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

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE DATE: 30 July 2024

Case No. A2022-046784

In the matter between –

SA BROADCASTING CORPORATION (SOC) LTD	First Appellant
SPECIAL INVESTIGATING UNIT	Second Appellant
and	
GEORGE HLAUDI MOTSOENENG	First Respondent
AUDREY RAPHELA	Second Respondent
SULLY MOTSWENI	Third Respondent
LESLIE NTLOKO	Fourth Respondent
NOMSA PHILISO	Fifth Respondent
SIMON TEBELE	Sixth Respondent
BESSIE TUGWANA	Seventh Respondent
TSHIFILA MULAUDZI	Eighth Respondent
NOMPUMELELO PHASHA	Ninth Respondent
JAMES AGUMA	Tenth Respondent

CORAM: MUDAU J, MALINDI J and WILSON J

Summary

The majority (Wilson J, with whom Mudau J agrees) holds that a debt to the state arising from an unlawful administrative act falls due when the act is set aside. The minority (Malindi J) holds that such a debt falls due when the state acquires knowledge from which the unlawfulness of the act can be inferred.

JUDGMENT

WILSON J (with whom MUDAU J agrees):

1 The question at the heart of this appeal is when a debt arising from an unlawful administrative act falls due. Is it when an organ of state forms the subjective opinion that the act was unlawful? Or is it when a court sets aside the act, having been persuaded of its unlawfulness? In this judgment, I conclude, consistently with longstanding authority, that, if "an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside" (*Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) ("*Oudekraal*"), paragraph 26), then the unlawful act stands as a fact for that period. It follows from this that a debt arising from the unlawful act can fall due only when a court sets the act aside – in other words, only when the act ceases to stand as a fact.

The Mzansi Music Legends scheme

2 This answer to the question is of considerable importance to the appellants in this case, who are the South African Broadcasting Association ("the SABC") and the Special Investigating Unit ("the SIU"). The SIU investigated the approval of a scheme adopted by the SABC on 24 July and 5 September 2016. The scheme was called the "Mzansi Music Legends" scheme. It entailed paying a once-off gratuity of R50 000 to individuals identified as having

achieved “legendary” status, and who had, for reasons of past racially discriminatory practice, not been accorded the kind of financial reward for their work that successful artists can expect today, irrespective of their race.

3 Ultimately, the Mzansi Music Legends scheme was only partially implemented. Fifty-three “music legends” received up to R50 000 each, but the SABC intended to recognise and pay many more “legends” before the scheme was frozen and ultimately abandoned. The total amount paid out under the scheme was some R2.425 million.

4 The Mzansi Music Legends scheme turned out to have been unlawfully adopted and implemented. This was established during the SIU investigation which was carried out as part of a wider probe into the SABC’s affairs. The unlawfulness of the scheme was conceded before us, and it is not necessary to explore the reasons for its unlawfulness in any detail. It is sufficient to remark that the scheme was adopted and implemented in breach of the SABC’s internal governance and financial control measures, many if not most of which have the force of law through the Broadcasting Act 4 of 1999 and the Public Finance Management Act 1 of 1999.

5 The respondents, all of whom are cited in their personal capacities, were members of SABC’s executive and operating committees at the time the scheme was adopted and implemented. The appellants say that each of the respondents had a role in adopting and implementing the scheme, and that they are all to some extent responsible for its unlawfulness.

6 Having concluded that the Mzansi Music Legends scheme had been unlawfully adopted and implemented, the SABC and the SIU applied to the

Special Tribunal to review and set the scheme aside. This had to be done because the implementation of the scheme constituted “administrative action”, within the meaning of section 1 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). The SABC was accordingly not entitled to simply mothball the scheme and disavow any entitlements the unpaid “music legends” might have acquired under it.

7 Moreover, although the decision to implement the music legends scheme was “administrative action” under PAJA, the SABC was not entitled to review its own decision in terms of that statute. This is because PAJA gives effect to section 33 of the Constitution, 1996, which affords private parties, and not the state, the right to just administrative action, together with the right to review unjust administrative action under PAJA. It followed from this that, notwithstanding the fact that the decision to implement the scheme constituted administrative action, the route to reviewing and setting the decision aside had to be through section 1 (c) of the Constitution (see *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC), paragraphs 28, 29 and 38 to 42). Section 1 (c) of the Constitution entrenches the rule of law as a founding value in our constitutional order, and affords a remedy to set aside any unlawful conduct by an organ of state, whether or not it constitutes administrative action. Where an organ of state engages section 1 (c) of the Constitution to set aside one of its own administrative acts, it “self-reviews” that act.

The self-review in the Special Tribunal

8 The SABC accordingly applied in the Special Tribunal to self-review its decision to implement the scheme. The SIU joined the SABC in the application, given the SIU's role in uncovering the payments made under the scheme and establishing their unlawfulness. The SIU's standing to seek the self-review relief arises from section 4 (1) (c) (i) of the Special Investigation Units and Special Tribunals Act 74 of 1996 ("the Special Tribunals Act"), which entitles the SIU to seek any relief to which the SABC is entitled, and which arises from the SIU's investigations of the SABC's affairs.

9 The SABC and the SIU asked the Special Tribunal to set aside the decision to implement the Mzansi Music Legends scheme. They also asked that the respondents be held jointly and severally liable to repay the R2.425 million that had already been disbursed under the scheme's terms. This, the appellants argued, was "just and equitable" relief under section 172 of the Constitution. In advancing this contention, the appellants were no doubt inspired by the power of a court, under section 8 of PAJA, to award compensation as "just and equitable relief" attendant upon the setting aside of an unlawful administrative act under that statute.

10 The respondents opposed the application on several grounds, only two of which need concern me. First, they argued that the SABC and the SIU had delayed the institution of the self-review unreasonably. The self-review application was instituted on 21 January 2021, but the decision the SABC and the SIU wished to set aside was taken more than four years before that. This, the first, second, third and seventh respondents contended, was

unreasonable. However, the Special Tribunal decided that the delay was not unreasonable, because the SIU report necessary to institute the proceedings was only finalised on 6 July 2020. The Special Tribunal found that there had been no undue delay in finalising the report, or in instituting these proceedings thereafter. The unreasonable delay argument accordingly failed.

11 The second relevant point raised before the Special Tribunal was that the claim for repayment against the respondents had prescribed. This contention was based on the proposition that the repayment claim is a "debt" for the purposes of the Prescription Act 68 of 1969. Under section 12 (3) of the Prescription Act a debt falls due when a creditor acquires knowledge of all the facts giving rise to the debt. In this case, the respondents contended, that meant that the debt fell due when the SABC acquired knowledge that the decision to implement the Mzansi Music Legends scheme was unlawful.

