IN THE HIGH OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **12 August 2022** Signature: _____

Case No.: 76591/19

In the matter between:

HLAUDI GEORGE MOTSOENENG	Applicant
and	
THE PUBLIC PROTECTOR	First Respondent
THE SOUTH AFRICAN BROADCASTING CORPORATION (PTY) LTD	Second Respondent
SABC BOARD OF DIRECTORS	Third Respondent
SPECIAL INVESTIGATING UNIT	Fourth Respondent
MINISTER OF COMMUNICATIONS	Fifth Respondent

JUDGMENT

NEUKIRCHER J:

[1] The applicant launched this application on 15 October 2019. In it, he seeks certain declaratory orders as well as an order reviewing and setting aside certain findings and the remedial order of the Public Protector (PP)[1] contained in her report titled *"When Governance and Ethics Fail: Investigation into allegations of maladministration, system corporate governance deficiencies, abuse of power and irregular appointment of Mr. Hlaudi Motsoeneng by the SABC"*[2] (the PP Report).

[2] The relief sought by the applicant is *inter alia* the following:

> *"1. Declaring the SABC to have failed to comply with the findings and remedial actions of the Public Protector in her Report titled "When Governance and Ethics Fail: Investigation into allegations of maladministration, system corporate governance deficiencies, abuse of power and irregular appointment of Mr. Hlaudi Motsoeneng by the SABC" ("the Report") issued on 17 February 2014;*
>
> *2. Declaring that the SABC has failed to comply with the order in Democratic Alliance v SABC and Others case no 3104/2016 and Democratic Alliance v Motsoeneng and Others under case no 18108/16*

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1 Who is the first respondent

2 The SABC is the second respondent in these proceedings

[2017] BLLR 153 (WCC); [2017] 1 All SA 530 (WCC) (12 December 2016);

3. *Declaring the SABC to be in contempt of a court order as referred to in paragraph 2 above;*
4. *Declaring the SABC to be in contempt of the Public Protector by failing to implement her remedial action; alternatively*
5. *...*
6. *In any event reviewing and setting aside the findings as they relate to the Applicant and the remedial action as ordered by the Public Protector in paragraph 11.3 of the said report pertaining to the Applicant;*
7. *Costs to be borne by any of the Respondents only in the event of opposition."*

[3] Paragraph 5 of the Notice of Motion was expressly abandoned during the applicant's argument before me.

The issues

[4] The main issues in this matter were defined by the parties in a joint practice note as the following:

4.1 whether the report of the PP, its findings and remedial action were irrational and unlawful, and therefore fall to be set aside and the extent to which this is necessary;

4.2 whether the SABC failed to comply with the findings and remedial actions of the PP Report, as well as the orders of the Western Cape High

Court of 2 December 2016 under case numbers 3104/2016 and 18107/16; and

4.3 following on 4.2, whether the SABC is in contempt of that court order.

[5] The following issues were also argued before me:

5.1 whether condonation is required for the delay in instituting the present proceedings (if there is a delay which was denied by the applicant);

5.2 whether the PP and the 4th respondent (the SIU) could be represented by the same attorneys or whether that would constitute an irresoluble conflict of interest;

5.3 whether condonation should be granted to the PP for the late filing of both a supplementary Rule 53 record[3] and the late answering affidavit[4];

5.4 whether the deponent to the PP's affidavit was properly authorised to do so.

The Rule 30

[6] As regards the above, the applicant filed a Rule 30 notice and followed this by an application in terms of Rule 30 in which he sought not only to strike out the supplementary record, but also the PP's affidavit. When the matter was argued before me the Rule 30 application was not pursued. Instead, I was informed that the objections set out in that application were contained in the applicant's replying affidavit and that the Rule 30 issues could be adjudicated on that basis.

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3 On 10 March 2021

4 This was accompanied by an application for condonation and was filed on 9 April 2021

[7] The applicant's objections are the following:

7.1 when the matter was originally set down for hearing on 19 April 2021, the PP had not filed a notice to oppose the application - only the 2nd, 3rd and 4th respondents had filed papers;

7.2 on 10 March 2021 the PP filed a supplementary record. This was filed by Werksmans who, at the time, were on record for the SIU. The filing notice of that supplementary record indicated that they were *"attorneys for the first and 4th respondents" (sic)*;

7.3 then, on 9 June 2021 – 10 days prior to the hearing – the PP filed an answering affidavit. This was accompanied by a notice appointing Werksmans as the PP's attorneys of record, as well as an application for condonation for the late delivery of the PP's answering affidavit;

7.4 on 15 April 2021 – 4 days before the hearing – the applicant then delivered a Notice in Terms of Rule 30(1) and 30(1)(a) objecting to:

(a) the notice appointing Werksmans as the PP's attorneys of record;

(b) the filing of the supplementary record; and

(c) the application for condonation and answering affidavit filed by the PP.

[8] Given these events, it is hardly surprising that Francis-Subbiah AJ found that the matter was not ripe for hearing on 21 April 2021 and removed it from her roll and reserved the question of costs.

[9] On 21 April 2021 the PP then filed an answering affidavit to the applicant's Rule 30 Notice.

