period in which such a decision might have been taken by Exco could not be traced.

[45] It is clear that the pension fund did not suffer any financial prejudice, and the indications are that the pension fund reserves might in fact have benefited from the withdrawal by the plaintiffs of their full pension values. According to the testimony of Mr Anton Els, the pension fund actuary, the Ludick option contravened a directive of the South African Revenue Service and could have threatened the fund's tax status. The pension fund did not, however, seek to recover any of the monies it paid to the plaintiffs and is not a party to the present litigation.

[46] Not only did the medical scheme not oppose the relief sought by the plaintiffs, but neither it, nor the SABC is against retaining them as continuation members. The only issue in this regard is whether the SABC should continue to pay the subsidy.

[47] In his evidence, Coop stated, at one stage, that he had in fact been told by Esterhuyse, who was a member of Exco at the time, that there had been a decision concerning Ludick. At another stage he testified that he had made the assumption that there had been such a decision. Some of the plaintiffs knew Esterhuyse and

testified that he had been a meticulous man who acted according to prevailing rules and that he would not have acted without an official decision. That then was the basis of the assumption. Coop and others accepted too, that the decision would not have been one peculiar to Ludick, but that it had been decided that persons in his position would be entitled to depart on those terms.

[48] Sisulu and Reddy who in some instances, at least on the face of the documents produced at the trial, were party to the decisions which led to several of the plaintiffs receiving the benefits in question, testified that they had not in fact considered whether the rules entitled these plaintiffs to what they had received. Both testified that they signed what their subordinates had prepared and put before them in this regard. Sisulu in particular appreciated the fact that some of the people earmarked by the 1995 retrenchment process had dedicated their entire working lives to the SABC and that it was important that such people be treated sensitively and with the utmost fairness. He testified that Harmse, Claassen and Coop had, in his experience, always acted with great integrity, that he had the fullest confidence in them and a relationship of mutual respect with them.

[49] The SABC's case concerning the events described above, as best as can be discerned, vacillated between two positions. First, more or less accusing Coop and Harmse and other top executives of having 'conspired' and acted fraudulently in favour of a select group of white managers in order to obtain the benefits in question when they must have known that they were not entitled to them. Second, stating before us that their case was that Coop and others had acted 'opportunistically' on the basis of the Ludick precedent in order to obtain the benefits for a select few white managers when they knew or ought to have known that they were not entitled to them.

[50] The SABC contended that Coop, Harmse and others deliberately withheld from the Board the details of the manner in which the plaintiffs departed from the SABC. According to the SABC, those who had either 'conspired' or acted opportunistically could not keep matters within the circle of the favoured few and, as word got around, they were thus compelled to extend the benefits to persons whom they had not initially contemplated.

[51] In essence, the SABC submitted that neither the Board, nor Exco, had authorised persons such as Coop and Harmse to grant

the plaintiffs the benefits which they had received and that consequently the SABC ought not to be held liable.

[52] The SABC further contended that, since the plaintiffs had held out to the pension fund and to the SABC that they had resigned, they ought to be held to their word. They should thus be regarded as having severed all links with the SABC and consequently be held to have no right to the subsidy, the concessionary television licence or any other benefit as might accrue to an actual retiree.

[53] Too much time and energy was spent by counsel for the SABC in the court below cross-examining plaintiffs about the meaning of the pension fund and medical scheme rules. Too little time was spent analysing the proper ambit of the dispute or whether there were adequate grounds for a proper defence. Much of the SABC's case was based on conjecture and it is thus not surprising that it is difficult to glean its true nature.

[54] One fundamental weakness of the SABC's case is that there were no attempts at secrecy by those labelled 'conspirators' or 'opportunists'. Ludick was unchallenged when he stated that, after he had come to the arrangement described above, he announced

its details to all who enquired about his departure. Almost every plaintiff who testified stated that the Ludick case or what it represented was common knowledge in the corridors of the SABC's headquarters. Furthermore, there are no discernable patterns of association or a conspiratorial modus operandi in respect of all of those who approved and received the benefits in question. When the plaintiffs were cross-examined, the precise manner of their alleged conspiracy or opportunism in collaboration with others was not put to them.