12 The respondents contended that they had no knowledge of the unlawfulness of the scheme, and that such knowledge could only have been acquired after they had left the SABC and an interim board had ordered the forensic investigation that unearthed the scheme and established its unlawfulness. The Special Tribunal agreed with these contentions and held that the SABC acquired knowledge of the unlawfulness of the scheme in August 2017, when the forensic investigation was ordered. That, the Special Tribunal held, is when the repayment claim fell due. Since an ordinary debt prescribes after three years, the repayment claim prescribed, at the latest, at the end of August 2020, several months before the self-review was instituted. On this basis, the Special Tribunal held that the repayment claim had prescribed.

13 Ultimately, the Special Tribunal reviewed and set aside the decision to adopt the Mzansi Music Legends scheme, but let the payments already made under it stand. The effect of the Special Tribunal decision was that those "legends" who had already been paid under the scheme could not be pursued for repayment, but that no further funds could be paid out under the scheme. The Special Tribunal declined to order the respondents to make good on the sums already disbursed under the scheme. This was on the basis that any claim that they should repay the disbursed funds had prescribed.

The appeal

14 Exercising their right of appeal under section 8 (7) of the Special Tribunals Act, the SABC and the SIU now challenge the Special Tribunal's order before us, but only insofar as the Special Tribunal refused the claim for repayment. The appeal was argued on that basis that a claim for payment arising from an unlawful administrative act is a "debt" for the purposes of the Prescription Act. Like the Constitutional Court in *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) ("*Njongi*") at paragraph 42, I approach the case on the reluctant assumption that this proposition is correct. This is because both parties accept that it is, and because, on the view I take of this case, it does not matter whether or not the repayment claim is a "debt" that can prescribe.

<u>Did the repayment claim prescribe?</u>

15 Everyone accepts that the decisions to make payments under the Mzansi Music Legends Scheme constituted "administrative action" under PAJA. The only reason that PAJA is not the vehicle through which the SABC challenged

the decisions is that PAJA does not apply to organs of state who self-review their own decisions.

16 In *Njongi,* the Constitutional Court dealt with an unlawful decision to withhold a social grant. The court held that the payment claim arising from that unlawful administrative act only fell due once a court had set aside the decision to withhold the grant under PAJA, or once the state had clearly disavowed the lawfulness of withholding the grant (see *Njongi* paragraphs 41 to 56).

17 This position was modified in *MEC for Health Eastern Cape v Kirland Investments* 2014 (3) SA 481 (CC), in which the Constitutional Court decided that the state may not after all disavow (or, in the language used in the judgment, treat as a "non-decision" (paragraph 68)) an apparently unlawful administrative act. A substantive application to review and set aside that administrative act must be brought. Until that happens, the act is "effective" and has legal consequences (see paragraphs 87 to 106). This necessarily implies that unlawful administrative acts, though invalid, exist as facts until a court sets them aside.

18 It follows from the decisions in *Njongi* and *Kirland* that a debt arising from an unlawful administrative act only falls due once the administrative act is set aside. So long as the administrative act stands, it exists as a fact, and prevents a debt that would otherwise be claimable from falling due. Once the administrative act is set aside, it ceases to exist as a fact, and the debt that would have been payable but for the administrative act then falls due.

19 It is for this reason that the Special Tribunal was wrong to conclude that the unlawfulness of the Mzansi Music Legends scheme was not a "fact" for the

purposes of section 12 (3) of the Prescription Act, but a mere conclusion of law, of which the appellants were not required to be aware before the repayment claim fell due (see paragraph 65 of the Special Tribunal's decision). It is clear from *Njongi* and *Kirland* that unlawful administrative acts are facts that are treated as having valid legal consequences until they are set aside. It follows that the setting aside of the administrative act is also a "fact" of which a creditor must be aware before a debt that would be payable but for the unlawful act falls due. The knowledge that the SABC had to acquire before the repayment claim in this case fell due under section 12 (3) of the Act was not that the Mzansi Music Legends scheme was unlawful, but that it had been set aside.

20 This accords with long-accepted judicial understandings of when a debt falls due. In *Truter v Deysel* 2006 (4) SA 168 (SCA), at paragraph 16, the court held that, "for the purposes of the [Prescription] Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim." If an unlawful administrative act stands as a fact and has legal consequences until it is set aside, then its setting aside must be one of the things that must have "happened" before the creditor can pursue their claim.

21 Moreover, in *Trinity Asset Management Pty Limited v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC), it was observed, at paragraph 40 that "it is a fundamental principle of prescription that it will begin to run only when the creditor is in a position to enforce his right in law, not necessarily when that right arises". Although that quote is harvested from the minority judgment, it is a point with which the majority took no issue (see paragraphs 96 to 100).

22 It follows from this that a party wishing to recover a debt that would be due but for an unlawful administrative act must first set that act aside before the debt can be claimed. This they may do, it is true, by seeking the setting aside of the unlawful act and the payment of the debt in the same proceeding, but that does nothing to change the fact that the debt is only due once the unlawful act is set aside. A court could not order the payment of the debt without setting the unlawful act aside, but it could, as the Special Tribunal did here, set the act aside without ordering the payment of the debt.

23 To put it another way, had the SABC in this case pursued the respondents only for the repayment relief, without seeking to set aside its own decision to implement the Mzansi Music Legends scheme, the respondents would have been perfectly entitled to rely on the ostensive validity of the decisions to make the payments under the Mzansi Music Legends scheme. They could, and I suspect would, have said that they do not owe anything unless and until the administrative acts authorising the R2.425 million worth of payments had been set aside.

24 It follows from all of this that the repayment claim did not fall due when the SABC formed the subjective view that the Mzansi Music Legends scheme was

unlawful. It would only have fallen due once the decisions to make payments under the scheme had been set aside. The Special Tribunal was accordingly mistaken when it held that the SABC's repayment claim had prescribed.

25 Before us, it was argued that the decision of the Constitutional Court in *President of the Republic of South Africa v Tembani* (CCT 162/22) [2024] ZACC 5 (6 May 2024) changed this position. In *Tembani*, the question was whether a delictual debt fell due when a presidential power was wrongfully exercised, or when the exercise of the power was declared to have been wrongful. On the basis of the doctrine of objective constitutional invalidity, the exercise of the power was held to have been wrongful from the moment it was exercised, not from the moment it was declared to have been wrongful (see paragraph 92).

26 Ms. Nyathi, who appeared for the first respondent, and Mr. De Beer, who appeared for the seventh respondent, both argued that it follows from *Tembani* that an unlawful administrative act is invalid from the outset, not from the date on which it is set aside.