[10] Each of these objections will each be dealt with *ad seriatum.*

The objection to Werksmans appointment

[11] The applicant has objected to Werksman's appointment as the PP's attorneys of record. He argues that the PP had not given notice that she wished to oppose this application; that when the supplementary record was filed on 10 March 2021 it was filed by Werksmans purportedly acting on behalf of the PP but they had failed to formally place themselves on record as representing her[5] and there was no application for condonation for the late filing of the supplementary record. To add insult to injury, Werksmans then filed the PP's application for condonation and answering affidavit.

[12] The point of all of this, says the applicant, is that up to 10 March 2021, when the supplementary record was filed, the PP had actually indicated that she did not intend to oppose the application. This she did in a letter dated 26 May 2020 addressed to Mr Mabaso of Werksmans[6], where she states:

> *"8. In conclusion, please be advised that the Public Protector will not be opposing the application on various grounds, amongst other being that she believes, on the basis of legal advice, that the application is academic, there are no prospects of success, the courts have previously provided clarity and authority on the impugned Report, there are parties who are already opposing the application, and her office is currently facing financial constraints…"*

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5 In terms of Rule 16

6 Who are acting for SIU

[13] This being the position in May 2020, the applicant now argues that there is no indication that the PP herself actually took the decision to appoint Werksmans as her attorneys of record or that she instructed them to file a supplementary record on her behalf or that she instructed them to oppose the review application and file an answering affidavit.

[14] However, the applicant has failed to utilse the provisions of Rule 7(1) which states:

> *"7(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application..."*

[15] This informal manner of objecting to the authority of a deponent was decried in **Unlawful Occupiers, School Site v City of Johannesburg**[7] and followed in **ANC Umvoti Council Caucus and Others v Umvoti Municipality**[8] where Gorven J stated:

> *"[26] In the Unlawful Occupiers case Brand JA, after stating that the procedure of dealing with authority on the affidavits should not be adopted, said:*

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7 2005 (4) SA 199 (SCA) paras 14-16
8 2010 (3) SA 31 (KZP)

'All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? The question can, in my view, be answered only in the negative.'

In the context of the judgment, Brand JA, in making these comments, was demonstrating, as one of the reasons for his earlier support of the procedure using Rule 7(1), the futility of wasting time and costs in the application when the Rule 7(1) procedure had been available. In other words, this is not a finding on the papers which renders the dictum obiter, it is a further example of why he supports the approach of Flemming DJP[9] endorsed earlier. Brand JA could not have put it more plainly than to say that "a party who wishes to raise the issue of authority should not adopt the procedure adopted by the appellants in this matter." He clearly endorsed as correct the statement by Flemming DJP that the rule-maker had made a policy decision that Rule 7(1) must be used to challenge authority. There is therefore also binding authority for the procedure and therefore I consider that this court is bound by these judgments.

[27] Even if these dicta are obiter they have strong persuasive force, given that they emanate from or are endorsed by the Supreme Court of Appeal as well as their clear and unequivocal nature. With respect, the reasoning in these cases also appears to me to accord with sound legal principle. The deponent to an affidavit is merely a witness, as was pointed out by Streicher JA in Ganes's case. It is the attorney of a litigant who, by signing a notice of motion and issuing application papers, signifies that that attorney has been authorised to initiate the application on behalf of the named litigant. Whether or not the litigation has

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[9] In Eskom v Soweto City Council 1992 (2) SA 703 (W) referred to with approval in Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624I - 625A

been properly authorised by the artificial person named as the litigant should not be dealt with by means of evidence led in the application. If clarity is required, it should be obtained by means of Rule 7(1) since this is a procedure which safeguards the interests of both parties. It frees the applicant from having to produce proof of what may not be an issue, thus saving an inordinate waste of time and expense in "the many resolutions, delegation and substitutions still attached to applications". It protects a respondent in that, once the challenge is made in terms of Rule 7(1), no further steps may be taken by the applicant unless the attorney satisfies the court that he or she is so authorised. Of course, if the challenge is to the authority of the respondent's attorney in an application, these comments apply equally but for opposite reason.

[28] I am therefore of the view that the position has changed since Watermeyer J set out the approach in the Merino Ko-Operasie Beperk case. The position now is that, absent a specific challenge by way of Rule 7(1), "the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant" is sufficient. It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used. This means that I disagree with Mr Gajoo's submission that Rule 7(1) provides only one possible procedure and that, if a respondent elects to challenge the matter of authority on the application papers, the applicant is required to prove such authority on the papers.

[29] There was no challenge in terms of Rule 7 (1) in the application which is the subject of this appeal. The appropriate procedure was therefore not used

by the appellants. It was accordingly not necessary for the applicant to prove the authority to initiate the application nor appropriate to attempt to do so on the papers. It was also not necessary for the court a quo to make a finding relating to authority on the affidavits delivered in the matter. Since there was no challenge in the required manner to the authority of the respondent's attorney who signed the notice of motion and initiated the application in the accepted way, this court does not have to deal with the question of authority."

