

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 17/29163

In the Application for admission as *amicus curiae*

**ORGANISATION UNDOING TAX ABUSE**

APPLICANT

*In re:*

In the matter between:

**SOUTH AFRICAN BROADCASTING CORPORATION  
SOC LIMITED**

APPLICANT

and

**SOUTH AFRICAN BROADCASTING CORPORATION  
PENSION FUND**

FIRST RESPONDENT

**GEORGE HLAUDI MOTSOENENG**

SECOND RESPONDENT

**MINISTER OF FINANCE**

THIRD RESPONDENT

**REGISTRAR OF PENSION FUNDS**

FOURTH RESPONDENT

---

**FOUNDING AFFIDAVIT**

---

I the undersigned,

**STEFANIE FICK**

do hereby make oath and state:

1. I am an adult female Head of Legal Affairs in the employ of the Applicant (in the *amicus curiae* application) and am duly authorised to depose to this affidavit on behalf of the Applicant, the Organisation Undoing Tax Abuse (“OUTA”).
2. The facts herein contained are, save where otherwise stated or where it so appears from the context, within my personal knowledge and are to the best of my knowledge and belief both true and correct. Where I make legal submissions, I do so on the basis of legal advice which legal advice I accept.
3. OUTA is a non-profit company incorporated under the Companies Act, 2008 with registration number 2012/064213/08 with its head office situated at 318 Oak Avenue, Randburg. OUTA’s main objectives are:
  - 3.1. the advancement of the Constitution of the Republic of South Africa (“the Constitution”);
  - 3.2. holding government accountable;
  - 3.3. the promotion of a prosperous country free from the abuse of authority and governed with the efficient use of tax revenue;

- 3.4. to be a trusted vehicle for positive change, in promoting and advancing the Constitution and other democratic processes by:
- a) challenging the taxation and the regulatory environment (as a whole or in part) as and when deemed as being irrational, unfit or ineffective for their intended purpose; and
  - b) questioning and challenging the squandering, maladministration and corrupt use of taxes by using our clear and effective methodology and then to hold those responsible for the maladministration and/or corruption to account for their behavior and actions.
4. This is an application in terms of rule 16A of the Uniform Rules of Court for admission of OUTA as an *amicus curiae*.

#### **THE PURPOSE OF THIS APPLICATION**

5. The report of the Public Protector no 23 of 2013/2014 entitled “*When Governance and Ethics fail*” [Adv.Thuli Madonsela, Public Protector of the Republic of South Africa and dated 17 February 2014 (“the report”)], is a report on an investigation into a number of issues, including whether:

- 5.1. the alleged appointment and salary progression of the Second Respondent (hereinafter referred to as “Mr. Motsoeneng”) were irregular and constituted improper conduct and maladministration;
- 5.2. Mr. Motsoeneng fraudulently misrepresented his qualifications to the South African Broadcasting Corporation SOC Limited (hereinafter referred to as the “Applicant”), including the statement that he had passed matric when applying for employment;
- 5.3. the purging of senior officials at the Applicant by Mr. Motsoeneng resulted in unnecessary financial losses in the CCMA and other settlements and whether such conduct could be classified as financial mismanagement. Furthermore, whether such conduct constituted improper conduct and maladministration;
- 5.4. Mr. Motsoeneng irregularly increased the salaries of various staff members, including a shop steward, resulting in a salary bill increase in excess of R29 million and if this amounted to financial mismanagement and accordingly improper conduct and maladministration;
- 5.5. there were systemic corporate governance failures at the Applicant and the causes thereof.

6. The report, *inter alia*, concludes with a direction that all monies be recovered which were irregularly spent through unlawful and improper actions from the appropriate persons. In addition, the Applicant's board within 30 days from the final report submit an implementation plan indicating how the remedial action referred to above will be implemented.
  
7. As the report runs to some 150 pages, it is not attached hereto, but OUTA undertakes to make a copy available to the above Honourable Court at the hearing hereof.
  
8. OUTA seeks to be admitted as an *amicus curiae* with a view to making submissions on the following constitutional issues, namely:
  - 8.1. that under the report, the Applicant has claims against Mr. Motsoeneng which are further and additional to those currently referred to by the Applicant in its papers; and
  
  - 8.2. secondly, and by the terms of the report, the Applicant's board is required, not only to recover all monies that were irregularly spent through unlawful and improper persons from the appropriate persons, in this instance Mr. Motsoeneng but to also implement the findings and remedial measures. As with any other report of the Public Protector, the report cannot be ignored;

8.3. thirdly, (and this is the point on which OUTA seeks to adduce very limited evidence) that notwithstanding that the Applicant as employer has since on or about **4 August 2017** enjoyed the consent of the South African Broadcasting Corporation Pension Fund (hereinafter referred to as the “First Respondent”) under section 37D of the Pension Fund Act 1956 (“the PFA”), the latter will withhold payment of Mr. Motsoeneng’s pension benefit pending the finalisation of a civil action by the Applicant against Mr Motsoeneng for damages suffered. The Applicant has failed during this time to implement the remedial action directed by the Public Protector against Mr. Motsoeneng by failing during this time to institute an action for damages against him;

8.4. fourthly, that the above conduct of the Applicant is a serious failure on its part to comply with the report and as such, with its obligations under the Constitution.

