THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 393/2015

In the matter between:

THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	**FIRST APPELLANT**
THE MINISTER OF COMMUNICATIONS	**SECOND APPELLANT**
HLAUDI MOTSOENENG: THE CHIEF OPERATING OFFICER OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	**THIRD APPELLANT**

and

DEMOCRATIC ALLIANCE	**FIRST RESPONDENT**
THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	**SECOND RESPONDENT**
THE CHAIRPERSON OF THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	**THIRD RESPONDENT**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FOURTH RESPONDENT**
SPEAKER OF THE NATIONAL ASSEMBLY	**FIFTH RESPONDENT**

THE PORTFOLIO COMMITTEE FOR COMMUNICATIONS OF THE NATIONAL ASSEMBLY **SIXTH RESPONDENT**

THE PUBLIC PROTECTOR **SEVENTH RESPONDENT**

and

CORRUPTION WATCH **AMICUS CURIAE**

Neutral Citation: *SABC v DA* (393/2015) [2015] ZASCA 156 (8 October 2015).

Coram: Mpati P, Navsa, Ponnan, Swain and Dambuza JJA

Heard: 18 September 2015

Delivered: 8 October 2015

Summary: Remedial action by Public Protector – has legal effect – absent review – cannot be ignored by State and public institutions – discussion of constitutional and legislative scheme regulating powers of Public Protector – order suspending Chief Operating Officer of the South African Broadcasting Corporation – held not to offend against separation of powers doctrine – reiteration of caveat against piecemeal litigation.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Schippers J sitting as court of first instance), judgment reported *sub nom Democratic Alliance v South African Broadcasting Corporation Ltd & others* 2015 (1) SA 551 (WCC).

The appeal is dismissed with costs including the costs attendant upon the employment of two counsel.

JUDGMENT

Navsa and Ponnan JJA (Mpati P, Swain and Dambuza JJA concurring):

[1] '*Sed quis custodiet ipsos custodes?*'[1] In posing that question, the Roman Poet Juvenal (*Satura VI* lines 347-8) was suggesting that wives could not be trusted and that keeping them under guard was no solution because guards could not themselves be trusted. Leonid Hurwicz, in accepting the Nobel Prize in Economic Sciences, stated: 'Yes, it would be absurd that a guardian should need a guard.'[2]

[2] In constitutional democracies, public administrators and State institutions are guardians of the public weal.[3] In South Africa that principle applies to administration

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[1] 'But who will guard the guards themselves?'

[2] Leonid Hurwicz 'But who will guard the guardians?' Nobel Prize Lecture delivered on 8 December 2007, available at *http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2007/hurwicz_lecture.pdf*, accessed on 1 October 2015.

[3] So, for example s 195(1) of the Constitution provides:
'Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

in every sphere of government, organs of State and public enterprises.[4] Section 41 of the Constitution requires all spheres of government and all organs of State to, amongst other things, 'secure the wellbeing of the people of the Republic', to 'provide effective, transparent, accountable and coherent government', to 'respect the constitutional status, institutions, powers and functions of government in the other spheres' and not to exercise their powers and functions in a manner that encroaches upon the institutional integrity of government in another sphere. Significantly, s 41 of the Constitution dictates that all spheres of government and all organs of State must co-operate with one another and must assist and support one another. They are required to co-ordinate their actions, to adhere to agreed procedures and to avoid legal proceedings against one another. In constitutional States there are checks and balances to ensure that when any sphere of government behaves aberrantly, measures can be implemented and steps taken to ensure compliance with constitutional prescripts. In our country, the office of the Public Protector, like the Ombud in comparable jurisdictions, is one important defence against maladministration and corruption. Bishop and Woolman state the following:[5]

'The Public Protector's brief, as initially adumbrated in the Interim Constitution, and as now determined by the Final Constitution and the Public Protector Act . . . is to watch the watchers and to guarantee that the government discharges its responsibilities without fear, favour or prejudice.' (Footnotes omitted.)

[3] In modern democratic constitutional States, in order to ensure governmental accountability, it has become necessary for the guards to require a guard. And in

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(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African People, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.'

[4] Section 195(2) of the Constitution reads:
'The above principles [see footnote 3 above] apply to –
(a) administration in every sphere of government;
(b) organs of State; and
(c) public enterprises.'

[5] See the chapter entitled 'Public Protector' by Michael Bishop and Stuart Woolman, in Stuart Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Service 6, 2014), at 24A-2.

terms of our constitutional scheme, it is the Public Protector who guards the guards. That fundamental tenet lies at the heart of this appeal, in which we consider the Public Protector's powers and examine the constitutional and legislative architecture to determine how State institutions and officials are required to deal with remedial action taken by the Public Protector.

[4] The litigation culminating in the present appeal arose, so it is alleged, because of the failure by the first appellant, the South African Broadcasting Corporation (the SABC), a national public broadcaster, regulated by the Broadcasting Act 4 of 1999 (the BA) and the second appellant, the Minister of Communications (the Minister), to implement remedial action directed by the Public Protector, a Chapter Nine institution established by s 181(1)*(a)* of the Constitution, in a damning report compiled by her. At the outset it is necessary to record that the State, in terms of s 8A(2) of the BA, is the sole shareholder in the SABC. Section 3(1) of the BA provides, inter alia, that the South African broadcasting system:

'*(a)* serves to safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa;

(b) operates in the public interest and strengthens the spiritual and moral fibre of society;

. . .'

[5] Between November 2011 and February 2012 the Public Protector received complaints from three former employees of the SABC. Those complaints in essence related to the alleged irregular appointment of the third appellant, Mr Hlaudi Motsoeneng, as the Acting Chief Operations Officer (the Acting COO) as well as systemic maladministration relating, inter alia, to human resources, financial management, governance failure and the irregular interference by the then Minister of Communications,[6] Ms Dina Pule, in the affairs of the SABC. On 17 February 2014 and following upon a fairly detailed investigation of those allegations, the Public Protector released a report relating to her investigation entitled 'When Governance and Ethics Fail'.[7]

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[6] The Minister of Communications is the Minister charged with the administration of the Broadcasting Act.

[7] Public Protector's Report No 23 of 2013/2014. The full title of the Report, filed by the Public Protector in terms of s 182(1)*(b)* of the Constitution and s 8(1) of the Public Protector Act, reads: 'A report on an investigation into allegations of maladministration, systemic corporate governance

[6] The Public Protector concluded that there were 'pathological corporate governance deficiencies at the SABC' and that Mr Motsoeneng had been allowed 'by successive [b]oards to operate above the law'. Her key findings in respect of Mr Motsoeneng, who she singled out for particularly scathing criticism, were that:

(i) his appointment as Acting COO was irregular;

(ii) the former Chairperson of the SABC Board, Dr Ben Ngubane, had acted irregularly when he ordered that the qualification requirements for the appointment to the position of COO be altered to suit Mr Motsoeneng's circumstances;

(iii) his salary progression from R1.5 million to R2.4 million in one fiscal year was irregular;

(iv) he had abused his power and position to unduly benefit himself;

(v) he had fraudulently misrepresented, when completing his job application form in 1995 and thereafter in 2003 when applying for the post of Executive Producer: Current Affairs, that he had matriculated;

(vi) he had been appointed to several posts at the SABC despite not having the appropriate qualifications for those posts;

(vii) he was responsible, as part of the SABC management, for the irregular appointment of the SABC's Chief Financial Officer;

(viii) he was involved in the irregular termination of the employment of several senior staff members resulting in a substantial loss to the SABC;

(viiii) he had unilaterally and irregularly increased the salaries of various staff members which resulted in a salary bill escalation of R29 million.

Moreover, the Public Protector found that the Department of Communications and the then Minister Pule, aided and abetted by Mr Motsoeneng, had unduly interfered in the affairs of the SABC. Such conduct, so she stated, 'was unlawful and had a corrupting effect on the SABC Human Resources' practices' and 'was grossly improper and constitutes maladministration'.

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deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC).'

The Public Protector borrowed from a former member of the SABC Board, who had stated: 'When governance and ethics fail, you get a dysfunctional organization. Sadly those in charge cannot see that their situation is abnormal. That has been the case at the SABC for a long time . . . ' A copy of the report is available at: *http://www.pprotect.org/library/investigation_report/2013-14/SABC%20FINAL%20REPORT%2017%20FEBRUARY%202014.pdf*, accessed 1 October 2015.

[7] As regards the Minister, the Public Protector, purportedly in terms of s 182 of the Constitution, directed the following to the Minister of Communications at the time of the report, Mr Yunus Carrim (who had since replaced Ms Dina Pule):

'**11.2 The current Minister of the Department of communications: Hon. Yunus Carrim**

11.2.1. To institute disciplinary proceedings against Mr Themba Phiri in respect of his conduct with regard to his role in the irregular appointment of Ms Duda as the SABC CFO.

11.2.2. To take urgent steps to fill the long outstanding vacant position of the Chief Operations Officer with a suitably qualified permanent incumbent within 90 days of this report and to establish why GCEO's cannot function at the SABC and leave prematurely, causing operational and financial strains.

11.2.3. To define the role and authority of the COO in relation to the GCEO and ensure that overlaps in authority are identified and eliminated.

11.2.4. To expedite finalization of all pending disciplinary proceedings against the suspended CFO, Ms Duda within 60 days of this report.'

