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 LIMITED	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: 24 OCTOBER 2014

Schippers J:

[1] This is an application for an urgent interdict under Part A of the notice of motion. The applicant, the Democratic Alliance (DA), a political party, seeks an order that the eighth respondent, Mr George Hlaudi Motsoeneng ("Motsoeneng"), be immediately suspended from his position as the Chief Operations Officer (COO) of the South African Broadcasting Corporation Limited (SABC), pending (1) the finalisation of disciplinary proceedings to be brought against him by the second respondent, the Board of the SABC ("the Board"); and (2) the determination of the relief sought in Part B of the notice of motion. The DA also seeks an order directing the Board to institute disciplinary proceedings against Motsoeneng within five days of the date of the court's order; and to appoint a suitably qualified person as acting COO to fill Motsoeneng's position, pending the appointment of a suitably qualified permanent COO.

[2] In Part B of the notice of motion, the DA seeks inter alia, an order reviewing and setting aside two decisions. The first is the Board's decision on 7 July 2014 to recommend the appointment of Motsoeneng as COO; and the second, the Minister's decision to approve that recommendation on 8 July 2014.

[3] The first, second and third respondents oppose the application. The fourth respondent, Ms Azwihangwisi F Muthambi, the Minister of Communications ("the Minister"), also opposes the application. So too, does Motsoeneng. Where appropriate, I shall refer to the first to fourth respondents as, "the respondents." The fifth, sixth and seventh respondents have not opposed the application nor delivered answering affidavits. The ninth respondent, the Public Protector, has filed an affidavit in which she says that she neither supports nor opposes the interdictory relief sought. However, she asks the court to assess the matter on the basis that her report dated 17 February 2014 is legally valid, binding and enforceable; and to refrain from pronouncing on the correctness of her findings or the remedial action contained in the report. I revert to these aspects below.

[4] The founding affidavit states that the basis for the relief sought in this application is the findings of the Public Protector. These findings are contained in a report entitled, "A Report on an Investigation into Allegations of Maladministration, Systemic Corporate Governance Deficiencies, Abuse of

Power and the Irregular Appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)" dated 17 February 2014 ("the Report").

The Public Protector's report

[5] It appears from the Report that the Public Protector launched an investigation after she was approached by a senior official of the SABC concerning various corporate governance failures in the management of the affairs of the SABC; financial mismanagement; and undue interference in the SABC by the former Minister and the Department of Communications ("the Department"). Subsequently, a former senior executive and several former employees of the SABC made similar complaints. These included the irregular appointment of Motsoeneng to the position of Acting COO despite not having the required qualifications; the purging of staff by Motsoeneng which resulted in an unprecedented escalation of the SABC's salary bill; and irregular salary increases for officials including Motsoeneng, whose salary was increased from R1.5 million to R2.4 million in a single year.

[6] After the complaints were analysed, the following eight issues were investigated: (1) whether Motsoeneng's appointment and salary progression were irregular; (2) whether Motsoeneng fraudulently misrepresented his

qualifications to the SABC, which included a statement that he had passed matric when applying for employment; (3) whether the appointment(s) and salary progression of Ms Sully Motsweni ("Motsweni") were irregular; (4) whether the appointment of Ms Gugu Duda ("Duda") as Chief Financial Officer (CFO) was irregular; (5) whether Motsoeneng had purged senior officials at the SABC, resulting in unnecessary financial losses in court and the Commission for Conciliation, Mediation and Arbitration (CCMA), and in other settlements; (6) whether Motsoeneng had irregularly increased the salaries of various staff members, which in turn resulted in an increase in excess of R29 million in the SABC's salary bill; (7) whether there were systemic corporate governance failures at the SABC and the causes thereof; and (8) whether the Department and Ms Pule, the former Minister of Communications, unduly interfered in the affairs of the SABC.

[7] The investigation by the Public Protector included research and analysis of the relevant laws and regulatory prescripts; analysis of correspondence and corporate documents; and telephonic and face-to-face interviews with current and former officials of the SABC and the Department, erstwhile members of the Board and the former Minister, Ms Pule.

[8] The Report states that the Public Protector conducts an enquiry into what happened, what should have happened and whether the conduct of the relevant officials amounts to improper conduct, maladministration or an abuse of power. The enquiry as to what happened is a factual one in which the office of the Public Protector relies primarily on official documents such as memoranda and minutes and less on oral evidence. The evidence is assessed and a determination is made on a balance of probabilities. In determining what should have happened, the Public Protector has regard to the Constitution, legislation, applicable policies and guidelines, and related sector and international benchmarks.

[9] The Public Protector considered the submissions made by affected parties including members of the Board, former employees of the SABC and the complainants, after she issued her provisional report on 15 November 2013. In preparing their responses to the provisional report, all the recipients implicated including Motsoeneng, were assisted by their attorneys. Motsoeneng was given a recording of his interview with the Public Protector and on 13 December 2013 he provided her with written comments in response to her provisional report.

[10] The findings of the Public Protector concerning the issues investigated may be summarised as follows:

(1) Motsoeneng's appointment and salary progression were irregular, and constitute improper conduct and maladministration. The Board violated the SABC's Articles of Association dealing with appointments, by allowing Motsoeneng to act without the requisite qualifications and Board resolution, and exceeding the capped salary allowance. The academic qualifications and requirements for appointment to the position of COO were tailored to suit Motsoeneng. In his position as Group Executive Manager: Stakeholder Relations, he received three salary appraisals in one year, raising his salary from R1.5 million to R2.4 million. As Acting COO, his salary was irregularly increased from R122 961 to R211 172 (a 63% increase), in violation of the SABC's personnel regulations. The Public Protector says that Motsoeneng presented the requests for these salary increases to new incumbents who would have relied on him for guidance on compliance with corporate prescripts and ethics.

(2) Motsoeneng fraudulently misrepresented his qualifications to the SABC. In his application form for employment he stated that he had passed standard 10 and filled in made-up symbols for subjects, knowing that he did not complete matric. He promised to furnish a matric certificate knowing that he did not have one. His conduct in relation to the matric qualification has been unethical since 1995, and is improper and a dishonest act as contemplated in s 6(4) of the Public Protector Act. Had he not lied about his qualifications, Motsoeneng would never have been appointed in 1995. Neither would he have been appointed to the post of Executive Producer: Current Affairs in 2003. Motsoeneng was appointed to several posts at the SABC, despite not having the requisite qualifications for such posts. The management of the SABC failed to exercise the necessary due diligence to avoid the misrepresentation or act decisively when it was discovered. This constitutes improper conduct and maladministration. It is also concerning that Motsoeneng's employment file has disappeared.

(3) The appointment(s) and salary progression of Motsweni were done without following proper procedures and in violation of the personnel regulations; and constitute an abuse of power and

maladministration. Motsweni was appointed to the following positions between 30 June 2011 and June 2012: General Manager: Compliance and Operation Stakeholder Relations and Provinces; Head: Compliance and Operations; and Acting Group Executive: Risk and Governance. Her salary was increased from R960 500 to about R1.5 million per year.

(4) Duda's appointment as CFO in February 2012 was irregular and unlawful, and involved improper conduct, maladministration and abuse of power. The position was advertised and interviews were conducted with shortlisted applicants. The Board made a recommendation to Ms Pule, the former Minister, that the successful candidate be appointed as CFO. She declined to approve that recommendation. Duda did not apply for the position. Mr Phiri ("Phiri"), the Acting Deputy Director-General of the Department, and Motsoeneng, orchestrated Duda's appointment after the recruitment and selection process had been closed. Motsoeneng admits that he got Duda's CV from Phiri and submitted it to the SABC. Motsoeneng also served on the panel which interviewed her. Her scores were simply added to those of the other shortlisted candidates.

Despite obtaining the second lowest of the average and total scores, Duda was appointed to the position of CFO.

(5) Motsoeneng was involved in the termination of the employment of several senior employees resulting in unnecessary financial losses to the SABC. He directly initiated the termination of the employment of Mr Bernard Koma ("Koma"), Mr Hosia Jiyane ("Jiyane"), Mr Motlenyane Diphoko ("Diphoko") and Mr Sello Thulo ("Thulo"), who testified against him in his disciplinary hearing in Bloemfontein. Koma received a settlement award of 12 months' salary at the CCMA on condition that he withdrew a civil case against the SABC after spurious charges were brought against him. Jiyane endured a disciplinary process which dragged on for two years before he won his case against the SABC. Diphoko was reinstated pursuant to a CCMA ruling nearly three years after the SABC had terminated his contract. This constitutes improper conduct, abuse of power and maladministration. Given Motsoeneng's involvement in most of these cases and the history of conflict between him and the majority of the employees and former employees concerned, purging cannot be ruled out. However, recklessness in these dismissals was endemic.

