CASES / VONNISSE

REMOVING DIRECTORS OF STATE-OWNED COMPANIES

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

1 Introduction

In *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited; SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited* ((81056/14) [2017] ZAGPJHC 289 (17 October 2017)) (*SOS Support Public Broadcasting Coalition v SABC*), the Gauteng Local Division, Johannesburg was faced with two applications brought against the South African Broadcasting Corporation SOC Limited (the SABC) by the SOS: Support Public Broadcasting Coalition, the Freedom of Expression Institute and the Trustees of the Media Monitoring Project Benefit Trust. The Minister of Communications (the Minister) and Mr Hlaudi Motsoeneng (the former chief operations officer of the SABC) were, *inter alia*, joined as respondents. Both applications related to the constitutionality and lawfulness of the powers exercised by the Minister in respect of the directors of the SABC board. The applications were instituted against a "background of systematic and repeated failures in the governance and management of the SABC" (*SOS Support Public Broadcasting Coalition v SABC supra* par 1).

The first application concerned the lawfulness of the powers vested in the Minister by virtue of the amended Memorandum of Incorporation (MOI) of the SABC (the amended MOI) and the SABC Board Charter (the Charter) in respect of the appointment, discipline and suspension of the executive directors of the SABC. The second application concerned the power of the Minister to remove the executive and non-executive directors of the SABC board from office. The focus of this note is on the second application, although the first application will also be addressed, albeit briefly. This note evaluates the judgment in this case, and its implications for state-owned companies.

2 The facts

2 1 The first application

In the first application, the court was required to determine whether certain provisions of the amended MOI and the Charter were consistent with the Broadcasting Act 4 of 1999 (the Broadcasting Act) and the Constitution of the Republic of South Africa, 1996 (the Constitution). The Broadcasting Act regulates the SABC, a national public broadcaster. This Act requires the SABC to comply with the Charter (s 6(1)). Under section 12 of the Broadcasting Act, the SABC board must comprise twelve non-executive directors and three executive directors – namely, the group chief executive officer, the chief operations officer and the chief financial officer. While the Act indicates that the non-executive directors must be appointed by the President on the advice of the National Assembly (s 13(1)), it is silent on the appointment of the executive directors. The SABC and the Minister contended that such silence meant that the Broadcasting Act either permitted or did not preclude the appointment process prescribed in the amended MOI and the Charter (par 120). The applicants, on the other hand, contended that the provisions in the amended MOI and the Charter were invalid.

The amended MOI (amended by the Minister in September 2014) and the Charter together confer extensive powers on the Minister over the executive directors of the SABC. These include powers relating to their appointment, terms and conditions of appointment, discipline and suspension. For example:

(i) the amended MOI provides that the appointment of the executive directors must be confirmed by the Minister before they may be appointed (clause 13.5.1);

(ii) the amended MOI (clause 13.5.3) and the Charter (clause 8.2) confer on the Minister a power of veto over the appointment of the executive directors, and there is no limit on the number of candidates that the Minister may veto;

(iii) the Minister is permitted to effectively waive the requirement of the board to advertise and shortlist candidates who apply for the position of executive director (clause 13.5.2);

(iv) the Minister has an unfettered discretion in the appointment process of the executive directors since no appointment criteria are prescribed;

(v) any decision taken by the Minister to reject the candidates recommended by the board is immune from challenge by the board or any interested person (clause 13.5.3);

(vi) the terms and conditions of the executive directors' employment contracts and their reappointment are made subject to the Minister's approval (clauses 13.5.5, 13.5.6 and 13.5.7);

(vii) the institution of any disciplinary proceedings against the executive directors and their suspension are made subject to the Minister's approval (clauses 13.7.1, 13.7.2 and 13.7.4); and

(viii) whereas previously the board alone had the power to recommend the removal of a board member from office, the amended MOI gives the board or the Minister the power to do so (clause 14.3.1.3).

In general, the amended MOI diverts power over the administration and operations of the SABC board away from the board in favour of the Minister, and extends new powers to the Minister.

2 2 The second application

In the second application, the court was required to determine whether the non-executive directors had been validly removed from office by the Minister in terms of section 71 of the Companies Act 71 of 2008 (the Companies Act). In terms of section 8A(2) of the Broadcasting Act, the State is the sole shareholder of the SABC. The Minister, as the sole shareholder representative of the SABC, removed three non-executive directors under section 71(1) of the Companies Act. The applicants sought a declaratory order that members of the SABC board could not be removed from office save in compliance with sections 15 and 15A of the Broadcasting Act. They also sought an order setting aside the Minister's removal of the non-executive directors under section 71(1) of the Companies Act. The crisp issue for determination was which legislative provisions applied to the removal of directors of the SABC board: section 71 of the Companies Act, or sections 15 and 15A of the Broadcasting Act?