[8] The Public Protector directed the Board of the SABC to ensure that:

(i) all monies are recovered which were irregularly expended through unlawful and improper actions from the appropriate persons;

(ii) appropriate disciplinary action was taken against Mr Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increments of certain staff and for his role in the purging of senior staff members resulting in numerous labour disputes and settlement awards against the SABC;

(iii) any fruitless and wasteful expenditure that had been incurred as a result of irregular salary increments to Mr Motsoeneng is recovered from him.

The Public Protector also required each of the Minister and the SABC Board to submit an implementation plan within 30 days indicating how the remedial action would be implemented and for all such actions to be finalised within six months.

[9] On 7 July 2014, instead of implementing the Public Protector's remedial action and without notice to her, the SABC Board resolved that Mr Motsoeneng be appointed the permanent COO of the SABC. This was accepted by the new Minister

(who had by that stage replaced Mr Yunus Carrim), Ms Faith Muthambi, who approved and formally announced his appointment the next day. Both the Board and the Minister acted as they did without reference to the Public Protector. Aggrieved, the Democratic Alliance (DA), the official opposition political party in the National Assembly, applied to the Western Cape Division of the High Court, Cape Town (the High Court), to first suspend and then set aside Mr Motsoeneng's appointment. It contended that in the light of the damning findings of the Public Protector in relation to Mr Motsoeneng and the clear requirements for the appointment of the COO, his appointment to that position was irrational and unlawful.

[10] The application was brought in two parts. Part A was an urgent application seeking, inter alia, the following relief:

'2. Directing that the Seventh Respondent ("Motsoeneng") is suspended with immediate effect from his position as Chief Operating Officer ("COO") of the First Respondent ("SABC"), and shall remain suspended at least until the finalization of the disciplinary proceedings to be brought against him in terms of para 3 and the determination of the review relief sought in Part B;

3. Directing the Second Respondent ("the Board") to institute disciplinary proceedings against Motsoeneng within five (5) days of the date of this court's order;

4. Directing the Board, within five (5) days of the date of this court's order, to appoint a suitably qualified person as acting COO to fill the position pending the appointment of a suitably qualified permanent COO;

5. Ordering that the members of the Board who voted in favour of the appointment of Motsoeneng as COO, and the Fourth Respondent ("the Minister") in their personal capacities pay the Applicant's costs on an attorney and client scale;

. . . . '

[11] Part B sought relief as follows:

'7. Reviewing and setting aside the decision taken by the Board, on or about 7 July 2014, to recommend the appointment of Motsoeneng as COO;

8. Reviewing and setting aside the decision taken by the Minister, on or about 7 July 2014, to approve the recommendation made by the Board to appoint Motsoeneng as COO;

9. Directing the Board to recommend the appointment of, and the Minister to appoint, a suitably qualified COO within 60 days of the date of the court's order;

10. Directing that, if the Board and/or the Minister fail to comply with the terms of paragraph 9, the Third Respondent ("the Chairperson"), and the Minister, shall file affidavits within 70 days of the date of this court's order giving reasons why all the members of the Board and the Minister should not be held in contempt of court;
11. Declaring that, the decisions to recommend and appoint Motsoeneng as COO before responding to the report of the Ninth Respondent [the Public Protector] dated 17 February 2014 and titled *'When Governance and Ethics Fail',* the Board and the Minister respectively were inconsistent with the Constitution, particularly section 181(3) of the Constitution, and invalid;
12. Ordering that the members of the Board who voted in favour of the appointment of Motsoeneng as COO, and the Minister in their personal capacities pay the Applicant's costs on an attorney and client scale;
. . . .'

[12] The application cited the SABC, the Board of Directors of the SABC and the Chairperson of the Board of Directors of the SABC (collectively referred to as the SABC) as the first to third respondents. The Minister of Communications, the President of the Republic of South Africa, the Speaker of the National Assembly, the Portfolio Committee for Communications of the National Assembly, Mr Motsoeneng and the Public Protector were cited as the fourth to ninth respondents respectively. No relief was sought against the President, the Speaker and the Portfolio Committee. They accordingly took no part in the proceedings either in this court or the one below. The SABC opposed the application as did the Minister and Mr Motsoeneng. We turn presently to the role played by the Public Protector in the preceding litigation and the present appeal.

[13] In support of the application, Mr James Selfe, the chairperson of the Federal Executive of the DA, relying principally on the Public Protector's report, stated in the founding affidavit:

'34. *First*, the Public Protector concluded that Motsoeneng had *lied about his qualifications* when applying for the COO position, and when applying for his earlier positions at the SABC. Motsoeneng lied about having obtained a matric certificate and made up imaginary grades on his application form. It appears that the SABC Board may have been aware of this misrepresentation and appointed Motsoeneng nonetheless. As the Public Protector notes, Motsoeneng's attempt to rely on this connivance only exacerbates his crime

as he showed no remorse for his unethical conduct. The lie was necessary as a matric was a minimum requirement for the position (as it had been for his earlier positions). The Public Protector described this as fraudulent.

35. Importantly, Motsoeneng admitted in his interview that he had lied in his application form. In addition, his fraudulent misrepresentation was known to the SABC from at least 2003 when a Group Internal Audit into the allegation that found he had indeed misrepresented himself by stating that he passed matric in 1991. The audit recommended that action should be instituted against Motsoeneng for his misrepresentation. This did not occur.

. . .

51. Appointing Motsoeneng in a permanent position would have been unlawful and irrational even if all the correct procedures had been followed. However, not only did the Board and the Minister appoint an admitted fraudster who had single-handedly cost the SABC tens of millions of rand and completely undermined public confidence and good corporate governance, it completely ignored the relevant legal provisions when it did so.

52. The DA was not privy to the details of the appointment of Motsoeneng, but those details have been widely exposed in the press. I rely on several of those media reports for the facts contained [in this] section. I attach several of them as annexures . . . . Rather than refer to the media reports for each allegation, I tell the sordid story with reference to all the media reports together as the source. Except where I note otherwise, none of the key allegations have been denied by the Board or the Minister.

53. One of the obstacles to filling the post of COO – and part of the reason Motsoeneng served in an acting capacity for so long – was that Mr Mvuzo Mbebe had obtained an interdict preventing the post from being filled on a permanent basis. Mbebe had been recommended as COO in 2007 by the Board, but his recommendation was overturned when a new chairperson – Ms Khanyi Mkhonza – took office. The interdict prevented the Board from permanently filling the post pending Mbebe's review of the Board's reversal.

54. This matter was close to being resolved by the previous Minister, Mr [Yunus] Carrim. It appears that the matter may have been finally settled by the current Minister [Ms Faith Muthambi] sometime in early July. The Minister arrived at a Board meeting on 7 July 2014 in possession of a note of settlement of the Mbebe dispute. If valid this would open the way for the appointing a new COO. However, Mbebe had denied that there has been a final settlement.

55. Even if the matter had been settled, it would merely start the process of advertising, shortlisting and interviewing candidates. That process had not yet started because it was believed Mbebe's interdict prevented any fresh appointment. In addition, the question of filling the new post of the COO was not on the agenda of the 7 July Board meeting.

56. However, it appears that when the Minister arrived at the SABC at 19:00 on 7 July 2014, she entered into a private conference with the Chairperson. When the Chairperson emerged from that conference at about 21:00, she proposed to the Board that it immediately appoint Motsoeneng as the permanent COO.

57. It appears that, in addition to the fact that the Mbebe issue had been resolved, the Chairperson informed the Board that it was necessary to appoint Motsoeneng because of a threat from his lawyers. Motsoeneng's attorneys had written stating that he was entitled to be appointed based on a "legitimate expectation", as he had been acting in the position for so long. The Chairperson relied on this document, and his assertion that Motsoeneng was performing well in his position to justify the appointment. The Chairperson also read out a letter from Motsoeneng that one Board member described "saying what a great person he is. In the letter, Hlaudi attributes all the success of the SABC to himself . . . like there is no one else working there".

58. Understandably, several board members objected. They claimed that the proper process – which, as I explain below, requires that the position be advertised, candidates shortlisted and interviewed – had not been followed. It is unclear whether they also raised the Public Protector's Report. Five of the eleven board members did not support his appointment: two abstained (Prof Bongani Khumalo and Vusumuzi Mavuso) and three voted against (Ronnie Lubisi, Krish Naidoo and Rachel Kalidass). The remaining six board members voted in favour (The Chairperson, Prof Mbulaheni, Obert Maghuve, Nomvuyo Mhlakaza, Ndivhoniswani Tshidzumba, Leah Khumalo and Hope Zinde).

59. After resolving to appoint Motsoeneng, the Board passed its recommendation on to the Minister for her approval at around 23:30 on 7 July 2014. The Minister informed the Board that she would "apply her mind" to the issue. She applied it extremely quickly as, the next day, 8 July 2014, she announced the appointment of Motsoeneng.

60. At no point did the Board or the Minister explain to the Public Protector why they were ignoring her findings and appointing Motsoeneng in a permanent position. Indeed, when responding to queries about how Motsoeneng could possibly be appointed in light of the PP Report, the SABC's spokesperson Kaizer Kganyago replied: "The Public Protector has nothing to do with [the permanent appointment of Motsoeneng]. The two are not together . . . I don't know how the two are related."

61. However, at a press briefing on 10 July 2014, the Minister indicated that the SABC Board had obtained the opinion of an independent law firm "to investigate all the issues raised by the Public Protector". The Minister stated that she and the Board were "satisfied that the report . . . cleared Mr Motsoeneng of any wrongdoing". The Minister provided no details about the contents of the law firm's report.' (Emphasis in original, formatting altered slightly.)