[55] The voluminous correspondence makes it clear that the 'mechanism' employed in the Ludick case was just that ─ a mechanism. It was disclosed as such to the plaintiffs' immediate superiors, to the pension funds advisor, to other top managers and even in some instances to Sisulu and/or Reddy. In two instances, as discussed above, the benefits in question were negotiated with Khuzwayo, independently of any decision made by senior or top white managers. In most instances the plaintiffs' immediate supervisors and/or senior management suggested the mechanism in question. It should also be borne in mind that the relevant events occurred at a time when the SABC was under intense public scrutiny.

[56] It is no answer to say that Sisulu, Reddy and others of the new order were unaware of the true import of what was being done in the SABC's name, or that they were yet to come to terms with the personnel regulations and the rules that governed the pension fund and medical aid scheme, or that they unwittingly signed letters put before them.

[57] Even if one were to accept in the SABC's favour (in the absence of an evidentiary basis for so doing), that a few top managers were involved in a conspiracy that later got out of hand, the problem remains that one is unable to identify which of the remaining plaintiffs were co-conspirators who were unable reasonably to rely on advice from top management including, in some instances, the CEO and the Group Head of HR.

[58] The probabilities in this regard are against the SABC, in that it is unlikely that persons who were approaching their retirement would jeopardise their entitlement to subsidised membership of the medical scheme by doing something they must have known was tainted with dishonesty and might attract serious and irrevocable consequences. At that stage of their lives, medical scheme membership was clearly increasingly important, not just in respect

of the amount of the SABC's contribution, but in respect of readily obtaining membership and similar benefits elsewhere.[10]

[59] Furthermore, not all the plaintiffs constituted 'top' or 'senior' management. Some were at best junior middle managers and at least one was a secretary. How they became part of the opportunism or conspiracy was neither explained nor explored. In real life it is probable that such persons who might justifiably be described as the rank and file would rely on guidance from top management.

[60] Whilst I agree with counsel for the SABC that the court below erred in basing its decision to reinstate the subsidy on ratification, as this had neither been pleaded, nor pointedly explored during the trial, I do not agree that on the totality of the evidence it follows that the plaintiffs should not have been afforded the relief they sought in the court below.

[61] In considering whether the plaintiffs proved that there was actual authority for the decisions on which the plaintiffs' claims are based the following must be taken into account. Coop testified

[10] Cf. Section 29(1)*(u)* read with s 29(1)*(s)* of the Medical Schemes Act 131 of 1998 which compels medical schemes to admit without a waiting period or the imposition of new restrictions based on health persons (and their dependants) who retired from the service of an employer or whose employment was terminated on account of age, ill-health or other disability. No such provision exists in respect of persons who voluntarily resign.

about Exco authorisation for the Ludick matter on a hearsay-basis ─ that he had been told by Esterhuyse that Exco had made such a decision. This should be compared with his testimony at another stage, that he had simply made an assumption, like others, that there must have been such authorisation because he knew that Esterhuyse always acted according to prevailing rules. He was reminded under cross-examination, that in an affidavit in the application proceedings he had stated that a Board decision had provided authority for the Ludick option. A number of plaintiffs who served on Exco could not recall such a decision which, since it might impact on them, one would have expected them to remember. Exco minutes for the relevant period could not be traced.

[62] In these circumstances it follows that the plaintiffs failed to prove that there was actual authority by Exco, either express or implied. In this regard the discussion in paras [65]-[75] hereafter has relevance.

