IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No.: 393/2015

WCHC Case No.: 12497/14

In the matter between:

THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	First Appellant
THE MINISTER OF COMMUNICATIONS	Second Appellant
HLAUDI MOTSOENENG: THE CHIEF OPERATING OFFICER OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	Third Appellant

and

DEMOCRATIC ALLIANCE	First Respondent
THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	Second Respondent
THE CHAIRPERSON OF THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	Third Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fifth Respondent
THE PORTFOLIO COMMITTEE FOR COMMUNICATIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent
THE PUBLIC PROTECTOR	Seventh Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

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I INTRODUCTION

1. When the Public Protector finds that a person acting in a senior public position is unfit for that office and should be disciplined, is it lawful for him, instead, to be appointed to that post permanently? Can an organ of state, confronted with findings and recommendations of the Public Protector, decline to respond to those findings, and then act in direct contradiction to her findings and recommendations?

2. The Appellants answer Yes to both questions. Their position is that although the Public Protector took remedial action requiring the First Appellant ("**SABC**") to institute disciplinary proceedings against the Third Appellant ("**Mr Motsoeneng**") they can, instead, appoint him as permanent Chief Operating Officer. Their position is that despite the absence of any meaningful challenge to the content of the Public Protector's findings, there is no need for them to institute disciplinary proceedings. Their position is that if they merely refer the Public Protector's Report ("**PP Report**") to an internal committee and their own attorneys, they can disregard its findings, without disclosing the contents of those reports.

3. The Appellants' position is inconsistent with the Constitution and the rule of law. It threatens very basic principles about accountability of organs of state and the role of the Public Protector. It is a position which, if accepted, would undermine the Public Protector – and Chapter 9 of the Constitution more generally – and make it easier for organs of state to engage in corruption and maladministration. The reality is that the SABC and the Second Appellant ("**the Minister**") have inexplicably placed the interests of Mr Motsoeneng above the interests of the SABC. They are willing to disregard and disrespect the Public Protector in order to protect Mr Motsoeneng.

4. The First Respondent ("**DA**"), by contrast, contends that when organs of state disregard the findings of the Public Protector, without any explanation, they act

irrationally and their decisions should not be allowed to stand. It effectively contends that, when a person who has admitted to fraud, and has been found by the Public Protector to have committed serious abuses of power and been responsible for failure of corporate governance, remedial action that he should be disciplined should be followed.

5. It is important to stress that this case is not only about arbitrary conduct designed to protect an individual at the expense of the state. It is also about the public broadcaster that millions of South Africans rely on to receive news and information about the country and the world that they inhabit. It is a public broadcaster that has a long history of corporate maladministration, that has only worsened for as long as Mr Motsoeneng has been present.[1] As long as it remains dysfunctional, it will be unable to fulfil its statutory mandate to

> *"encourage the development of South African expression by providing, in South African official languages, a wide range of programming that-*
>
> *(a) reflects South African attitudes, opinions, ideas, values and artistic creativity;*
>
> *(b) displays South African talent in education and entertainment programmes;*
>
> *(c) offers a plurality of views and a variety of news, information and analysis from a South African point of view;*
>
> *(d) advances the national and public interest.*"[2]

6. The High Court understood the issues at play. It understood the important role of the Public Protector and the need for it to be respected and protected. It understood the

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[1] FA at paras 21-30: Record Vol 1, pp 17-9.

[2] Broadcasting Act 4 of 1999 s 6(4).

patent irrationality of the conduct of the Board and the Minister in refusing to discipline Mr Motsoeneng. And it granted an order that cannot be faulted.

7. These heads of argument address the issues at stake in this application as follows:

7.1. **Part II** tackles the nature of the powers of the Public Protector and the status of her reports;

7.2. **Part III** explains why the conduct of the SABC and the Minister was unlawful, and why they are legally obliged to discipline Mr Motsoeneng;

7.3. **Part IV** deals with the various attacks on the High Court's judgment raised by the Appellants;

7.4. **Part V** concludes with the issue of costs.

7.5. **Part VII** addresses various technical objections concerning standing, the use of hearsay evidence and the Public Protector's right to participate in the proceedings.

II THE NATURE OF THE PP REPORT

8. Much of the debate in this matter has focused on whether or not remedial action taken by the Public Protector is "*binding*". The Public Protector and Corruption Watch argue that it is, the Appellants support the High Court's conclusion that it is not.

9. Framing the question in this way may be misleading. The question should not be: "Is remedial action taken by the Public Protector binding?" The question is: How does the Constitution require an organ of state to respond to remedial action taken by the Public Protector? This is a question of constitutional importance. The DA's position is:

9.1. First, the DA supports the submissions by the Public Protector and Corruption Watch that remedial action taken by the Public Protector must be complied with

unless the organ of state: (a) engages with the Public Protector and convinces her to alter the remedial action; or (b) successfully takes the PP's findings on judicial review. Indeed, although it described the PP's Report as "*not binding*", it argued in the founding affidavit for precisely this position.[3]

9.2. Second, the core difference between that approach and the approach adopted by the High Court is about who must approach a court. The High Court places the onus on the Public Protector or civil society groups to approach a court to vindicate the Public Protector if an organ of state refuses to comply. The DA, the Public Protector and Corruption Watch would place the onus on the organ of state to approach a court if it does not wish to comply with remedial action taken by the Public Protector. The latter is plainly preferable for several reasons:

9.2.1. The Constitution places a clear duty on all organs of state to "*assist and protect*" the Public Protector, and "*to ensure the independence, impartiality, dignity and effectiveness of [the Public Protector]*."[4] That must require active engagement until the remedial action taken is set aside. This Court said the following concerning the role of the Public Protector:

> "*The Constitution upon which the nation is founded is a grave and solemn promise to all its citizens. It includes a promise of representative and accountable government functioning within the framework of pockets of independence that are provided by various independent institutions. One of those independent institutions is the office of the Public Protector.*

[3] FA at paras 137-41: Record Vol 1, pp 53-4; RA at paras 79-86: Record Vol 4, pp 711-2.

