

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 393/15
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

SECOND APPELLANTS HEADS OF ARGUMENT

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INTRODUCTION

1. The unusual circumstances that give rise to this appeal arise from an attempt by the Respondent (“**the DA**”) to enforce the Court Order made by the Court below in the following terms:¹

- “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 Operations 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 appointment and salary increases of Ms Sully Motsweni; and for his role into the alleged suspension and dismissal of senior members of staff, resulting in numerous labour disputes and settlement awards against the SABC, referred to in paragraph 11.3.2.1 of the report of the Public Protector dated 17 February 2014.
2. An independent person shall preside over the disciplinary proceedings.
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.
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 on full pay.

¹ Motion Record; Vol. 5; page 831; par 127.

5. The first, second, third and fourth respondent shall pay the costs of this application jointly and severally, the one paying the others to be absolved. Such costs shall include the costs of two counsel.”

3. The far reaching consequences and effect of the Order are that:

3.1. First, the Court Order is final, in its effect, although it was sought in interim proceedings, which are still pending and vigorously pursued by the DA, in the Court below.

3.2. Secondly, it incorporates a quasi supervisory interdict measure (in paragraph 3 thereof) which was neither sought by the DA nor argued by any party in the Court below. Notice of the relief so grafted by the Court below in its order was not given to the respondents. We show why the approach of the Court below was both inappropriate and unfair. We also indicate why the quasi interdictory relief is problematic, at the level of principle, and practicality.

3.3. Thirdly, it violates the well-established principle of separation of powers, in circumstances where the DA has appropriate means within the relevant arm of government, the National Legislature and its relevant standing committee, to seek effective relief. The DA sought to side-step, and overlooked that arm of government, and invited the Court below to exercise a takeover power, without indicting why it did not follow the necessary prescribed legislative

processes. This is inappropriate and brings about unnecessary tension between different arms of government.

4. The DA obtained leave to execute the above Order of the Court below (“**the execution Order**”). The Appellants appealed against the execution Order. That appeal was however neither heard nor determined on the basis of an agreement between the parties that the DA would not execute the Order pending the outcome of the appeal to this Court, and the direction by this Court that the appeal against the Order of the Court below be heard urgently.

5. These heads of argument are structured as follows:

5.1. First, we address the legislative scheme relating to the appointment, removal and suspension of executive directors of the SABC. When the Order of the Court a quo is considered against this scheme, we submit that the Order granted by the Court a quo was neither competent nor appropriate.

5.2. Secondly, and in the event that this Court finds that notwithstanding the doctrine of separation of powers judicial intervention is competent and appropriate, we submit that the Court erred in finding that the Minister’s decision to reject the findings and remedial action of the Public Protector and prefer her own view was not rational.

5.3. Thirdly, we make submissions as to why the Court a quo erred in finding that in any event a disciplinary enquiry and a suspension against Mr Motsoeneng were justified.

5.4. Fourthly, we deal with the inappropriateness of the quasi supervisory interdict engrafted in paragraph 3 of the Court Order.

THE CONTROLLING PROVISIONS

6. We deal with the legislative scheme relating to the powers of appointment, removal and suspension of executive directors of the SABC in order to determine how and when these powers may be exercised by the relevant executive authority, having regard to the overriding doctrine of separation of powers.
7. We also do so in order to establish the level of scrutiny which this honourable Court will apply when it is called upon to intervene by taking over the exercise of the powers of immediate suspension. As we show, the threshold for the review of such powers is fairly high, and beyond the reach of a review under the Promotion of Administrative Justice Act, 3 of 2000, as amended ("**PAJA**").
8. The starting point are the provisions of section 12(a) and (b) of the Broadcasting Act, 4 of 1999, as amended ("**the BA**") which make it clear that the Board of the SABC comprises twelve non-executive members and three

executive members, namely, the Group Chief Executive Officer, the Chief Operating Officer and the Chief Financial Officer or their equivalent.

9. The BA expressly articulates the power and method of appointment of non-executive members of the Board. It provides, in that regard, that they are appointed by the President, acting on the advice of the National Assembly.² However, the BA is silent on how the executive directors contemplated in section 12(b) should be appointed.
10. The Articles of the SABC deal with the method of appointment of the executive members. They do so in Articles 11.1.2 and 11.1.4,³ as well as Article 19.1.1(a)⁴ and Article 19.2.⁵ These provisions of the Articles have previously been interpreted to mean that the appointing authority in respect of the executive members is the Board of the SABC represented by non-executive members only.⁶ It was held that the role of the Minister in connection with the appointment is to approve the appointment and subsequent contract of employment concluded by the SABC and its executive directors.⁷
11. We doubt the correctness of the above conclusions. We submit, though, that it is not necessary for this Court to decide, at this stage, whether or not the

² Section 13(1) of the BA.

³ Motion Record: Vol 2; page 348, paras 11.1.2 to 11.1.4.

⁴ Motion Record: Vol. 2; page 364, para 19.1.1.