[14] In opposing the application, both Ms Tshabalala, the then Chairperson of the SABC Board and Minister Muthambi denied that the Public Protector's findings and remedial action had been ignored or that Mr Motsoeneng's permanent appointment was irregular. In that regard the former said:

'49. Reasonably soon after receipt of the Public Protector's Report, and in addition to internal considerations of the Public Protector's Report and its findings and recommendations, the Board procured the services of Mchunu Attorneys, a firm of attorneys, to assist it in considering and investigating the veracity of the findings and recommendations by the Public Protector, as well as to assist the Board and management to respond to the Public Protector. Mchunu Attorneys reviewed the Public Protector's Report and investigated its findings and recommendations for purposes of advising the Board. Mchunu Attorneys prepared a report in respect of its task and gave advice to the Board.'

[15] Ms Tshabalala did not annex a copy of the report from the firm of attorneys to her affidavit, stating that it was privileged. She added that the Board did not disregard the report of the Public Protector. According to her, a Committee of Chairs had been established to deal with it. She asserted that the Board had been in constant communication with the Public Protector regarding her implementation plan and the Board's difficulties therewith. And later on in her affidavit, she stated quite emphatically:

'125.2. I deny what may be defamatory statements that Mr Motsoeneng is a fraudster as alleged in paragraph 51 [of the founding affidavit], based on the findings of the Public Protector, *which have been demonstrated to be false in this regard.*

125.3 The allegations contained in paragraphs 53 to 64 [of the founding affidavit] are based on media reports. They constitute hearsay evidence. Once the review record has been filed, reliable evidence will be before the Court and the Board will deal with the allegations in full in response to Part B of the notice of motion. *Suffice to state that the allegations are denied to the extent that they suggest that the appointment of Mr Motsoeneng is unlawful and irrational. . .*

125.4. The Minister was empowered to accept the recommendation of the Board and to appoint Mr Motsoeneng as the COO of the SABC. Any alleged failure by the Board to follow procedures set out in the Articles of Association did not preclude the 100% shareholder, empowered under the Broadcasting Act read with the Articles of Association to appoint a COO, to approve the appointment of Mr Motsoeneng. The legal basis for this contention, as well as the relevant facts, will be fully set out in the answering affidavit to Part B of the notice

of motion. The outcome of Part A does not depend on this. I am advised and respectfully submit that this is not a case of an applicant seeking interim relief that is linked directly to the final relief sought – as in Part A (allegedly interim) and Part B of the notice of motion (final).' (Our emphasis.)

[16] In opposing the DA's application the Minister stated in her answering affidavit:

'14. [At the meeting with the chairperson of the Board on 7 July 2014] I then raised my concerns with the Chairperson of the board of the [SABC] who then provided to me the transcript of the interview between the Public Protector and [Mr Motsoeneng]. After reading such transcript, I was satisfied that the [Mr Motsoeneng] did not lie to the first respondent about the Matric qualification. I was then satisfied that the [Mr Motsoeneng] is competent and has the necessary expertise to be appointed as the Chief Operations Officer.

15. I considered in that regard the further qualifications which [Mr Motsoeneng] had obtained throughout his employment with the [SABC] which are mentioned in the report of Mchunu Attorneys. I also considered the fact that [Mr Motsoeneng] had gained the necessary experience and acquitted himself exceptionally well for a period of almost three years when he was acting as the Chief Operations Officer.

. . .

33.2 The report of Mchunu Attorneys shows that the [SABC Board] has not ignored the findings of the Public Protector. That report shows that the [SABC Board] sought advice on how to deal with that report. Based on the advice it received the [SABC Board] considered it appropriate to conclude that the [Mr Motsoeneng] did not mislead the [SABC] about his qualifications.

. . .

41.4 However, I intend to engage the Public Protector on her findings, and bring to her attention facts which were uncovered by Mchunu Attorneys which could well affect her findings.

42. I have already indicated that I intend to engage the Public Protector in the light of facts which were established by Mchunu Attorneys, in their investigation. I have prepared the response of my office to the Public Protector of which such report will reach the Public Protector's office in time, I will also meet the portfolio committee on communications on the 26 August 2014 to take them through my reply to the Public Protector.

43.1 Once again, I point out that the findings contained in the report of the Public Protector should be considered in the light of the report by Mchunu Attorneys and the transcript of the interview between [the] Public Protector and [Mr Motsoeneng], which I meant to believe that the [SABC] will bring it to the attention of this court.'

. . .

45.2. I have been advised that the [DA] is not entitled to rely on newspaper reports referred in this paragraph. I object to the admissibility of annexure[s] . . . on the grounds that they constitute inadmissible hearsay evidence.

. . .

46.3. I deny that I arrived at the board meeting of the 7 July 2014 with a so called note of settlement on Mbebe's matter. It is further not true that I had a two hours meeting with the [SABC Board Chairperson] upon my arrival to the said board meeting. As a matter of protocol it is the duty of the [SABC Board Chairperson] to give me a brief of the issues.

. . .

47.1. I admit that I was present at the offices of the [SABC] on 7 July 2014. I went to those offices upon the invitation of the chair of the [SABC].

47.2. I only entered the meeting room after the [SABC Board] had concluded deliberations as per invitation of its chair.

47.3. I did not propose to the [SABC Board] that its members should appoint [Mr Motsoeneng] in a permanent capacity or in any capacity at all. I could not have done so, having regard to the independence of the [SABC Board], and the decision-making process that must be followed in making such appointments.

. . .

50.2. I informed the chair of the [SABC Board] that I can only act upon the decision of the [SABC Board] once I received a recommendation from the [SABC Board] which motivated its decision to recommend the appointment of the [Mr Motsoeneng].

50.3. On 8 July 2014 I received recommendation from the [SABC Board], together with several documents, including the report of Mchunu Attorneys which deal with their advice on the findings and remedial action of the Public Protector.

50.4. I did consider that recommendation and supporting documents, and thereafter decided to accept the recommendation on 8 July 2014.

50.5. I considered it my duty to make the decision on the recommendation of the [SABC Board] as expeditiously as was possible because the matter was urgent, and I had the constitutional duty to make a decision on that recommendation diligently and without delay.

. . .

51.3. I will continue to engage the Public Protector on her findings and remedial action relating to [Mr Motsoeneg]. I will, in that regard, make available to her the findings of Mchunu Attorneys, and ask her to consider whether that report impacts on her findings, and if so, to what extent.'

[17] After initially intimating that she would abide the decision of the High Court, the Public Protector felt constrained to file an affidavit with that court because, as she put it:

'No relief is sought by the Applicant against me. Nor do any of the Respondents seek to launch a counter-application to review the Report and set aside my findings contained therein. Therefore, when I originally received the application, I did not file a notice of intention to oppose the application. However, when I read the answering affidavits filed on behalf of the First – Third Respondents [the SABC, the SABC Board, and the SABC Board Chairperson] and the Eighth Respondents [Mr Motsoeneng], it became clear that the main thrust of their case was to discredit the Public Protector's reports and the findings and remedial action taken therein. The First – Third and Eighth Respondents seek to do this in circumstances where no Respondent had brought a counter-application to review and set aside the Report and its contents. Moreover, the answering affidavits filed by those Respondents are replete with inaccuracies with respect to the Report and its contents. It therefore became clear to me, that I need to place certain facts and considerations before this Court in an effort to assist the Court in its adjudication of this matter and in order to clarify the role of the Public Protector and the status of the findings and remedial action taken in my Report.'

[18] The Public Protector expressed the view that the principles of co-operative governance contemplated in the Constitution required the Minister and the SABC to have submitted an implementation plan to her, which they had failed to do. She therefore suggested that she was obliged to ventilate the issues in the current proceedings, rather than through co-operative governance processes. According to the Public Protector, Mr Yunus Carrim, undertook in Parliament to implement the remedial action. However, this was not done. Also the Board of the SABC, on more than one occasion, had indicated that it was engaging with the report and sought extensions from her in order to comply. The extensions were granted and notwithstanding indications by the Chairperson of the Board that the report was being given due consideration and that an implementation plan would be furnished, her remedial action was ignored.

[19] The court below (Schippers J), formulated the primary question for adjudication as follows: Are the findings of the Public Protector binding and

enforceable? He examined the relevant provisions of the Constitution and the Public Protector Act 23 of 1994 (the Act) and reasoned:

'50. . . . 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.[8] If it were 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.'

Then, somewhat contradictorily, he stated:

'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.'[9]

[20] Schippers J concluded:

'74. For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable.[10] However, when an organ of State rejects those findings or the remedial action, that decision itself must not be irrational.'

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[8] And in a footnote, the court below refers to section 165(5) of the Constitution, which reads:
'An order or decision issued by a court binds all persons to whom and organs of State to which it applies.'

[9] Note that where we have quoted from other judgments, we have omitted the square brackets around the relevant paragraph numbers so as to avoid confusion.

[10] We note that some support for the approach of Schippers J is to be found in Bishop & Woolman (*op cit*), who opine that one of the most common criticisms levelled at the Public Protector or ombudsmen generally is that the institution lacks the power to make 'binding decisions'. According to them, the real strength of the office lies in the power to investigate and report effectively. In this regard they refer (at 24A-3) to the following from Stephen Owen (S Owen 'The Ombudsman: Essential Elements and Common Challenges' in Linda C Reif (ed) *The International Ombudsman Anthology* (1999) at 51, 54–5):

'Through the application of reason the results are infinitely more powerful than through the application of coercion. While a coercive approach may cause a reluctant change in a single decision

He thus proceeded to consider whether the decision by the SABC to recommend - and the Minister's decision to appoint - Mr Motsoeneng as the permanent COO was rational. On that score the learned judge held:

'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.'

