IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: **393/2015**
WHCH case no: **12497/2014**

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 OF THE NATIONAL ASSEMBLY	Sixth Respondent
THE PUBLIC PROTECTOR	Seventh Respondent

THIRD APPELLANT'S HEADS OF ARGUMENT

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I. INTRODUCTION

1. On 19 August 2014 the first respondent ("the DA")[1], a political party represented in the National Assembly, approached the Court *a quo* on an urgent basis for the relief set out in Part A of the notice of motion.[2] The interdictory relief sought, purportedly in the form of interim relief,[3] i.e. the summary removal of the incumbent Chief Operating Officer ("COO") of the South African Broadcasting Corporation SOC Ltd ("the SABC"),[4] Mr Hlaudi Motsoeneng ("Motsoeneng),[5] was in reality final.[6]

2. In Part A, the DA sought an order *inter alia* that: i) Motsoeneng be suspended with immediate effect from the position of COO and that he remain suspended pending the finalization of disciplinary proceedings to be brought against him and the determination of certain review relief sought in Part B of the notice of motion;[7] and ii) that the Board of Directors ("the Board") of the SABC be directed to institute disciplinary proceedings against Motsoeneng within 5 days of the court's order.[8]

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[1] The DA was the applicant in the Court *a quo.*
[2] 1/2-3. The application was issued on 16 July 2014.
[3] The DA denies the relief they sought was final. See RA para 36, 4/696. References to the founding and replying affidavits in the Court *a quo* shall be FA and RA respectively. The answering affidavits filed by the various respondents in the Court *a quo* shall be referred to as: AA (SABC), AA (Minister), AA (Motsoeneng) and AA (Public Protector).
[4] The SABC, the Board of Directors and the Chairperson of the Board of Directors were each cited separately as the first to third respondent's in the Court *a quo.* The SABC is the first appellant in the appeal.
[5] Motsoeneng was the eighth respondent in the Court *a quo* and is the third appellant in the appeal.
[6] Prayers 1-6 of the notice of motion, 1/2-3. This relief was opposed by the SABC, the Minister and Motsoeneng. Motsoeneng and the Minister filed separate answering affidavits. The SABC, the Board and the Chairperson filed a separate answering affidavit deposed to by the Chairperson.
[7] Prayer 2 of the notice of motion, 1/2.
[8] Prayer 3 of the notice of motion, 1/2.

3. In Part B, the DA seeks to have the decision of the Board and the Minister of Communications ("the Minister"), the second appellant,[9] respectively to recommend and approve the permanent appointment of Motsoeneng, reviewed and set aside.[10] The review is set down for hearing in the Western Cape Division of the High Court from 12 to 14 October 2015.

4. The relief sought in Part A was essentially granted by the Court *a quo.*[11] In a judgment handed down on 24 October 2014, the Court *a quo* made *inter alia* the following orders:[12]

4.1. the Board of the SABC was directed to institute disciplinary proceedings against Motsoeneng in respect of the issues referred to in paragraph 11.3.2.1 of the report of the Public Protector dated 17 February 2014;[13] and[14]

4.2. pending the finalisation of the disciplinary proceedings, Motsoeneng shall be suspended from the position of COO on full pay.[15]

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[9] The Minister was cited as the fourth respondent in the Court *a quo.*
[10] It also seeks a declaration that the conduct of the Board and the Minister are inconsistent with section 181(3) of the Constitution.
[11] The Honourable Mr Justice Schippers.
[12] The judgment of the Court *a quo* ("the judgment") is at 5/760-833. The judgment has been reported as *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC). The order is at 5/834-834a.
[13] The Public Protector was cited as the ninth respondent in the Court *a quo,* and is cited as the seventh respondent in the appeal.
[14] Para 1 of the order of the Court *a quo.*
[15] Para 4 of the order of the Court *a quo.* The remainder of the relief set out in the order of the Court *a quo* relates to the manner and time periods in which the disciplinary proceedings are to be conducted.

5. This is an appeal, with the leave of the Court *a quo,*[16] by the SABC, the Minister and Motsoeneng,[17] against the judgment and order of the Court *a quo.* We submit that the relief granted by the Court *a quo* transgresses the separation of powers' doctrine by impermissibly intruding on the domain of the Executive and/or the Legislature. It violates Motsoeneng's rights to dignity and fair labour practices. The date of Motsoeneng's suspension was, in the circumstances, completely arbitrary.

6. We submit that the application was not urgent and was premature, being launched prior to the expiry of the time period for complying with the remedial action recommended by the Public Protector. Further the DA does not have standing to seek to enforce the remedial action recommended by the Public Protector and based its application entirely on hearsay evidence. The relief should therefore not have been granted and the application should have been dismissed with costs.

7. The Public Protector indicated that she neither supported nor opposed the relief sought by the DA in Part A,[18] and initially only filed a notice of intention to abide. She subsequently filed an answering affidavit contending that the remedial action taken in a report by the Public Protector is legally binding until challenged in a Court.[19]

8. This argument was rejected by the Court *a quo*. The Public Protector's application for leave to appeal was refused by the Court *a quo*.[20] Despite not petitioning this

[16] The order of the Court *a quo* in the applications for leave to appeal is at 5/911-912.
[17] Motsoeneng appeals against paragraphs 1, 2, 3 and 4 of the order of the Court *a quo.*
[18] AA (Public Protector) para 7, 4/740.
[19] AA (Public Protector) para 8, 4/741.
[20] Judgment of the Court *a quo* on leave to appeal para 16, 5/900.

Honourable Court for leave to appeal or obtaining any other permission to present argument at the appeal, the Public Protector has indicated that she intends doing so. We submit that this belated attempt to intervene is impermissible.

9. It is clear that the Public Protector does not support the decision of the Court *a quo* and the submissions she advances are not aimed at upholding that decision.[21] On the contrary, she wants to appeal against what she has described as declaratory relief granted by the Court *a quo,* determining the rights and powers of the Public Protector.[22]

10. As the Public Protector has not been granted leave to appeal however she is precluded from advancing an argument on an issue aimed at setting aside the decision of the Court *a quo.* This Honourable Court does not have jurisdiction to hear an appeal on an issue upon which leave has not been granted.[23]

II. BACKGROUND

11. Motsoeneng was the acting COO of the SABC from November 2011. On 7 July 2014 the Board recommended his permanent appointment as COO. This was approved by the Minister on 8 July 2014.

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[21] A respondent in an appeal is entitled to support the decision of the Court *a quo* on any ground. See: *Sentrale Kunsmiskorporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 395F-H.

[22] See the Public Protector's notice of application for leave to appeal, 5/869-870 and para 5 of her supporting affidavit, 5/875.

[23] *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) para 12-14.