Under section 15(1)(*a*) of the Broadcasting Act, the "appointing body" *may* remove a "member" from office after due inquiry and upon due recommendation by the board of directors if such member is found guilty of misconduct or inability to perform his or her duties efficiently (author's own emphasis). The "appointing body" is the body charged with the appointment of members of the board in terms of section 13 of the Broadcasting Act (s 1 of the Broadcasting Act). A "member" is defined in section 1 of the Broadcasting Act to mean executive and non-executive members of the board. The appointing body, in terms of section 1 read with section 13 of the Broadcasting Act, is the President acting on the advice of the National Assembly. The board of directors of the SABC is thus not empowered to remove a director on its own, although it may make such a recommendation to the President, who has a discretion whether or not to remove a board member from office.

Under section 15(1)(*b*) of the Broadcasting Act, the appointing body *must* remove a board member after due inquiry by the National Assembly and the adoption of a resolution recommending the removal of the director in terms of section 15A of the Broadcasting Act (author's own emphasis). Under section 15A(1)(*a*), the National Assembly may, after due inquiry and by the adoption of a resolution, recommend the removal of a board member on account of misconduct, inability to perform the duties of his or her office efficiently, absence from three consecutive board meetings without the permission of the board (except on good cause shown), failure to disclose a conflict of interest in terms of section 17, or on the basis of a disqualification as contemplated in section 16.

In essence, a board member *may* be removed by the President under section 15(1)(*a*) (on the recommendation of the board of directors), but *must* be removed by the President (on the recommendation of a committee of the National Assembly) under section 15(1)(*b*) read with section 15A(1)(*a*).

In contrast, under the Companies Act, a director may be removed from office by the shareholders by an ordinary resolution adopted at a shareholders' meeting under section 71(1) of the Companies Act, or by the board of directors under section 71(3) of the Companies Act.

3 Judgment

3 1 The first application

The court, per Matojane J, ruled that the powers granted to the Minister (under the amended MOI and the Charter) – to appoint, re-appoint and discipline executive directors – undermine the independence of the SABC, which independence is required by the right to freedom of expression (including the freedom of the media) under section 16 of the Constitution (par 117). Section 16 of the Constitution enshrines the right of the public, being the audience of the SABC, to access information and ideas (par 31). The court stated that the freedom to receive or impart information or ideas relates to the right of the SABC to communicate without interference (par 31). The powers conferred on the Minister by the amended MOI and the Charter, the court proclaimed, are inconsistent with the specific independence and pluralism required of a public service broadcaster (par 117). The court observed that the SABC board does not report to the Minister, but to the National Assembly. The board is consequently meant to be strictly independent, and is not required to work with other government agencies (par 48).

The court held further that the requirement of an independent SABC is implied in the duty of the State (under section 7(2) of the Constitution) to protect and promote the rights in the Bill of Rights, which include the right to freedom of expression and a free press (par 52). Since the SABC is the medium that should allow the free flow of ideas necessary for our democracy to function, the court held that the State must ensure that the SABC has the necessary structural and operational independence (par 52). The court emphasised further that the independence of the SABC is vital for the exercise of citizens' rights to vote, and to free and fair elections under section 19 of the Constitution. This is because the SABC is the primary source of political information for the majority of South Africans, who would be unable to exercise their right to vote meaningfully without access to independent and pluralistic information and opinion (par 60−61). If political or private interests govern the media, the court asserted, South Africans would not be provided with the accurate, neutral and pluralistic information they require to make the right to vote meaningful (par 63).

In coming to its conclusion that the Minister does not have the power to manage the affairs of the SABC, the court relied on section 13(11) of the Broadcasting Act. This provision stipulates that the "[b]oard controls the affairs" of the SABC and "must protect matters referred to in section 6(2) of

[the Broadcasting] Act". Section 6(2) requires the Independent Communications Authority of South Africa to monitor the SABC and enforce its compliance with the Charter. The court stated that sections 13(11) and 6(2) require the SABC board to control the affairs of the SABC and to ensure that the SABC complies with the Charter (par 121). It held that the Minister, as the representative of the SABC's sole shareholder and not a member of the SABC board, does not have a right to act on behalf of the SABC or to manage its business or affairs (par 122). It is Parliament, the court stressed, and not the Minister, that represents the public interest and performs an oversight role on behalf of the public (par 126). Since the effect of section 13(11) of the Broadcasting Act is to confer on the board the exclusive power to control the affairs of the SABC, the court found that the Minister is precluded from exercising any powers to control the directors in how they control the affairs of the SABC (par 127).

