IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case Number: 2018/16694

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED. **NO**
12 MAY 2026	[redacted]
DATE	SIGNATURE

SOUTH AFRICA BROACASTING CORPORATION SOC LIMITED	FIRST APPLICANT
SPECIAL INVESTIGATING UNIT	SECOND APPLICANT
AND	
NAZEEM HOWA	FIRST RESPONDENT
VURUN GUPTA	SECOND RESPONDENT
ATUL KUMAR GUPTA	THIRD RESPONDENT
GARY NAIDOO	FOURTH RESPONDENT

JUDGMENT

MAKUME, J:

1. This is an application in terms of Rule 10 of the Uniform Rules in which the applicant's seek an order joining the first, second, third and fourth respondents as the third, fourth, fifth and sixth respondents in the main application (the review application) against TNA Media Pty Ltd in liquidation.
2. Besides seeking an order for substituted service against certain of the respondents, by virtue of them being no longer in the Republic of South Africa, the applicant's seek an order in terms of Section 20(9) of the Company's Act 71 of 2008, to declare that TNA Media not be deemed to be a juristic person, but a venture of the respondents personally.
3. Lastly, that, in the event that TNA Media is ordered to repay moneys it received in the impugned tender, then upon joinder it be declared that the joined respondents are jointly and severally liable to the first applicant for repayment of such amount.

BACKGROUND FACTS

4. On or about 13 March 2012 SABC entered into a written agreement with TNA Media in terms of which TNA undertook to host a series of events, known as "The New Age Breakfast

Briefing, brought by SABC".

5. On 20 February 2015 the same parties concluded a renewal and amendment agreement of the main agreement, which was to extend same for a period of 36 months, terminable in the year 2018.
6. The events leading to the conclusion of the two agreements were raised at the ad hoc parliamentary committee, that was investigating events at the SABC. This led to the ad hoc committee, referring it to the interim board of SABC, who, after investigation, decided to refer the matter to the special investigating unit that had been tasked with investigating all Gupta-related contracts, due to revelations at the State Capture Commission (Zondo Commission).
7. Investigations had revealed that TNA Media had been awarded the contract by SABC improperly and not in accordance with procurement procedures, as envisaged in Section 217 of the Constitution, as well as supply-chain procedures of the SABC.
8. It is common cause that, at the time of the conclusion of the contract the first, second, third and fourth respondents were all directors of TNA Media.
9. On 6 June 2017 the Chief Operations Officer of SABC, in the person of Bessie Tugwotwa, and the Deputy Chairperson of the SABC Board, Mathata Tsedu met with a delegation from TNA, and informed them that SABC was terminating the impugned contract.

10. Attorneys acting for TNA then addressed a letter of demand to the SABC, accepting repudiation of the agreement and claimed damages in amount of R144 million. The attorneys subsequently referred the dispute for arbitration to AFSA, in terms of the impugned contract.

11. It was shortly after that, that SABC brought an application on an urgent basis. Part A is an interdict stopping the arbitration process, pending outcome of Part B, in which SABC seeks an order declaring the two agreements null and void *ab initio.*

12. Shortly thereafter TNA was placed under provisional liquidation and was finally liquidated later. In the year 2019 the SIU successfully applied to be joined as a second applicant in the main application.

13. On 10 December 2022 the first applicant launched this application to join the second, third and fourth respondents as respondents in the main application. The joinder application was brought on the basis that firstly the state capture report had recommended that the SABC should consider instituting civil proceedings against TNA Media, or its directors, and recover all costs incurred by the SABC, including disgorgement profits by TNA Media in relation to the breakfast shows.

14. The second and third respondents filed notice to oppose the joinder application and appointed Van Der Merwe Attorneys as the attorneys of record on 6 February 2023.

15. On 14 February 2023 Werksmans Attorneys withdrew the original application for joinder, and on 4 March 2024 an amended notice of joinder was relaunched with the following prayers:

15.1. That first, second, third and fourth respondents be joined as the third, fourth, fifth and sixth respondents (respondents) in the review application between the applicants and TNA Media under case number 16694/18.

15.2. That the application may be served on the respondents by:

(i) one publication of the notice of motion, excluding affidavit in an English Newspaper, circulating throughout the Republic of South Africa;

(ii) forwarding a copy of the notice of motion, including affidavits, to the respondents via electronic media platforms, such as WhatsApp, Facebook, Instagram and or like platform, alternatively;

(iii) granting leave for the applicants to serve the respondents by means of edictal citation.

