IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

SCA 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 Respondent

FIRST APPELANT'S HEADS OF ARGUMENT

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INTRODUCTION

1. This is an appeal against the whole of the order and judgment of Schippers J in the High Court (Western Cape Division) in *Democratic Alliance v South African Broadcasting Corporation SOC Limited and others* (12497/2014) 2015 (1) SA 551 (WCC) handed down on 24 October 2015, in which the Court granted the following substantive orders:

> "(1) The Board of the South African Broadcasting Corporation Limited (SABC) shall, within fourteen (14) calendar days of the date of this order, commence, by way of serving on him a notice of charges, disciplinary proceedings against the eighth respondent, the Chief Operating Officer (COO), Mr George Hlaudi Motsoeneng, for his alleged dishonesty relating to the alleged misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increases of Ms Sully Motsweni; and his role in the alleged suspension and dismissal of senior members of staff, resulting in numerous labour disputes and settlement awards against the SABC, referred to in paragraphs 11.3.2.1 of the report of the Public Protector dated 17 February 2014.
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> (2) An independent person shall preside over the disciplinary proceedings.
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> (3) The disciplinary proceedings referred to in paragraph (1) above shall be completed within a period of sixty (60) calendar days after they have been commenced. If the proceedings are not completed within that time, the Chairperson of the Board of the SABC shall deliver an

> affidavit to this court; (a) explaining why the proceedings have not been completed; and (b) stating when they are likely to be completed. The applicant shall be entitled, within five (5) calendar days of delivery of the affidavit by the Chairperson, to deliver an answering affidavit.
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> (4) Pending the finalisation of the disciplinary proceedings referred to in paragraph (1), and for the period referred to in paragraph (3) above, the eighth respondent shall be suspended from the position of COO of the SABC, on full pay. …"[1]

2. The appeal is also against the costs order granted against the first appellant ("the SABC").

3. The appeal raises the following issues:

   3.1. First, whether the findings and remedial action of the Public Protector are binding and enforceable.

   3.2. Second, whether the SABC and the second appellant ("the Minister") could differ with and not implement the findings and remedial action of the Public Protector that were the subject matter of the application by the respondent ("the DA") in the High Court if they had a rational basis for doing so.

   3.3. Third, whether the SABC had a rational basis to differ with and not implement certain of the findings and remedial action of the Public

[1] Vol 5 p 831 para 127.

Protector, which formed the subject matter of the DA's application in the High Court.

3.4. Fourth, whether Schippers J was correct in finding that the SABC did not have a rational basis for differing with and not implementing the findings and remedial action of the Public Protector that were the subject matter of the application by the DA in the High Court.

3.5. Fifth, whether the substantive orders granted by Schippers J constitute an appropriate remedy or whether they infringe the doctrine of separation of powers and any constitutional rights of the third appellant ("Mr Motsoeneng"), including his right to fair labour practices.

4. Our submissions follow the sequence set out in the "Table of Contents" above.

SECTION 182 OF THE CONSTITUTION[2]

The Public Protector's powers and functions are investigative and her findings and remedial action are not binding and enforceable

[2] Constitution of the Republic of South Africa, 1996.

5. Section 182 of the Constitution deals with the Public Protector's powers and functions. It provides as follows:

> "(1) The Public Protector has the power, as regulated by national legislation—
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> *(a)* to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
>
> *(b)* to report on that conduct; and
> *(c)* to take appropriate remedial action.
>
> (2) The Public Protector has the additional powers and functions prescribed by national legislation.
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> (3) The Public Protector may not investigate court decisions.
>
> (4) The Public Protector must be accessible to all persons and communities.
>
> (5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential."

6. We submit that it is clear from the provisions of section 182 of the Constitution that the Public Protector's powers and functions are investigative in nature. It is pursuant to the exercise of the investigative powers and the performance of those functions that the Public Protector is given the power to report on the conduct investigated and to take appropriate remedial action.

7. The taking of appropriate remedial action does not change the nature of the powers and functions into anything other than investigative. For example, the powers and functions do not change by reason of the remedial action taken into adjudicative powers and functions that could result in remedial action that approximates Court decisions and orders, which are by law binding and enforceable.

8. Having regard to the provisions of section 182 of the Constitution, the SCA in *Public Protector v Mail & Guardian*[3] makes it plain that the Public Protector performs investigative functions:

> "… His or her mandate is an investigatory one, requiring proaction".[4]

9. This is in line with what the Constitutional Court said in *In re: Certification of the Constitution of the Republic of South Africa, 1996*:[5]

> "[161] The purpose of the office of Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics. NT 182(1) provides that the Public Protector has the power "to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice". NT 182(4) provides that the Public Protector must be "accessible to all persons and communities". The Public Protector is an office modelled on the institution of the ombudsman, whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption or prejudice. The NT clearly envisages that members of the public aggrieved by the conduct of

[3] *Public Protector v Mail & Guardian* 2011 (4) SA 420 (SCA).
[4] Para 9.
[5] *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC).