### **BACKGROUND**

9. OUTA received notice of the Applicant’s notice in terms of Rule 16A, a copy of which is attached hereto marked “**SF2**”, which notice pertains to the alleged unconstitutionality of section 37D of the PFA.

10. The said notice relates only to the fact that the Applicant has an *alternative* claim against Mr. Motsoeneng for R11,508,549.12 which is set out in the original notice of motion and founding affidavit (see supplementary affidavit of Khanyisile Kweyama

dated 7 September 2017 at paragraph 6). The claim is based on losses sustained by the Applicant as a result of the payment to Mr. Motsoeneng in the form of a success fee in the sum of R11,508,548.12 (see founding affidavit of Kweyama dated 4 August 2017 at pars 29, 46, 47, read with supplementary affidavit of Kweyama dated 7 September 2017 at par 6).

11. It is pertinent to note that the Applicant alleges the wrongdoing in relation to this success fee, was committed by members of the so-called G & N Committee and Mr. James Aguma (who were not authorised to take the decision) and not by Mr. Motsoeneng himself, who in relation to the success fee, *“is not tainted by allegations of misconduct”* (see founding affidavit at pars 19, 20, 21, 24, 28, 30, 72, 73).
12. According to the Applicant, the unconstitutionality of section 37D of the PFA is only being brought on a conditional basis, as per the Applicant’s founding affidavit at par 69. Even where the intended beneficiary of the pension benefits was or may *ex facie* the documents not (*sic*) “[be] *the person who perpetrated a fraud, theft or misconduct against his employer*”, the said intended beneficiary should not, so claims the Applicant, be allowed to receive the said pension benefit by reason of the contravention of the rule of law and/or of the empowering provision (see founding affidavit at pars 69 – 77).
13. The Registrar of Pension Funds (hereinafter referred to as the “Fourth Respondent”) on **14 February 2018** filed an answering affidavit wherein it noted that its only

interest in the matter is the attack on the constitutionality of section 37D of the PFA.

The Fourth Respondent, *inter alia*, contends that:

*“[15.3] ... there is nothing constitutionally offensive in the wording of section 37D (1)(b)(ii) or for that matter, in the wording of the rest of the section ... [15.7] A fund may not of its own accord or at the instigation of an employer decide to deduct a member’s benefit, unless the member has either agreed in writing to such deduction, i.e. a contract/consensual basis, or a court order has been obtained establishing the liability of the member towards the employer on the basis specified in the sub-section. [15.8] There must be a causal link between the actions of the member, whose accumulated or vested benefit will be reduced, and the damage suffered by the participating employer. This element is also an integral part of our law and fits perfectly with the rule of law. [15.9] The position advocated by the applicant, namely that the deduction may be made from a member’s benefit even where that member did not cause damage to the employer offends against the rule of law. The applicant’s position allows for the attachment or reduction of benefits belonging to one person to settle losses caused by another. This will in fact allow for the arbitrary deprivation of property and infringe a member’s right enshrined in section 25 of the Constitution.”*

14. OUTA agrees with the Fourth Respondent.



15. Section 37D of the PFA falls to be read purposively and in context. The general rule is captured in section 37A of the PFA and sets out that pension benefits are not reducible, transferable or executable.
16. Section 37D sets out a limited set of statutory exceptions which allow for the pension fund to make certain deductions from pension benefits in certain circumstances. One of those circumstances is where the employer has suffered damage caused to it by reason of any theft, dishonesty, fraud or misconduct of the member and in respect of which a judgment has been obtained against the member in any court. In such circumstances, the fund may deduct from any benefit payable to the member compensation in respect of such damage and pay the amount to the employer concerned. (See section 37D(1)(b)(ii)(bb) of the PFA).
17. Mere receipt of an unlawful or undue benefit is not sufficient in law to attract legal liability on the part of the member. Unless it can be proved that the member who receives the unlawful benefit does so with a knowledge as to the impropriety and unlawfulness associated with the benefit and in this way, causes damage to the employer. It would appear that the call by the Applicant to extend the ambit of section 37D(1)(b) is one that is without merit and that is inconsistent with the Constitution and conventional principles of legal liability.
18. It is however submitted by OUTA that even if “**SF2**” does not raise a constitutional issue, there are other issues in this matter which do.

