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

Reportable

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 SOC LTD	Second Respondent
THE CHAIRPERSON OF THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN BROADCASTING CORPORATIONS SOC LTD	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 OPERATING OFFICER OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	Eighth Respondent
THE PUBLIC PROTECTOR	Ninth Respondent

JUDGMENT: 27 November 2015

DAVIS J

Introduction

[1] The Republic of South Africa Constitution Act 108 of 1996 ('the Constitution') sought to reimagine the relationship between the represented and those who were elected to represent, we the people of South Africa. It was envisaged that this particular model of democracy would transcend the voting process as constituting the only basis of political participation, particularly as it is an event that only takes place every five years. It was intended that governance would take place within a meticulously legally constructed framework of legal rules and principles, the latter of which are set out in detail and considerable care in the 1996 constitutional text. As the custodian of this text, courts are called upon to make a range of policy orientated decisions, many of which are saturated with polycentric consequences, others of which raise controversial political questions and all of which may well place the courts at the centre of political debate. However controversial the implications of a judgment, the judicial task is to ensure that government adheres to and promotes the values and principles in the Constitution and thus complies with the overarching principle of legality. Recourse to the concept of deference to the manifestation of the popular will, as sourced in the policies of the majority party in Parliament, must be located within this context. See in particular Karl Klare 'Self-Realization, human rights and the separation of powers: A democracy-seeking approach' 2015 Stellenbosch Law Review 465.

[2] This case concerns a decision of a member of the executive and its relationship to legality as I have sought to outline it. During argument, respondents repeatedly emphasised the critical need to defer to the choice of fourth respondent;

('the Minister') hence the imperative to locate the appropriate approach to the adjudication of this case.

[3] Briefly, on 7 July 2014 the third respondent ('the Board') recommended that the Minister should appoint the eighth respondent ('Mr Motsoeneng') as the chief operating officer ('COO') of the South African Broadcasting Corporation ('SABC'). The next day, on 8 July 2014, the Minister accepted this recommendation and duly appointed Mr Motsoeneng as the COO of the SABC.

[4] It might have been expected by the designers of the Constitution, who had laid out an intricate set of rules dealing with Parliament, that the official opposition in Parliament would have viewed the latter institution as the preferable location for disputing this appointment. But lawfare, the use of law as a replacement for political warfare, has become common place in South Africa. The applicant thus bases its case on arguments which contend that the decision both to recommended and later to appoint Mr Motsoeneng as the COO of the SABC are procedurally and substantially irrational. These arguments require this Court to examine and evaluate the merits of these submissions, notwithstanding that this dispute can be described as lawfare. It is the court's role to examine whether the appointment was made in terms of the principle of legality, only after which deference must be paid to the choice of a democratically elected Minister. Courts are the custodians of the principle of legality, as it is sourced in the Constitution. Where this principle is invoked, Courts are obliged to enter the arena. Beyond the scope of this principle, the invitation to be a custodian must be firmly refused.

A brief background

[5] In November 2011 Mr Motsoeneng was appointed as the acting COO of the SABC. Between 11 November 2011 and 26 February 2012, a series of complaints were lodged by former employees of the SABC which focussed on the alleged irregular appointment and conduct of Mr Motsoeneng as the acting COO of the SABC as well as a systematic manner of maladministration, mainly relating to human resources and financial management, governance failures within the SABC and irregular interference by the then Minister.

[6] These complaints were referred to the ninth respondent ('the Public Protector'). Following an investigations, the Public Protector issued a report on 17 February 2014 entitled "When Governance and Ethics Fail". She made a series of damming findings against the appointment of Mr Motsoeneng as interim COO well as his subsequent conduct; in particular she found the following:

1. Mr Motsoeneng lied about his qualifications when applying for a position of COO and in applying for earlier positions.
2. He abused his power by increasing his salary three times in the space of one year from R 1.5 m to R 2.4 m per annum.
3. He was responsible for the unlawful appointment of Ms Sulley Motsweni to various position as well as for salary increases which were allegedly unlawful between 2011 to 2012
4. He was partly responsible for the unlawful appointment of Ms Gugu Duda as chief financial officer.

5. He was responsible for the purging of “senior staff” which led to the avoidable loss of millions of rand towards salaries in respect of unnecessary settlements for irregular termination of contracts”.
6. He was responsible for the unilateral increase of salaries of Ms Motsweni as well as Ms Thobekile Khumalo.
7. There were ‘pathological’ corporate governance deficiencies within the SABC; and
8. The Department of Communications and, indeed the Minister thereof, had “unduly interfered in affairs of the SABC”, conduct which according to the Public Protector Mr Motsoeneng had aided and abetted.