The court consequently ruled that the powers granted to the Minister under the amended MOI and the Charter to appoint, re-appoint and discipline executive directors undermine the independence of the SABC. It accordingly declared certain clauses of the amended MOI and the Charter to be invalid and inconsistent with the Broadcasting Act (par 146). The declaration of invalidity was suspended for one year to allow the defects to be remedied. The court held further that the executive members of the SABC board are to be appointed solely by the non-executive members of the board, without any requirement for approval by the Minister (par 146). The court ordered the non-executive members of the SABC board to follow a process that ensures transparency and openness, including publicly advertising the positions and conducting interviews of suitable candidates (par 146).

3 2 The second application

The court ruled that the provisions of section 71 of the Companies Act do not apply to the SABC board (par 141). It found that the removal processes prescribed under the Companies Act undermine the independence of the SABC board in a manner that is inconsistent with the Constitution (par 141). The court proclaimed that if the board members could be unilaterally removed at the instance of the Minister as sole shareholder or by a simple majority vote of the board, "without any oversight, on any ground, and without due enquiry" this would inhibit board members from expressing views that are not aligned with the State or the majority board members (par 143). The court stated (par 145):

> "The Broadcasting Act is not listed under section 5(4)(*b*)(i) of the Companies Act, according, [sic] none of the provisions of the Broadcasting Act, is made applicable in the event of inconsistency with the Companies Act. This bridges [sic] section 7(2) and 16 of the Constitution and the relevant provisions of the Companies Act are invalid to this extent."

The court consequently declared that the members of the SABC board may not be removed from office save in compliance with sections 15 and 15A of the Broadcasting Act (par 146). It also set aside the removal of the two non-executive directors on the ground that the removals had unlawfully

been effected under section 71 of the Companies Act, and not in accordance with the procedures set out in section 15 of the Broadcasting Act (par 146). However, the court did not reinstate the two non-executive directors to their previous positions on the board, and did not provide any reason for this decision.

4 Analysis and discussion

4 1 Conflicts between the Companies Act and specific legislation governing state-owned companies

Section 9(1) of the Companies Act states that, subject to sections 5(4) and 5(5) of the Companies Act, any provision of the Companies Act that applies to a public company applies also to a state-owned company, except to the extent that the Minister has granted an exemption in terms of section 9(3) of the Companies Act. It must follow that section 71 of the Companies Act applies to the removal of directors of state-owned companies. However, the removal of directors of state-owned companies often results in much confusion as state-owned companies are governed not only by the Companies Act but also by their own specific legislation. For instance, the South African Airways SOC Limited is governed by the South African Airways Act 5 of 2007, the South African Post Office SOC Limited is governed by the South African Post Office SOC Ltd Act 22 of 2011, the Armaments Corporation of South Africa SOC Limited (Armscor) is governed by the Armaments Corporation of South Africa Limited Act 51 of 2003 (the Armscor Act) and the SABC is governed by the Broadcasting Act. Conflicts can and do arise between the removal of directors under the governing legislation of these state-owned companies and the removal of directors under section 71 of the Companies Act.

Section 5(4) of the Companies Act states that if there is an inconsistency between a provision of the Companies Act and a provision of any other national legislation, the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second. To the extent that this is not possible, the Companies Act lists certain specific Acts that will supersede it (s 5(4)(*b*)(i) of the Companies Act). These Acts are the Auditing Profession Act 26 of 2005, the Labour Relations Act 66 of 1995, the Promotion of Access to Information Act 2 of 2000, the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the Public Finance Management Act 1 of 1999, the Securities Services Act 36 of 2000 (which has since been repealed and replaced by the Financial Markets Act 19 of 2012), the Banks Act 94 of 1990, the Local Government: Municipal Finance Management Act 56 of 2003, and section 8 of the National Payment System Act 78 of 1998. In all other instances of conflict, the provisions of the Companies Act will prevail (s 5(4)(*b*)(ii)). Notably, the Broadcasting Act is not listed as one of the Acts that supersedes the Companies Act in the event of a conflict between two Acts.

One instance where the court was able to read the provisions of the Companies Act concurrently with a specific statute that applies to state-

owned companies is *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) (*Minister of Defence v Motau*). The Armscor Act governs the affairs of Armscor. Armscor is a state-owned company that was incorporated primarily to provide South Africa's armed services with military material, equipment, facilities and services. It is the armaments and technology procurement agency of the Department of Defence. The State is the sole shareholder of Armscor and exercises ownership control of Armscor through the Minister of Defence and Military Veterans (the Minister of Defence) (s 2(2) of the Armscor Act). Armscor's affairs are managed by its board of directors, which comprise nine non-executive members and two executive members (s 6(1) of the Armscor Act).