**A CLEAR AND SUCCINCT STATEMENT OF THE SUBMISSIONS WHICH WILL BE ADVANCED BY THE *AMICUS CURIAE*, AND THEIR RELEVANCE TO THE PRESENT PROCEEDINGS AND OUTA'S REASONS FOR BELIEVING THAT THE SUBMISSIONS WILL BE OF ASSISTANCE TO THE COURT AND ARE DIFFERENT FROM THOSE OF THE OTHER PARTIES**

19. Given that Rule 16A(2) read with rule 16A(5) permits “*any interested party in a constitutional issue raised in proceedings before a court*” to apply to be admitted as an *amicus*, OUTA would against this background, respectfully wish to draw the court’s attention to the following:

19.1. The material constitutional issues which OUTA seeks to raise in the present proceedings relate to the binding legal effect of the findings and remedial action of the Public Protector. This is illustrated by the fact that these findings and remedial action have not been met as they should have been, either fully relied on by the Applicant in its current papers or fully implemented by the Applicant. Notwithstanding that it has had every opportunity do so, at least since the time of the consent furnished by the First Respondent under section 37D of the PFA on or about **28 July 2017**.

19.2. OUTA submits that:

- 19.2.1. the failure to comply fully with the report *per se* raises a constitutional issue;
- 19.2.2. the report contains binding findings, decisions and remedial action;
- 19.2.3. the material findings of the report cannot be implemented willy-nilly;  
and
- 19.2.4. no decision grounded in the Constitution may be disregarded without recourse to a court of law.

19.3. The Office of the Public Protector is a Chapter Nine Institution in terms of the Constitution that has been established as an independent watchdog to strengthen constitutional democracy in South Africa. In terms of section 181(2) of the Constitution, it is an institution that is independent and subject only to the Constitution and the law. Section 181(3) imposes a positive obligation on other organs of state through legislative and other measures to assist and protect, *inter alia*, the Office of the Public Protector. Section 181(4) specifically prohibits any person or organ of state from interfering with the functioning of these institutions. The Public Protector has in terms of section 182(1) of the Constitution the power, as regulated by national legislation, to investigate any conduct in state affairs and/or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any

impropriety or prejudice; to report on that conduct and to take appropriate remedial action.

19.4. The Supreme Court of Appeal with reference to the report that is the subject of this matter, has found:

***“... Absent a review application however, [any affected] person is not entitled simply to ignore the findings, decision or remedial action taken by the Public Protector.”<sup>1</sup>***

19.5. The Constitutional Court has to similar effect noted:

***“When remedial action is binding, compliance is not optional whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. ...No binding and constitutionally or statutorily sourced decision may be disregarded will-nilly. It has legal consequences and must be complied with or acted upon.”<sup>2</sup>***

20. It is to be noted that the Applicant does purport in these proceedings to rely on the report.

---

<sup>1</sup> SABC & Others v Democratic Alliance & others [2015] 4 All SA 719 (SCA) at par [53]

<sup>2</sup> Economic Freedom Fighters v Speaker of the National Assembly 2016 (5) BCLR 618 (CC) at pars 73-74

21. Hence the Applicant states that *“the purpose of this further affidavit is to bring facts that are deemed to be relevant for the determination of this application, which facts emanate from the Public Protector’s Report.”* (see supplementary affidavit of Khanyisile Kweyama dated 7 September 2017 at par 9).
  
22. OUTA submits however, that the purported reliance by the Applicant on the report in these proceedings is contradicted by the fact that firstly, its proposed claims against Mr. Motsoeneng are limited and are not nearly as extensive as those identified in the report. Secondly, by the fact that to this date, the Applicant has not, and to the best of the knowledge of OUTA and notwithstanding that it is in a position to do so, instituted action, as called for by the Public Protector against Mr. Motsoeneng, for the recovery of damages caused by the latter’s unlawful and improper actions.
  
23. It is certainly so that the Applicant in **“SF1”** is seeking an order that the First Respondent and Mr. Motsoeneng be restrained from dissipating and concealing assets in the sum of R10,235,453.20 pending the determination of an action to be instituted within 60 days of the date of this order and it is also so that that said R10,235,453.20 is constituted by claims arising from the report. (see supplementary affidavit of Khanyisile Kweyama dated 7 September 2017 at paragraphs 9 – 28).
  
24. OUTA submits that the above ostensible reliance on the report is contradicted by two facts.

25. Not only are the Applicant's claims against Mr. Motsoeneng on the report more extensive than those set out in the computed figure above, but the Applicant notwithstanding that it is in a position to do so, has failed to this day to institute any civil action against Mr. Motsoeneng for damages. This fact is the only additional evidence which OUTA seeks to adduce.

**THE INCOMPLETE CLAIMS OF THE SABC AGAINST MR. MOTSOENENG HAVING REGARD TO THE PUBLIC PROTECTOR'S REPORT**

26. As noted above at paragraph 20, the report has been in part relied on by the Applicant. The Applicant has stated that its fully computed claims against Mr. Motsoeneng amounted to a sum that appears to be at least R10,235,443.20 (see the Applicant's supplementary affidavit at par 28).
27. Having regard to the Applicant's supplementary affidavit, it appears that this amount of R10,235,443.20 is comprised of the loss resulting from unlawful terminations which the Applicant has calculated to be R8,723,491.69. Such amount is computed from Mampane R4,344,688.51, Nzimande R2,578,803.18 and Lesala R1,800,000.00 and unlawful salary increases which Mr. Motsoeneng awarded to Ms. Sully Motsweni over a period of 4 years and calculated in the sum of R1,511,961.51.