[7] Pursuant to these findings, the Public Protector made a series of recommendations, including that appropriate disciplinary action be taken against Mr Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, his abuse of power and improper conduct and the fruitless and wasteful expenditure which had been incurred as a result of irregular salary increases which should, in turn, be recovered from the appropriate persons. The Public Protector also recommended to the Minister that he should “take urgent steps to fill the long outstanding vacant position of the chief operating officer with a suitably qualified permanent incumbent within 90 days of this report.”

[8] According to Mr James Selfe, who deposed to the founding affidavit on behalf of the applicant, on 07 July 2014 a board meeting of the SABC was held. The filling of a new post of the COO was not on the agenda of this meeting. However, when the Minister arrived at the SABC on 7 July 2014, she conferred with

the chairperson of SABC, as a result of which the chairperson proposed to the Board that it immediately appoint Mr Motsoeneng as the permanent COO. This version is placed in issue by respondent. What is clear however, is that the recommendation to appoint Mr Motsoeneng was made at approximately 23: 30 on 07 July 2014 by the Board. On the next day, 08 July 2014, the Minister announced the appointment of Mr Motsoeneng as COO.

[9] At a press briefing on 10 July 2014, the Minister indicated that the Board had obtained an opinion of an independent law firm to 'investigate all the issues raised by the Public Protector'. The Minister stated that she and the Board was 'satisfied that the report… cleared Mr Motsoeneng of any wrongdoing'. This report, known after the lawyer who had been briefed, was termed the Mchunu report in these proceedings.

[10] This action spurred a response from applicant, which then applied to the High Court first to suspend Mr Motsoeneng and then to set aside his appointment. Applicant contended that, in light of the damming findings by the Public Protector in relation to Mr Motsoeneng and the clear requirements for the appointment of a COO, the appointment which had been made was both irrational and unlawful.

[11] The application was brought in two parts. Part A was in the form of an urgent application seeking, inter alia, a declaration that Mr Motsoeneng be suspended with immediate effect from his position as COO of the SABC and that he remain suspended until the finalisation of disciplinary proceedings to brought against him. A further declaration was sought that the Board institute disciplinary

proceedings against Mr Motsoeneng within five days of the date of the court order together with a further declaration that the Board appoint a suitably qualified person as the acting COO to fill the position, pending the appointment of a suitably qualified COO.

[12] Part A was decided in favour of the applicant by the Cape High Court. See *Democratic Alliance v South African Broadcasting Corporation Limited* and other 2015 (1) SA 551 (WCC). The order of the Cape High Court was appealed to the Supreme Court of Appeal. In the light of the proceedings which took place in this court, it is now necessary to briefly examine the basis of this latter judgement.

The Supreme Court of Appeal judgment with regard to Part A

[13] Much of the argument before the SCA turned on the status of the Public Protector's report; that is the debate before the SCA was framed in terms of the key question posed by the High Court per Schippers J; 'are the findings of the Public Protector binding and enforceable?' Schippers J concluded that 'the findings of the Public Protector are not binding and enforceable. However, when an organ of State rejects those findings or the remedial action, that decision itself must not be irrational.' (para 74)

[14] Schippers J found that the conduct of the Board and the Minister, in rejecting the findings and the remedial action of the Public Protector, was arbitrary and irrational and consequently constitutionally unlawful. He ordered that the board of the SABC, within 14 days of the date of the court order, commence disciplinary

proceedings against Mr Motsoeneng for his alleged dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in various appointments and salary increases.

[15] On appeal, Navsa and Ponnan JJA adopted a different approach to the legal status of the report of the Public Protector. The learned judges of appeal found, through a meticulous examination of the constitutional status of the Public Protector, and, particularly s 182 (1) (c) of the Constitution, which provides that the Public Protector has the power to take appropriate remedial action, that it was incorrect to find that the Public Protector's findings and declaration of remedial action could be ignored, if the SABC had cogent reasons for doing so. In short, the Public Protector's report was binding, save if set aside by a court on review.