> government officials should be able to lodge their complaints with the Public Protector, who will investigate them and take appropriate remedial action."
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> (Emphasis added)

10. Given this, Schippers J was correct in finding that the functions and powers of the Public Protector are not adjudicative and that unlike Courts, the Public Protector does not hear and determine causes.[6] This finding is in line with that of the SCA in the *Mail & Guardian* case referred to above, i.e. that the Public Protector does not adjudicate or determine disputes between parties,[7] by the application of the law to facts. This is a function reserved for the Courts and Tribunals, as contemplated in section 34 of the Constitution.[8]

11. Being an office that is modelled on the institution of the ombudsman, the Public Protector's function is to respond to complaints and grievances against the public sector by conducting independent investigations and recommending remedial action. The Public Protector has no enforcement powers. Her powers are limited to making findings and recommendations as regards remedial action.

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[6] Judgment Vol 5 p 791 para 50.
[7] Para 9.
[8] Section 34 of the Constitution provides as follows:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

12. Schippers J was also correct in finding that unlike an order or decision of a Court contemplated in section 165(5) of the Constitution, which "binds all persons to whom and organs of state to which it applies", the Constitution nowhere provides that a finding or remedial action of the Public Protector shall so bind persons and organs of state to which it applies.[9]

13. If it had been the intention to confer similar powers to the Public Protector, i.e. to make final and binding decisions, as Courts do, section 182 of the Constitution would have contained a similar provision to section 165(5) of the Constitution. The position of the Public Protector in this regard is not significantly different to that of the other comparable Chapter 9 institutions in sections 184,[10] 185[11] and 187[12] of the Constitution.

14. Furthermore, if that intention was present, the Public Protector Act, 23 of 1994 ("the PP Act") would have contained appropriate provisions just as in the case of Tribunals envisaged in section 34 of the Constitution, whose powers to make binding decisions are conferred by their empowering legislation. Examples include the CCMA[13] in terms of section 143 of the Labour Relations Act, 66 of 1995 ("the LRA"), which deals with "the effect

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[9] Judgment Vol 5 p 791 para 51.
[10] South African Human Rights Commission.
[11] Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
[12] Commission for Gender Equality.
[13] Commission for Conciliation Mediation and Arbitration.

of arbitration awards";[14] and the Competition Tribunal in terms of section 64 of the Competition Act, 89 of 1998, which deals with the "status and enforcement of orders".[15]

15. The Public Protector is a creature of statute like the above Tribunals. The institution has no inherent powers, including inherent powers to make binding decisions. Such powers must be conferred on her by statute, i.e. the Constitution and/or the PP Act. None such power is conferred.

16. Schippers J was further correct in his finding that the power to take remedial action means no more than that the Public Protector may take steps to redress improper or prejudicial conduct.[16] These steps are essentially corrective or curative – not too different in concept to the measures called for in the Constitution to achieve equality in order to remedy injustices of the past. Their purpose is more of a cure than an imposition of penalty. The Constitutional Court put it this way in *South African Police service v Solidarity obo Barnard,*[17] in the context of remedial measures under the Constitution:

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[14] Section 143(1) provides that "an arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award."
[15] Section 64(1) of the Competition Act provides that "any decision, judgment or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court".
[16] Judgment Vol 5 p 791 para 51.
[17] [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014).

> "Our quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive."[18]

17. We are not, by these submissions, suggesting a diminished role for the institution of the Public Protector. The institution plays a critical constitutional role in the fight against abuse of power, dishonesty and maladministration in public institutions.[19] It supports adherence to the rule of law. Currie and De Waal[20] describe the purpose of the rule of law as follows:

> "to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedure."

18. But the enforcement of the rule of law through binding decisions and orders is given to the Courts and other Tribunals.

19. We submit that Schippers J was correct in accepting the following conception of the office of the Public Protector by Michael Bishop and Stuart Woolman, "Public Protector" in *Constitutional Law of South Africa,* 2nd Ed Vol 1[21]:

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[18] At para 30.
[19] Section 6 of the PP Act.
[20] Currie & De Waal *The Bill of Rights Handbook* (2005) at 10.
[21] Judgment, Vol 5, pp 794 - 795, para 57.

> "One of the most common criticisms levelled against the Public Protector, and ombudsman generally, is that the institution lacks the power to make binding decisions. In truth, however, the ability of the Public Protector to investigate and to report effectively – without making binding decisions – is the real measure of its strength. Stephen Owen explains this apparent paradox as follows:
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> > "Through the application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause a reluctant change in a single decision or action, by definition it creates a loser who will be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of potential complainants in the future".[22]

20. We submit further that the type of remedial action preferred by the Public Protector in a particular case does not determine its binding nature upon those affected by it or the Courts. Otherwise the Public Protector would clothe herself with powers not conferred by the Constitution and the PP Act by her choice of remedial action. Thus the wording preferred by the Public Protector in expressing remedial action does not determine its binding nature and effect.

21. For its part, the PP Act confirms the above characterisation of the Public Protector's powers and functions. It empowers the Public Protector to make appropriate recommendations regarding appropriate redress.