In *Minister of Defence v Motau*, the Minister of Defence terminated the membership of two members of the board of directors of Armscor in terms of section 8(*c*) of the Armscor Act after they had failed to attend various board meetings arranged by her. Section 8(*c*) of the Armscor Act provides that a board member must vacate office if his or her services are terminated by the Minister of Defence "on good cause shown". The directors who had been removed from office applied to the North Gauteng High Court, Pretoria, to set aside the decision of the Minister of Defence on the ground that it was unlawful, unconstitutional and invalid since it had not complied with PAJA. If the dismissal power of the Minister of Defence constituted administrative action, she would have to comply with PAJA. If, however, it constituted executive action, then the procedures for the removal of directors laid down in sections 71(1) and 71(2) of the Companies Act were applicable. The court *a quo* found that the dismissal power of the Minister of Defence had constituted administrative action, and that she had failed to comply with PAJA (see *Motau v Minister of Defence and Military Veterans*, unreported case no 51258/13, North Gauteng High Court, Pretoria, 18 September 2013). The court *a quo* consequently granted judgment in favour of the two directors who had been removed from office.

The Minister of Defence appealed to the Constitutional Court. The majority judgment of the Constitutional Court disagreed with the court *a quo* that the Minister of Defence's decision comprised administrative action. It held that the Minister's power to dismiss directors was more executive than administrative in nature. This was because it was an adjunct of the power to formulate defence policy; it was a high-level power, not a low-level bureaucratic power involving the application of policy. The Minister of Defence was afforded a broad discretion in exercising the power, which indicated that it constituted performance of an executive function rather than the implementation of national legislation (par 47, 49 and 51). On the basis that the Minister of Defence's power to dismiss board members constituted executive action rather than administrative action, the Constitutional Court held that this power was not subject to review under PAJA.

The minority judgment disagreed and held that the decision of the Minister of Defence to dismiss the board members had constituted administrative action (par 128). For this reason, the minority held that it was not necessary to determine whether section 71 of the Companies Act had applied to this matter. (An analysis whether the dismissal power of the Minister of Defence constitutes administrative action or executive action is beyond the scope of

this note, but see Konstant "Administrative Action and Procedural Fairness – *Minister of Defence and Military Veterans v Motau*" 2016 133(3) *SALJ* 491−504 for a discussion of this point).

On the question whether there were any procedural constraints on the exercise of the power of the Minister of Defence in terms of section 8(*c*) of the Armscor Act, the Constitutional Court held that section 8(*c*) of the Armscor Act and sections 71(1) and (2) of the Companies Act must be read concurrently. The court found that these two provisions are "perfectly compatible" (par 76) in that the Armscor Act provides the substantive criterion, while the Companies Act provides the process, by which board members of Armscor may be dismissed. Thus, in terms of section 8(*c*) of the Armscor Act, a director may be removed from office by the Minister on the basis of good cause, but the removal procedure must comply with the provisions of section 71(2) of the Companies Act.

The Constitutional Court held that in terminating the membership of the board members, the failure of the Minister of Defence to comply with the procedural requirements of section 71(2) of the Companies Act had rendered her actions unlawful (par 77 and 80). The court did not, however, set aside the decision and reinstate the two directors since it found that this would not be just and equitable in the exceptional circumstances of the case. The court found that the Minister of Defence had substantively good and compelling reasons for terminating the directorship of the two directors, and that she had demonstrated good cause for their removal (par 89). The court ruled that it was sufficient to declare that the conduct of the Minister of Defence was unlawful and to draw her attention to the proper procedure to be followed in dismissing directors of Armscor (par 86 and 94).

It is evident from the above discussion that even though section 71 of the Companies Act is said to apply to the removal of directors of state-owned companies, there is considerable confusion on this issue in circumstances where state-owned companies are governed by specific legislation regulating the removal of their directors. Challenges arise from the fact that state-owned companies are governed by both the Companies Act and by their own specific legislation. The case of *Minister of Defence v Motau* illustrates the complexity in this regard in that it may first have to be determined whether the dismissal power constitutes administrative action or executive action, and whether the Companies Act or PAJA must be applied. Furthermore, the substantive criteria for the removal of directors of the state-owned company may be contained in one piece of legislation governing the state-owned company, while the procedural criteria may be contained in other legislation. In *Minister of Defence v Motau*, the Constitutional Court succeeded in reading the Armscor Act and the Companies Act concurrently. It is not, however, always possible to read the Companies Act concurrently with a statute that regulates the affairs of a state-owned company, as is illustrated by *SOS Support Public Broadcasting Coalition v SABC supra*. A careful analysis must be made in each case to ascertain whether the provisions of the legislation governing the state-owned company and section 71 of the Companies Act may be applied concurrently and if not, which legislation would prevail.