15.3. It is declared that in terms of Section 20(9) of the Company's Act 71 of 2008, as amended, TNA Media shall be deemed not to be a juristic person, but a venture of the respondents personally.

15.4. It is hereby further declared that, in the event of TNA media being ordered to repay any moneys to the applicants in the review application, that the respondents, upon their joinder be declared to be jointly and severally liable to the applicants for repayment of such moneys, the one paying the other to be absolved.

16. On 6 May 2024 the applicants further amended the prayer set out above by deleting prayers 15.3 and 15.4 above. It is further worth noting that the prayers in respect of substituted service were later abandoned due to the respondents having agreed that service on them be at their attorneys of record. What then in reality remains, is the application to join the four respondents and the cost of that application.

17. There are two separate applications to strike, one by the applicants themselves in respect of certain averments set out in paragraph 9, 16.8, 17 and 14.2 up to 53 in the affidavit by Nomsa Penolope Felity in view of the fact that the applicant had by then amended its notice of motion by deleting prayers 3 and 4. That application was not opposed and is accordingly granted.

18. The second application to strike out is by the respondents, seeking the striking out of the word "nefarious" as it appears on paragraph 29 of the affidavit by Nomsa Penolope Felity, as well as paragraphs 37 and 41, up to and including paragraph

48 and 53.

19. According to the dictionary the word "nefarious" is an adjective, meaning "extremely wicked, villainous, criminal or immoral". It describes actions, plots or people that are shockingly evil or underhanded. The applicants used this word only once in paragraph 29 of its founding affidavit. The deponent specifically says: "Nefarious acts of TNA Media" and does not refer specifically to any of the respondents that are sought to be joined.

20. Rule 23(2) of the Uniform Rules provide as follows:

> "Where any pleading contain averments which are scandalous, vexatious or irrelevant, the opposite party may within the period allowed for filing any subsequent pleading apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph F or subrule (5) of Rule 6, but the court shall not grant the same, unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence, if it is not granted."

21. This rule firstly gives the court a discretion, secondly, it also requires the applicant to demonstrate how it will be prejudiced if the application to strike out is not granted. In the matter of

Titties Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T) at 368 F – H it was held that:

> "The rules gives the court a discretion and did not make it obligatory to strike out a matter which is scandalous."

22. A perusal of the annexures attached to the founding affidavit, and sourced from senior employees of SABC indicate that TNA officials handled the acquisition of that contract by devious means. I am accordingly satisfied that respondents are not in any way prejudiced if there is no striking of the averments in paragraph 16.8, 17, 14.2 as well as paragraph 53, and 41 up to 48 of the affidavits of Felity.

23. The writers, Jacob and Goldrein, in the matter, in "Pleading Principles and Practice", at page 271 write as follows:

> "Allegations in a pleading are scandalous if they state matters which are indecent or offensive, or are made for the mere purpose of abusing or prejudicing the opposing party."

24. The affidavit in the main application, deposed by Maseko, who carefully narrated how he was threatened and pressurised by both the Gupta brothers into allocating the TNA advertising contract by the government is probably some of the evidence the applicants will use to show the unacceptable conduct by TNA directors. The application to strike out is in the result dismissed.

THE JOINDER APPLICATION

25. It is trite law that the reason for joinder is usually convenience, time, effort and costs, are saved by joining parties or causes of action in one action, instead of bringing separate applications or actions. Apart from considerations of convenience there are circumstances in which it becomes essential to join a party because of the interest that that party has in the matter.

26. A party must be joined, if they have a legal interest in the subject matter, not merely a financial one, which could be prejudicially affected by the judgment. In the matter of *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) Nkabinde J held as follows:

> "The test for joinder requires that a litigant have a direct and substantial interest in the subject matter of the litigation, that is a legal interest in the subject matter of the litigation, which may be affected by the decision of the court. This view of what constitutes a direct and substantial interest has been explained and endorsed in a number of decisions of our courts."

27. Nkabinde J went on to refer, amongst others, to the judgment in *National Union of Metal Workers of South Africa v Intervalve*

Pty Ltd and Others 2015 (2) BCLR 182 (CC). That matter concerned an application by the National Union of Metal Workers of South Africa (NUMSA) to join Intervalve and BHR as parties to unfair dismissal proceedings pending in the Labour Court against Stein Muller. Intervalve, BHR, and Stein Muller were associated companies with interlinked shareholders and directors. They shared the same human resource services. Nkabinde J held at paragraph 189 that they had a direct and substantial interest in the proceedings on the following basis, that they had a hand in the dismissal of some of the employees, albeit through the medium of a shared HR services entity, and that these entities acted jointly and in single process to effect the dismissals.