12. On 17 February 2014 the Public Protector released a report of an investigation carried out by her office in which certain findings were made against Motsoeneng, the Board and the SABC ("the Report" or "the PP Report").[24] The PP Report also set out certain remedial action "*to be taken*",[25] setting a deadline of 16 August 2014 by when the "*actions requested*" as part of the remedial action taken by her were to be finalised and a final report presented.[26]

13. The DA contends that in view of the findings contained in the PP Report, the permanent appointment of Motsoeneng to the position of COO of the SABC is irrational and unlawful – even before the Public Protector has accounted to the National Assembly in terms of s 181(4) of the Constitution.[27] The DA therefore seeks the review relief in Part B mentioned above. The DA has however attempted, through the relief sought in Part A, to obtain the immediate removal of Motsoeneng from the position of COO of the SABC.

III. NATURE OF THE RELIEF AND FINDINGS OF THE COURT *A QUO*

14. Although the DA purported to seek interim relief in Part A of its notice of motion,[28] as the Court *a quo* held, this relief, properly considered, was final.[29] The basis for this relief was the findings of the Public Protector set out in the PP Report.[30] The DA relied entirely on inadmissible hearsay evidence in the form of the PP Report

[24] The PP Report was attached as annexure "JS1" to the founding affidavit (1/57-206).
[25] PP Report para 11, 1/202.
[26] PP Report para 12.3, 1/206.
[27] Constitution of the Republic of South Africa, 1996 ("the Constitution").
[28] Prayers 2 & 3 of the notice of motion, 1/2-3.
[29] Judgment para 23, 5/779.
[30] FA para 5 & 33, 1/12 & 1/20. The DA set out the findings of the Public Protector upon which it relies in para 34-43 of the FA, 1/20-24. The appellants dispute the summary of these findings set out in para 48 of the FA, 1/25-26.

and various media reports (themselves based on hearsay)[31] relating to Motsoeneng's appointment and contended that the application was brought "*to give effect to the Report and to vindicate the office of the Public Protector*".[32]

15. It contended that it has a clear right to the review relief sought in Part B, arguing that Motsoeneng's appointment was "*plainly*" irrational and unlawful.[33] It also made the alarmist and unsubstantiated claim that Motsoeneng's continued employment "*threatens the rights to freedom of expression and access to information of all South Africans*".[34]

16. The DA therefore sought permanently to remove Motsoeneng, under the guise of an order enforcing not only the recommendations made by the Public Protector in the PP Report, but their own interpretation of the of these. That this was its objective is clear from *inter alia* the statements made at paragraphs 93 and 96 of the founding affidavit.[35]

17. The Public Protector in fact did not, as part of her remedial action, recommend or request that Motsoeneng be immediately suspended. The DA contended that Motsoeneng's suspension was the only rational response to the Public Protector's findings.[36] The DA in addition sought to draw a number of unfounded and

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[31] AA (Minister) para 20.4, 3/507.
[32] Judgment para 20, 5/777. See FA para 91.2, 1/1/39 & para 93, 1/40.
[33] FA para 98, 1/41.
[34] FA para 99, 1/41.
[35] FA para 93, 1/40: "*That is what the Public Protector recommended, and that is what the DA seeks to achieve*". FA para 96, 1/41: "[T]*his litigation is the only effective means to remove Motsoeneng from the position he is unlawfully occupying, and to give effect to the Public Protector's findings.*" (Emphasis added).
[36] RA para 37, 4/697.

scandalous conclusions which, on a clear reading of the PP Report (taken at face value), are not supported by the findings contained in it. Thus:

17.1. the Public Protector made no finding that Motsoeneng was not eligible to hold office or perform the functions as the COO of the SABC. She did not, as alleged by the DA, make a "*clear finding…that Motsoeneng was not fit to serve as COO*".[37] This misrepresents the Public Protector's findings.

17.2. the Public Protector's findings do not justify the conclusion that the SABC "*cannot be functional while Motsoeneng is the COO*".[38]

17.3. there was no finding that his continued employment as COO would render the SABC a biased public broadcaster. The DA produced no evidence that this would be the case.[39]

17.4. there is further no justification in the PP Report or other evidence that he "*single-handedly undermined the independence of the SABC and perpetuated a crisis of governance"*.[40]

17.5. the DA did not produce any evidence for the dramatic claim that Motsoeneng's continued employment as COO does serious harm to the SABC.[41]

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[37] RA para 54, 4/703.
[38] FA para 30, 1/19.
[39] FA para 10, 1/14.
[40] FA para 92, 1/39-40.
[41] FA para 91, 1/39.

18. The Court *a quo* granted the Part A relief on two grounds: **First,** the Court found, correctly we submit, that the findings and remedial action of the Public Protector are not binding and enforceable.[42] It nevertheless proceeded to review the alleged decision of the Board and the Minister to reject the findings and remedial action, and found that these were arbitrary and irrational and unlawful.[43] In doing so the Court *a quo* conflated the review relief sought by the DA in Part B of the notice of motion, with the review of any decision to reject the findings and remedial action of the Public Protector, which was not sought.

19. The Court *a quo* then considered what an appropriate remedy should be,[44] and after finding that this included an order directing the Board to institute disciplinary proceedings against Motsoeneng,[45] held, by implication, that his suspension pending a disciplinary enquiry was implied by the Public Protector's remedial action.[46] The Court *a quo* held further that because the "*allegations of misconduct against* [Motsoeneng] *are serious*", this shows that *"unless he is suspended,* [he] *poses as a real risk not only to the integrity of the investigation concerning the allegations of his misconduct, but to the disciplinary enquiry itself*".[47] The evidence before the Court did not however justify such a finding.

20. **Secondly**, the Court *a quo* held that aside from the constitutional breach by the Board and the Minister, there was a *prima facie* case against Motsoeneng that

[42] Judgment para 74, 5/803.
[43] Judgment para 75-83, 5/804-807.
[44] Judgment para 84, 5/807.
[45] Judgment para 88, 5/809.
[46] Judgment para 89, 5/809.
[47] Judgment para 95-95, 5/812.

warrants the institution of disciplinary proceedings.[48] The Court therefore held that the DA had established the requirements for a final interdict that the disciplinary proceedings be instituted.[49]

21. The grounds of appeal are set out in Motsoeneng's application for leave to appeal.[50] We submit that the Court *a quo* erred in granting the relief it did on both of these grounds, and in making the following findings:

21.1. **First**, by finding that the DA had standing to seek the relief sought in Part A of the notice of motion "*to give effect to*" the PP Report.

21.2. **Secondly**, the Court *a quo* erred in its assessment of the evidence, and in particular the disputes of fact and the weight to be given to the facts contained in PP Report.

21.3. **Thirdly**, by finding that the Minister and the SABC had rejected the Public Protector's findings and that their response to the Report was irrational.