22. Section 6 of the PP Act deals with reporting matters to and additional powers of Public Protector. Section 6(4)(c) provides as follows:

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[22] At 24A-3.

> "(4) The Public Protector shall, be competent— …
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> (*c*) at a time prior to, during or after an investigation—
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> (i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority; and charged with prosecutions; or
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> (ii) if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority; and affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority; …"
>
> (Emphasis added)

23. We submit the following in conclusion:

23.1. There is nothing in the scheme of section 182 of the Constitution, or the Constitution as a whole, that gives the words "to take appropriate remedial action" a similar meaning to words such as "a decision of the Public Protector binds all persons to whom and organs of state to which it applies". To find that the words used in section 182(1)(c) of the Constitution have the latter meaning would cross the divide between interpretation and legislating,[23] and offend separation of powers.

[23] See *S v Zuma and Others* 1995 (4) BCLR 401 (CC) paras 17-18; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

23.2. Remedial action in terms of section 182(1)(c) of the Constitution, which is not further described or tabulated in that section, could include approaching a Court for appropriate relief or referring a matter to appropriate authorities such as the police and others for appropriate action. It could also include approaching the National Assembly for intervention in terms of section 8(2)(b) of the PP Act.

23.3. Schippers J was correct in finding that the powers of the Public Protector cannot be equated with those of a Court and that her findings and remedial action are not binding and enforceable and an organ of state may accept or reject them.[24]

23.4. Furthermore, the judgment provides a rational way of approaching the findings and remedial action imposed by the Public Protector, which is that the findings should not be ignored. [25] This, we submit, provides a fair balance between the legal duty to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness without giving the office the status of a Court or body with similar powers.

[24] Judgment, Vol 5, p 796, para 59.
[25] Ibid, para 60.

An organ of state may accept or reject the Public Protector's findings and remedial action

24. We accept that organs of state cannot ignore the findings and remedial action of the Public Protector.

25. We submit that the reason why organs of state cannot ignore the findings and remedial action of the Public Protector is because of the constitutional obligation on them to assist and protect the Public Protector, and to ensure *inter alia* the effectiveness of the institution of the Public Protector. They may also not interfere with the functioning of the Public Protector.[26] They also have an obligation in terms of section 41 of the Constitution to deal with the Public Protector's findings of fact and recommended remedial action bona fide and seriously.

26. The above guarantees adequately safeguard the institution of the Public Protector and ensure that it is not undermined. The Public Protector is entitled to seek the intervention of the National Assembly or that of the Courts in appropriate cases – to further safeguard the effectiveness of the institution.[27]

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[26] Section 181(3) and (4) of the Constitution.
[27] Schippers J took a different view, which we submit is not correct. See Judgment Vol 5 p 797 para 62.

27. Schippers J correctly relied on the finding in *Bradley and Others, Regina (on the Application of) -v- Secretary of State for Work and Pensions CA,*[28] wherein Sir John Chadwick said the following:

> "It follows that, unless compelled by authority to hold otherwise, I would conclude that the submissions advanced on behalf of the Secretary of State in respect of the first issue are correct: the Secretary of State, acting rationally, is entitled to reject a finding of maladministration and prefer his own view. But, as I shall explain, it is not enough that the Secretary of State has reached his own view on rational grounds: it is necessary that his decision to reject the Ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies 1967 Act. To put the point another way, it is not enough for a Minister who decides to reject the Ombudsman's finding of maladministration simply to assert that he had a choice: he must have a reason for rejecting a finding which the Ombudsman has made after an investigation under the powers conferred by the Act."[29]

28. We further accept that the rejection by a public body of the findings and remedial action of the Public Protector may, in appropriate circumstances, constitute the exercise of public powers. In such circumstances, the rejection must be rational. This is so because in our law every exercise of public power must be rational.[30]

29. We submit that as a matter of principle, the Court *a quo* was correct that the SABC and the Minister could reject the findings and remedial action of the

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[28] 2008] EWCA Civ 36, [2009] QB 114, [2008] Pens LR 103, [2008] 3 All ER 1116, [2008] 3 WLR 1059.
[29] At para 51.
[30] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 90.

Public Protector if they had a rational basis for doing so. We turn to this question at a factual level below.

THE SABC ACTED RATIONALLY

The Public Protector's findings and remedial action

30. The remedial action that formed the subject matter of the DA's application is captured in paragraph 11.3.2.1 of the Public Protector's report. It is stated as follows:

> "**11.3. The SABC Board to ensure that:**
>
> 11.3.1. …
>
> 11.3.2. Appropriate disciplinary action is taken against the following:
>
> 11.3.2.1. Mr Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increments of Ms Sully Motsweni, and for his role in the purging of senior staff members resulting in numerous labour disputes and settlement awards against the SABC; …"[31]

31. The factual findings underpinning the remedial action are captured in paragraphs 10.2,[32] 10.5[33] and 10.6[34] of the Public Protector's report.

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[31] Vol 1 pp 203-204.
[32] Vol 1 p 191.
[33] Vol 1 p 195.
[34] Vol 5 p 199.