[16] The learned judges on appeal had the following to say which is of particular relevance to the present dispute:

> 'Here, there is no suggestion that the Public protector exceeded her powers or that she acted corruptly. Nor have any of the other transitional grounds for a review been raised. The principal reason advanced by both the SABC and the Minister for ignoring the Public Protector's remedial action is that the former had appointed Mchunu Attorneys to 'investigate the veracity of the findings and recommendations of the Public Protector'. That, in our view, was impermissible. Whilst it may have been permissible for the SABC to have appointed a firm of attorneys to assist it with the implementation of the Public Protector's findings and remedial measures, it was quite impermissible for it to have established a parallel process to that already undertaken by the Public Protector and to thereafter assert privilege in respect

thereof. The assertion of privilege in the context of this case is in any event incomprehensible. If indeed it was aggrieved by any aspect of the Public Protector's report, its remedy was to challenge that by way of a review. It was not for it to set up a parallel process and then to adopt the stance that it preferred the outcome of that process and was thus free to ignore that the Public Protector. Nor was it for the Minister to prefer the Mchunu report to that of the Public Protector.' (para 47)

[17] Before the Supreme Court of Appeal, it appeared that counsel for all the parties agreed that Mr Motsoeneng should be subjected to a disciplinary enquiry. (see para 54) Hence, much of the debate before the SCA appeared to have concerned an attack on the correctness of the order of the High Court suspending Mr Motsoeneng. There are further passages from the judgment of the Supreme Court of Appeal which are relevant to the present dispute; in particular, the court's approach to the appointment by the Minister of Mr Motsoeneng as COO:

'On the undisputed evidence, it would appear that the Minister was able to apply her mind to the Mchunu Report, the recommendation of the Board and the transcript of Mr Motsoeneng's interview before acting on the recommendation of the SABC Board. She had to then weigh that against the 150 page Public Protector Report, which she already had in her possession. She did all of that within a single day. As this court has previously pointed out: 'Promptitude by public functionaries is ordinarily meritorious, but not where that is at the cost of neglecting the task. Moreover, the Minister seems to have restricted herself to a consideration of only one of the several negative findings against Mr Motsoeneng, namely, the allegation of dishonestly concerning his matric qualification. She does not state that she

considered the findings of abuse of power, waste of public money, purging of senior staff and the disregard for principles of good corporate governance, all of which were plainly relevant to her decision. She also says nothing about the failure of the Board to advertise the post, consider other candidates or hold interviews before recommending Mr Motsoeneng for appointment in circumstances where, had she properly considered the Public Protector's Report, she would have known that the Public Protector had found that he had 'been allowed by successive Boards to operate above the law'. Armed with that knowledge, she ought to have considered that greater vigilance was required of her in acting on the recommendation of the Board. Thus, despite the appellants' protestations to the contrary, the permanent appointment of Mr Motsoeneng is inconsistent with the Public Protector's findings and remedial action and is inconsistent with the principles of co-operative governance.' (para 56)

A final passage of the judgment is also worth noting:

'For it seems to be inconsistent to promote a person to one of the most senior position at the public broadcaster if there had been any genuine intention of instituting disciplinary proceedings against him. Rationally, implicit in his promotion has to be a rejection of the rather damning findings by the Public Protector. Not only does all of that render their assertion that they were still intent on engaging with the Public Protector contrived and disingenuous, but it strongly dispels the notion that they can still bring an open and impartial mind to bear on the matter.' (para 64)

Applicant's case

[18] Applicant's seeks to set aside the decision of the Board and the Minister to recommend and appoint Mr Motsoeneng to the post of COO respectively. It also requests this Court to direct that the Board recommend the appointment to the

Minister of a suitably qualified COO within 60 days of the date of this order together with certain ancillary relief that flows therefrom.

[19] Mr Katz, who appeared together with Ms Mayosi and Mr Bishop on behalf of the applicant, contended that the Board's decision to recommend the appointment of Mr Motsoeneng and the consequent decision of the Minister to accept this recommendation were patently irrational, both procedurally and substantially. In support of his argument, Mr Katz referred to the decision in *Democratic Alliance v President of South Africa and others* 2013 (1) SA 248 (CC). In that case, the President had appointed Mr Menzi Simelane as the National Director of Public Prosecutions, notwithstanding findings by the Ginwala Commission of Enquiry into the fitness of Advocate V P Pikoli to hold the office of NDPP that Mr Simelane was dishonest.

[20] The President acted on advice obtained from the Minister of Justice. The Minister of Justice considered that the President could ignore the adverse findings about Mr Simelane, because the Public Service Commission (PSC) had not given Mr Simelane's an opportunity to be heard. The legal submissions made by Mr Simelane lawyers focused on the point that Mr Simelane had not been given an opportunity to respond to the PSC's findings and that the Ginwala Commission's mandate was not to investigate Mr Simelane but rather former National Director of Public Prosecutions, Mr Vusi Pikoli.

