IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 12497/2014

In the matter between:

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

HLAUDI MOTSOENENG: THE CHIEF OPERATIONS OFFICER OF THE SOUTH AFRICAN BROADCASTING CORPORATION LIMITED Eighth Respondent

THE PUBLIC PROTECTOR Ninth Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL
23 APRIL 2015

Schippers J:

[1] There are two applications which must be decided. The first is an application for leave to appeal to the Supreme Court of Appeal (SCA) against the whole of the judgment handed down and order made by this court on 24 October 2014, [1] by the first, fourth, eighth and ninth respondents. The second is an application in terms of s 18 of the Superior Courts Act 10 of 2013 ("the Act"), that the order of 24 October 2014 be implemented pending the outcome of the appeal process.

The application for leave to appeal

[2] Section 17(1) of the Act provides that leave to appeal may be granted only inter alia, where the court is of the opinion that the appeal has a reasonable

[1] *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC)

prospect of success or there is some other compelling reason why the appeal should be heard.[2]

[3] The first respondent ("the SABC") and the eighth respondent ("Mr Motsoeneng") contend that the court erred in finding that the matter was urgent and that the applicant has standing. In my view there is no reasonable prospect of success on these grounds, for the reasons advanced in paragraphs 20-44 of the judgment. The remaining grounds of appeal broadly are that the court erred: (a) in holding that the SABC and the fourth respondent ("the Minister") had rejected the Public Protector's findings and remedial action by appointing Mr Motsoeneng as the Chief Operations Officer (COO) of the SABC, without any rational basis for doing so; (b) in finding that there is a *prima facie* case justifying the institution of disciplinary proceedings against Mr Motsoeneng; (c) in violating the doctrine of separation of powers by ordering the SABC to institute disciplinary proceedings against Mr Motsoeneng and directing that he be suspended pending those proceedings; and (d) in holding that s 41 of the Constitution and ss 15(1) and 15A of the Broadcasting Act 4 of 1999 do not constitute adequate alternative remedies. In my opinion, these grounds of appeal likewise have no prospect of success, for the reasons set out in paragraphs 61-63; 72 and 75-123 of the judgment.

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2 Section 17(1)(a) of the Superior Courts Act 10 of 2013.

[4] However, I consider that leave to appeal should be granted because there are other compelling reasons why an appeal should be heard.

[5] This court held that the findings of the Public Protector are not binding and enforceable, for the reasons set out in the judgment.[3] It found that before rejecting the findings or remedial action of the Public Protector, an organ of state must have cogent reasons for doing so.[4] The court determined the consequential steps which should be taken by an organ of state in a case where the Public Protector makes findings and takes remedial action as contemplated in s 182(1) of the Constitution.[5]

[6] These are important questions of law involving the interpretation and application of the provisions of the Constitution, which warrant a definitive judgment by the SCA for the following reasons.

(a) First, a definitive judgment in relation to the Public Protector's powers and the legal effect of the remedial action taken by the Public Protector is critical to the effective functioning of our democracy.

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3 *DA v SABC* n 1 paras 46-74.
4 *DA v SABC* n 1 para 66.
5 *DA v SABC* n 1 para 72

(b) Second, the lack of clarity regarding the binding effect of the findings of and remedial action taken by the Public Protector has a significant effect on both organs of state and ordinary South Africans. The latter look to the office of the Public Protector for protection against the abuse of public power. In her affidavit the Public Protector says that most of the work done by her office involves ordinary people trying to give effect to their constitutional rights. If the impression is created that reporting misconduct in state affairs, public administration or in any sphere of government to the Public Protector can have no material effect, the office of the Public Protector will be fundamentally and irreparably undermined. A decision of the SCA is therefore crucial in this regard.

(c) Third, clarity and certainty as to the nature and extent of the Public Protector's powers will provide much-needed guidance for future holders of that office and organs of state in the exercise of their constitutional obligations; and will protect and guarantee the integrity of the office of the Public Protector.

[7] For these reasons, I am of the opinion that leave to appeal the order to the SCA should be granted to the first, fourth and eighth respondents.

[8] As regards leave to appeal sought by the Public Protector, the notice of appeal states the following:

> "Those portions of the judgment appealed against are those which constitute findings affecting the ninth respondent, alternatively rulings of law determining the rights and powers of the ninth respondent, i.e. para 49 to 74 of the judgment."