The confusion on whether the removal provisions of the Companies Act or the Broadcasting Act prevail was exacerbated in *SOS Support Public Broadcasting Coalition v SABC supra* by the fact that Parliament had initially accepted that the Broadcasting Act prevails over the Companies Act, but had later changed its mind. On 26 March 2015, three non-executive SABC board members were removed from office after the board of directors passed a vote of no confidence in them. The Minister subsequently endorsed these removals, which had taken place under the Companies Act, and not the Broadcasting Act (see Merten "SABC Mess now in Parliament's Care. Don't Hold your Breath" (14 July 2016) http://www.dailymaverick.co.za /article/2016-07-14-sabc-mess-now-in-parliaments-care-dont-hold-your-breath./#.WAYSvfl95hE (accessed 2017-11-10). The three board members who had been removed from the SABC board had been opposed to the controversial permanent appointment of Mr Hlaudi Motsoeneng as the chief operations officer of the SABC in July 2014, after findings by the Public Protector that he had purged staff, irregularly boosted his salary and made misrepresentations about having a matric certificate (see *SABC v DA* (393/2015) [2015] ZASCA 156 (8 October 2015) par 13; and the Report of the Public Protector titled "When Governance and Ethics Fail" Report No. 23 of 2013/2014 (17 February 2014) 3−5).

At the time, a legal opinion was sought from Parliament's Constitutional and Legal Services division to advise the Portfolio Committee on Communications on the legality of the decision to remove the board members from office. The legal opinion expressed the view that the removal of the directors under the Companies Act was invalid because the Broadcasting Act superseded the Companies Act (see Mjenxane "Legal Opinion on Powers to Remove Board Members of the SABC" 24 March 2015 (reference number 31/15) par 21−22). The Portfolio Committee initially accepted the legal opinion that the removal of the three board members had been unlawful, but subsequently changed its mind and accepted that the removal of the board members under the Companies Act was valid. In light of the fact that the three board members who had been removed from office had not lodged a formal dispute and complaint, the Portfolio Committee stated that it was satisfied that due process had been followed in removing the directors under the Companies Act. The matter had been officially closed (South African Government News Agency "Committee Closes Legal Opinion on SABC Board Members" (26 May 2015) http://www.sanews.gov.za/south-africa/committee-closes-legal-opinion-sabc-board-members (accessed 2017-11-10)). Two of the three non-executive directors who had been removed from office were subsequently cited as the tenth and eleventh respondents in *SOS Support Public Broadcasting Coalition v SABC supra*.

It is submitted that there are further statutory provisions that cause confusion as to which of the Companies Act or the Broadcasting Act prevails are sections 8(5) and 8(6) of the Broadcasting Act. Section 8(5) states that the Companies Act applies to the SABC, save to the extent stipulated in the Broadcasting Act. Section 8(6) of the Broadcasting Act lists those provisions of the Companies Act 61 of 1973 that do not apply to the SABC. The provisions of section 8(6) of the Broadcasting Act have not been amended to reflect the equivalent provisions of the Companies Act (71 of 2008). Section 220 of the Companies Act 61 of 1973 (the predecessor to s 71 of the

Companies Act 71 of 2008) is not listed in section 8(6) of the Broadcasting Act as one of the provisions that do not apply to the SABC. On a literal interpretation, the implication is that the legislature did not intend to exclude the removal provisions under section 220 of the Companies Act 61 of 1973 (and now s 71 of the Companies Act 71 of 2008) from applying to the removal of directors of the SABC board. The High Court in *SOS Support Public Broadcasting Coalition v SABC supra* failed to address the further legislative conflict caused by sections 8(5) and 8(6) of the Broadcasting Act.

4 2 The difference in the removal procedures under the Companies Act and the Broadcasting Act

In comparing the removal provisions under the Companies Act with those under the Broadcasting Act, the court in *SOS Support Public Broadcasting Coalition v SABC supra* stated that sections 15 and 15A of the Broadcasting Act ensure that there is a level of oversight in the removal of a director of the SABC board since neither the Minister nor the board may unilaterally remove a director (par 139). The removal of a director requires an inquiry and it must be based on specified, objective grounds for removal (par 139). When the National Assembly recommends removal, the President has no discretion and must remove the director from office (par 139). Section 71 of the Companies Act, on the other hand, the court asserted, empowers the Minister to remove any member of the board, for any reason, "subject only to the requirement of notice under section 71(2)" (par 140). The board of directors, the court stated, is empowered to remove any member of the board, *inter alia*, for negligence or dereliction of duty by a simple majority, "subject only to the requirement of notice and comment under section 71(4)" (par 140).

It is submitted with respect that in comparing the removal procedures under the Broadcasting Act and Companies Act respectively, the court overlooked some of the important oversight provisions contained in section 71 of the Companies Act. For instance, when shareholders intend to remove a director from office under section 71 of the Companies Act, they must give the director in question a reasonable opportunity to make a presentation to the meeting before putting to vote the ordinary resolution to remove the director from office (s 71(2)(*b*) of the Companies Act). The director need not personally give the presentation; he or she may choose any representative, including a legal representative. Whether the opportunity given to a director (or a representative) to make a presentation is "reasonable" as required by section 71(2)(*b*) would depend on the facts of each case. It is submitted that the director must be given a fair opportunity to address the allegations made against him or her. It is accordingly not the case that the Minister is empowered to remove a director from office subject only to the requirement of notice, or without due enquiry, as stated by the court. It is also not correct to state that the board of directors is empowered to remove any board member subject only to the requirement of "notice and comment" (par 140). The board of directors is also obliged to give a director a reasonable opportunity to make a presentation to the board meeting, in person or through a representative, before the resolution to remove him or her from office is put to a vote.