[21] The court rejected these findings. It held that the findings of the Ginwala Commission and the PSC were relevant to Mr Simelane's appointment. Yacoob ADCJ gave short shift to these arguments, finding:

> 'The reason given by the Minister for ignoring these indications of dishonesty, albeit prima facie, in the evidence of Mr Simelane before the Ginwala Commission, the evaluation of his evidence by that Commission, and the recommendations of the Public Service Commission did not in all circumstances hold any water. Indeed, they do not disturb my original conclusion that the failure to take these indications into account were not rationally related to the purpose for which the power to appoint a fit and proper person as a National Director were given.' (para 85)

Of equal relevance is the following passage from Yacoob ADCJ's judgment:

> 'The President too should have been alerted by the adverse findings of the Ginwala Commission against Mr Simelane and ought to have initiated a further investigation for the purpose of determining whether real and important questions had been raised about Mr Simelane's honesty and conscientiousness. This he should have done despite his knowledge of Mr Simelane as a person. There is no rational relationship between ignoring the findings of the Ginwala Commission without more and the purpose for which the power had been given. (para 88)

[22] Mr Katz submitted that the Constitutional Court's assessment of a suitable National Director of Public Prosecutions was equally applicable to the appointment of a COO. This conclusion further derived authority from the Broadcasting Act 4 of 1999, together with the Memorandum of Association of the SABC and its Board's Charter. The Broadcasting Act requires that the members of the Board including the COO be persons that are 'committed to fairness… and openness and accountability on the part of those holding public office' and 'who are committed to

the objects and principles as enunciated in the Charter of the Corporation.' Clause 8.1.9 of the Charter, for example, provides that members of the Board are required to 'maintain the highest standard of integrity, responsibility and accountability. Both the Act and the Charter permit the suspension and removal of Board members who have acted dishonestly or abused their positions.

[23] In the present case, the Public Protector, who had expressly investigated Mr Motsoeneng, concluded that he had lied and was guilty of serious acts of maladministration, abuse of power and other forms of misconduct. In the context of this case, Mr Katz contended that the approach adopted in *Simelane*, was even more compelling for, in the *Simelane* case, the negative findings about Mr Simelane arose as a by-product of an enquiry into Mr Pikoli. Here, the express focus of the Public Protector was upon Mr Motsoeneng and his conduct.

[24] Before proceeding to analyse these submissions, I need to return to the SCA judgment and its role in the process of evaluation of applicant's case.

The implications of the judgment of the SCA as to part A

[25] At the conclusion of their judgment, Navsa and Ponnan JJA made the following observation:

> 'We appreciate that we were called upon to adjudicate only that part of the relief sought in Part A of the notice of motion. However, Part A is not a hermetically sealed enquiry and because of the manner in which the litigation was conducted we were obliged to range beyond it to a consideration of some matters upon which the High Court is yet to finally pronounce. In determining whether a suspension order

was apt, it was necessary for use to consider, at least on a prima facie basis, as was done by the court below, matter pertaining to Part B of the notice of motion. For, it must be accepted that the suspension order could only issue if there were prospects of success in relation to Part B. That is not to suggest that we have made any final decisions in relation to the review application not have we pre-empted any decision that the High Court might be in due course be called upon to make, including those that related to relevant Ministerial decisions and their proper classification.' (para 69)

[26] Two important consequences flow from this judgment insofar as the disposition of the present dispute is concerned. In the first place, as the learned judges of appeal noted, certain findings that are contained in their judgment have a bearing upon the evidence which has been placed before this Court. Secondly, the question arises as to the status of the SCA judgment, insofar as the finding of the binding nature of the Public Protector's report is concerned.

[27] The judgment of the SCA is clearly binding on me as a judge of the High Court. I should add that I embrace its findings with jurisprudential enthusiasm. Accordingly, on the basis of the law contained in the SCA judgment, it must follow that, as the Public Protector's report was binding on the SABC and the Minister, there can be no basis by which the Minister can argue that a report, binding on her, could be ignored to such an extent that it would still be rational to appoint Mr Motsoeneng to a permanent position of COO, after being appraised by the report of the Public Protector of the problems relating to Mr Motsoeneng as acting COO.

[28] Although this conclusion may appear to be obvious, some justification is necessary. When the Minister appointed Mr Motsoeneng on 08 July 2014, the Public Protector had published her report. It was available to the Minister. The Minister must have known or must be taken to have known of the damming findings made against Mr Motsoeneng, sufficient, inter alia, to justify a set of remedial actions, including the institution of disciplinary proceedings against Mr Motsoeneng. To quote from the report: 'His dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct about the appointments of 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.' On any plausible basis, to ignore a binding report and appoint the person to a permanent position when that person is required to be subjected to disciplinary action, pursuant to their conduct as an acting COO, is manifestly an act of irrationality which stands to be set aside.

