THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between	Case No: 3104/2016
DEMOCRATIC ALLIANCE	**APPLICANT**
and	
THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD ("SABC")	**1st RESPONDENT**
THE BOARD OF DIRECTORS OF THE SABC	**2nd RESPONDENT**
THE CHAIRPERSON OF THE BOARD OF DIRECTORS OF THE SABC	**3rd RESPONDENT**
THE MINISTER OF COMMUNICATIONS	**4th RESPONDENT**
GEORGE HLAUDI MOTSOENENG	**5th RESPONDENT**
WJ EDELING N.O.	**6th RESPONDENT**
THUMISO PRINCE PHALANE N.O.	**7th RESPONDENT**
THE PUBLIC PROTECTOR	**8th RESPONDENT**
And in the matter between	Case No:18107/16
DEMOCRATIC ALLIANCE	**APPLICANT**
and	

GEORGE HLAUDI MOTSOENENG	**1st RESPONDENT**
THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD ("SABC")	**2nd RESPONDENT**
THE BOARD OF DIRECTORS OF THE SABC	**3rd RESPONDENT**
THE ACTING GROUP CHIEF EXECUTIVE OFFICER OF THE SABC	**4th RESPONDENT**
THE PUBLIC PROTECTOR	**5th RESPONDENT**
MBULAHENI MAGUVHE	**6th RESPONDENT**
LEAH THABISILE KHUMALO	**7th RESPONDENT**
JAMES AGUMA	**8th RESPONDENT**
AUDREY RAPHELA	**9th RESPONDENT**
NOMVUYO MEMORY MHLAKAZA	**10th RESPONDENT**
NDIVHONISWANI TSHIDZUMBA	**11th RESPONDENT**
VUSI MAVUSO	**12th RESPONDENT**
KRISH NAIDOO	**13th RESPONDENT**
BESSIE TUGWANA	**14th RESPONDENT**
THE CHAIRPERSON OF THE PORTFOLIO COMMITTEE FOR COMMUNICATIONS OF THE NATIONAL ASSEMBLY	**15th RESPONDENT**
THE SPEAKER OF THE NATIONAL ASSEMBLY	**16th RESPONDENT**
THE MINISTER OF COMMUNICATIONS	**17th RESPONDENT**
AZWIHANGWISI FAITH MUTHAMBI	**18th RESPONDENT**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**19th RESPONDENT**
AFRICAN NATIONAL CONGRESS	**20th RESPONDENT**
THANDEKA GQUBULE	**21st RESPONDENT**
FOETA KRIGE	**22nd RESPONDENT**
SUNA VENTER	**23rd RESPONDENT**
BUSISIWE NTULI	**24th RESPONDENT**
KRIVANI PILLAY	**25th RESPONDENT**
JACQUES STEENKAMP	**26th RESPONDENT**
LUKHANYO CALATA	**27th RESPONDENT**
VUYO MVOKO	**28th RESPONDENT**

SOS SUPPORT PUBLIC BROADCASTING COALITION	**29th RESPONDENT**
MEDIA MONITORING AFRICA	**30th RESPONDENT**
HELEN SUZMAN FOUNDATION	**31st RESPONDENT**
FREEDOM OF EXPRESSION INSTITUTE	**32nd RESPONDENT**
SOUTH AFRICAN NATIONAL EDITORS FORUM	**33rd RESPONDENT**
RIGHT2KNOW CAMPAIGN	**34th RESPONDENT**
BROADCASTING, ELECTRONIC, MEDIA & ALLIED WORKERS UNION	**35th RESPONDENT**

Coram: LE GRANGE & ROGERS JJ

Heard: **23 & 24 NOVEMBER 2016**

Delivered: **12 DECEMBER 2016**

JUDGMENT

ROGERS J (LE GRANGE J concurring):

Introduction

[1] These applications have their origin in the Public Protector's report into governance at the South African Broadcasting Corporation Ltd ('SABC') and the litigation which ensued in relation to the appointment of Mr GH Motsoeneng ('Motsoeneng') as the SABC's Chief Operating Officer ('COO'). I shall refer to that litigation as the COO application. Motsoeneng's appointment as COO was eventually set aside. Although various forms of relief are claimed in the present applications, the first application's focus is a disciplinary tribunal's decision in December 2015 dismissing charges of misconduct brought against Motsoeneng by the SABC while the second application's focus is Motsoeneng's subsequent

appointment as Group Executive: Corporate Affairs ('GECA'). I shall refer thus to these two applications as the DC application and the CA application respectively.

[2] The applicant in both matters is the Democratic Alliance ('DA'). The active respondents are the Public Protector (largely supportive of the relief claimed by the DA), the SABC, Motsoeneng and the Minister of Communications. Mr Katz SC leading Ms Mayosi, Ms Bleazard and Mr Bishop appeared for the DA, Mr Labuschagne SC leading Ms Rajab-Budlender for the Public Protector, Mr S du Toit SC leading Mr Premhid for the SABC, Mr A Bester leading Mr Ayayee for Motsoeneng and Mr Maenetje SC leading Ms Patel for the Minister.

[3] In terms of the Broadcasting Act 4 of 1999 read with the SABC's Memorandum of Incorporation ('MOI'), the SABC is required to have a board of 15 directors of whom 12 must be non-executive, the remaining three being the Group Chief Executive Officer ('GCEO'), the COO and the Chief Financial Officer ('CFO'). The non-executive members are appointed by the President on the advice of the National Assembly. The three executive members are appointed by the board after obtaining the Minister's approval.[1] The same applies to a person acting in one of the three executive positions. In terms of s 13(10), nine members of the board, who must include the chairperson or deputy chairperson, constitute a quorum at any meeting.

Factual background

Motsoeneng's employment history 1995 - 2011

[4] Motsoeneng began employment with the SABC in 1995 as a trainee journalist. In June 2003, following several earlier promotions, he was appointed as Executive Producer of Lesedi FM. Questions have arisen as to whether Motsoeneng misrepresented his qualifications in 1995 and 2003.

[1] In the judgment of the Supreme Court of Appeal in the COO litigation, to which I shall return later (reported at 2016 (2) SA 522 (SCA)), the court seems to have understood from submissions made to it that the President appointed the executive members (see para 58) but s 13(1) is confined to the non-executive members. The Act itself does not deal with the appointment of the executive members. That aspect is covered in clause 13.5 of the MOI.

[5] In December 2006 he was dismissed pursuant to disciplinary proceedings unrelated to his qualifications. He pursued an internal appeal, in the meanwhile taking up temporary employment with the Free State Provincial Government. In April 2008 his appeal succeeded, pursuant to which he was offered re-employment as Producer: Radio Current Affairs at Lesedi FM. He was promoted in November 2009, August 2010 and April 2011, the last of these promotions being to the post of Group Executive: Stakeholder Relations and Provinces ('GESR'). In consequence of this appointment his salary increased from R367 584 to R1,4 million.

[6] In 2007 one Mvuzo Mbebe was recommended by the board for appointment as COO. When this recommendation was reversed, Mbebe launched proceedings against the SABC, resulting in an interdict in October 2008 which prohibited the SABC from appointing a permanent COO pending the outcome of a review application. Those proceedings were only settled in 2014. In the meanwhile in November 2011 Motsoeneng was appointed as Acting COO.

The Public Protector's investigation and report

[7] In late 2011 and early 2012 the Public Protector received complaints from former employees relating to alleged irregular appointments by Motsoeneng and systemic maladministration. In February 2012 the board voted to remove Motsoeneng as Acting COO but following various resignations a new board in March 2012 reversed Motsoeneng's removal. With effect from 1 April 2012 his total remuneration package was increased to R2,4 million.

[8] The Public Protector's investigation proceeded over 2012 and 2013. At the same time Motsoeneng allegedly led or participated in a purge of senior employees. In July 2013 the Public Protector, as part of her investigation, conducted an interview with Motsoeneng. In November 2013 she made a provisional report available to affected persons, including Motsoeneng. In December 2013 he lodged a written response.

[9] The Public Protector's final report was issued on 17 February 2014. She made various findings adverse to Motsoeneng, the Minister and others. The following is a summary of the main findings pertaining to Motsoeneng:

- His appointment as Acting COO was irregular. Inter alia the then chairperson of the board, Dr Ngubane, acted irregularly by altering the qualification requirements for the appointment to remove the academic qualifications previously advertised. This was to accommodate Motsoeneng's lack of the required qualifications.
- Motsoeneng's salary progression was irregular in that he received three increases in a single year. She was unable to rule out bad faith on Motsoeneng's part, her discomfort being accentuated by the fact that each increase was triggered by Motsoeneng's presenting requests for increases to new incumbents who would have relied on him for guidance in compliance with corporate prescripts and ethics.
- Motsoeneng committed fraud by stating in his application form for employment (ie in 1995) that he had completed matric. He fabricated the symbols he had supposedly obtained. The Public Protector found it disconcerting that he had tried to blame Ms Mari Swanepoel ('Swanepoel'), a former employee in the SABC's Human Resources department, and SABC management. He would not have been appointed in 1995 had he not lied about his qualifications. He repeated the lie in 2003 when he applied for the post of Executive Producer, a position to which he should never have been appointed.
- She was concerned that Motsoeneng's personnel file disappeared. The circumstantial evidence pointed to a motive on his part to do away with it but incontrovertible evidence did not allow a definite conclusion.
- The appointment of Ms Guga Duda ('Duda') as CFO in February 2012 was grossly irregular. Motsoeneng was involved in orchestrating that appointment.
- Motsoeneng purged senior staff members, leading to the avoidable loss of millions of rands in respect of salaries and settlements. He directly initiated the termination of six such employees, including two who had participated in

his 2006 disciplinary hearing (Messrs Koma, Jiyane, Thulo and Diphoko and Mesd Mbalathi and Ramaphosa). He was also involved in the premature termination of the employment contracts of two further employees (Mesd Ntombela-Nzimande and Mampane) and the indefinite suspension of a third (the same Duda whose appointment he had earlier orchestrated). No proper process was followed. His actions constituted improper conduct, abuse of power and maladministration.

- Motsoeneng irregularly increased the salaries of three named staff members (Ms Motsweni, Ms Khumalo and Mr du Buisson) and certain freelancers, resulting in an unprecedented salary bill escalation by R29 million. He was guilty of improper conduct and maladministration.
- The GCEO, COO and CFO failed to provide appropriate support to the board. In particular Motsoeneng caused the board to make irregular and unlawful decisions. Motsoeneng had been allowed by successive boards to operate above the law.

[10] Insofar as Motsoeneng was concerned, the Public Protector determined the following as the appropriate remedial action contemplated in s 182(1)(c) of the Constitution:

- The board was to ensure that all monies irregularly spent through unlawful and improper actions were recovered from the appropriate persons.
- The board was to ensure that appropriate disciplinary action was taken against Motsoeneng (i) for his dishonesty relating to the misrepresentation of his qualifications; (ii) abuse of power and improper conduct in the appointment and salary increments of Ms Sully Motsweni; (iii) his role in the purging of senior staff members resulting in numerous labour disputes and settlements against the SABC.
- The board was to ensure that any fruitless and wasteful expenditure incurred as a result of the regular salary increments to Motsoeneng, Motsweni and others were recovered from the appropriate persons.

[11] The Public Protector directed the Minister and board to submit implementation plans indicating how the remedial action would be implemented. This was to be done within 30 days of her report. She further directed that all remedial action be finalised within six months, with a final report to be presented to her office by 16 August 2014.

[12] One of the board's reactions to the Public Protector's report was to engage Mchunu Attorneys to prepare a report. This report appears to have been aimed at showing that the Public Protector should not have decreed the remedial action contained in her report.

Motsoeneng's appointment as COO and the COO litigation

[13] On the evening of 7 July 2014 the board resolved to recommend to the Minister that Motsoeneng be appointed as the COO. On the following day the Minister so appointed him. This was at a time when the SABC had taken no steps to have the Public Protector's report set aside on review and had not submitted an implementation plan to her. The circumstances in which the board made this recommendation, and the Minister's involvement in it, were the subject of disputed allegations in the COO application. On 10 July 2014 the Minister stated in a press briefing that she and the board were satisfied that the Mchunu report had cleared Motsoeneng of any wrongdoing.

[14] I pause to mention that there is some dispute as to whether the interdict granted in favour of Mbebe in 2008 to prevent the SABC from appointing a person to the position of COO was still in force as at July 2014. Nothing turns on this for present purposes.

[15] On 16 July 2014 the DA launched the COO application to set aside Motsoeneng's appointment as COO. The DA claimed interim relief in Part A and final review relief in Part B of its notice of motion. The Part A relief was heard by Schippers J in August 2014. On 24 October 2014 he delivered judgment.[2] He

[2] Reported at 2015 (1) SA 551 (WCC).

directed the board to commence disciplinary proceedings against Motsoeneng within 14 days, such proceedings to be completed within 60 days of commencement. Pending finalisation of the disciplinary proceedings, Motsoeneng was to be suspended on full pay.

[16] There were applications by the SABC, Motsoeneng and the Minister for leave to appeal and an application by the DA that the Part A order be implemented pending the determination of any such appeal. On 23 April 2015 Schippers J granted both applications.[3] Despite this order, Motsoeneng continued in office as COO and no disciplinary proceedings were initiated.

[17] The Part A appeal was heard in September 2015. The Supreme Court of Appeal ('SCA') delivered judgment on 8 October 2015.[4] The appeal was dismissed. This meant that disciplinary proceedings had to be initiated and completed in accordance with Schippers J's order and that Motsoeneng was to be suspended on full pay.

[18] In its judgment the SCA held that the Public Protector's findings and remedial action had a stronger legal effect than Schippers J had accorded them. They were binding unless and until set aside on review. The SCA was critical of the board's conduct in instituting an impermissible parallel investigation through Mchunu Attorneys.

[19] Although the disciplinary enquiry and the hearing of the Part B relief were matters which lay in the future, the SCA nevertheless described Motsoeneng's version to the Public Protector about his matric qualification as 'muddled and unclear' and as revealing an 'alarming lack of insight'. He appeared not fully to appreciate that he had been guilty of a deliberate falsehood. His explanation lacked contrition and honesty. The SCA also commented adversely on his more recent lack of candour in relation to Swanepoel, something to which I shall revert presently. Regarding the board's recent conduct, the SCA said the following (para 56):

---

[3] Reported on SAFLII at [2015] ZAWCHC 46.
[4] Reported at 2016 (2) SA 522 (SCA).

'In the face of the Public Protector's serious findings of dishonesty, abuse of power and maladministration against Mr Motsoeneng, the SABC purported to recommend him for appointment as the permanent COO…[D]espite 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 cooperative governance'.

[20] The lack of candour in relation to Swanepoel arose in this way. Motsoeneng claimed to the Public Protector that when he sought guidance from the HR department in 1995 as to how he should complete his application form, he disclosed that he did not have a matric certificate and that he was uncertain whether he qualified for one because he had only recently written supplementary examinations. Swanepoel allegedly told him that he should give his highest standard passed as "10" and that he should complete the form as best he could. He subsequently went to Pretoria where he ascertained that he had not met the minimum requirements for a matric certificate. He says he informed Swanepoel and one Alwyn Klopper of this fact. Motsoeneng told the Public Protector (in December 2013) and Schippers J (in August/September 2014) that he had tried to make contact with Swanepoel to obtain an affidavit from her but had been unsuccessful. He expressed the belief that she would have confirmed his version.[5]

[21] By the time the DA filed its application for leave to execute it had traced Swanepoel and obtained an affidavit from her. In this affidavit[6] she testified that she had made it clear to Motsoeneng in 1995 that he should not fill in a qualification which he did not have and that he would have to provide an original certificate to prove whatever he inserted. She testified that after he completed the form she repeatedly asked him to produce the matric certificate which he promised but failed to do. She left the SABC in 2006 and instituted a claim against the SABC for sexual harassment (unrelated to Motsoeneng). She said that in late 2012 (this would have

---

[5] For Motsoeneng's statement to the Public Protector, see p 875 in the CA application, para 23: *'I had attempted to make contact with Ms Swanepoel and regrettably to date, I have been unsuccessful. I have no doubt in my mind that she too would have confirmed my version…*'. We do not have Motsoeneng's affidavit in the COO application but its import is summarised in Schippers J's judgment in the application for leave to appeal para 25.