27 I do not think that is correct. *Tembani* was decided in the context of a member of the public suing the state in delict. The wrongful exercise of a presidential power (which, as far as I can see, was not alleged to have been an administrative act) formed part of the element of wrongfulness in the plaintiff's delictual claim. Understood in that context, *Tembani* makes perfect sense. But in this case, the SABC does not sue in delict. It seeks to review and set aside one of its own administrative acts. There is nothing in *Tembani* that speaks to, or purports to interfere with, either the rule that administrative acts stand as

facts until they are set aside (see, for example, *Oudekraal*), or with the rule that an organ of state cannot simply disavow an administrative act to which it no longer wishes to give effect (for which see *Kirland*, amongst other decisions). The decision in *Tembani* did not cite or deal with the decisions in *Kirland* or *Njongi*. It cannot, in my view, sensibly be read as limiting the impact of either of those decisions, or of the long lines of authority on which they are based.

28 It follows that the Special Tribunal's declaration, at paragraph 5.3 of its order, that the repayment claim had prescribed, cannot stand, and that the appeal must succeed to at least this extent.

Should the repayment claim succeed?

29 I now turn to the further issue of whether ordering the respondents to repay the R2.425 million disbursed under the scheme would be just and equitable, under section 172 of the Constitution, as the SABC and the SIU contend.

30 It is not suggested that any of the respondents personally benefitted from the Mzansi Music Legends scheme. Nor is it suggested that the scheme was adopted in bad faith or for some ulterior purpose. The Special Tribunal described the objectives of the scheme as "laudable and noble" (see paragraph 140 of the Special Tribunal's decision), the fact of its unlawfulness notwithstanding.

31 Many of the respondents dispute the extent of their involvement in the conception the scheme. Some say that they had little to do with it, and that they were not present at the meeting at which it was finally adopted. The

Special Tribunal specifically refrained from setting aside the payments that had already been made under the scheme at the time it declared the scheme unlawful.

32 In these circumstances, I do not think that the repayment relief can be just and equitable. To order repayment in this case would be to create the possibility that state officials who expend money on the state's behalf in good faith, with laudable aims and with no discernible motive for personal gain may be held personally liable for that money if their conduct is later found to have been unlawful. It is well-established that state officials are generally immune from damages claims arising from negligent acts performed in their official capacities in good faith (see *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), paragraph 55 and *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA), paragraph 26). I see nothing in this case that would justify a departure from that general rule.

33 Mr. Motepe, who appeared together with Ms. Cirone for the appellants, accepted all of this, but asked us, if we conclude that the repayment claim has not prescribed, to remit the question of just and equitable relief to the Special Tribunal for determination afresh.

34 However, I do not think that remittal would be appropriate. The facts before us are sufficient to ground the conclusion that repayment would not be just and equitable relief in this case. Those facts are unlikely to be challenged or to change on remittal. In any event, if the appellants are still entitled, on some other basis, to pursue some or all the respondents for the losses occasioned by the Mzansi Music Legends scheme, the determination that their repayment

claim only fell due on 18 October 2022, when the Special Tribunal declared the scheme unlawful, leaves the appellants with sufficient opportunity to explore any alternative remedies they may have.

Costs

35 The appellants initially challenged the Special Tribunal's decision to direct them to pay the seventh respondent's costs on the attorney and client scale. This was on the basis that the seventh respondent took no issue with the merits of the review, but only with the repayment relief, which she successfully resisted. During argument, Mr. Motepe accepted that there was no basis on which we could interfere with the exercise of the Special Tribunal's discretion in this respect unless we upheld the appeal against the refusal of the repayment relief. Since I would not uphold that aspect of the appeal, it seems to me that the Special Tribunal's costs order in favour of the seventh respondent should remain undisturbed.

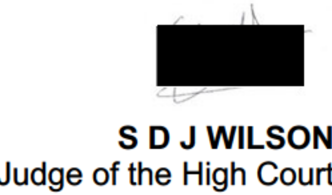
36 On appeal, the SABC and the SIU abandoned their case against the eighth and ninth respondents at the outset of the hearing before us. The first and seventh respondents opposed the appeal, and vigorously defended the Special Tribunal's conclusion that the repayment claim had prescribed. On the approach I take to this appeal, they have been unsuccessful on that point, but have nonetheless succeeded in fending off the repayment relief. In these circumstances, I think that each party should pay their own costs on appeal.

Order

37 For all these reasons, we make the following order –

37.1 The appeal is allowed only to the extent that paragraph 5.3 of the order of the Special Tribunal is set aside.

37.2 The appeal is otherwise dismissed, with each party paying their own costs.



S D J WILSON
Judge of the High Court

<u>MALINDI J:</u>

Introduction

38 This is an appeal against paragraphs 5.3, 6 and 7 of the Special Tribunal ("the Tribunal") Judgment and Order per Modiba J On 18 October 2022 under Special Tribunal case number: GP01/ 2021.

39 Paragraph 5.3 of the order reads as follows:

"*the debt in respect of which the applicants seek an order that the respondents pay an amount of R2 425 000.00 (two million four hundred and twenty-five thousand rand) to the SABC has become prescribed.*"

40 Paragraphs 6 and 7 relate to the costs orders to the effect that the parties shall pay their own costs and that the Appellants shall pay the 7th Respondent's costs on an attorney and client scale.

41 The Appellants sought that the Respondents pay the amount of R2.425 million in their personal capacities jointly and severally, the one paying the other to be absolved.

42 This amount arises out of the impugned decisions taken by the respondents on 24 July 2016 and 5 September 2016 to reward musicians identified as music legends with an amount of R50 000.00 each. These decisions were declared to be irregular and unlawful and were set aside by the Tribunal.

43 The appeal is opposed by the first and seventh Respondents.

Background

44 The background facts are largely common cause and are set out in the judgment[1] as follows:

"*[15] The idea that led to the impugned being made was conceived by Motsoeneng. EXCO made the July decision. OPCOM ratify this decision on five September 2016 and implemented it. The decision is recorded in a written solution OPCOM passed on 29 September 2016. It was signed by the SABC's former Deputy Company Secretary Lindiwe Bayi. The OPCOM resolution approved the impugned payments and required that the list of music legends be reviewed to ensure completeness and confirmation of beneficiary details to avoid duplicate payments. It also states that music legends who have been omitted from the list would be managed on a case by case basis if they subsequently approach the SABC.*

[1] Judgment: Vol 7, 003-706

[16] On 30 September 2016, a business case for the impugned payments was compiled by Motsoeneng as the then Chief Operating Officer, supported by Raphela as the then Chief Financial Officer and approved by Aguma as the then Group Chief Executive Officer. The business case sets out a motivation for the impugned payments. The impugned payments would incentive the music legends for supporting the SABC by compensating music legends who did not receive needle royalties prior to 1996. They would be paid a once off amount of R50,000 each.