[21] The learned judge accordingly issued the following order:

'1. The Board of the South African Broadcasting Corporation Ltd (SABC) shall, within 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 para 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 para 1 above shall be completed within a period of 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 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 para 1, and for the period referred to in para 3 above, the eighth respondent shall be suspended on full pay'.

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or action, by definition it creates a loser who will be unlikely to accommodate the recommendations in future actions. By contrast when change results from a reasoning process it changes a way of thinking and the result endures for the benefit of potential complainants in the future.'

[22] With the leave of the court below, the SABC, as the first appellant, the Minister, as the second, and Mr Motsoeneng, as the third, appeal to this court against the judgment of the court below. The DA opposes the appeal. The Public Protector instructed counsel to file heads of argument and address us from the bar on the status and effect of her findings and remedial action. Corruption Watch, a civil society organisation, who was granted leave by the President of this court to intervene as an amicus curiae in the appeal, endorses the Public Protector's contention that on a proper interpretation of s 182 of the Constitution, read with the Act, she has the power to take remedial action which cannot be ignored by organs of State.

[23] For a proper understanding, it is necessary to contextualise the position and purpose of the Public Protector within our Constitutional framework, and to consider her powers. As our interpretation differs from that of the court below, it is necessary that we do so in some detail. South Africa's Chapter Nine institutions were established as independent watchdogs to strengthen constitutional democracy in the Republic. Section 181(1) of the Constitution lists the institutions supporting constitutional democracy as:

'. . .

(a) The Public Protector.

(b) The South African Human Rights Commission.

(c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

(d) The Commissioner for Gender Equality.

(e) The Auditor-General.

(f) The Electoral Commission.'

[24] Section 181(2) of the Constitution states that '[t]hese institutions are independent, and subject only to the Constitution and the law'. For their part, 'they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'. Section 181(3) imposes a positive obligation on other organs of State, who 'through legislative and other measures, must assist and protect these institutions' to ensure their 'independence, impartiality, dignity and effectiveness'. Section 181(4) specifically prohibits any 'person or organ of the State'

from interfering with the functioning of these institutions. However, our Constitution does attempt to strike a balance between their independence, on the one hand, and accountability, on the other. To that end, s 181(5) provides that: '[t]hese institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.' But as the Constitutional Court pointed out in *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC) para 27: the Constitution, in effect, describes Chapter Nine institutions as State institutions that strengthen constitutional democracy; Chapter Nine institutions are independent and subject only to the Constitution and the law; it is 'a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government'; and independence cannot exist in the air and it is thus clear that independence is intended to refer to independence from the government.

[25] Thus even though these institutions perform their functions in terms of national legislation they are not organs of State within the national sphere of government. Nor are they subject to national executive control. Accordingly, they should be, and must manifestly be seen to be, outside government.[11] In *New National Party v Government of the Republic of South Africa & others* [1999] ZACC 5; 1999 (3) SA 191 (CC) para 98 and 99, it was stated by Langa DP, writing in a separate concurring majority judgment:

'In dealing with the independence of the [Independent Electoral] Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to "independence". The first is "financial independence". This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must, accordingly,

[11] See also *Independent Electoral Commission v Langeberg Municipality* para 31.

be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.

The second factor, "administrative independence", implies that there will be [no] control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires "to ensure (its) independence, impartiality, dignity and effectiveness".'

Langa DP was elaborating there on the independence of the Independent Electoral Commission but those considerations apply with equal force to the office of the Public Protector.

[26] The Public Protector, which is the first on the list of Chapter Nine institutions, has its historical roots in the institution of the Swedish Parliamentary Ombud.[12] That office was established with the adoption of the Swedish Constitution Act of 1809 and is said to have been a response to the King's authoritarian rule. The task assigned to the Swedish Ombud, which had been conceived as far back as 1713, was to ensure that public officials acted in accordance with the law and discharged their duties satisfactorily in other respects.[13] If the Ombud found this not to be the case he was empowered to institute legal proceedings for dereliction of duty.[14] Like similar institutions around the globe,[15] the purpose of the office of the Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics and that government officials carry out their tasks effectively, fairly and without corruption or prejudice.[16] The term *'Defenser del Pueblo'* employed in Spain and some South American countries translates into 'Public Defender'. This emphasises 'the protection of the people' and 'the public good'.[17]

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[12] See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC) (the *First Certification Judgment*) para 161.

[13] See The Swedish Parliamentary Ombudsman 'History', available at *http://www.jo.se/en/About-JO/History/*, accessed 5 October 2015.

[14] See also Stig Jagerskiöld 'The Swedish Ombudsman' (1961) 109 *University of Pennsylvania Law Review* 1077 for a general historical background of the Swedish ombudsman.

[15] Finland, Denmark, Norway, New Zealand, Spain and countries in South America are the examples provided by Bishop & Woolman (op cit) at 24A-1.

[16] *First Certification Judgment* para 161.

[17] See Bishop & Woolman (*op cit*) at 24A-1.

[27] When the office of an Ombud or Public Protector in the new constitutional dispensation was first mooted in this country, the African National Congress, the current ruling political party in Parliament, in a document entitled 'Ready to Govern: Policy Guidelines on a Democratic South Africa',[18] said the following:

'The ANC proposes that a full-time independent office of the Ombud should be created with wide powers to investigate complaints against members of the public service and other holders of public office and to investigate allegations of corruption, abuse of their powers, rudeness and maladministration. The Ombud shall have the power to provide adequate remedies. He shall be appointed by and answerable to Parliament.'

This predated the adoption of our Interim Constitution.

[28] The most significant constitutional provision is s 182, which reads:

'(1) The Public Protector has the power, as regulated by national legislation –

(a) to investigate any conduct in State affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.

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

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

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

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

[29] The independence, impartiality and effectiveness of the Public Protector are vital to ensuring accountable and responsible government. The office inherently entails investigation of sensitive and potentially embarrassing affairs of government.[19] In terms of s 182(2) of the Constitution the Public Protector also 'has the additional powers and functions' prescribed by national legislation. The national legislation that is referred to in s 182 is the Act, which makes it clear that, while the

[18] 'Ready to Govern: ANC policy guidelines for a democratic South Africa', as adopted at the African National Congress' National Conference, and dated 31 May 1992. A copy of this policy paper is available at: *http://www.anc.org.za/show.php?id=227*, accessed 1 October 2015.

[19] *First Certification Judgment* para 163.

functions of the Public Protector include those that are ordinarily associated with an ombudsman, they also go much beyond that.[20] The office of the Public Protector 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.'[21] It follows that in fulfilling its constitutional mandate that office will have to act with courage and vigilance.[22]

[30] Sections 193 and 194 of the Constitution provide for the appointment and removal of the Public Protector. The Public Protector is appointed by the President on the recommendation of the National Assembly. The National Assembly must recommend persons: (i) nominated by a committee of the Assembly proportionally composed of members of all political parties represented in the Assembly; and (ii) approved by the Assembly by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. In addition to being a South African citizen and a fit and proper person,[23] the Public Protector must have at least ten years' relevant experience or be a judge of the High Court.[24] This obviously suggests that the incumbent must be someone who is beyond reproach, a person of stature and suitably qualified. Section 183 of the Constitution provides for a non-renewable tenure of seven years. The Public Protector may be removed from office only on: (a) the ground of misconduct, incapacity or incompetence; (b) a finding to that effect by a committee of the National Assembly; and (c) the adoption by the Assembly of a resolution calling for her removal from office. A resolution of the National Assembly concerning the removal of the Public Protector from office must be adopted with a supporting vote of at least two thirds of the members of the Assembly. Upon the adoption of such a resolution the President must remove the Public Protector from office. The Public Protector is thus well protected and a high threshold is set for her removal. Significantly, in the *First Certification Judgment*, the Constitutional Court found that the provisions in the Interim Constitution governing the removal of the Public Protector from office did not pass constitutional muster.[25]

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[20] See *Public Protector v Mail & Guardian Ltd & others* [2011] ZASCA 108; 2011 (4) SA 420 (SCA) para 9.
[21] *Public Protector v Mail & Guardian* para 6.
[22] See *Public Protector v Mail & Guardian* para 8.
[23] See section 193(1) of the Constitution and s 1A of the Act.
[24] See s 1A(3) of the Act.
[25] See the *First Certification Judgment* para 163.

[31] The predecessors of the Public Protector are the Advocate-General and the Ombudsman. The office of the Ombudsman, like the Advocate-General that came before it, had the power under the (now repealed) Ombudsman Act 118 of 1979 to investigate reports of maladministration, but not to take remedial action directly. In other words, the Legislature expressly limited the Ombudsman's remedial powers. She had to refer her findings to other institutions for remedial action.[26] The office of the Public Protector was established by s 110 of the Interim Constitution. Section 112 of the Interim Constitution, which set out the powers and functions of the Public Protector, echoing the Ombudsman Act and the Attorney-General Act 92 of 1992 before it, merely stated that it was competent for the Public Protector, pursuant to an investigation:

'. . . 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, where necessary, any complainant regarding appropriate remedies; or

(iii) any other means that may be expedient in the circumstances.'