(6) Motsoeneng unilaterally increased the salaries of Motsweni, Ms Thobekile Khumalo, a shop steward and certain freelancers without following Part IV of the SABC's personnel regulations. These irregular and rapid salary progressions contributed to a R29 million increase in the SABC's salary bill. Motsoeneng's conduct was irregular, improper and constitutes maladministration. Between 1 July 2011 and 1 April 2012, Motsweni was appointed to three different positions. She did not apply for these positions, and was neither shortlisted nor interviewed. During this period her salary increased from R79 966 to R130 883 - a 63.7% increase. Motsoeneng was involved in Motsweni's appointments and she reported directly to him. Apart from this, several former employees were paid substantial amounts as labour dispute settlement awards or severance packages, resulting in unnecessary costs to the SABC.

(7) All of the above findings are symptoms of systemic corporate governance failures at the SABC in relation to human resources and financial management. Motsoeneng was allowed by successive boards of the SABC to operate above the law, undermining amongst others, the Group Chief Executive Officer

(GCEO) and causing the staff, particularly in the Human Resources (HR) and Financial Departments to engage in unlawful conduct. The Board failed to provide strategic oversight. The directors (mainly the GCEO, COO and CFO) did not provide the necessary support, information and guidance to help the Board discharge its fiduciary responsibilities. By his own admission Motsoeneng caused the Board to make irregular and unlawful decisions. The corporate governance structures at the SABC were dysfunctional. The Board was dysfunctional and allowed its member, Dr Ngubane, in effect to perform the function of an executive chairperson by authorising numerous salary increases for Motsoeneng. However, when the Public Protector questioned the Chairperson and the Board about Motsoeneng's rapid salary increases to R2.4 million per year and the increase of R29 million in the SABC's salary bill, they expressed shock and ignorance at this state of affairs.

(8) The allegation that the former Minister, Ms Pule, and the Department unduly interfered in the affairs of the SABC is substantiated. The former Minister improperly rejected the Board's recommendation that the successful candidate be appointed to the position of CFO, and orchestrated the inclusion

of Duda's CV. Phiri acted unlawfully in submitting Duda's CV to Motsoeneng, who arranged that she be interviewed as a single candidate by the Board after the selection process for the position of CFO had already been concluded and a recommendation made. The conduct of Phiri, Motsoeneng, the HR Department and the Board was unlawful, had a corrupting effect on human resource practices and constitutes maladministration.

[11] The appropriate remedial action to address the Public Protector's findings of maladministration as envisaged in s 182(1)(c) of the Constitution, are contained in paragraphs 11.2 and 11.3 of the Report. The remedial action includes the following:

(a) The Minister of Communications (then Mr Yunus Carrim) had to institute disciplinary proceedings against Phiri for his role in the irregular appointment of Duda as CFO of the SABC; and take steps to fill the then long outstanding vacant position of COO with a suitably qualified person within 90 days of the date of the Report.

(b) The Board had to ensure that all monies irregularly and unlawfully spent were recovered from the relevant persons.

(c) The Board also had to also ensure that disciplinary action was taken against Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increases of Motsweni, and for his role in purging senior staff members resulting in numerous labour disputes and settlement awards against the SABC.

(d) Disciplinary action also had to be taken against Ms Lulama Mokhobo ("Mokhobo"), the outgoing GCEO, for her improper conduct in approving the salary increases of Motsoeneng.

(e) Any fruitless and wasteful expenditure incurred as a result of irregular salary increases to Motsoeneng, Motsweni, Ms Khumalo, a shop steward and freelancers, had to be recovered from the relevant persons.

[12] The Report concludes with the aspect of monitoring. In terms thereof the Minister and the Board had to submit an implementation plan indicating how

the remedial action would be implemented, within 30 days of the date of the Report. The remedial action had to be finalised within six months and a final report had to be presented to the office of the Public Protector by 16 August 2014.

[13] The Minister did not furnish an implementation plan or take disciplinary steps against Phiri. The Board did not take any disciplinary action against Motsoeneng or Mokhobo, and took no steps to recover any fruitless and wasteful expenditure. Instead, on 8 July 2014 Motsoeneng was permanently appointed to the position of COO.

The appointment of Motsoeneng permanently as COO

[14] The founding affidavit states that the DA was not privy to the details of the appointment of Motsoeneng, but that those details have been widely exposed in the press. In summary, these media reports state the following. At a Board meeting on the night of 7 July 2014, the Minister held a private discussion with the Chairperson at 19h00. After the Chairperson emerged from that discussion at about 21h00, she proposed to the Board that it immediately appoint Motsoeneng as the permanent COO. Five of the 11 Board members did not support his appointment: two abstained and three voted against it. The

remaining six Board members voted in favour of the appointment. The Board submitted its recommendation to the Minister around 23h30 on 7 July 2014. The next day, 8 July 2014, the Minister announced the appointment of Motsoeneng as COO of the SABC. At a press briefing on 10 July 2014, the Minister stated that the Board had obtained the opinion of an independent law firm (Mchunu Attorneys) to investigate all the issues raised by the Public Protector; and that she and the Board were satisfied that the attorneys' report cleared Motsoeneng of any wrongdoing. Neither the Board nor the Minister informed the Public Protector that they were going to appoint Motsoeneng permanently. They did not follow an open and lawful process to appoint a new COO. It appears that they ignored the relevant legal provisions when appointing Motsoeneng permanently.

[15] The first to third respondents admit that Motsoeneng was permanently appointed to the position of COO. They say he was appointed "in the interests of the SABC - to achieve its stability going forward"; and that the above allegations are based on media reports and constitute hearsay evidence, which they will deal with when they respond to Part B of the notice of motion. Surprisingly, the Minister also says that the newspaper reports constitute inadmissible hearsay and an abuse of court process.

[16] But most of what is stated in the media reports is not hearsay. In her answering affidavit the Minister herself admits that the Chairperson invited her to attend the Board meeting of 7 July 2014, to discuss the question of the appointment of a permanent COO and the Public Protector's report; that she was briefed by the Chairperson on the issues (although she denies that it lasted for two hours); and that she attended the meeting after the Board had concluded its deliberations and decided to appoint Motsoeneng as the COO. The Minister also admits that on 8 July 2014 she accepted the Board's recommendation to appoint Motsoeneng permanently (which included the report by Mchunu Attorneys containing their advice on the findings and remedial action of the Public Protector); and that at the press briefing on 10 July 2014 she stated that Mchunu Attorneys had cleared Motsoeneng of any wrongdoing.

[17] As appears from her affidavit, the Public Protector was not informed of the intention to appoint Motsoeneng permanently to the position of COO. She says that the former Minister, Mr. Yunus Carrim, undertook in Parliament to implement the remedial action contained in the Report (which did not happen). The Chairperson informed the Public Protector in May 2014 that a final recommendation concerning the Report would be tabled at a Board meeting during June 2014, after which the Board would be in a position to approve an implementation plan, which would be forwarded to the Public Protector. That did not happen either.

[18] It also appears from the answering papers that, prior to Motsoeneng's appointment on 8 July 2014, the position of COO was not advertised; no other candidate was given an opportunity to apply for it; and the prescribed process to fill that position was not followed. Indeed, the first to third respondents contend that any alleged failure by the Board to follow the process for the appointment of the COO "does not preclude the Minister, as representative of the 100% shareholder … to take all decisions at annual general meetings of the SABC, from nevertheless appointing a COO."

[19] Having outlined the factual background to this application, it is appropriate now to deal with two preliminary points which the respondents have raised. The first is that the DA lacks standing to claim interdictory relief; and the second, that the matter is not urgent.

Standing

[20] In the founding affidavit it is stated that the DA seeks the relief in Part A of the notice of motion to give effect to the Report and to vindicate the Office of the Public Protector. Counsel for the first to third respondents contended that the DA can only do so to the extent that the Public Protector has made a specific

finding or directed specific remedial action which the DA seeks to give effect to. Inasmuch as the Public Protector has not sought the immediate suspension of Motsoeneng and the appointment of a suitable acting COO in his place, so the argument runs, the DA must prove standing in terms of the common law, which it has failed to do.

[21] Counsel for the Minister submitted that the DA has no legal standing on three grounds. First, the remedial action in the Report does not include the immediate suspension of Motsoeneng pending the outcome of disciplinary proceedings against him. The DA is not entitled to rely on the Report in an attempt to seek far more than the remedial action required. Second, the DA is bound by the Public Protector's stance that the remedial action she requires in terms of s 182(1) of the Constitution is not a mere recommendation, and therefore binding until set aside by a court. Third, the nature of the interim relief sought in Part A of the notice of motion goes much wider than the need to restore the *status quo ante* (in terms of which Motsoeneng would resume his former position as acting COO), pending the outcome of the proceedings to review and set aside Motsoeneng's permanent appointment, referred to in Part B. The DA seeks an order that he should be removed from that office for the time being.