[4] Constitution s 181(3).

> *The office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that is capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee.*"[5]

9.2.2. A decision of the Public Protector – like any other government action – is in force until it is set aside on review.[6] It would be anomalous to allow non-compliance with remedial action taken that remains legally valid. It would amount to a backdoor review of the Public Protector's findings.

9.2.3. On the High Court's approach, remedial action taken by the Public Protector will, as Corruption Watch points out, be dependent on the limited resources of the Public Protector and civil society to litigate. That cannot be the Constitutional scheme.

9.3. Third, even if the High Court is correct that a non-complying organ of state need not review the Public Protector's conclusions, the justificatory onus must still rest on the organ of state to explain non-compliance. The default remains compliance, unless it lays a basis for disobedience.

9.4. Fourth, in order to successfully defend an application to force compliance with remedial action taken by the Public Protector, an organ of state must: (a)

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[5] *The Public Protector v Mail & Guardian Ltd and Others* [2011] ZASCA 108; 2011 (4) SA 420 (SCA) at paras 5-6.

[6] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) at para 20; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC) at paras 100-6.

provide a rational reason for non-compliance; and (b) demonstrate that it only decided not to comply after good faith engagement with the Public Protector.

9.5. Fifth, the requirement of prior engagement is vital. The respect for the Public Protector demanded by s 181(3) of the Constitution cannot permit non-compliance through inaction, or a failure to attempt to resolve any disputes. It is also entirely inconsistent with principles of co-operative governance.[7] It is profoundly disrespectful of the office of the Public Protector to flout her findings without first engaging in good faith to seek a resolution. It is also, by definition, irrational. If an organ of state refuses to comply without first discussing the Public Protector's findings and conclusions and soliciting her views, it cannot know if it has rational reasons not to implement her remedial action.[8]

9.6. Sixth, the outcome of this appeal does not turn on the answer to this question.

9.6.1. If the SABC and the Minister were required to convince the Public Protector to change her remedial action or review the PP Report, then the appeal must fail. The Public Protector took remedial action. The SABC and the Minister have neither convinced the Public Protector to alter her findings, nor taken her report on review. Ergo, they must comply.

9.6.2. If the SABC and the Minister were entitled to refuse to comply with the remedial action, they did not do so for rational reasons, nor after

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[7] Constitution s 41. Section 41(1)(h) requires all organs of state to "*co-operate with one another in mutual trust and good faith*", in particular by "*informing one another of, and consulting one another on, matters of common interest*". The SABC and the Minister's conduct is incompatible with those obligations.

[8] *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC) at paras 49-51; *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC) at paras 33-7.

engaging in good faith. That is the basis on which the High Court decided the case, and it is a sufficient basis to dismiss the appeal.

III OBLIGATION TO DISCIPLINE AND SUSPEND

10. Faced with the PP Report, the SABC and the Minister had the following choices:
    10.1. Comply with the remedial action within the required timelines;
    10.2. Take the PP Report on judicial review;
    10.3. Engage with the Public Protector to seek an amendment to her findings and or remedial action; or
    10.4. If that engagement failed, provide a rational reason for their non-compliance.
11. The SABC and the Minister did none of these things. Instead, without any engagement on the content of the Report and without any rational basis, the SABC and the Minister not only failed to implement it, but acted directly contrary to both its spirit and its letter.
12. In this Part we demonstrate why the SABC and the Minister had no choice but to institute disciplinary proceedings against Mr Motsoeneng and their decision not to do so was in bad faith and irrational. We do so in three sections:
    12.1. We dispatch an argument that the relief sought in Part A is in fact a disguised review;
    12.2. We explain why the SABC and the Minister acted irrationally; and
    12.3. We demonstrate that the SABC and the Minister did not act in good faith.

Not a disguised review

13. It is implicit in many of the arguments made by the Appellants that the DA has, in fact, impermissibly sought to review a decision by the SABC and/or the Minister not to discipline Mr Motsoeneng. This is not correct for the following reasons:

13.1. Neither the SABC nor the Minister has taken such a decision. On their own version, the question of whether Mr Motsoeneng should be appointed permanently as the COO, and the question of whether he should be disciplined for past misconduct are entirely separate inquiries. While they have decided to recommend and appoint him, they say, they have not decided whether or not to discipline him. That was true when this application was launched and remains true today.

13.2. Accordingly, what the DA seeks to do is not to review a decision not to comply, but to force compliance in the face of non-compliance. Unless and until the SABC and the Minister can demonstrate: (a) good faith engagement; and/or (b) a rational basis not to implement the PP Report, it must discipline Mr Motsoeneng. Put simply, the default is compliance, unless non-compliance is justified. As we explain in the proceeding sections, non-compliance has not been justified.

13.3. Where the SABC and the Minister have in fact taken decisions – to recommend and appoint Mr Motsoeneng – the DA has taken those decisions on review.

Irrationality

14. The SABC and the Minister's failure to implement the recommendation to institute disciplinary proceedings against Mr Motsoeneng is patently irrational.

15. The traditional requirement of rationality is that government action must be rationally connected to a legitimate government purpose.[9] This is sometimes rephrased as a requirement that public power "*must be rationally related to the purpose for which the*

[9] See, for example, *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC) at para 85.

power was conferred."[10] This Court[11] and the Constitutional Court have held, that the principle of legality requires "*that both the process by which the decision is made and the decision itself must be rational.*"[12] The exercise of all public power must be both procedurally and substantively rational.

16. In order to determine whether a decision is procedurally irrational, a court "*must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.*"[13]

17. Moreover, the failure to consider relevant factors can render a decision irrational. *Simelane* established a three stage inquiry to determine whether that failure would render the decision irrational:

> *"The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational."*[14]

18. It is helpful to consider how the Constitutional Court applied these tests in *Simelane* as the facts are strikingly similar to the present matter. The President had appointed Simelane as the National Director of Public Prosecutions ("**NDPP**") despite findings by

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[10] *Simelane* (n 8 above) at para 27.

[11] *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) at para 69.

[12] *Simelane* (n 8 above) at para 33.