21.4. **Fourthly**, by granting an order that amounted to an inappropriate transgression of the separation of powers doctrine.

21.5. **Fifthly**, by finding that the suspension of Motsoeneng pending the outcome of disciplinary proceedings was a just and equitable remedy.

21.6. **Sixthly**, by finding that the DA has established grounds for a final mandatory interdict.

22. Before dealing with each of these aspects of the judgment, we address the submission made by the Public Protector that her findings and remedial action are

[48] Judgment para 102, 5/815.
[49] Judgment para 103, 5/815.
[50] 5/857-867.

binding and enforceable. As mentioned, we respectfully submit that the Public Protector's involvement in this appeal is impermissible in the circumstances.

IV. THE NATURE AND EFFECT OF THE PUBLIC PROTECTOR'S POWERS

23. The office of the Public Protector is a Chapter 9 institution tasked with the constitutional duty to investigate conduct in state affairs or in the public administration in any sphere of government that is alleged to be improper, or which may result in impropriety or prejudice.[51]

24. Section 182(1) of the Constitution grants the Public Protector the power, "*as regulated by national legislation*" to investigate, to report and "*to take appropriate remedial action*". The Public Protector also has the additional powers and functions prescribed by national legislation.[52] The legislation specifically enacted to regulate these powers is the Public Protector Act 23 of 1994 ("the PPA"). The PPA deals with various types of action which, it is submitted, may be considered 'remedial',[53] including making any appropriate recommendation after an investigation.[54] As the Constitution states however, it is for the Public Protector to take this action.

25. The Public Protector takes issue with the remedial action taken by her in terms of the Report being referred to as recommendations and argues that because the powers conferred by the PPA are additional to the powers referred to in section

[51] Section 182 of the Constitution.
[52] Section 182(2) of the Constitution.
[53] Sections 6, 7 & 8 of the PPA.
[54] Section 6(4)(c)(ii).

182(1) of the Constitution, a 'recommendation' issued by the Public Protector is somehow different to 'remedial action' taken by her.[55]

26. The clear purpose of the PPA, as envisaged by section 182(1) of the Constitution, is to regulate the powers of the Public Protector. A recommendation is merely a species of remedial action that may be taken. It is submitted that on a proper consideration of the Report, the remedial action taken by the Public Protector in the instant matter takes the form of recommendations. This is supported by the language used in part 11 of the Report setting out the remedial to be taken.[56]

27. The Constitution does not define the remedial action that may be taken by the Public Protector. Neither does the Constitution nor the PPA give any express indication that the remedial action that may be taken by the Public Protector is binding and enforceable.[57]

28. The Constitutional Court has made it clear that the office of the Public Protector is modelled on the institution of the ombudsman.[58] The Public Protector herself expressly describes her office in the Report as one of an ombudsman.[59] The functions or mandate of the Public Protector have been described by both this

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[55] AA (Public Protector) para 19-20, 4/744. 'Recommendations' are referred to in sections 5(3), 6(4)(c)(ii) and 8(1) of the PPA.
[56] 1/202-206.
[57] This was acknowledged in the submissions filed on behalf of the Public Protector in the Court *a quo* where it is argued that a purposive interpretation is required to be given to section 182(1) of the Constitution in order to reach the conclusion that the remedial action taken by the Public Protector is legally binding.
[58] *In re: Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996,* 1996 (4) SA 744 (CC) para 161 ("*Certification Judgment*").
[59] PP Report para 3.3.6 & 3.3.8, 1/91-92.

Court, and the Constitutional Court as investigatory.[60] Ordinarily ombudsmen do not possess powers of legal enforcement.[61] The Public Protector argues that this Court has described the functions of the Public Protector as "*going beyond that of an ombudsman*".[62] This Court was with respect referring to the powers provided by the PPA,[63] and the comments were made with in relation to the investigatory powers of the Public Protector and her role being more proactive than a traditional ombudsman.[64]

29. The description in the Report of how the investigation is conducted by Public Protector supports the view that her findings are not binding:[65]

> "*As is customary, the "what happened" enquiry is a factual question settled on the assessment of evidence and making a determination on a balance of probabilities. I must indicate though that we rely primarily on official documents such as memoranda and minutes and less on viva voce evidence.*" (Emphasis added.)

30. The Public Protector submitted in the Court *a quo* that it would be inappropriate for the Court to pronounce on the factual disputes between the parties insofar as they relate to the factual findings contained in the Report and that the Court should proceed on the basis that the Report is unchallenged and duly enforceable.[66]

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[60] *Certification Judgment* supra para 161; *Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) para 9-11.
[61] Judgment para 55, 5/794.
[62] Public Protector's affidavit in application for leave to appeal para 7.4, 5/875.
[63] Which the Public Protector has made clear she does not rely upon.
[64] *Public Protector v Mail & Guardian Ltd and Others* supra para 9 & 11.
[65] PP Report at page 6, 1/62.
[66] AA (Public Protector) para 29, 4/747.

31. It is a general principle that until a decision is found by a court to be unlawful it should be treated as valid.[67] The appellants did not seek an indirect review of the PP Report in the Court *a quo* and the Court was not asked to it set aside. It was in fact common cause between the appellants and the DA that the Public Protector's findings and remedial action were not binding on the Minister and the Board.

32. Bearing in mind the review relief that is sought in Part B, the disputes of fact raised before the Court *a quo* were for the purposes of showing that there is indeed other information that was available to the Minister and the Board which shows that suspending Motsoeneng was not the only plausible option open to them as the DA contends.[68] It cannot be that regardless of the amount of conflicting information available to them, any decision at odds with the PP Report would be irrational. It is for the Court at the review stage to determine whether in light of <u>all</u> information before the Minister and the Board their decisions (to appoint Motsoeneng) were rational.

33. The Public Protector did not find that Motsoeneng had to be suspended, or even that he was not eligible for appointment as COO. The remedial action referred to in the Report was that appropriate disciplinary action should be taken.[69]

34. In *United Democratic Movement and Others v Tlakula and Another*,[70] the Electoral Court acknowledged the relevance of the findings contained in a (different) report

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[67] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) at para 27. Although this is not without exception (see para 32 of the decision).
[68] FA para 105, 1/44.
[69] FA annexure "JS1", para 11.3.2.1 of the PP Report, 1/204.
[70] *United Democratic Movement and Others v Tlakula and Another* (EC 05/14) [2014] ZAEC 5 (18 June 2014).

of the Public Protector and but pointed out that it was for it sitting as the Electoral Court to "*investigate the facts and then to make a value judgment as to whether the facts do indeed constitute misconduct, in order to make any recommendation. Any opinion expressed or finding made by the Public Protector in this regard is not binding on this court*."[71] (emphasis added)

35. It will similarly be for the court hearing the review relief in Part B of this application to determine whether in light of all the information before the Minister and the Board, including the PP Report, their decisions were rational. In this sense at least, the Report is not binding.