[9] There is no order made against the Public Protector. She has not noted an appeal against any part of the order. It is trite that an appeal cannot be noted against the reasons for a judgment but only against the substantive order made by a court.[6]

[10] Although there is no order against the Public Protector, the nature and ambit of her powers under the Constitution have been determined in the judgment. The determination has been made in circumstances where the Public Protector: was a party to the proceedings; was represented by senior and junior counsel; and contended that her findings and remedial action are binding and enforceable, unless properly and successfully challenged in review proceedings.

[11] The holding that the findings and remedial action of the Public Protector are not binding and enforceable directly affects and determines the powers of the Public Protector and impacts on the functioning of the institution.

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[6] *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355; *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) para 39.

[12] In her affidavit in the application for leave to appeal the Public Protector contends that the court erred inter alia in relying on *Bradley*;[7] in its interpretation of s 182(1)(c) of the Constitution; and in formulating a test which has no basis in either the Constitution or the Public Protector Act 23 of 1994.

[13] These plainly are disputes which can be resolved by the application of law decided before a court, as contemplated in s 34 of the Constitution.[8] It appears however that an application of the rule that an appeal can be noted only against a substantive order would oust s 34. It would also be inconsistent with s 7(2) of the Constitution which provides that the judiciary must protect and promote the Bill of Rights,[9] as well as s 8(1) which states that the Bill of Rights applies to all law and binds the judiciary.[10]

[14] Section 8(3) of the Constitution provides the mechanism for the creation of a rule where previously neither an express rule of common law nor a provision of legislation gave adequate expression to the demands of a specific

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7 *R (on the application of Bradley and Others) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116 (CA).

8 Section 34 of the Constitution reads:
"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."

9 Section 7(2) of the Constitution reads:
"The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

10 Section 8(1) of the Constitution reads:
"The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all other organs of state."

constitutional right.[11] Section 8(3) has been utilised both directly under s 8(1) and indirectly under s 39(2) of the Constitution,[12] and reinforces a court's inherent power to create rules and remedies where the Bill of Rights so demands.[13]

[15] However, the question whether the Bill of Rights demands the creation of a new rule to develop or replace the principle that an appeal can be noted only against a substantive order, has neither been raised nor argued in this application. In these circumstances, I do not think it appropriate to decide this question. That said, the Public Protector, as a party with a direct and substantial interest in this matter, might very well be permitted to present oral argument at the hearing of the appeal before the SCA.

[16] In the circumstances I have no alternative but to refuse the application for leave to appeal by the ninth respondent.

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11 Section 8(3) of the Constitution reads inter alia as follows:
"In applying the provisions of the Bill of Rights to natural and juristic persons in terms of subsection (2), a court –
(a) in order to give effect to a right in a bill, must apply or if necessary develop, the common law to the extent that legislation does not give effect to that right;"

12 Section 39 (2) of the Constitution reads:
"When interpreting any legislation and when developing the common law and customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

13 Woolman et al (eds) *Constitutional Law of South Africa* (2nd ed 2012) vol 2 p 31-75.

The application for the implementation of the order

[17] The suspension of an order pending an appeal is regulated by s 18 of the Act. The relevant provisions read as follows:

> "**18. Suspension of decision pending appeal.** – (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
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> (2) …
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> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."

[18] The jurisdictional requirements for an order giving effect to a judgment pending an appeal are these: (a) there must be exceptional circumstances before an order which is the subject of an application for leave to appeal may be put into operation and executed; and (b) the party seeking to give effect to the order, in addition must show on a balance of probabilities that it will suffer irreparable harm if the order is not put into operation and executed, and that the other party will not suffer irreparable harm if it is.

[19] I have carefully considered the submissions by the SABC, the Minister and Mr Motsoeneng as to why the order should not be implemented. I have come to the conclusion that the circumstances of this case are out of the ordinary and thus exceptional, and that the order should be implemented in the public interest, for the reasons set out in the judgment and those advanced below.

[20] If this case were only about the relationship between an employer and employee, the circumstances might well be different. But this is no ordinary case. It involves the national broadcaster. It is a public institution owned and controlled by South Africans, and performing duties to the public. As stated in the judgment, it is of fundamental importance to our democracy that the SABC acts in a manner consistent with constitutional prescripts and within its powers as set out in the law. And the provisions of the Broadcasting Act 4 of 1999 demand that persons who serve on the board of the SABC be committed to openness and accountability and the principles enunciated in the charter of the SABC. One of these principles is that the board must always maintain the highest standards of integrity, responsibility and accountability.