[32] It is necessary to have regard to the relevant provisions of the Act to see how action by the Public Protector is triggered as well as to examine the range of statutory measures available to that office. But before we do that it is worth noting the material parts of the Preamble to the Act:

'Whereas sections 181 to 183 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996),[27] provide for the establishment of the office of Public Protector and that the Public Protector has the power, as regulated by national legislation, 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 have resulted in any impropriety or prejudice, to

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[26] Section 5(4) provided that the Ombudsman could, whether or not he or she held an inquiry, and at any time before, during or after such inquiry:

'*(a)* if he is of the opinion that the facts disclose the commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions;

(b) if he deems it advisable, refer any matter which has a bearing on mismanagement to the institution, body, association or organization affected by it or make an appropriate recommendation regarding the redress of the prejudice referred to in section 4(1)*(d)* or make any other recommendation which he deems expedient to the institution, body, association or organisation concerned.'

[27] Note that the Act came into force during the time of the Interim Constitution, and the reference here to the Final Constitution is as a result of an amendment to the Act by the Public Protector Amendment Act 113 of 1998.

report on that conduct and to take appropriate remedial action, in order to strengthen and support constitutional democracy in the Republic; . . . .'

[33] Importantly, s 6 of the Act is entitled 'Reporting matters to and *additional powers* of Public Protector'. Section 6(1) provides that any person may, in any matter over which the Public Protector has jurisdiction, report a complaint to that office. The Public Protector, may, in terms of s 6(3), refuse to investigate a matter reported, if the person ostensibly prejudiced is a State official or employee and that person has not exhausted remedies conferred in terms of the provisions of the Public Service Act, 1994[28] or if the affected person has not taken all reasonable steps to exhaust available legal remedies.

[34] Section 6(4)*(a)* of the Act deals with the Public Protector's additional competencies and provides that she is entitled to act on her own initiative. It provides:

'The Public Protector shall, be competent-

(a) To investigate, on his or her own initiative or on receipt of a complaint, any alleged–

(i) maladministration in connection with the affairs of government at any level;

(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

(iii) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21…of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 with respect to public money;

(iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function, or;

(v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person'.

[35] Section 6(4)*(b)* of the Act gives the Public Protector resort to what might, in broad terms, be described as alternative dispute resolution measures. It provides that the Public Protector shall be competent:

[28] Public Service Act, 1994 (Proclamation 103 of 1994, published in *GG* 15791, 3 June 1994).

'*(b)* to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by–

(i) mediation, or conciliation or negotiation;

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

(iii) any other means that may be expedient in the circumstances'.

[36] Section 6(4)*(c)*(i) states that if the Public Protector is of the opinion that the facts presented to her disclose the commission of an offence she is entitled to refer it to the authority charged with prosecutions. Section 6(4)*(c)*(ii) provides that if the Public Protector deems it advisable she may refer:

'. . . any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.'

[37] Section 6(5)*(a)* of the Act is especially pertinent to this matter. It provides that the Public Protector has the same powers referred to in s 6(4) set out above in relation to the affairs of an institution in which the State is the majority or controlling shareholder or in relation to any public entity as defined in s 1 of the Public Finance Management Act 1 of 1999 (the PFMA). This subsection of course encompasses the SABC.

[38] Section 7 of the Act gives the Public Protector extensive powers of investigation. She is entitled to subpoena persons and require them to give evidence. Persons being investigated have the right to be heard. Section 7A gives the Public Protector search and seizure powers.

[39] Section 8(1) of the Act provides:

'The Public Protector may, subject to the provisions of subsection (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.'

Section 8(3) reads as follows:

'The findings of an investigation by the Public Protector shall, when he or she deems it fit but as soon as possible, be made available to the complainant and to any person implicated thereby.'

[40] Section 11 of the Act makes it an offence for anyone to interfere with the functioning of the office of the Public Protector 'as contemplated in section 181(4) of the Constitution'.[29]

[41] As can be seen Parliament took very seriously its constitutional mandate to legislate the additional powers of the Public Protector. In that regard, conscious of the importance of the office, the Legislature was thorough and thoughtful.

[42] Subsections 6(4)*(b)*, *(c)* and *(d)* of the Act, which was enacted pursuant to the Interim Constitution, appear to mirror the language of s 112(1)*(b)* of the Interim Constitution.[30] The Final Constitution, however, in a significant shift in language, conferred an express further power on the Public Protector. Instead of empowering the Public Protector to 'endeavour' to resolve a dispute, or 'rectify any act or omission' by simply 'advising' a complainant of an appropriate remedy as under the Interim Constitution, the Final Constitution empowers the Public Protector to 'take appropriate remedial action'.[31] Significantly, the Constitution itself directly confers powers on the Public Protector. Section 182(1) confers the power on the Public Protector to: (a) investigate; (b) report*; and* (c) take appropriate remedial action. Those powers are complementary. If, of course, a complaint, or an investigation on her own initiative yields no indication of maladministration or corruption there will be no need to take remedial steps or utilise any of the other measures available to her. Once the Public Protector establishes State misconduct, however, she has the vast array of measures available to her as provided in the Constitution and the Act.

[43] Before us, all counsel accepted that the powers conferred on the Public Protector in terms of s 182(1)*(c)* of the Constitution far exceeded those of similar institutions in comparable jurisdictions. There was, however, a faint suggestion by counsel on behalf of the Minister, that the powers of the Public Protector ought

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[29] It will be recalled that that section of the Constitution provides that no person or institution of State may interfere with the functioning of a Chapter Nine institution.

[30] The Interim Constitution was enacted on 25 January 1994. The Public Protector Act was enacted on 16 November 1994.

[31] See, in this regard, the Public Protector Amendment Act 113 of 1998. The Public Protector Act was also later amended by the Public Protector Amendment Act 22 of 2003. However, the Public Protector Amendment Acts did not amend s 6(4) at all.

rightly to be sourced from the Act, being the legislation envisaged by the Constitution rather than from the Constitution itself. The problem with that suggestion is that the Constitution is the primary source and it stipulates and refers to 'additional' powers to be prescribed by national legislation.[32] The proposition on behalf of the Minister is contrary to the constitutional and legislative scheme outlined above and would have the effect of the tail wagging the dog.

[44] Our Constitution sets high standards for the exercise of public power by State institutions and officials.[33] However, those standards are not always lived up to, and it would be naïve to assume that organs of State and public officials, found by the Public Protector to have been guilty of corruption and malfeasance in public office, will meekly accept her findings and implement her remedial measures. That is not how guilty bureaucrats in society generally respond. The objective of policing State officials to guard against corruption and malfeasance in public office forms part of the constitutional imperative to combat corruption. The Constitutional Court in *Glenister v President of the Republic of South Africa & others* [2011] ZACC 6; 2011 (3) SA 347 (CC) noted (paras 176 and 177):

'Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of State contract for goods and services. . .

. . . Section 7(2) [of the Constitution] casts an especial duty upon the State. It requires the State to "respect, protect, promote and fulfil the rights in the Bill of Rights." It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The State's obligation to

[32] In this regard, see the title on 'Constitutional Law: Government Structures' in 5(3) *Lawsa* 2 ed replacement volume by D W Freedman, para 265.

[33] The Constitution's founding values include accountability, responsiveness and openness in government (s 1*(d)*). Section 7(2) obliges the State to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 33(1) requires administrative action to be lawful, reasonable and procedurally fair. Section 41 requires all organs of State to respect and co-operate with one another and inter alia to 'provide effective, transparent, accountable and coherent government for the Republic as a whole'. Section 195 requires all organs of State and public officials to adhere to high standards of ethical and professional conduct.

"respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern State, creates a duty to create efficient anti-corruption mechanisms."' (Footnotes omitted.)

The Public Protector, in her answering affidavit, expressed concern that:

'This matter represents yet another example of what would appear to have become a trend amongst politicians and organs of State to simply disregard reports issued and remedial actions taken by the Public Protector'.

[45] Two considerations appear to have weighed with the High Court in its conclusion that the findings of the Public Protector were not 'binding and enforceable'. First, it appears to have compared the powers of the Public Protector with that of a court and, second, it relied on a judgment of the English Court of Appeal in *R (on the application of Bradley & others) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36; [2009] QB 114 (CA). Regarding the first consideration, it is so that section 165(5) of the Constitution provides: 'An order or decision *by a court* binds all persons to whom and organs of state to which it applies' (our emphasis). But a court is an inaccurate comparator and the phrase 'binding and enforceable' is terminologically inapt and in this context conduces to confusion. For, it is well settled in our law that until a decision is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked (*Oudekraal Estates (Pty) Ltd v City of Cape Town & others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para 26). It was submitted, however, that that principle applies only to the decision of an administrative functionary or body, which the Public Protector is not. It suffices for present purposes to state that if such a principle finds application to the decisions of an administrative functionary then, given the unique position that the Public Protector occupies in our constitutional order, it must apply with at least equal or perhaps even greater force to the decisions finally arrived at by that institution. After all, the rationale for the principle in the administrative law context (namely, that the proper functioning of a modern State would be considerably compromised if an administrative act could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question (*Oudekraal* para 26)), would at least apply as much to the institution of the Public Protector and to the conclusions contained in her published reports.

[46] Regarding the second consideration, *Bradley* held as follows (para 51):

'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 [the Parliamentary Commissioner 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.'

With reference to *Bradley*, Schippers J held:

'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* is instructive.' (Footnote omitted.)