[29] However, an issue which was raised in the present proceedings concerned an application for leave to appeal to the Constitutional Court against the judgment and order of the Supreme Court of Appeal which I have analysed. The argument was raised by the respondents that, were the Constitutional Court to set aside the approach which the Supreme Court of Appeal had adopted to the status of the Public Protector's report, a different set of reasoning and justification might have to be applied. This submission followed from s 18 of the Superior Courts Act 10 of 2013 which provides that, 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 is suspended, pending the decision of the application or the appeal.

[30] It was as a result of s 18 of the Supreme Courts Act and its implications that a considerable amount of argument was devoted in this case to the position which would have applied had Schippers J's approach to the legal status of the Public Protector report been followed; that is, on the assumption that the Constitutional Court adopts a similar position or, alternatively that the status *quo ante* applies until the appeal is settled. What follows in this judgment is an evaluation of the present dispute in terms of these assumptions.

The respondent's justification for making an appointment notwithstanding the Public Protector's report

[31] In her affidavit, the Minister explained that there was four documents that she considered in detail prior to taking the decision to appoint Mr Motsoeneng as COO, namely a letter from the chairperson of the SABC of 7 July 2014, a letter from the chairperson of the SABC addressed to her on 8 July 2014, the Public Protector's report and the Mchunu report. She further stated that she had attended at the offices of SABC on 07 July 2014. After the board meeting, the chairperson had relayed to her the discussion and resolution that the Board had taken on the question of who should be appointed as COO on the SABC and its reasons therefore. Pursuant to the Minister's request, she received a written recommendation that the SABC should appoint Mr Motsoeneng as the permanent COO. This recommendation was accompanied by a motivation together with the Public Protector's report and the Mchunu report. The Minister stated that she

considered all of this information. She remained concerned about the findings of the Public Protector's report, in particular the allegation that Mr Motsoeneng had lied to the SABC about his qualifications when he initially was employed and, in particular, the finding that Mr Motsoeneng had fraudulently represented that he had a matric certificate when it was clear that he had not.

[32] These concerns were raised with the chairperson of the Board. The Minister was then provided with a transcript of an exchange between the Public Protector and Mr Motsoeneng. She read this transcript and was satisfied that Mr Motsoeneng had not lied to the SABC about having a matric qualification. Consequently, she was satisfied that he was competent and had the necessary expertise to be appointed as the COO.

[33] Applicant attacked the Minister's affidavit on a number of grounds. In particular, it noted that she had failed to disclose that she had access to the various reports, in particular the Mchunu report prior to 07 July 2014 in her answering affidavit which she deposed to in respect of Part A of the application. It was only when the evidential shoe pinched, that, in her affidavit deposed to in respect of the Part B application, she made these claims about reading these reports prior to 7 July 2014.

[34] Mr Maleka, who appeared together with Ms Pillay on behalf of the fourth respondent, submitted that there was no basis for this complaint. Even in her Part A answering affidavit, the Minister had explained that she received the written recommendation from the Board on 8 July 2014 which was accompanied by the

Public Protector's report and that of Mr Mchunu. She also had access to these reports prior to 7 July 2014; that is before she was appointed as the Minister when she had served as a member of Parliament and a Whip in the Portfolio Committee on Communications for some two, years before the previous National Assembly came to an end. As she said in her affidavit:

> 'The Public Protector's Report was important to my work on the Committee. I was also in receipt of a copy of that report since at least early June 2014. I was also in receipt of the Mchunu report since about the first week of June 2014. Indeed, at one of my very first meetings with my special advisor with Mr Mantasha I specifically discussed the content of both these reports and handed copies of them to him.'

[35] Mr Maleka submitted that in the light of this evidence placed before the Court, the Court had to be careful before trespassing into the domain of public officials by interfering with decisions entrusted by the Constitution or legislation these persons. So long as there was a rational connection between the facts and information available to a public official and the achievement of a purpose falling within the power being exercised, a court could not interfere merely because it considered the decision to be wrong or that a different outcome could be preferable. See *Minister of Education Western Cape and another v Beauvallon Secondary School and others* 2015 (2) SA 154 (SCA) at para 38.

[36] I accept that in many decisions what is required "is a judgment call" by the relevant authority. But a judgment call does not give *carte blanche* to the designated functionary. The latter must make a decision of which it can be said that the means selected are rationally related to the objectives that are sought to be achieved. What was sought to be achieved in this case was the appointment of a

person who was not only competent to perform the tasks required as the COO but was also a person who would maintain the highest standard of integrity, responsibility and accountability, all of which were objectives which are set out in the charter of the SABC.