[17] Ultimately, only 53 music legends were paid in the sum total the applicants seek to recover in these proceedings.

[18] By December 2016, members of the Board of the SABC who are in office when the impugned decisions were made had signed. In March 2017, an interim Board was appointed. It immediately became seized with several investigations into maladministration at the SABC. It also investigated the impugned decisions.

[19] On 1 September 2027, the President referred to the SIU for investigation allegations of impropriety into the affairs of the SABC under proclamation No R29 of 2017 published in Government Gazette No. 41086 (the Proclamation). The proclamation was amended by Proclamation R.18 of 2018.[2] The impugned decisions form part of several areas of investigation as authorised by these proclamations.

[2] Proclamation R.18 of 2018 published on 6 July 2018 in Government Gazette No. 41754.

[20] The SIU finalized its report in July 2020. It instituted this application in January 2021."[3]

45 Crucial dates that must be noted are the following[4]:

45.1 The payments to the music legends were made between October 2016 and February 2017;

45.2 A new interim Board was appointed in March 2017. It ordered a forensic investigation in August 2017;

45.3 The report was received by the SABC on 3 August 2017;

45.4 The report states that the decision to make the payments was irregular and breached the PFMA and the OPCOM had to be held accountable;

45.5 After the SIU was authorised to investigate the SABC affairs on one September 2017, the SABC Group Exco discussed the forensic report on 14 September 2017. The SABC Exco resolved that no further payments be made to the music legends;

45.6 The SIU was only authorised to investigate the impending decisions on 1 September 2017 when Proclamation R.29 was issued;

45.7 The second phase of the investigation was in May 2018;

45.8 The last interview or information was received on 10 April 2020;

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[3] Judgment: Vol 7, 003-710

[4] Judgment: Vol 7, 003-718 to 003-722

45.9 The SIU report was finalised on 7 July 2020;

45.10 The review application was launched on 21 January 2021;

The Parties' Contentions

46 The Appellants' case is a crisp one. It is whether, as was found by the Special Tribunal, the Appellants' claim had prescribed by the time the review application was launched and a repayment of the R2 425 000.00 was claimed.

47 The Appellants contend that the debt arose on 18 October 2022 as due and payable when the unlawful and or irregular decisions were set aside on review.

48 The Respondents contend that the debt arose and became due and payable during the first months of the tenure of the SABC's Interim Board which was appointed in March 2017 and had instituted a forensic investigation by August 2017 and received a report in the same month. They rely on the fact that the SABC Group Executive Committee (Exco) having discussed the forensic reports on 14 September 2017 and resolved that no further payments be made under the music legend scheme as the payments breached the PFMA and therefore irregular.

49 The issues for determination are therefore:

49.1 When the debt arose;

49.2 Whether if the debt has prescribed against the SABC, it has similarly prescribed against the SIU; and

49.3 Whether the debt arose on the date of the successful review judgment date (on 18 October 2022) in respect of the SIU.

The Special Tribunal Judgment

50 The Tribunal dealt with all three of these issues at paragraphs [64] – [70][5] and the SIU's *locus standi*. It held that the debt arose on 14 September 2017 when the SABC Exco adopted the forensic investigation report that it had commissioned and took a decision to stop any further payments under the Music Legends Project. The Tribunal held further that the SIU, as a representative applicant, cannot contend that the claim as in its separate capacity, arose when it concluded its own investigations in terms of the Presidential Proclamation and finalized it on 7 July 2020. In the result, the Tribunal held that the SIU is entitled to the relief to which the SABC is entitled. In this regard, the SABC's claim that has prescribed has also prescribed against the SIU.

51 What requires examination is whether the Tribunal was correct in its findings at paragraph 65, and as supported by *Mtokonya v Minister of Police*[6] to the effect that section 12(3) of the Prescription Act requires the creditor to have knowledge of the facts from which the debt arose. It does not require the creditor to have any knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that might be drawn from the facts from which the debt arose.

[5] Judgment: CaseLines section 003-720.
[6] 2018 (5) SA 22 CC at [32], [36], [44] – [45].

Discussion

52 As stated above, the appellants contend that the Tribunal erred in determining the date on which the debt arose and prescription started running. Reliance is placed on *Njongi v MEC, Department of Welfare, Eastern Cape*[7] for the principle that until such time as the decisions were reviewed and set aside the appellants were not aware of the existence of the obligation or the extent of the obligation owed by the respondents to them. They relied further on the authority of *WK Construction (Pty) Ltd v Moores Rowland and Others*[8] that the creditor must have established "the full extent of his rights" before prescription can run.

53 The Appellants then highlighted the excerpt in *Truter and Another v Deysel*[9] being the *dictum* of Van Heerden JA that:

"*A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."*

54 Van Heerden JA concluded by citing, with approval, the dictum in *Mckenzie v Farmers' Co-Operative Meat Industries Ltd*[10] that a "cause of action" for the purposes of prescription means:

[7] 2008 (4) SA 237 (CC) at [40] to [56].
[8] 2002 (6) SA 180 (SCA) at [33].
[9] 2006 (4) SA 168 (SCA) at [16].
[10] 1922 AD 16 at 23.

"*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved…"*

55 The Appellants do not state what facts were not available to them on 14 September 2017 when the SABC Group Exco met to consider the forensic report. All the necessary facts and legal basis to institute proceedings were available to them at this stage. The only impediment they submit, was that the administrative decision of the Operations Committee (OPCOM) remained valid or stood until such time as it was properly set aside by a Court of law as was held in *Kirland.*[11]

56 Section 14 and 15 of the Prescription Act 68 of 1969 provides for the two methods by which the running of prescription shall be interrupted. As regards section 15 the courts have held that it is the issuing of a summons that interrupts prescription. The issuing of a review application in this case sought also an order for the repayment of the R2 245 000.00 by the Respondents in their personal capacity. Whether this is analogous to issuing a summons was not an issue in the tribunal and need not be pursued.

57 Recently in 2020 the Supreme Court of Appeal, following upon a string of decisions on the application of the Prescription Act, also reiterated the requirements of section 12(3) of the Act by stating the following:

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[11] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC).

"[6] Prescription begins to run when the debt in question is due, that is, when it is owing and payable. Section 12(3) of the Prescription Act 68 of 1969 provides:

'*A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.*'

[7] In the present matter only the requirement of knowledge of 'the facts from which the debt arises' needs to be considered. These are the minimum essential facts that the plaintiff must prove to succeed with the claim. … Legal conclusions, such as the invalidity of a contract or that the delictual elements of negligence or wrongfulness have been established, are not facts. Neither is the evidence necessary to prove the essential facts."[12]

58 *MC* refers to *Truter*, *Gore*[13], and *Mtokonya*.