[21] The founding affidavit in this application cites a further example of a lack of integrity and accountability by a member of the board of the SABC. The former chairperson of the SABC, Ms Zandile Ellen Tshabalala was called to

account to the Parliamentary Portfolio Committee on Communications, for misrepresenting her qualifications. As also stated in the founding affidavit, despite the Committee's repeated requests to Ms Tshabalala simply to provide her certificate, or to admit that she was not truthful, she approached this court to shield her from having to prove her qualifications. It is a known fact that Ms Tshabalala resigned after the Portfolio Committee found her guilty of two charges of misconduct relating to allegations that she misrepresented her qualifications to Parliament and that she lied under oath when she said in an affidavit that her qualifications had been stolen during a burglary at her home.

[22] In the answering affidavit in this application, Ms Tshabalala however denies the truthfulness of the allegations concerning her qualifications. She also denies that she sought to avoid having to prove her qualifications. She says that the reasons for the Public Protector's findings that Mr Motsoeneng should face a disciplinary inquiry are not supported by the objective facts, and that the SABC's decision not to launch disciplinary proceedings is founded on cogent reasons.

[23] This underscores what appears from the Public Protector's report - there has been a culture of dishonesty, impunity and abuse of power at the SABC, and is a further reason why the order should be implemented in the public interest.

[24] Apart from this, the case is extraordinary because it involves the office of the Public Protector and the confidence of the public in that institution. The Public Protector conducted an investigation pursuant to complaints by employees of the SABC of systemic maladministration, improper conduct and abuse of power at the SABC. The Public Protector found that these complaints had merit and that disciplinary action should be taken against Mr Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct. The SABC and the Minister effectively ignored this and appointed Mr Motsoeneng permanently to the position of COO.

[25] The need to implement the order is further strengthened by the evidence disclosed in the affidavit of Ms Mari Swanepoel, which she made in this application. Mr Motsoeneng's evidence in this court is that when he applied for a job at the SABC, he told Ms Swanepoel that he had attempted but not passed standard 10, but that she had indicated that he should fill in "10" under the heading, "highest standard passed." Then he said that he was unable to trace Ms Swanepoel again.

[26] Ms. Swanepoel refutes this evidence. She says that she made it clear to Mr Motsoeneng that he must not fill in a qualification which he had not yet finished; that he would have to provide an original certificate to prove whatever he filled in on the application form; and that after he had completed the form

she repeatedly contacted Mr Motsoeneng to produce his matric certificate which he promised to do, but never did. Ms Swanepoel says that she also repeatedly followed up Mr Motsoeneng's failure to produce a matric certificate with her superiors, including Mr Paul Tati. It will be recalled that Mr Tati insisted that Mr Motsoeneng produce his matric certificate by no later than 12 May 2000. Mr Motsoeneng replied that he would furnish the certificate as soon as he received it.[14]

[27] Ms Swanepoel left the SABC in 2006. In late 2012 Mr Motsoeneng telephoned her. He told her that the SABC was trying to fire him and he wanted to keep his job. He said that his attorneys wanted her to make an affidavit about his matric certificate and the form he had completed. He indicated to Ms Swanepoel that she should say that he had told her that he did not have matric when he filled in the form. She refused. She also told Mr Motsoeneng that she did not wish to speak to him as she had a sexual harassment suit pending against the SABC at the time. He knew about the case and asked what she wanted from the SABC. She said she wanted R2 million in compensation. Mr Motsoeneng, then the Acting COO, replied, in Ms Swanepoel's words that, "*he could organise for the SABC to pay me the R2 million, if I was willing to depose to the affidavit about the certificate*." She again refused. Ms Swanepoel says that for some four weeks thereafter Mr Motsoeneng phoned her repeatedly, but she

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[14] *DA v SABC* n 1 para 113(b).

generally ignored his calls. On the occasions that she did answer, Mr Motsoeneng asked her if they could meet just to talk or if his attorneys could speak to her about the matter. She replied that she would talk to him but that she would not lie in an affidavit for him.