[37] Given the nature of the answering affidavit it appears that a critical component of the reasoning employed by the Minister in ignoring the finding of the Public Protector and hence appointing Mr Motsoeneng was the Mchunu report. Indeed in her affidavit the Minister states:

> '1. The Public Protector had made a range of very serious findings against Mr Motsoeneng.
> 2. The Mchunu report addressed these findings, with the result, certainly in my mind, the report of the Public Protector could not constitute a bar or indeed an impediment to the appointment of Mr Motsoeneng as COO.
> 3. I was therefore satisfied that the Mchunu report provided detailed answer to the findings of the Public Protector, and the answers as well as conclusions provided in Mchunu report are both rational and reasonable.
> 4. Notwithstanding the Mchunu report, I still had concerns in respect of the deceit.
> 5. in addition to the aforegoing, I had been furnished with a range of very impressive achievements by Mr Motsoeneng during his tenure as Acting COO. This, together with the findings of the Mchunu report motivated, informed and ultimately underpinned my decision.'

[38] Mr Katz made much of the fact that the Mchunu report was not an independent report in that Mchunu attorneys were the attorneys of the SABC and were paid by the SABC to prepare this report.

[39] It is not necessary to consider and evaluate this particular submission, for, far more important to the disposition of this case is the question to whether the Mchunu report dealt with the findings of the Public Protector, in a sufficient amount of detail to represent a justifiable answer to the Public Protector's finding.

[40] As illustrative, I will examine the question of Mr Motsoeneng's qualifications. In essence, the Mchunu report found that in 1995 Mr Motsoeneng obtained his first appointment at SABC. It was 'well known in fact to all in attendance that he had no matric, he did not lie about this and the SABC was not misled in this regard.' Accordingly, the Mchunu report finds that SABC personnel had always been fully aware that when he was employed by the SABC, Mr Motsoeneng did not have a matric qualification. As a result, it arrived at the following conclusion:

> 'In view of the above, it would be difficult if not impossible for the SABC to charge Mr Motsoeneng with dishonesty and/or misrepresentation of his qualifications as the SABC's own evidence unequivocally supports his case. Effectively, the evidence of Mr Kloppers and Mr Mothibi constitutes some form of investigation which would clear Mr Motsoeneng of any allegation of dishonesty and/or misrepresentation as these senior officials of the SABC were part of his appointment by the SABC at the time.
>
> Consequently, when considering the provisions of the SABC's Disciplinary Code and Procedure, and the case law stated above, it would appear to us that any

disciplinary action that may be instituted against Mr Motsoeneng would not succeed and that the evidence that has already been gathered in this matter is sufficient to dispose of this matter.'

[41] However, this set of findings, in my view, does not provide an adequate answer to the Public Protector's report. When viewed through the prism of a rational decision maker, who satisfies herself that she can ignore an otherwise damming set of findings against the candidate for a very senior position. A short extract from the Public Protector's report reveals an entirely different picture to that which is the product of the Mchunu report:

'Dr Ngubane's insistence that there is no evidence could be found that Mr Motsoeneng misrepresented his qualifications is astounding.

This assertion is however contradicted by the documentation and information submitted by the SABC to me as well as Mr Motsoeneng's own admission.

On 19 July 2013, Mr Motsoeneng indicated that he never misrepresented his qualifications during his employment at the SABC, as it was common knowledge that he did not possess a matric certificate.

However, after being shown the employment application form Mr Motsoeneng had completed at the SABC indicating the symbols he had claimed to have obtained in matric by me, he submitted that he was asked to fill the subjects as mere compliance by Mrs Swanepoel.

Mr Motsoeneng finally admitted to me during our meeting on 19 July 2013, that it was wrong of him to have claimed to have a matric certificate while knowing that he had not passed the grade.'

[42] The Public Protector also noted that there were findings of 11 September 2003 where the SABC group internal audit reported that the content of Mr Motsoeneng's application for employment was false because he had misrepresented his qualifications.

[43] A further passage of evidence referred to above appears in the Public Protector's report as follows:

> 'Adv Madonsela: But you knew … you are saying to me you knew that you had failed, so you … because when you put these symbols you knew you hadn't found … never seen them anywhere, you were making them up. So I'm asking you that in retrospect do you think then you should have made up these symbols, now that you are older and you are not twenty-three?
>
> Mr Motsoeneng: From me… for now because I do understand all these issues, I was not supposed, to be honest, if I was … now I was clear in my mind, like now I know what is wrong, what is right, I was not supposed to even put it, but there they said "No, put it", but what is important for me Public Protector, is everybody knew and even when I put there I said to the lady "I'm not sure about my symbols" and why I was not sure Public Protector, because I got a sub, you know I remember okay in English I think it was an "E", because you know after … it was 1995.
>
> If you check there we are talking about 1991, now it was 1995 and for me I had even to … I was supposed to go to school to check. Someone said "No, no, no, you know what you need to do? Just go to Pretoria." At that time Public Protector, taxi, go and check, they said, "no, you fail", I went and … that one is … and people who are putting this, Public Protector … and I'm going to give you … I know its Phumemele and Charlotte and this people when SABC were charging me, they were my witness.