[6] The affidavit was made on 31 October 2014 and is annexed to the founding papers in the DC application [pp 71-77]. Swanepoel also made a confirmatory affidavit in the DC application [pp 101-102].

been around the time the first complaints were laid with the Public Protector), Motsoeneng phoned her to say that the SABC was trying to fire him and that his attorneys wanted her to make an affidavit about his matric certificate in which she should say that he had told her he did not have a matric qualification. She refused to make the affidavit and told Motsoeneng she did not wish to talk to him as her sexual harassment case was still pending. Motsoeneng replied that he knew about that case and asked what she wanted. She said R2 million. He replied that he could organise the payment if she was willing to depose to the affidavit about the certificate. She refused. For several weeks he pestered her with calls. She ignored some of these and answered others. When she spoke with him, he asked if she would at least be willing to talk to him or his attorneys. She said that she would do so but not lie in an affidavit. The matter was not taken further.

[22] Motsoeneng's reply to this affidavit[7] was to admit the recent communications with Swanepoel. He claimed that his previous allegation to the effect that he had been unable to trace her had to be understood as meaning that he could not make contact with her for the purpose of obtaining an affidavit. He denied having attempted to bribe her. This is obviously unsatisfactory and it is hardly surprising that the SCA made the adverse observation it did.

[23] I should add that in his written response to the Public Protector in December 2013, a copy of which he has attached to his opposing affidavit in the CA application, Motsoeneng annexed a letter Swanepoel wrote on 5 September 2000 'To Whom It May Concern'. Motsoeneng claimed that this letter supported his version. In the letter Swanepoel said that she had prepared Motsoeneng's 1995 appointment letter for signature by her superior Ms Botes. The latter was aware that Motsoeneng had not handed in his matric certificate because Swanepoel had written on Motsoeneng's job application form 'outstanding matric certificate March 1995'. She concluded:

'Mr Motsoeneng thereafter went to Pretoria to see if he can get a matric certificate to combine his symbols. He informed me on the date of appointment that he was not sure of the symbols of his subjects and I informed him that it was fine.'

---

[7] See Schippers J's summary of the affidavit in para 28-29 of his judgment in the application for leave to appeal.

As Schippers J pointed out in his decision granting leave to appeal and leave to execute, this is very far from confirming Motsoeneng's version. On the contrary, it indicates an understanding on Swanepoel's part that Motsoeneng had passed matric but had not yet furnished his certificate to the HR Department and that he had passed his matric subjects but was uncertain about the symbols obtained.

The disciplinary proceedings and Davis J's judgment

[24] On 9 October 2015 the chairperson of the board wrote to the Minister to say that in the board's view the effect of the SCA's decision was that disciplinary proceedings had to be initiated against Motsoeneng forthwith. In the light of the 'previous view held by the board about the matter', the board deemed it prudent to request the Minister to be in charge of appointing the disciplinary chairperson and initiator (ie pro forma initiator). The board would concur in her appointments. The Minister replied the same day appointing Mr W Mokhari SC as the disciplinary chairperson and Mr Sandile July of Werksmans Attorneys as the initiator. Charges were served on Motsoeneng on 12 October 2015. Six charges were preferred:

(i) that Motsoeneng misrepresented in 1995 that he had passed matric and obtained specified symbols in various subjects; and that he had persisted with this misrepresentation in subsequent applications for employment within the SABC;

(ii) that in applying for the position of Executive Producer in 2003 he falsely stated that one of his previous jobs was as Head of Communications at the Department of Tourism and Economic Affairs in the Northern Cape;

(iii) abuse of his position as Acting COO in relation to Duda's appointment in 2011;

(iv) gross misconduct in relation to the promotion of Motsweni in 2012;

(v) abuse of his position as Acting COO in unfairly dismissing six named senior staff members who differed in opinion from him (these were six of the nine names mentioned in the Public Protector's findings – the omitted names were Ntombela-Nzimande, Mampane and Duda);

(vi) gross misconduct in unilaterally increasing his own salary and those of Motsweni and Khumalo (Du Buisson's name was omitted).

[25] At this point I flag an important issue relating to the disciplinary action forming part of the Public Protector's remedial action. The DA contends that for as long as the Public Protector's report stands her factual findings cannot be challenged. The disciplinary proceedings had to be conducted on the basis that Motsoeneng was guilty of the misconduct, the issue being the appropriate sanction. At least originally, the SABC did not share this view. Charges were framed and the hearing conducted on the basis that the merits were in issue. In argument before us, the Public Protector's counsel did not agree with the DA's contention that the disciplinary proceedings were sanction-only proceedings.

[26] Although disciplinary charges were commenced against Motsoeneng, the SABC did not give effect to his suspension. In mid-October 2015 the DA delivered an application to hold the SABC in contempt. This was resolved by an arrangement in terms whereof Motsoeneng took long leave accompanied by various undertakings from the SABC.

[27] Motsoeneng and the Minister filed applications with the Constitutional Court for leave to appeal the SCA's judgment.

[28] For a while the disciplinary proceedings, the Part B proceedings in the COO application and the applications for leave to appeal the Part A relief to the Constitutional Court continued in parallel. Davis J heard argument on the Part B relief on 12-13 October 2015 and reserved judgment. On 30 October 2015, by which date Davis J had not yet delivered judgment, the disciplinary hearing convened before Mr Mokhari. He queried whether it made sense to have parallel proceedings in the Part B case and the disciplinary case. He postponed the disciplinary hearing sine die. In mid-November 2015, however, and presumably with an eye on the 60-day period within which the court had ordered the disciplinary proceedings to be finalised, Mr Mokhari directed that the disciplinary case would be heard over the period 1-4 December 2015.

[29] On 27 November 2015 Davis J delivered judgment on the Part B relief.[8] He set aside Motsoeneng's appointment as COO. Because the application for leave to appeal the Part A case to the Constitutional Court was still pending, he dealt with the Part B case on two alternative bases, namely the law as laid down in the SCA's judgment and the law as it would be if the Constitutional Court reinstated Schippers J's approach. On the basis of the SCA's approach, he said that because the Public Protector's report was binding on the SABC and the Minister, it was unarguable to contend that it was rational to appoint Motsoeneng as the permanent COO when he still had to be subjected to disciplinary action. On the alternative basis, he considered that the object of the power of appointment was to ensure that the SABC had a COO who was not only competent to perform the work but who would maintain the highest standards of integrity, responsibility and accountability, all of which were objectives contained in the SABC's Charter. Even if it had been permissible for the SABC to commission the Mchunu report, that report did not address the Public Protector's findings in sufficient detail to dispel the doubts regarding Motsoeneng's integrity. There was a manifest need for an institution such as the SABC, which was meant to be transparent and accountable, to examine exhaustively all the disputes regarding Motsoeneng's integrity and qualifications before appointing him.

[30] Davis J declined to make the further order sought by the DA to the effect that the board be compelled within 60 days to recommend to the Minister the appointment of a suitably qualified COO. In that regard Davis J said the following (para 53):

'Much has been made by respondents of Mr Motsoeneng's achievements at the SABC and his "unique" ability to be the COO of the SABC. If it were properly shown that none of the allegations made against him are sustainable, it would be unfair, and hence premature at this stage, to preclude him from such consideration. In summary, it is preferable to allow the relevant disciplinary proceedings to run their course and to reflect this finding in the order…'.

[8] Reported at 2016 (3) SA 468 (WCC).

[31] I flag another issue at this stage, namely the legal effect of Davis J's order on Motsoeneng's employment status. Nobody suggests that with the setting aside of his appointment as the permanent COO he reverted to the position of Acting COO. The DA contends, however, that he ceased to be an employee at all. The SABC contends that he reverted to the last previous permanent position he held, namely GESR, a position to which he had been appointed in April 2011 and which was later renamed Group Executive: Corporate Affairs ('GECA').

[32] The disciplinary proceedings resumed before Mr Mokhari on 1 December 2016 with Davis J's judgment hot off the press. Mr Mokhari invited the legal representatives to address him as to whether the disciplinary proceedings had become moot. By this stage, and for reasons not apparent from the record, Mr July seems to have been replaced by a Mr Ledwaba as the initiator. Despite submissions to the contrary by Mr Ledwaba and Motsoeneng's attorney Mr Majavu, Mr Mokhari ruled that the setting aside of Motsoeneng's appointment as COO was a material intervening factor which justified terminating the disciplinary proceedings forthwith. This appears to have been on the basis that the charges were brought against him in his capacity as COO for things he had done as Acting COO (this is factually incorrect in relation to the first and second counts in the charge sheet of 12 October 2015). Mr Mokhari's ruling envisaged that disciplinary proceedings might be recommenced if Davis J's order were reversed on appeal.

[33] It appears that the SABC was not satisfied with this outcome. A new initiator, Mr Phalane, and a new disciplinary chairperson, Mr WJ Edeling (an advocate from Bloemfontein), were appointed. How this occurred is not disclosed in the record before us. There is an affidavit by the Minister that she played no part in their appointment. In the disciplinary review the deponent to the DA's founding affidavit, Mr J Selfe, says that the board was not involved, for which he relies on an extract from the affidavit in other proceedings of Mr FL Matlala, the (then) suspended GCEO, who was disputing the validity of his suspension. I should mention, though, that if Matlala was suspended before December 2015 he may not have been involved in the decision-making process. Be that as it may, the SABC has not responded to the DA's allegation that the board was not involved.

[34] The new disciplinary process was conducted with indecent haste, though this may have been attributable in part to the 60-day deadline and Mr Mokhari's unexpected approach. Be that as it may, in circumstances which have not been explained, someone determined that the new hearing was to start on Monday 7 December 2015. According to Motsoeneng, the new disciplinary proceedings were only initiated on that day and he only learnt of the appointment of a new chairperson when he arrived at the venue. Mr Phalane himself was only briefed on the morning of 7 December 2015. Unsurprisingly he asked for a postponement to which Motsoeneng's attorney, Mr Majavu, objected. After getting further instructions (from whom does not appear), Mr Phalane said that he would be ready to start at 20h00. Mr Edeling then granted a postponement to the following morning.

[35] From Mr Edeling's subsequent decision, it appears that only three charges were presented at the hearing, namely (i) the misrepresentation of Motsoeneng's qualifications in 1995; (ii) misconduct in relation to Motsweni's promotion; (iii) misconduct in relation to the dismissal of the six named staff members. This corresponded to part of the original first charge and the fourth and fifth charges. The following parts of the original charge sheet were not pursued: (a) the original first charge dealing with Motsoeneng's repetition of the matric misrepresentation in post-1995 job applications; (b) the second charge (the alleged misrepresentation regarding his supposed employment at the Northern Cape Provincial Government); (c) the third charge (concerning Duda's appointment); and (d) the sixth charge (the salary increases granted to himself and two other named staff members).

[36] At the start of proceedings on the Tuesday Mr Phalane asked that three of his witnesses be permitted to testify in camera because they were still employed at the SABC. Mr Edeling provisionally allowed this in the face of objection from Mr Majavu. After hearing the evidence, Mr Edeling ruled that the evidence should be open to all. He refused an application for the evidence of two further witnesses to be heard in camera. It appears that the evidence of the five witnesses ran over several days. One of these witnesses, Mr Paul Tati, previously employed in the SABC's HR department, placed on record that he currently had a three-year contract with the SABC. The person who negotiated the contract with him had recently been suspended and he believed this was an act of intimidation towards him.

[37] On the Tuesday there was a debate about whether Mr Phalane and his witnesses should be permitted to refer to the contents of a file of documents, exhibit "F". In the face of objection by Mr Majavu, Mr Edeling provisionally allowed the exhibit into evidence, subject to its contents in due course being proved by a certain Ms Oosthuizen. Mr Phalane indicated that he might require a postponement to procure Oosthuizen's testimony. Mr Edeling said that Mr Phalane would have to provide proper reasons for a postponement. When, after leading his five witnesses, Mr Phalane asked for a postponement on the basis that Oosthuizen would only be available on 11 January 2016, Mr Edeling upheld Mr Majavu's opposition on the ground that Mr Phalane had not adequately motivated the request. Mr Edeling made a consequential ruling that exhibit "F" was inadmissible.

[38] Mr Majavu then presented Motsoeneng's case. He did not call his client. His only witness was Alwyn Klopper who testified about the circumstances in which Motsoeneng was employed in 1995 and the knowledge of relevant role players that Motsoeneng did not have matric.

[39] Mr Edeling delivered an ex tempore judgment on 12 December 2015 in which he discharged Motsoeneng on all three counts. As to the first count (the 1995 misrepresentation), he decided that the document presented by Mr Phalane as being Motsoeneng's 1995 job application, exhibit "E", was inadmissible. The document was a copy, not an original, and had certain features which Mr Edeling found suspicious. Tati had not been with the SABC in 1995 and could not give direct evidence as to how the application form had been completed. Mr Edeling found it 'very strange' that Mr Phalane had not called the relevant HR employees in Bloemfontein at the time, Ms Botes and Ms Swanepoel. Based on Kloppers' evidence, he was concerned that the Bloemfontein HR office had been opposed to transformation and that the two ladies in question may have 'influenced' Tati with wrong information. At the end of his judgment Mr Edeling elevated this suspicion to a finding that these ladies were 'clearly lying' to Tati – this despite the fact that he had not heard from them. Accepting Kloppers' testimony, he acquitted Motsoeneng on the first count.

[40] As to the second count (concerning Motsweni), Mr Edeling said he could not understand why the charge had even been put to Motsoeneng since no evidence in support of it was led. Two witnesses whose evidence might have had a bearing on that charge (Mr Mabaso and Ms Francois) gave generalised evidence about HR policies but could not say anything on the Motsweni affair.

[41] As to the third charge (Motsoeneng's role in the dismissal of six named staff members), direct evidence was only led in regard to two of them, Diphoko and Koma. The former outright denied that Motsoeneng was in any way involved in his dismissal and said that the same was true of the dismissals of Mbalathi and Ramaphosa. Diphoko fingered another person as responsible for the dismissals. It appears that Mr Phalane may not even have consulted with Diphoko before leading his evidence because Mr Edeling remarked that it was clear from Diphoko's reaction to the details in the charge that he was seeing them for the first time in the witness box. The evidence of Koma was in Mr Edeling's opinion equivocal.

[42] So the state of play at the end of 2015 was that there was a pending application for leave to appeal against the SCA's dismissal of the Part A appeal, a pending application to appeal Davis J's setting aside of Motsoeneng's appointment as COO, and a disciplinary decision clearing Motsoeneng on the attenuated charges. It appears that following the disciplinary decision, Motsoeneng resumed his duties as COO, the effect of Davis J's decision having been suspended by the applications for leave to appeal.

The DC application and the Part B appeal proceedings

[43] The correctness of the SCA's view of the legal effect of the Public Protector's factual findings and remedial action would have been to the forefront of the proposed appeal by the SABC, the Minister and Motsoeneng to the Constitutional Court. Those same issues were to be considered in the *Nkandla* case, in which the Constitutional Court heard argument on 9 February 2016 and delivered judgment on 31 March 2016.[9] Even before the *Nkandla* hearing the would-be appellants in the

[9] *Economic Freedom Fighters v Speaker, National Assembly & Others* 2016 (3) SA 580 (CC).

SABC case withdrew their applications for leave to appeal, a fact formally recorded by the Constitutional Court on 3 February 2016. This meant that Schippers J's order on the Part A relief could no longer be questioned.

[44] The applications for leave to appeal to the Constitutional Court were presumably withdrawn because the appellants no longer regarded the Part A order as having practical effect. With the granting of Davis J's order the need to suspend Motsoeneng as COO fell away, subject to any appeal against Davis J's judgment. And if the disciplinary proceedings before Mr Edeling constituted compliance with the Public Protector's remedial action, the basis for suspension had in any event lapsed.

[45] As to the pending applications for leave to appeal against Davis J's judgment, Davis J dismissed them on 23 May 2016. The SCA dismissed petitions on 14 September 2016. The would-be appellants did not take it further. So 14 September 2016 was the date by which it was finally determined that Motsoeneng's appointment on 8 July 2014 as COO was invalid and set aside.