[16] Mr Maenetje has submitted that given that a) Werksmans' Notice of Appointment is dated 9 April 2021, b) that the PP's answering affidavit is also dated 9 April 2021 and c) that the challenge to (a) and (b) is contained in the applicant's replying affidavit which was delivered on 17 August 2021[10], there is no true challenge to either Werksmans' or Sithole's authority. Given that stated *supra,* I agree.

The supplementary record and the conflict of interest issue

[17] As to whether the supplementary record should be struck out: in my view there is no purpose achieved in doing so. The record in review proceedings provides an invaluable tool of ensuring that the court has all the relevant material before it. It also ensures that all the parties enter the arena on a similar footing.[11] This principle was stated thus in **Democratic Alliance and others v Acting National Director of Public Prosecutions and Others**[12]:

"[37] In the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with

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10 I.e. more than 4 months later
11 Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC)
12 2012 (3) SA 486 (SCA)

constitutional prescripts. That much is clear from the Constitutional Court judgments set out above. It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of Rule 53 or by courts exercising their inherent power to regulate their own process. Without the record, a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed…"

[18] There is no possibility that the applicant has suffered any prejudice with the late filing of the supplementary record as he has dealt with it and the content of the PP's answering affidavit in his further replying affidavit. Bearing in mind that the PP and the SIU oppose this application on the same grounds and raise the same legal argument, the applicant also cannot allege that he has been taken by surprise or that he has been unfairly disadvantaged.

[19] It is also for these reasons that I find that there is no bar to Werksmas acting for the PP and the SIU as I am of the view that, their interests being aligned, there is no conflict of interest.

The late answering affidavit

[20] The PP's answering affidavit is filed late but this has been fully explained. In essence, the explanation is that although the PP's initial stance was that opposition

was unnecessary, on 20 October 2020 the SIU directed a Rule 30A notice to her which complains that the Rule 53 record originally filed was incomplete and it lists the documents which it alleges are missing from that record. The PP then states that, upon receipt of the Rule 30A notice

> *"...it became evident to the Public Protector that it was necessary, in the interests of justice, for the Public Protector to actively participate in this application and to ensure that all the relevant facts and circumstances are placed before this Honourable Court. The SIU's Rule 30A notice highlighted the depth and scope of the prejudice and judicious unfairness that an applicant's culpable delay in launching a review inflicts on an organisation such as the Office of the Public Protector. This is so because it cannot...be in the interests of justice to permit an applicant to launch review proceedings after such a lengthy delay where, solely because of the lengthy delay, the decision making body is no longer in possession of the complete record that supported the decision making process..."*

[21] Given this and given the fact that the deponent to this affidavit[13] assisted the PP with the investigation and the preparation of the Report, the answering affidavit provides a useful tool in filling in some of the gaps of this matter. Over and above this, I am of the view that the explanation provided for its late filing is adequately explained, it is not prejudicial to any of the parties and it is in the interests of justice that it be considered to aid the court in coming to a decision in this matter.

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13 One T M Sithole

[22] Thus, condonation is granted for the late filing of both the supplementary record and the PP's answering affidavit.

The PP's Report

[23] The facts of this matter are not contentious and have been reported in several decisions in this country[14], they are thus not contentious. Those facts are, in brief, the following:

23.1 between November 2011 and February 2012, the PP received complaints from three former employees of the SABC that related to the alleged irregular appointment of the applicant as the Acting COO of the SABC, and the systemic maladministration relating to, inter alia, human resources, financial management, governance failure and the irregular interference by the erstwhile Minister of Communications, Ms Dina Pule, in the affairs of the SABC;

23.2 the PP's Report was released on 17 February 2014. In particular, the PP concluded that there were *"pathological corporate governance deficiencies at the SABC"*, and that the applicant had been allowed to *"operate above the law"*. Her findings in respect of the applicant in particular were that a) his appointment as Acting COO was irregular, b) that the former Chairperson of the SABC Board, Dr Ben Ngubane, had acted irregularly when he ordered that the qualifications requirements for the appointment of the position of COO be altered to suit the applicant's circumstances, c) the applicant's salary progression from R1.5 million to R2.4 million in one fiscal year was irregular, d) the

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14 Most of which will be referred to during the course of this judgment

applicant had abused his power and position to unduly benefit himself, e) when completing his job application form in 1995 and thereafter when applying for the post of Executive Producer: Current Affairs, the applicant had fraudulently misrepresented that he had matriculated, f) that the applicant had been appointed to several posts in the SABC despite not having the appropriate qualifications, g) that the applicant was responsible, as part of SABC management, for the irregular appointment of the SABC's Chief Financial Officer, h) that the applicant was involved in the irregular termination of the employment of several senior staff members resulting in a substantial loss to the SABC due to *inter alia* the severance packages that had to be paid out, and i) that the applicant had irregularly and unilaterally increased the salaries of several staff members which resulted in a salary bill escalation of R29 million;

23.3 the PP then directed the following remedial action specific to the applicant: that the Board of the SABC was to ensure that a) all monies be recovered which were irregularly expended through unlawful and improper actions from the appropriate persons, b) appropriate disciplinary action be taken against the applicant for his dishonesty relating to the misrepresentations of his qualifications, abuse of power and improper conduct in the appointments and salary increases of certain staff members and for his role in the purging of senior staff members resulting in numerous labour disputes and settlement awards against the SABC, and c) any fruitless and wasteful expenditure that had been incurred as a result of irregular salary increments to the applicant be recovered from him.