> Mr Madiba: I think if … I want to understand you correctly. You say you were asked by the SABC to put in those forms. … I mean to put in those …
>
> Adv Madonsela: To make up the symbols.
>
> Mr Madiba: To make up the symbols. Do you recall who said that to you?
>
> Mr Motsoeneng: Marie Swanepoel.'

[44] When this evidence is examined, it is clear that the Mchunu report concentrated on a question, which may well be important, but it is not the question that is relevant to the present dispute. In short, the Mchunu report was concerned with whether there could a basis to charge Mr Motsoeneng with dishonesty or misrepresentation. The Public Protector, by contrast, shows that, at best for Mr Motsoeneng, there was significant doubt as to whether he had misrepresented his qualifications. That doubt concerning his integrity is relevant to an assessment as to whether he was a person of sufficient integrity to merit an appointment of COO. There is no need to criticise the Mchunu report, given its scope and purpose. Suffice to note that it did not canvass the gamut of conduct examined by the Public Protector.

[45] This finding requires some qualification. As I have indicated throughout the argument in this case, Mr Motsoeneng is not on trial. This approach has implications to which I shall refer presently. What is important is that the Minister, without a clear answer sourced in the Mchunu report and with a transcript described correctly by the SCA as being an explanation which was "muddled and unclear" was in no position to exercise a rational decision to elevate Mr Motsoeneng, whose tenure as acting COO had already been placed in severe doubt, to the more elevated position of a permanent COO.

[46] If the passage that I cited was not sufficient to justify this conclusion the following from the transcript from exchange between Mr Motsoeneng and the Public Protector should have triggered even brighter warning lights:

> 'Adv Madonsela: But you know … you are saying to me you knew then that you failed so you … because when you put these symbols you knew that you hadn't found… never seen them anywhere, you were making them up. So I'm asking that in retrospect do you think you should have made up these symbols, now that you are older and you are not twenty three?
>
> Mr Motsoeneng: From me … for now because I do understand all the issues, I was not supposed, to be honest. If I was … now I was clear in my mind, like now I know what is wrong, what is right. I was not supposed to even to put it, but they said, "No, put it"…'

[47] Another issue which again highlights the difficulty in ignoring the Public Protector's report, notwithstanding its legal status, relates to increases in Mr Motsoeneng's salary. According to the Public Protector, Mr Motsoeneng increased his salary three times in the space of one year from R 1.5 m to R 2.4 m. She concluded that this constituted both improper conduct and maladministration. The Mchunu report has the following comment 'all the above mentioned salaries and/or salary adjustments contributed to the amount of R 29 m referred to in the Public Protector's report; however, in all instances the SABC appears to have followed its internal policies and procedures such as the DAF Policy in implementing the adjustment'. Nowhere does it appear that the Mchunu report evaluated its finding against those of the Public

Protector in this connection. Thus, nowhere in the papers do I find reasons for how the Minister rejected the Public Protector's report on the increased salaries, save for the following:

> 'The Mchunu report investigated in detail the findings of the Public Protector and provided answers that show that the Public Protector's findings are incorrect and not based on the documentary evidence, none of the findings of the Mchunu report suggest lack of the independence; the report is comprehensive and detailed.'

Furthermore, the Mchunu report relied almost entirely upon documentation of the SABC and hardly canvasses the reasons offered by the Public Protector in this particular connection. I doubt very much whether a board of a bank would countenance the appointment of a deputy bank manager for the Kroonstad branch so dense a cloud was there hanging over the head of the candidate, unless the appointment process was accompanied by a further, precise inquiry into the exact nature of all of the adverse findings made against the candidate for the position.