[46] As to Mr Edeling's disciplinary judgment, on 24 February 2016 the DA issued the DC application, the first of the two applications before us. Orders were sought (i) declaring that the SABC and its board had failed to respect and implement the findings and remedial action of the Public Protector; (ii) declaring that they had failed to comply with and had acted in contempt of the Part A order as confirmed by the SCA; (iii) declaring that the Minister had improperly interfered in the appointment of the disciplinary initiator and chairperson; (iv) declaring the disciplinary proceedings invalid and setting them aside; (v) directing the board to commence fresh disciplinary proceedings against Motsoeneng for the purpose of determining an appropriate sanction on the basis of the Public Protector's findings, with ancillary relief relating to the appointment of the initiator and chairperson and public access to the disciplinary proceedings; (vi) directing that pending the finalisation of the disciplinary proceedings Motsoeneng be suspended from the position of COO.

[47] The SABC, the Minister and Motsoeneng filed notices of opposition. The Public Protector, at that stage still Ms Madonsela, filed an affidavit broadly

supportive of the DA's position, though, as subsequently made clear by the Public Protector's counsel in argument, she does not agree with the DA that the disciplinary proceedings are concerned only with sanction.

[48] The DC application was set down for hearing on this court's semi-urgent roll on 23 May 2016.

[49] On 17 May 2016 the SABC issued an application out of the North Gauteng High Court to have parts of the Public Protector's report reviewed and set aside ('the PP application'). These included all the adverse factual findings against Motsoeneng and the SABC and all the remedial action directed at the SABC's board. This review application was instituted some two years and three months after the issuing of the Public Protector's report. The SABC sought condonation for its failure to comply with the 180-day time limit prescribed in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), its explanation being that it was only a combination of the DC application and the *Nkandla* judgment that had brought the SABC to the realisation that the Public Protector's adverse findings against Motsoeneng could not be challenged in the disciplinary proceedings unless and until the relevant parts of the Public Protector's report were set aside. The disciplinary proceedings conducted against Motsoeneng in the latter part of 2015 had thus been misconceived.

[50] The founding affidavit in the PP application was made by the SABC's acting GECA, Mr Jimi Matthews, who had presumably replaced Matlala. He alleged that the Public Protector's factual findings fell to be reviewed and set aside because they were incorrect and did not accord with the objective evidence. The SABC did not elaborate, saying that it could not do so until the Public Protector produced her record in terms of rule 53. The main review ground advanced was that the Public Protector had acted irregularly by making factual findings which could not be challenged by Motsoeneng in the disciplinary proceedings. A subsidiary review ground was that in terms of s 6(9) of the Public Protector Act 23 of 1994 the Public Protector should not have entertained the complaint regarding Motsoeneng's qualifications, given that the conduct in question had occurred more than two years prior to the lodging of the complaint.

[51] The SABC has not filed its supplementary founding papers in the PP application. Apparently there is a dispute regarding the rule 53 record. The Public Protector is opposing the PP application. The DA has not been cited as a respondent though it may intervene.

[52] On 19 May 2016 Motsoeneng filed opposing papers in the DC application. He said his affidavit was late because he originally thought the SABC would be filing substantive answering papers. The SABC's conduct in issuing the PP application indicated that the SABC would not now be doing so. He said he did not wish to enter the fray other than by stating certain facts germane to himself, insofar as his rights might be adversely affected by the relief claimed.

[53] The Minister filed an answering affidavit in the DC application on 19 May 2016 in which she denied unlawful interference in the appointment of the initial initiator and chairperson.

[54] On 20 May 2016 the SABC delivered an urgent application to have the DC application stayed pending the outcome of the PP application. The founding affidavit was again made by Matthews. The SABC contended that it would be in the interests of justice that it should not be required to file answering papers in the DC application until the PP application had been determined. The stay application, which was opposed by the DA and the Public Protector, came before Samela J on 23 May 2016. Having reserved his decision, he handed down judgment on 7 October 2016 dismissing the stay. His main ground for doing so was that the SABC's right to challenge the Public Protector's report had been perempted by its conduct in implementing the report by way of the disciplinary proceedings in the latter part of 2015.

[55] Matters had not stood still between 23 May 2016 and 7 October 2016. On 27 June 2016 Matthews resigned as Acting GCEO, stating that in trying to improve things from inside the SABC he had allowed the corrosive atmosphere to impact negatively on his moral judgment, leading to his becoming complicit in many decisions of which he was not proud. He said he would no longer be part of what was happening at the SABC. He subsequently acknowledged in a televised

interview that the recent affidavits he had made on behalf of the SABC were inconsistent with his resignation letter. He said that the SABC would be better off without Motsoeneng as its COO, who had in his view been exercising unbridled power and conducting a reign of terror. (Motsoeneng's response in the present proceedings is that Matthews is disgruntled by Motsoeneng's refusal to support a top-up payment to Matthews' retirement fund.)

[56] Mr James Aguma ('Aguma'), the CFO, was appointed as Acting GCEO in Matthews' place. Ms Audrey Raphela ('Raphela') was appointed as Acting CFO.

[57] During June and July 2016 the SABC instituted disciplinary proceedings against eight journalists who had spoken out against its editorial policies. They became known as the SABC Eight. They brought proceedings in the Labour Court and subsequently in the Constitutional Court against the disciplinary proceedings and subsequent dismissals. There were also proceedings by the Helen Suzman Foundation in the North Gauteng High Court challenging certain editorial decisions as amounting to improper censorship. Those proceedings were the subject of agreed interim relief on 20 July 2016.

[58] As already noted, on 14 September 2016 the SCA dismissed the petitions for leave to appeal against Davis J's judgment. This meant that the order declaring invalid and setting aside Motsoeneng's appointment as COO became final. Although there is a dispute as to the legal effect of this order on Motsoeneng's employment status, it is common cause that by no later than 14 September 2016 he ceased to be a director of the SABC, the directorship having been a statutory incidence of his office as COO. It is also common cause that with the lapsing of Motsoeneng's directorship, the number of directors fell from nine to eight. The board had for some time had fewer than the prescribed 15 members but with the lapsing of Motsoeneng's directorship the number dropped below that required for a quorum.

[59] It appears that as at September 2013 the SABC had a full board. Attrition occurred as follows: in July 2014 Mr T Bonakele resigned as a non-executive director; on December 2014 the chairperson of the board, Ms Ellen Tshabalala, resigned following a finding that she had misrepresented her qualifications; in

January 2015 Prof B Khumalo resigned as a non-executive director; and in March 2015 three non-executive directors – Ms Kalidass, Mr Lubisi and Ms Zinde (subsequently deceased) – were dismissed although the dismissals are subject to a pending legal challenge. This left nine directors, a number which reduced to eight on 14 September 2016. Since September 2013 the SABC had also lost two GCEOs, Matlala and Matthews. Since 2008 the SABC has not had a permanent COO and the decision to appoint Motsoeneng to that position in July 2014 was set aside as invalid.

[60] To complete the dystopian story of the board's disintegration, I can mention here that on 5 October 2016 two more non-executive directors, Mr Naidoo and Mr Mavuso, resigned in a blaze of publicity at the meeting of the Parliamentary Portfolio Committee for Communications of the National Assembly ('the PCC'), expressing shock at the conduct of the other board members. The remaining three non-executive directors refused to resign at the PCC's request. However two of them (Ms Mhlakaza and Dr Tshidzumna) subsequently wilted and resigned on 12 November 2016, leaving Prof Maguvhe ('Maguvhe'), the chairman, as the solitary non-executive director. The other two board members were and remain the Acting GCEO, Aguma, and the Acting CFO, Raphela. The SABC does not currently have an Acting COO for reasons which will appear below.

Motsoeneng's appointment as GECA

[61] To revert to mid-September 2016, the SABC took two decisions pertaining to Motsoeneng which on the face of it are remarkable in the light of the history since February 2014 and the SCA's recent dismissal of the petitions for leave to appeal:

- On 19 September 2016 the board, or what was left of it, resolved by round-robin to recommend to the Minister that Motsoeneng be appointed as Acting COO for the period 19 September - 18 December 2016 (acting appointments can only be made for three months at a time). Naidoo dissented. In the board's presentation to the PCC on 5 October 2016, the chairperson said that Motsoeneng had been cleared of all disciplinary charges through a transparent and independent hearing. Based on Davis J's judgment, he ought

not to be excluded from applying for the position of the permanent COO once it was advertised. Davis J's judgment did not prevent Motsoeneng from being appointed as Acting COO in the meanwhile.

- On 22 September 2016 the SABC concluded a five-year fixed-term contract of employment with Motsoeneng in terms of which he was to occupy the position of GECA with the same remuneration package he had enjoyed as COO. In Aguma's letter to Motsoeneng of that date, he said that the effect of the SCA's decision of 14 September 2016 was to nullify his appointment as COO and that the executive directors had decided to comply with the judgment. The effect was said to be that Motsoeneng returned to his former position, now renamed GECA. (Presumably the intention was that if Motsoeneng were subsequently appointed as permanent COO, his contract as GECA would be superseded.)

[62] The first of these decisions required ministerial approval. She declined to make the appointment. In any event since the board lacked a quorum it was unable to make a decision to recommend Motsoeneng's appointment to the Minister or to appoint him pursuant to any approval she might give.

[63] The second of these decisions did not require a decision by the Minister. According to the SABC, it was a staff appointment within the managerial authority of the Acting GCEO, Aguma. In any event, so the SABC contends, there was no decision as such; Motsoeneng simply reverted to his previous position by operation of law. In its presentation to the PCC on 5 October 2016, the chairperson said that in law Motsoeneng could not be placed in a worse position than he was before. The only vacancy was that of Group Executive: Human Resources but that was not a position for which Motsoeneng had any competency. To accommodate him as GECA it was necessary to redeploy the existing GECA, Ms Bessie Tugwana ('Tugwana'). She was thus moved to the position of Group Executive: Special Projects. And with the Minister's refusal to appoint Motsoeneng as Acting COO, the residual board members recommended to the Minister that one of three persons, including Tugwana, be appointed as Acting COO. The Minister so appointed Tugwana on 27 September 2016. However because the board lacked a quorum it

was unable to make a valid decision to seek the Minister's approval for Tugwana's appointment or to make the appointment pursuant to ministerial approval.

[64] At its meeting on 5 October 2016 the PCC resolved that the SABC's board was dysfunctional and had failed to comply with the Public Protector's report and ensuing court judgments. It resolved to institute an enquiry in terms of s 15A of the Broadcasting Act into whether the board should be dissolved. The PCC's enquiry was scheduled to be held on 8-11 November 2016 but the remaining board members objected on the basis that the PCC had prejudged the matter. This resulted in the appointment of an ad hoc committee to conduct the investigation. At the time the present cases were heard the ad hoc committee's investigation had not begun.

[65] I have previously mentioned that on 7 October 2016 Samela J dismissed the application to stay the DC application.

The CA application

[66] On 11 October 2016 the DA issued the CA application, the second of the two cases before us. In summary the DA sought the following relief: (i) declaring that unless and until all the negative findings against Motsoeneng in the Public Protector's report are set aside on review, Motsoeneng may not hold any position at all in the SABC; (ii) declaring that Aguma's decision, taken on 22 September 2016, to employ Motsoeneng at all, and in particular to appoint him as GECA, is inconsistent with the Constitution, unlawful and invalid, and setting the decision aside; (iii) declaring that the decision of the board, approved by the Minister, to appoint Tugwana as Acting COO is inconsistent with the Constitution, unlawful and invalid and setting it aside; (iv) declaring that the SABC, Aguma and the board have violated their constitutional obligations to the Public Protector in terms of s 181(3) of the Constitution; (v) declaring that the board has been inquorate since 14 September 2016; (vi) directing Motsoeneng, the six remaining board members (at that time Maguvhe, Khumalo, Mhlakaza and Tshiszumba together with Aguma and Raphela) and the Minister to pay the costs of the application in their personal capacities on an attorney/client scale.

[67] The notice of motion stated that the application would be made on 23 and 24 November 2016. In the founding affidavit Selfe alleged that there were grounds for it to be so entertained on the court's semi-urgent roll.

[68] Shortly after the issuing of the CA application the DA's attorneys wrote to the Judge President asking for a directive that the DC application be enrolled together with the CA application on 23 and 24 November 2016. This was approved by the Judge President. On 26 October 2016, and at our direction, the parties' legal representatives met with us in chambers. A timetable was set but the respondents reserved their position on urgency.

[69] The new Public Protector, Ms Mkhwebane (who succeeded Ms Madonsela on 1 November 2016), filed an affidavit which substantially repeated the content of her predecessor's affidavit in the DC application.

[70] The SABC, the Minister and Motsoeneng filed notices of opposition and answering papers and the DA duly replied. The parties and their legal representatives are to be commended for adhering to a relatively tight timetable.

[71] In his answering affidavit Motsoeneng said that although he was cited as a respondent in the PP application he now intended to intervene as a co-applicant to support the reviewing and setting aside of the Public Protector's report. He also delivered, with his answering papers, a counter-application to stay the CA application and an application to strike out certain matter from the founding affidavit.

The applications to be admitted as amici curiae

[72] On the day before the hearing began we received applications by email from the Decolonisation Foundation ('TDF') and the Musicians Association of South Africa ('MASA') to be admitted as amici curiae. They were represented by counsel (Mr Mpshe SC and Mr Masipa respectively) at the start of proceedings. Another organisation, the Independent Music Performance Rights Association ('IMPRA'), from which we had received no papers, was also represented by counsel (Mr Mkhabela) and likewise wished to be admitted as an amicus curiae. Mr Mkhabela

was not yet in a position to hand us a copy of his client's application. The DA opposed these applications.

[73] After hearing Mr Mpshe, Mr Masipa and Mr Katz, we dismissed the applications by TDF and MASA, indicating that we would provide reasons later together with our ruling on costs. We declined to hear IMPRA's application as it was not before us.

[74] The TDF and MASA wanted to adduce evidence and make submissions about Motsoeneng's achievements in championing transformation and local content. Their counsel were unable, however, to indicate why such evidence and submissions were relevant to the issues we had to decide. Motsoeneng has not been criticised in the present proceedings in relation to transformation and local content. Insofar as content is concerned, the papers deal with alleged censorship of a political nature but even that material is not directly relevant. Furthermore the TDF and MASA did not appear to have anything new to say about Motsoeneng's positive attributes. The SABC and Motsoeneng have already dealt with such matters in their papers. And counsel for the amici did not seem to be aware that the position Motsoeneng currently occupies (GECA) is one which according to the SABC and Motsoeneng is unrelated to programming content so that content policies in favour of local musicians are now the responsibility of other executives.

[75] Mr Katz asked that we dismiss the amicus applications with costs. In my view this request is justified. The amicus applications were brought on very short notice. The delay was not satisfactorily explained. The applications, if granted, might have disrupted, and would certainly have lengthened, the hearing of the main case. It is by no means clear that the applications contained all the evidence which the would-be amici wanted to adduce.[10] While the applications may have been well meant, they were in the objective sense frivolous because the requirements for being admitted as an amicus were not remotely met (new and relevant facts and/or

[10] The TDF's deponent said that an attached affidavit by one Mbuli was 'inter alia' the evidence on which the TDF would rely.

submissions to which the court's attention would not otherwise have been drawn).[11] The costs are not likely to be very great since opposing affidavits were not filed and the applications were disposed of within 15 minutes. Nevertheless, and as a matter of principle, unmeritorious applications of this kind should not be encouraged. Accordingly we now add to our dismissal of the TDF and SAMA applications an order that they pay the DA's costs occasioned thereby. We do not make any order on the IMPRA application because it was not properly before us.

Urgency and service

[76] In his affidavit opposing the CA application, Motsoeneng submitted that the application should be struck from the roll because it did not have sufficient urgency to justify the time constraints under which he was placed. This was allied to an allegation that the CA application was not properly served on him and that his attorneys only received a complete copy thereof (electronically) on Monday 7 November 2016. Mr Bester placed considerable emphasis on these matters during oral argument.

[77] The SABC likewise said that the matter was not so urgent as to justify the timetable. The SABC's counsel did not develop this complaint in written or oral argument.

[78] The CA application was issued on 11 October 2016. At that stage the DC application was pending. Samela J had recently dismissed the stay application. Mr Majavu was on record for Motsoeneng in the DC application.

[79] On 12 October 2016 Ms Jonker of the DA's attorneys ('MSS') called at the SABC's offices in Sea Point and asked the receptionist to call someone who could receive service of the CA application for the SABC, its board and Motsoeneng. A Ms Conradie was summoned who accepted service and confirmed that she would distribute the application to whomever needed it.