The Constitutional Court in *Minister of Defence v Motau* (par 79) stated that the purpose of sections 71(1) and (2) of the Companies Act was not only to ensure that a majority of shareholders assented to a decision to dismiss a director, but also to ensure that those whose interests are materially affected by the decision are given an opportunity to put forward relevant information, and thereby to ensure that the decision makers are appropriately informed before making a far-reaching decision. The presentation gives a director an opportunity to state his or her case and to ensure that he or he is not removed from office on an impulsive vote (Davies and Worthington *Gower and Davies Principles of Modern Company Law* 9ed (2012) 412). The presentation is akin to an enquiry under sections 15 and 15A of the Broadcasting Act, in that a shareholder or board member may ask questions of a director relating to the allegations against him or her, and the director may state his or her case and address allegations, and ensure that the shareholders or the board of directors, as applicable, are fully and appropriately informed before voting on the resolution to remove him or her from office. There is therefore, contrary to the statement made by the court, some level of oversight in the removal of a director under the Companies Act.

There was a further important level of oversight regarding the removal of a director under the Companies Act that was not alluded to by the court in *SOS Support Public Broadcasting Coalition v SABC supra*: under section 71(5) of the Companies Act, a director who has been removed from office by the board of directors may apply to court to review the board's decision. The review application must be instituted within 20 business days of the board's decision to remove the director from office (s 71(5)). The statutory review procedure ensures that a court exercises some oversight over the board's decision to remove a director from office. In contrast, sections 15 and 15A of the Broadcasting Act do not make any provision for a court to review the decision to remove a director from the SABC board. It is therefore not the case, as stated by the court that the removal process under the Companies Act "denies members of the SABC Board security of tenure" (par 141).

The grounds for the removal of a director on a recommendation by the National Assembly under the Broadcasting Act are in fact broader and more far-reaching than those provided under section 71(3) of the Companies Act for the removal of a director by the board of directors. Under section 71(3) of the Companies Act, the board of directors may remove a director only if he or she is ineligible or disqualified, incapacitated, or has neglected or been derelict in the performance of the functions of director. Under section 15A(1)(*a*) of the Broadcasting Act, the National Assembly may adopt a resolution recommending the removal of a director from the SABC on account of misconduct, inability to perform his or her duties efficiently, disqualification, if he or she has been absent from three consecutive board meetings without the permission of the board (save on good cause shown), and if he or she has failed to disclose a conflict of interest in terms of section 17 of the Broadcasting Act. This widens the scope under the Broadcasting Act for the removal of a director when compared to the Companies Act.

However, the provisions for the removal of a director by shareholders under the Companies Act do provide a lower level of security of tenure for directors when compared to the Broadcasting Act. This is because the Companies Act does not require shareholders to provide any reason for removing a director from office. This may be because it is well established that when shareholders of a company remove a director from office in terms of section 71(1) of the Companies Act, they may exercise their vote to do so in any way they please since their right to vote is a right of property that they are entitled to exercise in whatever way they desire (see *Pender v Lushington* (1877) 46 ChD 317 319; *Re HR Harmer Ltd* [1959] 1 WLR 62 82; *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) 680; *Desai v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) 519; *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187 (PC) 221). In order for shareholders to successfully remove a director from office under section 71 of the Companies Act, an ordinary resolution must be passed. Section 65(8) of the Companies Act specifically prohibits the threshold for an ordinary resolution for the removal of a director by the shareholders to be increased to more than 51 per cent of the voting rights exercised on the resolution. Since the Minister is the sole shareholder representative of the SABC, it is only the Minister's vote that is required to remove a director from office. For this reason, a director on the SABC board would not have a high level of security of tenure if he or she were to be removed by the shareholder representative of the SABC (the Minister). In contrast, such a director would have a higher level of security of tenure if removal from office were in terms of the Broadcasting Act effected by the President on the adoption of a resolution of the National Assembly calling for the director's removal.