⁵ Motion Record: Vol. 2; page 365, para 19.2.

⁶ *Mpofu v South African Broadcasting Corp Limited (SABC) and Others* (2008/18386) [2008] ZAGPHC 413 (16 September 2008), para 24 (“*the Mpofu judgment*”).

⁷ *The Mpofu judgment*, para 24.

appointing authority in connection with the appointment of the executive directors of the SABC is the Minister or the non-executive members of the Board, as was held in *the Mporu judgment*. That issue might well arise in the Part B proceedings.

12. At this stage of the proceedings, this Court is concerned with the powers of removal or suspension of an executive director of the SABC. These powers are expressly regulated and dealt with in both the BA and the Articles, none of which have been challenged by the DA, in the Court below. They provide the following.
13. Section 15(1)(a) of the BA confers a discretion on the Minister to remove an executive director on account of misconduct or incompetence. The Minister may only exercise that discretion after due inquiry and upon recommendation by the Board of the SABC.
14. Section 15(1)(b) of the BA imposes the obligation on the Minister to remove an executive director from office when the National Assembly has passed a resolution which calls for the removal of such a director. The National Assembly is entitled to pass a resolution for removal on any of the grounds prescribed in section 15A(1)(a)(i) to (v) of the BA, namely: (a) misconduct; (b) inability to perform the duties of his or her office efficiently; (c) absence from three consecutive meetings of the Board without permission of the Board, except on good cause shown; (d) 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. The National Assembly is also required to hold an inquiry before it may lawfully adopt or pass the resolution calling for the removal of an executive director of the SABC.⁸

15. Insofar as the suspension of the executive members of the Board is concerned, the provisions of subsection (2) of section 15A of the BA are relevant. They provide, in that regard, that the Minister may suspend an executive director from office only after the National Assembly has initiated proceedings for the removal of the executive director concerned.⁹
16. We submit that the provisions of section 15A(2)(a) of the BA make it clear that the discretion to suspend an executive director from office reposes in the Minister. The conclusion to the contrary expressed in *the Mpofo judgment*¹⁰ is, with respect, not sound. In this round of litigation the DA accepts,¹¹ as do other Appellants,¹² that the Minister is the appointing authority. It is therefore not necessary for this honourable Court to express a firm view on the incorrectness of *the Mpofo judgment*. But insofar as it is necessary for this Court to express a firm view on this issue, we invite it to overrule *the Mpofo judgment*, to the extent that it held otherwise.

⁸ Section 15A(1)(b) of the Broadcasting Act which was inserted in that Act by section 3 of the Broadcasting Amendment Act, 4 of 2009, and which into force as from 10 March 2009.

⁹ Section 15A(2)(a) of the Broadcasting Act.

¹⁰ Paras 26 to 29.

¹¹ Motion Record: Vol. 1; page 36, para 78.

¹² Motion Record: Vol. 2; page 383, para 20 and Vol. 2; page 418, para 111; Vol. 3; page 565, para 24.

17. The only constraint on the ministerial powers of suspension is that the Minister may lawfully exercise his or her discretion only after the National Assembly has initiated its proceedings for the removal of an executive director. We do not suggest at all that there will never be circumstances where an executive member of the SABC cannot be lawfully suspended otherwise than in terms of section 15A(2)(a) of the BA. Such circumstances may well arise, but must demonstrably be exceptional, and in cases of extreme urgency. In those circumstances, "the clearest of cases" must be demonstrably be proven, as a threshold requirement for a suspension.¹³
18. It is not surprising that the BA has prescribed the interlocking powers of the executive and legislative authority to bring about suspension of an executive director, when circumstances so require. Both the executive and legislative authorities exercise supervisory authority on the Board of the SABC, and are entitled to intervene to ensure effective performance of members of the Board.
19. We have drawn attention to the above provisions of the BA and the Articles in order to show that there are statutory remedies, including the remedial action of suspension conferred upon the executive authority and legislative functionaries of government. The DA has not suggested at all that those remedies do not exist or may not lawfully be pursued. Instead, it has headlong resorted to urgent litigation without any reasonable explanation

¹³ *National Treasury and Others v Opposition to Urban Tolling* 2012 (6) 223 (CC).

as to why it did not pursue the statutory remedies which respect and promote the doctrine of separation of powers.

20. It will be recalled that the DA admits, in the replying affidavit, that it has initiated parliamentary process of the National Assembly to call upon the Minister and deal with the issues which arise in the Public Protector's report.¹⁴ That process provides an adequate remedy for the DA. It has elected to initiate and must prosecute it to its logical end.
21. The DA contends that the decision of the Minister to appoint Mr Motsoeneng as the chief operating officer of the SABC constitutes an administrative action, and is open to review in terms of PAJA.¹⁵
22. For the purposes of Part A the issue which arises is whether the power of the Minister to suspend an executive director constitutes an administrative action or executive action. This question is fundamentally important in order to assess whether the Court will readily take over that power by way of interim relief, having regard to the recent judgments of the Constitutional Court.
23. According to the Constitutional Court, when a court is invited to intrude into the terrain of the executive, especially when the executive decision-making process is still uncompleted, it must do so only in the clearest of

¹⁴ Motion Record: Vol. 4; page 701, para 39; and page 735, annexure "JS8" of the Replying Affidavit.