[13] Ibid at para 37.

[14] Ibid at para 39.

both the Ginwala Commission of Inquiry and the Public Service Commission ("**PSC**") that he was dishonest.

19. The President had, on the advice of the Minister of Justice, ignored the findings of dishonesty against Simelane. The Minister reasoned that he was entitled to do so because: (a) the PSC had not given Simelane an opportunity to be heard; (b) the legal submissions made by Simelane's lawyers were convincing; (c) Simelane had not been given an opportunity to respond to the PSC's findings; (d) the Ginwala Commission was not investigating Simelane, but former NDPP Pikoli; and (e) the Ginwala Commission was not a court.[15]

20. The Constitutional Court rejected all these reasons. It held that the findings of the Ginwala Commission and the PSC were relevant to Simelane's appointment. "*The President's decision to ignore it was of a kind that coloured the rationality of the entire process, and thus rendered the ultimate decision irrational.*"[16] This was so because "*ignoring* prima facie *indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively.*"[17]

21. *A fortiori*, the present failure to discipline Mr Motsoeneng is irrational.

Procedural Irrationality

22. In order to determine whether the failure to discipline Mr Motsoeneng was rational, it is necessary to determine the obligations of the SABC and the Minister with regard to

[15] Ibid at paras 80-84.

[16] Ibid at para 86.

[17] Ibid at para 89.

membership of the Board. These appear clearly from the Broadcasting Act read with the Articles of Association and the Charter. The Broadcasting Act requires the members of the Board – including the COO – to be persons who are "*committed to fairness … and openness and accountability on the part of those holding public office*"[18] and "*who are committed to the objects and principles as enunciated in the Charter of the Corporation*".[19] The Charter is replete with provisions requiring members of the Board to "*maintain the highest standard of integrity, responsibility and accountability*"[20] and upholding high standards of corporate governance. The Broadcasting Act[21] and the Charter[22] permit or require the suspension or removal of board members who act dishonestly, or abuse their positions.

23. The SABC and the Minister are therefore obliged to ensure that the post of COO (or acting COO) is filled with someone who – whatever other qualities they may have – is honest, respects principles of good corporate governance, and does not waste public money. That purpose needs to be considered against the information before the Board and the Minister, and the procedures they followed.

<u>The Board</u>

24. On its own version, the Board acted irrationally. There are three main reasons for that conclusion.

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[18] Broadcasting Act s 13(4)(b).

[19] Broadcasting Act s 13(4)(d).

[20] Clause 8.19: Record Vol 2, p 310.

[21] Broadcasting Act ss 15-16.

[22] Clause 8.7; Record Vol 2, p 309.

25. First, faced with the PP Report, it elected to establish a committee to investigate the Public Protector's findings, and it hired a firm of attorneys to consider the PP Report.[23] However, it does not inform the court what findings, if any, that Committee reached. Indeed, it does not even state that the Committee had reached any findings by 7 July 2014 when the decision to recommend was made. Moreover, it claims privilege over the entire contents of the Mchunu Report.[24]

26. The fact that the Board established a process to consider the PP Report does not aid it unless it explains what that process determined and how that negates the findings of the Public Protector. The Committee of Chairs the Board established was required prepare findings and recommendations and submit them to the Board.[25] It had to complete this process by 10 March 2014. In addition, the Committee was required to draw up minutes of its meetings.[26] Neither the recommendations, nor the minutes of the Committee's meetings have been provided to this Court. No reason has been provided for that failure. The Court therefore does not know on what basis the Board believed it could recommend Mr Motsoeneng in light of the Public Protector's findings. We do not know because the Board refused to tell the High Court.

27. It cannot be sufficient to cross the bar of procedural rationality to allege that other investigations were done, without alleging what procedures those investigations followed, and what conclusions, if any, those investigations reached. It should be stressed that it is highly unlikely that the internal investigations conducted by the SABC could produce the same independent and impartial investigation conducted by the PP. The Public Protector is an independent constitutional institution. The Committee of

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[23] Chairperson's AA at paras 105-108; Record Vol 2, pp 416-417.

[24] Chairperson's AA at para 50; Record Vol 2, p 396.

[25] Terms of Reference: Committee of Chairs; **ZET14**; Record p 490.

[26] Ibid at Record p 491.

Chairs is composed of members of a Board which includes Mr Motsoeneng. And Mchunu are the SABC's own attorneys, the same SABC that vigorously defended Mr Motsoeneng in its response to the Public Protector's provisional report.

28. Second, the Board, on its own version, did not advertise the position or consider any other candidates. It does not explain that choice. It did not interview the single candidate it chose to recommend. It does not explain that choice. The DA submits that alone renders the decision irrational. When recommending someone to a senior position, a relevant consideration is to know who is available to fill the position. If the decision maker refuses to consider who else is available, because it has already decided on a candidate, it fails to consider relevant information and acts irrationally. The fact that the SABC's own Articles required the Board to interview other candidates and prepare a shortlist only enhances the inherent irrationality of the Board's approach.

29. Third, we have already described how an organ of state is required to respond to remedial action taken by the Public Protector. The Board could not rationally respond to that report merely by obtaining its own internal reports, and then acting contrary to the Public Protector's findings without even reporting the conclusions of those internal reports. If the Board believed the Public Protector had made an error, it could only rationally refuse to implement the required remedial action after it reported back to her, sought her views, and attempted to convince her to amend her findings.

The Minister

30. The Minister's decision is naturally tainted by the procedural irrationality of the Board's approach. But her decision too was procedurally irrational for the following independent and self-standing reasons.