[22] It is convenient to deal with the respondents' contentions upfront. The fact that the Report does not specifically include the immediate suspension of Motsoeneng pending the outcome of disciplinary proceedings against him is not decisive of that issue. Accepting that the DA has standing and has established the requisites for the grant of an interdict, the question is whether, on the papers before this court, *prima facie* a case has been made out which warrants the institution of disciplinary proceedings against Motsoeneng; and, if so, whether he should be suspended pending the finalisation of those proceedings.

[23] On a proper reading of the relief sought in Part A of the notice of motion, more specifically that disciplinary proceedings be instituted against Motsoeneng, the claim is one for a final mandatory interdict. Is trite that whether an interdict is final or interim depends on its effect upon the issue, not upon its form.[1] Thus the argument that the relief sought goes much wider than the restoration of the *status quo ante* is erroneous.

[24] The Constitutional Court has repeatedly stressed that a broad rather than a narrow approach should be adopted to standing, also in matters that involve an infringement of rights other than those protected in the Bill of Rights.[2]

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1 See Joubert et al (eds) *The Law of South Africa* (2nd ed 2008) Vol 11 p 418 para 401 and the authorities there collected.

2 *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC) para 33; *Freedom Under Law v Acting Chairperson: Judicial Service Commission, and Others* 2011 (3) SA 549 (SCA) paras 19 and 20.

[25] The founding affidavit states that the DA is acting not only in its own interests - as a political party with an interest in an independent and functional public broadcaster - but also in the interests of its members and the public.

[26] The provisions of the Broadcasting Act 4 of 1999 ("the Broadcasting Act"), make it clear that the SABC exercises public power.

(a) The object of the Broadcasting Act is to establish a broadcasting policy in the Republic in the public interest, which includes the establishment of a strong and committed public broadcasting service which will serve the needs of the whole of South African society.[3]

(b) The South African broadcasting system is owned and controlled by South Africans, and serves to safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa.[4]

(c) In pursuit of its objects and in the exercise of its powers, the SABC enjoys freedom of expression and journalistic, creative

[3] Section 2(l) of the Broadcasting Act.
[4] The preamble to Chapter II and section 3(1) of the Broadcasting Act.

and programming independence as enshrined in the Constitution.[5] Indeed, the provisions of the Broadcasting Act must be construed in a manner which is consistent with these objectives.[6]

(d) The members of the Board must, when viewed collectively, be persons who are suited to serve on the Board by virtue of their qualifications, expertise and experience; and must be persons who are committed to: fairness, freedom of expression, the right of the public to be informed, openness and accountability on the part of those holding public office, and the principles enunciated in the Charter of the SABC.[7]

(e) One of the aims of the Charter is to ensure the application of the principles of good corporate governance in all dealings by, and in respect and on behalf of the SABC.[8] The Charter also states that the goals which the Board has adopted to guide it and the SABC in carrying out their public broadcasting mandate, include the creation of a financially sound corporation built on a sustainable business model, and ensuring that its assets are used

5 Section 6(3) of the Broadcasting Act.
6 Section 1(2) of the Broadcasting Act.
7 Section 13(4) of the Broadcasting Act.
8 Clauses 2 and 3.2 of the Charter.

> in an effective and efficient way in line with the requirements of key legislation to which the SABC is subject; ensuring full compliance by the SABC with the Broadcasting Act, the Charter and other legislation applicable to the SABC; and putting in place systems, policies and procedures to ensure improved business processes and good governance within the SABC.[9] The Board must always maintain the highest standard of integrity, responsibility and accountability.[10]

[27] It is of fundamental importance to our democracy that an institution such as the SABC, acts in a manner consistent with constitutional prescripts and within its powers as set out in the Act and the Charter. A political party participating in Parliament necessarily has an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts, and that the rule of law is upheld.[11]

[28] The DA claims standing on the basis of the following constitutional and democratic concepts: respect for the rule of law and the principle of legality (that the Minister and the Board acted unlawfully and unconstitutionally); the strengthening of democracy (that the respondents ignored the findings of the

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9 Clauses 7.3.5 and 7.3.9 of the Charter.
10 Clause 8.19 of the Charter.
11 *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) paras 44 and 45.

Public Protector and the remedial action required); and public accountability and open governance (that there has been a culture of poor corporate governance, abuse and impunity at the SABC).

[29] In my view the DA has standing on any of these grounds.[12] Its members can be expected to hold the party to the principles contained in its constitution to promote the rule of law and accountable public administration, even if this involves litigation.[13]

[30] Moreover, it is in the public interest that the issues raised in Parts A and B of the notice of motion be adjudicated. The Broadcasting Act requires fairness on the part of members of the Board, openness and accountability and entrenches the right of the public to be informed. The Charter is aimed at good corporate governance and requires the Board to maintain the highest standards of integrity, responsibility and accountability. In these circumstances and given the facts of this case, I do not think it can seriously be argued that the DA is not acting in good faith in the public interest.

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12 *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) para 17.

13 *DA v NDPP* n 11 para 45.

[31] Even more closely analogous to this case is *Democratic Alliance v President of the Republic of South Africa and Others*,[14] in which the DA challenged the President's decision to appoint Mr Menzi Simelane as the National Director of Public Prosecutions (NDPP), essentially on the ground that Mr Simelane was not a fit and proper person to be appointed as the NDPP, as contemplated in s 9(1) of the National Prosecuting Authority Act 32 of 1998. As in that case, this application concerns matters of national and constitutional importance, having regard to the fundamental principles and objects of the Broadcasting Act - freedom of expression and journalistic, creative and programming independence of the SABC as enshrined in the Constitution. On this basis also, it cannot be gainsaid that the DA has standing.

[32] For these reasons I hold that the DA has standing to act in its own interests, those of its members as well as in the public interest.

Urgency

[33] It is trite that in an application such as this, the applicant must set out explicitly the circumstances which render the matter urgent and the reasons why it claims it could not be afforded substantial redress at a hearing in due course.[15]

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14 2013 (1) SA 248 (CC).

15 Rule 6(12)(b) of the Uniform Rules of Court.

[34] The founding affidavit states that two factors render this matter urgent. The first is the serious harm that Motsoeneng has done to the SABC and which he will continue to cause for as long as he occupies the position of COO. The second is the need to vindicate the constitutional role of the Public Protector.

[35] As regards the first factor, the DA says that "the Public Protector's damning findings about Motsoeneng are unchallenged"; he has wasted public money to benefit himself and his friends and to attack his enemies; and he has ignored legislation governing the SABC to further his own ends. Then it is said that if the SABC is to be put back on a path of stability and independence, it must start with Motsoeneng's suspension and the institution of disciplinary proceedings against him.

[36] As to the second factor, the DA contends that the Board and the Minister have ignored the findings and recommendations of the Public Protector, and by appointing Motsoeneng as COO they have undermined the dignity and effectiveness of the Public Protector. The DA also says that until her investigation was concluded, it would have been premature to approach the court, as the Public Protector had given the Board and the Minister until 16 August 2014 to give effect to the remedial action; that they have disregarded the Report by appointing Motsoeneng permanently; and that this litigation is the

only effective means to remove him and give effect to the Public Protector's findings.

[37] The respondents' argument that the matter is not urgent may be summarised as follows. Motsoeneng has been the Acting COO for more than two years. The DA has been in possession of the Report since 17 February 2014 when it was made public, and was thus aware of the Public Protector's findings and the timelines within which she wanted the Board and the Minister to give effect to the remedial action contained in the Report - 16 August 2014. Any urgency is self-created: the Public Protector did not recommend that Motsoeneng be removed from his post, but disciplined; the Board and the Minister have not ignored the Public Protector's findings; there is no reason why the DA waited until 16 July 2014 allegedly to save the SABC from the harm caused by Motsoeneng's continued employment (this ground existed since 17 February 2014); and the Public Protector has acknowledged the need for the organs of state in this litigation to engage with one another in accordance with the principles of cooperative governance.

[38] The interdict that Motsoeneng be immediately suspended is sought pending the determination of the application to review the Minister's decision on 8 July 2014 to permanently appoint him as COO. It was obviously

impossible to review that decision before it was taken on 8 July 2014. It was made public at the Minister's media briefing on 10 July 2014.

[39] This application was launched on 16 July 2014. Given its nature and the issues which must be decided, this was not unreasonable.

[40] It would have been premature to seek Motsoeneng's suspension before 16 August 2014, when the Board and the Minister had to submit a final report to the Public Protector concerning the implementation of the remedial action referred to in the Report. I have no doubt that had the DA launched proceedings before 16 August 2014 to implement the remedial action in the Report, the respondents would have objected that those proceedings were premature, particularly in the light of the Board's letters of 21 February, 18 March and 18 May 2014 to the Public Protector. In those letters the Board indicated that it was reviewing the Report; that recommendations would be made regarding the remedial action; and that an implementation plan would be approved by the Board and sent to the Public Protector.