[28] In the answering affidavit Mr Motsoeneng states that he knew that he does not have a matric certificate and that he disclosed that fact to Ms Swanepoel. He does not deny that he contacted her in late 2012. He says that his statement that he was unable to trace Ms Swanepoel, must be understood to mean that he could not make contact with her for the purpose of obtaining an affidavit from her. Then he says that she agreed to make an affidavit confirming what she had said in a letter dated 5 September 2000. But that letter does not say that Ms Swanepoel knew that Mr Motsoeneng did not pass matric or that she told him what to fill in on the application form when he applied for a job with the SABC. Mr Motsoeneng also states that he did not get the affidavit from Ms Swanepoel. The reason he suggests is that she wanted a settlement of her sexual harassment case, as he put it, she "*was concerned only with her own matter.*"

[29] As to the settlement of Ms Swaneopoel's case against the SABC, the answering affidavit states that in March 2014 Ms Swanepoel's claim was settled

in an amount which is subject to a confidentiality clause. Mr Motsoeneng denies that he attempted to bribe Ms Swanepoel.

[30] These facts merely underscore the point there is a *prima facie* case which justifies the institution of disciplinary proceedings against Mr Motsoeneng. Again, I must stress that I make no findings as to whether or not Mr Motsoeneng is guilty of improper conduct.

[31] Ms Tshabalala however says that the serious allegations by Ms Swanepoel require further investigation before they can be accepted as forming a basis for disciplinary action against Mr Motsoeneng.

[32] Ms Tshabalala misses the point. The allegations concerning Mr Motsoeneng's qualifications and what Ms Swanepoel is alleged to have done when Mr Motsoeneng completed the relevant application form, are not new. Neither are the allegations relating to his qualifications confined to a misrepresentation concerning a matric certificate. The matter was investigated by the Public Protector who found that disciplinary action should be taken against Mr Motsoeneng inter alia for misrepresenting his qualifications. In May 2014 the SABC informed the Public Protector that it would furnish her with an implementation plan concerning her report. It failed to do so. Instead, Mr Motsoeneng was appointed permanently to the position of COO, without

reference to the Public Protector and without following the prescribed procedures to fill that position. These facts are not in dispute.

[33] It is common cause that the appeal process might take a considerable period of time and that a suspension of the order will mean that Mr. Motsoeneng will remain in the position of COO whilst the appeal process runs its course. And the disregard of the Public Protector's findings and remedial action by the SABC and the Minister will remain un-remedied. In my view, this state of affairs also constitutes irreparable harm to the public interest.

[34] By contrast, Mr Motsoeneng will not suffer irreparable prejudice. As stated in the judgment, any prejudice that he might suffer will be significantly contained - he will suffer no loss of remuneration and the suspension is for a limited period. And he may be found not guilty on the allegations of misconduct that have been hanging over him for years. Such a result could only serve the interests of Mr Motsoeneng, as well as those of the SABC.

[35] Finally, I do not accept that the SABC will suffer irreparable harm if disciplinary proceedings are brought against Mr Motsoeneng. The harm that the SABC has suffered is apparent from the report of the Public Protector, which states:

> "All of the above findings are symptomatic of pathological corporate governance deficiencies at the SABC, including failure by the SABC Board to provide strategic oversight to the National broadcaster as provided for in the SABC Board Charter and King III Report… Mr Motsoeneng has been allowed by successive Boards to operate above the law, undermining the GCEO among others, and causing the staff, particularly in the Human Resources and Financial Departments to engage in unlawful conduct."

[36] For the above reasons, I am of the view that the applicant has made out a proper case that SABC and the public will suffer irreparable prejudice unless the order is put into operation.

[37] I make the following order:

(a) Leave to appeal to the Supreme Court of Appeal, against the whole of the order contained in paragraph 127 of the judgment of this court handed down on 24 October 2014, is granted to the first, fourth and eighth respondents.

(b) The costs of the application for leave to appeal shall be costs in the appeal.

(c) The application by the ninth respondent for leave to appeal to the Supreme Court of Appeal is refused. There is no order as to costs.

(d) The order of this court contained in paragraph 127(1)–(4) of the judgment handed down on 24 October 2014 shall operate and be executed, pending the outcome of the appeal to the Supreme Court of Appeal.

(e) The costs of the application to implement the order of 24 October 2014 shall be paid by the first, fourth and eighth respondents jointly and severally, the one paying the others to be absolved. Such costs shall include the costs of two counsel.

SCHIPPERS J