4 3 The statutory interpretation of conflicting statutes under the common law

The common-law principle of interpretation *lex specialis derogat legi generali* states that when two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) supersedes a law that governs general matters only (*lex generalis*) (see *R v Gwantshu* 1931 EDL 29 31; *Kent NO v South African Railways* 1946 AD 398 429−430; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) 603; *S v Shangase* 1972 (2) SA 410 (N) 430; *S v Hattingh* 1978 (2) SA 826 (A) 829; *Consolidated Employers Medical Aid Society v Leveton* 1999 (2) SA 32 (SCA) 40−41; and De Ville *Constitutional and Statutory Interpretation* (2000) 79). Another way of stating this principle of interpretation is that general rules do not derogate from special ones (De Ville *Constitutional and Statutory Interpretation* 79). The rationale for this principle of interpretation is that when the legislature has given attention to a specific subject and has made special provisions for it, a subsequent general enactment is not intended to interfere with those special provisions unless it clearly manifests that intention (see *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A) 164 and Kellaway *Principles of Legal Interpretation of Statutes, Contracts and Wills* (1995) 369). In *Kent NO v South African Railways* (*supra* 405) the then-

Appellate Division formulated this rule of statutory construction by stating that statutes:

> "must be read together and the later one must not be so construed as to repeal the provisions of an earlier one, or to take away rights conferred by an earlier one unless the later Statute expressly alters the provisions of the earlier one in that respect or such alteration is a necessary inference from the terms of the later Statute. The inference must be a necessary one and not merely a possible one."

In *Khumalo v Director-General of Co-operation and Development* (*supra* 164−165) and *Sasol Synthetic Fuels (Pty) Ltd v Lambert* (2002 (2) SA 21 (SCA) par 15), the Supreme Court of Appeal approved the above formulation of this rule of statutory construction. This principle of interpreting statutes is also recognised in English law. In the UK case of *Corporation of Blackpool v Starr Estate Company Limited* ([1922] 1 AC 27 34), Viscount Haldane succinctly formulated this principle of interpretation as follows:

> "(W)e are bound . . . to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specifically declared."

On the basis of the common-law principle of interpretation of statutes *lex specialis derogat legi generali*, it is arguable that the provisions on the removal of directors contained in the earlier-enacted Broadcasting Act, being specific legislation dealing with the governance of the SABC, would prevail over the removal provisions in the later-enacted Companies Act, being general legislation dealing with state-owned companies. This argument is reinforced by the fact that there are no clear, express or specific indications that the legislature intended to repeal the provisions of the Broadcasting Act when the Companies Act was promulgated. The High Court in *SOS Support Public Broadcasting Coalition v SABC supra* failed to apply this common-law principle of interpretation of statutes when ascertaining whether the Broadcasting Act or the Companies Act prevails where the removal of directors is concerned. While the court came to the conclusion that the Broadcasting Act prevails over the Companies Act on the basis of the applicability of the Constitution, it could, in the alternative, have reached this conclusion based on the application of the common-law principle of *lex specialis derogat legi generali*.

4 4 Practical resolution of the conflict between the Companies Act and the Broadcasting Act

While the High Court in *SOS Support Public Broadcasting Coalition v SABC supra* found that sections 15 and 15A of the Broadcasting Act prevail over section 71 of the Companies Act, it did not clarify how the conflict in law between the Companies Act and the Broadcasting Act is to be resolved in practice. The fact remains that the Companies Act has failed to list, in

section 5(4)(*b*)(i), the Broadcasting Act as one of the statutes that prevails in the event of a conflict with the Companies Act.

It is suggested that section 5(4)(*b*)(i) of the Companies Act should be amended to include a reference to the Broadcasting Act as one of the statutes that prevail over the Companies Act in the case of a conflict between the two Acts. Alternatively, it is suggested that the Minister of Trade and Industry should be requested, under sections 9(2)(*a*) and 9(3) of the Companies Act, to exempt the SABC from the provisions of section 71 of the Companies Act. Under section 9(2) of the Companies Act, the member of the Cabinet responsible for state-owned companies may request the Minister of Trade and Industry to grant a total, partial or conditional exemption from one or more provisions of the Companies Act, applicable to all state-owned companies, any class of state-owned companies or to one or more particular state-owned company. In terms of section 9(3) of the Companies Act, the Minister may, by notice in the *Government Gazette* after receiving the advice of the Companies and Intellectual Property Commission, grant an exemption contemplated in section 9(2) only to the extent that the relevant alternative regulatory scheme ensures the achievement of the purposes of the Companies Act at least as well as the provisions of the Companies Act, and subject to any limits or conditions necessary to ensure the achievement of the purposes of the Companies Act. Since sections 15 and 15A of the Broadcasting Act would regulate the removal of directors of the SABC at least as well as the provisions of the Companies Act, it is submitted that the granting of an exemption excluding the SABC from the provisions of section 71 of the Companies Act, would resolve the legislative conflict between sections 15 and 15A of the Broadcasting Act, and section 71 of the Companies Act.

It is suggested further that section 8(6) of the Broadcasting Act, which sets out those provisions of the Companies Act 61 of 1973 that do not apply to the SABC, must be updated to refer to the relevant equivalent provisions of the Companies Act (71 of 2008), and must specifically include a reference to section 71 of the Companies Act (71 of 2008). In this manner, the legislative conflict between the Companies Act and the Broadcasting Act would be resolved, and the two Acts would be in harmony.