[41] No purpose would have been served had the applicant waited until after 16 August 2014 to launch this application. The Board and the Minister, by their actions, had made it clear that effect was not going to be given to the findings and remedial action in the Report.

[42] Part of the remedial action was that the former Minister, Mr Carrim, had to fill the vacant position of COO with a suitably qualified person within 90 days. That deadline came and went. On 17 June 2014 the DA put a question to the Minister for written reply in Parliament as to whether agreement had been reached by the SABC as to when the post of COO would be advertised and if not, why not. The Minister replied on 2 July 2014 that no progress to reach a settlement had been made. The DA could not have known at any stage that Motsoeneng would be appointed (without any advertisement or interview for the post of COO) less than a week later. The matter became urgent when his appointment was announced on 10 July 2014.

[43] Finally, when I heard the application on 19 August 2014, the papers were complete, heads of argument had been filed, and the matter was argued. No purpose would therefore have been served by issuing the customary order when an application is not urgent - striking the matter from the roll. In any event, the matter was urgent.

[44] I am accordingly of the view that a proper case for urgency has been made out.

[45] Before considering the merits of the matter, it is necessary to deal with a central issue in this application - whether the findings of the Public Protector are

binding and enforceable. The Public Protector says that this issue is relevant not only for this application: it has broader and significant implications for the working of our democracy and the independence and effectiveness of the institution.

Are the findings of the Public Protector binding and enforceable?

[46] The starting point is the Constitution. The Public Protector is one of six state institutions established to strengthen our constitutional democracy.[16] These institutions are independent, subject only to the Constitution and the law; required to be impartial and exercise their powers and perform their functions without fear favour or prejudice; and are accountable to the National Assembly.[17]

[47] The role of the Public Protector is set out in the Constitution in these terms:

> "182. **Functions of Public Protector** – (1) The Public Protector has the power, as regulated by national legislation-
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> (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
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> (b) to report on that conduct; and

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16 Section 181 (1) of the Constitution.

17 Section 181 (2) and (5) of the Constitution.

(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that the report be kept confidential."

[48] In terms of s 6(4)(b) of the Public Protector Act 23 of 1994, the Public Protector is competent inter alia:

"to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by-

(i) mediation, conciliation or negotiation;

(ii) advising, when necessary, any complainant regarding appropriate remedies; or

(iii) any other means that may be expedient in the circumstances;"

[49] Counsel for the Public Protector submitted that on a proper construction of s 182(1)(c) of the Constitution and s 6 the Public Protector Act, the findings and the remedial action of the Public Protector in paragraphs 11 and 12 of the Report, are binding and enforceable, unless properly and successfully challenged in review proceedings. Any other construction, so it was submitted, would render the institution of the Public Protector toothless.

[50] In my view, these submissions are incorrect. The powers and functions of the Public Protector are not adjudicative. Unlike courts, the Public Protector does not hear and determine causes. The Report itself states that in the enquiry as to what happened the Public Protector relies primarily on official documents such as memoranda and minutes, and less on oral evidence. In the enquiry as to what should have happened the Public Protector assesses the conduct in question in the light of the standards laid down in the Constitution, legislation, and policies and guidelines.

[51] Further, unlike an order or decision of a court, a finding by the Public Protector is not binding on persons and organs of state.[18] If it was intended that the findings of the Public Protector should be binding and enforceable, the Constitution would have said so. Instead, the power to take remedial action in s 182(1)(c) of the Constitution is inextricably linked to the Public Protector's investigatory powers in s 182(1)(a). Having regard to the plain wording and context of s 182(1), the power to take appropriate remedial action, in my view, means no more than that the Public Protector may take steps to redress improper or prejudicial conduct. But that is not to say that the findings of the Public Protector are binding and enforceable, or that the institution is ineffective without such powers.

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[18] Section 165(5) of the Constitution reads:
"An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[52] The wide powers of investigation under s 182(1)(a) of the Constitution and ss 6 – 8 of the Public Protector Act, and the power to take remedial action in s 182(1)(c), illustrate both the flexibility and effectiveness with which the institution can operate by comparison to more traditional institutions of dispute resolution, such as courts. The functions of the Public Protector include identifying instances of maladministration – a much looser and malleable concept than strict legal tests applied by courts. And a maladministration test is more relevant to the grievances of the complainant, and offers the potential of real and relevant outcomes - as illustrated by the facts of this case.

[53] The Public Protector's investigative role in addressing citizens' complaints about public sector administration means that the complainant is not required to put together a case against a public official or body. The Public Protector simply investigates the complaint to determine whether it is valid and requires redress. This process has many procedural and cost advantages for the complainant, and gives effect to the constitutional requirement that proportionate and accessible redress mechanisms are made available to citizens - hence the power to take appropriate remedial action.

[54] The Constitutional Court has described the functions of the Public Protector as investigatory, and likened the office to the institution of the ombudsman:

> "The purpose of the office of Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics. NT 182(1) provides that the Public Protector has the power
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> 'to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice'.
>
> NT 182(4) provides that the Public Protector must be 'accessible to all persons and communities'. The Public Protector is an office modelled on the institution of the ombudsman, whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption or prejudice. The NT clearly envisages that members of the public aggrieved by the conduct of government officials should be able to lodge their complaints with the Public Protector, who will investigate them and take appropriate remedial action."[19]

[55] The Constitutional Court has said that the office of the Public Protector is modelled on the institution of the ombudsman. This, I think, is significant for two reasons. First, as in the case of ombudsmen who operate independently of the executive and public authority more generally, the Public Protector is independent and subject only to the Constitution and the law. Second, and in

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[19] *In re: Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996,* 1996 (4) SA 744 (CC) para 161.

contrast to their investigatory powers, ombudsmen ordinarily do not possess any powers of legal enforcement.

[56] The independence of ombudsmen (and the Public Protector) is evidenced by their wide-ranging investigatory powers to summon witnesses and discover documents. In *Mail & Guardian*,[20] Nugent JA said that the mandate of the Public Protector is investigatory, requiring proaction, and that the sweeping powers given to the Public Protector under the Public Protector Act (to discover information and call for explanations from any person; to require any person to produce documents and appear for examination; and to search for and seize documents) underscores that proactive function.[21] Moreover, no person or organ of state may interfere with the functioning of a Chapter 9 institution such as the Public Protector.[22]

[57] In contrast to their investigatory powers, ombudsmen ordinarily do not possess any powers of legal enforcement. Indeed, the power to make binding decisions is considered antithetical to the institution - the key technique of the ombudsman is one of intellectual authority (making logically consistent and defensible findings) and powers of persuasion. It seems to me that in principle,

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20 *Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA).
21 *Mail & Guardian* n 20 paras 9-11.
22 Section 181(4) of the Constitution.

the position of the Public Protector is no different. In this regard, Bishop and Woolman say:

> "One of the most common criticisms levelled against the Public Protector, and ombudsmen generally, is that the institution lacks the power to make binding decisions. In truth, however, the ability of the Public Protector to investigate and to report effectively - without making binding decisions - is the real measure of its strength. Stephen Owen explains this apparent paradox as follows:
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> > "Through the application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause a reluctant change in a single decision or action, by definition it creates a loser who will be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of potential complainants in the future."[23]

[58] The Public Protector Act, in keeping with the scheme of ss 181 and 182 of the Constitution, contains no provision that the findings and remedial action required by the Public Protector are binding and enforceable, as in the case of a court order. In cases where the lawgiver intends that the findings of a tribunal should be enforceable, it says so. For example, an arbitration award by the CCMA is final and binding and may be enforced as if it were an order of the

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[23] Woolman *et al* (eds) *Constitutional Law of South Africa* (2nd ed 2012) Vol 2 p 24A-3.

Labour Court.[24] The same applies to a decision of the Competition Commission.[25]

[59] However, the fact that the 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.

[60] The respondents accept - as they must - that an organ of state cannot ignore the findings and remedial action of the Public Protector. That much is clear from s 181(3) of the Constitution which provides that other organs of state, through legislative and other measures, must assist and protect the Chapter 9 institutions, to ensure their independence, impartiality, dignity and effectiveness.

[61] Counsel for the first to third respondents however submitted that the obligations imposed in terms of s 182(3) and (4), and the principles of cooperative government and intergovernmental relations contained in s 41 of the Constitution, are sufficient to ensure that the Public Protector is not

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[24] Section 143(1) of the Labour Relations Act 66 of 1995 reads:
"An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award."

[25] Section 64 (1) of the Competition Act provides that "any decision, judgment or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court."

undermined. Then it was submitted that the Public Protector is also entitled, as regards her findings on a particular investigation, to seek the intervention of the National Assembly to which the Board and the Minister are accountable, as contemplated in s 8(2)(b) of the Public Protector Act.[26] The Minister says that a request for intervention to the National Assembly or its Portfolio Committee on Communications is an adequate remedy and that the interdictory relief should be refused on this ground alone.