[63] The plaintiffs in a replication relied on estoppel, otherwise described as ostensible authority. A person who has not authorised another to conclude a juristic act on his or her behalf may in appropriate circumstances be estopped from denying that

he or she had authorised the other so to act. The effect of a successful reliance on estoppel is that the person who has been estopped is liable as though he or she had authorised the other to act.[11]

[64] The essentials of estoppel can briefly be stated as follows: The person relying on estoppel will have to show that he or she was misled by the person whom it is sought to hold liable as principal to believe that the person who acted on the latter's behalf had authority to conclude the act, that the belief was reasonable and that the representee acted on that belief to his or her prejudice.[12]

[65] The distinction between actual and ostensible authority was explained by Denning MR in *Hely-Hutchinson v Brayhead Ltd., and Another* [1968] 1 QB 549 (CA) at 583A-G ([1967] 3 All ER 98 at 102A-E):

'[A]ctual authority may be express or implied. It is *express* when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing

[11] 1 *Lawsa* (reissue) para 210.
[12] 1 *Lawsa* (reissue) para 211 and *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) para 26.

director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.

Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his *actual* authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the "holding-out". Thus, if he orders goods worth £1 000 and signs himself "Managing Director for and on behalf of the company", the company is bound to the other party who does not know of the £500 limitation...'

[66] In *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) this Court, in applying that *dictum*, stated

(para 25):

'As Denning MR points out, ostensible authority flows from the *appearances* of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. Our law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong... But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him. Thus, to take this case, the fact that Assante[13] held himself out as authorised to act as he did is by the way. What Cape Produce must establish is that the NBS created the impression that he was entitled to do so on its behalf. This was much stressed in argument, and rightly so. And it is not enough that an impression was in fact created as a result of the representation. It is also necessary that the representee should have acted reasonably in forming that impression: *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) at 50A-D. Although an intention to mislead is not a requirement of estoppel, where such an intention is lacking and a course of conduct is relied on as constituting the representation, the conduct must be of such a kind as could reasonably have been expected by the person responsible for it, to mislead.

[13] The manager of the NBS Bank Ltd.

Regard is had to the position in which he is placed and the knowledge he possesses…'

[67] Esterhuyse was the Group Head of HR and a member of Exco until his death in 1993. Harmse was the CEO and a member of both the Board and of Exco. For those in subordinate positions at the SABC they would be the two persons, *par excellence,* to whom they could look for guidance and authority on matters affecting personnel.

[68] I agree with counsel for the SABC that Coop's evidence in regard to the question of how he established the authority for the Ludick precedent was unsatisfactory. This could perhaps be attributed to the fact that he felt pressurised by having advised many of the plaintiffs on an assumption he was later unable to substantiate. It does not necessarily make him a liar in respect of the assumption he made, nor does it follow that he acted unreasonably in making such an assumption. He was supported in this by a number of plaintiffs who readily assumed that Esterhuyse, because of his meticulousness, must have obtained at least Exco's approval. Furthermore, according to Coop, Esterhuyse told him that he (Esterhuyse) would inform the Regional HR managers of 'the resignation/early retirement option' so that they could apply it

to other employees of the SABC. An overview of the evidence indicates that, in time, this information was indeed passed on to the Regional HR managers. In their testimony both Harmse and Claassen maintained that, they too had assumed that there had been such a decision.

[69] Ludick, as the correspondence shows, in the first instance looked to the Group Head of the HR department and asked him pointed questions. He questioned his interpretation of the pension fund rules but was reassured that the resignation mechanism was a legitimate way of withdrawing his full pension value. There was no reason to doubt that Esterhuyse was speaking for the SABC when he confirmed that Ludick's 'resignation' from the pension fund would not affect his retiree status and that he would be permitted to continue his membership of the medical scheme.

[70] Still not satisfied, Ludick approached Harmse asking for confirmation. The letter he received from Harmse, the relevant particulars of which are set out in para [15] above, understandably reassured him. The SABC could hardly be heard to say that its CEO, in addressing a senior manager's personnel concerns on official stationary and acting in conjunction with the Group HR Head, was not speaking on behalf of the SABC. Coop, Harmse

and Claassen all testified that, as far as they were concerned, the resignation option was merely a mechanism to enable an employee who qualified for early retirement to withdraw his/her full pension value. They all regarded those employees who took early retirement, but utilised the resignation option so as to withdraw their full pension values, as retirees. Because there was no financial implication for either the SABC or the pension fund, they did not consider it necessary that Board approval be obtained for permitting the resignation option.