59 Therefore, insofar as section 12(3) of the Prescription Act is concerned, in addition to having the knowledge of the identity of the debtor, the interpretation that follows is that the facts or the factual issue is what is necessary or required for purposes of section 12(3).

60 The Act does not define the words "knowledge of the … facts from which the debt arises" or give any detail to these words.

[12] *MEC for Health, Western Cape v M C* (Case N0. 1087/20190 [2020] ZASCA 165 at paragraph [6]-[7].
[13] *Minister of Finance and Others v Gore N.O.* [2006] ZASCA 98; 2007 (1) SA 111 (SCA)

61 This is a similar dilemma the applicants in *Mtokonya v Minister of Police*[14] faced. The applicants criticised the fact that section 12(3) of the Act refers only to knowledge of "the facts from which the debt arises" and does not also refer to knowledge of legal conclusions that must be drawn from those facts. The applicants said this creates a lacuna. They requested the Constitutional Court to decide whether this section requires a creditor to also know that the conduct of the debtor is wrongful and actionable before a debt may be deemed to be due or before prescription may begin to run.

62 In paragraph [37] of the Judgment the court answered this question by stating that:

> "*The question that arises is whether knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a fact. This is important because the knowledge that section 12(3) requires a creditor to have is "knowledge of facts from which the debt arises". It refers to the "facts from which the debt arises". It does not require knowledge of legal opinions or legal conclusions or the availability in law of a remedy*."

63 The court went further to state that:

> "*A conclusion of law results when legal effects are assigned to events. A conclusion of law stands for more than the happening of events, it is a step in the legal disposal of events.* ***If a rule of law must be applied before a conclusion is reached, that conclusion is one of law***." (Emphasis added)

[14] *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC).

64 And also said, "the distinction between [questions of fact and questions of law] is vitally practical. A question of fact usually calls for proof. A question of law usually calls for argument."[15]

65 In *Truter* it was stated that:

> "*As indicated above, the presence or absence of negligence is not a fact, it is a conclusion of law to be drawn by the court in all the circumstances of the specific case. Section 12(3) of the Act requires knowledge of the relevant legal conclusions (i.e. that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions."*[16]

66 I hasten to venture that a declaration of invalidity of administrative action is indeed a legal conclusion drawn by the court in all the circumstances of a specific case. It is a rule of law applied to the facts or events. In this case the Tribunal concluded that in all the circumstances OPCOM did not have the authority to make the decisions that it did. The Tribunal could have held otherwise on the facts.

67 Ultimately, whether a person or party knows of the existence of a debt is a question of fact not law.[17]

68 In this case the question arises whether a declaration of invalidity of administrative action is a question of fact or law. Before *MC (supra)* the cases

[15] *Mtokonya* at [43]
[16] *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 19.
[17] *Mtokonya* at [71]

below had stated that nothing not stated in the Act disrupts prescription where all the facts giving rise to the debt are known to the creditor.

69 In *Minister of Finance and Others v Gore NO*[18] the Supreme Court of Appeal said:

"*This Court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'*"[19]

70 In *Claasen v Bester*[20] the Court also said knowledge of legal conclusions is not required before prescription begins to run.[21]

71 In *Yellow Star Properties 1020 (Pty) Ltd v Department of Development Planning and Local Government (Gauteng)*[22] the court likewise said the failure by an applicant to appreciate the legal consequences which flowed from the facts does not delay the date prescription commences to run.[23]

72 In *Fluxmans Incorporated v Levenson*[24] the court echoed what is mentioned above by confirming that Section 12(3) of the Prescription Act only requires

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[18] *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA).
[19] Id at paragraph 17.
[20] *Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA).
[21] Id at paragraph 15.
[22] *Yellow Star Properties 1020 (Pty) Ltd v Department of Development Planning and Local Government (Gauteng)* [2009] ZASCA 25; 2009 (3) SA 577 (SCA); [2009] 3 All SA 475 (SCA).
[23] Id at paragraph 37.
[24] *Fluxmans Incorporated v Levenson* [2016] ZASCA 183; [2017] 1 All SA 313 (SCA); 2017 (2) SA 520 (SCA).

knowledge of the material facts from which the prescriptive period begins to run and that it does not require knowledge of the legal conclusion.[25]

73 In *Steenkamp v the Provincial Tender Board, Eastern Cape*[26] the Constitutional Court wrestled with the question whether financial loss caused by improper performance of a statutory or administrative function should attract liability for damages in delict. The Court referred to Section 8 of the Promotion of Administrative Justice Act[27] ("PAJA") as providing examples of public remedies suited to vindicate breaches of administrative justice which are "just and equitable". These remedies are in the main of a public law and not private law character.[28] Section 8 of PAJA provides as follows:

"*(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders—*

(a) directing the administrator—

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and—

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

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[25] Id at paragraph 42.
[26] 2007 (3) SA 121 (CC).
[27] Act 3 of 2000.
[28] At [30].

(ii) in exceptional cases—

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders—

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs."

74 The appellants obtained their remedy under paragraph (1)(c) and, in my view, ought to pursue the common law remedy separately and in compliance with

such law. A damages claim such as in this case is subject to laws which have not been dispensed with by the Constitution.

***Tembani*[29] *vs Kirland*[30]**

75 In the case of *Tembani* there were 25 plaintiffs who owned farms or conducted farming operations in Zimbabwe. In 2005, Zimbabwe amended its Constitution to allow agricultural land to be confiscated or expropriated without compensation and ousted the jurisdiction of its courts to entertain challenges to such confiscations. Some of the plaintiffs successfully pursued claims against Zimbabwe in the South African Development Community ("SADC") Tribunal. However, Zimbabwe defied the Tribunal's decisions. In 2011, the SADC Summit decided to suspend the operations of the SADC Tribunal with the support of South Africa's then President Zuma. In 2014, the Summit adopted a new Protocol abolishing individual access to the Tribunal, which President Zuma signed. In 2018, the High Court declared President Zuma's participation in suspending the Tribunal and signing the 2014 Protocol as unconstitutional, and this was confirmed by the Constitutional Court. The President was ordered to withdraw his signature from the 2014 Protocol.

76 Appellants submitted that:

"…*because a finding of constitutional validity has to be made or confirmed by this Court, the plaintiffs' causes of action were not completed until such an*

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[29] *President of the Republic of South Africa and Another v Tembani and Others [*2024] ZACC 5 (*Tembani*).
[30] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd [*2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (*Kirland*).

order was made by this Court. In other words, … until this Court made its order the President's conduct had to be treated by a trial court as constitutional."