---

[11] Rule 16A(6)(b); *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 9; *Certain Amicus Curiae Applications: Minister of Health & Others v Treatment Action Campaign & Others* [2002] ZACC 13 para 5; *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & Others* 2013 (2) SA 620 (CC) para 26.

[80] On the morning of 14 October 2016 MSS emailed the entire application to Motsoeneng at the email address used for communicating with him in relation to previous litigation. It is not in dispute that the email address in question was and is his active email address. Jonker omitted to request a receipt confirmation but said in her affidavit that she did not receive a failed-sending message. Motsoeneng denies, however, that he received the email. On the same day Ms Jonker emailed Mr Majavu to ask whether he would accept service of proceedings on Motsoeneng's behalf. He replied to say that he did not have such instructions.

[81] By 12 October 2016 it was public knowledge that the DA had launched the CA application. A press release of that date by the SABC itself said that the DA had launched proceedings to have Motsoeneng's appointment as GECA set aside.

[82] On 25 October 2016 Le Grange J's registrar notified the legal representatives in the DC application (this included Mr Majavu) that the DC application would be heard together with the CA application on 23-24 November 2016 and that the judges requested a meeting with the legal representatives on the following day. Motsoeneng was represented at that meeting by counsel, Mr Fergus, who was briefed solely for purposes of attending this meeting. Directions were given for the filing of papers in both cases. On the same day, 26 October 2016, there was email correspondence between Mr Majavu and Ms Jonker. Mr Majavu said that the GECA application had not been served on his client though it had been publicised in the press. Mr Jonker replied to say that service was effected on Motsoeneng in Sea Point and by email. She said that for Motsoeneng to claim that he had not received it was 'disingenuous'. There does not appear to have been any further relevant communication between Mr Majavu and Ms Jonker until 10 November 2016.

[83] One would have thought that by Wednesday 26 October 2016, if not earlier, Motsoeneng and his attorney, knowing that there was a further application directed at him and that it was to be heard on 23-24 November 2016, would have taken steps to obtain the application. The obvious practical solution was for Mr Majavu to request MSS to deliver a copy of the application to his office.

[84] Mr Majavu says that he obtained an electronic copy of the notice of motion and founding affidavit (without annexures) from the SABC's attorneys on Thursday 3 November 2016 and a full copy (also from the SABC's attorneys) on Monday 7 November 2016. As I have observed, Motsoeneng and his attorney could have been placed in this position by not later than 26 October 2016 if they had followed the simple expedient of asking Ms Jonker, in response to her email of 26 October 2016, to deliver a copy of the application to Mr Majavu's office.

[85] It was on the basis that his client had only received the full application on 7 November 2016 that Mr Bester submitted that Motsoeneng had effectively had barely one week within which he had to file his opposing papers. I am somewhat sceptical of Motsoeneng's assertion that the application did not get to him via Ms Conradie or by email. At best for him, he chose not to be proactive in obtaining the papers for himself and his attorney.

[86] Even on his own version, Motsoeneng through his attorney had an electronic copy of the papers, excluding the annexures, by Thursday 3 November 2016. Almost all of the annexures are documents which Motsoeneng had in his possession and with which he would have been familiar: judgments and extracts from papers in previous litigation; extracts from the Public Protector's report; the whole of the Mchunu report; the SABC's MOI and Charter; Mr Edeling's disciplinary judgment, correspondence addressed to Motsoeneng and the like.

[87] Motsoeneng filed a full answering affidavit on 14 November 2016. He did not identify any matters with which he would have liked to deal more fully if he had been allowed more time. The affidavit has no obvious lacunae. Mr Bester submitted that where a litigant is put under severe time constraints he and his counsel may not know what might have emerged from more leisurely reflection. However one would expect that, at least by the time of argument, there would be some plausible suggestion as how Motsoeneng could have improved his opposing papers with more time.

[88] As to urgency, the founding affidavit alleged that a hearing on this court's semi-urgent roll was warranted. Various considerations in support of this allegation

were advanced. The most compelling, in my view, is that the conduct complained of in the CA application is, if the DA's characterisation of it is correct, contemptuous of the Public Protector and the judicial system. The last straw was when the SABC, in the face of the dismissal by the SCA of the petitions for leave to appeal, proceeded within days to appoint Motsoeneng to another high position. Selfe says that the DA held back to see whether the proceedings of the PCC on 5 October 2016 might resolve the problem. When that did not occur, the present application was launched on 11 October 2016 for hearing on 23-24 November 2016. If Motsoeneng had come into possession of the application by 14 October 2016, the directions subsequently issued by the court would have given him a full month for his answering papers. Admittedly his counsel, like the others in the case, were put under considerable time pressure when it came to the filing of heads of argument, but full heads were filed by all concerned and there was opportunity for amplifying the submissions in oral argument.

[89] Mr Bester argued that the DA had not sought condonation for its failure to effect proper service through the sheriff in accordance with rule 4 and for its departure from the long-form requirements of rule 6. On the latter score, I think the allegations in the founding papers regarding urgency are sufficient. As to non-compliance with rule 4, Mr Bester's argument is not without merit. But, as has often be observed, the rules exist for the court, not vice versa. The court must not be detained by rules 'to a point where they are hamstrung in the performance of the core function of dispensing justice'.[12] So while the DA's slackness in relation to formal service is to be deprecated, I do not consider that Motsoeneng has been materially prejudiced. To strike the matter from the roll would indeed hamstring this court in the administration of justice.

The counter-application to stay the CA application

[90] Motsoeneng has a second dilatory string to his bow. He contends that the CA application should be stayed pending the outcome of the PP application.

---

[12] *Eke v Parsons* 2016 (3) SA 37 (CC) para 39. See also, eg, *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd & Another* 2014 (2) SA 119 (WCC) para 11.

[91] I can understand the rationale for an application to stay the DC application pending the outcome of the PP application, since the SABC's obligation to institute disciplinary proceedings against Motsoeneng is sourced in the Public Protector's remedial action. The SABC and Motsoeneng in fact brought such an application but Samela J dismissed it. It has not been renewed before us.

[92] What I do not understand is why the CA application should be stayed pending the outcome of the PP application. The SABC is required to respect the Public Protector's report until it is set aside. The future setting aside of the Public Protector's report would not retrospectively legitimise or render rational decisions taken by the SABC at a time when the report was binding on it. The CA application is primarily concerned with two matters, (i) the lawfulness and rationality of the SABC's decision in September 2016 to employ Motsoeneng as GECA and the related redeployment of Tugwana; (ii) the lack of a quorate board. The PP application will not deal with the second of these issues; and, as I have said, future success for the SABC in the PP application will have no bearing on the legality and rationality of its decisions in September 2016.

[93] The conditional counter-application must thus be dismissed.

Prematurity and the ad hoc committee's investigation

[94] Motsoeneng's counter-application did not contain a prayer that the CA application be stayed pending the outcome of the ad hoc committee's investigation. However Motsoeneng's opposing affidavit advanced this contention and Mr Bester supported it in argument. I shall thus treat it as a supplementary ground on which Motsoeneng wants the CA application to be stayed

[95] Motsoeneng's contention is without merit. The ad hoc committee is conducting an enquiry in terms of s 15A(1)(b) of the Broadcasting Act. That provision empowers the National Assembly, after due enquiry, to recommend to the President that the board be dissolved for failing to discharge its fiduciary duties, adhere to its Charter and carry out its duty to control the SABC's affairs. Among the matters specifically included in this investigation are the response of the SABC to

the Public Protector's report and to subsequent court judgments; the ability of the current board to take legally binding decisions in the light of the resignation of members; and human-resource issues such as the appointment and dismissal of executives.

[96] Although the ad hoc committee may deal with some of the factual matters traversed in the present litigation, it will do so for the sole purpose of determining whether the National Assembly should recommend the dissolution of the board. If such a recommendation is made, the President will be obliged to dissolve the board (s 15A(2)(c)) and to appoint an interim board for a period not exceeding six months (s 15A(3)). Since Motsoeneng's position as GECA is not a board position, the dissolution of the board would not affect his appointment. A new board would not have the power which a court has to set aside Motsoeneng's appointment as invalid. At most, the board could cause disciplinary proceedings to be instituted against Motsoeneng with a view to the termination of his employment.

[97] As to the board's currently being inquorate, the ad hoc committee and National Assembly have no power to make declaratory orders.

[98] Accordingly, and even if there were grounds to believe that the ad hoc committee's proceedings would lead to an expeditious recommendation by the National Assembly to dissolve the board, there would be no justification for staying the present proceedings. Whether an expeditious outcome can be expected is doubtful. The PCC was initially going to conduct the investigation itself but the remaining board members complained that the PCC's members had prejudged the matter. This led to the appointment of an ad hoc committee.

[99] After the completion of argument in the present case it was reported in the press that Maguvhe had launched proceedings to interdict the work of the ad hoc committee on the basis that its members also lacked impartiality. Although the application was dismissed, several days reserved for the committee's work were lost. It has also been reported that the SABC is resisting a summons for the production of documents. The ad hoc committee's proceedings eventually began on Wednesday 7 December 2016. The SABC's representatives, including Maguvhe,

Aguma and Motsoeneng, walked out in protest because certain documents had not been made available to Maguvhe (who is partially sighted) in braille. Maguvhe subsequently failed to attend a sitting at which he was to be questioned. Although I have no reason to doubt the ad hoc committee's resolve to proceed expeditiously, it appears that its work may not be plain sailing. And one does not know how long it would take for the National Assembly to act on any recommendation made by the ad hoc committee. The fact that board membership has been allowed to dwindle over a period of more than two years without intervention by way of replacements does not inspire confidence.

The December 2015 disciplinary proceedings (paras 4-5 of DC notice of motion)

Nature of the disciplinary proceedings required by the Public Protector

[100] I turn now to the DC application, starting with a consideration of the nature of the disciplinary proceedings required by the Public Protector's remedial action. The DA contends that the Public Protector's factual findings against Motsoeneng had to be accepted in the disciplinary proceedings, the only question being the appropriate sanction. This is the first ground of review. It is also reflected in the relief the DA seeks in respect of the fresh disciplinary proceedings to be instituted.

[101] We only have an executive summary of the Public Protector's factual findings together with the chapter of her report containing the remedial action.[13] Everyone accepts, however, that the executive summary is a fair statement of the Public Protector's factual findings. The SABC's founding papers in the PP application set out her factual findings in accordance with that summary.

[102] In the SCA's Part A judgment the court concluded that a person or institution aggrieved by a finding, decision or remedial action taken by the Public Protector might in appropriate circumstances challenge the report by way of a review application. Absent a review application, such person is not entitled simply to ignore the findings, decision or remedial action taken by the Public Protector or to embark

[13] The complete report is, of course, a public document accessible inter alia on the Public Protector's website.

on a parallel investigation and to adopt the position that its investigation trumps the findings, decision or remedial action taken by the Public Protector (para 53).

[103] The Constitutional Court's *Nkandla* judgment endorsed (in para 68) the SCA's statement (in para 52) that the Public Protector could realise the constitutional purpose of her office if other organs of state were entitled to second-guess her findings and ignore her recommendations. The primary focus of the *Nkandla* judgment appears to be the legal effect of the remedial action rather than the legal effect of the factual findings. Mogoeng CJ observed that the legal effect of the remedial action in a particular case depends on the nature of the issues under investigation and the findings made (para 69). It is within the power of the Public Protector to provide for remedial action with binding effect. If the remedial action is of that kind, compliance is not optional. The rule of law dictates that in such circumstances an aggrieved party must comply with the remedial action unless and until it is set aside by a court (paras 73-75). In *Nkandla* the court was satisfied that the remedial action taken against the President had binding effect, given the nature of the Public Protector's factual findings (para 76). Although the President was entitled to investigate the correctness of the Public Protector's factual findings, he could not on the strength of such an investigation simply disregard the Public Protector's report. Before he could do so a court of law would have to set aside the findings and remedial action (paras 78-81). Since the President had not sought such relief from a court, his disregard of the Public Protector's report was a failure to uphold, defend and respect the Constitution (para 83).

[104] It thus seems to me that the primary significance of the Public Protector's factual findings is to explain and justify the remedial action taken. The nature of the investigation and the factual findings play an important part in interpreting the remedial action and assessing its legal effect. If the remedial action is directed at a specific institution, and if the remedial action is on a proper interpretation of the report binding, the institution must comply with the remedial action and respect the factual findings unless and until they are set aside on review.

[105] In the present case strong adverse factual findings were made against Motsoeneng. The remedial action was, however, directed not at him but at the

Minister and the board. I am satisfied, having regard to her factual findings, that the remedial action was binding on the board. The SABC could not fail to take disciplinary action on the grounds specified by the Public Protector unless her factual findings regarding Motsoeneng and the resultant remedial action were set aside by a court. So far, I think, everyone in the present case concurs.

[106] The nature of the disciplinary action constituting the remedial action is a different matter. The disciplinary action was to be directed at Motsoeneng. He is not a person bound by the remedial action. The report did not require him to ensure that anything was done. If he is not bound by the remedial action, why should he be bound by the Public Protector's factual findings?

[107] If the Public Protector's factual findings were binding on Motsoeneng in the disciplinary proceedings, it is difficult to see how there could be any outcome other than dismissal, such were the extent and egregious nature of the adverse findings. If that had been the Public Protector's intention, one would have expected her remedial action to be that the SABC dismiss Motsoeneng, yet that is not what she said.

[108] I think there is good reason why the Public Protector did not decree that Motsoeneng be dismissed. Although Motsoeneng was interviewed by the Public Protector and afforded the opportunity to make submissions on her provisional report, he did not have the opportunity to face and question his accusers.[14] The procedure by which the Public Protector made her findings was not such as an employee would be entitled to expect where disciplinary charges are brought against him. Our labour law requires that before a disciplinary sanction may be imposed on an employee there must be a fair and adequate procedure to establish

[14] Section 7(9)(b) of the Public Protector Act 23 of 1994 states that if it appears to the Public Protector during the course of an investigation that a person is being implicated in the matter under investigation, such person or his legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before her in terms of s 7. The full report in the present case is not before us. From the version available on the Public Protector's website, it appears that certain other implicated persons (not Motsoeneng) sought to invoke s 7(9)(b). The Public Protector's view regarding the right of cross-examination is not altogether clear from her report but she seems to have thought it sufficient that implicated persons had been given an opportunity to respond to adverse allegations (see paras 3.2 – 3.3 pp 32-37 and para 5.3 pp 43-44).

the alleged misconduct. This includes the right to be present when evidence is led in support of the charges, to examine any documents relied upon, to cross-examine witnesses and to lead evidence. Unsurprisingly these rights are reflected in the SABC's disciplinary code.

[109] In my view it would have been unfair to Motsoeneng and a violation of his labour rights for the Public Protector to take remedial action which required him to be bound by her factual findings in disciplinary proceedings. A report with such an effect might well be vulnerable to review. One should not readily ascribe such an intention to the Public Protector. The fact that the required disciplinary proceedings would involve an investigation of the merits in which Motsoeneng might be exonerated seems to have been taken for granted by Schippers J (para 106), Davis J (para 53) and the SCA (para 54).

[110] Mr Labuschagne explained in argument that it was not the Public Protector's position that Motsoeneng or the chairperson of the disciplinary enquiry were bound to accept the correctness of the Public Protector's factual findings. He submitted that the Public Protector's findings had to be 'taken into account' in the disciplinary proceedings but the chairperson was at liberty to reach different factual conclusions.

[111] Mr du Toit said that Mr Labuschagne's argument represented a significant change from the position adopted by the Public Protector in her affidavits. I accept that Mr du Toit and other counsel might have gained the impression that her stance was that her factual findings were binding for all purposes, particularly if her affidavits were read through the prism of the DA's founding papers. However, having re-read the Public Protector's affidavits, I am satisfied that she did not say, expressly or by necessary implication, that Motsoeneng and the disciplinary chairperson were bound by her factual findings or that the disciplinary proceedings were to constitute a sanction-only hearing. She regarded the December 2015 disciplinary proceedings as flawed, not because the merits of the charges were investigated, but because the process was conducted in bad faith. The SABC, she said, had 'sabotaged' its own disciplinary process. The SABC's counsel in their heads of argument referred to her statement that her remedial action 'contemplated a fair and lawful disciplinary hearing'.