36. Finally, the Public Protector made it clear that she considers that the principle of co-operative governance contemplates that there would be a process of meaningful engagement with the parties affected by the remedial action (which does not include the DA) to determine the way forward.[72] The DA cannot, as it attempts through this litigation to do, dictate to the Public Protector what the outcome of the remedial action taken by the Public Protector should be.

37. Granting the relief sought by the DA in Part A, namely the enforcement of its own interpretation of the remedial action taken by the Public Protector not only infringes the separation of powers doctrine for the reasons we address below, but it in fact undermines the independence of the Public Protector and her ability to resolve the issues in a manner that respects and upholds the principles of co-operative

[71] Ibid at para 35.
[72] AA (Public Protector) para 5, 4/739.

governance.[73] The Constitution is clear in this regard: no person or organ of State may dictate to or interfere with the functioning of the Public Protector.[74]

38. Even if the findings and remedial action of the Public Protector should stand as binding and enforceable this begs the question of who has the standing to enforce the PP Report.[75] We submit that the DA does not have standing to enforce the findings and remedial action in the PP Report and the Court *a quo* erred in finding that it did. It is to this question that we now turn.

V. THE DA'S LACK OF *LOCUS STANDI*

39. The DA may well have standing to seek the review relief in Part B. it has no *locus standi* to seek the relief in Part A. This is tied up with the true nature of the relief sought in Part A and whether there is a *prima facie* right in need of protection. The DA relies on an alleged "*constitutional duty*" to challenge the conduct of the Minister and the Board. It says that it brings this challenge in its own interests as well as the interests of its members and the public on the basis that there is a strong public interest in the proper functioning of the SABC.[76]

40. As the relief sought in Part A is in fact not interim, it is not necessary to preserve any right the Applicant has to have the decision of the Board and the Minister reviewed. Motsoeneng's suspension will not change this. An applicant for an

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[73] "*The independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government*.": *Certification Judgment* supra para 163.
[74] Section 181(4) of the Constitution.
[75] The Public Protector does not submit that the DA has the standing to enforce the PP Report.
[76] FA para 10, 1/14.

interim interdict must establish more than merely a right to approach a court to review an administrative decision: the right to review an impugned decision does not require any preservation *pendente lite*.[77]

41. The DA states that it in any event has a clear right to the relief sought in Part B.[78] Apart from the DA's entitlement to such relief being anything but clear, the right to approach a court for relief is not sufficient for the granting of an interim interdict.

42. It then states that Motsoeneng's continued employment as COO threatens the rights of freedom of expression and information of all South Africans guaranteed in sections 16 and 32 of the Constitution.[79] This allegation is speculative, based on inadmissible hearsay evidence which is itself objectively incorrect, and further amounts to an incorrect reading of this hearsay evidence.

43. What the DA is in fact seeking to do is to obtain a court order enforcing the recommendations made by the Public Protector in the Report i.e. it is claiming a right to demand the institution of disciplinary proceedings.

44. As the DA acknowledges,[80] the Board, which has the sole authority to take disciplinary steps against directors,[81] is not bound by the findings and recommendations of the Public Protector. In terms of section 182(1)(c) of the Constitution, the Public Protector has the power, regulated by the PPA to take

[77] *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) para 50.
[78] FA para 98, 1/41.
[79] FA para 99, 1/41.
[80] FA para 94, 1/40.
[81] Section 14(2), Broadcasting Act 4 of 1999.

appropriate remedial action. This includes approaching a Court for appropriate relief to enforce compliance with her findings and recommendations.

45. Section 181(5) of the Constitution provides that the Public Protector (and other Chapter 9 institutions) are accountable to the National Assembly and must report on their activities and the performance of their functions at least once a year to the National Assembly. Section 8(2)(a) of the PPA further requires such report also to be tabled in the National Council of Provinces. Section 8(2)(b) of the PPA sets out the circumstances when a report on the findings of a particular investigation shall be submitted to the National Assembly.

46. The DA, as a political party represented in the National Assembly, can therefore take steps through the parliamentary process if it wishes to enforce the Public Protector's findings. It cannot approach the courts directly to enforce the Report. To allow it to do so would in fact undermine the independence of the office of the Public Protector, [82] and infringe the separation of powers, as discussed below.

47. The DA argues that if Motsoeneng's appointment as COO was irrational and unlawful, he was never entitled to hold the position.[83] Although the Public Protector's remedial action included the appointment of a permanent COO, she did not preclude the appointment of Motsoeneng. The only sanction against him is that he must be disciplined. The fact that disciplinary proceedings are instituted against Motsoeneng does not necessarily mean that:

[82] As discussed above.
[83] RA para 32, 4/695.

47.1. He will be found guilty of the charges against him;

47.2. Even if he is found guilty, he will necessarily be dismissed as COO of the SABC; and/or

47.3. He is precluded from being recommended for and/or appointed to the position of permanent COO of the SABC.

48. Therefore, the successful review of the decisions of the Board and the Minister in Part B will not mean that Motsoeneng cannot be reappointed. This shows that the relief sought in Part A is not at all necessary to preserve any rights that may be determined in Part B. It is simply an attempt by the DA at enforcing their own interpretation of the PP Report to summarily remove Motsoeneng.

49. The Constitutional Court has repeatedly held that a broad approach to standing should be adopted, even in matters that involve an infringement of rights other than those protected in the Bill of Rights.[84] However it has also held that a court should be circumspect in affording standing to applicants purporting to act in the public interest in terms of section 38(d) of the Constitution. This will depend on various factors to determine whether a person is genuinely acting in the public interest. There is no closed list but these will include: "*the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations*".[85]

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[84] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC) para 33. See also: *Freedom Under Law v Acting Chairperson: Judicial Service Commission, and Others* 2011 (3) SA 549 (SCA) para 19.

[85] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) para 17 citing O'Regan J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and*

50. In *Freedom Under Law v Acting Chairperson: Judicial Service Commission, and Others*[86] this Court recognised the standing of a non-profit company whose mission included promoting democracy under law, advancing the understanding and respect for the rule of law and the principle of legality, and securing and strengthening the independence of the judiciary, to act in the public interest to seek the review of a decision by the Judicial Services Commission to dismiss complaints made against a Judge President.[87]

51. This matter is distinguishable from the present in two respects. **First**, the DA may have standing to approach a court to have the decision of the Minister and the Board reviewed. This is however not the same as seeking to enforce the recommendations contained in the PP Report. **Secondly**, the Public Protector is not an individual called upon to enforce compliance with her report. The office of the Public Protector is established by Chapter 9 of the Constitution with the powers and financial means to take appropriate remedial action in the public interest.