The SABC provided a rational basis why it did not implement the remedial action in paragraph 11.3.2.1 of the Public Protector's report

32. Schippers J found that the reasons for the SABC's decision not to discipline Mr Motsoeneng for misconduct in terms of paragraph 11.3.2.1 of the Public Protector report are stated in the SABC's answering affidavit as follows:

> "The Board decided to recommend the appointment of Mr Motsoeneng by the Minister to the position of COO at its meeting on 7 July 2014. It did so in order to secure the interests of the SABC, and in the knowledge that there was no reasonable basis to discipline him for any misconduct".[35]

33. The above passage is quoted from paragraph 111 of the SABC's answering affidavit.[36] That paragraph does not contain the SABC's full reasons for not implementing the findings and remedial action in paragraph 11.3.2.1 of the Public Protector's report. Instead, it deals with the decision to recommend the appointment of Mr Motsoeneng to the position of COO. That decision is challenged in pending review proceedings under Part B of the DA's notice of motion.[37] It is not before this Court.

34. What the Court *a quo* was required to do was to consider the explanations and facts set out by the SABC in paragraphs 38 to 109 of the SABC's

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[35] Judgment p 805 para 77.
[36] Vol 2 p 418.
[37] Vol 1 p 4.

answering affidavit.[38] It is the facts and explanations contained in these paragraphs that provide the SABC's reasons for not accepting and implementing the remedial action in paragraph 11.3.2.1 of the Public Protector's report.

35. It is clear from those paragraphs in the SABC's answering affidavit that the SABC took the view, on the facts available to it and the advice received, that the findings and remedial action was irrational because the objective facts did not support findings of wrongdoing for which the Public Protector required the SABC to take disciplinary action against Mr Motsoeneng. This being the province of the SABC as employer, it was entitled to determine whether or not a basis for taking disciplinary action against Mr Motsoeneng existed. If not, it was open to the SABC not to take disciplinary action against Mr Motsoeneng, in respect of which it would bear the onus to prove wrongdoing amounting to misconduct.

36. We submit that a proper consideration of the aforesaid paragraphs in the SABC's answering affidavit, in which it deals with each of the findings that underpin the remedial action in paragraph 11.3.2.1 of the Public Protector's report, discloses a rational basis for not accepting the findings of the Public Protector and not implementing the remedial action.

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[38] Vol 2 pp 390-417.

37. A rationality test did not require the Court *a quo* to determine the correctness of the objective facts that the SABC placed before it as to why there was no basis to take disciplinary action against Mr Motsoeneng as per paragraph 11.3.2.1 of the Public Protector's report.

38. The Constitutional Court in the *Pharmaceutical* case[39] explained the nature and extent of the rationality standard as follows:

> "[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately".[40]

39. This Court has further expanded upon the standard of rationality and what it means, in *Minister of Home Affairs v Scalabrini Centre*,[41] as follows:

> "[65] But an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason – in contra-distinction to one that is arbitrary – which is different to whether it was reasonably made. All that is required is a rational connection

[39] *Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA* 2000 (2) SA 674 (CC).
[40] See also *South African National Roads Agency Ltd v Toll Collect Consortium* 2013 (6) SA 356 (SCA).
[41] *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA).

> between the power being exercised and the decision, and a finding of objective irrationality will be rare.
>
> [66] Whether a decision is rationally related to its purpose is a factual enquiry blended with a measure of judgment. It is here that courts are enjoined not to stray into executive territory. …"
>
> (Emphasis added)

40. We submit in this regard that Schippers J was incorrect in finding that the SABC did not provide a rational basis for differing with and not implementing the findings and remedial action of the Public Protector in paragraph 11.3.2.1 of the Public Protector's report.

41. The power to discipline is to be exercised fairly and on the basis of a *prima facie* basis of misconduct that an employer has evidence to prove. The SABC did not find such a case to exist on the basis of the Public Protector's investigation and report. The reasons it gave for not implementing the remedial action were, in such circumstances, rationally related to the power to discipline.

42. More particularly, and as regards the alleged fraudulent misrepresentation of Mr Motsoeneng's qualifications:

    42.1. in paragraphs 38 to 59 of its answering affidavit,[42] the SABC sets out the objective facts that demonstrate that Mr Motsoeneng did not

[42] Vol 2 pp 390-399.

misrepresent his qualifications when he was first employed by the SABC, nor that he fraudulently did so at any stage of his employment with the SABC;

42.2. in paragraph 45.3 of its answering affidavit,[43] the SABC makes it clear that "[s]ince the application form in 1995 [Mr Motsoeneng] has never completed an application form at the SABC in which he claimed to have Matric"; and

42.3. in paragraph 48 of its answering affidavit,[44] the SABC dealt with the erroneous findings by the Group Internal Audit.