[24] It is common cause that the applicant was dismissed from the SABC on 12 June 2017. It is, also common cause that the applicant was not dismissed because of the remedial action ordered by the PP – in fact, the applicant was dismissed after a disciplinary hearing found him guilty of further charges brought against him by the SABC. It is precisely the SABC's failure to implement the remedial action ordered by the PP that has prompted this application.

The issue of delay

[25] At the outset of this matter the respondents have all taken the point that the application was unduly delayed. It is common cause that the application was launched on 15 October 2019 – this is 5 years and 10 months after the PP Report was issued. It is also common cause that the applicant has not launched these proceedings in terms of the *Promotion of Administrative Justice Act*[15] ("PAJA"). Rather, he states that it is based on the doctrine of legality. Whilst none of the respondents have conceded that this view is in fact correct, the matter was argued on the basis contended for by the applicant.

[26] It is the respondents' position that irrespective of whether the application is brought under PAJA or the doctrine of legality, the applicant has unduly delayed launching these proceedings, that the undue delay cannot be overlooked and the application should be dismissed on this ground.

[15] Act 3 of 2000

[27] In **Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality**[16], the Supreme Court of Appeal stated:

> *"[18] The rationale for the rule that an application for the review of an administrative decision should be launched without undue delay is predicated upon a desire to avoid prejudice to those who may be affected by the impugned decision. As was said in Gqwetha v Transkei Development Corporation Ltd and Others 2006 (2) SA 603 (SCA) ([2006] 3 All SA 245; [2005] ZASCA 51) paras 22 – 24, the rule is based upon two principles, namely that 'the failure to bring a review within a reasonable time may cause prejudice to the respondent . . . (a)nd . . . there is a public interest element in the finality of administrative decisions and the exercise of administrative functions . . . '.Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight . . . .Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay . . . . A material fact to be taken into account in making that value judgment — bearing in mind the rationale for the rule — is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result from their being set aside.'*

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[16] 2017(6) SA 360 (SCA) at paragraph 18

A consideration of the consequences of setting a decision aside, and any resultant prejudice, was said to be an important consideration (paras 33 – 34);

> *'...(D)elay cannot be evaluated in a vacuum but only relative to the challenged decision, and particularly with the potential for prejudice in mind...'.*

In the exercise of the discretion to condone an unreasonable delay, the prospect of the challenged decision being set aside is not

> *'a material consideration in the absence of an evaluation of what the consequences of setting the decision aside are likely to be . . .'."*[17]

[28] Whilst PAJA reviews must be instituted within 180 days[18], there is no such time stipulation in respect of a legality review. But this does not mean that the applicant may unreasonably delay the institution of proceedings:

> *"[44] But what do we make of the legislature's decision to remove these time limits? Does this mean that litigants are not constrained by any requirement to act timeously? In my view the legislature's decision to remove the 12-month prescription period opens the actions of public functionaries in terms of the PSA to ongoing scrutiny and transparency. Bearing in mind the purpose of the Repealing Act, the repeal of s 39 allows that an applicant cannot automatically be non-suited on the basis of a delay. Nevertheless, it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in*

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[17] See also *Altech Radio Holdings (Pty) Ltd v City of Tshwane Metropolitan Municipality* 2012(3) SA 25 (SCA) at para 16

[18] PAJA Section 7(1)

initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution. However, because there are no express, legislated time periods in which the MEC was required to bring her application, there is no requirement that a formal application for condonation needs to have been brought."[19]

[29] The applicant does not concede that he delayed unreasonably in instituting these proceedings. In fact, his stance is unwavering in this regard: he argues that:

29.1 as the application is founded on the principle of legality, the time limit contained in section 7 of PAJA does not apply;

29.2 it is therefore not necessary for him to seek condonation even if it is considered that the application was instituted "late" (or after an unreasonable delay);

29.3 the "trigger" for the review application is that the SABC is using the PP Report to victimize him by instituting proceedings against him to recover monies and attach his pension fund (the pension fund application);

29.4 that given that the pension fund order was handed down in the Gauteng Local Division on 18 January 2019 and this application launched nine months later, any delay is not unreasonable;

29.5 that his prospects of success in this application are so overwhelmingly good, that even if the institution of these proceedings were delayed, the delay should be overlooked; and

29.6 that it is in the interests of justice that his application be heard because the *"...overall effect of stigmatization by being branded a 'criminal' and*

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[19] *Khumalo and Another v MEC for Education, Kwazulu-Natal* 2014 (5) SA 579 (CC)

a 'corrupt manager' by the SABC and the SIU without any due process hearing has been quite severe and has been nothing short of constitutionally perverse".