5 Conclusion

This note has critically analysed the High Court's decision in *SOS Support Public Broadcasting Coalition v SABC supra*. Based on the constitutional rights contained in section 16 (freedom of expression) and section 7(2) (the requirement of the State to respect, protect, promote and fulfil the rights in the Bill of Rights), the High Court ruled that the powers granted to the Minister under the amended MOI and the Charter (to appoint, re-appoint and discipline executive directors) undermine the independence of the SABC. The court stressed that the board of directors of the SABC must be strictly independent since it does not report to the Minister, but to the National Assembly. The court made it clear that the Minister does not have any legal right to control the affairs of the SABC.

The differences between the removal of a director under section 71 of the Companies Act and sections 15 and 15A of the Broadcasting Act respectively have been discussed. It has been argued that the court, with respect, overlooked the fact that section 71 of the Companies Act does provide a certain level of oversight where the removal of a director by the shareholders and by the board of directors is concerned. It has been observed that the court concluded that the removal processes under the Broadcasting Act prevail over those prescribed under the Companies Act on the basis that, if this were not the case, the independence of the SABC would be undermined in a manner that is inconsistent with the Constitution. It has been argued that the court could have come to the same conclusion on the basis of the application of the common-law principle of interpretation of statutes *lex specialis derogat legi generali*, in terms of which the provisions on the removal of directors contained in the Broadcasting Act, being earlier-enacted specific legislation dealing with the governance of the SABC, would prevail over the removal provisions in the Companies Act, being later-enacted general legislation dealing with state-owned companies.

It has further been noted that the court did not clarify how the conflict between the Companies Act and the Broadcasting Act is to be resolved in practice. It is suggested that section 5(4)(*b*)(i) of the Companies Act should be amended to include a reference to the Broadcasting Act as one of the Acts that prevails over the Companies Act in the case of a conflict between the two Acts. Alternatively, it is suggested that the Minister of Trade and Industry should be requested, under sections 9(2)(*a*) and 9(3) of the Companies Act, to exempt the SABC from the provisions of section 71 of the Companies Act. In addition, it is suggested that section 8(6) of the Broadcasting Act should be amended to specifically include a reference to section 71 of the Companies Act (71 of 2008) as one of the provisions that do not apply to the SABC.

Even though section 71 of the Companies Act is said to apply to the removal of directors of state-owned companies, it is evident from *Minister of Defence v Motau* and *SOS Support Public Broadcasting Coalition v SABC supra* that there is considerable confusion on the applicability of section 71 of the Companies Act where state-owned companies are governed by specific legislation regulating the removal of their directors. A careful analysis needs to be made in each case to ascertain whether the provisions of the specific legislation governing the state-owned company and section 71 of the Companies Act may be applied concurrently (as was possible in *Minister of Defence v Motau*) and if not (as in *SOS Support Public Broadcasting Coalition v SABC supra*), which legislation would prevail.

It is submitted that *SOS Support Public Broadcasting Coalition v SABC supra* is a commendable decision that is to be welcomed because it has finally resolved the long-standing confusion over the Minister's powers over the SABC's board of directors, as well as the conflict between the Companies Act and the Broadcasting Act with regard to the removal of directors of the SABC board. As pointed out by the High Court in its judgment, the high rates of illiteracy in South Africa, the limited distribution and cost of newspapers and the cost of subscription television make the

SABC the "primary source of information for the majority of South Africans" (*SOS Support Public Broadcasting Coalition v SABC supra* par 40). As the Constitutional Court stated in *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* (2007 (1) SA 523 (CC) par 28), an independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. If the SABC is not independent, this could impact on the quality of democracy in South Africa (*SOS Support Public Broadcasting Coalition v SABC supra* par 39). The judgment in *SOS Support Public Broadcasting Coalition v SABC supra* fortifies the independence of the SABC board, and emphasises that the board must be run by the board itself, without any control, influence or interference by third parties.

It should be noted that the Broadcasting Amendment Bill [B39-2015] was tabled in the National Assembly on 4 December 2015. This Bill aimed to amend the Broadcasting Act. *Inter alia*, the Bill aimed to amend the procedures for the appointment and removal of non-executive members of the SABC board. The amendments provided that non-executive members of the SABC board had to be appointed by the President on the advice of the Minister. The amendments also conferred on the Minister much power to remove directors of the SABC board. However, the Bill was withdrawn from Parliament on 18 September 2018, and sent back to the Minister to be reconsidered. It remains to be seen whether the revised Bill will accord with the sentiments expressed by the court in *SOS Support Public Broadcasting Coalition v SABC supra* regarding the independence of the SABC.

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