[62] The respondents however are mistaken. The facts of this very case show that the constitutional and statutory provisions upon which they rely are inadequate to ensure that the Public Protector is not undermined. Furthermore, a request for intervention to the National Assembly or its Portfolio Committee is not a legal remedy which grants similar protection as an interdict.[27]

[63] The respondents, in effect, have rejected the Public Protector's findings and remedial action, by not convening a disciplinary enquiry and appointing Motsoeneng permanently as COO. Disregarding the findings and remedial action subverts the Public Protector's powers under s 182 of the Constitution.

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[26] Section 8(2)(b) of the Public Protector Act reads as follows:
"The Public Protector shall, at any time, submit a report to the National Assembly on the findings of a particular investigation if-
(i) he or she deems it necessary;
(ii) he or she deems it in the public interest;
(iii) it requires urgent attention of, or intervention by, the National Assembly;
(iv) he or she is requested to do so by the Speaker of the National Assembly;
(v) he or she is requested to do so by the Chairperson of the National Council of Provinces.

[27] *Cape Town Municipality v Abdulla* 1974 (4) SA 428 (C) at 440H-441A.

The powers of the Public Protector to investigate any conduct in the public administration and to take appropriate remedial action, strengthens democracy by providing both the individual and the wider society with the assurance that the various institutions of state can be called to account, should they fail to maintain expected standards in carrying out their functions or in their dealings with the public. In turn, the bond of trust between the citizen and the state is strengthened by promoting transparency in government and other state institutions.

[64] The critical role which the Public Protector fulfils cannot be over-emphasised. As was said in *Mail & Guardian*:

> "The office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee."[28]

[65] If the Public Protector does not have the power to make binding decisions, how then is effect to be given to the findings and remedial action to address the maladministration referred to in the Report, so as to ensure that the office of the Public Protector is not undermined?

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[28] *Mail & Guardian* n 20 para 6.

[66] It seems to me that before rejecting the findings or remedial action of the Public Protector, the relevant organ of state must have cogent reasons for doing so, that is for reasons other than merely a preference for its own view. In this regard, *Bradley*[29] is instructive. The case concerned a report of an ombudsman in which she addressed the circumstances in which final salary schemes were wound up underfunded, and the role of government in that regard. The ombudsman found that there had been maladministration and that the complainants had suffered injustice. She made a number of recommendations to remedy the injustice caused by maladministration. The Secretary of State for Work and Pensions declined to accept any of the findings of maladministration in the report and rejected a number of the ombudsman's recommendations. The claimants applied for judicial review. They sought an order quashing the decision of the Secretary of State rejecting the ombudsman's findings and for the matter to be remitted to the Secretary for reconsideration. The claimants argued that the ombudsman's findings of maladministration were binding on the Secretary of State, unless they were flawed or unreasonable. The Secretary of State submitted that he was entitled to reject the ombudsman's findings on the basis of a *bona fide* difference of view, unless that rejection is itself flawed or unreasonable.

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

[67] The court held that there was nothing in the relevant legislation which in terms required the body whose conduct was the subject of an investigation, to accept the ombudsman's findings of maladministration. The test to determine whether the Secretary of State's rejection of the ombudsman's findings had to be quashed was not whether the Secretary himself considered that there had been maladministration, but whether in the circumstances his rejection of the ombudsman's finding to that effect was itself rational.

[68] Sir John Chadwick put it thus:

> "It follows that unless compelled by authority to hold otherwise, I would conclude that … the Secretary of State, acting rationally, is entitled to reject the finding of maladministration and prefer his own view. But, as I shall explain, it is not enough that the Secretary of State has reached his own view on rational grounds: it is necessary that his decision to reject the ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies the 1967 Act. To put the point another way, it is not enough for a minister who decides to reject the ombudsman's finding of maladministration simply to assert that he had a choice: he must have a reason for rejecting a finding which the ombudsman has made after an investigation under the powers conferred by the Act."[30]

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30 *Bradley* n 29 para 51.

[69] Elaborating on this conclusion, Sir John Chadwick said:

> "… It is not … a general rule that facts found in the course of a statutory investigation can only be impugned on *Wednesbury* grounds: although, plainly, if the investigator can be shown to have acted irrationally, that will be a powerful reason for rejecting his findings. The true rule … is that the party seeking to reject the findings must himself avoid irrationality: the focus of the court must be on his decision to reject, rather than on the decision of the fact finder."[31]

[70] I am mindful that *Bradley* was a review of the Secretary of State's decision to reject an ombudsman's findings, and the rule that the use of foreign case law requires circumspection. But the principle in *Bradley* seems to me to find equal application in this case.

[71] There can be no question that a decision whether or not to accept the findings or remedial action of the Public Protector constitutes the exercise of a public power. Rationality is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries.[32] It is a requirement of the principle of legality that decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary.[33] For present purposes, it is unnecessary to decide whether or not a decision to reject the findings and remedial action of

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31 *Bradley* n 29 para 71. See also *R (on the application of Equitable Members Action Group) v HM Treasury and others* [2009] All ER (D) 163 para 66.

32 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 90.

33 *Pharmaceutical* n 32 para 85.

the Public Protector constitutes administrative action as contemplated in the Promotion of Administrative Justice Act 3 of 2000.

[72] Thus in a case where the Public Protector makes findings and takes remedial action, the consequential steps to be taken by the relevant organ of state, in my view, are these:

(a) The organ of state must properly consider the findings and remedial action. As the findings are not binding and enforceable, the organ of state must decide whether or not the findings should be accepted and the remedial action implemented. That is the purpose of the power.

(b) The process by which that decision is made and the decision itself, must be rational,[34] having regard to the underlying purpose of the Public Protector – to ensure that government officials carry out their tasks effectively, fairly and without corruption or prejudice.

(c) In a case where a dispute arises because the organ of state decides not to accept the findings or implement the remedial

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[34] *Democractic Alliance v President of the RSA* n 14 para 34.

action, it obviously has to engage the Public Protector. Contrary to the contention by counsel for the first to third respondents, such engagement, in my view, does not take place pursuant to the provisions of s 41 of the Constitution - the Public Protector is not an organ of state *within a sphere of government* as contemplated in s 41(1).[35] (It is thus hardly surprising that the Intergovernmental Relations Framework Act 13 of 2005 does not apply to the Public Protector.[36])

(d) Ultimately the relevant organ of state may apply for judicial review of the Public Protector's investigation and report.[37]

[73] It goes without saying that a decision by an organ of state rejecting the findings and remedial action of the Public Protector is itself, capable of judicial review on conventional public law grounds.

[74] For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable. However, when an organ of

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35 Section 41(1)(h)(vi) of the Constitution provides inter alia that all spheres of government and all organs of state within each sphere must cooperate with one another in mutual trust and good faith by avoiding legal proceedings against one another.

36 Section 2(2)(e) of the Intergovernmental Relations Framework Act provides that the Act does not apply to any institution established by Chapter 9 of the Constitution.

37 In *Mail & Guardian* n 20, the SCA held that an investigation and report of the Public Protector is subject to review by a court, for example, where the investigation is not conducted with an open and enquiring mind (para 21).

state rejects those findings or the remedial action, that decision itself must not be irrational.

Are the decisions to reject the findings and remedial action rational?

[75] The Public Protector says that on more than one occasion, the Board indicated that it was engaging with the Report and sought extensions in order to comply with it. Those extensions were granted. By letter dated 18 May 2014, the Board informed the Public Protector that it would provide an implementation plan after its meeting in June 2014. The Public Protector goes on to say that the only remedial action which the SABC has implemented, is that the disciplinary action against Duda, the CFO, has been completed.

[76] The third respondent, in her answering affidavit, states that in March 2014 the Board appointed a Committee of Chairs to deal with the Report and in turn, to report to the Board. According to the Committee's terms of reference that process should have been completed by 10 March 2014. The third respondent says that various meetings were held by the various Committees which also held workshops to deal with the Report. However, the Board has not placed before the court any report or minutes of these committees, or any facts

to show why it rejected the Public Protector's findings of maladministration, improper conduct and abuse of power on the part of Motsoeneng.

[77] The reasons for the Board's decision are stated in the answering affidavit as follows:

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

[78] There are no grounds, let alone rational grounds, for the Board's decision to reject the Public Protector's findings and remedial action.