28. OUTA however, states that this sum of R10,235,443.20 constitutes only some of the claims available to the Applicant in respect of the irregular actions of Mr. Motsoeneng that are identified in the report.
  
29. It is so that the Applicant has also stated that it will seek to review and set aside the decision to appoint Mrs. Duda and recover all amounts paid to her from Mr. Motsoeneng and his accomplices; and that it is intent on launching civil proceedings to recover from Mr. Motsoeneng all amounts that were paid to employees who were unlawfully suspended by him, *“which amount is still being computed and will be made available upon ascertainment.”* (see the Applicant’s supplementary affidavit at pars 24 and 27). These statements serve to suggest an awareness by the Applicant that its claim against Mr. Motsoeneng is greater than the fully computed claims.
  
30. Notwithstanding the above, OUTA submits that the Applicant’s professed claim against Mr. Motsoeneng overlooks many other aspects of the report with the result being that the findings and remedial action contained in the report are not being implemented fully and are instead being ignored.
  
31. The Applicant has correctly acknowledged that it is a national broadcaster funded through the public purse, that public funds must be in line with the empowering provisions and that courts should not countenance the use of public funds contrary to the empowering provisions.

32. By omitting to make reference in this application to the full extent of its claims against Mr. Motsoeneng and by failing to ensure that “***all monies are recovered that were irregularly spent through unlawful and improper actions from the appropriate persons***”, in this instance from Mr. Motsoeneng, it is submitted that the Applicant is failing to comply with a constitutional obligation and is failing to take proper steps to recover public funds that have been irregularly and unlawfully spent from the appropriate person.
33. The omitted binding findings, decisions and remedial action contained in the report are referred to below.

**THE MATERIAL SECTIONS OF THE PUBLIC PROTECTOR’S REPORT THAT HAVE BEEN OVERLOOKED**

34. Firstly, the Applicant’s application fails to draw adequate or any attention to the fact that the report highlights the overall regulatory framework within which the Applicant is required to operate. Such framework being governed by laws that include the Constitution, the Broadcasting Act 4 of 1999 (“BA”), the Public Finance Management Act no 1 of 1999 (“PFMA”), the SABC Personnel Regulations and the SABC Board Charter.<sup>3</sup>

---

<sup>3</sup> Public Protector Report par 8.1



35. Without seeking in this affidavit to fully detail the implications and significance of the above regulatory environment (for which detail the court is referred to the report) OUTA wishes to draw attention to the fact that the report highlights that:

35.1. the Applicant is the national public broadcaster and is regulated by the BA. In terms of s 8A (2) of the BA, the state is the sole shareholder in the Applicant. Section 3(1) of the BA provides, *inter alia*, that the South African broadcasting system:

35.1.1. serves to safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa; and

35.1.2. operates in the public interest and strengthens the spiritual and moral fibre of society.

35.2. the Applicant is an “**organ of state**” and thus an institution performing a public power or performing a public function in terms of legislation (see section 211 of the Constitution). As an organ of State and in terms of section 195(1) of the Constitution, the following material democratic values and principles enshrined in the Constitution, apply to the Applicant:

*“195(1) ...*

*(a) A high standard of professional ethics must be promoted and maintained.*

*(b) Efficient, economic and effective use of resources must be promoted.*

*(c) ...*

*(d) ...*

*(e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.*

*(f) Public administration must be accountable.*

*(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.”*

35.3. The management of finances of the Applicant as a public entity is regulated by the PFMA, the main objective of which is to regulate the efficient and effective financial management of national or provincial departments and public entities.

35.4. The PFMA places the responsibility mainly on the accounting authority and/or officer of an entity or government department. An accounting authority is defined as those persons mentioned in section 49 of the PFMA. Section 49 provides that the board is the accounting authority for a public entity such as

the Applicant. The accounting authority must ensure that the entity is managed in accordance with the PFMA.<sup>4</sup>

35.5. The SABC Board Charter in terms whereof the board must, *inter alia*, take effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure, losses from criminal conduct, and expenditure not complying with the operational policies of the Applicant (report at par 8.11).

## **FINDINGS AND REMEDIAL ACTION IN RESPECT OF ACTS COMMITTED BY**

### **MR MOTSOENENG**

36. Insofar as the losses or damages suffered by the Applicant, which according to the report have been caused by the acts and/or omissions of Mr. Motsoeneng (and save and apart from the existing claim made by the Applicant against Mr. Motsoeneng), the Public Protector made the following relevant findings and concerning acts committed by Mr. Motsoeneng:

36.1. the irregular appointment and salary progression of Mr. Motsoeneng as the acting Chief Operations Officer (“COO”) (see report at pars 9.1 and 10.1);

---

<sup>4</sup> Public Protector Report at 8.5.3; It is noted that in terms of the PFMA, that the PFMA Regulations issued under Gazette no 27388 dated 15 March 2005, Treasury Regulations for departments, trading entities, constitutional institutions and public entities provide at paragraph 12.7.1 that losses or damages suffered by an institution because of an act committed or omitted by an official must be recovered from such an official if that official is liable in law.