[112] It was suggested by Mr Katz that the question whether the disciplinary proceedings were to be a sanction-only affair might best be left for decision in the PP application. I do not see why that should be done. The DA's contention that the Public Protector's remedial action contemplated a sanction-only hearing is one of the DA's attacks on the December 2015 disciplinary process. If Mr Edeling's disciplinary judgment is set aside and the SABC is ordered to institute fresh disciplinary proceedings, the parties must know what the ambit of the new disciplinary proceedings is. Para 6 of the notice of motion in the DC application expressly seeks a direction that the SABC commence disciplinary proceedings against Motsoeneng for the purpose of determining the appropriate sanction to be imposed.

[113] Furthermore it is not certain that the sanction-only issue will be reached in the PP application. The Public Protector will not be advancing that point. It will only arise if the DA is granted leave to intervene. If the DA does join those proceedings, there are two preliminary grounds on which the Public Protector and DA may seek the dismissal of the application, namely the delay in instituting the application and peremption. If one or both of those points succeed, there may be no decision on the merits of the review.

[114] My conclusion is that the disciplinary process contemplated by the Public Protector's remedial action is one in which the merits of the charges must be investigated. However, because the institution of disciplinary proceedings against Motsoeneng is not a voluntary decision by the SABC but compulsory by virtue of the Public Protector's remedial action, those involved cannot disregard the Public Protector's report. If the disciplinary proceedings are to meet the purpose of the remedial action, the initiator and chairperson must, as Mr Labuschagne submitted, have due regard to the Public Protector's report. The report will inform the charges to be brought against Motsoeneng and identify at least some of the evidence available to support the charges. That evidence, and any other evidence gathered in preparation for the hearing, must be fairly presented to the chairperson. If this were not done, a disciplinary outcome which cleared Motsoeneng of all charges would not be credible.

[115] It follows that I do not accept the DA's attack on the December 2015 disciplinary proceedings insofar as it rests on the sanction-only contention. I also do not accept that the order for the holding of fresh disciplinary proceedings should limit such proceedings to sanction alone. It also follows that the primary ground of review advanced by the SABC in the PP application is misconceived.

Other review grounds in the disciplinary application

[116] The DA advanced several other grounds of review to impeach the disciplinary proceedings. Because of the SABC's recent acceptance of the DA's erroneous sanction-only view and its consequential acceptance that the disciplinary proceedings of December 2015 were misconceived, the SABC has not responded meaningfully to these other grounds of review.

The Minister's involvement in appointment of Messrs July and Mokhari

[117] One of the grounds of review is the Minister's involvement in the appointment of Messrs July and Mokhari as the first initiator and chairperson. Since neither of them was involved in the disciplinary proceedings which cleared Motsoeneng, the Minister's involvement in their appointment would not, even if irregular, taint such proceedings. However, and since the notice of motion in para 4 seeks a declaration that the Minister acted unlawfully by 'improperly interfering' in the appointment of the initiator and chairperson, I must deal with the point.

[118] I have already referred to the exchange of correspondence between the board and the Minister on 9 October 2015. It is clear from the correspondence that, if the board was in law required to appoint the initiator and chairperson, the board abdicated that responsibility to the Minister. Mr Maenetje on behalf of the Minister drew our attention to the fact that the remedial action does not say that the board must appoint the initiator and chairperson; it merely says that the board must ensure that disciplinary action is taken against Motsoeneng. If it were otherwise lawful for the board to allow the Minister to make the appointment, such appointment would not have contravened the Public Protector's report.

[119] Mr Maenetje referred us to clause 13.6.3 of the SABC's MOI which provides that the board has the right and power to institute disciplinary proceedings against the three statutory executives 'upon the approval of the Minister'. The Minister is thus accorded some role in disciplinary proceedings against the COO. However clause 13.6.3 limits the Minister's role to the approval of disciplinary proceedings. In accordance with the MOI and the board's statutory function of controlling the affairs of the corporation (s 13(11)), it is the board which has the right and power to institute any disciplinary proceedings, carrying with it the right and power to appoint the initiator and chairperson.

[120] The Minister's involvement in the appointment of Mr July and Mr Mokhari was thus contrary to law. However on the papers it cannot be found that the Minister 'improperly interfered' in the appointments. It appears that the board wished to refrain from selecting these functionaries because the board might, in view of the previous views it had expressed, be perceived as biased (ie as pro-Motsoeneng). Whether, in the light of the history, the Minister's position from that perspective was any better may be doubted. But the Minister says she was acting bona fide in accommodating the board's request. It cannot be found that Messrs July and Mokhari were selected because they were believed to be pliable in favour of Motsoeneng. Mr Katz in replying argument specifically disavowed any imputation against them.

[121] Since the element of improper interference has not been established and since the Minister's involvement in any event had no practical effect, I do not think an order in terms of para 4 of the notice of motion is justified.

Irregularity in the appointment of Messrs Phalane and Edeling

[122] If Messrs Phalane and Edeling were not duly appointed, that would obviously invalidate the disciplinary proceedings. The DA alleged that their appointment was not brought to the board. Although the inference to be drawn from Matlala's evidence depends on precisely when he was suspended and when Messrs Phalane and Edeling were appointed, the SABC has not answered the allegation. There is no

evidence at all as to when, how and by whom Messrs Phalane and Edeling were appointed.

[123] In argument Mr Katz drew our attention to the fact that the board's rubber-stamping of the Minister's appointment of Messrs July and Mokhari was reflected in a round-robin resolution. Motsoeneng's own name appears on the resolution. This point was not highlighted in the founding papers and I would thus be willing to assume that the explanation is the same as that given by the SABC in relation to another resolution affecting Motsoeneng in September 2016, namely that the inclusion of his name was an error and that he was not in fact involved in the signing of the resolution.

[124] On the assumption that Motsoeneng was not involved in the appointments of Messrs July, Mokhari, Phalane and Edeling because of his conflicting interest in the matter, there were only eight remaining directors. That was not sufficient for a quorum. There is authority that a quorum must be determined with reference to those directors lawfully entitled to participate in the business in question.[15] Section 75(5) of the Companies Act 71 of 2008, however, unlike the previous Companies Act, provides that if a director has a 'personal financial interest' in respect of the matter to be considered at a meeting of the board, he must disclose his interest before the meeting and if present must leave after making the disclosure. While absent he is, in terms of s 75(5)(f), to be regarded as present at the meeting for purposes of determining whether there is a quorum. It is possible that this provision applies to the SABC by virtue of s 8A(5) of the Broadcasting Act read with s 5(4)(b)(ii) of the Companies Act. Since we were not addressed on this matter or on the applicability of s 75(5)(f) to round-robin resolutions, I prefer to express no opinion as to whether eight directors could by round-robin resolution have appointed Messrs Phalane and Edeling.

[125] The simple fact is that there is no evidence that the remaining board members made the appointments. Due challenge was made to the validity of the

[15] *Blythe v The Phoenix Foundry Ltd, Wilson & Muir* 1922 WLD 87 at 91-92.

appointments. In the absence of an explanation from the SABC, I think we must find that Messrs Phalane and Edeling were not duly appointed.

Disciplinary proceedings a charade

[126] The DA impugns the disciplinary process before Mr Edeling on the basis that they were a charade. In support of this general complaint, the DA's founding papers deal at some length with the following matters: (i) that from the outset the charges put to Motsoeneng did not include all the matters identified in the Public Protector's report; (ii) that by the time of the disciplinary hearing before Mr Edeling there were only three charges; (iii) that Mr Phalane was required to conduct the prosecution on extremely short notice; (iv) that a postponement was refused; (vi) that a number of persons who could have given relevant evidence and whose identities appeared clearly from the Public Protector's report were not called to testify (para 94 of the founding affidavit identifies 11 such people including Swanepoel, Botes and various persons allegedly dismissed at Motsoeneng's instance).

[127] The Public Protector supported this description of the disciplinary process. She says the SABC sabotaged its own disciplinary process. The SABC did not implement her remedial action in good faith.

[128] These allegations are largely unanswered. There has been no explanation from the SABC as to when and by whom Messrs Phalane and Edeling were appointed, who told Mr Phalane that he had to be ready to proceed on the same day he was appointed, who was responsible for providing Mr Phalane with the evidence to be led and who determined the charges to be pursued. It would have been quite impossible for Mr Phalane, in the very short time allowed, to familiarise himself with the detail, to consult with witnesses and to make further investigations. This must have been perfectly obvious to the SABC and, I must respectfully add, to Mr Edeling.

[129] Mr Katz did not impugn the integrity of Mr Phalane or Mr Edeling. I nevertheless think it unfortunate that Mr Edeling adopted the approach he did. If he was not aware of the Public Protector's report (his judgment makes no reference to

it), this was a serious shortcoming on the part of those who appointed him. If he was aware of the report, I would have expected him to display greater appreciation for his role on behalf of the SABC in giving effect to the Public Protector's remedial action. Where a public body appoints someone to chair a disciplinary enquiry, that person effectively becomes the decision-maker for the public body and his or her decisions are susceptible to review.[16] Here matters went further because the Public Protector's remedial action invested the disciplinary process with a special legal and public significance. An enquiry conducted with inappropriate haste and obvious lack of preparation, and characterised by the omission of significant charges and a manifest failure to call relevant witnesses, was not going to achieve what the Public Protector envisaged. There was no credible process pursuant to which one could say that, on a conspectus of all the evidence – including that which was available to the Public Protector – Motsoeneng was or was not guilty of the misconduct found by the Public Protector. This was a case which cried out for greater intervention on the part of the chairperson to ensure that the objects of the Public Protector's remedial action were met.

[130] The 60-day time limit for the completion of the disciplinary proceedings (which ultimately began to run on 8 October 2015 when the SCA handed down its Part A judgment) was not a proper basis for a rushed job. Para 3 of Schippers J's order contemplated that the disciplinary proceedings might not be completed within 60 calendar days, in which case the chairperson of the board was to deliver an explanatory affidavit with a statement as to when the proceedings were likely to be completed. On the assumption that Mr July was ready to run the hearing properly before Mr Mokhari in early December 2015 (we do not know whether this is the case), Mr Mokhari's decision to terminate the process would obviously have justified a judicial extension of the period. Schippers J's order did not even require the SABC to seek an extension; its chairperson merely had to file an explanatory affidavit. Only if the DA were dissatisfied with the explanation would the matter have had to serve again before court.

---

[16] See *Ntshangase v MEC for Finance, KwaZulu-Natal & Another* 2010 (3) SA 201 (SCA) paras 12-13.

[131] I am satisfied on this basis that the disciplinary proceedings conducted before Mr Edeling, including his judgment, must be set aside as not being in accordance with the Public Protector's remedial action and thus unlawful.

[132] I must add, however, that there is insufficient evidence to find that the SABC (ie its board or senior executives) deliberately sabotaged the disciplinary enquiry. Mr Phalane may have been acting independently and doing the best he could on short notice. There may have been a bona fide (though misconceived) view that, come what may, the disciplinary proceedings had to be wrapped up by mid-December 2015.

Consequential relief in DC application (paras 6-10 of notice of motion)

[133] Everyone accepts that if the disciplinary proceedings of December 2015 are set aside there will have to be new disciplinary proceedings complying with the Public Protector's remedial action. The DA seeks orders in that regard mutatis mutandis in accordance with Schippers J's order, namely that the proceedings cover the matters identified in the Public Protector's remedial action; that they be commenced by a new initiator, appointed by the board, within 14 calendar days; that they be presided over by a new independent chairperson appointed by the board; and that they be completed within 60 calendar days (with the same procedure for an explanatory affidavit from the chairperson if they are not so completed). The other parties did not object to these orders.

[134] The DA seeks further orders to the effect that the disciplinary proceedings be open to the public and that the media be entitled to record and report on the proceedings. The SABC and Motsoeneng do not in principle have an objection to these orders. Mr du Toit referred us to the judgment of Koen J in *Media 24 (Pty) Ltd & Others v Department of Public Works & Others* [2016] 3 All SA 870 (KZP) where the question of public and media access to disciplinary proceedings was discussed at some length. Mr du Toit suggested that we might rather cast our order along the lines of Koen J's order. The learned judge set aside rulings by various disciplinary chairpersons denying media access and directed them, as well as the chairpersons in other disciplinary proceedings, to make rulings on media access within one

month. It is clear from his judgment that the general principle of public access was supported. It is difficult to anticipate and regulate every issue in advance though the learned judge attempted to encapsulate some principles in para (d) of his order.

[135] In the present case the DA proposes that the chairperson be entitled to impose reasonable restrictions on media access, 'taking into account the right to freedom of expression, open justice and the principles of openness, accountability and responsiveness'. These are legitimate considerations but our order should make clear that they are not exhaustive. Other considerations would include fairness to Motsoeneng and fairness to witnesses. I think similar qualifications should apply to the order that the disciplinary proceedings be open to the public. Our order will establish that the default position is openness to the public and access to the media, with restrictions being within the power of the chairperson, having regard to all legitimate considerations. Apart from any specific considerations mentioned in our order, Koen J's judgment contains valuable guidance for the chairperson.

[136] Although nobody objects to the requirement that the new disciplinary proceedings be commenced promptly, there is a practical difficulty. The Public Protector's remedial action is directed at the board. In line with this fact and Schippers J's order, the notice of motion in the DC application requires the board to commence the disciplinary proceedings and inter alia to appoint the new initiator and chairperson. The problem is that the board is inquorate and cannot make these decisions. During the hearing we raised with counsel the possibility that the court might appoint the initiator and chairperson if the parties (excluding for this purpose the DA but including the Public Protector) could agree on the persons to be so appointed. Such agreement could, we thought, be viewed as a variation by the Public Protector of her remedial action in view of the changed circumstances.

[137] We indicated that unless agreed names were furnished to us within one week we would assume that the parties had not been able to agree on this course of action. In the absence of agreed names, we would have no choice but to order that the disciplinary proceedings be instituted by the board within 14 days of its becoming quorate. We did not receive agreed names within one week. However this morning the court received a letter from the SABC's attorneys recording that the

parties had agreed on the identity of a person to chair the disciplinary proceedings. In regard to the initiator, the SABC proposed three names while the Public Protector proposed a fourth. The SABC's attorneys suggested that the court should select one of the proposed persons as the initiator. My colleague Le Grange J, who concurred in the final draft of this judgment prior to receipt of this morning's letter, is out of town today and I have not been able to contact him. In the circumstances the court's order in regard to the date on which the new disciplinary proceedings must commence and in regard to the appointment of the chairperson and initiator will have to be deferred for a short time.

[138] The SABC submitted that 'for reasons of logic and justice' the new disciplinary hearing should await the outcome of the PP application. I disagree. The SABC has already failed in a bid to have the DC application stayed. Furthermore we have concluded that the new disciplinary enquiry is not a sanction-only process. This disposes of the main ground of review in the PP application, at the same time removing the one potential uncertainty which might have justified a deferral of the new disciplinary enquiry. There is no question of the SABC or Motsoeneng suffering irreparable harm if the new disciplinary enquiry takes place before a final determination of the PP application. If Motsoeneng were cleared pursuant to a new credible process, that would be to his advantage. If he were convicted, that would be because the charges were established by the evidence. This would show that the disciplinary proceedings were justified, regardless of the rights or wrongs of the Public Protector's report.

[139] I must mention one further matter relating to the new disciplinary proceedings. The charges must include at least those identified by the Public Protector's remedial action. It does not follow that the charges must be so restricted. The approach of the board and the initiator should not be that they will do only the bare minimum to comply with the remedial action. They must bona fide consider whether, apart from the matters identified by the Public Protector, there are other charges properly to be brought against Motsoeneng, particularly in relation to events post-dating the publication of the Public Protector's report. Some of the additional matters have been touched upon in this judgment, including Motsoeneng's affidavits concerning Swanepoel.

Remaining relief in DC application (paras 1, 2, 10 and 11 of notice of motion)

[140] Paras 1 and 2 of the notice of motion seek general declarations that the SABC and its board have failed to respect and implement the findings and remedial action of the Public Protector and have failed to comply with, and acted in contempt of, court judgments. Because things have moved on since the DC application was instituted, I shall defer a consideration of these prayers until later in this judgment.