¹⁵ Motion Record: Vol. 1; page 51; par 132 and 133.

chief operations officer, pending the outcome of the appointment of a suitably qualified permanent chief operations officer.²¹

30. That form of interference has a negative effect on the SABC. It will require the SABC to incur unnecessary expense, in order to fulfill the wishes of the DA. There is simply no justification for such a course of conduct. It will be noted that the Minister raised this concern, in her answering affidavit,²² and the DA has not sought to contradict it, or meet it otherwise.
31. The Order granted by the Court a quo, we submit, does violence to the doctrine of separation of powers. It resulted in this honourable Court immediately assuming the powers of suspension of Mr Motsoeneng which by law are exclusively vested in the Minister. It also resulted in the Court intervening by means of such take-over power without regard to the statutory procedures prescribed in the controlling legislation.
32. This, the Court a quo ordered despite: (a) the absence of exceptional circumstances; (b) the DA having statutory remedies that carefully give effect to and promotes the doctrine of separation of powers; (c) the DA not having produced any evidence beyond the findings in the Public Protector's report, to establish "*the clearest of cases*".

²¹ Motion Record: Vol. 1; page 3, para 4.

²² Motion Record: Vol. 3; page 541, para 65.2.

THE REPORT OF THE PUBLIC PROTECTOR AND THE MINISTER'S
RESPONSE TO IT

33. As a point of departure, we submit that the Court a quo correctly made the following findings in respect of the Public Protector:

33.1. The Constitution contains no provision that findings and remedial action required by the Public Protector are binding and enforceable, as in the case of a Court Order.²³

33.2. The fact that findings of and remedial action taken by the Public Protector are not binding decisions does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject, at will.²⁴

33.3. Although the findings of the Public Protector are not binding and enforceable, when an organ of state rejects those findings or the remedial action, its decision must itself not be irrational.²⁵

34. The Minister accepts, as she did in the Court below that an organ of state cannot ignore the findings and remedial action of the Public Protector.²⁶ That however, is not what the Minister did in the present instance. The following account of the factual background shows that the Minister did not ignore the Public Protector's report, or that she acted irrationally. We deal firstly with the factual account which proves that the Minister did not

²³ Motion Record: Vol. 5; page 795; par 58.

²⁴ Motion Record: Vol. 5; page 795; par 59.

²⁵ Motion Record: Vol. 5; page 803; par 74.

²⁶ Motion Record: Vol. 5; page 795; par 60.

ignore the Public Protector's report. We thereafter show that the Minister did not act irrationally.

THE MINISTER DID NOT IGNORE THE PUBLIC PROTECTOR' S REPORT

35. The Minister has denied in terms that the Public Protector's findings were ignored.²⁷ She has explained in this regard that the Mchunu Report (which was supported by sworn statements) was an important response to the findings of the Public Protector.²⁸

36. The Minister has also explained that:

36.1. She intends to engage the Public Protector on her findings and bring to her attention facts which were uncovered by Mchunu Attorneys which could well affect her findings.²⁹

36.2. She did prepare a response to the Public Protector.³⁰

36.3. She will also meet the Portfolio Committee on Communications and take them through her reply to the Public Protector.³¹

36.4. The findings of the Public Protector should be considered in light of the Mchunu Report and the transcript of the interview.³²

²⁷ Motion Record: Vol. 1; page 17; par 21 read with Vol. 3; page 517; par 33.

²⁸ Motion Record: Vol. 1; page 17; par 21 read with Vol. 3; page 517; par 33.

²⁹ Motion Record: Vol. 3; page 522; par 41.

³⁰ Motion Record: Vol. 3; page 523; par 42.

³¹ Motion Record: Vol. 3; page 523; par 42.

36.5. She will ensure that the findings of Mchunu Report are made available to the Public Protector for her consideration.³³

37. We accordingly submit that on the evidence, the Minister did not ignore the findings of the Public Protector.

THE MINISTER DID NOT ACT IRRATIONALLY

38. The Court below concluded that the Minister's reasons for appointing Motsoeneng as a permanent COO of the SABC, meant that she decided in the circumstances, to reject the findings and remedial action of the Public Protector and prefer her own decision and reasons as rational. The Court below concluded that they were not.³⁴ We submit that the Court below erred in making that conclusion.

39. As a starting point, we submit that the Court a quo in effect, impermissibly reviewed (in the Part A proceedings) the Minister's decision to permanently appoint Mr Motsoeneng. This, notwithstanding the fact that that relief is expressly sought under Part B of the Notice of Motion, which leg of the case is still to be adjudicated. We submit that the Court erred in doing so.

40. The legal principles applicable to rationality review are as follows:

40.1. Courts must be wary of trespassing into the domain of public officials by interfering with decisions entrusted by the Constitution

³² Motion Record: Vol. 3; page 523; par 43.1.