52. The DA also relies on the decisions of this Court and the Constitutional Court which 'upheld' its standing "*to bring similar challenges in the public interest*"[88] in the matter of *Democratic Alliance v President of the Republic of South Africa and Others*[89] and *Democratic Alliance and Others v Acting National Director of Public*

Others 1996 (1) SA 984 (CC) para 234. See also: *Freedom Under Law v Acting Chairperson: Judicial Service Commission, and Others* supra para 19.
[86] 2011 (3) SA 549 (SCA).
[87] At para 21-23.
[88] RA para 17, 4/691.
[89] 2013 (1) SA 248 (CC). The decision of the Supreme Court of Appeal in this matter is reported as: *Democratic Alliance v President of the Republic South Africa and Others* 2012 (1) SA 417 (SCA).

Prosecutions and Others[90]. Both of these decisions concerned an application for review. Neither of them however involved an application for 'interim' relief which would have had the effect of enforcing a report with the status of the Public Protector's report.

53. Part of the DA's complaint is that the Board and the Minister's decision to appoint Motsoeneng as permanent COO was taken in a manner that infringed the dignity of the office of the Public Protector and in doing so they acted in contravention of section 181(3) of the Constitution. Accordingly the DA seeks a declaration to that effect in Part B.[91] This is separate to the question of whether the DA can seek an order enforcing compliance with a non-binding report.

54. The PPA provides for instances where conduct amounts to contempt of the Public Protector. It is the Public Protector who has *locus standi* to take steps to deal with such contempt that she may feel has been committed. It does not give a political party, no matter how much representation it has at a national, provincial or local government level, *locus standi* to obtain an order to enforce a Public Protector's report, when this is not legally binding in the first place.

55. Finally, a display of public opinion on an issue in the media does not equate to 'public interest'.[92] To the extent that the DA relies on media reports of "*widespread*

[90] 2012 (3) SA 486 (SCA).
[91] Notice of motion, prayer 11, 1/4
[92] See: *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) para 5, fn 3 (the Constitutional Court did not make any finding in regard to standing in this case); and *S v Makwanyane* 1995 (3) SA 391 (CC) para 88 on the role of public opinion in a constitutional democracy.

condemnation"[93] in regard to Motsoeneng's appointment, this does not give it standing to institute these proceedings.

56. In the circumstances the DA does not have standing to seek the relief sought in Part A and the Court *a quo* erred in finding that it did.

VI. THE DA'S RELIANCE ON HEARSAY

57. The DA relied solely on the PP Report and media reports (themselves based on hearsay), to found the requirements for the relief sought in Part A. The application was therefore based entirely on inadmissible hearsay evidence. No factual basis for the various allegations made against Motsoeneng was placed before the Court *a quo* in any credible or reliable form.

58. Despite this and the material disputes of fact that arose from the papers, the Court *a quo* rejected the versions of the SABC, the Minister and Motsoeneng. There was no basis for doing so.[94]

59. In *Kiliko and Others v Minister of Home Affairs and Others*[95] the court disregarded *the allegations that formed the factual basis* a report of the Public Protector as they had not been placed before it in an acceptable evidentiary manner.[96]

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[93] FA para 63, 1/29-30.
[94] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1983 (3) SA 623 (A) at 634E-635C.
[95] 2006 (4) SA 114 (C).
[96] At para 18.

60. In *Public Protector v Mail & Guardian Ltd and Others*[97] referred to above, this Honourable Court, in the context of considering the duties of the Public Protector when conducting an investigation, examined the nature of material that was placed before the Public Protector and the evidentiary value of this. The Court was not called upon to make findings on the veracity or authenticity of such material and was concerned with it only insofar as it cast light on the adequacy of the Public Protector's investigation.[98] It set out the approach to be taken to such evidence, drawing a distinction between evidence that is admissible to prove that a document exists or that a statement was made, and inadmissible hearsay evidence as to the truth of the contents of that document or statement.[99]

61. The DA's case *in casu* is based entirely on the correctness of the findings in the PP Report, the factual basis for which was not properly before the Court *a quo*. Manifestly, it is not simply relying on the fact that the Public Protector published a report. It is the Public Protector's findings which the DA seeks to rely on to establish the requirements for interim relief.[100]

62. In *De Lacy v South African Post Office* [101] the Constitutional Court dealt with the weight to be given to reports by an Ombudsman and an auditors firm. This Honourable Court had discounted these reports as hearsay or of little evidentiary weight.[102] The Constitutional Court per Moseneke DCJ confirmed this approach saying: "*the decision whether the report of the Ombudsman or of the auditors is*

[97] 2011 (4) SA 420 (SCA).
[98] At para 13.
[99] At para 14.
[100] See: FA para 91 – 108, 1/39-44.
[101] 2011 JDR 0504 (CC).
[102] *S A Post Office v De Lacy* (19/08) [2009] ZASCA 45 (13 May 2009) para 30.

admissible or ought to carry any weight is a matter of law which in my view is not open to any criticism".[103] The appellants in that case had sought to rely on these reports as evidence of a fraudulent tender process in circumstances where they had no independent evidence of fraud or misconduct involved in the tender.[104]

63. The DA argued that because the Report was prepared by a 'constitutional body' the findings of the Public Protector cannot be hearsay.[105] That cannot be so. The nature of evidence as hearsay depends not on the identity of the person giving the hearsay evidence, but on that person's involvement in the particular proceedings and whether the probative value of the evidence depends upon the credibility of any person other than the person giving such evidence.[106] As the DA relies on more than simply the fact that findings were made and a report prepared, in order to substantiate its case, it is relying on hearsay evidence properly so called.

64. The deponent to the DA's founding and replying affidavits, Mr Selfe, quite clearly has no personal knowledge of the information contained in the PP Report.[107] The Court is not required to admit hearsay simply because the source of the evidence and grounds for the deponent's belief in their veracity are disclosed.[108] The admission is still governed by section 3 of the Law of Evidence Amendment Act ("the LEAA").[109]

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[103] At para 83.
[104] See para 19 & 104.
[105] RA para 25, 4/693.
[106] Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 defines 'hearsay' as: **"***evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence*".
[107] He confirms his lack of person knowledge in respect of the events of 7 and 8 July 2014 at paragraph 21 of the replying affidavit. He asserts no personal knowledge of the facts contained in the PP Report.
[108] *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 692C.
[109] 45 of 1988.

65. While a court may be entitled to admit hearsay evidence in urgent matters where it is necessary to restrain immediate injury and to maintain the *status quo,*[110] this is not such a matter. This is however also subject to the provisions of section 3 of the LEAA.

66. Taking into account the various factors listed in section 3(1) of the LEAA, as well as the fact that, but for the reliance on the PP Report, the DA is not able to make out a case for the relief it seeks in Part A or, put differently, the DA's complete dependence on the Report, it would not be in the interests of justice to admit the hearsay evidence.