[141] Para 10 seeks an order that pending the finalisation of the disciplinary proceedings Motsoeneng be suspended from his position as COO. Subsequent to the institution of the DC application it was finally determined that Motsoeneng's appointment as COO was invalid and should be set aside. Para 10 thus falls away. In the CA application the DA seeks other relief relating to Motsoeneng's suspension.

[142] Para 11 deals with costs, which I shall address at the end of this judgment.

The CA application and Motsoeneng's employment status

[143] I turn now to the CA application. There was considerable debate about the legal effect of the order setting aside Motsoeneng's appointment as COO, an order which became final on 14 September 2016. It is common cause that the decision terminated Motsoeneng's office as a director. The issue relates to his employment status. Mr Katz submitted that since Motsoeneng's only employment status prior to that order was as COO, he ceased to be an employee with the setting aside of the COO appointment. Mr du Toit argued that Motsoeneng not only remained an employee but reverted to the position he had occupied prior to his appointment as COO, namely the current GECA post.

[144] If a person is a permanent employee in position X and is promoted to position Y, I do not accept that with the setting aside of his appointment to position Y he ceases to be an employee. In such a case the only act causing the person not to be an employee in position X is that he has been promoted to position Y. In the circumstances posited, the act by which the person is appointed to the new position is the same act that causes his employment in the previous position to terminate. It

is unsound in principle, and unfair, to hold that the act is set aside for purposes of determining the promotion but not for purposes of determining whether he remains an employee. That position is quite different from the example, given by Mr Katz, of a person who resigns a position at employer X in order to take up a position at employer Y and where the appointment to position Y is later set aside. The resignation from the one employer and appointment by the new employer are independent legal acts. The one may be valid and the other invalid.

[145] Accordingly, if Motsoeneng were a permanent employee at the time he was promoted to the position of COO, the setting aside of his appointment as COO would not in my opinion have caused him to cease to be an employee.

[146] I have framed this with reference to a permanent employee. This is because of an aspect which the court raised with counsel. Aguma states in his affidavit that Group Executive posts are held for five years. Motsoeneng has attached a copy of his GECA employment contract of 22 September 2016 which confirms this. The contract is for a fixed term of five years as from 19 September 2016. In terms of clause 6 it is recorded and agreed that Motsoeneng shall not have any right, entitlement or expectation to permanent employment with the SABC, or to the renewal or extension of the agreement, at the end of the contract period.

[147] What we raised with counsel was this. If Motsoeneng's employment contract as GESR (the position he held prior to his appointment as COO and which has now been renamed GECA) was on similar terms to the current GECA contract, Motsoeneng's employment (leaving aside his invalid appointment as COO) would have expired on 31 March 2016, being five years after his appointment to this position. In reply Mr Katz handed us a copy of p 47 of the Public Protector's report where it is stated that Motsoeneng's GESR appointment was indeed for a fixed period of five years starting on 1 April 2011. If the GESR contract contained the equivalent of clause 6 mentioned above, Motsoeneng contractually had no right or expectation to permanent employment or to the renewal or extension of the contract. Mr du Toit's reference to the definition of 'dismissal' in s 186(1)(b) of the Labour Relations Act 66 of 1995 would prima facie not avail Motsoeneng because, in the case of a fixed-term contract, there can only be a 'dismissal' if inter alia the

employee ‘reasonably expected’ that the contract would be renewed or that he would be retained in employment on an indefinite basis.

[148] If this were the true state of affairs, it appears that the SABC dealt with Motsoeneng in September 2016 on the factually incorrect premise that he was still an employee or that he was entitled to the renewal of his contract. The Public Protector’s report, for as long as it stood, provided a powerful reason not to offer Motsoeneng any employment which the SABC was not under an obligation to recognise.

[149] However the DA did not raise this point in its papers. We do not have Motsoeneng’s April 2011 contract. Furthermore a contractual provision such as clause 6 of Motsoeneng’s current GECA contract may not be dispositive of the question whether a person has a reasonable expectation of renewal though it constitutes strong prima facie proof.[17] Because the issue was not raised, we cannot be sure that we have all the facts (though, as Mr Katz pointed out, it is difficult to see on what basis Motsoeneng could, after the issuing of the Public Protector’s report in February 2014, have had a reasonable expectation of continued employment). I think it would be unfair in the circumstances to decide the case on this basis. I thus assume, without so deciding, that Motsoeneng should be treated as having been a permanent employee at the time he was appointed as COO. On that basis, the setting aside of his appointment as COO did not terminate his employment relationship with the SABC.

[150] I do not think it follows that the SABC was compelled to allow Motsoeneng to resume performing the functions of the GECA, ie to occupy the post of GECA. Immediately prior to the SCA’s dismissal of the petitions on 14 September 2016, the post of GECA was occupied by Tugwana. If by operation of law Motsoeneng had to be allowed to resume the duties of the GECA, Tugwana presumably had to be allowed to resume the duties of the position she held before she was appointed as

---

[17] See *SA Rugby Players' Association (SAPRA) & Others v SA Rugby (Pty) Ltd & Others; SA Rugby (Pty) Ltd v SAPRA* [2008] 9 BLLR 845 (LAC) paras 44-46. See also *Mediterranean Woollen Mills (Pty) Ltd v South African Clothing and Workers' Union* 1998 (2) SA 1099 (SCA) at 1101H-1102G; *Independent Municipal and Allied Trade Union & Another v City of Johannesburg Metropolitan Municipality & Others* [2014] 6 BLLR 545 (LAC) paras 32-34.

GECA. This might have a domino effect on other appointments. There was nothing invalid about Tugwana's appointment as GECA. She was not cited as an interested party in the COO application. I do not think that in law the setting aside of Motsoeneng's appointment as COO had any legal effect on the validity of other appointments. Tugwana's appointment to the GECA position was not an administrative act dependent for its validity on the validity of Motsoeneng's appointment as COO.[18]

[151] It follows, on the assumption I have made regarding permanent employment, that with the final setting aside of Motsoeneng's appointment as COO the SABC was obliged, for as long as Motsoeneng remained an employee, to accord him the employment benefits attaching to his previous position but was not obliged without more to reinstate him as the occupant of the GECA post. I thus reject Mr du Toit's submission that there was no appointment decision in September 2016 at which review relief could be directed. If the SABC wanted Motsoeneng to resume the responsibilities of the GECA post, a decision to that effect was required. If such a decision was reached, Tugwana would have to be redeployed, which is in fact what happened. These decisions would also have had a labour law dimension since Tugwana was not necessarily obliged to accept deployment. If there had been no other position for her, the SABC might have been confronted with a decision as to which of the two should be retrenched.

[152] However, and even if the setting aside of the COO appointment automatically reinstated the status quo prior to the invalid appointment, the SABC went well beyond this in September 2016. Firstly, the SABC concluded a new five-year contract with Motsoeneng which guaranteed him employment at least until September 2021. Second, in that contract the SABC agreed to pay him the amount attaching to the post of COO. Unsurprisingly the contract uses the language of appointment. The same is true of the board's presentation to the PCC on 5 October 2016.[19]

---

[18] Cf *Seale v Van Rooyen NO & Others; Provincial Government, North-West Province v Van Rooyen NO & Others* 2008 (4) SA 43 (SCA) para 13.

[19] Record 547. The SABC's counsel submitted in their heads of argument that this document was of unknown authorship and unconfirmed by anyone and had no status as evidence. However the unofficial minutes of the PCC meeting issued by the Parliamentary Monitoring Group reflect that the

Character of the appointment decision

[153] Mr du Toit submitted that if there was a decision at which a review could be directed, the decision was a private law matter which was not susceptible to review. He emphasised that the position of GECA is not one of the three statutory executive positions requiring appointment by the board and approval by the Minister. It is an ordinary staff appointment made by the GCEO.

[154] The SABC is a public body existing for the objectives set out in s 8 of the Broadcasting Act. Those objectives are concerned with the public interest. Section 10 specifies certain further requirements with which the SABC's public service must comply. The public interest is again to the forefront. The SABC is required by s 6 to have a Charter. This document states that the board is responsible for ensuring that the SABC's mandate as a public broadcaster is achieved. Clause 7.3 of the Charter sets out various goals to guide the board and the SABC in the delivery of its mandate. These goals reflect the public interest served by the SABC.

[155] In terms of s 14 of the Broadcasting Act the affairs of the SABC are administered by an executive committee consisting of the three statutory executives and not more than 11 other members. The executive committee is accountable to the board and performs such functions as determined by the board. Clause 18 of the Charter provides that as a general principle matters referred to the board for approval must first have been 'interrogated' by the executive committee and relevant board committee.

[156] Section 26(1) provides that the SABC may engage such officers and other employees as it may deem necessary for the attainment of its objects and must determine their duties, salaries, wages, allowances or other remuneration and their other conditions of service in general.

DA's deponent, James Selfe, was present at the PCC meeting. Those minutes record Maguvhe making submissions to the PCC in accordance with the briefing document at 543-548. Neither Motsoeneng nor Aguma denies in his affidavit that the briefing document was presented to the PCC as being the board's position.

[157] In my view, therefore, the SABC is a public body which, when it acts, is generally exercising public power. In regard to employees, the SABC's power to engage staff is sourced in s 26 of the Broadcasting Act and is a power to be exercised for the attainment of the SABC's objects which are, as I have indicated, objects in the public interest. When the SABC, represented by its Acting GCEO, decided that Motsoeneng should resume the responsibilities of the GECA and that Tugwana should be redeployed to another GE position, the SABC was exercising a public power.

[158] This view seems to me to find strong support in the decision of the majority of the Constitutional Court in *Chirwa v Transnet Ltd & Others* 2008 (4) SA 367 (CC). The question there was whether an employee dismissed by Transnet could, as an alternative to proceedings under the Labour Relations Act, assert a constitutional cause of action under PAJA. Chirwa does not appear to have occupied a statutory position within Transnet. She was dismissed pursuant to an ordinary disciplinary hearing. The justices were unanimous in finding that the dismissal was not 'administrative action' for purposes of PAJA.[20] However a majority of the court was agreed that the dismissal involved the exercise of public power. In para 138 Ngcobo J (with whom six other justices concurred) said the following (footnotes omitted):

'I am unable to agree with the view that in dismissing the applicant Transnet did not exercise public power. In my view, what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power. I agree with Cameron JA that Transnet is a creature of statute. It is a public entity created by statute and it operates under statutory authority. As a public authority, its decision to dismiss necessarily involves the exercise of public power and, "(t)hat power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution".'

[159] In the SCA in *Chirwa* Cameron JA placed reliance on the general position laid down in *Administrator, Transvaal, & Others v Zenzile & Others* 1991 (1) SA 21 (A) where, in a pre-PAJA decision, Hoexter JA held that the principles of administrative law applied to the dismissal of public servants. Cameron JA distinguished *Cape*

[20] See also *Gcaba v Minister for Safety and Security & Others* 2010 (1) SA 238 (CC).

Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others 2001 (3) SA 1013 (SCA) where the court had declined to extend this approach to the cancellation of a purely commercial contract. This decision was to be explained, in Cameron JA's view, on the basis that in *Metro Inspection Services* the public body in concluding the contract had not been acting from a position of superiority or authority by virtue of being a public authority (paras 54-55).

[160] If the dismissal of an employee by a public body such as the SABC is the exercise of the public power, a fortiori must this be the case in relation to appointments. Once an appointment has been made, there is scope for an argument that the relationship between the parties is governed by their contract and the remedies in the Labour Relations Act. The same scope does not exist in relation to the exercise of the power of appointment.

[161] The proposition that the appointment of staff by a public body entails the exercise of a public power seems to me to find direct support in the judgment of the Constitutional Court in *Khumalo & Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC). That case concerned the promotion of two employees in a provincial department of education. The employees did not occupy senior executive positions. The MEC brought an application in the Labour Court to have the promotions set aside. The application succeeded in that court and in the Labour Appeal Court but was reversed in the Constitutional Court. Skweyiya J, writing for the majority, held that the true nature of the MEC's application was for judicial review under the principle of legality rather than a PAJA review. He emphasised that the principle of legality is applicable to all exercises of public power and not only to 'administrative action' as defined in PAJA. The principle requires that all exercise of public power be, at a minimum, lawful and rational.[21] The appeal succeeded not because the decisions were not subject to review but because in the court's view the MEC had unreasonably delayed in bringing her review application.

[162] It is also important to distinguish between the legal relationship between the public body and its employee on the one hand and the relationship of the public

[21] Para 28.

body to third parties in respect of that contract of employment. *Chirwa* was a case arising between the public body and its employee. The court had to grapple with the question whether the Labour Relations Act, by giving effect to the Constitution's guarantee of fair labour practices, precluded the characterisation of the dismissal as 'administrative action' and limited the employee to her remedies under the Labour Relations Act. Different questions arise where a third party complains that the conclusion of an employment contract by a public body constitutes an act of unlawful maladministration. The public body and the appointed employee may be perfectly happy with the contract but this should not render it immune from examination at the suit of a third party. Nobody in the present case has disputed the DA's locus standi to do so.

[163] The present case is distinguishable from an authority cited by the SABC's counsel, *Calibre Clinical Consultants (Pty) Ltd & Another v National Bargaining Council for the Road Freight Industry & Another* 2010 (5) SA 457 (SCA). The decision in that case (that the bargaining council's procurement decisions were not susceptible to review) was based on a conclusion that the council was not publicly funded and did not owe its duties to the public but to its contributing members. Although the council owed its existence to legislation, it was in that respect no different from a private company. The SABC's status is quite different. Nugent JA considered that in assessing whether conduct was subject to review it is useful to ask whether the power or function in question was 'governmental' in nature. Ultimately, he said, judicial review was all about accountability to the public (para 40). That the SABC should be accountable to the public for its decision to appoint Motsoeneng as GECA seems to me clear. It is not about letting the DA dictate to the SABC who it can and cannot employ but about subjecting the SABC's decisions in that regard to basic principles of legality.

[164] Mr du Toit argued that the DA had failed in its papers to address the question whether the decision of which it complained amounted to 'administrative action' for purposes of PAJA. He referred us in that regard to the majority judgment in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] ZASCA 143. The question there was whether an applicant could bypass PAJA by directly invoking the doctrine of legality. Although the majority said that this could not be

done, they did not find that the applicant should be non-suited merely because it had failed to invoke PAJA. Instead the court examined the act in question and, having concluded that it amounted to 'administrative action' for purposes of PAJA, held that the applicant had failed to comply with the 180-day time limit laid down in s 7(1) and had failed to explain the delay.

[165] Since the grounds of review encompassed under the doctrine of legality find their counterparts in s 6(2) of PAJA, it seems to me unnecessary to decide whether an act is 'administrative action' for purposes of PAJA unless, on the facts of the case, the characterisation would affect the outcome (for example, in relation to time limits). Indeed the Constitutional Court's judgment in *Albutt* appears to me to lay down that one should not decide such a question unless it is necessary.[22] I would emphasise that the exercise of public power not qualifying as administrative action is still subject to the principle of legality.

[166] In the present case the DA relies on the doctrine of legality. Since the application was launched promptly after the decisions complained of, it would make no difference whether or not we classified the impugned decisions as 'administrative action' for purposes of PAJA. It suffices to find, as I do, that the decisions involved the exercise of public power and are in principle susceptible to review.

<u>The decision to appoint Motsoeneng as GECA (para 2 of notice of motion)</u>

[167] The attack on the decision to appoint Motsoeneng as GECA is based essentially on alleged irrationality. Although the Public Protector's report did not in terms say that Motsoeneng could not be appointed to such a position, the decision was said to be irrational in much the same way as was his appointment as COO (which the Public Protector's report had also not expressly forbidden).

[168] When Motsoeneng was appointed as GECA in September 2016 the Public Protector's report was still in force and binding on the SABC. The fact that there was

---

[22] *Albutt v Centre for the Study of Violence and Reconciliation & Others* 2010 (3) SA 293 (CC) paras 79-84.

a pending application in Gauteng to have the report set aside did not change that fact. The SABC was not entitled to prejudge the outcome of the PP application.

[169] In addition to the Public Protector's findings against Motsoeneng, there were subsequent events which the SABC was required to take into account. Motsoeneng was found by the SCA to have displayed a lack of candour in what he said about trying to get an affidavit from Swanepoel. There is nothing to show that this has been investigated. During Motsoeneng's tenure as Acting COO and then permanent COO most of the non-executive members of the board resigned and now only one remains. Successive Acting GCEOs departed, in Matthews' case with strong words directed at the corrosive atmosphere within the SABC and a description of Motsoeneng's tenure as a 'reign of terror'. There are the events surrounding the SABC Eight and their subsequent reinstatement in response to legal proceedings.