31. First, she did not consider all the relevant materials because it was impossible for her to do so in the time available to her. She contends that she was able to apply her mind to the 150 page PP Report, the Mchunu Report, and the recommendation from the Board, request the transcript of Mr Motsoeneng's interview from the Chairperson, and consider that transcript, all in less than a day.[27] That is simply not credible. If the Minister really intended to apply her mind to the issues raised by the Public Protector, she could not have done so in the time she alleges she took. As Nugent JA pointed out, in criticising the erstwhile Public Protector:

> *"Promptitude by public functionaries is ordinarily meritorious, but not where that is at the cost of neglecting the task. The promptitude in this case is explained by the paucity of the investigation."*[28]

32. Second, on her own version she was only "*concerned*" by one of the eight negative findings against Mr Motsoeneng in the PP Report: the allegation of dishonesty around Mr Motsoeneng's matric certificate.[29] Having satisfied herself on that single issue, she concluded that Mr Motsoeneng should be appointed.[30] The Minister never alleges that she considered the findings of abuse of power, wasting of public money, purging of senior staff, and disregard for principles of good corporate governance. Those findings were plainly relevant to her decision. Her failure to consider them can only render her decision unlawful.

33. Third, if she had considered the PP Report, she would have known that the Public Protector found that Mr Motsoeneng "*has been allowed by successive Boards to*

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[27] RA at para 64; Record Vol 4, p 709.

[28] *The Public Protector v Mail & Guardian Ltd and Others* [2011] ZASCA 108; 2011 (4) SA 420 (SCA) at para 3.

[29] Minister's AA at para 13: Record Vol 3, p 504.

[30] Minister's AA at para 14: Record Vol 3, p 505.

operate above the law".[31] She would also have known that the Public Protector was concerned by the current Chairperson's attitude to her provisional report. The Public Protector noted that "*unlike the outgoing Board, Mr Hlaudi Motsoeneng and the GCEO, you appear to deny any governance failure on the part of the erstwhile Board. Even more concerning, is how the Board whose role is to guide the SABC's ethical conduct reacts to my intended findings regarding Mr Hlaudi Motsoeneng's dishonesty.*"[32]

34. Armed with that knowledge, the Minister would have been hesitant to accept the recommendation of the Board that she disregard the PP Report. She would have been aware that the Board might once again be acting as the puppet of Mr Motsoeneng. The Minister would, at the very least, have approached the Public Protector for her feedback before deciding whether Mr Motsoeneng could rationally be appointed. She failed to do so and her failure renders her decision irrational.

35. Fourth, the Minister never mentions the Board's failure to consider other candidates. Like the Board, she offers no justification for this failure. She either failed to consider it, or considered it and determined it was irrelevant. Either way, she failed to consider the relevant fact that – contrary to the Articles of Association – the Board failed to consider any other candidates. That, too, makes her decision irrational.

Substantive irrationality

36. Not only did the Board and the Minister follow irrational procedures, their decisions were substantively unconnected to the purpose of their powers. The Public Protector

[31] PP Report at para 10.7.4: Record Vol 1, p 201.

[32] PP Report at para 6.14.9: Record Vol 1, p 149.

has made serious findings of dishonesty, abuse of power and maladministration against Mr Motsoeneng. For the reasons advanced earlier, those findings stand until they are reviewed by the Public Protector or set aside by a court. The refusal to discipline – evidenced by the decisions to recommend and appoint – was contrary to the central findings of the Report. That alone renders the decisions irrational.

37. In addition, the Public Protector is plainly better suited to determine issues of maladministration within the SABC than the SABC itself. The Public Protector is an external, independent and impartial investigator. She conducted a detailed investigation in which she interviewed all the relevant roleplayers, considered all relevant documents, and gave all affected parties an opportunity to comment on her provisional report. Only after following that process, did she make her findings and take remedial action. Those findings cannot rationally be dispelled by other internal inquiries. If the SABC disagrees with them, it must approach the Public Protector, or seek to have the Report reviewed. Until then, the Report is the best evidence available of what role Mr Motsoeneng in fact played at the SABC.

38. The Appellants have raised some substantive complaints about the Public Protector's findings. They submit that she made various mistakes in analysing the evidence.[33] In reply, the DA explained in detail why those criticisms were without foundation.[34] In fact, the criticisms demonstrated that the SABC and the Minister had wilfully failed to understand the PP Report. The High Court considered the criticisms and the DA's responses in detail and concluded that the Appellants' "*contention that on the facts,*

[33] The response is contained in the Chairperson's AA at paras 38-103: Record Vol 2, pp 390-414. It is persisted with in this court most vigorously by the Minister. See Minister's HoA at para 45. In particular, the continued assertion by the Minister that Mr Motsoeneng was not responsible for the purging of fourteen senior staff members (HoA at para 45.5) evinces a blatant disregard for what the Public Protector in fact found.

[34] RA at paras 99-116: Record Vol 4, pp 718-27.

no case has been made out that there is a justifiable reason to believe that Motsoeneng has engaged in serious misconduct, is unsound."[35] The DA submits that the High Court was correct.

39. Even if the SABC had good reason to doubt the Public Protector's findings – which is denied – appointing Mr Motsoeneng under the cloud of those findings would be irrational. It would be necessary to clear that cloud, by convincing the Public Protector to revisit her findings, or by review. As long as those findings remain in place, appointment of Mr Motsoeneng was irrational.

Failure to engage in good faith

40. The SABC and the Minister did not engage in good faith with the Public Protector about her Report before they acted in direct contradiction to it. That is so for one simple reason. Despite their protestations to the contrary, the permanent appointment of Mr Motsoeneng is inconsistent with the remedial action taken by the Public Protector. That action demonstrated that they would not comply with the remedial action that required that disciplinary proceedings be instituted. It is inconsistent to promote a person to one of the most senior positions at the SABC if one had any intention of instituting disciplinary proceedings against him for serious misconduct.

41. That complete disregard for the Public Protector was not preceded by a period of good faith engagement in which the SABC sought to explain its misgivings about the Report. It happened by ambush, without warning and without any attempt to uphold the "*dignity and effectiveness*" of the Public Protector:

[35] High Court Judgment at paras 107-118: Record Vol 5, pp 816-828.

41.1. After the Public Protector issued her Report, there were letters between the SABC and the Public Protector about the steps the SABC was taking to comply with the Report.[36]

41.2. There was no suggestion that the Board was considering not complying with the Report. Instead, the SABC merely asked for more time within which to comply. As far as the Public Protector was aware, the only difficulty was the SABC's delay in complying.