67. In those circumstances there was no reason to reject the evidence of the chairperson of the SABC, the Minister or Motsoeneng. As the entire precipice of the DA's case falls away without its reliance on inadmissible hearsay evidence, the application should have been dismissed by the Court *a quo*.

VII. THE DECISION TO 'REJECT' THE PUBLIC PROTECTOR'S FINDINGS

68. The Court *a quo* found that the Board and the Minister had rejected the findings and remedial action of the Public Protector, and that this was arbitrary, irrational and unlawful.[111]

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[110] *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* supra at 692C.
[111] Judgment para 75-83, 5/804-807.

69. "[R]*ationality is not aimed at testing the reasonableness, fairness or appropriateness of a decision, nor whether an alternative or better means could have been employed to achieve the desired end*. *It is restricted to the 'threshold question' whether the decision taken 'is properly related to the public good it seeks to realise*'".[112]

70. The Board indeed took steps to ensure that the Public Protector's findings and recommendations are, where appropriate, implemented.[113] These included the formation of a Committee of Chairs comprised of various Chairpersons of the various committees of the Board, including: Audit; Governance and Nominations; Human Resources and Remuneration; and Social and Ethics Committees, to prepare a report to the Board;[114] as well as procuring the services of independent legal representatives to investigate and review the PP Report and prepare a report for the Board on this.[115] The Board was also been in constant communication with the Public Protector regarding the implementation plan and the difficulties faced by the Board.[116]

71. The Board did not therefore simply disregard the Public Protector's findings and recommendations. Taking into account the evidence of the SABC and the Minister and, with respect, applying the *Plascon-Evans* rule, that the response of the

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[112] *Minister of Education for the Western Cape v Beauvallon Secondary School* (865/13) [2014] ZASCA 218 (9 December 2014) para 38, referring to *Law Society of South Africa & others v Minister of Transport & another* 2011 (1) SA 400 (CC) para 35.
[113] AA (SABC) para 20-24 & 104- 109, 2/383-385 & 2/416-417.
[114] AA (SABC) para 105-107, 2/416-417.
[115] AA (SABC) para 108, 2/417.
[116] AA (SABC) para 106 & annexure "ZET15", 2/416 & 3/492.

Minister and the SABC was entirely rational and the reasons for such response were cogent.

VIII. INAPPROPRIATENESS OF RELIEF GRANTED

72. After finding that the conduct of the Board and the Minister was constitutionally unlawful,[117] the learned Judge held that a "*just and equitable order is one directing the Board to institute disciplinary proceedings against Motsoeneng as contemplated in paragraph 11.3.2.1 of the Report*".[118]

73. An appropriate remedy must be fair to those affected by it and vindicate effectively the constitutional right violated.[119] A court may fashion a new remedy where one does not exist to ensure that the rights enshrined in the Constitution are protected and enforced.[120]

74. The question is therefore whether the suspension of Motsoeneng was required in order to protect or enforce any rights in the Constitution? Given that the Public Protector did not include in her remedial action that Motsoeneng be suspended, the answer to this must surely be no. One need only consider the situation that would have arisen had the Board instituted disciplinary action but not suspended him: the DA would not have been able to come to court and complain that the

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[117] Judgment para 83, 5/807.
[118] Judgment para 88, 5/809.
[119] *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, SASSA and others* 2014 (4) SA 179 (CC) para 29, citing *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 29.
[120] *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC) para 19.

constitutional role of the Public Protector was being undermined or that the Board and/or the Minister had acted irrationally in not suspending him.

75. The basis on which the Court *a quo* appears to have found that it was necessary to suspend Motsoeneng is the Court's view that "*it is unlikely that [the Board] would even consider suspending him*".[121] This is however without any factual basis. There was therefore no need to create a new constitutional remedy as the Court *a quo* did.

76. The relief granted by the Court *a quo*, was inappropriate for at least three reasons.

76.1. **First**, it amounts to an impermissible infringement of the separation of powers doctrine.

76.2. **Secondly**, the suspension of Motsoeneng was not appropriate in the circumstances and infringes his rights to dignity and fair labour practices.

76.3. **Thirdly**, having found that the conduct of the Board and the Minister was arbitrary and irrational and therefore unlawful, the relief granted by the Court *a quo* amounted to a substitution of the learned Judge's own views on the Public Protector's findings. Having in effect set aside the decision not to institute disciplinary proceedings, the matter should, with respect, have been referred back to the Board and/or the Minister for reconsideration.[122]

77. The first two of these are considered in more detail below.

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[121] Judgment para 100, 5/814. Cf: the reasoning of Murphy J in *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP) para 234, which was rejected by this Honourable Court on appeal, as discussed below.

[122] *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) para 29.

a) Infringement of the separation of powers doctrine

78. The effect of the order is that an employer is now compelled to institute disciplinary proceedings against an employee, where that employer has already considered that there is no reasonable basis to do so. In the circumstances, such a remedy does not protect and enforce the Constitution but rather oversteps the separation of powers.

79. The order granted by the Court *a quo* usurps the disciplinary function of the Board and the Minister. It further usurps the functions of the Executive and the Legislature to remove a member from the Board in certain defined circumstances.[123] This is an impermissible intrusion into the domain of these arms of government.

80. The Broadcasting Act 4 of 1999 ("the Broadcasting Act") does not deal with the appointment of the Executive Directors, this process is provided for in the Articles of Association ("the Articles")[124] and supplemented by the SABC Board Charter ("the Charter").[125] The provisions of the Articles and the Broadcasting Act make it clear that the appointment of a COO, whether acting or permanent, is the function of the Minister.[126] It is therefore a decision taken by a Member of the Executive in his or her discretion.

[123] For a general discussion on the principle of separation of powers see the statements of the Constitutional Court per Langa CJ in *Glenister v President of the Republic of South Africa and Others* supra para 29-36.
[124] The Articles form part of the Memorandum of Incorporation of the SABC which is attached as annexure "JS6" to the DA's founding affidavit, 2/331-375.
[125] A copy of the Charter is attached as annexure "JS5" to the DA's founding affidavit, 2/303-324.
[126] AA (Motsoeneng) para 23-24, 3/564-565.

81. It is also the function of the Minister to remove a member of the Board (which includes the COO),[127] and he or she must do so after a finding to that effect by a committee of the National Assembly and the adoption by the National Assembly of a resolution calling for the member's removal.[128] The Minister also has a discretion to remove a member from the Board in the circumstances contemplated in section 15(1)(a) on account of misconduct or inability to perform his or her duties efficiently, "*after due inquiry and upon recommendation by the Board"*

82. The conduct of the COO, being an Executive Director, is subject to the control of the Board,[129] which as the functionary that controls the affairs of the SABC,[130] exercises any disciplinary action over directors of the SABC.