³³ Motion Record: Vol. 3; page 524; par 43.2.

³⁴ Motion Record: Vol. 5; page 807; par 82.

or legislation to them. As long as there is a rational connection between the facts and information available to a public official and the achievement of the purpose falling within the power being exercised, a court cannot interfere merely because it considers the decision to be wrong or that a different outcome would have been preferable.³⁵ In its analysis, this Court had regard to the question of whether a “judgment call” had been vested in the functionary.³⁶

40.2. In **Ronald Bobroff and Partners Inc v De La Guerre** 2014 (3) SA 134 (CC) the Court explained that rationality is a less stringent test than reasonableness.³⁷ It expressly cautioned against the Courts venturing beyond rationality into reasonableness, which courts could not do under the guise of rationality review.³⁸

40.3. A rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: it has been described by the Constitutional Court as the “minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries”. The rationale for this test, according to the Constitutional Court is “to achieve a

³⁵ *Minister of Education for the Western Cape and Another v Beauvallon Secondary School* (865/13) [2014] ZASCA 218 (9 December 2014) at par 38 and footnote 15.

³⁶ At par 40. See too: *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at par 51.

³⁷ At par 7.

³⁸ At par 11.

proper balance between the role of the legislature on the one hand, and the role of the courts on the other”.³⁹

40.4. Rationality review requires restraint on the part of the Court.⁴⁰

41. In responding to the challenge that she acted irrationally, the Minister has explained that:

41.1. She attended at the offices of the SABC on 7 July 2014.⁴¹

41.2. After the Board meeting, the Chairperson relayed to her the discussion and the resolution which the Board had taken on the question of who should be appointed as COO of the SABC and its reasons therefor.⁴²

41.3. Pursuant to the Minister’s request, she received a written recommendation from the SABC that she should appoint Mr Motsoeneng as the permanent COO.⁴³

41.4. That recommendation was accompanied by a motivation for Mr Motsoeneng’s appointment, the Public Protector’s Report and the report by Mchunu Attorneys.⁴⁴

³⁹ *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at par 42.

⁴⁰ *Ibid* at par 43.

⁴¹ Motion Record: Vol 3; page 502; par 8 and 9.

⁴² Motion Record: Vol 3; page 503; par 10 and 11.

⁴³ Motion Record: Vol 3; page 504; par 12.

- 41.5. The Minister considered the information submitted to her (which information included the Mchunu Report).⁴⁵
- 41.6. She remained concerned by the finding in the Public Protector's report that Mr Motsoeneng had deceitfully lied to the SABC about his qualifications when he was employed and in particular the findings of the Public Protector that Mr Motsoeneng had fraudulently represented that he had obtained a Matric Certificate when in truth he had not.⁴⁶
- 41.7. The Minister raised her concerns with the former Chairperson who provided the Minister with a transcript of the interview between the Public Protector and Mr Motsoeneng. After reading the transcript, the Minister was satisfied that Mr Motsoeneng did not lie to the SABC about the Matric qualification. The Minister was then satisfied that Mr Motsoeneng is competent and had the necessary expertise to be appointed as COO.⁴⁷
42. We emphasize that at that stage on the enquiry, the relevant question the Court was required to consider was not whether the view taken by the Minister was correct or not. The relevant question was whether she made the necessary connection between the information placed before her by the

⁴⁴ Motion Record: Vol 3; page 504; par 12.

⁴⁵ Motion Record: Vol 3; page 504; par 13.

⁴⁶ Motion Record: Vol 3; page 504; par 13.

⁴⁷ Motion Record: Vol 3; page 504; par 14.

Board of the SABC and her decision. We submit that she did, on the undisputed facts.

43. The Minister also considered the further qualifications that Mr Motsoeneng had obtained throughout his employment with the SABC which are mentioned in the Mchunu Report.⁴⁸
44. The Minister also considered the fact that Mr Motsoeneng had gained the necessary experience and acquitted himself exceptionally well for a period of almost three years when he was acting COO.⁴⁹
45. In addition to the foregoing, it is noteworthy that in this regard the founding affidavit relies on eight key findings of the Public Protector to "*demonstrate that his [Mr Mosoeneng's] appointment as COO was irrational*".⁵⁰ We list these findings below. We point out, though, that none of them support the DA's asserted constitutional violations or indeed those of the Court below.
 - 45.1. The first is that Mr Motsoeneng had lied about his qualifications when applying for the COO position and when applying for his earlier positions at the SABC.⁵¹ This allegation has been refuted by

⁴⁸ Motion Record: Vol 3; page 505; par 15.

⁴⁹ Motion Record: Vol 3; page 505; par 15.

⁵⁰ Motion Record: Vol 1; page 20; para 33.