41.3. In fact, what was occurring in the background was that the SABC had established a "*Committee of Chairs*" with a mandate to "*analyse, in detail, the Report of the Public Protector with the view to making recommendations to the Board thereby empowering the Board to make and informed and cogent response to the Report of the Public Protector within the set deadlines.*"[37] What is telling about this mandate is that (contrary to what the Board had told the PP) it does not direct the Committee to develop an implementation plan. Rather, it requires it to assist the Board to craft a "*response*" to the PP Report. Meanwhile, the SABC had also instructed its attorneys to "*investigate and review*" the PP Report.[38]

41.4. The Public Protector was not informed that a firm of attorneys was "*reviewing*" her Report, nor was she provided with the result. She was also not provided with the various reports or minutes that supposedly emerged from the Committee of Chairs. She was not informed in any way that the SABC had concerns about her findings regarding Mr Motsoeneng.

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[36] The letters (and the Public Protector's responses) are annexed to the PP Affidavit: Record Vol 4, pp 751-9.

[37] SABC Terms of Reference, annexure **ZET14**; Record Vol 3 p 490.

[38] Chairpersons AA at para 108: Record Vol 2, p 417.

41.5. Up until 2 July 2014 – less than a week before Mr Motsoeneng's appointment – the Minister informed the DA that it was not possible to appoint a permanent COO because of ongoing litigation.[39]

41.6. Instead, on 8 July 2014, she was met with active non-compliance with her Report when Mr Motsoeneng was permanently appointed as COO, without advertisement, without warning, contrary to existing court orders.

42. That is not good faith engagement, it is the opposite. It is duplicitous and unjustifiable in light of the commands in ss 181(3) and (4) of the Constitution. For that reason too, the non-compliance is unconstitutional, and compliance should be ordered.

IV THE APPELLANTS' CONTENTIONS

43. In this Part we address various arguments made to attempt to defend the conduct of the Board and the Minister. It is telling that none of the Appellants tackle the heart of the matter. They do not attempt to defend disregard for the Public Protector. Instead they hide behind issues of separation of powers, standing, and fairness. None of these contentions have any merit. They are transparent attempts to distract from the core issue: the SABC and the Minister's blatant disregard for the Public Protector, and their inexplicable commitment to keeping Mr Motsoeneng in office.

44. We cover these attempts in the following order:

44.1. Separation of powers;

44.2. Suspension;

44.3. Supervision;

44.4. Standing; and

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[39] FA at para 11: Record Vol 4, p 689.

44.5. Hearsay.

Separation of powers

45. The Appellants all contend that the relief granted by Schippers J violates the separation of powers. The argument appears to be that, because the Broadcasting Act (read with the Articles of Association) afford the Board, the Minister and the National Assembly roles in appointing, suspending and removing members of the Board (including Mr Motsoeneng), a Court cannot intervene when they exercise those powers irrationally and unlawfully.

46. The DA submits there is no substance in these arguments. The High Court agreed. They should be rejected for the following two reasons:

46.1. Separation of powers issues are not applicable in this context; and

46.2. This is, in any event, one of the rare instances where separation of power concerns are not determinative.

Not applicable

47. The separation of powers is a construct of how the Constitution assigns powers and responsibilities between the three branches of government and the various other organs of state.[40] The DA's primary submission is that this is not a matter in which the separation of powers concerns apply. That is so for the following six reasons.

48. First, if the Constitution requires that organs of state comply with remedial action taken by the PP, then it cannot be a violation of the separation of powers for courts to give effect to that constitutional requirement. Indeed, it would violate separation of powers

[40] See *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 109-111; S Seedorf & S Sibanda 'Separation of Powers' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) ch12-p21.

for courts not to order compliance in appropriate cases as it would undermine the constitutional role and status of the PP.

49. Second, as Schippers J held: "*it is difficult to conceive how the rule of separation of powers can be said to be undermined by the rationality enquiry. It has nothing to do with whether a decision is a rational. Either the decision is rational or it is not.*" [41]

50. Third, once a Court finds a constitutional violation, it may provide just and equitable relief.[42] The separation of powers is (at most) a factor to be considered in determining what relief to grant, not a basis to refuse any relief at all.

51. Fourth, the reliance on the separation of powers is exceptionally self-serving. The Minister and the Board have made it abundantly clear that they have no intention to institute disciplinary proceedings against Mr Motsoeneng. The decision to appoint Mr Motsoeneng as the permanent COO is incompatible with any position other than to refuse to institute disciplinary proceedings against Mr Motsoeneng. The decision to appeal the High Court's order (and the interim execution order) combined with the acclamatory tone of both the Chairperson's and the Minister's affidavits towards Mr Motsoeneng, only serve to confirm their unflinching (and irrational) support for him.

52. In those circumstances, it is nonsensical to contend that the SABC and the Minister should be allowed to exercise a discretion. The SABC and the Minister have made their position plain – they will not act. If that position is – as the High Court found – irrational and unlawful, it must be set aside and they must be ordered to act rationally and unlawfully. They can do that only by complying with the remedial action taken by the Public Protector and instituting disciplinary proceedings against Mr Motsoeneng.

53. Fifth, the reference to the role of the NA is similarly unconvincing:

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[41] See also High Court Judgment at para 99; Record Vol 5, p 813.

[42] Constitution s 172(1)(b).

53.1. The NA has no power to force the SABC to institute disciplinary proceedings against Mr Motsoeneng. Its power is limited to the removal of Mr Motsoeneng from office as COO. Approaching the NA would simply not assist the DA to obtain the relief it seeks.

53.2. The NA is a political body, and it provides political oversight of the membership of the Board. It does not provide a legal (constitutional) check to ensure that the SABC and the Minister abide by the rule of law. That is the role of the judiciary.

53.3. The DA did approach the NA. Mr Davis wrote to the Committee's Chair on 11 July 2014 to initiate a discussion about the appointment of Mr Motsoeneng.[43] However, "*every attempt to discuss the Public Protector's report and the appointment of [Mr] Motsoeneng was shut down by the ANC members on the Committee.*"[44]

53.4. Lastly, the Speaker of the NA and the Portfolio Committee on Communications were cited as respondents in the High Court. Neither indicated any objection to the DA's decision to seek to enforce the remedial action taken by the Public Protector, nor contended that they were being improperly circumvented.