83. The order that Motsoeneng be summarily suspended pending the outcome of disciplinary proceedings against him amounts to an infringement of the separation of powers doctrine which precludes the courts from impermissibly assuming the functions that fall within the domain of the executive.[131]

84. No matter the level of alleged incompetence or maladministration, especially allegations which are not proven, the separation of powers demands that the powers of constitutionally and legislatively ordained organs of state must not be usurped.[132]

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[127] Section 12, of the Broadcasting Act.
[128] Section 15A(1) of the Broadcasting Act.
[129] Section 14(2) of the Broadcasting Act.
[130] Section 13(11) of the Broadcasting Act.
[131] *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA) para 51.
[132] See: O'Regan K "Checks and Balances Reflections on the development of the Doctrine of Separation of Powers under the South African Constitution" FW De Klerk Memorial Lecture, Potchefstroom, 10 October 2005 (available at http://www.saflii.org/za/journals/PER/2005/5.html).

85. In *National Director of Public Prosecutions and Others v Freedom Under Law,*[133] this Court reiterated the importance of the separation of powers doctrine. Notwithstanding that it upheld the decision of the court *a quo* to set aside the impugned decisions, it held that the mandatory interdicts sought in that case would amount to "*inappropriate transgressions*" of the separation of powers doctrine.[134] It accordingly set these interdicts aside stating that "*the court will only be allowed to interfere with this constitutional scheme on rare occasions and compelling reasons*".[135]

86. The mandatory interdicts in question in that case were not dissimilar to the relief granted by the Court *a quo* in the present matter. The effect on the separation of powers doctrine *in casu* is greater given that the impugned decisions of the Minister and the Board (to appoint Motsoeneng) have yet to be set aside on review. The present case is not a rare occasion justifying an interference with the constitutional scheme.

87. As we have set out above, the relief granted by the Court *a quo* is not necessary to preserve or protect any right. It is aimed at enforcing the version of the remedial action taken by the Public Protector that the DA believes should have been taken. It removes Motsoeneng and precludes his future appointment when this was manifestly not the scope of the Public Protector's remedial action. The suspension

[133] 2014 (4) SA 298 (SCA).
[134] At para 51.
[135] Ibid.

of Motsoeneng was not necessary to provide appropriate relief. It therefore does violence to the separation of powers doctrine.[136]

b) Suspension

88. The remedial action taken by the Public Protector does not include the suspension of Motsoeneng. However the learned Judge in the Court *a quo* appeared to find that this was implied by the Public Protector's "*remedial action…that the Minister had to take urgent steps to fill the…vacant position of COO*".[137]

89. A suspension is a punitive sanction that is imposed after a finding of guilt as an alternative to dismissal. It may generally only be imposed in circumstances pending a disciplinary hearing where there is a risk that the employee will interfere with the investigation or the disciplinary process.[138]

90. The learned Judge relied on the concept of a "*suspension for good administration*" and referred to in the English decision of *Lewis v Heffer and others.*[139] The Court *a quo* relied on this case as authority for the proposition that the suspension of an employee summarily may be justified if good administration requires it, finding that "*unless he is suspended, Motsoeneng poses as a real risk not only to the integrity of the investigation concerning the allegations of his misconduct, but to the*

[136] See: Judgment para 99, 5/813-814.
[137] Judgment para 89, 5/809.
[138] *Koka v Director-General: Provincial Administration North West Government* [1997] 7 BLLR 874 (LC) at 883.
[139] [1978] 3 All ER 354 (CA) at 346c-e.

disciplinary enquiry itself",[140] and that the rules of natural justice did not apply to the particular circumstances of this case.[141]

91. *Lewis* concerned the suspension by the National Executive Committee of the Labour Party of constituency officers and committees. Denning MR held that where a suspension was made as a holding operation pending enquiries, the rules of natural justice did not apply, as the suspension was merely done as a matter of good administration in a situation where prompt action was necessary.[142]

92. This is not the position in South African law. Our law, as set out in *Muller and Others v Chairman, Ministers' Council, House of Representatives, and Others*,[143] a Full Bench decision by which the Court *a quo* was bound, requires that the principles of natural justice apply to a suspension, whether as a punitive sanction or pending a disciplinary inquiry.[144]

93. In a more recent decision, Wallis J (as he then was) referred with approval to the reasoning of Howie J in *Muller supra,* stating: *"*[t]*he correctness of that decision has not subsequently been challenged and it appears to reflect current received wisdom in the field of employment."*[145]

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[140] Judgment para 96, 5/812.
[141] Judgment para 100, 5/814.
[142] At 364c-e.
[143] 1992 (2) SA 508 (C).
[144] At 523A-C and 524J per Howie J (as he then was): "*I respectfully agree with the reasoning on which the Lewis and Furnell cases were distinguished in the appellate judgments in the Dixon and Birss matters. I also agree with the reasoning on which those matters were decided. That reasoning is persuasive and casts the nature and implications of a public service officer's suspension without pay in telling and accurate perspective. Such suspension unquestionably constitutes a serious disruption of his rights*" (at 523A-C).
[145] *Sokhela and Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) and Others* 2010 (5) SA 574 (KZP) para 83.

94. The DA contends, in emotive language, that "*every minute that* [Motsoeneng] *spends in a position of power at the SABC is a further threat to this already failing institution*";[146] and that Motsoeneng has "*almost single-handedly undermined the independence of the SABC and perpetuated a crisis of governance*" at the SABC. This is the DA's own conclusion and not that contained in the PP Report.

95. It was not alleged that Motsoeneng's suspension is necessary to protect the integrity of any investigation or disciplinary process. Indeed, this could not be alleged as on the DA's version he is already guilty. It simply wanted an order of court to sanction him. There was no evidence to suggest that Motsoeneng would interfere with the disciplinary proceedings in any way and the Court *a quo* erred in coming to this conclusion.[147]

96. The Court *a quo* therefore misdirected itself by finding, by implication, that the assumption that it was unlikely that the SABC would even consider suspending Motsoeneng,[148] justified a departure from the rules of natural justice. The Court *a quo* was bound by the decision in *Muller (supra).* Motsoeneng was entitled to be heard by his employer, the SABC, prior to being suspended pending the outcome of any disciplinary proceedings instituted against him.

97. A summary suspension without a hearing (which is in effect what the Court *a quo* ordered) would not only infringe Motsoeneng's contractual rights arising from the

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[146] FA para 92, 1/40.
[147] Judgment para 95, 5/812.
[148] Judgment para 100, 5/814.

contract of employment but it will amount to an unfair labour practice and would be in breach of PAJA and the rules of natural justice.