77 Rogers J, writing on behalf of the unanimous Court held that the argument:

"*Confuses what has to be decided with who has to decide it and when it has to be decided. If the President acted unconstitutionally in May 2011 and August 2014 in the manner alleged by the Plaintiffs, his conduct was, objectively speaking, already unconstitutional then. If a court of competent jurisdiction later concludes that the President acted unconstitutionally, its conclusion is that he acted unconstitutionally when he performed the act in question. The acts do not become unconstitutional only from the time the court makes such a conclusion. This is in accordance with the doctrine of objective constitutional invalidity. Having regard to the plaintiffs' pleaded case, a component of the wrongfulness alleged by them was that the president violated the constitution by his conduct in 2011 and 2014. If the President indeed acted contrary to the Constitution at those times, the components of pleaded wrongfulness came into existence in 2011 and 2014. What the plaintiffs are to allege and prove was that the President acted unconstitutionally at those times. They did not need to allege and prove that another court had already found that the President so acted."*[31]

78 It was argued by the Plaintiffs before the Constitutional Court that President Zuma's conduct remained of full force and effect until the declaration of unconstitutionality was confirmed by the Constitutional Court. On this note they added that until the Constitutional Court had confirmed the declaration of

[31] Tembani at [91].

invalidity, the High Court would have had to treat President Zuma's conduct as constitutionally valid and could thus not have determined the question of wrongfulness. The plaintiffs also made a proposition that an application for review relief can interrupt prescription in respect of a delictual claim arising from the conduct found in the review to have been unlawful.

79 Amongst the legal questions the Constitutional Court had to entertain was the question of prescription; when did the debts become due and whether the plaintiffs' claims had prescribed; and the issue of confirmatory and exclusive jurisdiction in these kinds of cases.

80 The plaintiffs argued that the Constitutional Court's judgment in *Law Society*[32] completed their causes of action, as President Zuma's conduct remained in force until declared unconstitutional by this Court. They stated: "Until this Court confirmed the declaration of invalidity, the High Court would have had to treat President Zuma's conduct as constitutionally valid and could thus not have determined the question of wrongfulness."[33]

81 In dealing with these issues, firstly, the court confirmed the legal position of section 12(3) of the Prescription Act which is, prescription starts to run against a creditor when the creditor has the minimum facts that are necessary to institute action, and that the running of prescription is not postponed until the creditor becomes aware of the full extent of its legal rights.[34]

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[32] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC).
[33] *Tembani* at para 57.
[34] Id at paragraph 86.

82 Notwithstanding this legal position, the existence of procedural mechanisms exist to enable proceedings to be served so as to interrupt prescription.[35]

83 When dealing with the issue of confirmatory and exclusive jurisdiction the court said this case fell within its confirmatory and not exclusive jurisdiction. The Court reasoned that its confirmatory jurisdiction under sections 167 and 172 of the Constitution meant the plaintiffs' delictual claims against the President could not be completed until the Court confirmed the unconstitutionality of the president's conduct related to the SADC Tribunal, which was a necessary element of wrongfulness they had to establish. This impacted when prescription started running. The court found that the action fell "due" by not later than 18 August 2014.[36]

84 As in *Tembani,* the Appellants contended that they could not pursue a delictual claim until the OPCOM's conduct had been declared invalid and unconstitutional and set aside. This was a legal impediment to pursue a delictual claim despite knowledge of the debtor and the facts giving rise to that debt. However, *Tembani* held that to plead the case the claimants did not have to plead that another court had already found the OPCOM conduct to be unlawful.[37]

85 As stated in *Tembani*, it is not for the Court to speculate what the Respondents would have pleaded in their defence. That bridge should be crossed when it is reached. Rogers J referred to section 15(6) of the Act as providing procedural mechanisms to enable proceedings to be served so as to interrupt

[35] Id at paragraph 96.
[36] Id at paragraph 102.
[37] Paragraph [92].

prescription. He comments that the issuing of summons would not have been premature pending the unconstitutionality declaration in that matter as much as it would not have been premature to issue summons in the SABC matter pending the invalidity of the administrative action of the OPCOM.[38]

86 Rogers J makes a distinction between a public law claim in review proceedings and a private law claim for delictual damages. A claim for delictual damages stands alone against a public law claim in review proceedings.[39] the sequence of this two-step process would depend on the circumstances of each case - whether to institute review proceedings first (provided that in the estimation of the claimant such proceedings would be concluded before the period of prescription lapses), or to institute the delictual claim first in order to interrupt prescription and have those proceedings held in abeyance pending the outcome of review proceedings.

87 The Appellants obtained a right to hold the respondents accountable as the first leg of the process by the declaration of unlawfulness of the respondents' conduct. However, recovering a debt arising out of the impugned decisions was a second step requiring a claim under delict and which claim is subject to the laws of prescription.[40] In this case the delictual claim was made together with the review application and the claim had prescribed.

88 In this court the appellants sought to distinguish *Tembani* on the basis that there it was a claim for delictual damages as opposed to the public law remedies involved in the current appeal, *Kirland*, *Njongi* and others. This

[38] *Tembani* at paragraph [96], [97], and [98].
[39] At paragraph [124].
[40] See Tembani at [116].

distinction is artificial. The SABC is claiming delictual damages against the respondents. It seeks to recover an amount paid unlawfully as a result of their decisions. The public law remedy stands alone as a declaration of invalidity and the recovery of the money also stands alone as a claim that may have been pursued separately but for the SIU proclamations that mandate the SIU to recover losses.

89 The Constitutional Court distinguished between public law claims and private law claims for delictual damages. The court said the following:

"*The differences between a public law claim in review proceedings and a private law claim for delictual damages are substantially greater than in the above examples. A violation of the Constitution is of the essence where an applicant claims constitutional relief for an alleged violation of the Constitution by the President. In a delictual claim against the President, the plaintiff must establish that the President acted wrongfully in the delictual sense. A breach of the Constitution may or may not be an element of establishing wrongfulness; it is not an element of the cause of action as such. Fault, causation and damage are not elements of a public law cause of action.*"[41] *(Emphasis added).*

90 In *Kirland* the Constitutional Court had to deal with a matter under the following facts:

[41] Id at paragraph 124.

90.1 In July 2006 and May 2007, Kirland Investments applied for approvals to establish a 120-bed hospital in Port Elizabeth, two unattached operating theatres and a 20-bed hospital in Jeffreys Bay.

90.2 An Advisory Committee considered Kirland's applications and recommended that they be refused. The Superintendent-General accepted the recommendations and declined to approve them. These decisions were reduced to writing but before the Superintendent-General could sign them, he was involved in a motor vehicle accident and took sick leave for six weeks.