Bradley does not in any way assist in the interpretation of our Public Protector's constitutional power 'to take appropriate remedial action'. It concerned a different institution with different powers, namely, the powers of the Parliamentary Commissioner under the Parliamentary Commissioner Act, 1967, who undertakes investigations at the request of Members of Parliament. She does not have any remedial powers. Section 10 of the Parliamentary Commissioner Act merely requires her to report on her investigation to the Member of Parliament who laid the complaint, the Department of State against whom the complaint was laid and, if any injustice has been done, to the Houses of Parliament. The function of the Parliamentary Commissioner appears, in other words, to be confined to a reporting function, which is merely one of the functions of our Public Protector, and is specified under s 182(1)*(b)* of the Constitution. The Parliamentary Commissioner does not have any equivalent of our Public Protector's power to 'take appropriate remedial action'. *Bradley* is consequently not of any assistance in the interpretation and understanding of our Public Protector's remedial powers. Schippers J's reliance on *Bradley* was therefore misplaced.

[47] Here, there is no suggestion that the Public Protector exceeded her powers or that she acted corruptly. Nor have any of the other traditional grounds for a review

been raised. The principal reason advanced by both the SABC and the Minister for ignoring the Public Protector's remedial action is that the former had appointed Mchunu Attorneys to 'investigate the veracity of the findings and recommendations of the Public Protector'. That, in our view, was impermissible. Whilst it may have been permissible for the SABC to have appointed a firm of attorneys to assist it with the implementation of the Public Protector's findings and remedial measures, it was quite impermissible for it to have established a parallel process to that already undertaken by the Public Protector and to thereafter assert privilege in respect thereof. The assertion of privilege in the context of this case is in any event incomprehensible.[34] If indeed it was aggrieved by any aspect of the Public Protector's report, its remedy was to challenge that by way of a review. It was not for it to set up a parallel process and then to adopt the stance that it preferred the outcome of that process and was thus free to ignore that of the Public Protector. Nor was it for the Minister to prefer the Mchunu report to that of the Public Protector. It bears noting that the Public Protector is plainly better suited to determine issues of maladministration within the SABC than the SABC itself. That, after all, is why the office of the Public Protector exists. The Public Protector is independent and impartial. Mchunu Attorneys, who had already represented the SABC during the course of the Public Protector's investigation, was not. The Public Protector conducted a detailed investigation in which she interviewed all the relevant role players, considered all relevant documents, and gave all affected parties an opportunity to comment on her provisional report. Only after following that process, did she make her findings and take remedial action. That cannot simply be displaced by the SABC's own internal investigation. Thus, absent a review, once the Public Protector had finally spoken, the SABC was obliged to implement her findings and remedial measures.

[34] It is unclear on what basis the SABC asserts privilege in respect of the Mchunu report. First, the report appears to have been procured by the SABC with the aim of investigating and assessing the veracity of the Public Protector's findings. Thus notwithstanding the fact that the relationship between Mchunu Attorneys and the SABC appears facially at least to have been that of an attorney and client, it is doubtful whether, properly construed, the Mchunu Report is in the nature of a communication between an attorney and client in respect of which privilege from disclosure can rightly be asserted. Second, the Mchunu report was furnished by the SABC to the Minister, who in turn stated in her answering affidavit: 'I will ensure that the findings of Mchunu Attorneys are made available to the Public Protector for her consideration'. It is contradictory to assert privilege and then at the same time to offer to make it available to another party.

[48] Both the Minister and the SABC complain that they were still intent on engaging with the Public Protector about her report. But, once she has finally spoken, following upon a full investigation, where those affected have been afforded a proper hearing, as happened here, there should have been compliance. However, as the Public Protector pointed out in her affidavit '[t]he deadline for compliance . . . is 17 August 2014. At the time of filing this affidavit, on 14 August 2014, no compliance has been effected.'[35] In addition, as pointed out in paras 14 and 16 above, it is clear that the SABC adopted an intransigent approach to the remedial action and the Minister followed suit. Moreover, on the evidence, the claim that they were intent on engaging the Public Protector rings hollow. The permanent appointment of Mr Motsoeneng as the COO in the face of the extremely serious findings made by the Public Protector against him is inconsistent with that claim. It appears to be undisputed that: (i) the position of COO was not formally advertised and, accordingly, no other candidates were considered for what, after all, was a very senior position at a public broadcaster; (ii) the filling of that position did not appear on the agenda for the meeting at which the decision of the Board to recommend the appointment was taken; and (iii) no interviews were held, not even with the single candidate that the Board chose to recommend. All of that despite the SABC's own Articles of Association that required the Board to interview other candidates and prepare a shortlist. What is more is that Mr Motsoeneng's appointment appears to have taken place in the face of an interdict granted in Mr Mbebe's favour. It thus appears that despite the Public Protector's damning findings, both the SABC and Minister were dead set on Mr Motsoeneng's appointment and had no genuine intention of engaging with the Public Protector.

[49] It is important to emphasise that this case is about a public broadcaster that millions of South Africans rely on for news and information about their country and the world at large and for as long as it remains dysfunctional, it will be unable to fulfil its statutory mandate.[36] The public interest should thus be its overarching theme and

[35] From the explanation of the Public Protector, it seems that she had given a number of extensions to the deadline originally specified in her report, and so at the time that she deposed to the affidavit on 14 August 2014, the extended deadline was 17 August 2014. And although she deposed to the affidavit before the deadline had arrived, she took the view that the actions of the SABC and the Minister made it clear that they were in any event not going to meet it.

[36] In terms of s 6(4) of the BA, the SABC must:

objective. Sadly, that has not always been the case. Its Board has had to be dissolved more than once and its financial position was once so parlous that a loan of R1 billion, which was guaranteed by the National Treasury, had to be raised to rescue it. Here as well, the public interest appears not to have weighed with the Board of the SABC. The Public Protector observes in her report:

'. . . I found it rather discouraging that the current SABC Board appears to have blindly sprung to Mr Motsoeneng's defence on matters that preceded it and which, in my considered view, require a Board that is serious about ethical governance to raise questions with him.'

That approach by the Board appears to have carried through in this litigation. By way of example, the Public Protector pointed out in her report that:

'. . . Mr Motsoeneng admitted, during his recorded interview, that he had falsified his matric qualifications'.

She added that:

'Mr Motsoeneng indicated that he had passed Standard 10 ("matric") in 1991 at the age of 23 years and indicated five (5) symbols he had purported to have obtained in this regard.'

In his written response to the Public Protector's provisional report, Mr Motsoeneng accepted that the information furnished on the form when he first sought employment at the SABC 'was clearly inaccurate' and that his assertion that he had passed standard ten was 'inaccurate and false'. That notwithstanding, Ms Tshabalala, who had been appointed Chairperson of the SABC Board shortly before the application was launched in the court below stated: 'The objective facts contradict the finding by the Public Protector that Mr Motsoeneng misrepresented his qualifications . . .' and 'the findings of the Public Protector . . . have been demonstrated to be false in this regard'. Likewise, the Minister's assertion that after reading the transcript of the interview between the Public Protector and Mr Motsoeneng she was satisfied that he did not 'lie to the [SABC] about the matric qualification' can hardly withstand scrutiny.

[50] The following parts of a transcript of the interview conducted on 19 July 2013 by the Public Protector with Mr Motsoeneng, concerning his matric qualification,

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'encourage the development of South African expression by providing, in South African official languages, a wide range of programming that –
(a) reflects South African attitudes, opinions, ideas, values and artistic creativity;
(b) displays South African talent in education and entertainment programmes;
(c) offers a plurality of views and a variety of news, information and analysis from a South African point of view;
(d) advances the national and public interest.

appear to support that part of the Public Protector's report referred to in the preceding paragraph:

'Adv Madonsela: But you knew . . . you are saying to me you knew that you had failed, so you . . . because when you put these symbols you knew you hadn't found . . . never seen them anywhere, you were making them up. So I'm asking you that in retrospect do you think you should have made up these symbols, now that you are older and you are not twenty-three?

Mr Motsoeneng: From me . . . for now because I do understand all these issues, I was not supposed, to be honest. If I was . . . now I was clear in my mind, like now I know what is wrong, what is right, I was not supposed to even put it, but there they said "No, put it ", but what is important for me Public Protector, is everybody knew and even when I put there I said to the lady "I'm not sure about my symbols" and why I was not sure Public Protector, because I got a sub, you know I remember okay in English I think it was an "E", because you know after . . . it was 1995.

If you check there we are talking about 1991, now it was 1995 and for me I had even to go to . . . I was supposed to go to school to check. Someone said "No, no, no, you know what you need to do? Just go to Pretoria." At that time Public Protector, taxi, go and check, they said, "No, you fail", I went and. . . . That one is . . . and people who are putting this, Public Protector . . . and I'm going to give you. . . I know it is Phumemele and Charlotte and this people when SABC were charging me, they were my witness.

Mr Madiba: I think if. . . I want to understand you correctly. You say you were asked by the SABC to put in those forms. . . I mean to put in those. . .

Adv Madonsela: To make up the symbols.

Mr Madiba: To make up the symbols. Do you recall who said that to you?

Mr Motsoeneng: Marie Swanepoel.'