36.2. in accordance with SABC Policy number HR002/98/A – Acting in higher scale, the maximum period for acting on a higher position should not exceed three months except with the approval of the board. The fact that Mr. Motsoeneng has been acting as the COO for well over 2 years, constitutes a contravention of the Articles of Association (par 9.1.4);

36.3. the findings that Mr. Motsoeneng's salary progression was irregular is also substantiated. Mr. Motsoeneng received salary appraisals three times in one year, hiking his salary as Group Executive Manager: Stakeholder Relations from R1.5 million to R2.4 million. His salary progression as the Acting COO concomitantly rose irregularly from R122,961.00 to R211,172.00 (63% increase) in 12 months and was in violation of Part IV of the SABC Personnel Regulations and SABC policy no HR002/98/A. Acting in higher scale, this constituted improper conduct and maladministration (par 10.1.3);

*“While ... I have accepted that salary increases at the SABC are negotiated without any performance contracts or notch increase parameters, **I am unable to rule out bad faith in Mr. Motsoeneng in the circumstances that allowed 3 salary increases in one fiscal year resulting in Mr. Motsoeneng's salary being almost doubled.** My discomfort with the whole situation is exacerbated by the fact that all were triggered by him presenting his salary increase requests to new incumbents who would legitimately relied on him for guidance on compliance with corporate prescripts and ethics. **It cannot be said that he***

**[Mr. Motsoeneng] *did not abuse his power and/or his position to unduly benefit himself although on paper the decisions were made by other people. ...***” (par 10.1.4).

36.4. Regarding Mr. Motsoeneng’s alleged fraudulent misrepresentation of his qualifications to the Applicant when applying for employment including stating that he had passed matric, it was set out in the report that:

36.4.1. *“Fraudulent misrepresentation is both a form of misconduct and a criminal act that can be prosecuted. By his own admission, Mr. Motsoeneng did falsify his qualifications, not once but at least twice. The question is, what do we make of that conduct. Clearly the conduct was unethical and in violation of the corporation’s Code of Ethics. (par 9.2.1).*

36.4.2. *The allegation that Mr. Motsoeneng committed fraud by stating in his application form that he had completed matric from Metsimantsho High School is substantiated. ... Mr. Motsoeneng’s conduct regarding his matric results has been unethical continuously since 1995. The conduct is improper and constitutes a dishonest act as envisaged in section 6 (4)(a)(ii) and (iii) of the Public Protector Act. (par 10.2.1).*

36.4.3. *The allegation that Mr. Motsoeneng was appointed to several posts at the SABC despite having no qualifications as required for such posts, including a matric certificate, is substantiated and this constitutes improper conduct and maladministration. (par 10.2.2).*

36.4.4. *Mr. Motsoeneng would never have been appointed in 1995 has he not lied about his qualifications. He repeated his matric misrepresentation in 2003 when he applied for the post of Executive Producer: Current Affairs to which he, accordingly should never have been appointed. (par 10.2.3).*

36.4.5. *I am also concerned that Mr. Motsoeneng's employment file disappeared amid his denial of ever falsifying his qualification and that at one point he used the absence of such information to support his contention that there was no evidence of his alleged fraudulent misrepresentation. The circumstantial evidence points to a motive on his part although incontrovertible evidence to allow a definite conclusion that he indeed cause the disappearance of his employment records, particularly his application forms and CV could not be found. (par 10.2.4)"*

36.5. Mr. Motsoeneng irregularly increased the salaries of various staff members including a shop steward, resulting in a salary bill increase in excess of

R29 million and if this amounted to financial mismanagement and accordingly improper conduct and maladministration (par 10.6), the following findings are noteworthy:

- 36.5.1. the allegation that Mr. Motsoeneng irregularly increased the salaries of various staff members is substantiated (par 10.6.1);
- 36.5.2. Mr. Motsoeneng unilaterally increased the salaries of Ms. Sully Motsweni, Ms. Thobekile Khumalo, a shop steward, and certain freelancers without following part IV of the SABC Personnel Regulations (par 10.6.2);
- 36.5.3. these irregular and rapid salary progressions contributed to the Applicant's unprecedented salary bill escalation by R29 million (par 10.6.3);
- 36.5.4. had the Applicant's board not stepped in, Mr. Motsoeneng would have also recklessly proceeded to convert contract staff members without proper financial planning as required by Human Resources Policies (par 10.6.4);
- 36.5.5. Mr. Motsoeneng's conduct was irregular and amounts to improper conduct and maladministration (par 10.6.5);

36.5.6. the alleged systemic corporate governance failures at the Applicant and the causes thereof (par 10.7). In amplification of the aforementioned:

36.5.6.1. *“... by its own admission, Mr. Motsoeneng caused the [b]oard to make irregular and unlawful decisions”* (par 10.7.2); and

36.5.6.2. Mr. Motsoeneng has been allowed by successive boards to operate above the law, undermining the Group Chief Executive Officer (“GCEO”) among others, and causing the staff, particularly the human resources and financial departments, to engage in unlawful conduct (par 10.7.4).