[170] Although there was ostensibly a disciplinary process clearing Motsoeneng in December 2015, it was an obviously defective process which could not have set anyone's mind at rest. By the time the SABC took its decision in September 2016 to appoint Motsoeneng as GECA, there was not only a pending application to have the disciplinary proceedings set aside; the SABC itself had accepted (whether for good reason or bad) that the disciplinary proceedings were defective and would have to be recommenced unless the Public Protector's report were set aside.

[171] Mr du Toit argued that the GECA position is a less influential one than the COO position so that Motsoeneng's appointment to the former position should not necessarily suffer the same fate as his appointment to the latter position. While there is no doubt a difference between the positions, the GECA position is nevertheless a very senior one. In that capacity Motsoeneng is a member of the executive committee. He reports directly to the GCEO. The GECA job description describes the main purpose of the position as being to 'manage, portray and communicate an appropriate corporate image' of the SABC. The incumbent is responsible 'for efficiently and effectively leading and managing' the provinces by ensuring 'optimal alignment' with the SABC's business goals and strategies. Key accountabilities include: formulating and directing strategies to enhance public, governmental and stakeholder understanding and goodwill towards the SABC;

management of all stakeholder relationships; effective government liaison and influencing of government policy; ensuring effective SABC representation in international fora; implementing and maintaining cost-effective, appropriate corporate and regulatory solutions, systems and equipment; effectively integrating and allocating resources in the day-to-day operations; ensuring implementation of and adherence to SABC policies and procedures in the provinces; ensuring the implementation of sound ethical business processes in all areas and disciplines within the provinces; continually upholding the SABC's corporate identity in all areas so as to ensure the SABC's integrity, credibility and positive image within all the provinces; providing effective communication to ensure that staff, group executives and divisional heads are well informed on all aspects of operations and strategy; and identifying and managing risk in accordance with the SABC's risk strategy.

[172] In the COO application Davis J found that it was patently irrational for the SABC to have appointed Motsoeneng to the position of COO. The learned judge referred inter alia to *Democratic Alliance v President of South Africa & Others* 2013 (1) SA 248 (CC) where the Constitutional Court, upholding the decision of the SCA, found that the appointment of Mr Simelane to the position of National Director of Public Prosecutions was irrational where serious adverse findings made by a commission of enquiry had not been credibly investigated and refuted.

[173] In my opinion the same applies to the SABC's decision to appoint Motsoeneng as GECA. He was appointed to a senior executive position carrying with it significant responsibilities despite the fact that serious adverse findings in the Public Protector's report had not been set aside and despite subsequent events which cast a further significant shadow over his integrity and leadership abilities. The SCA said, with reference to the Part A appeal, that the Public Protector was quite correct in observing that the SABC's board appeared to have blindly sprung to Motsoeneng's defence (para 55). This sort of behaviour has continued. We know that if the remnant of the SABC's board had got its way in September 2016, Motsoeneng would have been appointed as the Acting COO. The remnant, including Aguma, the Acting GCEO, appears to have been hellbent on keeping him in the highest position possible. To do so they redeployed someone whose performance as GECA has not, at least on the papers before us, been subjected to any criticism.

It is also apparent from the papers that the remnant of the board is still intent on having Motsoeneng as the COO. Criticism of Motsoeneng by the Public Protector and courts is seen as an obstacle to be circumvented, not a potentially real problem to be bona fide investigated.

[174] The SABC's decision was, moreover, not merely a holding move. Motsoeneng received a new appointment on the standard five-year fixed term. And quite remarkably, he was appointed at a COO's remuneration. I find it incomprehensible that the SABC could have thought that Motsoeneng remained entitled to a COO's remuneration where that remuneration attached to a position to which he had been invalidly appointed.

[175] I am thus satisfied that Motsoeneng's appointment as GECA was invalid and must be set aside.

Motsoeneng's 'suspension' (para 1 of notice of motion)

[176] In para 1 of the notice of motion the DA seeks a declaration that, unless and until all negative findings against Motsoeneng in the Public Protector's report are reviewed and set aside, Motsoeneng may not hold any position at all in the SABC. To the extent that this relief is sought to be justified on the basis that the effect of the setting aside of Motsoeneng's appointment as COO has resulted in his not being an employee at all, I have already explained why I cannot uphold the contention.

[177] It seems to me that the relief is more properly viewed as a suspension of Motsoeneng as an employee. If Motsoeneng is no longer an employee at all, the outcome of the PP application would not change the position. The potentially limited duration of the order is consistent rather with suspension. If there is to be a suspension, however, it should not depend solely on the outcome of the PP application. In view of my conclusion as to the nature of the disciplinary proceedings required by the Public Protector's remedial action, another event which might cause the suspension to cease is if Motsoeneng is exonerated pursuant to a valid and credible disciplinary process.

[178] As to whether there should be a suspension, the Public Protector's report did not include, in the remedial action, a direction that Motsoeneng be suspended pending the outcome of the disciplinary proceedings. In the COO application, however, his suspension as COO was sought and granted. The juridical basis and factual justification for suspension were discussed by Schippers J in paras 89-101 and by the SCA in paras 55-65. An argument by the Minister and SABC that a suspension would offend against the separation-of-powers doctrine was rejected. There is in any event less traction for that argument in the present case, given that the power to remove and suspend a GECA does not require the involvement of the President or Minister.

[179] One of the considerations which weighed in favour of suspension in the COO application was the conduct of the board in defending Motsoeneng and showing scant respect for the Public Protector's findings. Although the legal misapprehension under which the SABC might have laboured at that time in relation to the legal effect of the Public Protector's remedial action has since been dispelled by the *Nkandla* judgment, the remnant of the board has continued to evince an attitude of protecting and retaining Motsoeneng at all costs. If suspension is appropriate in the light of the Public Protector's report and subsequent events, the remnant of the board (even if it were capable of acting) and Aguma cannot be trusted to take a disinterested decision in the SABC's best interests.

[180] The SCA (para 61) endorsed Schippers J's reasoning to the effect that it was untenable for Motsoeneng to remain in office while disciplinary proceedings were being brought against him, given that fellow board members and Motsoeneng's subordinates would have to be interviewed and documents produced. His presence at the SABC posed a real risk to the integrity of the investigation and disciplinary enquiry. Given that there will need to be fresh disciplinary proceedings against Motsoeneng, these considerations remain valid. Although Motsoeneng does not now, at least ostensibly, occupy as influential a position as COO, he is no doubt still, de facto, a powerful force within the SABC. He was the Acting COO/permanent COO for just under five years (November 2011-September 2016). The Acting GCEOs have come and gone. The current Acting GCEO as well as the one remaining non-executive director are firm supporters of Motsoeneng and would still

like to see him as COO. It is fanciful to suppose that people within the SABC whose cooperation might be required for a credible disciplinary enquiry will discern much difference in Motsoeneng's sphere of influence.

[181] There is another important consideration in favour of suspension. The decision to appoint Motsoeneng as COO in July 2014 would have been perceived by ordinary members of the public as displaying a contemptuous attitude to the Public Protector. Subsequent court cases had to be fought at first instance and on appeal, with the SABC all the while doing its best to ensure that Motsoeneng remained in office. Then in September 2016 the end of the road was seemingly reached insofar as the COO appointment is concerned. What did the SABC then do? It recommended to the Minister that she approve the appointment of Motsoeneng as the Acting COO and in the meanwhile proceeded to give Motsoeneng a five-year contract as GECA at a COO's salary. This displayed a contemptuous attitude not only to the Public Protector but to the courts. Our public institutions and the administration of justice will be brought into disrepute if an organisation such as the SABC can play games like this. The rule of law must be vindicated.

[182] Para 1 seeks a temporary prohibition on Motsoeneng holding any position at all in the SABC, not merely the position of GECA. Having regard to the history of the SABC's conduct, I think it right to extend the suspension beyond Motsoeneng's position as GECA. It would be inconsistent with the Public Protector's findings for him to hold any senior position at the SABC pending further developments. Nobody suggests that he might temporarily be redeployed to a junior position or that he could reasonably be expected to occupy a junior position. There would thus be no practical difference between a temporary prohibition against his holding any senior position and against his holding any position at all. An order in the latter terms is preferable to avoid uncertainty. In any event, one of the justifications for suspension is to ensure the integrity of the disciplinary process. This requires Motsoeneng's absence from the premises in any employment capacity whatsoever.

[183] The public may with justification be weary of the suspension of senior public officials on full pay. In the present case one does not know how long the suspension

will operate, given that the new disciplinary proceedings can only be instituted once the board becomes quorate. Whether in the meanwhile the SABC is obliged to remunerate Motsoeneng at all may depend on the issue previously mentioned regarding the expiry of his 2011 contract. If the SABC is obliged to continue remunerating Motsoeneng, I fail to see on what basis he is entitled to remuneration at a COO rate. These are matters on which the SABC will, however, need to take advice. Even if Motsoeneng will receive substantial remuneration during the period of suspension, the circumstances dictate that he should be suspended.

The inquorate board (para 5 of notice of motion)

[184] There is no opposition to the declaration sought by the DA to the effect that the board of the SABC has been inquorate since 14 September 2016. That it has been inquorate since that date is quite clear.

[185] In her answering affidavit the Minister claimed that by virtue of s 66(11) read with s 5(4)(b)(ii) of the Companies Act the board could validly transact business despite being inquorate. In the Minister's heads of argument her counsel wisely abandoned this contention. It is thus unnecessary to say more than that the saving effect of s 66(11) applies where invalidity would otherwise flow from the fact that a company does not have the minimum prescribed number of directors. The sub-section does not address the case where a company has fewer directors than required for a quorum.

Tugwana's appointment as Acting COO (para 3 of notice of motion)

[186] It is common cause that because the board has been inquorate since 14 September 2016, it was not possible for the board to recommend Tugwana's appointment to the Minister or to so appoint her following the Minister's approval. The DA is thus entitled to have a declaration to this effect and to have the purported appointment set aside.

[187] It was submitted on behalf of the SABC and the Minister that the court should suspend the effect of the declaration because the SABC requires the services of an

Acting COO and is unable at the moment to remedy the position given the absence of a quorate board. It was pointed out that no criticism of Tugwana as such is contained in the papers. Mr du Toit argued for a suspension of the order until 26 December 2016, the terminal date of Tugwana's acting appointment. Mr Maenetje submitted that a six-month suspension was needed since the SABC was unlikely to have a quorate board at any time during December 2016. I think that is a realistic submission but it presents the legal obstacle that the court would somehow have to sanction a further invalid appointment to extend Tugwana's acting stint into 2017.

[188] I do not think there is a sufficient basis for suspending the order. While Tugwana's qualities have not been challenged, her identification as one of the suitable candidates for the position was not done by a quorate board. There is no quorate board to oversee the performance of her functions. The day-to-day work which would ordinarily be done by a COO may still have to be done but it is not imperative that such work be performed by a person with the status and authority of a duly appointed COO and with concomitant office as a director. One should not, by way of suspension, mask the true state of affairs, which is that the SABC lacks a board to govern its affairs.

[189] In regard to decisions already taken by Tugwana, I think it would be appropriate to make a similar order to that made by the Constitutional Court in the case involving Mr Simelane,[23] namely that the invalidity of Tugwana's appointment will not by itself affect the validity of any of the decisions taken by her up to the date of our order.

Alleged violation of ss 181(3) and 182(1)(c) of the Constitution

[190] Section 181(3) of the Constitution provides, with reference to state institutions supporting constitutional democracy, that other organs of state must, through legislative and other measures, assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness. Section 1821)(c) empowers the Public Protector, in reporting on conduct, to take appropriate remedial action.

[23] *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC) para 93.

[191] General declarations in terms of these provisions have been sought by the DA against the SABC and its board in para 1 of the notice of motion in the DC application and in para 4 of the notice of motion in the CA application. The SABC is an 'organ of state' as defined in the Constitution. Wilfulness is not a prerequisite for a finding that the SABC failed to comply with its constitutional duties.

[192] It is clear that the SABC has failed to comply with the Public Protector's remedial action. The SABC's board was required to submit an implementation plan within 30 days of the Public Protector's report, to finalise the remedial action within six months and to submit a final report by 16 August 2014. This was not done. Disciplinary charges were eventually only put to Motsoeneng on 12 October 2015. The resultant disciplinary enquiry was a feckless affair and did not constitute compliance with the Public Protector's report. Appropriate disciplinary proceedings have yet to start. Until March 2016 the SABC may have misapprehended the legal effect of the Public Protector's findings and remedial action. Objectively speaking, though, the SABC failed to respect the dignity and effectiveness of the Public Protector's office and failed to comply with her remedial action.

[193] Despite the *Nkandla* judgment, the SABC has still failed to ensure that appropriate disciplinary proceedings are brought against Motsoeneng. The PP application, instituted in mid-May 2016, did not suspend the Public Protector's remedial action. The SABC's attempt to stay the DC application (and hence its obligation to bring proper disciplinary proceedings against Motsoeneng) was dismissed.

[194] It also appears to be common cause that the SABC has not taken steps to recover any of the monies contemplated in the Public Protector's remedial action.

[195] Apart from its failure to comply with the express terms of the Public Protector's remedial action, the SABC has also acted in a manner inconsistent with her factual findings by (i) failing to suspend Motsoeneng pending the outcome of disciplinary proceedings; (ii) appointing him as permanent COO in July 2014; (iii) appointing him as GECA in September 2016. The effectiveness of the Public Protector's report and remedial action were undermined by this conduct.

[196] The DA is thus entitled to the declarations sought.

Alleged violation of ss 165(4) and (5) of the Constitution

[197] Sub-section 165(4) states that organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. Sub-section 165(4) provides that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. In para 2 of the DC application the DA seeks an order that the SABC, its board and its chairperson conducted themselves unlawfully and in breach of these provisions by failing to comply with, and acting in contempt of, Schippers J's judgment as confirmed by the SCA.

[198] The foundation for this relief is not discretely addressed in the DA's founding affidavit. I do not think the founding affidavit makes out a case for relief based on contempt. There were prompt applications for leave to appeal against Schippers J's order of 24 October 2014. These suspended the effect of his order (though not the Public Protector's remedial action which the court order was intended to reinforce). On 23 April 2015 he granted the applications for leave to appeal but also directed that the Part A relief would have immediate effect pending the determination of the appeal. As permitted by s 18(4) of the Superior Courts Act, the SABC brought an urgent appeal to the full bench against the execution order. According to the DA's founding affidavit, the parties subsequently agreed that the execution appeal would not be heard and that instead attempts would be made to get expedited dates in the SCA for the Part A appeal and in this court for the Part B relief. Although not so stated, I infer that this was accompanied by an understanding that, pending the expedited Part A appeal, Schippers J's order would not need to be implemented. The SCA dismissed the Part A appeal on 8 October 2015. Four days later disciplinary charges were put to Motsoeneng. Although the resultant disciplinary action did not constitute compliance with the Public Protector's remedial action, it would be going too far to say that this simultaneously constituted contempt of Schippers J's order.

[199] There was a period of a few days following the SCA's judgment of 8 October 2015 during which the SABC did not give effect to Motsoeneng's suspension as COO. He subsequently took long leave on terms which satisfied the DA. Although the DA delivered a contempt application in respect of the initial failure to suspend Motsoeneng, the DA did not press ahead with it. The DA cannot expect us to decide the contempt application in the present proceedings.

[200] I thus do not consider there to be a basis for the relief claimed in para 2 of the notice of motion.

Motsoeneng's striking-out application

[201] Motsoeneng delivered an application to strike out a considerable part of the DA's founding affidavit in the CA application on the basis that such material was irrelevant and/or vexatious and/or hearsay. The application was not addressed in argument. I have reviewed the material in question and in the main consider that striking-out is not justified.