This explanation by Mr Motsoeneng is muddled and unclear. Even after the passage of a considerable period of time and sufficient opportunity for reflection on his part, it does reveal an alarming lack of insight. He appears not to fully appreciate that this was an admitted deliberate falsehood and that in that sense his explanation lacks contrition and honesty. But his explanation evidently satisfied both the Board and the Minister that he did not lie about his matric qualification. It is not clear how they could have come to that conclusion because it is not in dispute that: (a) he did not have a matric qualification; and (b) when he first sought employment with the SABC he misrepresented that he did. It matters not, as he suggests in seeking to justify his behaviour, that certain persons at the SABC might have known that he did not in fact

have a matric. That others may have known the truth simply makes them complicit in the lie. It does not excuse his lie. Mr Motsoeneng's more recent lack of candour and contrition is also cause for concern. He does not furnish a confirmatory affidavit from Ms Swanepoel. In his answering affidavit Mr Motsoeneng states 'I have been unable to trace Swanepoel again'. But it would seem that she did depose to an affidavit in which she disputes his version. That affidavit, for some inexplicable reason, does not form part of the appeal record. In his judgment on the application for leave to appeal, Schippers J records:

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

26. Ms Swanepoel refutes this evidence. She says that she made it clear to Mr Motsoeneng that he must not fill in a qualification which he had not yet finished; that he would have to provide an original certificate to prove whatever he filled in on the application form; and that after he had completed the form she repeatedly contacted Mr Motsoeneng to produce his matric certificate which he promised to do, but never did. Ms Swanepoel says that she also repeatedly followed up Mr Motsoeneng's failure to produce a matric certificate with her superiors, including Mr Paul Tati. It will be recalled that Mr Tati insisted that Mr Motsoeneng produce his matric certificate by no later than 12 May 2000. Mr Motsoeneng replied that he would furnish the certificate as soon as he received it.

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

about the matter. She replied that she would talk to him but that she would not lie in an affidavit for him.' (Footnotes omitted.)

[51] There is yet a further context in which the public interest does not appear to have been well served. The affidavits filed on behalf of the Minister and the SABC treat with disdain the allegation that Mr Motsoeneng's appointment was irrational and unlawful because those allegations are pieced together from media reports and thus constitute hearsay evidence. But that may well be to misconceive the position, because, as Nugent JA, albeit in a different context, put it in *Mail & Guardian* (above) (para 26), '[a] newspaper that publishes a series of articles on matters of great public concern can only be seriously damaged by a finding that much of what was published is not correct or cannot be substantiated.' Moreover, it is no less important for the public as it is for the court to be reassured that there has been no impropriety in public life. There is no justification for saying to either that they must simply accept that there has not been conduct of that kind. The Minister and chairperson of SABC Board are senior public office bearers, whose function it is to inspire confidence that all is well in public life. In those circumstances we think it is unfortunate that they should have chosen to respond to the evidence as they did. Unlike the DA, they were present and intimately involved in what had transpired. In those circumstances they owed not just the court but also their fellow citizens an explanation. In our view the overriding public interest obliged them to make full and frank disclosure rather than shield themselves from scrutiny by resorting to technical points in opposition. After all, the information pertaining to Mr Motsoeneng's appointment was peculiarly within their knowledge.

[52] The Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1)*(c)* must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation. It follows that the language, history and purpose of s 182(1)*(c)* make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation. All

counsel before us rightly accepted that the Public Protector's report, findings and remedial measures could not be ignored.

[53] To sum up, the office of the Public Protector, like all Chapter Nine institutions, is a venerable one. Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored. State institutions are obliged to heed the principles of co-operative governance as prescribed by s 41 of the Constitution. Any affected person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application. Absent a review application, however, such person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector. Moreover, an individual or body affected by any finding, decision or remedial action taken by the Public Protector is not entitled to embark on a parallel investigation process to that of the Public Protector, and adopt the position that the outcome of that parallel process trumps the findings, decision or remedial action taken by the Public Protector. A mere power of recommendation of the kind suggested by the High Court appears to be more consistent with the language of the Interim Constitution and is neither fitting nor effective, denudes the office of the Public Protector of any meaningful content, and defeats its purpose. The effect of the High Court's judgment is that, if the organ of State or State official concerned simply ignores the Public Protector's remedial measures, it would fall to a private litigant or the Public Protector herself to institute court proceedings to vindicate her office. Before us, all the parties were agreed that a useful metaphor for the Public Protector was that of a watchdog. As is evident from what is set out above, this watchdog should not be muzzled.

[54] After lengthy debate in this court all counsel were agreed that the Public Protector's directive that Mr Motsoeneng be subjected to a disciplinary enquiry must be respected and consequently had to be implemented. Counsel on behalf of Mr Motsoeneng insisted that he was eager to clear his name through that process and thus welcomed it. For all the aforesaid reasons it was rightly conceded that the order by the court below that disciplinary proceedings should be instituted was unassailable.

[55] What occupied a greater part of the debate in this court was an attack on the correctness of the order of the High Court suspending Mr Motsoeneng. It was submitted on behalf of all three appellants that in her determination of an appropriate remedy as contemplated by s 182(1)*(c)* of the Constitution, the Public Protector had not seen fit to order Mr Motsoeneng's suspension. Accordingly, so the submission went, it was not competent for Schippers J to do so. It is so that in ordering the SABC to commence disciplinary proceedings against Mr Motsoeneng, the High Court primarily sought to vindicate the Public Protector. But sight cannot be lost of the fact that matters did not end with the report of the Public Protector. The Public Protector observed quite correctly in her report that the Board 'appears to have blindly sprung to Motsoeneng's defence' and 'at times . . . appeared more defensive on his behalf' than Mr Motsoeneng himself. In earlier correspondence with Ms Tshabalala, the Public Protector observed:

'. . . unlike the outgoing Board, Mr Hlaudi Motsoeneng and the GCEO, you appear to deny any governance failure on the part of the erstwhile Board. Even more concerning, is how the Board whose role is to guide the SABC's ethical conduct reacts to my intended findings regarding Mr Hlaudi Motsoeneng's dishonesty'.

We know how the Board reacted to the Public Protector's findings: In the face of her serious findings of dishonesty, abuse of power and maladministration against Mr Motsoeneng, the SABC purported to recommend him for appointment as the permanent COO. And the Minister, on the strength of that recommendation, purported to appoint him.

[56] On the undisputed evidence it would appear that the Minister was able to apply her mind to the Mchunu Report, the recommendation of the Board and the transcript of Mr Motsoeneng's interview before acting on the recommendation of the SABC Board. She had to then weigh that against the 150 page Public Protector Report, which she already had in her possession. She did all of that within a single day. As this court has previously pointed out: 'Promptitude by public functionaries is ordinarily meritorious, but not where that is at the cost of neglecting the task.'[37] Moreover, the Minister seems to have restricted herself to a consideration of only one of the several negative findings against Mr Motsoeneng, namely, the allegation of dishonesty concerning his matric qualification. She does not state that she

[37] *Public Protector v Mail & Guardian* (above) para 3.

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

[57] The principal attack on the suspension order on behalf of both the Minister and the SABC was that such an order had the effect of offending the separation of powers doctrine. In that regard reliance was placed on *National Treasury & others v Opposition to Urban Tolling Alliance & others* [2012] ZACC 18; 2012 (6) SA 223 (CC) (*OUTA*), para 71 in which the Constitutional Court stated:

'71. The high court does not mention a word about the submission of the government applicants on separations of powers. As a result we do not have the benefit of its attitude to the submissions. It is equally unclear whether the high court had considered the submissions at all. Before granting interdictory relief pending a review a court must, in the absence of mala fides, fraud or corruption, examine carefully whether its order will trespass upon the terrain of another arm of government in a manner inconsistent with the doctrine of separation of powers. That would ordinarily be so, if, as in the present case, a state functionary is restrained from exercising statutory or constitutionally authorised powers. In that event, a court should caution itself not to stall the exercise unless a compelling case has been made out for a temporary interdict. Even so, it should be done only in the clearest of cases. This is so because in the ordinary course valid law must be given effect to or implemented, except when the resultant harm and balance of convenience warrant otherwise.'

[58] It was submitted that the power to remove the COO was one vested in the President and that it was not competent for a court to usurp that function. We were

referred to s 15 of the BA which deals with the removal from office of a 'member'. In s 1 of the BA, a 'member' is defined to include executive members of the SABC Board, which in turn includes the COO, in terms of s 12*(b)*.

Section 15(1) of the BA provides:

'(1) 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; or

(b) must remove a member from office after a finding to that effect by a committee of the National Assembly and the adoption by the National Assembly of a resolution calling for that member's removal from office in terms of section of 15A.'

The appointing body in terms of s 1 read with s 13 of the BA is the President acting on the advice of the National Assembly. The submission on behalf of the Minister and the SABC was that it was for the President to suspend or remove permanently and not for a court to direct a suspension.

[59] In the present case the Minister and the SABC both erred in their approach to the task that confronted them. In this regard it is important to emphasise that the Constitution requires that public power vested in the Executive and other functionaries be exercised in an objectively rational manner.[38] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the principle of legality, which is part of that law. The principle of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.[39] Thus, although the common law remains relevant to this process,[40] the nature and characterisation of the public power exercised, namely, whether executive or administrative, matters less now than it did

[38] *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of South Africa & others* [2000] ZACC 1; 2000 (2) SA 674 (CC) para 89.

[39] See *Affordable Medicines Trust & others v Minister of Health & others* [2005] ZACC 3; 2006 (3) SA 247 (CC) para 49; *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* [1998] ZASCA 14; 1999 (1) SA 374 (CC) para 58.