⁵¹ Motion Record: Vol 1; page 20; para 34.

the SABC, which explains that the objective facts contradict this finding.⁵²

45.2. The second is that Mr Motsoeneng acted in bad faith and abused his powers by increasing his salary three times in the space of one year; from R1.5 million to 2.4 million.⁵³ The SABC has explained the basis and reasons for the salary increase and concluded that in the circumstances, it was indeed regular.⁵⁴ It has also explained that there is no evidence to suggest that Mr Motsoeneng participated in these processes and that to the extent that he may have done so, such participation would have been in the course of the performance of his duties and responsibilities given to him by the Board. He did not do so purely for his personal interest.⁵⁵

45.3. The third is that Mr Motsoeneng was responsible for the unlawful appointment of Ms Sully Motsweni to various positions and for her subsequent unlawful salary increases between 2011 and 2012.⁵⁶ The SABC has attached a memorandum⁵⁷ in this regard (which shows that Mr Motsoeneng is neither identified as having motivated for the appointment nor as having approved the

⁵² Motion Record: Vol 2; page 390; paras 38 to 53.

⁵³ Motion Record: Vol 1; page 21; para 37.

⁵⁴ Motion Record: Vol 2; page 405; paras 75 and 76.

⁵⁵ Motion Record: Vol 2; page 405; para 77.

⁵⁶ Motion Record: Vol 1; page 22, para 38.

⁵⁷ Motion Record: Vol. 3; page 480.

appointment). On this basis, the SABC concluded that the findings of the Public Protector in this regard are incorrect.⁵⁸

45.4. The fourth is that Mr Motsoeneng was, in part, responsible for the unlawful appointment of Ms Gugu Duda as Chief Financial Officer.⁵⁹ Notwithstanding this finding paragraph 7.4 of the Public Protector's Report proffers the following explanation⁶⁰ (which itself demonstrates the shortcomings of its finding): (a) internal and external advertisements were placed for the position of CFO; (b) four candidates were invited for interviews; (c) a recommendation for a suitable candidate was made to the then Minister who did not approve the recommendation made by the Board and directed that the SABC restart the recruitment process; (d) thereafter, an additional candidate (who had not originally applied) was interviewed by SpencerStuart along with other Board members; (e) the Board then resolved to send three names (including Ms Duda).

45.5. The fifth is that Mr Motsoeneng was responsible for the "purging" of senior staff that led to the avoidable loss of millions of Rand toward salaries in respect of unnecessary settlements for irregular termination of contracts.⁶¹ Despite the SABC's complaint as to the paucity of information and detail from the Public Protector, it has

⁵⁸ Motion Record: Vol 2; page 406, paras 81 and 82.

⁵⁹ Motion Record: Vol 1; page 22, para 39.

⁶⁰ Motion Record: Vol 1; page 158.

⁶¹ Motion Record: Vol 1; page 23, para 40.

dealt with this allegation in some detail.⁶² The SABC has explained the circumstances under which fourteen of its former employees are no longer employed at the SABC. These relate to contracts having come to an end, persons having retired, dismissals pursuant to disciplinary hearings and a contention that Mr Motsoeneng was not responsible for any of these.⁶³

45.6. The sixth is that Mr Motsoeneng had unilaterally increased the salaries of certain persons without following the regulatory requirements, thereby resulting in irregular and improper conduct and an unprecedented salary bill escalation by R29 million by the SABC.⁶⁴ The SABC has refuted this allegation explaining that upon investigation, it is satisfied that there has been no irregular spending through the unlawful and improper actions of Mr Motsoeneng which has resulted in a loss of R29 million.⁶⁵ The SABC has explained in this regard that all salary adjustments were properly motivated with the necessary approvals in terms of the SABC's policies having been obtained.⁶⁶

45.7. The seventh is that Mr Motsoeneng was in large part responsible for "*pathological corporate governance deficiencies at the SABC.*"⁶⁷

⁶² Motion Record: Vol 2; page 407, para 84 and following.

⁶³ Motion Record: Vol 2; page 409, paras 88 to 103.

⁶⁴ Motion Record: Vol 1; page 23, para 41.

⁶⁵ Motion Record: Vol 2; pages 400, para 61.

⁶⁶ Motion Record: Vol 2; pages 402 to 404, para 66 to 70.

⁶⁷ Motion Record: Vol 1; page 23, para 42.

50. According to the judgment, the rights that the DA asserted in its own and in the public interest are⁷⁴:

50.1. Compliance with the rule of law and the principle of legality.

50.2. The statutory right conferred by the BA that members of the Board must be persons who are: (a) suited to serve the Board by virtue of their qualifications and experience; and (b) committed to fairness, freedom of expression, the right of the public to be informed and openness and accountability; and (c) the right to ensure compliance by the SABC with the Broadcasting Act and the Charter; (e) the Board obligation to ensure good governance within the SABC, which statutory rights the Court found are rooted in the BA.

51. We submit that the Court a quo erred in finding that the DA had established a clear right. The question, properly construed, is whether the DA had established a clear right for: (a) the Board to institute disciplinary proceedings against Mr Motsoeneng; and (b) an order to suspend Mr Motsoeneng.