43. As regards the alleged abuse of his position, the following facts are important:

43.1. In her findings relating to this allegation, the Public Protector finds that Ms Motsweni's appointment and salary progression were done without following proper procedures and were in violation of sub-section G-3 of DAF and Part IV of the Personnel Regulations [Paragraph 10.3.1 of the Public Protector's report].[45] Related to the issue of the salary increment was the Public Protector's finding that

[43] Vol 2 p 394.
[44] Vol 2 p 395.
[45] Vol 1 p 193.

the SABC should recover the monies irregularly spent on salary increments.

43.2. The SABC explained at paragraphs 81 to 82 of its answering affidavit [46] that the appointment and salary progression of Ms Motsweni were not in contravention of the relevant recruitment policies, procedures and regulations of the SABC; and that where deviations were necessary these were properly sought and approved; and attached the relevant motivation for approval to the answering affidavit. The SABC specifically denied that Ms Motsweni's appointment was improper or that Mr Motsoeneng was to blame for it.

44. As regards the alleged purging of staff, the following facts are important:

44.1. In the Public Protector's report at paragraph 10.5.1, [47] the Public Protector does not make a direct adverse finding of abuse of power or improper conduct on the part of Mr Motsoeneng. The Public Protector merely says that she cannot rule out the possibility of purging.

[46] Vol 2 pp 406-407.
[47] Vol 1 p 195.

44.2. If Mr Motsoeneng were to be disciplined for this, there would need to be further investigations by the SABC to determine whether indeed there was purging and that Mr Motsoeneng played a role in such purging.

44.3. Secondly, in relation to Mr Motsoeneng's involvement in the dismissals of employees, the SABC gives full explanations at paragraphs 83 to 102 of its answering affidavit.[48] In these paragraphs the SABC explains the difficulty in dealing with the findings made in paragraph 10.5.2.1 of the Public Protector's report, which allege that Mr Motsoeneng was directly involved in the dismissals of certain SABC employees because the Public Protector did not evaluate each case based on its own facts and merits. In other cases, the employees in question are still employed by the SABC and have not been dismissed or allegedly purged. In any event, each case is explained and no evidence of purging exists.

45. In light of the above, we submit that the facts and explanations set out by the SABC, which ought to have formed the basis of the judgment,[49] disclose that its decision was a reasoned one, and was not irrational.

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[48] Vol 2 pp 407-408.
[49] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 633 (A) at 634H-I and 635A-C.

46. We submit that Schippers J slipped inadvertently into a consideration of whether the SABC's decision was one that the Court considered to be reasonable. Had he applied the low threshold test of rationality properly, he would not have found that the SABC's rejection of the Public Protector's findings and remedial action was rational.

SEPARATION OF POWERS

General

47. We submit with respect that the Constitutional Court has made it plain that the separation of powers doctrine is a serious doctrine under our Constitution.

48. In *Outa,*[50] the Constitutional Court, albeit unlike here concerned with an order restraining the exercise of statutory powers, reminded all Courts in the land that they should heed the doctrine when exercising their interim remedial powers. It said *inter alia* the following in this regard:

> "[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define "clearest of cases". However, one important consideration

[50] *National Treasury and others v Opposition to Urban Tolling Alliance and others (Road Freight Association as applicant for leave to appeal)* 2012 (11) BCLR 1148 (CC).

> would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case."

49. We submit that the present case called for a proper regard to separation of powers in determining the nature and extent of the relief to grant to the DA, which the Court a *quo* did not do adequately.

50. This Court has also emphasised the importance of giving proper regard to separation of powers when considering the grant of relief on matters that fall within the domain of other branches of government. It said the following in *Mdluli*'s case:[51]

> "[51] What remains are issues concerning the appropriate remedy. As we know, the court a quo did not limit itself to the setting aside of the impugned decisions. In addition, it (a) ordered the NDPP to reinstate all the charges against Mdluli and to ensure that the prosecution of these charges are enrolled and pursued without delay; and (b) directed the Commissioner of Police to reinstate the disciplinary proceedings and to take all steps necessary for the prosecution and finalisation of these proceedings (paragraph 241(e) and (f)). Both the NDPP and the Commissioner contended that these mandatory interdicts were inappropriate transgressions of the separation of powers doctrine. I agree with these contentions. That doctrine precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime, while the Commissioner of Police is the authority mandated to manage and control the SAPS. As I see it, the court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons. Suffice it to say that in my view this is not one of those rare occasions and I can find no compelling reason why the executive authorities should not be given the opportunity to perform their constitutional mandates in a proper way. The

[51] *National Director of Public Prosecutions and others v Freedom under Law* [2014] 4 All SA 147 (SCA).