36.5.7. Mr. Motsoeneng’s alleged purging of senior staff members of the Applicant resulted in unnecessary financial losses in the CCMA, court and other settlements, which amounted to financial mismanagement. The Public Protector found that (par 10.5):

36.5.7.1. *“...Mr. Motsoeneng purged senior staff members leading to the avoidable loss of millions of rand towards salaries in respect of unnecessary and settlements of for irregular termination of contracts* (par 10.5.1);



36.5.7.2. *the SABC lost millions of rand due to procedural and substantive injustices [is] confirmed in findings of the CCMA and the courts”* (par 10.5.1);

36.5.7.3. the Applicant’s records show that Mr. Motsoeneng played a direct role in the dismissals of Messrs. Koma, Jiyane, Thulo, Dipholo, Mbalathi and Ramaphosa (par 10.5.2.1);  
and

36.5.7.4. the results of many of the individual cases support the allegation that there was maladministration in the process leading to avoidable financial losses as can be seen from the report at paragraphs 10.5.2.6 - 10.5.2.19.

37. It is thus submitted that the Applicant in setting out its fully computed claims against Mr. Motsoeneng in the sum of R10,235,453.20, has overlooked the findings of the Public Protector with respect to Mr. Motsoeneng’s culpability and responsibility for:

37.1. his unlawful salary progression;

37.2. Mr. Motsoeneng’s fraudulent misrepresentation of his qualifications to the Applicant;

37.3. an irregular increase in the salaries of various staff members, including a shop steward, resulting in a salary bill increase in excess of R29 million;

37.4. unnecessary financial losses to the Applicant resulting from court cases in CCMA, court and other settlements, consequent upon the unlawful termination of staff; and

37.5. losses consequent upon systemic corporate governance failures caused by Mr. Motsoeneng.

38. The Applicant's claim moreover, does not acknowledge the relationship between the findings and the remedial action directed by the Public Protector. In terms of the remedial action as directed by the Public Protector, the Applicant's board has a duty to ensure that all monies are recovered that were irregularly spent through unlawful and improper actions from the appropriate persons.

39. The Public Protector specifically recommended that appropriate remedial action be taken as envisaged in section 182(1)(c) of the Constitution. In this regard, it was recommended that:

*"11.3 The SABC board to ensure that:*

**11.3.1 All monies are recovered that were irregularly spent through unlawful and improper actions from the appropriate persons;**

11.3.2 *Appropriate disciplinary action is taken against the following:*

11.3.2.1 *Mr. Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increments of Ms. Sully Motsweni, and for his role in the purging of senior staff members resulting in numerous labour disputes and settlement awards against the SABC;*

11.3.2.2 *Ms. Luluma Mokhobo the outgoing GCEO for her improper conduct in the approval of the salary increment to Mr. Motsoeneng;*

**11.3.2.3 Any fruitless and wasteful expenditure that has been incurred as a result of irregular increments to Mr. Motsoeneng, Ms. Motsweni, Ms. Khumalo, a shop steward and the freelancers, is recovered from the appropriate persons; ...”.**

40. To the already computed claims against Mr. Motsoeneng, the following further claims therefore fall to be added:

40.1. firstly, an action against Mr. Motsoeneng himself for the loss sustained as a result of the salary progression(s). On the finding of the Public Protector, there is a potential damages action against Mr. Motsoeneng for pure economic loss in respect of this issue, yet this claim is not advanced by the Applicant;

40.2. secondly, the Applicant has a duty to recover damages from Mr. Motsoeneng arising from his fraudulent misrepresentation of his matric qualifications both when applying for employment in 1995 and when thereafter and from time to time applying for promotion(s). These misrepresentations are such as to give rise to a claim for damages for pure pecuniary loss arising from Mr. Motsoeneng's fraudulent non-disclosure. This claim, it is submitted, should be included by the Applicant in its fully computed claims against Mr. Motsoeneng;

40.3. thirdly, the remedial action requires that any fruitless and wasteful expenditure incurred as a result of irregular increments to Mr. Motsoeneng, Ms. Khumalo (a shop steward) and the freelancers, is recovered from the appropriate persons. This remedial action seemingly speaks to the finding of the Public Protector that *“these irregular and rapid salary progressions [by Mr.*

Motsoeneng] *contributed to the National Broadcaster's unprecedented salary bill escalation by R29 million.*"<sup>5</sup>;

40.4. fourthly, steps should be taken to recover all losses resulting from systemic corporate governance failures; and

40.5. lastly, steps should be taken to recover all losses resulting from the purging of senior staff.