[30] Of course, the issue of delay is not a simple one, especially in this matter where there is a myriad of events that have taken place since 17 February 2014 which are all important when considering the parties' arguments on this issue. In this, the words of Theron J in **Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd**[20] bear relevance:

"[50] In terms of the first leg of the enquiry, any explanation offered for the delay is considered. We know in the present matter that the MEC has made no attempt to explain why she was idle for so long. Considering the typically short time frames for challenges to decisions in the context of labour law, the MEC's delay of about 20 months, if taken from the time of the receipt of the Report, is significant in itself. Furthermore, in the absence of any explanation, the delay is unreasonable.

[51] The fact that the MEC has elected not to account for the delay, despite having had the opportunity to do so at multiple stages in the litigation, can only lead one to infer that she either had no reason at all or that she was not able to be honest as to her real reasons. Had the matter been brought by a private litigant, this aspect of the test might weigh less heavily. However, given that the MEC is responsible for the decision, that she is obliged to act expeditiously in fulfilling her constitutional obligations, and that she should have within her

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[20] 2014(5) SA 579 (CC)

control the relevant resources to establish the unlawfulness of the decision she impugns, the unreasonableness of the unexplained delay is serious.

[52] But should we nevertheless overlook the unreasonable delay? On this leg of the test, the majority in Gqwetha held that the delay cannot be evaluated in a vacuum but must be assessed with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision. In the context of public-sector employment, the value of security for employees and mitigating the arguably inherent inequality of the workplace must be kept in mind.

[53] Under the Constitution, however, the requirement to consider the consequences of declaring the decision unlawful is mediated by a court's remedial powers to grant a 'just and equitable' order in terms of s 172(1)(b) of the Constitution. A court has greater powers under the Constitution to regulate any possible unjust consequences by granting an appropriate order. While a court must declare conduct that it finds to be unconstitutional invalid, it need not set the conduct aside. The delay was indeed a factor taken into account by the Labour Appeal Court when deciding whether or not to set aside the applicants' promotions once they had been found unlawful."

[31] In this matter, the applicant failed to provide any explanation in his founding affidavit for his 5 years and 8 months' delay in instituting proceedings. Instead, he chose to do so in his supplementary founding affidavit and it states that:

31.1 whilst he was still in the employ of the SABC, an application had been prepared to review and set aside the PP Report. That application is

dated 17 May 2016 and was served on the PP on 18 May 2016. It is common cause that this application never proceeded;

31.2 as soon as he was dismissed from the SABC, the SABC took a decision to stop payment of his pension *"significantly denuding Motsoeneng's financial ability to engage in another prolonged round of litigation with it"*. He sought to have his pension paid out and the SIU intervened in the application;

31.3 he then states:

> *"12. ...It was in the course of fighting the SABC and the SIU, that I was advised that my biggest problem was the existence of the Report of the Public Protector from which the SABC and the SIU significantly relied on for their vindictive actions against me.*
>
> *13. I decided to bring this application only after the advice..."*;

31.4 it is common cause that the application to stop payment of the applicant's pension fund was instituted on 4 August 2017. It appears from the judgment of Maier-Frawley J[21] that prior to that application being launched the SABC wrote to the South African Broadcasting Corporation Pension Fund ("SABC Fund") on 20 July 2017 informing it that it was investigating allegations of misconduct against the applicant and was in the process of preparing to institute proceedings against him for the recovery of damages caused to the SABC by reason of his dishonest conduct. The SABC then, *inter alia*, requested the Fund to withhold payment of the whole of any benefit payable to the applicant pending any judgment.

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[21] *SABC SOC Ltd v SABC Pension Fund and Others* 2019(4) SA 608 (GJ)

[32] In the present application, the applicant does not state when it was that he consulted with his legal representatives or when it was that he received the advice mentioned in paragraph 31.3 *supra*. He also argued that the *"reasonable time"* to institute this application only commenced when Maier-Frawley J handed down judgment on 18 January 2019 as this is when the full facts came to his knowledge.

[33] In order to deal with this issue and decide whether or not the applicant is correct in his contention, the background to this application must be considered.

Background

[34] Following on the remedial action recommended in the PP's Report, the Democratic Alliance ("DA") launched an urgent application on 12 December 2015 to set aside the applicant's appointment as COO of the SABC. Part A of that application was heard by Schippers J and judgment handed down on 23 April 2015. Leave to appeal was granted[22] and the judgment in the appeal was delivered on 8 October 2015[23]. Importantly, the Supreme Court of Appeal (SCA) stated the following:

> *"[4] The litigation culminating in the present appeal arose, so it is alleged, because of the failure by the first appellant, the ...SABC, a national public broadcaster ... and the second appellant, the Minister of Communications (the Minister), to implement remedial action directed by the Public Protector..., in a damning report compiled by her..."*[24]

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[22] *Democratic Alliance v South African Broadcasting Corporation Soc Ltd* 2015 JDR 0948 (WCC)
[23] *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA)
[24] This is exactly the same ground traversed in the present proceedings.

[35] The SCA stated:

"[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."

[36] Thus, it is quite clear that in 2015 already, the applicant was not only advancing the same argument but was also well aware of the fact that the PP's findings would continue to haunt him unless he took proactive measures.