> setting aside of the withdrawal of the criminal charges and the disciplinary proceedings have the effect that the charges and the proceedings are automatically reinstated and it is for the executive authorities to deal with them. The court below went too far."
>
> (Emphasis added)

51. We submit that the Court *a quo* went too far in the nature and extent of the relief that it granted to the DA.

The relief granted constitutes an inappropriate transgression of the doctrine of separation of powers

52. It is common cause that as COO, Mr Motsoeneng is a member of the SABC Board.

53. Section 15A of the Broadcasting Act sets out how members of the SABC Board are to be suspended and removed.[52] It confers the power to

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[52] Section 15A of the Broadcasting Act provides as follows:

> "**15A. Resolution for removal of member, dissolution of Board and appointment of interim Board —**
>
> (1)
>
> (*a*) The National Assembly may, after due inquiry and by the adoption of a resolution, recommend the removal of a member from office on account of any or all of the following:
> (i) Misconduct;
> (ii) inability to perform the duties of his or her office efficiently;
> (iii) absence from three consecutive meetings of the Board without the permission of the Board, except on good cause shown;
> (iv) failure to disclose an interest in terms of section 17 or voting or attendance at, or participation in, proceedings of the Board while having an interest contemplated in section 17; and

recommend the removal of a member of the SABC Board to the National Assembly following a specified procedure; and the power to suspend a member of the SABC Board on the appointing body.

54. A Court is not the appointing body. That body is the Minister on the recommendation of the Board.

55. In deciding to suspend Mr Motsoeneng, the Court *a quo* failed to give effect to the procedures and allocation of powers carefully crafted in section 15A

(v) his or her becoming disqualified as contemplated in section 16.

(*b*) The National Assembly may, after due inquiry and by the adoption of a resolution, recommend the dissolution of the Board if it fails in any or all of the following:
(i) Discharging its fiduciary duties;
(ii) adhering to the Charter; and
(iii) carrying out its duties as contemplated in section 13 (11).

(2) The appointing body—

(*a*) may suspend a member from office at any time after the start of the proceedings of the National Assembly for the removal of that member;

(*b*) must act in accordance with a recommendation contemplated in subsection (1) within 30 days;

(*c*) must dissolve the Board if the resolution recommends the removal of all the members of the Board.

(3)

(*a*) Upon the dissolution of the Board contemplated in subsection (2) (*c*), the appointing body must appoint an interim Board consisting of the persons referred to in section 12 (*b*) and five other persons recommended by the National Assembly.

(*b*) The interim Board must be appointed within 10 days of receiving such recommendations and is appointed for a period not exceeding six months.

(4) The appointing body, on the recommendation of the National Assembly, must designate one of the members of the interim Board as the chairperson and another member as the deputy chairperson, both of whom must be non-executive members of the interim Board.

(5) A quorum for any meeting of the interim Board is six members."

of the Broadcasting Act. It impermissibly intruded upon the domain of the National Assembly and the appointing body.

56. In addition, the Court *a quo* ignored the remedial powers given to the National Assembly under section 8(2)(b) of the PP Act as far as the findings and remedial actions of the Public Protector are concerned. It intervened on an urgent basis to vindicate the findings and remedial action of the Public Protector when the PP Act grants such powers to the National Assembly in the first place.

57. Taking upon itself to decide that Mr Motsoeneng should be suspended and disciplined, in circumstances where the Public Protector did not even recommend a suspension, the Court *a quo* transgressed into the domain of the National Assembly and the appointing body in terms of section 15A of the Broadcasting Act; and also of the National Assembly in terms of section 8(2)(b) of the PP Act.

58. The Court *a quo* not only failed to restrain itself from suspending Mr Motsoeneng and directing that he be disciplined, it assumed a supervisory function over the disciplinary process and function to be undertaken by the SABC Board. It determined that the chairperson must be an independent person; it determined the time frame within which the disciplinary action is

to take place; and afforded the DA – a stranger to the employment relationship – a say over the aforesaid timeframe.

59. We submit with respect that the Court *a quo*'s approach in this regard constitutes a significant misdirection, which this Court should correct, in line with the approach in the *Mdluli* case.

60. We submit that the supervisory role that the Court *a quo* assumed could only be justified in exception circumstances, and where it is clear that the SABC Board and the Minister are unlikely to comply with the law. The Court ought to have approached the matter on the basis that the SABC Board and the Minister would comply with the law if the matter was referred back to them – even with directions regarding further interactions with the Public Protector, failing which their conduct would be unconstitutional and subject to control by the Courts, including by way of judicial review.[53]

The orders usurp the power of employers and are unfair and unconstitutional

[53] See, for example, albeit in a different context, *Van Rooyen and Others v S and Others* 2002 (8) BCLR 810 (CC), in which the Constitutional Court said the following:

> "[87] In dealing with the legislation that was the subject matter of the constitutional challenge, the High Court seems not to have had regard to two important considerations. First, that decisions of the Magistrates Commission and the Minister in giving effect to powers vested in them by the legislation are subject to constitutional control. If they take decisions or conduct themselves in a manner inconsistent with judicial independence, or with the right that everyone (including magistrates) have to just administrative action, such decisions or conduct will be invalid, and liable to be set aside by the higher judiciary. The well-informed, thoughtful and objective observer would pay due regard to this."

61. Matters of discipline and suspension fall squarely within the domain of employers. This is probably the reason why the Public Protector stopped short of recommending that Mr Motsoeneng be suspended, nor of preparing a draft charge sheet for the discipline of Mr Motsoeneng. The Court *a quo* did not restrain itself adequately.