98. Clause 12 of the SABC Personnel Regulations (Jan 2000)[149] deals with suspensions and provides that before being suspended, pending the holding of a disciplinary hearing an employee shall be given an opportunity to respond to the proposed suspension before a decision is taken. The suspension ordered by the Court *a quo* therefore infringes his right to fair labour practices[150] as well as the implied contractual right to fairness in any disciplinary process.[151] These rights have both a procedural and substantive dimension.[152] From an administrative law point of view, a suspension which constitutes administrative action in terms of PAJA attracts the obligations of procedural fairness laid down in PAJA.[153] These too are circumvented by the order of the Court *a quo*.

99. Motsoeneng's constitutional, statutory and contractual rights cannot simply be ignored because the position he occupies is within the public sphere.[154]

100. The Court *a quo* further erred in holding that the reasons advanced by Motsoeneng as to why he should not be suspended, do not bear scrutiny, and that any prejudice he would suffer would be ameliorated by the fact that he would suffer no loss of

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[149] AA (Motsoeneng) annexure "HM2", 4/665.
[150] Both in terms of section 23(1) of the Constitution and section 186(2)(b) of the Labour Relations Act 66 of 1995.
[151] *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) para 11.
[152] Ibid.
[153] *Sokhela and Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) and Others* supra para 83.
[154] *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 53-65. In this case however the dispute was whether the President had the power remove the head of the NIA, not whether a Court could order his suspension at the behest of a political party.

income.[155] A suspension, even with pay, will affect Motsoeneng's dignity. A suspension carries with it negative personal and social consequences for an employee, affecting the employee's dignity as well his or her reputation and integrity in the workplace and beyond, job security and prospects for advancement. This has repeatedly been recognised by our courts.[156]

101. The Full Bench in *Muller supra,* set out clearly the effect of a suspension: "*The implications of being deprived of one's pay are obvious. The implications of being barred from going to work and pursuing one's chosen calling, and of being seen by the community round one to be so barred, are not so immediately realised by the outside observer. There are indeed substantial social and personal implications inherent in that aspect of suspension."*[157]

102. This Honourable Court has also emphasised that "[t]*he freedom to engage in productive work – even where this is not required in order to survive – is indeed an important component of human dignity*".[158]

103. Motsoeneng's dignity will be severely prejudiced if he is pre-emptively suspended and prevented from carrying out his functions as COO and as an employee of the SABC, creating an impression in the eyes of the public that he is guilty of the charges that are to be instituted against him in the disciplinary proceedings, before these proceedings have even been instituted, let alone finalised.

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[155] Judgment para 101, 5/814.
[156] *POPCRU obo Masemola & others v Minister of Correctional Services* [2010] 4 BLLR 450 (LC) at 455, para 34; *Mogothle v Premier of the North West Province & another* [2009] 4 BLLR 331 (LC) at 345, para 47; *SAPO v Jansen Van Vuuren NO & others* [2008] 8 BLLR 798 (LC) at 804, para 39.
[157] At 523.
[158] *Minister of Home Affairs and others v Watchenuka and another* 2004 (4) SA 326 (SCA) para 27.

104. Finally, the SABC has always known that Motsoeneng did not have a matric certificate. Motsoeneng denies that he ever misrepresented this to the SABC, a denial which is echoed by the Board. However this suggestion was raised as far back as 2006 in the disciplinary proceedings instituted against him (for reasons unrelated to the matric certificate issue).[159] Disciplinary action instituted after such an unreasonable delay would be unfair.[160]

105. In the circumstances, the relief sought is entirely inappropriate and the application should accordingly be dismissed.

IX. FAILURE TO ESTABLISH GROUNDS FOR MANDATORY INTERDICT

106. The Court *a quo* held that aside from the constitutional breach by the Board and the Minister, the relief was justified as there was a "*prima facie case which warrants the institution of disciplinary proceedings against Motsoeneng*".[161] In other words the Court found that independently of the attempt to enforce the PP Report, the DA was entitled to final mandatory relief. In this respect the Court misdirected itself in finding that the DA had established the requirements for final relief.

107. The Court *a quo* held that the clear right that the DA asserted was compliance with the rule of law and the principle of legality and certain statutory rights conferred by

[159] AA (Motsoeneng) para 13.7, 3/558.
[160] *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* (CCT 10/13) [2013] ZACC 49 (18 December 2013); 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC) para 44-48. This was in the context of a delay in bringing a review application, however the review sought the setting aside of the promotion of two employees.
[161] Judgment para 102-103, 5/815.

the Broadcasting Act.[162] The Court however erred in accepting this. The right actually relied upon in substance, which the DA does not have, is a right to demand that disciplinary proceedings be instituted by the SABC against its COO. This is what the relief was aimed at.

108. No such right exists. It is not conferred by the Broadcasting Act. As set out above, the discipline of directors of the SABC is the function of the Board. It is clear that no basis exists, independent of the review of the Board and the Minister's response to the PP Report, to challenge any decision of the Board not to institute disciplinary proceedings against a director. To allow this would amount to a grave infringement of the separation of powers doctrine and place every government department or public institution at risk of litigation to force them to take disciplinary steps against their employees.[163]

109. Once it is accepted that the DA has no right to demand the institution of disciplinary proceedings, it follows that there is no injury committed. The Court *a quo's* finding in this regard was in event, with respect, premised on its misdirection in regard to the disputes of fact raised in the application.

110. It follows then that the Court *a quo* erred in finding that the DA had proved a clear right and an injury actually committed for the purposes of a final mandatory interdict that disciplinary proceedings be instituted against Motsoeneng and that he be suspended pending their finalisation.

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[162] Judgment para 104, 5/815.

[163] Cf: the approach taken by the Constitutional Court to determining whether the performance of a function by a member of the judiciary offends the separation of powers in *NSPCA v Minister of Agriculture, Forestry and Fisheries, and Others* 2013 (5) SA 571 (CC) para 38.

X. CONCLUSION & COSTS

111. In the circumstances we submit that the DA failed to make out a case for the relief sought in Part A. Taking into account that:

111.1. this application was not urgent;

111.2. it was not competent for the DA to seek to enforce the recommendations of the Public Protector;

111.3. it was launched prior to the expiry of the time period for filing a response to the Public Protector's recommendations; and

111.4. it was based entirely on hearsay evidence,[164]

the Court *a quo* should have dismissed the application with costs, including the costs of two counsel.

112. Accordingly the third appellant seeks the following order:

a) The appeal succeeds;

b) The first respondent is to pay the third appellant's costs of the appeal, such costs to include the costs of two counsel; and

c) The order of the Court *a quo* is set aside and replaced with the following order:

> "The application for the relief set out in Part A of the applicant's notice of motion, is dismissed with costs, including the costs of two counsel, such costs to be paid by the applicant."

[164] *Epstein and Payne v Fraay and Others* 1948 (1) SA 1272 (W) at 1276.

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30 July 2015