90.3 During the Superintendent-General's absence, an Acting Superintendent-General was appointed. Meanwhile, the MEC informed officials that she would meet with the Provincial Chairperson of the ruling political party to discuss Kirland's applications.

90.4 The Superintendent-General had declined the applications on 9 October 2007 and two days later he had the accident. On 23 October 2007, the MEC summoned the Acting Superintendent-General to her office and reviewed the file containing the Superintendent-General's decision to refuse approval. She instructed the Acting Superintendent-General to approve Kirland's applications. She also did so due to political pressure. The Acting Superintendent-General was aware of the Superintendent-General's refusal decision based on the Advisory Committee's recommendation, but the MEC said she had authority as political head to make the final decision.

90.5 The Acting Superintendent-General stated that in accordance with the verbal instruction from [the MEC], he drafted a letter to [Kirland] informing it that its applications had been approved.

90.6 Kirland subsequently applied to increase the capacity of the proposed hospitals based on the purported approvals.

90.7 After resuming duties, the Superintendent-General again declined to approve Kirland's applications. By letter dated 20 June 2008, the Superintendent-General informed Kirland that the approval by the Acting Superintendent-General was withdrawn, as the area was oversupplied with private health facilities.

91 The Court had to determine, amongst others, whether the approval by the Acting Superintendent-General was an effective decision until set aside.

92 Cameron J said, in view of the judgment of Constitutional Court in *Oudekraal*[42]*,* an invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside.[43] The court said this position comes from the principle of the rule of law.[44]

93 The court also said:

"*For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty,*

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[42] *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* [2009] ZASCA 85; 2010 (1) SA 333 (SCA).
[43] *Kirland* at paragraph 101.
[44] Id at paragraph 103.

unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid."[45]

94 In *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO (Magnificent Mile Trading 30 (Pty) Limited)*[46] Madlanga J said, in relation to the Oudekraal principle, "it is one thing to say – but for an unlawful administrative act – something would never have come about and that, once it has come about, it continues to exist for as long as the unlawful administrative act to which it owes its existence has not been set aside."[47]

95 The court went further to say:

"*Crucially though, the Oudekraal rule itself is informed by the rule of law. Imagine the spectre of organs of state and private persons ignoring or giving heed to administrative action based on their view of its validity. The administrative and legal chaos that would ensue from that state of affairs is unthinkable. Indeed, chaos and not law would rule."*[48] *As such, the Oudekraal rule averts the chaos by saying an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside."*[49]

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[45] Id.
[46] *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO and Others* [2019] ZACC 36; 2020 (1) BCLR 41 (CC); 2020 (4) SA 375 (CC).
[47] Id at paragraph 43.
[48] Id at paragraph 50.
[49] Id at paragraph 51.

96 This position does not seek to confer legal validity to the unlawful administrative act, but rather, seeks to prevent self-help for an orderly governance and administration.[50]

97 Jafta J concurring with this position, said the following:

> "*we must acknowledge the principle that, just like laws, administrative actions are presumed to be valid until declared otherwise by a court of law. What this means is that any person who disregards such law or action does so at his or her own peril should it turn out that the law or action is valid*."[51]

98 This position, however, does not mean that the administrative act is valid. It is only treated as such. The only time it can be ignored without being set aside is in cases where a person is coerced by a public authority into complying with an unlawful administrative act.[52]

99 It appears that there is a concurrence on this position. Case law seems to be suggesting that as a general principle administrative action is valid until set aside.[53] This position accords with the position under private law too that an obligation under private law, such as a contract between parties, is enforceable until it has lawfully been set aside.[54]

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[50] Id at paragraph 51.
[51] *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO and Others* [2019] ZACC 36; 2020 (1) BCLR 41 (CC); 2020 (4) SA 375 (CC) at [83].
[52] *Kwa Sani Municipality v Underberg/Himeville Community Watch Association and Another* [2015] ZASCA 24; [2015] 2 All SA 657 (SCA) at para 12. See also *Bowman Gilfillan Inc and another v Minister of Transport; In re: Minister of Transport v Mahlalela and others* [2018] JOL 40032 (GP) at paragraph 61.
[53] See *Trudon (Pty) Ltd v The National Prosecuting Authority* 2018 JDR 2161 (GP).
[54] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 82-85. Compare *Premier, Free State, And Others v Firechem Free State (Pty) LTD* 2000 (4) SA 413 (SCA).

100 Coming back to *Kirland* and *Tembani*. *Kirland* says an administrative action is valid until set aside. *Tembani* says the issuing of the summons would not be premature. However, in exclusive jurisdiction matters the requirement would be either that the relevant party simultaneously issues summons in the High Court and in the Constitutional Court. The summons would refer to the parallel application before the Constitutional Court and seek a stay of the summons pending the Constitutional Court's decision. Alternatively, the creditor could start by just issuing an application in the Constitutional Court, as a first step in proceedings for the recovery of delictual damages.

101 The Court, however, said this does not matter for purposes of prescription.[55]

102 *Tembani* did not refer to *Njongi* and the cases considered by it. In *Njongi*, the court grappled with whether the right to receive a social disability grant within the context of the entrenched socio-economic rights can be subject to extinctive prescription where such grant had been cancelled by a provincial government. The claim was for arrear payments from the date that the cancellation was declared invalid.

103 In *Bushula*[56] a full reinstatement of the grant was ordered with the effect therefore that grants not paid from the date of cancellation had to be paid to date of the declaration of invalidity of administrative action. In this regard, Yacoob J in Njongi said:

[55] *Tembani* at paragraph 96.
[56] *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2000 (2) SA 849 (E).

“[45] I agree. But the doctrine of nullity does have important practical implications whenever it becomes necessary to determine the consequences of invalidity. The order in Bushula evidently required the applicant to be put back into the position in which he would have been had the administrative decision not been made at all. This is in essence the practical application of the principle of objective invalidity or nullity. After a judgment setting this administrative decision aside has been given, the administrative decision is certainly regarded as having been void ab initio.

[46] But that is a wholly different question from the one that must be answered in this case. Here we are concerned with administrative action that remains effective. Far from having been a nullity while in operation, the administrative decision with which we are here concerned as well as the thousands of others that were taken at about the same time have caused untold misery and suffering. This case cannot therefore be decided on the basis that the administrative action concerned was a nullity from the beginning. As I have already pointed out, the consequences of the administrative decision must be determined, so far as is possible, in order to achieve the situation that would have existed had the administrative decision been a nullity.”[57]

104 In *Ngxuza*[58] the SCA castigated the provincial government for not following the decision in *Bushula*, *i.e*. reinstating fully the grants in circumstances where the cancellations were unlawful.