[37] The dismissal of the appeal on 8 October 2015 by the SCA led to the applicant and the Minister filing applications for leave to appeal to the Constitutional Court but in the meantime it meant that Schippers J's order stood. This was to the effect that disciplinary proceedings had to be initiated and completed in terms of his order, and in the meantime, the applicant was suspended on full pay.

[38] Although the disciplinary proceedings were initiated by the SABC and Adv Mokhari SC appointed as disciplinary Chairperson ("the Chairperson"), the SABC did not suspend the applicant. The latter gave rise to an urgent application heard by Davis J in October 2015. Davis J handed down judgment on 27 November 2015 in which

he, *inter alia*, set aside the applicant's appointment as COO[25] which then became the subject of an application for leave to appeal which he dismissed, and the SCA dismissed the petition.

[39] By this stage, and with the outcome of the leave to appeal to the Constitutional Court still pending[26], Mokhari SC convened the disciplinary hearing on 1 December 2015. It appears that those proceedings were ruled moot by him as the applicant's appointment as COO had been set aside by Davis J.

[40] The SABC then, rather quickly, appointed Adv Edeling as the new Chairperson and fresh disciplinary proceedings commenced a week later on 8 December 2015. On 12 December 2015 he found in favour of the applicant.

41] In February 2016 the DA brought another application[27] in which it sought, *inter* alia, a) a declarator that the SABC and its Board had failed to implement the findings and remedial action of the PP and to declare that they were therefore in contempt of the SCA order insofar as that was concerned; b) an order that the proceedings before Edeling were invalid and should be set aside and c) and order that the proceedings should start afresh and that the applicant should be suspended as COO pending finalisation of those disciplinary proceedings. That matter was set down on 23 May 2016 before Le Grange J and Rogers J.[28]

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[25] The remainder of the order is not relevant to these proceedings
[26] Which it appears was not proceeded with
[27] Under case no. 3104/2016 – *"the first application"*
[28] *Democratic Alliance v South African Broadcasting Corporation SOC Ltd ("SABC")* 2016 JDR 2330 (WCC)

[42] On 17 May 2016 the SABC issued an application out of this court[29] claiming the following relief:

> *"1. Condoning the late filing of this review application in terms of section 9(2) of the Promotion of Administrative Justice Act 3 of 2000.*
>
> *2. Reviewing and setting aside the findings of the Public Protector reflected in paragraph 10.1 to 10.7 of her report entitled "When Governance and Ethics Fail" published on 17 February 2014 ("the SABC Report").*
>
> *3. Reviewing and setting aside the remedial action ordered by the Public Protector in paragraph 11.3 of the SABC report..."*
>
> This application was later withdrawn.

[43] Then on 22 September 2016 the SABC concluded a 5-year fixed term contract in terms of which the applicant was appointed to the position of Group Executive of Corporate Affairs ("GECA") with the same remuneration package as he had received as COO[30] and on 11 October 2016 the DA issued out another application[31] in which it sought orders, *inter alia*, that a) unless and until all the negative findings against the applicant in the PP's report are set aside on review, the applicant may not hold any position at all at the SABC; and b) declaring the decision to appoint him as GECA inconsistent with the Constitution, invalid and unlawful and setting it aside. This application was heard together with that set out in paragraph 41 *supra*.

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[29] Under case number 39679/2016
[30] The proverbial rose by any other name...
[31] The second application under case number 18107/2016

[44] Judgment in the Western Cape matters was handed down on 12 December 2016 and in respect of the two DA applications the salient part of the orders read as follows:

44.1 in the first application: this order set aside the Edeling proceedings and the new disciplinary process had to reconvene and be finalised within the time frames set out in the judgment. The court also ordered that, in the event of a failure to adhere to the timeframes, the chairperson of the SABC had to deliver an affidavit to court to explain the Board's failure;

44.2 in the second application: *inter alia* the decision to employ the applicant as GECA was declared invalid and was set aside and an ordered was issued that unless and until the negative findings in the PP's Report are reviewed and set aside, or unless and until the applicant is exonerated from the said negative findings by way of a valid disciplinary hearing, he may not hold any position at all at the SABC.

Thus the applicant was well-aware that his employment prospects were limited unless he took steps or the SABC disciplinary process was completed in his favour.

[45] On 19 April 2017 the applicant held a press conference during which he had some very unflattering things to say about the SABC Board and its members which resulted in a fresh disciplinary process initiated by the SABC on 20 April 2017. On 3 May 2017 the charge sheet was prepared in respect of this incident and on 16 May 2017 the SABC then commenced parallel, but separate, disciplinary proceedings based on the PP's report and issued the charge sheet on that.

[46] On 10 July 2017 the applicant then launched an application to compel the SABC to institute disciplinary proceedings per the above order. But this application was withdrawn. As a result, the SABC then brought a Rule 41(1)(c) application for the costs of that application. It was opposed by the applicant and on 21 November 2019 Sievers AJ dismissed the Rule 41(1)(c) application.