41. In short, it is submitted that the claim of the Applicant against Mr. Motsoeneng is of a significantly greater magnitude and is more extensive than is currently set out in the papers of the Applicant. The Applicant is not entitled in law to ignore this greater claim. The rule of law requires that the report should be fully implemented unless and until it is set aside by a court of law.

42. Accordingly, the amount to be deducted from Mr. Motsoeneng's pension benefits under, *inter alia*, section 37D(1)(b)(ii) of the PFA in respect of compensation for damages caused to the Applicant by reason of Mr. Motsoeneng's dishonesty, fraud or misconduct, is considerably greater than that currently claimed by the Applicant.

---

<sup>5</sup> Public Protector Report par 10.6.3.

**THE FAILURE TO IMPLEMENT THE PUBLIC PROTECTOR'S REPORT**

43. OUTA submits that in the absence of a review of the report, which has never in fact occurred, the Applicant has been and remains obliged to implement the Public Protector's findings and remedial measures in full.
44. OUTA submits that the facts that emerge from the present litigation highlight a continuing failure on the part of the Applicant to implement the findings and remedial action of the Public Protector.
45. The present application was launched on 4 August 2017.
46. The Applicant on a date to be determined by the registrar of the court is now seeking an order as per its amended notice of motion dated 11 September 2017, a copy of which is attached marked "**SF1**".
47. It is common cause that the "*assets*" and "*benefits*" referred to in paragraphs 1 and 2 of "**SF1**" (and which the Applicant seeks to interdict from being dissipated, concealed and/or from being paid out) are pension benefits as contemplated by section 37D of the PFA (see paragraphs 35 – 42 of the founding affidavit read with the annexures thereto).

48. It is trite that the object of section 37D(1)(b) of the PFA is to protect an employer's right to pursue the recovery of money misappropriated by its employee(s) and that a pension fund has discretion to withhold payment of the pension benefit in these circumstances under this section of the PFA.
49. Notwithstanding the terms of the relief sought by the Applicant, it is apparent from the papers, that the First Respondent has already and on **28 July 2017** agreed to withhold payment of the pension benefit to Mr. Motsoeneng provided that the present application be served on the First Respondent on or before 4 August 2017. (see founding affidavit, annexures "**KK5**", see also "**KK6**").
50. In the letter "**KK6**" from the attorney of the First Respondent to the attorneys of the Applicant dated **28 July 2017**, it is pertinently stated: *"If your client persists with its intention to proceed with an urgent application to prevent our client from making payment it will have to do so urgently in any event have the papers served on our client urgently on or before 4 August 2017 and then to prosecute the application on the same basis. ... **The Fund must and will act in terms of the provisions of its rules and the provisions of the Pension Funds Act more particularly section 37D thereof ...**"*
51. There is no suggestion on the papers that the First Respondent has made payment to Mr. Motsoeneng of his pension benefit. On the contrary and as noted above, the

attorney for the First Respondent has stated that it will act in terms of section 37D of the PFA.

52. The First Respondent has instead not paid out the pension benefit to Mr. Motsoeneng, and the Applicant has by agreement between the First Respondent and itself on or about **28 July 2017**, secured preservation of the pension benefit under section 37D of the PFA pending determination of Mr. Motsoeneng's liability or for at least such time as pending the outcome of the present application, provided that the present application be urgently prosecuted.

53. Notwithstanding the above, there is no suggestion on the papers that the Applicant has instituted an action for damages against Mr. Motsoeneng, as far as OUTA is aware.

54. Instead, what is contemplated in "**SF1**" is that an action for damages *will* be instituted within 60 days of the granting of the relief sought by the Applicant.

55. This continuing failure by the Applicant to institute an action for recovery of damages from Mr. Motsoeneng falls to be considered in the context of the fact that:

55.1. the Applicant has already secured preservation of the pension benefit; and



55.2. a statement by the attorneys for the First Respondent on **28 July 2017** and made in a letter to the Applicant's then attorneys that *"if your client persists with its intention proceed with an urgent application to prevent our client from making payment it will have to do so urgently in any event have the papers served on our client on or before 4 August 2017 **and then to prosecute the application on the same basis**"* (see founding affidavit "KK6");

55.3. in light of the specific remedial action directed by the Public Protector in her report to the effect that *"all monies are recovered which were irregularly spent through unlawful and improper actions from the appropriate persons"* and the *"SABC is to submit an implementation plan indicating how the remedial action referred to in paragraph 11.1.3 above (sic) will be implemented, within 30 days from the date of my final report."* (see the report at paragraph 11.3.1 read with paragraph 12.2).

56. OUTA submits that the rule of law requires that remedial action of the Public Protector should be implemented by terms so set out by the Public Protector and without delay.