28. In the matter of *International Trade Administration Service Commission v Scaw Metal, Scaw South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) a case that concerned an application for certain interdictory relief in respect of anti-dumping duty, imposed in respect of certain steel wire, rope products, imported from Breden International Limited (UK), the applicant, Scaw, was a South African entity, and the respondents (ITAC), a statutory body with the duty to make recommendations to the Minister of Trade and Industry. Breden sought leave to intervene in the application for leave to appeal to the Constitutional court. Moseneke DCJ for the court was satisfied that Breden did indeed has a direct and

substantial interest and held as follows:

> "There can be no gainsaying that Breden UK has a pressing commercial interest in the fate of the existing anti-dumping duties against its products. For as long as this restraining order is in place ITAC and the two ministers of state would be precluded from taking steps that would bring the sunset review to fruition, and that may lead to the end of anti-dumping duties. The duties would remain in force, to the obvious commercial detriment of Breden UK's potential exposure in South Africa.".

29. It is against this background that I now consider whether it be convenient to join the respondents, and if so, whether they have a direct or substantial interest in the review application set out in part B.

30. In the opposing affidavits, as well as in their heads, the respondents say firstly that they have no direct and substantial interest in the outcome of the review application. They then proceed to raise three points in-limine. Firstly, that this court has no jurisdiction in respect of the second and third respondents (the Gupta brothers). Secondly, that any possible claim against the respondents has prescribed, and lastly that there is no cause of action pleaded against the respondents.

JURISDICTION

31. The concept "jurisdiction" is closely linked to the existence of a set of legal rules, and the authority to take action on behalf of the law. One of the well-known rules is one of submission, or consent.

32. In this matter both the second and the third respondents have submitted themselves to the jurisdiction of this court by electing to accept service of documents on them, at their South African attorneys. This, to enable them to participate fully in the conduct of the proceedings. They filed opposing affidavits, thus fully engaging with the process of the South African court. In the matter of *Jameson Neil v Sabingo Amindo Cesar* Case number 329/2000 SCA, heard on 21 February 2002 Fallam JA found that a letter written to the appellant's attorneys by the respondent's attorneys constituted sufficient submission by Peregrinus to the court's jurisdiction. At paragraph 4 of that judgment the Honourable Judge quotes that letter in full as follows:

> "In light of the fact that we represent our client in South Africa, we confirm that our client hereby consents to the jurisdiction of the Witwatersrand Local division of the High Court, in respect of your client's action, and our client also appoints our offices as his chosen

> *domicilium citandi et executandi* for all purposes. There is accordingly no need for you to confirm the order already obtained, or indeed to serve the order for attachment of the judgment, and there is also no need for the writ of attachment which must have been issued by yourselves in respect thereof to be executed by the Sheriff. An attachment is now not necessary or competent under the circumstances."

33. In *American Flag PLC v Great African T-shirt Corporation CC* 2000 (1) SA 36 (W) it was held that, even where there was no other *cause jurisdictionis*, such as that the contract sued on was concluded in the court area of jurisdiction, where the plaintiff was an incola in an action for money, submission to the jurisdiction by the perigrinus defendant was effective.

34. The agreement, which is the subject matter of the review application was concluded in this court's jurisdiction and the respondents have not disputed that. The respondents, through their own attorneys, have conceded that all processes in this matter be served on the attorneys, as their chosen domicilium. They have in the result unilaterally submitted themselves to the jurisdiction of this court. The court further held that a judgment given by a court against a peregrinus who has

submitted to its jurisdiction will be internationally enforceable and will be recognise by the court of the judgment debtor's domicile.

PRESCRIPTION

35. The respondents argue that a claim against them and the company TNA Media has become prescribed. This can never be correct. It is a plea that the respondents are free to raise in their answering affidavit to the main application. It is in that court where a decision will be made about prescription.
36. The respondents maintain that the applicants have not attempted to define the nature of the claim that SABC could possibly have against TNA. They presume it could only be in the form of an enrichment claim, and if so, such a claim is against TNA, and not against TNA directors. If the debt against TNA has prescribed, the same applies to the directors.
37. The fourth respondent, Gary Naidoo, filed the opposing affidavit on behalf of all the respondents, and in paragraphs 77.5 of his affidavit he says that the cause of action, if any, arose in June 2018, which is the date on which, according to them, the applicants became aware of the purported facts leading to the claim. As a result that claim prescribed on 7 June 2021.
38. It is trite law that in terms of 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. The difference concerning the facts in this matter is that a review application must first decide on the validity or otherwise of the impugned contract, and until such time no prescription can run against the applicant's possible claim.