52. We submit that the DA plainly has no right (clear or otherwise) to an Order suspending Mr Motsoeneng. In the context of an employment relationship, an order of suspension has been equated to an arrest, which may only be

⁷⁴ Motion Record: Vol 5; page 815; par 104.

ordered or upheld in exceptional circumstances.⁷⁵ Even in circumstances where the Court is inclined to intervene and order immediate suspension of an employee at the instance of a third party to the employment relationship, it will do so upon evidence which clearly shows a basis for such an order. The Public Protector also made no such order. There is accordingly no such basis for the DA to assert a clear right in this regard.

53. As regards the institution of disciplinary proceedings, both the Minister and the SABC have carefully explained the steps taken in relation to the report of the Public Protector and their reasons for having rejected the findings of the Public Protector's report. We reiterate, there is no basis for contending that the Minister has acted irrationally in this regard. In the circumstances, we submit that the DA has failed to show a clear right for the Board to institute disciplinary proceedings against Mr Motsoeneng.

54. The sole basis on which the DA sought to establish a right was that the appointment of Mr Motsoeneng as a permanent chief operations officer of the SABC was "*plainly irrational and unlawful*".⁷⁶ The only ground for the asserted irrationality is that the Public Protector has made "*damning findings*" against Mr Motsoeneng, and has prescribed institution of disciplinary proceedings against him.

⁷⁵ *Mogothle v Premier of the North West Province & another* [2009] 4 BLLR 331 (LC), para 31.

⁷⁶ Motion Record: Vol 1; page 41; para 98.

55. Relying on the Public Protector's findings and remedial action, the DA contends that it is irrational to appoint Mr Motsoeneng as a permanent chief operations officer.
56. The DA sets much store by the judgment of the Constitutional Court in *Simelane*.⁷⁷
57. We immediately point out that the elementary but fundamental difference between the judgment of the Constitutional Court in *Simelane* and the present case is that the former did not deal with the question of immediate suspension of Mr Simelane pending the outcome of the decision of the President to appoint him as the National Director of Public Prosecutions ("the NDPP"). That question did not arise and the Constitutional Court did not deal with it. It follows therefore that the DA cannot call in aid that judgment, in this round of litigation.
58. A more instructive difference between the judgment of Constitutional Court in *Simelane* and the DA's present application is this. In the former the Constitutional Court was called upon to assess the rationality of the President's decision to appoint the NDPP, in the context of a constitutional requirement that the office holder of that office must be a fit and proper

⁷⁷ *Democratic Alliance v President of The Republic of South Africa* 2013 (1) SA 248 (CC).

person.⁷⁸ That requirement was an objective jurisdictional fact which had to be met, to make the President's decision rational.⁷⁹

59. The DA's reliance on *Simelane* proceeds on the *a priori* assumption that Mr Motsoeneng is not fit to hold office. But that assumption is not justified. We say so for the following reasons:

59.1. First, the Public Protector did not find or conclude that Mr Motsoeneng was not fit to hold the office of the chief operations officer.

59.2. Secondly, the Public Protector recommended disciplinary action against Mr Motsoeneng. One cannot anticipate findings of fact, and conclusions of law which may be made in due course, and assume that the only conclusion that will be made is that Mr Motsoeneng is not qualified to hold the relevant office. To do so is make a mockery of the prescribed disciplinary proceedings.

59.3. Thirdly, one cannot also assume that the logical outcome of disciplinary proceedings is the dismissal of Mr Motsoeneng as the acting chief operations officer.

60. In the final analysis, in *Simelane*, the Constitutional Court concluded that the President's decision was irrational because he ignored relevant

⁷⁸ *Simelane*, supra, para 14.

⁷⁹ *Simelane*, supra, para 20.

information which was at the heart of the fitness or otherwise of Mr *Simelane* to hold the office of the NDPP.

61. The same cannot be said in this case for reasons already addressed. In summary, the Minister was aware of, and considered the Public Protector's report.⁸⁰ She also considered the Mchunu report,⁸¹ and the motivation of the SABC Board to recommend the appointment of Mr Motsoeneng.⁸² She also considered further qualifications and experience which Mr Motsoeneng gained during the period of his acting appointment.⁸³
62. She was concerned about the Public Protector's finding that Mr Motsoeneng was deceitful and lied about his qualification. She raised her concern with the chair of the SABC who responded by furnishing a copy of the transcript of the Public Protector's interview of Mr Motsoeneng.⁸⁴ She then considered that transcript and concluded that Mr Motsoeneng did not lie about his qualification.⁸⁵
63. Having regard to the above factors, we submit that the DA has not established a clear right. On this basis, we submit that the DA has failed to establish a basis for the interdictory relief sought and ultimately granted by the Court a quo.

⁸⁰ Motion Record: Vol 3; page 504, para 13.

⁸¹ Motion Record: Vol 3; page 504, para 12; page 530, para 50.3; page 532, para 53.2.

⁸² Motion Record: Vol 3; page 504, para 13; page 505 paras 15 and 16; page 509, para 23.2; pages 536 to 539, paras 60.1 to 60.3.