62. Fair labour practices have been emphasised as fundamental under the Constitution by the Constitutional Court.

63. Section 23(1) of the Constitution guarantess to "everyone" the right to fair labour practices. The LRA gives effect to this right. The Constitutional Court said the following in the *NEHAWU* case in this regard:[54]

> "[41] The declared purpose of the LRA 'is to advance economic development, social justice, labour peace and the democratization of the workplace'. This is to be achieved by fulfilling its primary objects which includes giving effect to section 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution. This is the approach that has been adopted by the LAC and the Labour Court in construing the LRA.
>
> [42] Security of employment is a core value of the LRA and is dealt with in Chapter VIII. The chapter is headed 'Unfair Dismissals.' The opening section, section 185, provides that '[e]very employee has the right not to be unfairly dismissed.' This right is essential to the constitutional right to fair labour practices. As pointed out above, it seeks to ensure the continuation of the relationship between the worker and the

[54] *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC).

> employer on terms that are fair to both. Section 185 is 'a foundation upon which the ensuing sections are erected'".
>
> (Emphasis added)

64. The LRA covers all employees, including those in the public service. It excludes only those employees that are members of the organisations listed in section 2 of the LRA. The SABC is not listed in section 2 of the LRA.

65. The LRA in section 186(2)(b)[55] declares that an unfair suspension constitutes an unfair labour pratice. It prohibits it and thereby guarantees the constitutional protection in section 23(1) of the Constitution.

66. Suspension is an employment or labour matter regulated by section 23 of the Constitution and the LRA, and not administrative action regulated by section 33 of the Constitution and PAJA. The Constitutional Court confirmed this in *Gcaba v Minister for Safety and Security and Others*:[56]

> "[63] Before addressing the issue of jurisdiction, and in order to do so, the question must be answered whether the conduct complained of by Mr Gcaba was administrative action.

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[55] It provides as follows:

> "**186 Meaning of dismissal and unfair labour practice**
>
> …
>
> (2) '**Unfair labour practice'** means any unfair act or omission that arises between an employer and employee involving –
>
> …
>
> (b) the unfair suspension of an employee or any other unfair disciplinary act short of dismissal in respect of an employee …".

[56] *Gcaba v Minister for Safety and Security and Others* 2010 (1) BCLR 35 (CC).

> [64] Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the State as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action. …
>
> [66] In *Chirwa* (*supra*) Ngcobo J found that the decision to dismiss Ms Chirwa did not amount to administrative action. He held that whether an employer is regarded as "public" or "private" cannot determine whether its conduct is administrative action or an unfair labour practice. Similarly, the failure to promote and appoint Mr Gcaba appears to be a quintessential labour-related issue, based on the right to fair labour practices, almost as clearly as an unfair dismissal. Its impact is felt mainly by Mr Gcaba and has little or no direct consequence for any other citizens.
>
> [67] This view is consistent with the judgment of Skweyiya J in *Chirwa*, who did not decide this issue, but indicated a leaning in this direction. It furthermore does not contradict the unanimous judgment of this Court in *Fredericks* (*supra*), which left the issue open. There was no dispute about whether the decision at the centre of the dispute was administrative action.
>
> [68] Accordingly, the failure to promote and appoint the applicant was not administrative action. If his case proceeded in the High Court, he would have been destined to fail for not making out the case with which he approached this Court, namely an application to review what he regarded as administrative action."

67. First, being an employment or labour matter, the suspension of an employee falls, in the first instance, within the domain of the employer, i.e. the Minister and the Board, and not the Court.

68. Secondly, where an employer cannot suspend an employee unfairly, the Court can also not to do so unfairly. To do so would be unconstitutional – in breach of section 23(1) of the Constitution – as given effect to by the LRA, in particular section 186(2)(b) of the LRA.

69. The suspension of an employee would constitute an unfair labour practice if it is effected in a procedurally unfair manner or there is no substantive fairness, i.e. a fair reason to suspend.

70. In *Sokhela v MEC for Agriculture (KZN),*[57] Wallis J (as he then was), set out the law in this regard as follows:

> "[83] For those reasons it seems to me that the exercise of the power to terminate the appointment of a board member under section 11 of the Act will constitute administrative action. Is the position any different in regard to the suspension of a board member under section 12 of the Act? In my view, the answer is that it is not. The question whether suspension, as opposed to dismissal, attracted the requirements of natural justice and an obligation to comply with the *audi alteram partem* principle was comprehensively considered by Howie J in *Muller & others v Chairman, Ministers' Council, House of Representatives & others* where the learned Judge held, for reasons that I find entirely persuasive, that there is no reason in principle to distinguish between a suspension and a dismissal. The correctness of that decision has not subsequently been challenged and it appears to reflect current received wisdom in the field of employment. It follows that, in my view, the suspension of the applicants by the MEC did constitute administrative action in terms of PAJA and attracted the obligations of procedural fairness laid down in PAJA. As set out above in my judgment the MEC did not comply with those obligations before suspending the applicants. Accordingly their suspension was invalid and the applicants are entitled to the relief that they claim in these proceedings."

[57] *Sokhela v MEC for Agriculture (KZN)* 2010 (5) SA 574 (KZN).