[79] The Minister's answer to the findings and remedial action in the Report in so far as they relate to Motsoeneng is seemingly confined to the finding that Motsoeneng had lied about his qualifications when he was employed by the SABC. She says that she was concerned about this finding. She raised her concerns with the third respondent who provided her with the transcript of Motsoeneng's interview with the Public Protector. After reading the transcript she was satisfied that Motsoeneng did not lie about the matric qualification. The Minister goes on to say that she was then satisfied that Motsoeneng is competent and has the necessary expertise to be appointed as COO, having

considered the further qualifications which he had obtained throughout his employment with the SABC, the experience he gained and the fact that he acquitted himself of his duties exceptionally well for almost three years when he was the Acting COO.

[80] The Minister states that she had to take a decision on the Board's recommendation expeditiously because the matter was urgent. However, she does not set out any facts or circumstances which rendered the matter urgent. Instead, she makes a general statement that from documents submitted to her by the Board together with its recommendation, she was satisfied that Motsoeneng had performed satisfactorily, and "brought financial and corporate stability" to the SABC. She says she intends to "engage the Public Protector on the findings, and bring to her attention facts which were uncovered by Mchunu Attorneys which could well affect her findings." But not one of these facts allegedly uncovered are disclosed, despite the fact that the Minister herself says that she will ensure that the findings of Mchunu Attorneys are made available to the Public Protector. The Minister further states that she has prepared a response to the Report to be submitted to the Public Protector by the due date (17 August 2014). The Minister concludes that her decision to appoint Motsoeneng is rational.

[81] Nowhere in her affidavit does the Minister state that she considered the other findings against Motsoeneng, more specifically the allegations in relation to abuse of power and improper conduct on his part in the appointments and salary increases of Motsweni, or his role in purging senior staff members which resulted in numerous labour disputes and settlement awards against the SABC.

[82] In the light of the Minister's reasons for permanently appointing Motsoeneng as the COO, the question then arises whether, in the circumstances, her decision to reject the findings and remedial action of the Public Protector and prefer her own view, is rational. In my judgment, it is not.

[83] The conduct of the Board and the Minister in rejecting the findings and remedial action of the Public Protector was arbitrary and irrational and consequently, constitutionally unlawful. They have not provided cogent reasons to justify their rejection of the findings by the Public Protector of dishonesty, maladministration, improper conduct and abuse of power on the part of Motsoeneng.

[84] The next question is whether the relief sought – that Motsoeneng should face a disciplinary inquiry and be suspended pending its finalisation - is an appropriate remedy.

[85] The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.[38] Section 172(1) of the Constitution provides that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid, and may make any order that is just and equitable.[39]

[86] There seems to be no significant difference between an order which is "just and equitable" as contemplated in s 172(1)(b) of the Constitution the "appropriate relief" which a court may grant under s 38 thereof. In *Fose*,[40] Ackermann J opined that construed purposively, there was no material difference between the concept "appropriate relief" in s 7(4)(a) of the interim Constitution and an "appropriate and just" remedy contained in the Canadian Charter of Rights and Freedoms:

> "It can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate. In applying s 7(4)(a) the interests of both of the complainant and society as a whole ought, as far as possible, to be served."[41]

[87] Appropriate relief in essence is a remedy which is required to protect and enforce the Constitution. And an appropriate remedy means an effective

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38 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) para 99.
39 Section 172 (1) (a) and (b) of the Constitution.
40 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).
41 *Fose* n 40 para 38.

remedy, for without an effective remedy for a constitutional breach, the values underlying a right entrenched in the Constitution cannot properly be upheld or enhanced.[42] Likewise, an order which is just and equitable is directed at protecting and enforcing the Constitution. In *Fourie*,[43] Sachs J held that the precise circumstances of each case must be considered with a view to determining how best the values of the Constitution can be promoted by an order that is just and equitable. What is clear, however, is that courts have a duty to provide effective relief to those affected by a constitutional breach.

[88] In the light of what is stated above and the particular circumstances of this case, I consider that an effective, just and equitable order is one directing the Board to institute disciplinary proceedings against Motsoeneng as contemplated in paragraph 11.3.2.1 of the Report.

[89] I come now to the suspension. The remedial action taken by the Public protector does not include Motsoeneng's suspension pending a disciplinary enquiry. However, part of the remedial action was that the Minister had to take urgent steps to fill the long outstanding vacant position of COO with a suitably qualified incumbent within 90 days of the Report (dated 17 February 2014) and

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42 *Fose* n 40 paras 19 and 69.

43 *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others,* Amicus Curiae*); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) para 135.

to establish why GCEO's cannot function at the SABC and leave prematurely, causing operational and financial strains.

[90] The Minister and the Board were required to submit an implementation plan indicating how the remedial action would be implemented within 30 days of 17 February 2014; and the remedial action had to be finalised within six months. As already stated, that did not happen.

[91] In *Lewis*,[44] Lord Denning MR crispy formulated the rationale for the suspension of an employee as a holding operation, as follows:

> "Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay, pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it … . The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work the man is suspended."[45]

[92] A suspension for good administration applies *a fortiori* in this case. In the words of the Public Protector:

> "The essence of the allegations investigated was that there was systemic corporate governance failure at the SABC at the core of which was

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44 *Lewis v Heffer and others* [1978] 3 All ER 354 (CA).
45 *Lewis* n 44 at 364c-e.

> expediency, acutely poor human resources management and a dysfunctional Board, all of which was said to be primarily due to manipulative scheming by the SABC's acting COO, who allegedly lacked the requisite competencies for the post and manipulated, primarily new Boards and GCEO's to have his way and to purge colleagues that stood in his way."

[93] Maladministration, improper conduct and abuse of power on the part of Motsoeneng are recurring themes in the Report. It states that the HR records of the SABC and his own account show that Motsoeneng was involved in most of the irregular terminations of employment of several senior employees of the SABC in which it lost millions of Rands due to substantive and procedural injustices, confirmed in findings of the CCMA and the courts. Motsoeneng was allowed to operate above the law and caused staff to engage in unlawful conduct. He improperly and irregularly increased the salaries of various staff members. He was one of the executive directors who failed to assist the Board in discharging its fiduciary responsibilities effectively and by his own admission, caused the Board to make irregular and unlawful decisions. The Public Protector says that Motsoeneng triggered his three salary increases in one fiscal year by presenting those requests to new incumbents who would have legitimately relied on him for guidance and compliance with corporate prescripts and ethics; and he abused his power and position to unduly benefit himself.

[94] Despite all this, the current Board, the Public Protector says, "appears to have blindly sprung to Mr Motsoeneng's defence" and "at times … appeared more defensive on his behalf" than Motsoeneng himself.

[95] The allegations of misconduct against Motsoeneng are serious. He is the COO of the SABC. He is an executive member of the Board. He has virtually unlimited authority over his subordinates and access to all the documentation in relation to the charges of misconduct that will be preferred against him. Given the nature of the allegations and the persons involved, referred to in the Report, Motsoeneng's fellow Board members and his subordinates would have to be interviewed, and documents produced.

[96] What this shows is that unless he is suspended, Motsoeneng poses a real risk not only to the integrity of the investigation concerning the allegations of his misconduct, but to the disciplinary enquiry itself. It is untenable that he should remain in office while disciplinary proceedings are brought against him.

[97] In these circumstances, and in the light of the allegations of abuse of power in the Report, in my opinion there can be no doubt that it is just and equitable that Motsoeneng should be suspended, pending finalisation of disciplinary proceedings to be brought against him. Good administration of the SABC, and openness and accountability, demand his suspension.

[98] In reaching this conclusion I have taken into account the reasons advanced in Motsoeneng's affidavit as to why he should not be suspended. They are these. The Board is responsible for exercising disciplinary powers over directors and employees of the SABC, which is regulated by labour law. A suspension would breach the rules of natural justice in that Motsoeneng would not be given an opportunity to respond to the proposed suspension. A suspension carries negative personal and social consequences affecting an employee's dignity and reputation. It would create an impression in the eyes of the public that Motsoeneng is guilty even before disciplinary proceedings are instituted. A suspension would violate the rule of separation of powers, as the court would usurp the power to remove a member of the Board, reserved to the executive and the legislature in the Broadcasting Act. Similar reasons have been advanced by the first to third respondents.

[99] In my opinion, these reasons do not bear scrutiny. The separation of powers argument fails for two reasons. First, I have found that the decision of the Board and the Minister to reject the Public Protector's findings and remedial action was irrational. As was held in *Democratic Alliance v President of the RSA*,[46] it is difficult to conceive how the rule of separation of powers can be said to be undermined by the rationality enquiry. It has nothing to do with whether a decision is a rational. Either the decision is rational or it is not.

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[46] Note 14 para 44.

Second, the rule of separation of powers cannot be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to a litigant who successfully raises a constitutional complaint.[47]

[100] As regards the rules of natural justice, the particular circumstances of this case warrant the suspension of Motsoeneng pending a disciplinary enquiry. It is unlikely that the respondents would even consider suspending him. The papers show that the Board voted to remove him from the position of Acting COO in 2012, but that decision was reversed by a new Board, appointed after the members of the Board who took the removal decision, had resigned. When the Public Protector required disciplinary action to be taken against Motsoeneng, and that the position of Acting COO be filled, the Board and the Minister appointed him permanently to the post of COO.