[40] See *MEC for Environmental Affairs and Development Planning v Clairison's CC* [2013] ZASCA 82; 2013 (6) SA 235 (SCA) para 19.

under the common law, pre-Constitution.[41] As Nugent JA pointed out in *Minister of Home Affairs & others v Scalabrini Centre & others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA), para 61:

'Professor Hoexter has observed that the doctrine [of legality] is in the process of evolution, and will continue to evolve —

"quite possibly to the extent that it eventually encompasses all the grounds of review associated with regular administrative law. Meanwhile, the principle fairly easily covers all the grounds ordinarily associated with authority, jurisdiction and abuse of discretion: . . . Here at least, the principle of legality is a mirror image of administrative law. It is administrative law under another name."' (Footnote omitted.)

As this court has previously explained:

'To ensure a functional, accountable constitutional democracy, the drafters of our Constitution placed limits on the exercise of power. Institutions and office bearers must work within the law and must be accountable. Put simply, ours is a government of laws and not of men or women.'[42]

[60] The question, whether the Minister and the SABC have to give effect to remedial action by the Public Protector is one eminently for a court to decide. In any event, according to the Public Protector, the Executive through Minister Carrim had undertaken in Parliament to give effect to the remedial action taken by her. In that regard the Portfolio Committee on Communications held a meeting on 18 February 2014, with the purpose of allowing the Minister and Deputy Minister of Communications to present a progress report on the commitments made to the Portfolio Committee covering the period November 2013 to January 2014. The Parliamentary Monitoring Group's report of this meeting records the then Minister Carrim as suggesting that:

'. . . if it was legally tenable:

- he would commit to giving a report, by end March [2014], or at least prior to the election
- if necessary, there could be teleconferences arranged to discuss the matter
- *whatever the [Department of Communication] and Ministry must legally do, they would*
- an exit report would be written telling the incoming executive to proceed with whatever was outstanding'. (Our emphasis.)

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[41] *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* [2012] ZASCA 15; 2012 (3) SA 486 (SCA) para 29.

[42] *Democratic Alliance v President of the Republic of South Africa & others* [2011] ZASCA 241; 2012 (1) SA 417 (SCA) para 66.

What is more, is that on 4 July 2014, the new Minister, Ms Faith Muthambi, appeared before a joint sitting of the Portfolio Committees on Communications, and on Telecommunications and Postal Services, and the Parliamentary Monitoring Group's report of this meeting records that:

'Minister Muthambi said the SABC matters were not new, and she was paying urgent attention to ensuring that SABC served the interests of the nation as a whole. SABC would submit a report to her, on issues raised by the Public Protector, on 28 July 2014. She was equally upset with some of the matters at SABC and this was in the public domain. *SABC must comply with the Public Protector's recommendations.* Human resource issues raised by the Public Protector were also being addressed.' (Our emphasis.)

The SABC and the Minister appear to have vacillated between resisting the Public Protector's remedial action and undertaking to comply therewith. Unlike in *OUTA*, here the Minister and the SABC were afforded every opportunity to discharge their constitutional duty. In fact, they were directed to do so by the Public Protector. They declined to do so because, as we have shown, they misconceived the import of the Public Protector's powers and acted irrationally in their response to it. This is thus a case of both the SABC and the Minister failing to understand the effect of the Public Protector's remedial action as well as failing in their obligation to the SABC and the country at large. That is a matter pre-eminently for a court.

[61] In light of the Public Protector's findings and the events subsequent to her report, the High Court was rightly concerned that Mr Motsoeneng should not continue to be in office with serious allegations concerning maladministration and the integrity of the SABC hanging over him. The High Court approached the enquiry thus:

'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.'

The approach of the High Court cannot be faulted.

[62] In addition, in arriving at its conclusion that a suspension was appropriate, the high court exercised a narrow discretion. The test for interference in a discretion of that sort is that formulated in *Ex parte Neethling & others* 1951 (4) SA 331 (A) at 335C-F. Here it has not been shown that Schippers J exercised his discretion capriciously or upon a wrong principle or upon any other ground justifying interference. See also *Ferris & another v Firstrand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC) para 28.

[63] Further, it bears noting that a judicial decision is only appealable if it has the following three attributes: first, it must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed (see *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532I - 533B, cited with approval by the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) para 49). The suspension of Mr Motsoeneng pending finalisation of his disciplinary proceedings, appears to have neither the second nor third of the required attributes. That would be enough to disqualify it as an appealable decision, because the first attribute – assuming it to be present – cannot on its own confer appealability. Mr Motsoeneng has been suspended pending finalisation of his disciplinary proceedings. That does not, one would imagine, in and of itself dispose of even a portion of the relief claimed. It is thus also distinctly questionable at this stage whether the order suspending Mr Motsoeneng will have any final effect.[43] The facts of this case thus distinguish it from those dealt with by the Constitutional Court in *OUTA.*

[43] See, inter alia, *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) 47C–D; *Cronshaw & another v Fidelity Guards Holdings Pty Ltd* [1996] ZASCA 38; 1996 (3) SA

[64] As the excerpts from the affidavits of both the Minister and Ms Tshabalala show, they express themselves in strong language. Both appear to have already exonerated Mr Motsoeneng of any wrongdoing. For it seems to be inconsistent to promote a person to one of the most senior positions at the public broadcaster if there had been any genuine intention of instituting disciplinary proceedings against him. Rationally, implicit in his promotion has to be a rejection of the rather damning findings by the Public Protector. Not only does all of that render their assertion that they were still intent on engaging with the Public Protector contrived and disingenuous, but it strongly dispels the notion that they can still bring an open and impartial mind to bear on the matter. The appeal against the suspension order must therefore also fail.

[65] One further aspect requires further brief consideration. As set out earlier in this judgment, relief was sought in two parts. Schippers J rightly held that on a proper construction of the relief sought in Part A of the notice of motion, namely that disciplinary proceedings be instituted, the claim was one for final relief. The suspension order, as outlined above, is an interim order pending the outcome of review proceedings. We were informed by counsel on behalf of all the parties that the contemplated review application has been allocated a preferential date and will be heard during the first week of October 2015.

[66] At the outset of the hearing of the appeal, we were occupied with some debate as to whether it was desirable that this court consider the appeal in respect of Part A at this stage given that: (a) the proceedings in the High Court are un-terminated inasmuch as Part B has yet to be determined by the High Court; and (b) entertaining the appeal now would result in a proliferation of piecemeal hearings and appeals. See *Walhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113 (A) at 119H-120C. In *Guardian National Insurance Co Ltd v Searle NO* [1999] ZASCA 3; 1999 (3) SA 296 (SCA) at 301A-C, the following was stated:

'As previous decisions of this Court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is

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686 (A); and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* para 49, where the above two cases are cited with approval.

unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time.'

[67] In *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd & another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA), this court said the following (paras 89 and 90):

'89. Before concluding we are constrained to make the comments that follow. Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition, it might well be desirable to have that issue decided first.

90. This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately.' (Footnotes omitted.)

[68] The course followed by the litigants and the court below will no doubt result in protracted and cross-cutting litigation. So, for example, this judgment might be appealed to the Constitutional Court. The review application, if decided in favour of the DA, might result in Mr Motsoeneng no longer holding office, but that judgment might also be appealed, first to this court and then to the Constitutional Court. It might well have been in the interest of justice for the review application to have been heard expeditiously with that decision being determinative, either at High Court level or, ultimately, one of the appellate courts. The manner in which the matter was dealt with will lead to protraction and all the while the institution will have to endure the uncertainty that will follow.

[69] We appreciate that we were called upon to adjudicate only that part of the relief sought in part A of the notice of motion. However, part A is not a hermetically sealed enquiry and because of the manner in which the litigation was conducted we were obliged to range beyond it to a consideration of some matters upon which the High Court is yet to finally pronounce. In determining whether a suspension order was apt, it was necessary for us to consider, at least on a prima facie basis, as was

done by the court below, matters pertaining to part B of the notice of motion. For, it must be accepted that the suspension order could only issue if there were prospects of success in relation to part B. That is not to suggest that we have made any final decisions in relation to the review application nor have we pre-empted any decision that the High Court might in due course be called upon to make, including those that relate to relevant Ministerial decisions and their proper classification.[44]

[70] It follows for all of the aforesaid reasons that the appeal must fail.

The appeal is accordingly dismissed with costs including the costs attendant upon the employment of two counsel.

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M S Navsa

Judge of Appeal

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V M Ponnan

Judge of Appeal

[44] See in this regard *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC).

Appearances:

For First Appellant:	N H Maenetje SC (with him H Rajah) Instructed by: Mchunu Attorneys, Cape Town Bokwa Attorneys, Bloemfontein
For Second Appellant:	V Maleka SC (with him K Pillay) Instructed by: State Attorney, Cape Town State Attorney, Bloemfontein
For Third Appellant:	N M Arendse SC (with him S Fergus) Instructed by: Majavu Inc, Johannesburg Rampai Attorneys, Bloemfontein
For First Respondent:	A Katz SC (with him N Mayosi and M Bishop) Instructed by: Minde Schapiro & Smith, Cape Town Symington & de Kok, Bloemfontein
For Seventh Respondent:	G Marcus SC (with him E Labuschagne SC and N Rajab-Budlender) Instructed by: Adams & Adams, Pretoria Honey Attorneys, Bloemfontein
For Amicus Curiae:	C Steinberg (with her L Kelly) (Heads of argument prepared by W Trengove SC and C Steinberg and L Kelly) Instructed by: Cliffe Dekker Hofmeyr, Johannesburg Matsepes Inc, Bloemfontein