[71] But it goes further. Nauta, the pension fund advisor, facilitated the withdrawal of Ludick's full pension benefit and confirmed in writing that he was entitled to remain a subsidised member of the medical scheme. Furthermore, upon departure Ludick received a gratuity paid only to retirees.

[72] It does not behove the SABC to adopt the position that, if Ludick and the other plaintiffs had properly considered the rules of the pension fund and the medical scheme, they could not reasonably have relied on what was told to them by management or that they could not reasonably have believed that they were entitled to depart the SABC on the bases in question. This presupposes that each plaintiff considered the rules in detail and

that they would not have been reassured by top management that the use of the mechanism was legitimate, particularly when the pension fund and the medical scheme appeared to approve. We know now that the pension fund did not suffer financial loss of any kind. When one considers those who followed on Ludick's precedent, one is compelled to the conclusion that they were doubly reassured.

[73] The following factors should be considered in tandem with what is set out in the preceding paragraphs. In the ensuing years not only did the number of persons in the different categories of plaintiffs grow substantially, but the SABC budgeted for and in fact paid the subsidy for them. It was common knowledge that the SABC was subject to stringent internal and external audits. Successive CEO's and Group HR Heads had continued to permit people to depart in the Ludick manner. The financial statements in which there was exponential annual growth in the provision made for the SABC's long-term commitment to post-retirement medical scheme contributions for current and past employees, including the plaintiffs, contributed to the impression that the Ludick method of departure was approved at the highest level. Each successive plaintiff could rely on what had passed between the SABC and

others before him or her. Indeed, Anton Heunis, who was the SABC's principal witness and is its present Senior General Manager, Audience Service Division, conceded as much under cross-examination.

[74] As in the *NBS Bank* case, supra, the plaintiffs' case was not limited to the appointment of the various relevant officers who acted on the SABC's behalf.[14] It included their senior status, the trappings of their appointment, the manner in which they went about their dealings with the plaintiffs, the use of official documents and processes, the apparent approval of subordinate and related organisations, such as the pension fund and medical scheme, the length of time during which the Ludick option was applied, the Board's own financial accounts and the conduct of CEO's who were Board members.

[75] As in the *NBS Bank* case, the SABC created a façade of regularity and approval and it is in the totality of the appearances that the representations relied on are to be found.[15]

[76] The plaintiffs were adamant that their continued subsidised membership of the medical scheme was a material consideration

[14] Paras 28-32.
[15] Para 33.

when they made the decision to terminate their services with the SABC. As already pointed out, in the twilight of their lives they would have found it extremely difficult, if not impossible, to obtain affordable membership of a substitute medical scheme (with or without a waiting period). For the majority of them, this difficulty has been compounded by the lapse of a decade since their departure from the SABC. Having regard to the number of years spent in the service of the SABC and as members of the medical scheme they would, no doubt, have contributed to the reserves of the scheme and be entitled to benefits that flowed from this.

[77] The vast majority of plaintiffs who testified insisted that, had the representations not been made, they would not, because of the importance of medical aid in relation to their personal circumstances, have ‘resigned’ as suggested. They would have retired in the normal course, thereby retaining membership of the medical scheme and avoiding the parlous circumstances in which they now find themselves.

[78] They thus acted to their prejudice in relying on the representations made. The subsidy and the concessionary television licences were unilaterally terminated and the plaintiffs

were thus treated differently to other retirees. They were required to justify their positions and finally resorted to the present litigation.

[79] If, as stated above, we can rightly conclude that the SABC has failed to establish a conspiracy of any sort or that their submissions about opportunism are without foundation, then it must, in my view, follow that the plaintiffs have established the essentials of estoppel.