[101] Finally, it is simply wrong that Motsoeneng's suspension would create a public perception that he already is guilty of misconduct. Any prejudice that he might suffer will be significantly contained in that he will suffer no loss of remuneration, and the suspension is for a limited period.

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47 *Fourie* n 43 para 170, per O'Regan J.

A disciplinary enquiry is in any event justified

[102] Aside from the constitutional breach by the Board and the Minister referred to above, there is on the papers before the court a *prima facie* case which warrants the institution of disciplinary proceedings against Motsoeneng.

[103] The DA seeks a final interdict that the Board institute disciplinary proceedings against Motsoeneng. The requisites for a final interdict are settled law. The applicant must establish a clear right; an injury committed or reasonably apprehended; and the absence of protection by any other ordinary remedy.[48]

[104] Whether the applicant has a right is a matter of substantive law. Whether that right is clear is a matter of evidence.[49] The founding affidavit states that the rights which the DA asserts in its own and the public interest, are these: compliance with the rule of law and the principle of legality; the statutory right conferred by the Broadcasting Act that members of the Board must be persons who are: (1) suited to serve on the Board by virtue of their qualifications expertise and experience; and (2) committed to fairness, freedom of expression, the right of the public to be informed and openness and accountability; and the right to ensure compliance by the SABC with the Broadcasting Act and the

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48 *Setlogelo v Setlogelo* 1914 AD 221 at 227.
49 LAWSA n 1 Vol 11 p 415 para 397.

Charter, and the Board's obligation to ensure good governance within the SABC. These statutory rights are rooted in Chapter II of the Broadcasting Act, which states that the South African broadcasting system is owned and controlled by South Africans.

[105] As to the second requirement - an injury committed - the papers show that *prima facie*, there is a case of irregular and improper conduct, maladministration and abuse of power on the part of Motsoeneng, which calls for an answer.

[106] But before dealing with this issue, two preliminary points are required to be made at the outset. The first is obvious: I make no findings on whether or not Motsoeneng is guilty of improper conduct, maladministration or abuse of power. That is the function of the disciplinary tribunal. The second is that I do not pronounce upon the correctness or otherwise of the facts put up by the first to third respondents in support of their contention that the Public Protector's findings have no merit. I refer to those facts merely because they underscore the conclusion that there is a *prima facie* case justifying the institution of disciplinary proceedings against Motsoeneng.

[107] I turn now to consider the allegations against Motsoeneng. His role in the suspension of Ms Lorraine Francois, ("Francois") an internal auditor, which

resulted in a labour dispute and settlement award against the SABC, has not been explained. The office of the Public Protector interviewed Francois and analysed documents relating to labour disputes involving the SABC, including CCMA arbitration awards and settlements. In 2012 SizweNtsaluba-Gobodo (SNG) auditors reviewed the SABC's corporate governance practices and issued a damning report that corporate governance structures within the SABC were dysfunctional. On 1 November 2012 Francois wrote to the Board with a request that it consider the SNG report. Motsoeneng refused to release the report because it implicated several Board members. He threatened to get rid of Francois if she released it. On 6 November 2012 the Chairperson of the Board handed Francois a letter of suspension with no reasons. Francois, who was suspended for months, successfully challenged her suspension in the CCMA and was reinstated. According to Motsoeneng's comments to the interim report of the Public Protector, the remuneration package of Francois was R1.7 million per year.

[108] The third respondent's answer to the suspension of Francois is simply that her employment was not terminated by the SABC. She says, "The Public Protector reported in error on this matter."

[109] Regarding the allegations that Motsoeneng was involved in the suspension of numerous employees, which constitutes improper conduct, abuse of power and maladministration, the Report states inter alia, the following:

(a) Koma informed the Public Protector's investigation team that he was suspended and charged by Motsoeneng with spurious offences relating to the purchase of 20 Mercedes-Benz vehicles from Debis Fleet Management. The investigation team met with Koma and his case is included in the letters of suspension and termination furnished to the Public Protector. He was paid an undisclosed amount in settlement by the SABC. The first to third respondents do not deal with Motsoeneng's role in Koma's suspension. They simply say that "a dispute involving this employee was settled" on the advice of the General Manager: Group Employee Relations, and that the former GCEO, Mokhobo, approved the settlement. Motsoeneng says that Koma resigned on 21 November 2011.

(b) Diphoko, who testified against Motsoeneng in his disciplinary hearing, was reinstated after a CCMA ruling nearly three years after the SABC had terminated his contract. Neither the first to

third respondents nor Motsoeneng have dealt with these allegations.

(c) On 15 March 2013 Mr Thabiso Lesala ("Lesala"), the former Group Executive HR, informed the investigation team that he reported directly to Motsoeneng who in turn, supposedly reported to the former GCEO, Mokhobo. However, Motsoeneng did as he pleased without being reined in by Mokhobo. For example, she would sign salary increases for Motsoeneng despite the lack of motivation and justification for those increases by HR. Lesala says he resigned because of this constant abuse of HR policies. Subsequently he lodged a claim of constructive dismissal at the CCMA. On 31 January 2013 he entered into a settlement agreement with the SABC and was paid the sum of R2 million. The first to third respondents' explanation for this is that "Mokhobo agreed to settle the dispute amicably." Motsoeneng denies that Lesala was purged and says that he "accepted a pay-out of what was legally due to him and left."

[110] As regards the allegations of abuse of power and improper conduct in the appointments and salary increases of Motsweni, the following is stated in the Report:

(a) On 27 June 2011 Motsweni was offered and accepted a position in the office of the Group Executive: Stakeholder Relations and Provinces, occupied by Motsoeneng, at a remuneration package of R960 500 per year.

(b) Eight months later, on 1 February 2012, the SABC appointed Motsweni as Head: Monitoring, Compliance and Operation Service at a package of some R1.5 million per year. This position was also within the office of the COO, occupied by Motsoeneng.

(c) During the period 1 July 2011 to 1 April 2012, Motsweni was appointed to three different positions without applying for them, being shortlisted or attending interviews. In all these positions Motsweni reported directly to Motsoeneng.

(d) The positions were not advertised. Indeed, the SABC could not provide any proof of this. It is clear that the SABC's recruitment policy was not followed.

(e) Between 1 July 2011 and 1 April 2012, Motsoeneng approved Motsweni's total monthly cost to the SABC, which increased from R79 966 to R130 883 – by 63.7%.

(f) Motsoeneng's explanation to the Public Protector is this. He had identified a need for a position similar to Motsweni's for the whole of the SABC largely because of an increased focus by auditors on compliance matters identified by the Auditor General. He thought it would be a duplication to appoint another person to strengthen compliance and monitoring. He then elevated Motsweni's entire division to his office, to deal with compliance corporate-wide. Motsweni's appointments to the posts of General Manager: Compliance and Operations, and General Manager: Finance, were urgent and the HR division had applied for approval of deviations from the recruitment policy. Although he motivated Motsweni's salary increases, HR division had supported them and they were approved by the GCEO.

(g) But the former GCEO, Mokhobo, says that Motsoeneng regularly increased Motsweni's salary as a reward. She writes Motsoeneng's emails, prepares documents for him, explains what is contained in documents, writes his responses and generally does everything for Motsoeneng.

[111] The first to third respondents' answer to all of this is simply that Motsweni was appointed at the time when the SABC was required to implement the findings of the Auditor General. Then it is said that "the issue was handled in accordance with proper recruitment policies of the SABC and where deviations were necessary these were properly sought and approved." A memorandum dated 22 June 2011 for permission to deviate from the recruitment policy in respect of only one position to which Motsweni was appointed (General Manager: Compliance and Provincial Operations), is annexed to the answering affidavit. The relevant provisions read as follows:

"**2. BACKGROUND**

There is an urgent need for the two roles of General Manager: Compliance & Provincial Operations and General Manager: Finance, respectively within Stakeholder Relations and Provinces Division.

3. MOTIVATION

The recruitment policy requires that all positions should be advertised, either internally or externally before being filled. These provisions are not suitable

> for the current situation based on the urgency. An exception is therefore required based on the seniority of the positions."

[112] Thus a number of aspects regarding the alleged abuse of power and improper conduct by Motsoeneng in the appointments and salary increases of Motsweni, remain unexplained. The Board's explanation is essentially the same as that proffered by Motsoeneng in his answer to the Public Protector's interim report - which she rejected.