57. This is not what has occurred *in casu*.

D5

58. OUTA submits that if the Applicant was sincere about the fact that it is relying on the report, it would have already instituted the action for damages against Mr. Motsoeneng.
59. OUTA submits that nothing in the present litigation has to date served to prevent the Applicant from instituting such an action for damages and that in the circumstances, the failure by the Applicant to do so is an act in disregard of the specific remedial action directed by the Public Protector.

**CONSENT BY PARTIES TO OUTA BEING ADMITTED AS AN AMICUS AND  
CONDONATION**

60. On **14 December 2017** OUTA advised all the parties of its intention to make an *amicus curiae* submission as per the terms set out herein. These include that the remedial action in the report cannot be ignored and that the misconduct of which the Public Protector found Mr. Motsoeneng to have committed was more extensive than was been alleged by the Applicant. In the letter, it is stated that given that the report has already been in part relied on by the Applicant and given that the Respondents had not filed their papers and given that the Applicant may indeed file yet further papers, OUTA considered it prudent to first have regard to the Respondents' answering papers and any further affidavits that the Applicant chose to file before applying to be admitted. A copy of this letter is attached hereto marked "**SF3**".

61. On **6 February 2018**, the Applicant through its attorneys responded by indicating that its client had no issues with OUTA being admitted as *amicus curiae* in these proceedings and thereby gave its consent should OUTA decide to seek admission as such in these proceedings. A copy of this letter is attached marked “**SF4**”.
62. On **12 February 2018** Mr. Motsoeneng’s attorneys, after apologising for their delay in replying, advised “*your client is at liberty to take whatever action it deems appropriate to assert whatever rights they assert*”. Mr. Motsoeneng’s attorneys further advised OUTA to do so “*without any further delay*” and whilst stating that they at a collegial level, appreciated the proposed approach of OUTA, they cautioned OUTA against making a decision at the close of pleadings as to whether or not it intends to join the matter. A copy of this letter is attached as “**SF5**”.
63. On **16 February 2018**, the Fourth Respondent through its attorneys indicated that its client did not have any objection to OUTA joining as an *amicus curiae* in this matter. A copy of this letter is attached as “**SF6**”.
64. OUTA is not aware as to whether or not pleadings have indeed closed and/or whether or not all Respondents have filed their answering affidavits or indeed that this matter has been set down for hearing.
65. On **6 April 2018** OUTA advised all the parties that it intended to proceed with lodging an amicus submission. In addition to the matters raised in “**SF3**”, OUTA gave notice

in which it sought the written consent of the parties, seeking to adduce relevant evidence on the fact that the Applicant, notwithstanding that it has on or about **28 July 2017** secured the consent of the First Respondent under section 37D of the PFA to withhold payment of Mr. Motsoeneng's pension benefit. Furthermore, the Applicant failed at all times subsequent thereto to institute an action for damages against Mr. Motsoeneng for the losses identified in the report. A copy of this letter is attached marked "**SF7**". The parties were called on to give their consent to the raising of this issue within 4 days of service of the letter.

66. Insofar as it may be necessary to do so, OUTA hereby applies for condonation for this late submission. The grounds for the delay in applying for this admission are principally set out in "**SF3**" attached hereto and relate to OUTA's proposed approach to the admission set out therein. This letter which also sets out the essence of the submission contained herein was served on the parties and none have objected to OUTA applying to make an *amicus* submission.
67. It is thus evident that although the consent given by Mr. Motsoeneng is qualified, all or virtually all the parties to this matter, and with full knowledge as to the proposed content of the OUTA submission, and during **February 2018** have consented to OUTA being admitted as an *amicus* to these proceedings on the terms set out in OUTA's letter "**SF3**".

68. Having regard to the facts of this matter, it is respectfully submitted that the fact and timing of the present application is not such as to unduly prejudice the parties or to justify a refusal to grant this application. It is submitted that the content of this affidavit is important both to this matter and to matters involving reports of the Public Protector in general. The prospects of success of the present application are strong and taking into account all the circumstances, the court should exercise its wide permissive powers so as to allow this application.

### **OUTA'S INTEREST IN THE PRESENT PROCEEDINGS**

69. The interest in the present proceedings arises from OUTA's interest in advancing the Constitution, combatting corruption and holding government to account. The constitutional values which OUTA champions require that the findings in regard to abuse of public money committed by Mr. Motsoeneng and the remedial action contained in the report should be fully, timeously and responsibly implemented.

### **CONCLUSION**

70. In the premises OUTA seeks an order as per the notice of motion to which this affidavit is attached.

---

DEPONENT

SIGNED AND SWORN TO BEFORE ME, COMMISSIONER OF OATHS ON THIS \_\_\_\_ DAY OF APRIL 2018, BY THE DEPONENT, HAVING ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS HEREOF; HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND THAT SHE REGARDS SAME AS BINDING ON HER CONSCIENCE.

---

COMMISSIONER OF OATHS