⁸³ Motion Record: Vol 3; page 505, para 15.

⁸⁴ Motion Record: Vol. 4; page 504, paras 13 and 14.

⁸⁵ Motion Record: Vol. 4; page 504, paras 13 and 14.

An injury committed or reasonably apprehended

64. As to the second requirement, the Court a quo concluded that the papers show prima facie that there is a case of irregular and improper conduct, maladministration and abuse of power on the part of Mr Motsoeneng which calls for an answer.⁸⁶

65. We respectfully submit that the Court a quo erred in finding that the evidence put up by the Appellants in support of their contention that the Public Protector's findings have no merit underscore the conclusion that there is a prima facie case justifying the institution of disciplinary proceedings against Mr Motsoeneng.⁸⁷

66. We submit that the Court a quo erred in relying on the following in this regard:

66.1. The role of Mr Motsoeneng in the suspension of numerous employees which constitutes improper conduct, abuse of power and maladministration.⁸⁸

66.2. The allegations of abuse of power and improper conduct by Mr Motsoeneng in the appointment and salary increases of Ms Motsweni.⁸⁹

⁸⁶ Motion Record: Vol. 5; page 816; para 105.

⁸⁷ Motion Record: Vol. 5; page 816; para 105.

⁸⁸ Motion Record: Vol. 5; page 818; par 109.

66.3. The allegations concerning Mr Motsoeneng's dishonesty in relation to misrepresentation of his qualifications.⁹⁰

67. In making the above findings, the Court failed to have regard to the Appellants' version that there has been remarkable improvements, both in the financial outlook, and capacity, of the SABC to deliver on its mandate. The Court a quo also failed to have proper regard to the Appellants' response to the findings of the Public Protector.

The absence of protection by any other remedy

68. The DA contends that it has "no alternative means to have Mr Motsoeneng removed than to approach this Court."⁹¹

69. This is not correct. We have dealt with the provisions of section 15A of the BA, and have demonstrated the obvious remedy it provides, and in a way which respects and promotes separation of powers between the legislative, executive and judicial organs of government.

70. Given that the DA is a political party represented in the National Assembly, it has available to it section 15A of the Act. We have also drawn attention to the fact that the DA has already initiated parliamentary process to give

⁸⁹ Motion Record: Vol. 5; page 820; par 110.

⁹⁰ Motion Record: Vol. 5; page 823; par 113.

⁹¹ Motion Record: Vol 1; page 43; para 103.

effect to the Public Protector's report.⁹² The process has not yet been completed.

71. The effect of the relief sought by the DA is to undermine the process initiated by it. We submit that the DA should not be allowed to change course, at whim.
72. The DA claims that the possibility that the Portfolio Committee would agree to a section 15A process is very unlikely.⁹³ We submit that this response is speculative in the extreme. It demonstrates that, on its version, the DA accepts that a section 15A process exists and that it did not comply with it.
73. The DA's further argument on this score is that the decision is ultimately made by the Minister, and given that the Minister so recently approved the appointment, there is no real possibility of her agreeing to suspend or remove Mr Motsoeneng from office.⁹⁴ This allegation is made for the first time in reply; accordingly the Minister has not answered to it. However, we submit that it is entirely speculative and clearly serves to demonstrate that the DA does have an alternative remedy available to it.
74. We accordingly submit that the DA does indeed have an alternative remedy available to it.

⁹² Motion Record: Vol 4; page 735, annexure "JS8".

⁹³ Motion Record: Vol 4; page 701, para 39.

⁹⁴ Motion Record: Vol 4; 702, para 40.

THE RESIDUAL DISCRETION

75. In the circumstances, we submit that the DA has not complied with any of the threshold requirements for an interim interdict, let alone a final interdict. The result thereof is that the application must fail.
76. If despite the submissions we have advanced, this Court concludes that the DA has in fact met the requirements for the grant of an interdict, then we submit that in any event the relief sought ought to be refused in accordance with this Court's residual discretion.⁹⁵ The following crucial factors are relevant to the exercise of this residual discretion:
- 76.1. First, the effect of the relief is to ignore a decision taken by the Minister in the absence of a review and setting aside of that decision. Under the regulatory framework, the Minister is the only functionary empowered to take such a decision.
- 76.2. Second, the Minister's decision did not transgress any finding of the Public Protector.
- 76.3. Third, the DA has placed no direct evidence of whatsoever nature in support of its bald contention that the ongoing employment of Mr Motsoeneng would violate constitutional rights under sections 16 and 32.

⁹⁵ *Stock and Another v Minister of Housing and Others* 2007 (2) SA 9 (C) at par 18.