39. The issue of prescription was raised and dealt with by the full court in the matter of *SA Broadcasting Corporation* (SOS Limited and another) *v Motsoeneng and Others* (A2022/046784) (2024) ZAGP JAC 688. The majority decision by Wilson J and Mudau J held that:

> "A debt to the state arising from an unlawful administrative act falls due when the act is set aside. In other words, when the act ceases to stand as a fact."

40. The court in *Trinity Asset Management (Pty) Ltd v Grindstone Investment 132 (Pty) Ltd* 2018 (1) SA 94 (CC) held 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."

41. In paragraph 22 of SABC the court held as follows:

> "It follows from this that a party wishing to recover a debt that will be due, but

for an unlawful administrative action must first set that debt aside, before the debt can be claimed."

42. Accordingly this point regarding prescription is based on wrong interpretation and understanding of Section 12(3) of the Prescription Act, and falls to be dismissed.

43. The next defence made by the respondent is that there is no cause of action demonstrated on the papers to hold the respondents liable for debts or action of the company, TNA. The respondents allege that, notwithstanding the provisions of Section 77 of the Company's Act, which deals with potential liability of directors of a company, there is according to them no facts alleged by the applicants against the respondents to attract any personal liability.

44. Once again, the respondents wished to turn a blind eye to the report and findings of the State Capture Commission, as well as those of the SIU, which clearly indicate that TNA Media directors were complicit in their maleficence, fraud, and/or corruption that occurred in the negotiations and conclusion of the agreements between TNA Media and the SABC.

45. That cause of action will be clearly set out in the supplementary affidavit in support of the review application, and it is only at that stage that the respondents are at will, or be free to file exceptions to the application as not disclosing any cause of action in terms of Rule 23 of the Uniform Rules

of Court.

THE DIRECT AND SUBSTANTIAL INTEREST IN THE MATTER

46. It is trite law that the test to determine whether a party has to be joined has been at direct and substantial interest. Direct and substantial interest has been held to mean, an interest in the right which is the subject matter of the litigation, and not merely a financial interest, which is only an indirect interest in such litigation.

47. In the matter of *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 at 659 it was held as follows:

> "Indeed it seems clear to me that the court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest, without either having that party joined in the suit, or if the circumstances of a case admit of such a cause, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interest."

48. It is not in dispute that the respondents were, all of them, directors of TNA Media at the time of the conclusion of the contract. Both the SABC as well as the SIU have indicated

that, once a joinder application shall have been granted they intend to amend the relief sought in the review application, to include a just and equitable remedy, that the damages suffered by the SABC from the irregular appointment of TNA Media be recovered from the directors of TNA Media.

49. The respondents therefore have a direct and substantial interest in the ultimate outcome of the review application. The respondents have not demonstrated that they have no direct and substantial interest in the subject matter of the review application. This court agrees with the applicant's contention that the respondents have merely filed opposition to this application for purposes of delay, and to avoid accountability for their participation in the irregularities that occurred between SABC and TNA Media.

50. The joinder of the respondents will serve to avoid duplication of legal expenses. The relief sought by the applicants in the main application cannot be sustained or carried into effect without prejudicing the respondents. In the event the court in the review application finds in favour of the applicant, then it goes without saying that the erstwhile directors of TNA Media should jointly and severally be held liable for the losses incurred by SABC, due to the unlawful contracts concluded with their knowledge and the active participation of the directors.

51. I am satisfied that, based on the grounds set out above, the

test for joining the respondents has been satisfied. In the result I make the following order.

ORDER

1. The first, second, third and fourth respondents are hereby joined as the third, fourth, fifth and sixth respondents in the review application between applicants and TNA Media under case umber 16694/18.
2. The respondents are ordered to pay the costs of this application, including the costs of two counsel.

[redacted]

MAKUME J

JUDGE OF THE HIGH COURT

JOHANNESBURG

Appearance

For the Applicant :	Adv Jabu Motepe SC
Instructed by:	Werksmans Attorneys
For the Respondent :	Adv Michael Hellens SC
	Adv Leon Van Gass
Instructed by:	Dockrat Attorneys