54. Sixthly, the case law relied on by the Appellants – *OUTA*[45] and *Freedom Under Law*[46] – are of no assistance:

54.1. *OUTA* concerned an interim interdict to prevent the implementation of government policy. The interference would have cost the economy billions of

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[43] RA at para 39: Record Vol 4, p 697.

[44] RA at para 39: Record Vol 4, p 698.

[45] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC).

[46] *National Director of Public Prosecutions and Others v Freedom Under Law* [2014] ZASCA 58; 2014 (4) SA 298 (SCA).

Rands. The Court in *OUTA* made it clear that its concerns about judicial interference with the executive were confined to: (a) policy matters and, more particularly, budget allocation;[47] and (b) interim orders.[48] This matter concerns a final interdict for the enforcement of remedial action taken by the Public Protector. It is not conduct in the "*heartland*" of executive power, and it occurs at the final, not the interim stage.

54.2. *Freedom Under Law* concerned an interdict demanding the re-institution of a prosecution and disciplinary proceedings following a successful review of decisions to withdraw those proceedings:

54.2.1. The DA has not sought to review state conduct. It has sought to enforce the remedial action taken by the Public Protector. If it has made out a case for that relief, the remedial action – instituting disciplinary proceedings – must follow.

54.2.2. Moreover, this case does not concern the institution of prosecutions, which the Constitution directly places in the hands of the NDPP.[49] Nor does it touch on the power to "*manage and control*" the police service, which the Constitution grants exclusively to the National Commissioner

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[47] *OUTA* (n 45 above) at para 67 ("*the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of Executive Government function and domain.*" The Court also pointed out that "*the collection and ordering of public resources inevitably calls for policy-laden and polycentric decision making*". Disciplining a single official is of an entirely different nature.)

[48] Ibid at paras 44-47. The Court made it clear that the separation of powers was to be considered at the balance of convenience stage, a requirement that does not exist for final interdicts. This makes complete sense. If a person establishes a clear right, they are entitled to relief. Separation of powers concerns cannot rob them of that right.

[49] Constitution s 179(2).

of Police.[50] It concerns compliance with remedial action taken by the PP. That does not raise the same separation of powers concerns.

54.2.3. Lastly, in *Freedom Under Law* the effect of reviewing the decisions to withdraw charges was that "*the charges and the proceedings are automatically reinstated and it is for the executive authorities to deal with them.*"[51] The orders of re-instatement were unnecessary and this Court's real objection was to the additional orders that the prosecutions be pursued without delay and that all necessary steps were taken to finalise the disciplinary proceedings. In this case, there is no decision to review, but an application to enforce remedial action. An interdict must follow as no other relief is available.

Clearest of cases

55. To the extent that the judgments in *OUTA* and *Freedom Under Law* apply at all to the present case, they do not preclude the order granted by the High Court. Both cases recognise that courts may grant orders interfering with the separation of powers "*when a proper and strong case has been made out for the relief*".[52] That will only occur "*on rare occasions and for compelling reasons.*"[53]

56. *OUTA* and *Freedom Under Law* are not authority for the proposition that there is an absolute bar on courts ordering the restraint or exercise of executive powers. They hold only that courts must be hesitant to do so and should only act for good reasons.

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[50] Constitution s 207(2).

[51] *Freedom Under Law* (n 46 above) at para 51.

[52] *OUTA* (n 45 above) at para 65.

[53] *Freedom Under Law* (n 46 above) at para 51.

57. It is appropriate to do so in this case. The constitutional institution (the Public Protector) created to investigate state misconduct has already concluded that: (a) Motsoeneng should face disciplinary proceedings; and (b) effectively he cannot serve as COO. It is also a case where the Public Protector has found that Motsoeneng is largely responsible for "*pathological corporate governance deficiencies at the SABC*",[54] that he has wasted public money and acted unethically and against the principles of good governance in the appointment and remuneration of himself and others, and that he has "*purged*" senior staff members.

58. It is a case where despite the findings of the Public Protector, the Board and the Minister – irrationally, and without following the prescribed procedures – appointed Mr Motsoeneng on a permanent basis instead of disciplining him. Instead of appointing a suitably qualified person who is not a danger to the health of the SABC as COO, they appointed Mr Motsoeneng. There would be no purpose in leaving the question of Mr Motsoeneng's discipline and suspension in the hands of the Board (while he remains a member) or the Minister. They have made their position completely clear: they will support Mr Motosoeneng no matter what.

59. Accordingly, this is a case where the only way to give effect to the rule of law, the requirements of the Broadcasting Act, and the findings of the Public Protector and the constitutional right to freedom of expression, is for this court to uphold the High Court's order that Mr Motsoeneng face a disciplinary inquiry, and be suspended until it is complete.

60. In addition, this is not a case where the courts are acting on the recommendation of a private party in a complex policy area. They are giving effect to the findings of the Public Protector following an extensive investigation. If anyone is guilty of violating

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[54] PP Report at para 10.7.1: Record Vol 1, p 200.

the separation of powers, it is the SABC and the Minister for failing to respect the office of the Public Protector.

61. In that light, this is the "*clearest of cases*", where the concerns about separation of powers should not prevent the courts from upholding the rule of law, constitutional rights, and the office of the Public Protector.

Suspension

62. The Appellants criticize the High Court for ordering Mr Motsoeneng's suspension pending the outcome of the disciplinary proceedings.[55] There are two strands to this criticism: (a) it violates Mr Motsoeneng's labour rights; (b) it is not justified. Neither has merit:

62.1. The Appellants argue that by suspending Mr Motsoeneng without a hearing, the High Court violated his labour rights. Mr Motsoeneng may have been entitled to a hearing before he was suspended.[56] He received one before the Public Protector who interviewed him, provided him with a provisional report and considered his response. He received a full hearing before the High Court where he was represented by senior counsel, and was provided with an opportunity to place whatever facts he wished to before the High Court. Few employees have ever received such a thorough hearing before being suspended pending a disciplinary inquiry.[57] It can hardly be suggested that he was unfairly treated.