76.4. Fourth, the relief sought in Part A will undermine, and make mockery of the process initiated by the DA itself.

QUASI SUPERVISORY INTERDICT

74. We have already drawn attention to the way the Court below incorporated the quasi supervisory interdict in paragraph 3 of its order. It is troubling that none of the respondents were heard on that issue, before the order was made. Moreover it is a matter which did not arise on the papers, because the DA did not ask for that relief, or contend for it, in argument.⁹⁶

75. The difficulty with the supervisory order made by the Court below is that it sought to monitor the implementation of a remedy it considered to be interim relief, in the face of ongoing litigation between the parties. That meant that the statutory remedies in the BA were taken over by the Court below, as it took the primary responsibility of ensuring that the proceedings were completed within the period determined by it, or an explanation from the Chair had to be furnished why they were not completed in that time.

76. In that way, the supervisory interdict radically intruded in the realm and functions of the executive and legislative branches of government. That is, with respect, inappropriate, particularly when there is supposed to be pending litigation between the parties to ventilate the fundamental

⁹⁶ *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) at par 15 to 18.

question on whether the case a cause for the review of the Minister's and SABC' s decisions has been shown.

APPROPRIATE ORDER

77. We submit that the appropriate order is that Part A should have been dismissed with costs, including the costs of two counsel. We accordingly ask that the appeal is upheld with costs, including the costs of two Counsel.

Vincent Maleka SC

Karrisha Pillay

Counsel for the Third Appellant

29 July 2015

Chambers

Sandton and Cape Town

LIST OF AUTHORITIES

Legislation

1. Promotion of Administrative Justice Act 3 of 2000
2. Broadcasting Act 4 of 1999

Case-Law

3. Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC)
4. Democratic Alliance v President of the Republic of South Africa 2013 (1) SA 248 (CC)
5. Fischer v Ramahlele 2014 (4) SA 614 (SCA) *
6. Gool v Minister of Justice and Another 1955 (2) SA 682 (C)
7. International Trade Administration Commission v SCAW SA (Pty) Ltd 2012 (4) SA 618 (CC)
8. Masethla v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC)
9. Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC)
10. Minister of Education for the Western Cape and Another v Beauvallon Secondary School (865/13) [2014] ZASCA 218 (9 December 2014)
11. Mogothle v Premier of the North West Province & another [2009] 4 BLLR 331 (LC)
12. Mpofo v South African Broadcasting Corp Limited (SABC) and Others (2008/18386) [2008] ZAGPHC 413 (16 September 2008)
13. National Treasury and Others v Opposition to Urban Tolling 2012. (6) 223 (CC)*
14. Ronald Bobroff and Partners Inc v De La Guerre 2014 (3) SA 134 (CC)*
15. Stock and Another v Minister of Housing and Others 2007 (2) SA 9 (C)

CHRONOLOGY TABLE

The following terms are used in the chronology:

“Minister”:	Minister of Communications
“SABC”:	South African Broadcasting Corporation SOC Ltd
“Board”:	Board of Directors of the SABC
“Motsoeneng”:	Hludi Motsoeneng
“Report”:	Final Report of the Public Protector dated 17 February 2014

DATE	EVENT	RECORD
November 2011	Motsoeneng appointed as Acting COO of the SABC	FA para 24, 1/18
15 November 2013	Public Protector releases her provisional report	AA (Motsoeneng) para 11, 3/552
17 February 2014	Public Protector releases her Report	“JS1”, 1/57-206
18 March 2014	Public Protector informed by letter from the Board that a special Committee of Chairs, comprising of Chairpersons of various Committees of the Board to deal with her Report	AA (SABC) para 22, 2/384 & “ZET2”, 3/453
18 May 2015	Board writes to Public Protector to advise her on progress of implementing the remedial action	AA (SABC) para 106, 2/416 & “ZET15”, 3/492
5 June 2014	Board receives report prepared by Mchunu Attorneys	AA (SABC) para 108, 2/417
7 July 2014	Board holds meeting	FA para 54, 1/27
7 July 2014	Board recommends Motsoeneng’s permanent appointment as COO	FA para 4, 1/11-12
8 July 2014	Minister approves Motsoeneng’s permanent appointment as COO	FA para 4, 1/11-12
16 August 2014	Date by when final report on actions requested by Public Protector in her Report to be presented by Minister and	“JS1” para 12.3, 1/206

	the Board	
19-20 August 2014	Part A of the application argued before the Court <i>a quo</i>	1/1
24 October 2014	Judgment of the Court <i>a quo</i> handed down	5/761
18 December 2014	Applications for leave to appeal and application in terms of Rule 49(11) argued before the Court <i>a quo</i>	
23 April 2015	Judgment of the Court <i>a quo</i> granting leave to appeal handed down	5/893

PRINT OUT OF STATUTES FROM ELECTRONIC DATABASE

By agreement between the Second and Third Appellants and in order to avoid undue prolix, the Third Appellant will provide electronic printouts of:

Promotion of Administrative Justice Act 3 of 2000

Broadcasting Act 4 of 1999

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 393/15
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

CERTIFICATE

We hereby certify that there has been compliance with Rules 10 and 10A(a).

DATED AT CAPE TOWN THIS 30TH DAY OF JULY 2015.

PP 
Vincent Maleka SC


Karrisha Pillay

Counsel for the Third Appellant