[47] It is common cause that on 12 July 2017 the applicant appeared before Adv Cassim SC in respect of charges relating to the press conference of 19 April 2017. It is common cause that the applicant was dismissed on 12 July 2017 pursuant to these findings. It is common cause that the disciplinary proceedings in respect of the charge sheet dated 16 May 2017 based on the PP Report were never finalised as the SABC is of the view that those proceedings are moot as the applicant is no longer an employee and thus it is common cause that the order granted by the Western Cape was not complied with.

[48] Already on 4 August 2017 steps were initiated to interdict the R11 million pension pay out to the applicant (i.e. the pension fund application). This was followed on 5 February 2018 by the action instituted against the applicant by the SABC and the Special Investigating Unit (SIU) under case number 18/04253 in the GLD, for damages exceeding R21 million for, *inter alia*, the fruitless and wasteful expenditure in respect of the SABC's increased salary bill, the unlawful termination of staff resulting in the millions spent in respect of litigation and severance and settlement packages and the unlawful R11 million *"success fee"* paid to the applicant.

[49] As stated, the judgment in the pension fund application was handed down on 18 January 2019 and this application instituted on 15 October 2019.

Did the applicant delay?

[50] The applicant's version regarding the delay is set out in paragraph 31 *supra*. On his own version, he received advice at some stage after 4 August 2017 when the proceedings set out in paragraph 48 were instituted. His protestations that the *"reasonable period"* only started running after judgment was handed down in 2019 simply do not wash because, on his own version, he was advised that the PP's report was his *"biggest problem"*. It is significant that he has failed to take this Court into his confidence regarding when precisely he consulted with his legal representative as it was clear as far back as December 2016 that the PP Report would remain a thorn in the applicant's side unless he took steps to set it aside and when he was fired from the SABC, he also knew that her remedial action had become moot.

[51] There is no explanation for the delay. In fact, the applicant's explanation does not even cover specifics and it is unmeritorious and unhelpful. I find that, given the facts of this matter, there has indeed been a delay.

Should the delay be condoned?[32]

[52] The applicant states that it is in the interest of justice that any possible delay be condoned. His case is that he has throughout, since the PP's report was published, been branded a pariah so much so that he has struggled to find employment. To add insult to injury, the *"freezing"* of his pension fund in January 2019 has had the result

[32] *Buffalo City supra* at paragraph 53

that he has been unable to fund the defence he wishes to maintain against the litigation against him. His argument is that, unless the disciplinary proceedings by the PP are finalised he will have no recourse. His argument is that he will be able to clear his name once this process is launched in compliance with the order issued in the Western Cape and he argues that any delay in bringing the application is *"...insignificant to the weight of the constitutional issues involved"* and that it is in the interests of justice that his application be heard because the *"...overall effect of stigmatization by being branded a 'criminal' and a 'corrupt manager' by the SABC and SIU without any due process hearing has been quite severe and has been nothing short of constitutionally perverse"*.

[53] His argument is, lastly, that the SABC is in contempt of the Western Cape order as it has not complied with its terms.

[54] In my view, the argument cannot be sustained:

54.1 firstly, it loses sight of the fact that he is no longer an employee of the SABC and thus the SABC has no authority over him whatsoever – it cannot therefore finalise the disciplinary proceedings against him that were instituted already on 16 May 2017;

54.2 the fact that the SABC actually did institute those proceedings means that they were in compliance with the order of the Western Cape – however, the failure to finalize that hearing is attributable solely to the applicant's conduct;

54.3 the applicant has himself in several affidavits both in previous applications and the present both admitted that his dismissal has

rendered the disciplinary proceedings moot and then denied this – he cannot approbate and reprobate;

54.4 his own complaint in the present application is that the 2018 GLD action[33] is based on the PP's Report and those findings are being used as the stick to beat him with – this being so, the applicant will have adequate opportunity to refute those findings once those proceedings are underway.

[55] In any event, there can be no doubt that, whilst the remedial actions of the PP are binding[34], her findings are not. This is very clearly set out in the Western Cape judgment[35]. Had they been binding, the only issue with which a disciplinary body would have been tasked would have been to hand down an appropriate sanction and instead of the PP ordering the SABC to take appropriate steps to recover the amounts deemed to be fruitless and wasteful expenditure, she would have simply ordered him to repay those amounts.

[56] Furthermore, the applicant's argument that his pension money was withheld based on the PP's findings is similarly baseless – his pension was withheld because of the claim for the repayment of the R11 508 549.12 he took as a *"success fee"* – this he received on 12 and 13 September 2016 i.e. two years after the PP's Report was issued.

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[33] Paragraph 48
[34] *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016(3) SA 580 (CC) at paragraph 71
[35] At paragraphs 104 to 114

[57] It has been the applicant's stance throughout argument that it is not for this court to decide whether the findings of the PP are correct. The complaint is solely that, as her remedial action has not been implemented, he has been prejudiced and this is the basis upon which he seeks to set aside the Report. But if this is so, the pending action in the GLD will provide him an equal, if not better, opportunity to vindicate himself – there he will be able to present evidence and have the opportunity to cross examine witnesses. In my view that forum is the better one to ventilate all the issues between the parties. Thus the applicant's rights are more than adequately protected.