[80] For all the reasons referred to above this conclusion would apply equally to Coop and Harmse. As rightly conceded by counsel for the SABC, the facts surrounding Claassen's departure from the SABC make his case the strongest of all the plaintiffs.

[81] Before us counsel for the SABC conceded that in the event of a finding by this Court that the plaintiffs did indeed depart from the SABC as retirees, it follows that they ought rightly to have been treated in exactly the same manner as all other retirees.

[82] As demonstrated above, the total provision for post-retirement medical scheme subsidy funding made by the SABC for current and past employees was substantial. The dispute concerning the proper 'retiree status' of the plaintiffs provided an opportunity in 2001 for the unilateral termination (on three months'

notice) of their subsidy with effect from 1 November 2001. In 2002 the SABC Exco, possibly contemplating that prospective employees would provide the easiest opportunity for costs savings, decided that all employees appointed after 1 June 2002 would not qualify for any medical scheme subsidy upon their retirement. This was then expressly incorporated in new letters of appointment.

[83] It did not stop there. In 2003 the SABC Board set in motion a process aimed at phasing out the medical scheme subsidy for all retirees, present and future, over a five-year period at a reduction rate of 20% per annum. A consultation process was initiated with continuation members of the medical scheme and all current employees and their unions ─ the plaintiffs were not involved in this process. In a letter dated 3 November 2003, Dr Namane Magau, who succeeded Khuzwayo as Group Head of HR (now called 'Director: Human Capital'), informed all continuation members (other than the plaintiffs) of the SABC's intention to follow this course, commencing on 1 April 2004, and invited written representations concerning the proposed changes. According to this letter, the subsidy had been made gratuitously and the SABC could no longer justify the level of expenditure required to maintain same.

[84] We were informed by counsel that the response by the general body of continuation members (other than the plaintiffs) has been a storm of protest and the commencement of legal proceedings against the SABC in this regard. The particulars of the challenge and the SABC's response to it are not before us.

[85] Counsel for both parties accepted that, in the light of the concession referred to in para [81], in the event of this Court deciding the main issue in favour of the plaintiffs, they were entitled to the relief sought in the declaration and mirrored in the order of the court below.[16] It is thus not necessary to decide any of the other issues raised by counsel, including the plaintiffs' alternative challenge on the basis of administrative review.

[86] I turn to the question of costs. Blieden J was justifiably distressed at the attitude adopted by the SABC towards those who had served it for a substantial part of their working lives. He was critical of the manner in which counsel for the SABC advanced their client's case, as were counsel for the plaintiffs. However, having regard to the gap in internal documentation and considering the death or departure of several key actors in the history of the matter, some leeway ought to have been afforded them in the

[16] See para [1] above.

presentation of their client's case. In my view, Blieden J's reaction in the form of the punitive costs order was too severe.

[87] Counsel for the SABC submitted before us that, in the event of the plaintiffs' succeeding in the present appeal, they should nonetheless be mulcted in the costs of the application in the court below to vary an agreement (restricting the issues) reached by the parties. They referred in this regard to the many mutations of the plaintiffs' case during the course of the proceedings in the court below.

[88] Whilst it is true that the plaintiffs' case mutated from time to time, the same is true of the SABC's case. In my view, the plaintiffs are entitled to all the costs properly incurred to enable a proper ventilation of the dispute. I see no reason to deny them the costs of the aforesaid application.

[89] It was accepted by counsel that a variation of the punitive costs order issued by Blieden J should not affect the ordinary order of costs attendant upon success on appeal.

[90] For all the reasons set out above, the following order is made:

1. The appeal is dismissed, save that the order of costs made in the court below is set aside and substituted as follows:

'The SABC is ordered to pay the plaintiffs' costs of suit, including the costs of two counsel.'

2. The SABC is ordered to pay the costs of appeal, including the costs of two counsel.

_____
M S NAVSA
JUDGE OF APPEAL

CONCUR:

MTHIYANE	JA
BRAND	JA
VAN HEERDEN	JA
CACHALIA	AJA