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[55] See, for example, Motsoeneng's HoA at paras 88-105.

[56] *Muller and Others v Chairman, Ministers' Council, House of Representatives, and Others* 1992 (2) SA 508 (C).

[57] In any event, the Labour Appeal Court has held that, in the context of precautionary suspensions "*as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural*

62.2. It is a common principle both in South Africa,[58] and in other jurisdictions[59] that a person may be suspended in order to preserve the integrity of a disciplinary process. There is abundant evidence that Mr Motsoeneng's continued presence at the SABC would have threatened the integrity of the disciplinary inquiry,[60] but three key facts stand out:

62.2.1. Mr Motsoeneng was responsible for the "*systemic corporate governance failure*" at the SABC and the basis for the Public Protector's investigation was that Mr Motsoeneng "*manipulated, primarily new Boards and GCEO's to have his way and to purge colleagues that stood in his way*".[61] As the Public Protector put it elsewhere, Motsoeneng had been "*allowed by successive Boards to operate above the law, undermining the GCEO among others, and causing the*

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fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspensions tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimized. Secondly, the period of suspension often will be (or at least should be) for a limited duration. … And, thirdly, the purpose of the suspension - the protection of the integrity of the investigation into the alleged misconduct - risks being undermined by a requirement of an in-depth preliminary investigation." *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC) at para 44.

The real complaint is not that the process leading to the suspension was unfair, but that it was not taken by his employer. See, for example, SABC's HoA at para 67. But that is a complaint about unfairness to the SABC, not unfairness to Mr Motsoeneng. In reality, it is no complaint at all. If the court was entitled to order the disciplinary inquiry (because there is no lawful basis not to implement the remedial action taken by the PP), then it also had the power to order his suspension if that was necessary to ensure the inquiry was independent and effective.

[58] See, for example, *Mogothle v Premier of the North West Province & Another* (2009) 30 ILJ 605 (LC) at paras 31 and 39; *Koka v Director-General: Provincial Administration, North West Government* (1997) 18 ILJ 1018 (LC).

[59] *Lewis v Heffer & others* 1978 (3) All ER 354 (CA); *Cabiakman v. Industrial Alliance Life Insurance Co.* [2004] 3 SCR 195.

[60] High Court Judgment at paras 92-6: Record Vol 5, p 810-2.

[61] PP Report at 10: Record Vol 1, p 67.

staff, particularly in the Human Resources and Financial Departments to engage in unlawful conduct."[62]

62.2.2. The ex-Chairperson, Ms Tshabalala, "*appears to have blindly sprung to Mr Motsoeneng's defence*" and "*at times … appeared more defensive on his behalf" than Motsoeneng himself*";[63]

62.2.3. Mr Motsoeneng wrote a letter to the Board demanding to be appointed COO on 7 July 2014. Without interviewing him or considering any other candidates, he was recommended by the Board on the same day, and appointed by the Minister on the next.

62.3. Given the clear evidence that Mr Motsoeneng manipulated the Board, and that it continues to irrationally act in his favour, there is a legitimate fear that he would interfere with a disciplinary inquiry against him. Suspension was not only justified, it was necessary.

Supervision

63. The Minister contends that it was inappropriate for the High Court to grant a "*quasi supervisory interdict*" over the disciplinary inquiry.[64] The complaint is twofold:

63.1. The supervision was not sought. But, as this Court has held: "*If a constitutional breach is established, this Court is (as was the Court below) mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it*

[62] PP Report at para 10.7.4: Record Vol 1, p 201.

[63] PP Report at 9: Record Vol 1, p 66.

[64] Minister's HoA at paras 74-6.

was presented or argued."[65] If supervision is just and equitable, it can be granted.

63.2. It is inappropriate in the face of the ongoing Part B litigation. The two parts of the litigation concern different issues: Part A is about disciplinary proceedings. Part B is about the decisions to recommend and appoint. Supervision of the disciplinary proceedings will not affect the determination of Part B.

64. Moreover, the supervision was plainly warranted in light of the attitude of the SABC to the remedial action taken by the Public Protector, and in this litigation. It cannot be trusted to treat Mr Motsoeneng impartially without court supervision of the disciplinary process.

Standing

65. Mr Motsoeneng persists with the argument that the DA lacks standing to bring this litigation.[66] This is the case, he argues, because the DA is attempting to give effect to the PP Report, which only the Public Protector may do. There is no merit to this contention.

65.1. This is a constitutional matter. It concerns issues of administrative justice, the rule of law, freedom of expression and access to information. Standing is governed by s 38 of the Constitution which affords standing on anyone acting in their own interest, an organisation acting in the interests of its members, or

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[65] *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd* [2004] ZASCA 47; [2004] 3 All SA 169 (SCA) at para 18, quoted with approval in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC) at para 52.

[66] See, for example, Chairperson's AA at para 26; Record Vol 2, p 386.

a litigant acting in the public interest.[67] This provision requires courts to adopt a "*broad approach to standing*".[68]

65.2. This Court dealt with the standing of the Democratic Alliance to bring litigation such as the present in *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others*.[69] In that matter, the Applicant challenged a decision to drop criminal charges against President Zuma. Navsa JA stated:

> *"It is of fundamental importance to our democracy that an institution such as the NPA, which is integral to the rule of law, acts in a manner consistent with constitutional prescripts and within its powers, as set out in the National Prosecuting Authority Act 32 of 1998. Certainly the membership of the DA can rightly be expected to hold the party they support to the foundational values espoused in the DA's constitution and to expect the DA to do whatever is in its power, including litigating, to foster and promote the rule of law. … [I]t follows that the DA has standing to act in its own interests, as well as in the public interest, and is entitled to pursue that application to its conclusion."*[70]

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[67] Section 38 reads: "*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-*

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members."

[68] *Ferreira v Levin NO* 1996 (1) SA 984 (CC) at para 165.