[58] As a further consideration of whether the applicant's delay should be overlooked, it is also important to consider the effect that his delay has had on all the parties to the application and the fact that evidence has, through the passage of time, gone missing. This is clearly demonstrated by the allegations made by the PP in the answering affidavit which detail that, given the passage of time since publication of the PP's Report, the storage capacity issues which have necessitated the records being moved off-site and then back to the PP's office, the record being delivered to the PP's attorneys because of the applicant's review application[36] and its collection upon termination of those proceedings, and the loss of documents stored on old laptops which have been replaced, the PP cannot guarantee that the delivered record constitutes the entire record (despite an extensive search being undertaken).

[59] The considerations set out *supra* are of importance as

> *"The passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of*

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[36] As set out in paragraph 31.1

a decision makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired."[37]

[60] Given all of the above, I am of the view that it is not in the interests of justice to overlook the considerable delay in instituting these proceedings. In my view, given that the applicant will have more than sufficient opportunity to vindicate himself in the action, and given the undue delay in instituting the review sought, condonation must be refused.

The declarators and contempt

[61] It is trite that a Court has a discretion whether or not to grant declaratory relief[38]:

"[80] Returning to the requirements, the Supreme Court of Appeal in Cordiant applied a two-stage approach in considering whether or not to grant declaratory relief: (i) the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and (ii) the court may then exercise its discretion either to refuse or grant the order sought. Declaratory orders are discretionary and flexible as this court pointed out in Rail Commuters:

'It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which

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[37] Khumalo v MEC for Education: KwaZulu Natal 2014 (3) BCLR 333 (CC) at para 48

[38] *Competition Commission of South Africa v Hosken Consolidated Investments Ltd and Another* 2019(3) SA 1 (CC)

can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.'

[81] The parties have not taken issue with this two-staged approach except to the extent that the Commission is of the view that no live dispute existed between the parties and therefore the Tribunal should not have exercised its discretion to grant a declarator.

[82] The absence of a live dispute may militate against the granting of a declaratory order. This is, however, not a hard-and-fast rule. In Ex parte Nell the Appellate Division held that an existing dispute was not a prerequisite for the granting of a declaratory order. This, however, does not mean that the court does not retain its discretion to refuse to grant a declaratory order in the absence of a live dispute. In Oakbay the High Court followed a similar approach and pointed out that a court is not precluded from granting a declaratory order where there exists uncertainty about a legal question and where it is more practical for a court to decide the issue 'without there being an already existing dispute'."

[62] The question is whether any, or all, of these prayers should be granted.

[63] Contempt has been defined as the deliberate, intentional, refusal of failure to comply with a court order.[39]

[64] In **Fakie NO v CCII Systems (Pty) Ltd**[40] Cameron J set out the requirements thus:

> *"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).*
>
> *[10] These requirements - that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."*

[65] In this case, as has been stated, the SABC <u>did</u> commence disciplinary proceedings – they were not finalized because of the applicant's subsequent conduct[41]

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[39] *Holtz v Douglas and Associates (OFS) CC* 1991(2) SA 797 (O) at 502C; *Consolidated Fish Distributors (Pty) Ltd v Sive* 1968(2) SA 517 (C) at 522 B-C

[40] 2006(4) SA 326 (SCA)

[41] i.e. after the Western Cape order

which resulted in his dismissal. The minute he was dismissed, the employer/employee relationship that is at the heart of the disciplinary hearing terminated thus rendering those proceedings moot (which he admits in several Court proceedings). To continue with those proceedings has become impossible as a result.[42]

[66] Thus, in my view, the applicant is unable to prove the two essential elements of contempt i.e. that the SABC has wilfully and mala fide failed to comply with the Western Cape order.

[67] I am of the view that the applicant has not made out a case for any of the other relief sought.

The reserved costs of 21 April 2021

68] There was much finger-pointing by all the parties as to who was to blame for the matter being postponed on 21 April 2021. The postponement was triggered by the filing of the supplementary record on 10 March 2021 and the filing of the PP's answering affidavit. These events triggered a ream of subsequent events which are detailed in paragraphs 7 and 8 *supra*. I am of the view that were it not for the late filing of the supplementary record and the PP's answering affidavit, the matter would have been ready to proceed on 21 April 2021. I am therefore of the view that the PP must pay these wasted costs.

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[42] *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC)

Costs

[69] I am of the view that costs should follow the result. The matter is of sufficient complexity to warrant the employment of two counsel and all the parties have employed both senior and junior counsel, thus these costs are warranted.

Order

[70] Thus, the order I made is the following:

The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel of which one is a senior counsel, save that the first respondent is ordered to pay the costs occasioned by the postponement on 21 April 2021.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 August 2022.

For the applicant:	Adv T Masuku SC, with him Adv MPD Chabedi
Instructed by:	Bokwa Attorneys
For the 1st and 4th respondents:	Adv N Maenetje SC, with him Adv P Cirone
Instructed by:	Werksmans Attorneys
For the 2nd and 3rd respondents:	Adv F Nalane SC, with him Adv S Qagana
Instructed by:	Mogaswa and Associates Inc
Date of hearing:	4 May 2022