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[57] *Njongi* at paragraphs 45 and 46.

[58] *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another 2001 (2) SA 609 (E); 2000 (12) BCLR 1322 (E).*

105 Mrs Njongi's grant had been partially reinstated, and the Constitutional Court had to deal with whether there should have been a full reinstatement as in *Bushula* and *Ngxuza*. The Court assumed in favour of the Provincial Government that the obligation at issue is a debt for purposes of the Act.[59] The only question was whether "*the obligation to pay the arrears had always remained immediately enforceable,… whether it could be said to have been due*."[60]

106 In *Matinese*[61] the High Court held that a review was necessary as a precondition to the enforcement of the debt arising out of the termination of her grant. *Njongi* endorses this principle and concludes that because full reinstatement had not been effected, prescription had not yet begun to run.[62]

107 Although *Tembani* does not refer to *Njongi* there is no doubt that Rogers J was alive to the distinction between private law and public law remedies in litigation. It is more authoritative in regard to the principle repeated multiple times in both the Supreme Court of Appeal and the Constitutional Court that the knowledge of the facts contemplated in the Act does not include conclusions of law. This applies in both public and private law litigation. In my view, that conduct or administrative action has not been set aside and therefore remains effective does not mean that the creditor has not gained knowledge of the debtor and the facts giving rise to the debt. It merely means

[59] *Njongi* at [43].
[60] Ibid.
[61] *Matinese v Member of the Executive Council for the Department of Welfare, Eastern Cape (1603/03) (10 February 2024) at p 13*.
[62] *Njongi* at paragraph 56 – 59.

that a legal impediment stands in the way of prosecuting a claim until it has been overcome.

108 The *Oudekraal* principle is not an answer to the appellants' failure to interrupt prescription. They could have issued summons and had the trial held in abeyance pending the outcome of the review, if so advised.

109 The SABC disavowed any reliance on the impugned decisions on 14 September 2017 and should have taken steps to hold the OPCOM accountable and recover money from the respondents as advised. Yacoob J said that "*where the organ of state 'disavows reliance' on the decision concerned, prescription begins to run from that date.*"[63] That signifies that the SABC appreciated that it can claim against the Respondents but for the *Oude Kraal/Kirland* obstacle which required to be removed before its claim is hit by prescription or to proceed with review parallel to a delictual claim according to *Tembani*.

110 If the Respondents had acted unlawfully and in breach of the PFMA in February 2017 they did not need a review decision to establish knowledge of the debtor and facts giving rise to such debt.

111 The conclusion is that the SABC claim has prescribed. It has also prescribed against the SIU for the insurmountable reasons stated by Modiba J in the Tribunal. The interpretation of section 2(1)(c) and 5(5) of the SIU and Tribunal Act[64] is clear in its reading. The SIU has the power to initiate proceedings in its own name where its interests are impacted in the circumstances stated in

[63] *Njongi* at paragraph 56.
[64] No 764 of 1996.

Section 2(1)(c), otherwise it acts on behalf of the relevant organ of state. *Special Tribunal Unit v Kim Diamonds (Pty) Ltd*[65] remains good law on the SIU's representative capacity when acting under any Proclamation to conduct investigations on behalf of organs of state or against them and to initiate proceedings on their behalf.

112 To hold otherwise would offend against the Prescription Act and render it ineffective. In this regard the Chief Justice, writing for the majority in *Mtokonya* said:

> "*[63] Furthermore, to say that the meaning of the phrase "the knowledge of . . . the facts from which the debt arises" includes knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law would render our law of prescription so ineffective that it may as well be abolished. I say this because prescription would, for all intents and purposes, not run against people who have no legal training at all. That includes not only people who are not formally educated but also those who are professionals in non-legal professions. However, it would also not run against trained lawyers if the field concerned happens to be a branch of law with which they are not familiar. The percentage of people in the South African population against whom prescription would not run when they have claims to pursue in the courts would be unacceptably high. In this regard, it needs to be emphasised that the meaning that we are urged to say is included in section 12(3) is not that a creditor must have a suspicion (even a reasonable suspicion at that) that the conduct of the debtor giving rise to the debt is wrongful and actionable but we*

[65] 2004 (2) SA 173 (SpT).

are urged to say that a creditor must have knowledge that such conduct is wrongful and actionable in law. If we were asked to say a creditor needs to have a reasonable suspicion that the conduct is or may be wrongful and actionable in law, that would have required something less than knowledge that it is so and would not exclude too significant a percentage of society."[66]

113 *Njongi* does not delineate between public and private law remedies. Private law claims are subject to prescription whereas public law claims are not.

114 The real issue between *Kirland* (and the class of judgments that follow the *Oudekraal* principle) is whether administrative action is invalid from the date that it was taken, like wrongful conduct in *Tembani* which was held wrongful from date of such conduct, or whether the administrative action remains effective until it is set aside its loss of effect is only from the date of declaration of invalidity. I see no reason why the latter applies when in *Njongi* the reinstatement was with effect from date of the impugned decision, not from the date of the invalidity which would have left her with no "back-pay."

115 In this case the appellants would therefore not be entitled to recover any moneys, because the OPCOM decision would have been valid until set aside and with no retrospective effect.

Conclusion

116 For the reasons stated above, the appeal stands to fail. Furthermore, as was held in the Tribunal it is not necessary to consider whether personal liability of

[66] *Mtokonya* at [63].

the Respondents would be appropriate in this case is view of the finding on prescription which disposes of the matter as a whole.

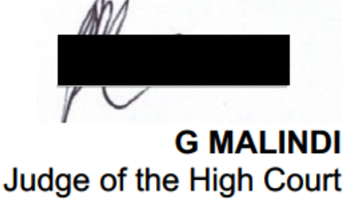
Costs

117 The appellants are to pay the cost of the 1st and 7th respondents, including the cost of counsel on the B Scale. The issues were important to both sides of this matter and engaged a measure of complexity.

118 I would have made the following order:

118.1 The appeal is dismissed.

118.2 The Appellants are to pay the cost of the 1st and 7th respondents, including the cost of counsel on the B Scale.



G MALINDI
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 30 July 2024.

HEARD ON:	22 May 2024
DECIDED ON:	30 July 2024
For the Appellants:	J Motepe SC P Cirone Instructed by Werksmans Attorneys, Johannesburg
For the First Respondent:	N Nyathi Instructed by Bokwa Law Inc, Pretoria

For the Seventh Respondent:	M De Beer Instructed by Moeti Kanyane Inc
For the Eighth and Ninth Respondents:	M Kufa Instructed by Machaba Attorneys