[113] The allegations concerning Motsoeneng's dishonesty in relation to the misrepresentation of his qualifications, may be outlined as follows:

(a) Motsoeneng misrepresented to the SABC that he had passed standard 10 in his application for employment in 1995, when he knew that he failed matric. In the application form Motsoeneng stated that he had completed five subjects. He admitted that the symbols which he filled in on the form were false. He said he did this because Ms Marie Swanepoel ("Swanepoel"), an HR administrator, told him to "put anything" in the form concerning the symbols. As regards the certificate itself, the form states that it is "outstanding", thus giving the impression that there is

indeed a matric certificate which would be submitted in due course.

(b) By letter dated 12 October 1999, a HR consultant of the SABC asked Motsoeneng to hand in a copy of his matric certificate. In another letter dated 4 May 2000, Mr. Paul Tati ("Tati"), also a HR consultant, informed Motsoeneng that numerous reminders had been sent to him to produce his matric certificate, and insisted that it be submitted by no later than 12 May 2000. Tati also drew Motsoeneng's attention to the fact that in 1995 he had indicated on his application for employment that his highest standard passed was standard 10. Motsoeneng acknowledged receipt of the letter of 4 May 2000. He indicated that he was not in possession of the matric certificate and would provide it as soon as he received it. He never did.

(c) The former GCEO, Mokhobo, states that in August 2003 the Group Internal Audit unit of the SABC investigated the allegation that Motsoeneng had misrepresented that he had passed matric in 1991. It found that when Motsoeneng applied for the post of Executive Producer at Lesedi FM in 2003, the requirements for that post were a degree or diploma in

Journalism, and eight years' experience in the production of radio current affairs programmes, three years of which had to be in a managerial role. Motsoeneng did not meet any of these requirements. Despite this, he was appointed to the position.

(d) In its findings dated 11 September 2003 the Group Internal Audit unit states that Motsoeneng received a rating of 2 out of 5 for qualifications, even though he does not have a matric certificate, or a degree or diploma. It recommended that management institute action against Motsoeneng for misrepresenting his qualifications.

(e) The recommendation by the Group Internal Audit unit was never implemented by the SABC.

(f) Despite the finding of the Group Internal Audit unit, on 5 April 2012 Dr Ngubane, the former Chairperson of the Board, informed the Public Protector in writing that the SABC could find no evidence that Motsoeneng had misrepresented his qualifications - which the Public Protector says is astounding. A former member of the Board, Advocate Mahlati, informed the Public Protector that when she tried to ascertain during Board

meetings whether Motsoeneng had lied about his qualifications, she was suppressed by the Chairperson, with the support of the majority of Board members.

(g) On 30 January 2012 the "Sunday Independent" newspaper published an article in which it was stated that Motsoeneng had been fingered by an SABC internal audit probe as having lied about having a matric certificate when he applied for a position several years ago. Motsoeneng lodged a complaint against the newspaper with the Ombudsman of the Press Council. The complaint was dismissed. The Ombudsman found that the Sunday Independent was justified in stating that Motsoeneng had lied about having a matric certificate. Motsoeneng lodged an appeal to the Press Council of South Africa. The Appeals Panel dismissed the appeal and found that Motsoeneng had lied about having passed standard 10, in his application form for employment.

(h) In his CV submitted for the position of Executive Producer: Current Affairs at Lesedi FM, Motsoeneng stated that he had been appointed as Head of Communications of the Department of Tourism and Economic Affairs in the Northern Cape. That

was not true and thus a misrepresentation of what he had accomplished. Motsoeneng had only been employed by the SABC.

[114] In summary, Motsoeneng's answer to the allegations concerning the misrepresentation of his qualifications is this. He says he was wrong in recording false information in his application form. Swanepoel had indicated that he should fill in "ten" under the heading, highest standard passed; and that he should complete the form as best he could when he told her that he could not remember which subjects he had passed or the symbols obtained. He was "head-hunted" by amongst others, Mr Alwyn Kloppers ("Kloppers"), the then Managing Editor of SABC's Radio News. He did not mislead the SABC. Kloppers knew that Motsoeneng had not passed matric but did not regard this as a barrier to his appointment. Kloppers has confirmed this in an affidavit. According to Moetsoeneng, Kloppers ensured that he completed a course in radio journalism under the auspices of the Thompson Foundation (between 6 and 17 February 1995), which in the view of Kloppers, would "have bridged that shortcoming" - Motsoeneng's not having passed standard 10.

[115] Motsoeneng himself says that throughout his upward mobility in the SABC, at no point was he required to submit any proof of his academic qualifications. As to the recommendation by the Group Internal Audit unit that

action be taken against Motsoeneng for misrepresenting his qualifications, he says that the Head of the unit advised him that "no wrongdoing had been found"; and that despite his request, he had not been furnished with a copy of the relevant report.

[116] On the alleged misrepresentation of Motsoeneng's qualifications, the first to third respondents rely on essentially the same explanation which he gave to the Public Protector in answer to her interim report, summarised above. They say that the Board has found no basis to charge Motsoeneng with fraud or dishonesty regarding his qualifications in 1995 or at any point in his employment with the SABC.

[117] The first to third respondents do not deal at all with the recommendation by the Group Internal Audit unit that action be taken against Motsoeneng; or the misrepresentation of his qualifications when applying for the position of Executive Producer: Current Affairs at Lesedi FM.

[118] It follows that the first to third respondents' contention that on the facts, no case has been made out that there is a justifiable reason to believe that Motsoeneng has engaged in serious misconduct, is unsound.

[119] What all of this shows, is that the second requirement for the grant of an interdict that Motsoeneng be subjected to a disciplinary inquiry, has been met.

[120] As regards the third requirement, the alternative remedy must be adequate in the circumstances; be ordinary and reasonable; be a legal remedy; and grant the applicant similar protection.[50]

[121] Counsel for the Minister contended that the DA should have pursued alternative statutory remedies in the Broadcasting Act and the articles of the SABC, in terms of which an executive director may be suspended or removed from office. More specifically, it was contended that s 15(1)(a) of the Broadcasting Act confers a discretion on the Minister to remove an executive director on account of misconduct or incompetence, when the National Assembly has passed a resolution which calls for the removal of that director. Section 15A(2) provides that the Minister may suspend an executive director from office only after the National Assembly has initiated proceedings for the removal of that director.[51]

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50 LAWSA n 1 Vol 11 p 416 para 399.

51 Section 15(1)(a) of the Broadcasting Act reads:
"The appointing body-
(a) may remove a member from office on account of misconduct or inability to perform his or her duties efficiently after due inquiry and upon recommendation by the Board;"

[122] As already stated, the alleged alternative remedy is inadequate and does not grant similar protection as an interdict. In addition, there are two jurisdictional requirements before a member of the Board may be removed from office by the National Assembly under section 15(1)(a) of the Broadcasting Act. First, it must hold an inquiry into misconduct. Second, the National Assembly must adopt a resolution to remove the member. This is unlikely to happen given the response of the Board and the Minister to the findings and remedial action of the Public Protector. Moreover, despite an undertaking in Parliament by the former Minister, Mr. Carrim, that the remedial action in the Report would be implemented, that did not happen.

[123] The DA has met the requisites for the grant of a final interdict and on this basis also, Motsoeneng should be subjected to a disciplinary enquiry, and be suspended pending that inquiry.

[124] The remaining relief sought may be dealt with briefly. An order that Motsoeneng be suspended pending the determination of the review proceedings in Part B of the notice of motion would have no practical effect. It is trite that an interim interdict is designed to preserve or restore the *status quo* pending the final determination of the rights of the parties. The interdict, if granted, would result in a restoration of the *status quo ante*: Motsoeneng would be the Acting COO.

[125] An order by this court directing the Board to appoint a suitably qualified person as the Acting COO is inappropriate. There seems to be no reason why an acting COO should not be appointed by the Board in the interim, as happened in the case of Motsoeneng when that position became vacant.

[126] Finally, there is the question of costs. There is no reason why costs should not follow the result.

[127] I make the following order:

(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 appointments and salary increases of Ms Sully Motsweni; and for his role in the alleged suspension and dismissal of senior members of staff, resulting in numerous labour disputes and settlement awards against the SABC,

referred to in 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 from the position of COO of the SABC, on full pay.

(5) The first, second, third, and fourth respondents 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.

SCHIPPERS J

Applicant's counsel	: Advocates A Katz SC, M Bishop and N Mayosi
Applicant's attorneys	: Minde Shapiro Smith Attorneys
First to third respondents' counsel	: Advocates M Maenetje SC and H Rajah
First to third respondents' attorney	: Mchunu Attorneys
Fourth respondent's counsel	: Advocates V Maleka SC and K Pillay
Fourth respondent's attorney	: State Attorney
Eighth respondent's counsel	: Advocates N Arendse SC and S Fergus
Eighth respondent's attorney	: Majavu Incorporated
Ninth respondent's counsel	: Advocates E Labuschagne SC and N Rajab-Budlender
Ninth respondent's attorney	: Adams & Adams Attorneys