(Emphasis added)

71. From the *Sokhela* judgment it is plain that the same procedural fairness requirements apply even if the suspension of an employee were found to constitute administrative action,[58] which would be contrary to the judgment of the Constitutional Court in *Gcaba*.

72. The approach of the Labour Court is the same as that in *Sokhela* above, as is reflected in the *Mogothle* case:[59]

> "[39] In summary: each case of preventative suspension must be considered on its own merits. At a minimum though, the application of the contractual principle of fair dealing between employer and employee, imposing as it does a continuing of fairness on employers when they make decisions affecting their employees, requires first that the employer has a justifiable reason to believe, *prima facie* at least, that the employee has engaged in serious misconduct; secondly, that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy; and thirdly, that the employee is given the opportunity to state a case before the employer makes any final decision to suspend the employee."

(Emphasis added)

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[58] See the *Mdluli* case referred to above at paras 48-50; In *Mphaphuli* O'Regan J stated:

> "Fairness is one of the core values of our constitutional order: the requirement of fairness is imposed on administrative decision-makers by section 33 of the Constitution; on courts by sections 34 and 35 of the Constitution; in respect of labour practices by section 23 of the Constitution; and in relation to discrimination by section 9 of the Constitution.

[59] *Mogothle v Premier of the North West Province & another* [2009] 4 BLLR 331 (LC).

73. The SABC Personnel Regulations (Jan 2000), attached to Mr Motsoeneng's answering affidavit as "HM2",[60] follow *Sokhela* and *Mogothle*. They undertake to all employees of the SABC, including Mr Motsoeneng, as follows regarding suspension:

> "**12 <u>SUSPENSION OF AN EMPLOYEE</u>**
>
> Where, prima facie, an employee has inter alia committed an act of serious misconduct such as assault or theft or fraud, the employee may be suspended pending an investigation and/or the holding of a disciplinary hearing. The employee shall be advised that the Corporation is considering suspending the employee pending an investigation or the holding of a disciplinary hearing and the employee shall be given an opportunity to respond to the proposed suspension before a decision is made to suspend such employee. If the employee is suspended, the employee shall be advised of the suspension in writing. Any such suspension shall be on full pay."[61]

74. The suspension of Mr Motsoeneng by the Court *a quo* offended all of the above procedural and substantive safeguards and, significantly, usurped the powers and functions of the Board and the Minister as Mr Motsoeneng's employers. Mr Motsoeneng was afforded no hearing as to why he ought not to be suspended, as his employer was obliged by law to do.

75. Given that Mr Motsoeneng is suspended by Court order, he is deprived of the right to challenge his suspension as an unfair labour practice under the LRA, whether or not he has a case to pursue in that regard.

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[60] Vol 4 p 658.
[61] Vol 4 p 665.

CONCLUSION

76. We submit in conclusion for the reasons advanced above that the appropriate order would be that:

76.1. the SABC's appeal is upheld with costs;

76.2. the order of Schippers J of in the Court *a quo* including the costs order against the SABC is set aside.

77. If any order is to be granted, it should encompass a referral of the matter back to the SABC and the Minister with such directions as the Court deems appropriate, including directions as to further interactions with the Public Protector regarding the remedial action in paragraph 11.3.2.1 of the Public Protector's report. Such directions would be appropriate even if the Court were to find that the SABC failed to follow a rational process in not accepting the Public Protector's findings and remedial action.

NH MAENETJE SC
H RAJAH

CHAMBERS, SANDTON
3 AUGUST 2015

LIST OF AUTHORITIES

1. *Public Protector v Mail & Guardian* 2011 (4) SA 420 (SCA)
2. *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC)
3. *South African Police service v Solidarity obo Barnard* 2014 (6) SA 123 (CC)
4. Currie & De Waal *The Bill of Rights Handbook* (2005)
5. Michael Bishop and Stuart Woolman, "Public Protector" in *Constitutional Law of South Africa,* 2nd Ed Vol 1
6. *S v Zuma and Others* 1995 (4) BCLR 401 (CC)
7. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)
8. *Bradley and Others, Regina (on the Application of) -v- Secretary of State for Work and Pensions* [2008] 3 All ER 1116
9. *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC)
10. *South African National Roads Agency Ltd v Toll Collect Consortium* 2013 (6) SA 356 (SCA)
11. *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA)
12. *National Treasury and others v Opposition to Urban Tolling Alliance and others (Road Freight Association as applicant for leave to appeal)* 2012 (11) BCLR 1148 (CC)
13. *National Director of Public Prosecutions and others v Freedom under Law* [2014] 4 All SA 147 (SCA)
14. *Van Rooyen and Others v S and Others* 2002 (8) BCLR 810 (CC)
15. *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC)
16. *Gcaba v Minister for Safety and Security and Others* 2010 (1) BCLR 35 (CC).
17. *Sokhela v MEC for Agriculture (KZN)* 2010 (5) SA 574 (KZN)
18. *Mogothle v Premier of the North West Province & another* [2009] 4 BLLR 331 (LC)