[48] A further disturbing feature, even if one is prepared to assume away the omission in the affidavit of the Minister to which she deposed insofar as the Part A proceedings are concerned, is her account of her deliberations with respect to Part B. It is clear that a recommendation was made by the Board to the Minister to appoint Mr Motsoeneng to the position of COO on 07 July 2014. It does not appear to be disputed that several board members objected to this process of recommendation, claiming that the position had to be advertised, candidates had to be shortlisted and interviewed. Five of the eleven board members did not support this appointment of which two abstained. The recommendation was passed onto the Minister at around 23:30 on 07 July 2014. On the next day, she announced the

appointment of Mr Motsoeneng. There is insufficient evidence as to how she examined all of the complex issues raised by way of a comparison between the Public Protector's report and the Mchunu report and the various implications which flowed therefrom. It is possible that the Minister had read these reports prior thereto but without careful and deliberate examination of all of these issues pertinently raised in the Public Protector's report, it is difficult to see how, within significantly less than 24 hours, the Minister had concluded rationally that the appointment should be made and that no further investigation was requested. In her own affidavit, to which I have made reference, she said she remained concerned about Mr Motsoeneng's qualifications but must have satisfied herself by way of studying the competing versions within but a few hours.

[49] This conclusion is merely part of an overall finding which indicates that the decision to appoint Mr Motsoeneng, when there was a manifest need for a transparent and accountable public institution such as the SABC to exhaustively examine all of the disputes raised about his integrity and qualifications, cannot be considered as a rational decision.

[50] In *Pharmaceutical Manufacturers Association SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at 85 Chaskalson P (as he then was) said:

> 'It is a requirement of the rule of law that the exercise of public powers by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other

functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'

See also *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) in which the court found that the rule of law and the very principle of legality requires a rational relationship between the exercise of public power and the objectives sought to be achieved. If the objective sought to be achieved was to appoint a COO, who met the needs of the Broadcasting Act and the Charter then the means which the Minister adopted in this case, for all these reasons outlined above, cannot be concluded to be rational.

Conclusion

[51] By the time this case was argued, this Court had the benefit of the SCA judgment. Even if the approach adopted by the Schippers J must still be considered to be the law, given the appeal against the SCA judgment, I can take cognisance of the fact that the only appeal lodged before the Constitutional Court relates to the requesting of the suspension of Mr Motsoeneng, pending the outcome of a disciplinary procedure. This is evident from the notice of leave to appeal which was handed up to me by counsel for Mr Motsoeneng. The narrow basis of this appeal itself reveals the untenable implications of a finding which dismisses this application. Mr Motsoeneng is now the subject of disciplinary proceedings, yet I am asked to hold, notwithstanding this process, that the Minister acted rationally in making a decision which amounted to a conversion from acting COO, during which time Mr Motsoeneng's performance and conduct has prompted this disciplinary action, to appoint him as permanent COO.

[52] There is a further implication which follows therefrom. As indicated earlier, this case is not about Mr Motsoeneng. Mr Maenetje, who appeared together with Ms Rajah on behalf of first to third respondent, submitted in his careful argument that there is no basis by which this court could determine the outcome of this disciplinary hearing. Accordingly, if Mr Motsoeneng is acquitted of all of the charges which are to be determined by a disciplinary tribunal, it was possible that he could then be considered for appointment as a permanent COO of the SABC. In other words, it would be "a bridge too far" to grant the applicant relief within the terms sought, namely to direct the Board to recommend the appointment of suitably qualified COO within 60 days of the order of this court and hence ignore the outcome of the disciplinary process.

[53] Much has been made by respondents of Mr Motsoeneng's achievements at the SABC and his 'unique' ability to be the COO of the SABC. If it is properly shown that none of the allegations made against him are sustainable, it would be unfair and, hence premature at this stage, to preclude him from such consideration. In summary, it is preferable to allow the relevant disciplinary proceedings to run its course and to reflect this finding in the order. Hence, I agree with Mr Maenetje that this is the prudent course of action. Accordingly I propose to tailor the order which is to be granted accordingly.

[54] To return to the relevant law: if the SCA's approach to the legal status of the report of the Public Protector is the law to be applied to this dispute, then it must follow from this finding alone that the Minister has acted irrationally and, more generally, unlawfully. She would have ignored a binding set of findings which

required immediate remedial attention. Whatever the Minister's assessment of Mr Motsoeneng and hence her obvious preference for him, her decision, on either of the two legal foundations, is incongruent with legality. If the alternative approach to the law is applied, the facts, as set out in the papers and summarised in this judgment, justify a similar conclusion about irrationality for the reasons set out above.

The order

[55] For the reasons set out above the following order is made:

1. The decision taken by the fourth respondent on or about 08 July 2014 to approve the recommendation made by the first and second respondent to appoint the eighth respondent as the Chief Operating Officer of the first respondent is hereby reviewed and set aside.
2. The first, second, third respondent, fourth respondent and the eighth respondent are ordered to pay the costs of this application, including the costs of two counsel, jointly and severally, the one to pay the others to be absolved.

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DAVIS J