[69] [2012] ZASCA 15; 2012 (3) SA 486 (SCA).

[70] Ibid at para 45. Other cases where the standing of the DA to litigate to uphold the rule of law include: *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (no contention that the DA lacked standing to challenge the appointment of the NDPP); *Democratic Alliance v President of South Africa and Others* [2014] ZAWCHC 31; [2014] 2 All SA 569 (WCC); 2014 (7) BCLR 800 (WCC); 2014 (4) SA 402 (WCC) (challenge to the proper tagging of legislation in

65.3. Not only has this Court recognised the DA's right to act in these types of cases, it appears to have recognised that all citizens have a right to vindicate the protection promised by the Public Protector. In *Public Protector v Mail & Guardian*,[71] Nugent JA held that the Mail and Guardian had standing to review a decision of the Public Protector. The newspaper advanced two grounds for standing: that the report made negative findings about it, and that it acted in the public interest. On the second issue, Nugent JA explained the argument as follows:

> *"[T]heir counsel pointed out that the Constitution guarantees the protection of the office of the Public Protector to all inhabitants of the country. Once again that must be correct. He submitted that in those circumstances, when it comes to matters that concern its inhabitants at large, every one of them must be entitled to vindicate that promised protection."*[72]

65.4. Although the issue was left undecided, the above quote supports the position that ordinary citizens can act to vindicate the powers of the PP.

65.5. The Public Protector was cited as a respondent and is participating in the case. Although she has chosen to abide, she has expressed no objection to the DA enforcing compliance with her report. Indeed, the tenor of her submissions strongly supports the DA's application.

65.6. There is, in any event, no basis for the submission that a private party cannot act to enforce the powers of a public body. Mr Motsoeneng refers to no such authority, and we are aware of none. It would be extremely strange if public

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Parliament); *Democratic Alliance v Speaker of the National Assembly and Others* [2015] ZAWCHC 60 (challenge to the constitutionality of legislation concerning the use of the security services in Parliament).

[71] [2011] ZASCA 108; 2011 (4) SA 420 (SCA).

[72] Ibid at para 27 (our emphasis).

decisions that have broad public consequences could not be enforced merely because the decision-maker was unable or unwilling to do so.

Hearsay Evidence

66. Mr Motsoeneng complains that the DA's case is built entirely on hearsay, namely the PP Report.[73] It is inadmissible, he contends, for the DA to rely on the truth of the contents of the PP Report. This submission can be rejected for the following reasons:

66.1. It is based on a persistent misunderstanding of the DA's case. Mr Motsoeneng states that the DA's case "*is based entirely on the correctness of the findings*" in the PP Report.[74] This is incorrect. The DA relies on the PP Report for the fact that the Public Protector made them. The basis for the relief is the Appellant's failure to offer any rational reason not to comply with the Report. Even if they are not correct, the SABC and the Minister have failed to explain why they have not complied with them.

66.2. The PP Report is not hearsay. The Public Protector has confirmed the content of the Report under oath.[75] If it was ever hearsay, it no longer is. That does not mean that a court must accept the truth of the PP's findings. But the Report is admissible both for the fact of its existence and its content. The weight that should be accorded to it will depend on its cogency – the process that was followed in compiling it. As the Appellants have put up no evidence that, on a proper consideration, challenges the evidence, it should be accepted as true.

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[73] There is also a suggestion that the DA has improperly relied on hearsay in media reports. As the DA pointed out in reply, this allegation is entirely self-serving as the version advanced in the media reports was almost entirely confirmed by the Appellants in answer. RA at para 22: Record Vol 4, p 692.

[74] Motsoeneng's HoA at para 61.

[75] PP Affidavit: Record Vol 4 p 737.

66.3. The cases relied on by Mr Motsoeneng do not support his conclusion:

66.3.1. *De Lacy* concerned the use of a report prepared by auditors appointed by an ombudsman.[76] This Court found that, as it was not confirmed by the auditors, it constituted hearsay. It also found that the auditors made it clear "that their conclusions were tentative, based on an incomplete examination of all the evidence, and were expressly stated to be subject to various disclaimers." It was in those circumstances that this court held that the findings should not "*be accorded any weight.*"[77] The PP's findings are confirmed on affidavit, are final and are made without disclaimer.

66.3.2. *Public Protector* did not hold that a report of the Public Protector is hearsay. It held that it was not called on to make an assessment of the truth of the matters considered by the PP.[78] It then held that "*Courts will generally not rely upon reported statements by persons who do not give evidence (hearsay) for the truth of their contents.*"[79] This statement was made in the context of statements by an undisclosed source recorded by a journalist in an affidavit, not in the context of the PP's report. The case is no authority for the proposition that a report of the PP, confirmed under oath, is hearsay.

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[76] *De Lacy and Another v South African Post Office* [2011] ZACC 17; 2011 (9) BCLR 905 (CC).

[77] Ibid at para 79.

[78] *The Public Protector* (n 28 above) at para 13.

[79] Ibid at para 14.

V CONCLUSION AND COSTS

67. All the Appellants submit that, if the appeal is successful, they should be awarded their costs. That position loses sight of the well-known dictum in *Biowatch Trust v Registrar, Genetic Resources & Others* that parties who are unsuccessful in non-frivolous constitutional litigation against the state should not pay the government's costs.[80] That rule is not dependent on the identity of the litigant, or the motivation for the suit, but the nature of the litigation.[81]

68. This is not frivolous litigation. It is a serious attempt to address a serious public wrong. If the appeal is successful, there should be no order as to costs. By contrast, if the appeal is dismissed, the DA is entitled to its costs.

69. In conclusion, this court should make the following order:

    69.1. The appeal is dismissed with costs, including the costs of three counsel.

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14 August 2015

Chambers, Cape Town

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[80] 2009 (6) SA 232 (CC).

[81] Ibid at paras 17-20. See also *Democratic Alliance v President of South Africa and Others* [2014] ZAWCHC 31; 2014 (4) SA 402 (WCC) at paras 107-108 (holding that the DA was entitled to the protection of the rule, even if it had brought the litigation with a political motive).