[202] Some of the material derives from the Public Protector's report[24] and from Mr Edeling's disciplinary judgment[25]. To the extent that such material is of a hearsay nature, its source justifies reliance thereon. The DA's deponent refers to YouTube links in support of allegations made concerning the events at the PCC meeting on 5 October 2016 and the SABC's subsequent media briefing.[26] I do not see how objection can be made to providing these links, particularly where the events in question are not in dispute. Certain of the paragraphs advance relevant legal contentions with reference to the *Nkandla* judgment.[27] There are allegations regarding the reaction of the Presidency, the Cabinet and the ruling party's chief whip to Motsoeneng's appointment as GECA and the dismay expressed by various persons and organisations regarding Motsoeneng's tenure at the SABC.[28] The fact that such views have been expressed on a wide scale is of some, albeit not central,

[24] Paras 50-55.
[25] Paras 112-120.
[26] Paras 148 and 152.
[27] Paras 122-125.
[28] Paras 146 and 157-171.

relevance to the question whether Motsoeneng should be suspended and the rationality of his appointment to the GECA position.

[203] However I think the description of Motsoeneng in para 9 of the founding affidavit is couched in sweeping and offensive terms (including a statement that he is 'a modern day Goebbels') to which legitimate objection can be taken. I think that this paragraph and the third sentence of para 166 (which repeats the Goebbels comparison) should be struck out.

[204] I do not think any separate costs order in relation to the striking-out application is warranted.

Costs in the DC application

[205] In the DC application the DA seeks costs jointly and severally from any respondent opposing the relief sought. The parties who filed notices of opposition are (i) the SABC, its board and chairperson; (ii) the Minister; (iii) Motsoeneng.

[206] The costs arising from the stay application and the hearing on 23 May 2016 have already been dealt with in Samela J's judgment.

[207] On 14 November 2016 the SABC, its purported board (inquorate) and the chairperson filed an affidavit (by Aguma) in which it accepted that the disciplinary proceedings had been deficient and abided the court's decision in regard to paras 4 and 5 of the notice of motion. The SABC continued to oppose the relief sought in paras 1 and 2 and submitted that prayers 7-9 were too widely stated.

[208] Insofar as the SABC is concerned, I have found that the DA is entitled to the relief claimed in para 1 as well as paras 4 - 9 (with some modifications). Since the relief claimed in para 1 is tied up with the consequential relief claimed in paras 4 – 9, I take them together when considering costs. I have found against the DA in regard to para 2 of the notice of motion and have not upheld its contention that the new disciplinary proceedings must be confined to sanction. Since the disciplinary application was eventually in essence unopposed by the SABC, I think the DA

should be awarded costs against the SABC on an unopposed basis. Regardless of the SABC's attitude, the DA had to approach the court for relief.

[209] Motsoeneng filed an opposing affidavit in May 2016 and his previous counsel filed short heads in advance of the hearing on 23 May 2016. Before us, however, Motsoeneng's main focus of opposition was the CA application. His current counsel did not file any further heads under the DC case number and concentrated their oral argument on the CA application. Their heads in the CA application did, however, address at some length a point of importance in the DC application, namely whether the disciplinary action required by the Public Protector is a sanction-only hearing. I have found against the DA on this point. The grounds on which the December 2015 disciplinary proceedings have been set aside are not defects for which Motsoeneng was responsible.

[210] In the circumstances, and although Motsoeneng at no stage withdrew his opposition to the DC application, I think it would be fair to make no order for costs against him in the DC application.

[211] The Minister filed an answering affidavit in May 2016 in which she confined herself to her alleged unlawful influence in the appointment of the first initiator and chairperson (para 3 of the notice of motion). She filed a short supplementary affidavit on the same issue in November 2016. I have concluded that the DA is not entitled to the relief claimed in para 3. But although on the facts the Minister did not make herself guilty of 'improper interference', her participation in the appointment was strictly speaking irregular. As between the DA and the Minister, the parties should bear their own costs

[212] I do not consider there to be justification for making a separate costs order against the chairperson or members of the board.

Costs in the CA application

[213] In the CA application the DA seeks costs against Motsoeneng, the six persons who were directors when the CA application was launched and the Minister.

The application was opposed by Motsoeneng, the SABC, by its purported board, and by the Minister. The individual directors did not personally oppose. When the notice of opposition by the SABC and the board was filed on 18 October 2016, only four of the six directors remained in office, two of whom resigned before the answering papers were filed. Aguma stated in the answering affidavit that he was only authorised to represent the SABC. No opposing papers were filed on behalf of the board or its remaining members.

[214] Motsoeneng opposed the application in his personal capacity. Since the DA has substantially succeeded against him, there is no reason for costs not follow the result.

[215] The SABC opposed the application, a matter alleged by Aguma to be within his authority as Acting GCEO. The DA's success would ordinarily carry with it an order for costs against the SABC. The DA says, however, that the costs should not come from the SABC (effectively the public purse) but from various individuals.

[216] Aguma, a director and Acting GCEO, was directly responsible for Motsoeneng's appointment as GECA. It must have been obvious to him, in the light of the judgment of the SCA dismissing the appeal against Schippers J's judgment and its order dismissing the petitions for leave to appeal against Davis J's judgment, that for as long as the Public Protector's report remained undisturbed, and in the absence of a credible disciplinary process exonerating Motsoeneng, the latter's appointment to the GECA position was indefensible. Yet such was his blind commitment to Motsoeneng that he not only appointed him to that position but strongly motivated his fresh appointment as Acting COO. He displayed a disdain for, and unwillingness to accept, the Public Protector's report and court judgments.

[217] The launching of the proceedings by the DA to set aside the GECA appointment was thus entirely foreseeable and the result inevitable. But instead of conceding, Aguma caused the SABC to oppose the application. His contention that there was no decision at which a review could be directed and that Motsoeneng simply found himself in the position he did by operation of law was contrived and plainly wrong. His contention that if there was a decision it did not have a public

character reflects a worrying misapprehension by Aguma concerning the power he wields on behalf of the SABC in the public interest. Both contentions were directed at shielding his decision from judicial scrutiny. On the merits, his attempt to distinguish the COO and GECA positions was untenable insofar as Motsoeneng's suitability for appointment is concerned. It beggars belief that Aguma could have thought that a person against whom findings had been made such as those contained in the Public Protector's report was worthy of appointment as GECA even though he was disqualified as COO. The notion that Aguma genuinely thought that is too far-fetched to be believed. The true explanation is that he was intent on supporting Motsoeneng to the hilt, regardless of what the Public Protector and courts may have said.

[218] If Maguvhe and the other directors had urged Aguma not to appoint Motsoeneng as GECA, he may have refrained. However the decision to appoint Motsoeneng was not theirs. One may suspect that Maguvhe, who supported Motsoeneng's appointment as Acting COO, was in communication with Aguma about Motsoeneng's appointment as GECA but the material before us does not permit a factual finding to this effect. Although Maguvhe has not distanced himself from the SABC's opposition to the CA application, there is no evidence that the decision to oppose was discussed with him. It is true that Maguvhe and the remaining directors were party to the invalid decision to appoint Tugwana but they may not have appreciated the quorum difficulty. The SABC in the event accepted that the board was inquorate and Tugwana's appointment invalid. While the conduct of Maguvhe and the other remaining directors does them no credit, I do not think, in relation to the matters which are the subject of the relief claimed in the CA application, that Maguvhe or the other directors are personally implicated to an extent which justifies a personal liability for costs.

[219] The case against the Minister was relatively confined. The DA has obtained substantial success in regard to the prayers she opposed. However I do not think her conduct involves personal impropriety. The costs order insofar as she is concerned will thus be confined to her official capacity.

[220] For the reasons I have said, Aguma stands on a different footing. Those controlling the affairs of the SABC have already been warned about jumping blindly to Motsoeneng's defence and not paying due heed to the Public Protector's report. The stage in this saga has been reached where a personal liability for costs is justified. In *Gauteng Gambling Board & Another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) para 54 Navsa JA observed that it was the taxpayer who would ultimately have to meet the costs awarded against the MEC. He said it was time for the courts seriously to consider holding officials who behaved in the high-handed manner described by him personally liable for costs incurred. This might have a 'sobering effect on truant public office bearers'. To his regret, he was not able to follow that course in the case before him because the applicant had not prayed for a personal costs order.

[221] In another matter involving the SABC, Lagrange J, after referring to the above judgment, made an order calling upon two SABC officials to show cause why they should not personally be held liable for the costs of the application.[29]

[222] In the present case Aguma was not only representing the SABC in exercising a public power, a power which he abused. As a director of the SABC and its Acting GCEO, he stood in a fiduciary relationship to the SABC. A court may order costs against a director personally if there has been a want of bona fides or negligence or unreasonable or improper action: see *Francarmen Delicatessen (Pty) Ltd v Gulmimi & Another* 1982 (2) SA 485 (W) at 488E-F. Although the latter principle would usually only come into play in litigation between corporate insiders, the SABC is a unique kind of company. Its shares are held by the government, essentially on public trust. The people of the country have a legitimate interest to see that the SABC is not made to shoulder unnecessary costs.

[223] In this case, unlike *Gauteng Gambling Board*, the DA specifically asked for a costs order against the directors personally and they were cited in their personal capacities. I am persuaded that it would be just to make a costs order against

---

[29] *Solidarity & Others v South African Broadcasting Corporation* 2016 (6) SA 73 (LC) paras 74-78. See also *Westwood Insurance Brokers (Pty) Ltd v Ethekwini Municipality* [2016] ZAKZDHC 46 para 61; Plasket *Protecting the Public Purse: Appropriate Relief and Costs Orders against Officials* (2000) 117 SALJ 151.

Aguma. The order will provide, however, that the DA may recover its costs from the SABC to the extent that it cannot recover them from Aguma.

Conclusion and order

[224] I would thus make the following order in Case 3104/16 (the disciplinary application):

(a) It is declared that, in the respects identified in paras 192, 193, 194 and 195(i) and (ii) of this judgment, the first and second respondents (the 'SABC' and 'board' respectively) conducted themselves unlawfully and in breach of sections 181(3) and 182(1)(c) of the Constitution by failing to respect and implement the findings and remedial action of the Public Protector in her report of 14 February 2014 entitled *When Governance and Ethics Fail* ('the Public Protector's report').

(b) It is declared that the disciplinary proceedings instituted against the fifth respondent ('Motsoeneng') on or about 12 October 2015, including the ruling of the sixth respondent on 12 December 2015 ('the old disciplinary proceedings'), are inconsistent with the Constitution and invalid.

(c) The old disciplinary proceedings are reviewed and set aside.

(d) The SABC is directed to commence disciplinary proceedings against Motsoeneng inter alia for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increments of Ms Sully Motsweni, and for his role in the purging of senior staff members resulting in numerous labour disputes and settlement awards against the SABC ('the new disciplinary proceedings').

(e) Subject to para (f) below, the new disciplinary proceedings shall be:

(i) commenced by a new initiator, through the delivery to Motsoeneng of a letter setting out the disciplinary charges, within two weeks of his or her appointment, such appointment to be made by the board within two weeks of its becoming quorate;

(ii) presided over by a new chairperson, who shall be an independent person appointed by the board; and

(iii) completed within two months from date of commencement.

(f) It is recorded that, with a view to enabling the new disciplinary proceedings to commence prior to the board's becoming quorate, the SABC, Motsoeneng and the Public Protector have agreed on the identity of a person to chair the disciplinary enquiry and have proposed certain names as the initiator. If the court appoints the disciplinary chairperson and initiator in accordance with these proposals, a decision on which is deferred due to the temporary unavailability of Le Grange J and which will thus be dealt with in a supplementary order, the new disciplinary proceedings shall be commenced by the appointed initiator within two weeks of the court's supplementary order and be completed within two months of commencement

(g) If the new disciplinary proceedings are not completed within the two-month limit mentioned above, the following directions shall apply:

(i) The chairperson of the board, or in the event of there being no such chairperson the Group Chief Executive Officer or Acting Group Chief Executive Office, shall, by no later than the date on which the said period expires, deliver an affidavit to this court explaining why the proceedings have not been completed and stating when they are likely to be completed.

(ii) The applicant shall be entitled, within five calendar days of delivery of the said affidavit, to deliver an affidavit in response thereto.

(h) The new disciplinary proceedings shall

(i) be open to the public; and

(ii) the media shall be entitled to record and report on the proceedings,

subject to such reasonable restrictions as the chairperson of the disciplinary hearing may impose, taking into account inter alia the right to freedom of expression, open justice and the principles of openness, accountability and responsiveness, fairness to Motsoeneng and fairness to witnesses.

(i) The SABC shall pay the applicant's costs on an unopposed basis, including those attendant on the employment of two counsel.

(j) Save as aforesaid, no order as to costs is made.

[225] I would make the following order in case 18107/16 (the CA application):

(a) In regard to the application brought by the first respondent ('Motsoeneng') for the striking out of matter from the founding affidavit, para 9 and the third sentence of para 166 of the founding affidavit are struck are out. Save as aforesaid, the striking-out application is dismissed.

(b) Motsoeneng's application to stay the main case is dismissed with costs.

(c) It is declared that, unless and until the negative findings against Motsoeneng in the Public Protector's report are reviewed and set aside, or unless and until Motsoeneng is exonerated from the said negative findings by way of a valid disciplinary hearing, Motsoeneng may not hold any position at all in the second respondent ('SABC').

(d) It is declared that the decision of the eighth respondent ('Aguma'), taken on or about 22 September 2016, to employ Motsoeneng as the SABC's General Executive: Corporate Affairs, is inconsistent with the Constitution, unlawful and invalid, and the said decision is reviewed and set aside.

(e) It is declared that the decision of the third respondent (the remaining members of the board as at September 2016) to appoint the fourteenth respondent ('Tugwana') as the Acting Chief Operating Officer ('COO') is inconsistent with the Constitution, unlawful and invalid, and the said decision is reviewed and set aside.

(f) Decisions taken and acts performed by Tugwana in her purported capacity as Acting COO prior to the date of this order are not invalid merely because of the invalidity of her appointment.

(g) It is declared that, in the respect identified in para 195(iii) of this judgment, the SABC through Aguma has violated its constitutional obligation in terms of s 181(3) of the Constitution to assist and protect the Public Protector and to ensure her dignity and effectiveness.

(h) It is declared that the board of the SABC has been inquorate since 14 September 2016 and remains inquorate.

(i) Motsoeneng and Aguma in his personal capacity are directed, jointly and severally, to pay the applicant's costs. To the extent that the applicant is

unable to recover the said costs from Aguma, the applicant shall be entitled to recover same from the SABC.

(j) The seventeenth respondent (the Minister of Communications in her said capacity) is directed to pay the applicant's costs occasioned by her opposition, her liability to any relevant extent being joint and several with that of Motsoeneng and Aguma.

(k) It is recorded that the applications by the Decolonisation Foundation and the Musicians Associations of South Africa to be admitted as amici curiae were dismissed on 23 November 2016. The said two parties are directed to pay the applicant's costs occasioned by their respective applications to be admitted as amici.

(l) All costs in terms of this order shall include the costs attendant on the employment of two counsel.

LE GRANGE J:

[226] I concur and it is so ordered.

_____

LE GRANGE J

_____

ROGERS J

APPEARANCES

For Applicant in Case 3106/16:	Mr A Katz SC and Ms J Bleazard
	Instructed by

	Minde Schapiro & Smith Inc Tyger Valley Office Park Building No 2 Cnr Willie van Schoor & Old Oak Roads Bellville
For Applicant in Case 18107/16	Mr Katz SC and Ms N Mayosi and Mr M Bishop Instructed by Minde Schapiro & Smith Inc Tyger Valley Office Park Building No 2 Cnr Willie van Schoor & Old Oak Roads Bellville
For Mr GH Motsoeneng in both matters	Mr A Bester and Mr A Ayayee Instructed by Majavu Attorneys, Johannesburg c/o Nongogo Nuku Inc 7th Floor, Spoornet Building 1 Adderley Street Cape Town
For the SABC in both matters	Mr S du Toit SC and Mr K Premhid Instructed by:

	Ncube Inc c/o Nongogo Nuku Inc 7th Floor, Spoornet Building 1 Adderley Street Cape Town
For the Minister of Communications in both matters	Mr NH Maenetje and Ms F Patel Instructed by: The State Attorney 22 Long Street Cape Town
For the Public Protector in both matters	Mr E Labuschagne SC & Ms N Rajab-Budlender Instructed by: Adams & Adams, Pretoria c/o 28th Floor, I Thibault Square Cnr Long Street & Hans Strijdom Ave Cape Town